

Commissioned by the African Canadian
Community Coalition on Racial Profiling

CRISIS, Conflict and Accountability

By Charles C. Smith



CRISIS, CONFLICT AND ACCOUNTABILITY:

The Impact and Implications of Police Racial Profiling

By Charles C. Smith



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BACKGROUND

The African Canadian Community Coalition on Racial Profiling (ACCCRP) was established in 2002 by the African Canadian Legal Clinic (ALCLC) to develop a united and effective community position on the issue of racial profiling, and in particular, its impact on the African Canadian community. The ACCCRP, which started as a coalition of over 35 organizations and leaders within the African Canadian community, has grown to include over 57 representatives.

The ACCCRP aims to be inclusive of the diversity of communities and interests that currently exist within the Black community. Despite its brief history the ACCCRP has played a leading and active role in articulating the African Canadian community's collective voice on this crucial and timely issue. The ACCCRP organized a successful press conference in response to the Toronto Star's series of articles on racial profiling, which validated decades of concerns raised by the African Canadian community on this insidious and pervasive problem. The Coalition issued several press releases critiquing the decision of the Toronto police force for yet another study on race relations rather than engaging in a sincere action-oriented dialogue with Toronto's Black community leaders, with respect to the issue of racial profiling and race relations. In 2003, with the support of the Canadian Race Relations Foundation and the Federal Department of Multiculturalism, the ACCCRP commissioned Charles C. Smith and Maureen J. Brown to conduct research on best practices and responses to racial profiling in Canada, the United States and the United Kingdom. As part of the research process, ACCCRP convened consultations with communities to record their concerns and experiences. This research has resulted in two reports entitled *Crisis, Conflict and Accountability*, and *In Their Own Voices*. These Reports will be launched at a national Consensus Conference in March 2004 in celebration of International Day for the Elimination of Racial Discrimination.

The ACCCRP continues to call for the following:

1. The establishment of an Independent Police Complaints and Oversight Body to hold the police accountable for their actions and to address community concerns regarding racism and racial profiling.
2. To work with all levels of government to provide adequate resources to the Black community for developing and implementing a community based documentation project whereby African Canadians can gather the stories and complaints from African Canadians who are victims of racial profiling.
3. The establishment of a process to implement the recommendations that have been made in existing reports on policing, along with an independent audit mechanism to review the effectiveness of this implementation process every two years.

The African Canadian Legal Clinic continues to co-ordinate the meetings and activities of the ACCCRP. The African Canadian Legal Clinic and ACCCRP remain committed to working with the Black community to pressure all three levels of government to develop and bring forward concrete and effective legislative, policy and program reform. This will ensure that the recommendations as contained in these two Reports will be implemented in order to end racial profiling.

African Canadian Community Coalition on Racial Profiling

March 2004

ACKNOWLEDGEMENTS

I would like to thank the members of the African Canadian Community Coalition on Racial Profiling for bestowing on me the honour, privilege and responsibility for preparing this report. I am truly humbled by this choice and can only hope that my work has come somewhere near either the Coalition's expectations and/or our community's need to have a clear, strong voice on this persistent, debilitating and utterly unnerving subject.

I would also like to thank Trupati Patel who provided excellent research assistance in the earlier going and was a great pleasure to work with in the early drafting. Needless to say, the editors for this work, Nick and Reem Bahdi, deserve very special comments for going over this report and making many invaluable suggestions to improve it.

Equally, there is Maureen Brown who worked with me and talked with me all hours of the day and night to explore ideas and to exchange suggestions. It has been a real treat working with you, Maureen, and I am hopeful we will work together again.

Finally, there are my children – Asher and Tema. Much of this writing is for you in the great hope that the world I describe in these pages will be one you will never know.



SECTION 1

IN A STATE OF CRISIS

Introduction:

In the fall, 2002, the Toronto Star newspaper released a series of articles reporting on the results of substantive research indicating that in stops, searches, arrests and detentions from 1996 - 2002 the Toronto Police Services treated peoples of African descent differently than other racialized groups¹. Examining data after the release of the report of the Ontario Commission on Systemic Racism into the Criminal Justice System², the authors of the Star series concluded that Toronto police disproportionately single out individuals of African descent and that this may constitute discriminatory treatment.

Like other media reports on racial profiling in North America³, the Star series unleashed a highly charged debate. While some people contended that these articles merely confirmed what had been known for years, others vilified the Star series and denied its veracity⁴. In fact, during an interview with the Star reporters to discuss the articles' findings, Toronto's Police Chief dismissed the results entirely and abruptly cut short the interview. But the issue did not go away. A series of activities within government, policing circles, the courts and the community to address this complex and contentious issue followed.

In response to the policing crisis, the former Chair of the Canadian Race Relations Foundation, the Honourable Lincoln Alexander, convened a summit with high-level leaders from all three levels of government and within the African Canadian community. Early in 2003, the Ontario Human Rights Commission announced a probe on racial profiling and the Federal Minister responsible for Multiculturalism convened a national conference on policing and diversity in February, 2003. At the same time, the Chief of Police commissioned research by Professor Harvey of the University of Toronto to contest the Star series while the Police Association announced its intention to sue the Star for libel. Within Ontario Courts, the case of Deacovan. Brown was being considered by the Court of Appeal and the African Canadian Community Coalition on Racial Profiling (ACCCRP) made presentations to the Ontario Civilian Commission on Police Services (OCCPS) to rebute the aforementioned research commissioned by the Chief of Police.

The matter did not end there. The Toronto Police Association libel action was dismissed by the courts. The Ontario Provincial Police have now placed cameras on some of their cars and

¹ See October 9, 2002. Following rejection of their request by the Toronto Police Services, the Star reporters filed a Freedom of Information request and ultimately received a database detailing more than 480,000 incidents in which an individual was arrested or ticketed for an offence and in which approximately 800,000 criminal and other charges were laid.

² David Cole and Margaret Gittens (co-chairs) *Report of the Ontario Commission on Systemic Racism in the Criminal Justice System*, Queen's Printer, Toronto, 1995

³ For example, see Orlando Sentinel, *The Colour of Suspicion*, Jeffrey Goldberg, June 20, 1999, New York Times Magazine; *Racial Profiling Allegations Bring Calls for Statewide Data Collection*, Amy Radil, MPR News; *What's Race Got to Do With It?*, John Cloud, Time Canada, July 30, 2001; and other

⁴ See *Black leaders want a say*, Peter Small, *Toronto Star*, October 26, 2002 and *Police chief calls for race relations probe*, Michelle Shephard and Jennifer Quinn, *Toronto Star*, October 26, 2002. See also Frances Henry and Carol Tator *Racial Profiling in Toronto: Discourses of Domination, Mediation and Opposition*, Final Draft, Canadian Race Relations Foundation, March 20, 2003

police forces in Kingston and Ottawa have initiated racial profiling data collection projects. At the same time, in December 2003, the Nova Scotia Human Rights Tribunal issued a ringing decision substantiating a complaint of racial profiling filed by a reknowned athlete against the Halifax Police Department. Also, the Ontario Human Rights Commission released its report on racial profiling. Further, the Supreme Court of Canada overturned a decision of the Ontario Courts concerning the right of a family to enter a civil suit against the Toronto Police for the shooting death of one of their family members. Other actions that have occurred include:

- National consultations by members of the Senate to introduce a private members' bill on racial profiling;
- Discussions within the legal profession, particularly the Court Challenges Program and Canadian Bar Association, on racial profiling⁵; and
- Continued community pressure and concern on this matter at it affects such areas as immigration law, national security and various communities, i.e., Latino, Arab, Muslim and South Asian.

In examining these concerns, this report looks at the history, current manifestations, impact of, and initiatives to identify and eliminate police racial profiling. To do this the report is divided into three sections. The first section summarizes the developments contributing to the current manifestation of conflict between the Toronto Police and the African Canadian community. The second section reviews the particular history of racial profiling in the U.S., the U.K. and Canada. The third and final section reviews current efforts to reduce and eliminate this phenomenon, identifying what has and has not worked as well as what needs to be done in the future.

The material gathered in this report will be useful to those interested in challenging racial profiling by police. Politicians, citizens, police, and others will be able to use this research to develop ways to address the perceptions and realities of racial profiling and to find ways to work together toward this common goals. This report may also be useful to others interested in examining anti-Black racism in other sectors, eg., education, employment, health and cultural productions, as the history of anti-Black racism appears to permeate through these sectors as well. In this sense, the methodology of this report may be helpful to examining these other areas.

⁵ Respectively, this took place in October 22, 2004 at the Court Challenges Program annual meeting and in February, 2004 at the Canadian Bar Association's mid-winter meeting.

CONTEXTUALIZING THE DISCOURSE:

There was significant evidence that many police officers who are constantly in contact with the public develop strong feelings and beliefs as to attributes of individuals, based on factors such as appearance and racial background. These officers would no doubt be offended if their attitudes were described as potentially racist. Nevertheless, the same attitudes can and do produce a bias in behaviour which results in unequal treatment of individuals of different cultural or racial background.

*Allan Andrews, Metropolitan Auditor, in **Review of Race Relations Practices in the Metropolitan Toronto Police Force**, Municipality of Metropolitan Toronto, 1992*

To address racial profiling in Toronto, it is essential to look at the state of relations between peoples of African descent and the police. This particularly troubling discourse evolved over the past three decades through a series of public incidents which include: the shooting deaths and wounding of numerous African Canadians; the seemingly countless protests by peoples of African descent and their supporters; the establishment of government task forces and citizen advocacy groups; the release of numerous reports and recommendations; and the establishment of political and bureaucratic functions aimed at improving police race relations and ensuring public and political accountability of the police⁶.

The past three decades have also been marked by expressions of concern from African Canadian communities about police surveillance and attacks on African Canadian community leaders. In particular, the African Canadian community has expressed concern on several occasions about such issues as over-policing as well as police harassment and brutality. In this context, it is astounding to note the enormous attention given to the relationship between the African Canadian community and the police over the last three decades. In a relatively short period of time, seemingly innumerable yet consistent recommendations have been made and adopted to address the troubled relations between police and African Canadians. Yet, these recommendations have been virtually ignored outside the African Canadian community. It is also critical to recognize that the repetitiveness of this discourse severely impacts on peoples of African descent. Equally, it is imperative to acknowledge the failure of societal and institutional 'memory' of the historically troubled relationship that has existed between Toronto police and African Canadians. As well, it is important to recognize the negative ways in which peoples of African descent who articulate their concerns about Toronto police are portrayed in the public domain⁷.

⁶ On a related point, Philip C. Stenning suggests that "In Canada, as in many other countries, the challenges of policing an increasingly culturally, racially, ethnically, linguistically, and religiously diverse society have preoccupied policymakers and academics during the last four decades. A combination of dramatically increased immigration, and police services that have often slowly or reluctantly recognized the need for and embraced changes within their organizations and practices, had led to still-unresolved tension and conflict between police and many members of the communities they serve." Check this quotation? See ***Policing the Cultural Kaleidoscope: Canadian Experience***, Police & Society, 2003, Issues No.7 at 14. See also Frances Henry and Carol Tator supra note 4 at 2.

⁷ Regarding the notion of 'memory' and the portrayal of African Canadians who speak out on issues of policing, it is important to note that we live in a culture that moves ahead quickly and does not support constructive moments for reflection. (One key example of this is the numerous reports that have been commissioned on the subject of relations between police and subordinate racialized groups cited later in this section.) This has an impact on individual, community and social capacity to recall antecedents and to question any movement forward based on such an assessment. It also casts into shadow activity or inactivity, hence making any action seem nuanced and untainted by antecedents. This is critical in examining organizational and political behaviour in terms of assessing the will for change and the sincerity in making change, particularly as it relates to policing and law and order. In

Documented through media reports, scholarly research and various public as well as political forums, an examination of the history of the relationship between Toronto Police and African Canadians reveals an extraordinary situation, crystallized again and again by the impact of sudden highly charged and sometimes violent events. These events have unleashed disastrous consequences on all of those involved in the discursive formation surrounding police and peoples of African descent⁸

All of these factors point to a debilitating reality for peoples of African descent. They strongly suggest that this community lives within a perpetual state of crisis. This crisis may not be apparent to everyone, but is a daily reality for the African Canadian community⁹. The release of the Toronto Star series on racial profiling and the subsequent denials by the bureaucratic and political leadership of the police - including the Chief of Police, the Police Services Board, the Ontario Minister for Public Safety and Security, the Mayor of Toronto and the President of the Toronto Police Association - have simply added to this crisis. A summary review of the issues that comprise this reality may be helpful.

BACKGROUND TO THE CURRENT CRISIS:

In 1978 and 1979 respectively, Buddy Evans and Albert Johnson were shot and killed by Toronto Police officers. Protests over the the circumstances surrounding their shooting deaths took a number of forms, including political and civil actions. While no-one could forecast it at the time, these two men were among the first killed in an increasing number of incidents with police in Toronto and other Canadian urban centres such as Montreal and Ottawa. Since the deaths of Johnson and Evans, over 17 people of African descent have been shot by police in Ontario, resulting in the death of 11 individuals. All of those shot and killed have been men, the majority of them youth¹⁰.

terms of the portrayal of African Canadians who have challenged police authorities on these issues, Professor Akua Benjamin writes: "Social and legal banishment were the outcome or consequences for Black leaders who advocated against police shootings and for systemic changes to the criminal justice system...Onto this discursive field the Black leadership was increasingly presented to television viewers and/or newspaper readers." Professor Benjamin cites particular news articles in the Toronto Sun (May 6 and July 5, 1992) and the Toronto Star (August 21, 1988). In reviewing these articles, she comments that "One of the media's tactics was to promote the leadership as a small band of rabble-rousers who did not speak for the majority of members of the Black community." ***The Social and Legal Banishment of Anti-racism***, at 184 and 185 in ***Crimes of Colour***, ed. Wendy Chan and Kiran Mirchandani, 2002, Broadview Press.

⁸ In choosing the term 'discursive' formations, I am referring to the body of thought developed by Michel Foucault and made relevant to anti-racism work in Canada through the writings of Carol Tator and Frances Henry.

⁹ For example in *Police chief calls for race relations probe*, Michelle Shephard and Jennifer Quinn, ***Toronto Star***, October 26, 2002, Valerie Steele, Executive Director of the Jamaican Canadian Association, is quoted as saying: "I've been in Canada for 30 years and have heard about the problem with racial bias and policing every year for thirty years. This is not new to us." For further discussion on 'everyday racism' and its implications for peoples of African descent as well as other peoples from subordinate racialized communities see Philomena Essed ***Everyday Racism***. In terms of a Canadian reality, see Charles C. Smith and Erica Lawson ***Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination***, African Canadian Legal Clinic, 2002, and Charles C. Smith ***Racism and Community: Building Equity or Waiting for Explosions***, Stanford Law and Policy Review, 1997.

¹⁰ See Gabriella Pedicelli ***When Police Kill: Police Use of Force in Montreal and Toronto***, Vehicule Press, 1998 at 64. Pedicelli lists the following police shootings that resulted in fatalities in Montreal and Toronto, 1987-1993: Montreal - Anthony Griffin, Jose Carlos Garcia, Yvon Lafrance, Presley Leslie, Jorge Chavarria, Paul McKinnon, Marcellus Francois, Armand Fernandez, Osmond Fletcher,

These incidents took place simultaneous to an increasing police presence within African Canadian communities. As Philip C. Stenning notes "...allegations of unjustified 'overpolicing' and excessive police use of force (including lethal force) against blacks abounded during the 1970s, 1980s and 1990s..."¹¹ For example, there were several confrontations between police and African Canadian communities in Jane-Finch (1990), Lawrence Heights (1989), Birchmount-Finch (1987), Regent Park (1983-86) and Alexandra Park (1980s) - all densely populated public housing sites for low-income communities which are poorly serviced and in which there is high unemployment, particularly for youth¹². Confrontations also took place between the police and African Canadians in response to the rising number of shootings of African Canadians by police. Such confrontations led the police in 1993 to compile a list of high profile African Canadian community leaders. When the existence of this list came to light, it further served to demonstrate the intensive police surveillance of the African Canadian community¹³.

Several other activities further exacerbated this conflict. In 1989, while the Chief of Police was asserting that the Police Force did not collect data linking race and crime, the Staff Inspector of 31 Division in North York released such data to the media and to the members of a municipal race relations committee¹⁴. In May 1992, following the Rodney King decision, a series of incidents were triggered, culminating in the Yonge Street riots. Simultaneously, a member of the Ontario Cabinet resigned following comments she made about police and African Canadian youth. A high profile leader within the African Canadian community was brought to trial on charges of immigration fraud while another leader who served on the police services board, was vilified for his comments about the relationship between African Canadian youth and the police, particularly his suggestion that these youth saw police as an 'occupying army'¹⁵.

Trevor Kelly, Yvon Asselin; Toronto - Eugene Desmarais, Gardiner Myers, Lester Donaldson, Wade Lawson, Mark Ageoli, Donald Peltier, Joseph Noisjoly, Kenneth Allen, Raymond Lawrence, Dominic Sabatino, Luis Vega, Ian Coley. In Toronto, from 1993 - 1997, the following individuals were shot by police: Albert Moses, Albert Gale, Osbaldo Aldama, Tony Viveiros, Tommy Anthony Barnett, Andrew Bramwell, John Braithwaite, Wayne Williams, Edmond Yu, Hugh Dawson. Of these fatalities, in Montreal 5 of 11 are African Canadian; and in Toronto 11 of 22 are African Canadian. See also Charles C. Smith and Erica Lawson *ibid* at 24 as these figures on police shootings do not include those wounded by police: Sophia Cook, Wayne Williams, Andrew Bramwell, Faraz Suleman, Francis Nichols, T.T. (a youth under the age of 18). Further, Henry Musaka was the latest fatality in 1999. These deaths and shootings are clearly disproportionate to the African-Canadian presence in the community..

¹¹ *Supra* note 6 at 16. See also: Yasmin Jiwani *The Criminalization of "Race", the Racialization of Crime*, at 69 in ***Crimes of Colour***, ed. Wendy Chan and Kiran Mirchandani, *supra* note 7

¹² See Frances Henry who writes: "Of central concern to the Caribbean community is their relationship with the police. Since the police are usually the first point of contact with the justice system, they are most often singled out by Caribbean Black people. Here, as in the U.K. and the U.S., police-Black community relations are at the core of racial tensions in the city (footnotes omitted)" She further writes: "Regardless of their class origins or their present class status, students tended to view the police as the 'ultimate oppressor'. ***The Caribbean Diaspora in Toronto: Learning to Live With Racism***, in Chapter 10 ***Relations with Police, Justice and the Courts*** at 201 and 202, University of Toronto Press 1994. See also Charles C. Smith ***When the Rules Do Not Apply and the Resources Are Not Equal: Mediating Conflict between Police and Racial Minority Youth in Low-Income Communities***, paper presented to the North American Conference on Peacekeeping and Conflict Resolution, 1988, Montreal.

¹³ See Clayton James Mosher in ***Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems, 1892-1961***, University of Toronto Press, 1998 at 18

¹⁴ See *Racial data a hot potato*, ***Toronto Star***, October 26, 2002.

¹⁵ The Minister in question was the first African Canadian woman to hold a cabinet position in the Ontario Government. In response to a question regarding the initiation of a youth employment

In addition, Audrey Smith, a woman of African descent was subjected to a widely reported strip search for allegedly transporting drugs. Reports of Smith's strip search were followed by the even more widely reported "Just Desserts" incident which involved African Canadian youth who attempted to rob a downtown restaurant. The robbery resulted in the shooting death of one of the restaurant patrons. In the subsequent trial proceedings, the accused were brought into the courtroom in shackles causing one judge to remark on the negative image portrayed by shackling the men¹⁶. There has also been the continued conflict over the Caribana Cultural Festival, an annual 10 day summer festival showcasing Caribbean arts. This event became a major focus for the police following the stabbing of an officer in 1985. Since that time, there have been several efforts to contain the Festival's most significant event, the Caribana Parade, including the requirement that the parade organizers arrange for a significant number of police and private security.

Further, as if rallying public support for the police, the mainstream media released numerous articles that either portrayed people of African descent as criminals and/or provided blanket support to the police for their actions in dealing with this community. In *Racist Discourse In Canada's English Print Media*, Frances Henry and Carol Tator argue that "[o]ne of the most important components of the ways in which crime is racialized is the over-reportage of crimes allegedly committed by people of colour and especially Blacks¹⁷". Providing a thorough analysis of this assertion, Henry and Tator examine the Toronto Star, the Globe and Mail and the Toronto Sun in terms of their treatment of the "Just Desserts" trial, young offenders and gun control, immigration and deportation¹⁸.

Many commentators allege that the high profile incidents between Toronto police and the African Canadian community identified above represent intentional attempts by the police and their media supporters to disparage both individuals within the African Canadian community and the African Canadian community as a whole. Whether this allegation can be verified remains a matter of research and debate; however, these high profile incidents and the challenges they have bred for the African Canadian community make clear that a unique relationship does exist between this community and Toronto police.

The shootings of African Canadian men and the increased police presence in African Canadian communities have generated numerous reports and recommendations to address policing and race relations. These documents, commissioned by all levels of government and by the Metropolitan Toronto Police Services, have focused particularly on the training of police, the recruitment of police officers, political oversight, civilian complaints mechanisms and other issues such as special inquiries, the collection of statistics and establishment of effective policies¹⁹. Many communities and advocacy groups began expressing clear and growing concern about policing and its impact on African Canadian communities at the same time that official reports and recommendations were being released. The

program that would focus on the employment needs of African Canadian youth and how such youth would be identified, she replied that "Nobody has a problem identifying them when they want to shoot them." Notes on file with author from interview with Zanana Akande, January 12, 2004 Supra note 12 at 19 for discussion regarding Dudley Laws and the immigration case as well as the president of the Toronto Police Association's comments about Arnold Minors. For more on Arnold Minors see, *Misquotes used against him, Minors says, Globe and Mail*, Henry Hess, October 28, 1994, and, *I have no intention of quitting, Toronto Star*, Paul Hallihan, October 21, 1994..

¹⁶ See *R v. Brown [Stay Application]*, [1998] Ontario Court of Justice (General Division) Trafford, J., November 2, 1998 at 6 para.20-22

¹⁷ Canadian Race Relations Foundation at 125.

¹⁸ Ibid 123-160.

¹⁹ Supra note 6 at 17 where Stenning has also noted these categories as the major areas in which policy and program initiatives have been recommended.

recommendations made in the official reports and by community groups are identified and discussed in the next section.

'STUDIED TO DEATH':

Any investigation of police relations with Toronto's African Canadian community is fraught with pitfalls. Many African Canadian leaders and community organizations strongly oppose new studies of the issue. In part, their opposition stems from concerns that the studies will be headed by individuals with little connections to or understandings of the African Canadian community. They also argue that the matter had already been 'studied to death', and stress that another process to uncover facts and make recommendations was a useless exercise, cynically designed to defer dealing with the issues at hand. They argue that given the numerous reports and recommendations made over the years, attention should be paid to assessing what the police had implemented and how this implementation had been done²⁰. For these reasons, the review proposed by the Chief of Police which was to be headed by a non-African Canadian²¹, had been strongly condemned by many African Canadian leaders and community organizations.

In response to the Police Chief's suggestion, the community members who formed the ACCCRP focused their attention on the results of the many previous studies and recommendations. In doing this, they made a direct challenge to policing leadership and questioned the will of the police leadership to sincerely implement the many recommendations addressing policing and race relations. They were concerned that the recommendations from the many previous reports were not being implemented properly, if at all, particularly the 1993 recommendation of the Metropolitan Auditor that an annual report on race relations be prepared. The Auditor recommended that police performance be evaluated against measurement indicators aimed at assessing effectiveness relative to acceptable performance and service standards. As one member of the ACCCRP had said: "Nobody has come to the community and asked us what we want and that is an insult. We are the ones - our children are being stopped by the police, harassed by police officers - and we should have a say in how the process should take place²²."

Such concern is not surprising. Not too long before the Toronto Star series on racial profiling appeared, the African Canadian Legal Clinic had issued a study entitled "***Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination***" which was submitted to the United Nations International Committee on the Elimination of Racial Discrimination²³.

²⁰ In accepting the responsibility to conduct the review of the Toronto Police Services, the Honourable Charles Dubin commented: "I'll be looking at the (police) board's practice and procedures and initiatives that deal with community outreach, recruiting and diversity." *Police chief calls for race relations probe*, Michelle Shephard and Jennifer Quinn, *Toronto Star*, October 26, 2002. *supra*

²¹ *Ibid.* As one response to the Star series, Police Chief Fantino secured the commitment of former Chief Justice of Ontario, the Honourable Charles Dubin, to lead a review of race relations and policing practices. At first Mr. Dubin accepted this offer but later withdrew.

²² *Supra* note 4 for comment by Dudley Laws. See also reference in the same article to Margaret Parsons, Executive Director African Canadian Legal Clinic, and Zanana Akande, President Urban Alliance on Race Relations, who is quoted as saying "I think this is a stall. There are recommendations upon recommendations" from previous reports that have not been implemented. Also, Valerie Steele is quoted as saying: "The Dubin appointment is for a review, but it has already been studied to death. There are lots of studies already on the table - why don't they already implement some of the recommendations that have been put forward from a lot of good reports?"

²³ *Supra* note 9 at 25 -30.

Cited as significant evidence in *Borde v. Her Majesty the Queen*²⁴, this study contained a section which started with the words “Reports, reports, reports...” It states:

Since the end of the 19th and beginning of the 20th century, there has been ample evidence identifying the disproportionate impact of the criminal justice system on peoples of African descent...Despite the expression of concern by the African Canadian community regarding these facts, there has been little leadership from either government or the public to address the issues. The only time attention has been paid to these serious concerns is after a significant event, usually one in which police use of violence and/or force has resulted in serious injury or death (footnotes omitted)²⁵.

Beginning with the reports by Justice Donald Moran, Arthur Maloney, Walter Pittman and Archbishop Cardinal Carter in the 1970s and listing some 14 reports issued over the next 15 years across Canada, the ACLC report identified the repeated public attention given to policing and race relations over a short and intense period of time²⁶. In addition, the Metropolitan Police Services commissioned reports to provide them with further analysis of challenges and opportunities related to improving race relations²⁷. While these reports were either being written, recommendations adopted and strategies implemented, the relationship between the police and the African Canadian community seemed to proceed from crisis to

²⁴ Ontario Court of Appeal, November, 2002 C38189

²⁵ Supra note 9 at 25.

²⁶ Ibid at 25-26. The reports cited in the ACLC work include: *Report to the Metropolitan Board of Commissioners of Police*, Arthur Maloney, 1975, for the Province of Ontario; *The Royal Commission into Metropolitan Toronto Police Practices*, Justice Donald Moran, 1976, for the Province of Ontario; *Now Is Not Too Late*, Walter Pittman, 1977, for the Municipality of Metropolitan Toronto; *Report to the Civic Authorities of Metropolitan Toronto and its Citizens*, Cardinal G. Emmett Carter, 1979, for the Municipality of Metropolitan Toronto; *Race Relations and the Law: Report of a Symposium Held in Vancouver, British Columbia*, 1992, Minister of Multiculturalism; *The Regent Park Report*, 1985, Public Complaints Commission; *Discrimination Against Blacks in Nova Scotia*, Wilson Head and Don Clairmont, 1999 *The Report of the Race Relations and Policing Task Force*, Clare Lewis, 1989, for the Ontario Ministry of the Solicitor General; *Report on Race Relations, Final Report and Summary of Information Gathered from Service Providers and Racial Minority Community Organizations in the Jane-Finch Community Regarding the Quality of Police-Minority Community Relations*, 1989; Stephen Lewis, 1992, for the Province of Ontario; *The Report of the Race Relations and Policing Task Force*, Clare Lewis, 1992, for the Ontario Ministry of the Solicitor General; *Review of Race Relations Practices of the Metropolitan Police Force*, Alan Andrews, 1992, for the Municipality of Metropolitan Toronto; *Toward a New Beginning - The Report and Action Plan of the Four-Level Government/African Canadian Community Working Group*, 1992; *Police Use of Force and Violence Against Members of Visible Minority Groups in Canada*, Phillip Stenning, 1994, for the Canadian Centre for Police Race Relations; *Report on Attorney-General's Files, Prosecutions and Coroner's Inquests Arising out of Police Shootings in Ontario*, H.S. Glasbeek, 1995, for the Commission on Systemic Racism in the Ontario Criminal Justice System; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, 1995*, Province of Ontario. . In addition to these, it is also important to mention *The Black Presence in the Canadian Mosaic*, Wilson, Head, 1975, for the Ontario Human Rights Commission; *Policing in Ontario for the Eighties: Perceptions and Reflections: Report of the Task Force on the Racial and Ethnic Implications of Police Hiring, Training, Promotion and Career Development*, Dr. Reva Gerstein, 1980, for the Ontario Ministry of the Solicitor General; *Ensuring Public Accountability: A Background Paper on Initiatives of the Metro Toronto Police Services Board Regarding Public Complaints Against Police Officers*, Toronto Police Services Board, 1992, for Metropolitan Legislation and Licensing Committee of the Metropolitan Council; *Moving Forward Together: An Integrated Approach to Race Relations*, Metropolitan Toronto Police, 1995; *Performance Audit: the Public Complaints Process Toronto Police Service*, City of Toronto Audit Services, 2002.

²⁷ See *A Strategy to Enhance the Metropolitan Toronto Police Force's Profile with Racial Minorities*, Equal Opportunity Consultants, 1992; and *As We Were Told*, Mukwa Ode First Nations Consulting Inc, 1992.

crisis, some of it quite public²⁸.

It is interesting to note that simultaneous to the confrontational incidents that gave rise to public attention and the issuing of subsequent reports, Canadian society was experiencing unprecedented demographic changes resulting from amendments to its immigration laws. Newcomers from Asia, Africa, Latin America and the Caribbean were becoming the major sources for immigrants to Canada and more people from subordinate racialized communities were settling in record numbers in Canada's largest urban centres. While this had significant impact on various public sector institutions, the impact of these changes were most discernable in the relations between peoples of African descent and the police, principally because of the statutory authority invested in the police to use force, including deadly force²⁹.

In assessing the implications of these changes, studies commissioned or undertaken by the regional government of Metro Toronto indicated the likelihood of conflict and societal stress if institutions, particularly the police, did not begin to develop and implement proactive policies and programs that directly challenged racism and other forms of discrimination. As Tana Turner's analysis suggested, "[t]he increasing racial minority population in Metropolitan Toronto raises a variety of issues regarding institutional change to accommodate and reflect the changing racial composition of Metro. Current issues include police-community relations ..." Turner later forcefully suggests that "[t]he increasing proportion of racial minority youth will have particular implications for policing in Metro Toronto. Specifically, issues regarding cultural differences of such a visible segment of the population must be addressed by the police if the rising tensions between the two groups are to be diffused³⁰." In addition to Ms Turner's report, the Municipality of Metropolitan Toronto (as it was then) reviewed all of its policies, services and programs to address similar concerns. In doing so, it identified that various communities experienced barriers in accessing public services, including policing services³¹.

Given the enormous amount of work already done, the significant knowledge amassed by African Canadian communities over two decades of experience, and the numerous recommendations already advanced that addressed each aspect of policing and race relations, it is not surprising that the ACCCRP expressed outrage when it was announced that yet another report was to be undertaken. The outrage was fueled by the fact that the report was to be authored by the Honourable Charles Dubin, a former Chief Justice of Ontario whom the ACCCRP noted had no identifiable background in anti-racism issues and no distinguishing accomplishments recognized by the African Canadian community³².

²⁸ Supra note 12, particularly Charles C. Smith

²⁹ Supra note 6 at 15 Stenning notes that "During those 30 years, for example, Toronto's population multiplied almost six fold, and immigration accounted for most of this increase. In 1961, 95 per cent of Torontonians were of European extraction, but by 1991 this population had been reduced to 47 per cent...(Further) (i)t was estimated that, by 2001, about half the population of Toronto ... would be members of visible minority groups."

³⁰ See *The Composition and Implications of Metropolitan Toronto's Ethnic, Racial and Linguistic Populations*, Multicultural and Race Relations Division, Chief Administrative Officer's Department, Municipality of Metropolitan Toronto, March 1990 at ii and vii respectively.

³¹ See *Review of Ethno-Racial Access to Metropolitan Services*, Multicultural and Race Relations Division, Chief Administrative Officer's Department, Municipality of Metropolitan Toronto, 1990. These documents were not far removed from those that were commissioned to specifically address issues of policing and race relations. Based on such assumptions, the regional government began a process to comprehensively address these challenges and to ensure that initiatives to do so were being developed and implemented by all of its agencies, including the police.

³² This was a major concern of the Coalition which felt that this appointment was simply another way to defer the issue and, by doing so, to deny the immediate attention it required.

ACCCRP members believed that the reports issued over the years had conveyed all that was necessary for effective policing in a racially diverse community. The previously released reports addressed race relations training, recruitment of racial minorities as police officers, the establishment of civilian complaints mechanisms as well as political and advisory bodies. These reports also addressed the issue of implementation over time and the need to develop accountability mechanisms to ensure effective implementation. Before discussing the community's position on the matter, it is worth summarizing the key issues raised in these reports and their related recommendations.

Race Relations Training:

Police officers work with people. They provide an essential public service that supports community safety and contributes to the comfort that individuals and communities have in their social and private interactions. In this context, developing the knowledge and skills of police officers to provide law enforcement services in a democratic, pluralist society is a fundamental requirement. As part of this process, many police forces have acknowledged the importance of educating both new recruits and veteran officers in areas of new technologies, criminology, developments in criminal law, police administration and undertaking their assignments within the public domain. Needless to say, cross-cultural understanding, race relations and anti-racism have become part of the curriculum of police education and training³³.

In Toronto, the focus on race relations training came about primarily as a result of recommendations made in the aforementioned reports. Some of these recommendations have included: combining race relations training into all training areas with an emphasis on education, skills development and behavioural issues; making training objectives consistent with overall organizational objectives and relevant to operational conditions; providing race relations training for all Force personnel within a reasonable time³⁴; providing refresher training regularly and at times of promotion³⁵; and integrating race relations training into refresher training courses by the Ontario Police College and having professionals assess these courses³⁶. Further, as a catalyst for such developments, Stephen Lewis proposed the establishment of an Ontario Police Training, Education and Development Board. This Board was to have broad community and police representation to implement recommendations of the Strategic Planning Committee on Police Training and Education of the Ministry of the Solicitor General. Priority was to be given to recommendations concerning race relations³⁷.

In light of the relative lack of attention paid to this matter coupled with the expertise in the area of race relations that existed outside police forces, these studies and reports have

³³ In the mid-1980s, a national conference entitled *Policing in a Multicultural and Multiracial Society* was held in Vancouver, British Columbia. This conference brought together law enforcement officers and individuals concerned about the impact of changing demographics on the provision of policing services and the differences that police services in large urban centres would face as a result. Needless to say, there was a considerable contingent of conference participants from Toronto who, upon their return, set up the Greater Toronto Working Group on Policing in a Multicultural and Multiracial Community which from 1986 - 1990 produced reports on employment equity, community relations and education/training.

³⁴ *Review of Race Relations Practices of the Metropolitan Toronto Police Force*, Municipality of Metropolitan Toronto, Audit Department, Alan Andrews at 69-70, 1992

³⁵ *Police Use of Force and Violence Against Members of Visible Minority Groups in Canada*, Canadian Centre for Police Race Relations, Dr. Phillip C. Stenning, at 1.46, 1994

³⁶ *Report of the Race Relations and Policing Task Force*, Queen's Printer, Ontario, at 163, 1992

³⁷ *Report on Race Relations in Toronto*, Stephen Lewis, at 13, 1992. This was to have taken place by Nov. 1, 1992

suggested that external staff with extensive race relations training experience be used to conduct race relations training.³⁸ They also stressed that trainers needed to be persons of colour³⁹. In his 1992 review of race relations practices of the Toronto police, the Metropolitan Auditor made several recommendations regarding training materials. For example, he pointed to the need to: ensure an appropriate balance in the depiction of minorities; give priority to training resource budgets; increase use of hi-tech resources for training; explore the potential use of race relations messages in video presentations to form the core of race relations training content⁴⁰.

The Canadian Race Relations Foundation advocated a similar approach and noted the central importance of human rights legislation in training,⁴¹ while the 1989 Race Relations Task Force Report proposed limited probationary internships with racial community groups and service providers in addition to on-the-job learning and classroom instruction⁴². It was also suggested that the Ministry of the Solicitor General consult with various law enforcement organizations (e.g., the Canadian Centre for Police Race Relations) to develop model race relations and anti-discrimination training standards for use by police forces in Canada⁴³.

RECRUITMENT OF A DIVERSE POLICE FORCE:

The importance of having a police force that reflects the composition of the community it serves has been at the forefront of issues concerning policing and race relations. As with other public sector organizations, this matter has been on the policing agenda since the mid-1980s. It was largely influenced by the seminal work of Justice Rosalie Abella and her task force on employment⁴⁴. In addition to Abella's study, a majority of reports on policing and race relations have directly addressed this issue and have underscored the benefits of and need for compliance with provincial employment equity legislation at various organizational levels, including middle and upper management⁴⁵. Previous reports have also noted that frontline recruiting personnel should also reflect the composition of the community⁴⁶.

Numerous strategies have been recommended to facilitate the development of a more diverse police force, including the need to:

- Introduce employment equity training for all personnel of the Ministry of the Solicitor General and restoration of staffing of the Race Relations Policing Unit⁴⁷;

³⁸ Supra note 34 at 70

³⁹ Supra note 35 at 1.46. In addition, it has been suggested that trainer qualifications and skills be explicitly identified and used to appoint trainers and that trainers be evaluated on performance in accordance with their job requirements. Also recommended were formal procedures to relate the operational impact of training back to the training process for appropriate corrective action. [supra note 35 at 70]

⁴⁰ Supra note 34 at 69-70. Andrews also recommended that race relations training content encompass an emphasis on education, skills development and behavioural issues and be integrated into all areas of training. He advised that the Cross Cultural, Ethnicity and Race Relations Training course ("CERT") be reassessed and revised to incorporate the Ministry of the Solicitor General's work in the race relations area.

⁴¹ **Facts About ... Racism and Policing**, www.ccrf.ca at 8.

⁴² Supra note 36 at 106.

⁴³ Supra note 35 at III.7-8

⁴⁴ See **Equality in Employment: A Royal Commission Report**, 1984

⁴⁵ Most of those cited have called for such programs for policing., eg., supra note 34 at 58, supra note 37 at 19

⁴⁶ Supra note 34 at 57 and supra note 35 at 1.45

⁴⁷ Supra note 36 at 157-158.

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- Develop a public commendation process for police forces exceeding minimum requirements prescribed under employment equity regulations⁴⁸;
- Provide adequate funding to the Constable Selection Project ("CSP") and related projects for the development of bias-free selection processes;
- Use the CSP to assemble recruit availability data to set employment equity goals and alternative employment strategies such as lateral entry and permanent specialization of uniformed officers, especially at senior levels, to achieve a more racially representative force at higher ranks⁴⁹;
- Use of early retirement schemes to create more openings for which minorities could be recruited⁵⁰;
- Establish a Central Police Recruiting Unit with sufficient resources and staff⁵¹;
- Adopt blind grading of examinations to avoid any possible bias or perception of bias⁵²;
- Adopt standardized candidate screening for all Ontario and Canadian forces, and the documentation of differences between the candidate screening standards of the Toronto police force from those of other Ontario and Canadian forces;
- Use of alternative methods to obtain background checks on recent immigrants to accelerate the hiring of such applicants⁵³;
- Publicize hiring and promotional practices to target subordinate racialized groups among the public and the Force and provide unsuccessful candidates with direct information regarding their applications and test results⁵⁴;
- Maintain a confidential database on the racial and gender makeup of the Force to track and monitor the progress of such officers and take appropriate remedial action where necessary⁵⁵;
- Conduct recruitment outreach efforts in avenues such as schools and in communities and ensure regular surveys of Force personnel to uncover (and address) any on-the-job race relations concerns⁵⁶;
- Avoid employment discrimination in terms of assignments, training opportunities, etc.⁵⁷
- Conduct race relations audits that encompass reviews of any underestimated or changed hiring/promotional opportunities.

⁴⁸ Ibid at 159

⁴⁹ Ibid at 160

⁵⁰ Ibid at 160-161

⁵¹ Ibid at 161

⁵² Supra note 34 at 57 and 58

⁵³ Ibid at 57 - 58

⁵⁴ Ibid at 57 - 58

⁵⁵ Ibid at 58. See also *Race Relations and the Royal Canadian Mounted Police*, **Currents**, Vol. 7, No.4, February 1992, T. John Samuel, at 20]

⁵⁶ Supra note 35 at 1.45

⁵⁷ Ibid at 1.45.

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- Expand minority youth/police summer employment program⁵⁸ and develop a process to fast-track qualified African Canadian and other racialized individuals in the RCMP⁵⁹ and in local forces⁶⁰.

The Metropolitan Auditor further suggested that adequate weight must be given to the range of skills required in police officers. To that end, greater emphasis must be placed on qualifications such as interactions with the public in the evaluation of officer performance. The Auditor's report suggested that greater emphasis is needed on the evaluation of a probationary officer's performance, particularly as regards interactions with the public. He recommended that the evaluation process should lead to the correction of skill deficiencies, such as the introduction of conflict management training to those officers who lacked such skills. The Auditor's report also highlighted the need for a more formalized promotion and transfer process to minimize actual bias as well as the perception of bias⁶¹.

Recommendations have been made to develop various awards to recognize progress in race relations practices, both at the Force level and the individual officer level. It has also been suggested that promotion decisions take into consideration any such awards⁶² and that the long-term negative impact of inappropriate officer conduct be stressed and communicated to all officers⁶³. Another proposal indicated that racially discriminatory police practices should be considered disciplinary offences⁶⁴.

COMMUNITY BASED POLICING:

Community based policing was developed as a concept to improve relations between police and the community and to enable ordinary citizens to assist in promoting crime prevention and community safety. Community based or 'neighbourhood' policing encompasses principles of community partnership and empowerment.⁶⁵ It requires mutual trust and respect between community members and law enforcement officials. Police departments began embracing this method in the late 1980s and received strong endorsement by the Ontario Commission on Systemic Racism in the Criminal Justice System (the "Commission"). The Commission in particular, exhorted the Ministry of the Solicitor General and Correctional Services (MSGCS) to collaborate with local community groups and with police to establish guidelines based on community based policing for the use of police discretion in stopping and questioning persons⁶⁶.

⁵⁸ *Towards a New Beginning: The Report and Action Plan of the Four-Level Government/African Canadian Community Working Group*, at 101, 1992

⁵⁹ *Supra* note 6 at 20

⁶⁰ *A Report and Recommendations on Amendments to the Police Services Act Respecting Civilian Oversight of Police, 1996* at 20

⁶¹ *Supra* note 34 at 58

⁶² *Supra* note 35 at 1.47

⁶³ *Supra* note 34 at 111

⁶⁴ *Supra* note 35 at 1.45

⁶⁵ See *Race Relations and Policing: A Minority Perspective*, *Currents*, Vol. 7, No.4, February 1992 at 4

⁶⁶ *Supra* note 2 at 359. These guidelines were to specify the factors officers may and may not use in exercising discretion to stop and question individuals and to be widely circulated in the languages most commonly spoken in Ontario. In developing these guidelines, the Commission suggested that consideration be given to the reasonable suspicion test used in a UK Code of Practice for police. Reasonable suspicion cannot be supported on the basis simply of a higher than average chance that the person has committed or is committing an offence, for example, because he belongs to a group within which offenders of a certain kind are relatively common or because of a combination of factors such as these. For example, a person's colour can never be a reasonable ground for suspicion. The

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Several methods of developing community-based policing models have been suggested, including:

- The Canadian Race Relations Foundation advocated using exchange programs to improve police relations with non-governmental organizations⁶⁷;
- The Commission proposed that police boards establish local community policing committees ("CPCs") around divisional police levels or other community/geographic groupings relevant to the jurisdiction. It submitted that CPCs be established as sub-committees of police services boards. Each CPC was to be responsible for: (1) developing agreements with police to establish, and monitor the implementation of, police goals and performance standards reflective of local community needs; (2) developing policing practices and policies on as needed basis; (3) acting as liaison between the local community and police services boards; (4) aiding in informal complaint resolution upon request by complainants and the divisional superintendent; and (5) collaborating with police, legal professionals and the judiciary to encourage community education regarding security and the operation of the criminal justice system⁶⁸.
- The Commission advocated that the Ministry of the Solicitor General, in concert with police services boards, fund community surveys concerning local safety (e.g., (un)reported crime, peacekeeping operations and experiences with local police services) and that the summaries of such findings be distributed widely⁶⁹. The surveys were to be conducted every five years. A review of committee memberships and the creation of criteria for the membership of police/community committees was also recommended⁷⁰.
- Suggestions on improving community relations vary from the recruitment of respected community individuals to advise police on race relations issues in the delivery of police services⁷¹ to calls for a provincial police race relations oversight body which would also sponsor and assume relevant research efforts⁷².
- Stephen Lewis directed that a community-based Monitoring and Audit Board work in association with the Race Relations and Policing Unit of the Ministry of The Solicitor General. He believed these groups should collaborate (e.g., identify police forces for audits, refine methodology, design questions, etc) with municipalities and police forces to conduct audits of police race relations policies on a regular basis⁷³.
- Others have advised that the police force structure should adopt one focal point responsible for co-ordinating race relations policy development, program design and delivery as well as assessment tasks⁷⁴. Clear articulation and communication of the role, mandate and manner of operation of various police units involved with direct community relations programming to the Force and community representatives was also

mere fact that a person is carrying a particular kind of property or is dressed in a certain way or has a certain hairstyle is likewise not of itself sufficient (United Kingdom, Home Office, *Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, London: HSMO, 1985).

⁶⁷ Supra note 41 at 9

⁶⁸ Supra note 2 at 347-49

⁶⁹ Ibid at 349

⁷⁰ Supra note 34 at 98.

⁷¹ Supra note 60 at 19

⁷² Supra note 35 at 1.48

⁷³ Supra note 36 at 7

⁷⁴ Supra note 34 at 98

recommended. Other recommendations focused on the need to reconsider community programming to ensure that it reflects a partnership between community groups and the police, instead of being police-dominated. Proposals also included re-evaluation of job requirements and mandates of Community Relations Officers to provide clear and consistent job performance expectations that still kept in mind operating differences⁷⁵.

- Still other suggestions concerned: (1) the creation of specialized race relations units within police forces; (2) policies on dissemination of public information on race and crime; (3) implementation of "crisis networks" to enable police leadership to make quick contact with community representatives during times of critical police race relations; (4) fostering police involvement in recreational, educational and social activities with youth, in particular⁷⁶, and (5) developing of creative methods for promoting positive interaction between African Canadian police officers and youth⁷⁷.

POLITICAL OVERSIGHT AND MECHANISMS FOR POLICE COMPLAINTS:

Some commentators have recommended that local municipal councils exercise political oversight of the police as a way of enhancing police accountability within the context of democratic decision-making structures. For example, one study supported the creation of a Safety and Equity Standing Committee for the city of Toronto with responsibility for effective policing at the municipal level that would be accountable to City Council⁷⁸. Significant community input regarding the goals, policies and priorities for effective community policing was identified as being essential for this committee⁷⁹. More local neighbourhood/community safety and security committees were proposed to address and assist effective policing issues at the local level, and to communicate with the City Safety and Security Committee⁸⁰. Finally, it was suggested that an annual city policing plan be created after comprehensive community consultation through the Safety and Security Committee and local community committees. Progress towards plan objectives was to be publicly discussed and assessed⁸¹.

The Special Investigations Unit ("SIU")

The SIU has been surrounded in controversy since its establishment. Accordingly, past studies and reports on policing in Toronto abound with recommendations regarding the SIU. For example, the Commission advocated a significant funding increase for the agency as well as legislative changes⁸². It urged amendments to the *Police Services Act* to require officers involved with SIU investigations to submit requested information/evidence to the SIU immediately or, at the latest, 24 hours after an SIU request for such submissions. Any officer who failed to comply with a request or who refused to respond to SIU questions would be suspended without pay⁸³.

Other reports indicate that it is important to make clear the SIU's status as lead investigative

⁷⁵ Ibid at 98

⁷⁶ Supra note 35 at 1.47

⁷⁷ For example, supra note 58 at 101

⁷⁸ See *Reclaiming Police Back on to the Community and Municipal Agenda*, *Currents*, Vol. 9, No. 2, Phillip C. Stenning at 30-31

⁷⁹ Ibid at 31

⁸⁰ Ibid at 31

⁸¹ Ibid at 31

⁸² Supra note 2 at 382

⁸³ Ibid 382-383

agency when its mandate is invoked⁸⁴; and to clarify an officer's duty under s. 113(9) to cooperate fully with SIU investigations in accordance with the criminal law and her Charter rights⁸⁵.

Proposed changes to the *Police Services Act* Regulations included:

- (1) Authorizing the SIU director to charge officers who fail to provide timely evidence/information with misconduct offenses and requiring respective police chiefs notified by the SIU of a subordinate officer's failure to provide a complete statement to an SIU investigator or to immediately suspend the officer without pay⁸⁶;
- (2) Clarifying that Police Chiefs have a duty to compel statements from witness/subject officers in SIU investigations and stressing the disciplinary consequences to recalcitrant officers⁸⁷; and
- (3) Requiring local police services to aid the SIU in various ways, e.g., promptly turning over all evidence in their possession to the SIU, segregating witness civilians from police and officers from one another, etc.⁸⁸.

The SIU's independence has also been the subject of concern. Stephen Lewis called for its removal from the Ministry of the Solicitor General and recommended that the SIU instead report to the Attorney General as an arms-length agency by Oct. 1, 1992. He noted that the SIU must be adequately funded to guarantee its independent investigative capacity. Lewis further recommended that exemplary civilian employees with non-criminal investigative experience form part of each SIU investigation⁸⁹. Others have suggested that the SIU be located in the Investigations Division of the Ontario Police Service Commission, an agency of the Ministry of the Solicitor General, and be headed by a civilian Chief Investigator with investigation experience. Under this model, the Crown counsel in the Criminal Law Division of the Attorney General's office would provide advice on SIU investigations.⁹⁰

Still other commentators, noting the necessity for independence of the SIU from government bodies involved with enforcing the criminal and civil codes, proposed that the Metro Public Complaints Commission and the SIU be housed under the umbrella of one Ontario commission. Securing the SIU's independence, according to these commentators, required measures such as: (a) providing the SIU with the requisite legal authority to execute its functions; (b) establishing a ceiling on the proportion of SIU chief investigator vacancies that may be filled by those who have been employed as police officers for over six months; and (c) prohibiting of (former) police officers from being candidates for SIU field investigator positions⁹¹.

With respect to enforcement, the Commission urged that a highly publicized Special Prosecutions Unit be established in the Ministry of the Attorney General to prosecute all SIU charges. In addition, it called for the creation and wide publicity of guidelines for this special unit following consultation with defense counsel, the SIU, police services and members of

⁸⁴ Supra note 60 at 27

⁸⁵ Ibid at 31

⁸⁶ Supra note 2 at 382

⁸⁷ Supra note 60 at 31 and 25 respectively

⁸⁸ Ibid at 27.

⁸⁹ Supra note 36 at 9 - 10

⁹⁰ Supra note 60 at 26

⁹¹ ***Abuse of Power and Non-Accountability: The Case of the Coroner's Inquest Judging the Legitimacy of Police Killings in Ontario***, David W. McKinney, Jr., 1991 at 240

subordinate racialized communities⁹².

Another recommendation involved the creation of specialized tribunals as viable alternatives to coroner's inquests to review incidents involving the use of deadly force by police and to determine the legitimacy of such force in each incident. These alternative tribunals would be mandated to decide on questions of fact and assess administrative liability with reference to an administrative liability standard. A three-member panel was proposed for these alternative tribunals, with members having qualifications akin to judges. The officer who used deadly force, the family of the deceased and the office to which the SIU reported would each select one panel member⁹³.

Public Complaints Processes

In terms of the police complaints process, some proposed amendments to the *Police Service Act* to transfer initial racial discrimination complaint investigations from the public complaints bureau of a police force to the Public Complaints Commissioner. The latter was called on to review the disposition of all racial discrimination complaints by police chiefs. It was pointed out that additional staff and resources were needed by the Public Complaints Commission in light of these new responsibilities⁹⁴.

The Metropolitan Auditor proposed a slightly different public complaints process model. He recommended establishing criteria to allocate responsibility for the investigation of complaints to the Complaints Bureau, the Unit Commander and the Internal Affairs Unit. His report urged the Toronto police to reach an agreement with the Office of the Police Complaints Commissioner regarding informal resolution of minor complaints so as to encourage officers to resolve these complaints without possible negative impact. He also recommended that formal complaint mechanisms regarding civilian staff involved in enforcement activity (e.g. parking control officers) be created and publicized⁹⁵.

As for recording complaints, the Metropolitan Auditor recommended that multiple complaints concerning an officer(s) be recorded more accurately to reflect the facts of a complaint. Data from the complaint process would be used to obtain feedback, and to identify trends and patterns regarding personal and institutional performance. Consideration was also to be given to developing a process for generating feedback on the service provided by the Toronto Police Force. The Auditor considered the correlation of Use of Force data to complaints to be essential to determining the existence of patterns which required remedial action. This report also stressed the need for Unit Commanders to take and report on follow-up action respecting officers who were the subjects of multiple complaints⁹⁶.

The Auditor also suggested that the time lag between the receipt of a complaint and the securing of statements from subject officers had to be reduced and, in more serious cases, recommended that statements from the relevant officers be obtained as soon as possible after the receipt of a complaint. General service and other non-officer complaints were also to be dealt with promptly and any related action taken with respect to the complaint had to be documented. Moreover, it was suggested that the respective Division compile a record of complaints received by phone from individuals who did not wish to file formal complaints. This record, along with documentation of any related action taken, would be sent to the Complaints Bureau for official recording. Finally, the Auditor urged that data be maintained

⁹² Supra note 2 at 384

⁹³ Ibid at 223, and, 243-244

⁹⁴ Supra note 36 at, 8

⁹⁵ Supra note 34 at 111-112

⁹⁶ Ibid at 111

on the treatment and disposition of internal cases of discrimination and harassment⁹⁷.

Inquiry

Stephen Lewis' recommendations served as the impetus for the Commission on Systemic Racism in the Ontario Criminal Justice System which, as has been indicated in other parts of this study, made its own extensive recommendations on police-race relations in Ontario. In his report on race relations, Lewis proposed a broad inquiry into race relations and the criminal justice system. He stressed that the inquiry must include Crown attorneys, the judiciary and court administration, correctional facilities, probation, community policing and parole services. He further directed that an interim report by the inquiry dealing with correctional facilities be tabled for Jan. 1, 1993, with a final report due on July 1, 1993. The panel overseeing the report was to allow for majority representation from subordinate racialized communities⁹⁸.

Enforcement

Recommendations advanced in the past have also included the need to establish a single oversight body, the Ontario Police Services Commission (OPSC), which would consist of an Adjudications Division and an Investigations Division. The OPSC would be headed by a full-time (civilian) Chair, two (civilian) full-time Vice-Chairs and an unspecified number of racially diverse part-time Community Commissioners. Under this model, all preliminary jurisdiction for non-SIU investigations would reside with local police services with the province supervising the assignment of investigative duties. It was thought that the OPSC, learning from its investigation and adjudication functions, would liaise with the Policing Services Division (PSD) regarding its oversight process and suggest standards to address systemic problems to the PSD⁹⁹.

Statistics

Given the "considerable merit"¹⁰⁰ in statistics that measure police action in various situations, the Metropolitan Auditor urged Toronto Police to maintain such a statistics database. Andrews maintained that such a database could shed light on policing trends as well as policing activity in the context of racialization by measuring "police activity relative to discretionary charges and the results of these charges, or to charges resulting solely from contact with individual members of the public"¹⁰¹. Statistics were to be maintained with sufficient detail to permit the generation of valid statistical conclusions. It was suggested that a statistical base be employed to develop indicators evaluating the level of any bias in policing activities for the Force overall and for internal comparisons among different operating units. The Police Services Board was urged to reconsider its prohibition against race-statistics and to consider collecting statistics on factors, "such as occurrences, charges or complaints which identify race, including the race of the officer"¹⁰². Further, access to raw data was to be limited and a civilian body proposed to compile, maintain and analyze compiled statistics. The Police Chief or senior officer were to authorize the rationale of

⁹⁷ Ibid at 112

⁹⁸ Supra note 37 at 15-16. Lewis (at 5) also recommended the reconstitution of the Clare Lewis Race Relations and Policing Task Force (in the person of Clare Lewis and two of his former task members) to assess current implementation, the status of outstanding recommendations and proposals for progress .

⁹⁹ Supra note 60 at 13-15

¹⁰⁰ Supra note 34 at 77.

¹⁰¹ Ibid at 77

¹⁰² Ibid at 78

collected statistics, and the release of reports/analyses based on them¹⁰³.

Policies

The Canadian Race Relations Foundation (CRRF) proposed that clear communication policies be implemented to prevent the use of stereotypes by police and media in matters including but not limited to the reporting on crime. CRRF also proposed that all forces adopt and apply a Diversity Management policy to all their practices, from hiring to service calls¹⁰⁴. This policy would be vigorously enforced by senior officials. Stenning's report makes a similar recommendation¹⁰⁵.

It was also proposed that the Deputy Minister of the Ministry of the Solicitor General chair an Anti-Racism and Diversity Executive Committee. This Committee was to be responsible for creating and implementing a strategic Ministry plan regarding police-race relations. This plan was to include the following policing priorities: (1) community policing with an anti-racism component; (2) an anti-racism strategy to eliminate systemic biases in Ministry and police force practices and policies; and (3) implementation of Ministry employment equity plans and support for police force and police service boards' employment equity plans¹⁰⁶.

The Use of Force

Given the disproportionate number of African Canadian persons against whom the police have used deadly force, this issue has also been the focus of attention in previous studies concerning police/community (race) relations. One suggestion was to amend section 25(4) of the *Criminal Code* – the provision which allows officers to use deadly force – to restrict its application to circumstances where the fleeing suspect poses an imminent threat of death to other persons¹⁰⁷. Another recommendation called for the Ontario government to complete public consultations on police use of force and amend the *Police Services Act Regulations* regarding the use of force by Sept. 1, 1992. Clearer guidelines about the use of force and alternatives to force were also proposed along with a report filing requirement by police officers anytime guns are drawn/used¹⁰⁸. As well, it was deemed critical that reports recording incidents involving the use of force be analyzed to ascertain trends such as the type of force applied in various situations, by various officers¹⁰⁹. The Ministry of the Solicitor General was advised to develop a more restrictive use of force policy and to fund research concerning the collection of reliable evidence about police use of force. The Ministry was also advised to promote the use of non-fatal weapons by police officers. The need to report all civilian deaths to a central body was recognized. Further, training in the use of firearms, including training aimed at providing officers with the mental preparation to respond appropriately to highly dangerous situations, was recommended as a high priority¹¹⁰.

¹⁰³ Ibid at 78, and, 84- 85. See also ***Workshop on Collecting Race and Ethnicity Statistics in the Criminal Justice System***, Centre of Criminology, University of Toronto, Anthony N. Doob at 9, 1991. Participants at this workshop encouraged the collection of race-crime statistics at most or all decision-making stages of the criminal justice system to help uncover racism in the system. They cautioned, however, that statistics could be misinterpreted by various actors (e.g. media, politicians, police, academics) and thus should be collected in public and accountable manner. See also Stenning supra note 36 at III.5 who also argued for creating an appropriate method of recording race/ethnicity of all citizens who come into police contact.

¹⁰⁴ Supra note 41 at 9

¹⁰⁵ Supra note 35 at III.7

¹⁰⁶ Supra note 36 at 19-20, and, 156

¹⁰⁷ Supra note 58 at 94

¹⁰⁸ Supra note 36 at 11

¹⁰⁹ Supra note 34 at 85

¹¹⁰ Supra note 34 at 85. See also supra note 35 at III.5,6,7

Suggestions concerning legislation included:

- (1) the adoption of an Ontario administrative standard based on functionally relevant, objective and reasonably clear criteria to determine the legitimacy of police use of deadly force¹¹¹; and
- (2) adopting legislation allowing for the charging and prosecution of public officials who fail to adequately penalize subordinates violating public trust and human rights codes. For administering the legislation, consideration was to be given to the Ontario Ombudsman Office¹¹².

Corrections

The Interim Report of the Commission recommended the appointment of an Anti-Racism Co-ordinator for adult corrections to achieve report goals. These goals included: the provision of most favorable treatment for all prisoners without racial discrimination; the elimination of racial segregation of prisoners; dignified treatment free from racial bias for all prisoners; and correctional services that respect prisoners' religious, cultural, personal care and linguistic needs. The Coordinator was expected to report to the Deputy Minister overseeing adult corrections and the former's authority and mandate were to be made public. A second recommendation was to designate the Office of Child and Family Services Advocacy ("OCFSA") to act as the Anti-Racism Co-ordinator for young offenders. Its mandate, authority, and functions were to parallel those of the Anti-Racism Co-ordinator for adult offenders. These two Anti-Racism Co-ordinators were to recognize the unique needs of racialized female prisoners. The OCFSA and the office of Anti-Racism Co-ordinator for adult corrections were responsible for, among other things: (a) creating and implementing processes for engaging community participation in corrections; (b) performing systematic examinations of ministry programs; (c) undertaking random audits of prison programs, services, and conditions; and, (d) investigating racism charges from prisoners or staff.

Job duties endorsed for prison superintendents included eliminating racism. This duty was to be a key part of their performance appraisals. It was anticipated that superintendents would do a complete needs analyses for all racialized minorities to ensure the provision of culturally suitable services by May 1, 1994. It was suggested that processes to gauge dietary, linguistic and religious requirements of prisoners would be devised by that same date. In addition, it was recommended that superintendents implement a program to abolish the disparate numbers of African Canadian prisoners placed in Hamilton detention centres while awaiting trials in Toronto. Further, Ontario correctional facilities were required to end the racial segregation of prisoners. Various strategies aimed at securing this objective were outlined. Provincial policies were to be implemented by May 1, 1994 to achieve non-discriminatory treatment in various pre-trial (e.g., transfer of prisoners) and post-sentence matters (e.g., classification of prisoners for assignment to correctional facilities)¹¹³.

¹¹¹ Supra note 2 at 224 and 227

¹¹² Ibid at 233

¹¹³ *Interim Report of the Commission on Systemic Racism in the Ontario Criminal Justice System – Racism Behind Bars: The Treatment of Black and Other Racial Minority Prisoners in Ontario Prisons*, Ontario, Queen's Printer, 1994 at 89-98

POLICE RESPONSES:

...(M)uch of the Force activity in respect to race relations has been in programs in employment equity, in community involvement, and in other areas in which the Force interacts with racial minorities. But most are framed in a form which views the Force as an institution which does not require change at the core. Consequently, effort has been directed towards changes around the fringes of the operation or accommodation of differences in the community, without recognizing the fact that the institution, its culture and its values need to change.

Alan Andrews, Metropolitan Toronto Auditor, *Review of the Race Relations Practices of the Metropolitan Toronto Police*, 1992.

As is clear from the numerous reports, continued community advocacy and political action, as well as the growing number of libel suits and criminal cases, much needs to be done to improve relations between police and subordinate racialized communities, particularly the African Canadian community. In this regard and shortly after the Toronto Star's series on racial profiling, the Toronto Police Services compiled a report identifying its responses to the numerous reports and recommendations aimed at improving police relations with racialized communities¹¹⁴. The Toronto Police Services report suggests that the organization has responded positively to the numerous recommendations advanced in the various reports and that it has implemented changes in response to the recommendations.

However, it is difficult to determine the extent to which the Toronto Police Services has implemented the changes necessary to improve police relations with peoples of African descent. A review of the overwhelming number of reports and recommendations on policing and race relations as well as the Toronto Police Services response does not clarify the matter, particularly given that there appears to be no demonstrable change in key areas related to services, employment equity and citizen complaints. Any strategies implemented to address the many issues raised in this context appear to either have been implemented only once or to have had an insignificant impact.

Further, it appears that many recommendations have not been implemented at all and several commentators have pointed to the inadequacy of the police response. For example, Stenning has identified several areas where recommendations have either not been implemented or have been implemented improperly. In particular, he draws attention to deficiencies in police recruitment, poor evaluations of 'police intercultural courses' and police failure to fully implement recommendations from the Ontario Task Force on Race Relations and Policing¹¹⁵. Indeed, it is difficult to obtain statistics about police recruiting. A Toronto Star article suggests that the Toronto Police "...will not release the number of visible minority officers currently on the force¹¹⁶."

Regarding complaints against police, Professor Tammy Landau has provided significant evidence of community dissatisfaction with the complaint process and with the police role in it¹¹⁷. Landau suggests that "[a]n analysis of the complainants' views of the Toronto scheme

¹¹⁴ See *Policing a World Within a City: The Race Relations Initiatives of the Toronto Police Service*, January 2003.

¹¹⁵ Supra note 6 at 18- 19, 20 and 21 respectively. The issue of employment equity was a major concern of Susan Eng, former Chair of the Police Services Board, who set this a priority. See *Policing on the firing line: Susan Eng set to launch police force revolution*, *Toronto Star*, Andrew Duffy, May 15, 1991

¹¹⁶ See *When racism is a gun to the head*, October 22, 2002,

¹¹⁷ See *Public Complaints Against the Police: A View from Complainants*, 1994, Centre for Criminology, University of Toronto, and *Back to the Future: The Death of Civilian Review of Public*

clearly indicated that the arrangement whereby the police investigated themselves had a devastating impact on the legitimacy of the system. Sixty per cent of complainants who had experienced the whole complaints process and whose complaint had been resolved did not think that Toronto had a fair system for handling complaints against the police: over two-thirds stated that they were either unsatisfied or very unsatisfied with their experience making a complaint, and over half said that, knowing what they knew at the time of the interview, they would not use the same system again¹¹⁸."

Further, the recent report of the City of Toronto Auditor on the police complaints' process found that "...discipline imposed against police officers is not being monitored. In two out of ten files we reviewed where complaints were substantiated, discipline as adjudicated was not imposed¹¹⁹." The Auditor notes that communications materials on the police complaint process is in English only and, as such, constitutes a significant barrier to many within Toronto's linguistically diverse community. Further written guidelines needed for the classification of all complaints are lacking. The Auditor also pointed to deficiencies in documentation which ultimately resulted in complainant allegations neither being identified nor addressed. The problems identified included the fact that final reports sometimes lacked sufficient information to justify their conclusions, missing documentation and action on subsidiary issues raised during investigations, and unexplained gaps in investigator log notes. The Auditor stressed the need for guidelines aimed at ensuring that the complainant is told of any discipline resulting from substantiated complaints. Finally, he pointed to the lack of adequate legal representation of complainants and commented upon the overall lack of public confidence in the complaints process, particularly by those who had filed complaints¹²⁰.

These deficiencies make it clear that organizational will is lacking within the Toronto Police Service and its Board to ensure that policing is provided in a community-sensitive, non-discriminatory and equitable manner on an ongoing basis. As the Metropolitan Auditor Allan Andrews commented in his 1992 report, the police have declared that they have implemented all recommendations from all reports and then they move on to other things. The quality of the implementation and the degree to which they are systemically adopted remains unclear however. While the former may be a matter for debate, failure in the latter is clearly evident. This has prompted community advocates to be critical of the police and to disregard their assertions of commitment to positive race relations.

COMMUNITY ADVOCACY AND THE TACTICS OF CONFRONTATION:

As the various reports noted above were being developed and implemented, community advocacy groups mobilized in response to these incidents served to focus public attention on policing and relations between peoples of African descent. Since Albert Johnson and Buddy Evans, several sectors within the African Canadian community and other communities have protested the shooting deaths and wounding of African Canadians. Whether through the leadership of individuals, community-based organizations or the development of spontaneous coalitions, the African Canadian community has not been silent. Rather, it has been engaged in a number of actions to ensure effective and bias-free policing¹²¹.

Complaints Against the Police in Ontario, Canada, in *Civilian Oversight of Policing: Governance, Democracy and Human Rights*, ed., Andrew Goldsmith and Colleen Lewis, Oxford, Hart Publishing, 2000.

¹¹⁸ Ibid Goldsmith and Lewis at 67 (footnote omitted).

¹¹⁹ See ***Audit of the Toronto Police Services Public Complaints Process***, September 10, 2002 at 27

¹²⁰ Ibid at 15, 19, 24-25, 28, and 29-30.

¹²¹ See Community Coalition Concerned about Civilian Oversight of Police ***In Search of Police Accountability: Report of the Community Coalition Concerned about Civilian Oversight of Police***

Some of the organizations involved in these activities have included: the Black Resource and Information Centre, the Black Secretariat, UJAMMA, the Jane Finch Concerned Citizens Organization, the Jamaican Canadian Association, the Regent Park Committee Against Police Harassment, the Black Action Defence Committee, the African Canadian Legal Clinic, the Coalition to Stop Police Harassment, the African Canadian Coalition on Racial Profiling and other organizations. While some of these groups no longer exist, others continue to be actively engaged in raising issues related to policing and African Canadians. In many instances the approach of these organizations has been deemed as 'confrontational.' Yet, even those organizations and groups which have taken a moderate approach have not been successful in deterring continued negative policing impacts on the African Canadian community. Further, while much of the emphasis of these groups has been on the widely reported acts of police shootings, there has been consistent focus by several of these groups on the day-to-day and less widely examined interactions between African Canadian youth and police within low-income high rise social housing environments. The emphasis on the daily interaction between police and African Canadian youth has occurred in direct response to policing concerns raised in such locations as Jane-Finch, Lawrence Heights, Regent Park., Birchmount-Finch, Alexandra Park and St. Jamestown.

Owing to its persistence, there is little doubt that much of the community advocacy was being heard. As Stenning suggests: "[o]ften as the result of pressures arising out of the hearing of complaints by provincial Human Rights Commissions, many governmental institutions began to adopt formal anti-racism, race relations, and equality policies in the 1970s. The police were somewhat slower, however, to implement this approach¹²²." As indicated earlier, the reports and task forces established to address policing and race relations had come about as a result of continued community insistence. In fact, as the policing crisis deepened within subordinate racialized communities and demands for substantive change and action increased, the government response became more probing and serious.

One can see the qualitative difference between the mandate and results of the reports issued in the 1970s and 80s and the final report of the Ontario Commission on Systemic Racism in the Criminal Justice System. What began in the 1970s as a discourse on police community relations became, in this last iteration, a thoroughgoing analysis of institutional racism in the field of law enforcement and the administration of justice¹²³. Also, what began as inquiries led by White men developed into a commission jointly led by a White man and an African Canadian woman.

The substantive differences between the reports of the 1970s and 80's indicates a clear growth in the understanding of the discourse engaging police and subordinate racialized groups, particularly African Canadians. This difference is most pronounced in examining racialized disparities and discrimination in the linkages between arrests, convictions, detentions in general and for specific areas of criminal activity, particularly drug related.

which has written: "Many of the improvements to the system of of civilian oversight came as a result of community advocacy in response to the blood shed by Ontarians who were shot by police. These are a stark reminder that police accountability is not a theoretical or academic concept. Instead it is a necessary, saving governing principle of democracy, and should be an integral part of any policing system." See also Benjamin supra note 7 and Charles C. Smith supra note 9.

¹²² Supra note 6 at 24..

¹²³ For an interesting parallel with police-race relations in the U.K., see Simon Holdaway *Police Race Relations in England and Wales: Theory, Policy, and Practice*, Police & Society, 2003, Issue No.7 at 57-58.. Holdaway notes the qualitative difference in addressing institutional racism from the time of Lord Scarman's report on the 1981 Brixton riots to the more recent Sir McPherson report on the murder of Stephen Lawrence. Whereas the former rejects the notion of institutional racism, the latter embraces it.

While the first phase of reports focused solely on the police as an arm of the state, the later studies broadened the inquiry to include an examination of the public system of law enforcement including crown attorneys, judges and the law itself. It was the penetrating insight of the Ontario Commission on Systemic Racism into the Criminal Justice System that revealed the way in which the entire administration of justice supported racist outcomes. When the findings of the Ontario Commission were combined with examinations of the role of the media in perpetuating racialized stereotypes of crime and criminality, it became abundantly clear that the continued persistence of racialized conflict between the police and African Canadians was a multi-layered, complex phenomenon resulting from the values and actions of a number of institutions¹²⁴.

Then came a change of government in Ontario. With the 1995 election of the Conservative government, many of the efforts to address equality rights were dismantled. Employment equity, anti-racism and the mechanisms for complaints against the police were abruptly dismantled or eventually eliminated following consultations set-up to justify their elimination¹²⁵. This is what happened to the process of civilian complaints against police: The Conservative government's study entitled, ***A Report and Recommendations on Amendments to the Police Services Act Respecting Civilian Oversight of Police***, resulted in the elimination of the Public Complaints Commissioner in Ontario¹²⁶.

In January, 1997, ***An Act to Review the Partnership Between the Province, Municipalities and the Police and to Enhance Community Safety*** was released by the Ontario government¹²⁷. In response, numerous community organizations worked together under the auspices of the Community Coalition Concerned about Civilian Oversight of Police¹²⁸. Acknowledging the importance of community advocacy to creating improvements in oversight of the police, the Community Coalition critiqued what it perceived as the shortcomings of the government's legislative amendments. In particular, the Coalition identified problems such as the government's failure to provide an adequate community consultation, police abuse and misuse of power, the lack of public confidence in the police, the "killing of Ontarians" by police, the lack of police accountability. The Coalitions stressed the importance of civilian oversight and a civilian complaints process to help address these problems. It also put forward numerous recommendations addressing: appropriate methods for dealing with police misconduct; accessibility in the filing of complaints against police; the need for community education and awareness on police complaint processes; the need for an advocacy office to support complainants; a transparent and independent process for the investigation of complaints; and independence in the reporting of a civilian oversight office¹²⁹.

In addition to these concerns, Professor Landau has noted that the Black Action Defence Committee was concerned that "Bill 105" totally dismantles the principles of police accountability, accessibility, fairness and impartiality" and that the Ontario Ombudsman had

¹²⁴ Supra note 17 at 123 - 160

¹²⁵ See Akua Benjamin supra note 7.

¹²⁶ Supra note 60.

¹²⁷ See Bill 105 Province of Ontario.

¹²⁸ This organization represented some 25 community groups who worked together to release ***In Search of Police Accountability: Report of the Community Coalition Concerned About Civilian Oversight of Police***. See also ***Brief to the Standing Committee on the Administration of Justice, Re., Bill 105, An Act to Amend the Police Services Act*** submitted by the African Canadian Legal Clinic.

¹²⁹ Ibid. The submission of the African Canadian Legal Clinic supported many of the recommendations put forward by the Coalition. In addition to these, it also referenced the importance of police cooperation with the Special Investigations Unit as detailed in Sub-section 113(9) of the Police Services Act which requires full cooperation, including the power of the Chief of Police to order officers to cooperate as noted in section 41(b) of the Police Services Act.

indicated "cause for serious concern...(given that) Bill 105, as currently drafted, represents a step backward¹³⁰." Despite these and other objections, notably from the Metropolitan Toronto Police Association, Bill 105 was adopted in November, 1997. Its adoption ended civilian oversight of the complaints process against police, a key component of community advocacy regarding police accountability, particularly as it concerned relations between the police and African Canadians.

This is the climate in which the Toronto Star series on racial profiling has emerged, a highly contentious environment marked by community pressure, official denials coupled with the apparent intransigence of the provincial government and its insensitivity to the concerns of the African Canadian community.

¹³⁰ Both quotes cited as submissions to Legislative Committee, *Hansard 17 March 1997* in ***Back to the Future: The Death of Civilian Review of Public Complaints Against the Police in Ontario, Canada*** at 72.

RACIAL PROFILING THEN AND NOW

SECTION 2

RACIAL PROFILING—THEN AND NOW

INTRODUCTION:

As to the portent, the pattern of incidents clearly reflecting policies unspoken, but no less authorized, conveys the message that Black people are now, as they have been throughout the history of this country, expendable. No matter their status, income, or accomplishments, we are at risk of harassment, arrest, injury, or death by those hired to protect the public peace.

Derrick Bell *Police Brutality: Portent of Disaster and Discomforting Divergence*¹

Racial profiling is the most recent manifestation of the intensely hostile relationship between police and subordinate racialized communities, particularly those of African descent. Commonly referred to as “DWB” (Driving While Black) and considered by some as an integral component of the war on drugs, racial profiling has its own history which is squarely situated within this relationship. To attempt to see it in any other way avoids the critical issues evident in the historical relationship of peoples of African descent in North America and the United Kingdom. This history has been plagued by experiences of capture and a brutal rupture with culture, language and homeland followed by slavery, forcible confinement, exploited labour, enforced residential and educational segregation and punishment by violence and death both through mob and state sanctioned actions. It has also been justified through the process of racialization as exemplified in religious custom, cultural theory and development, political and economic development, law, and their concomitant social values which pervade political and institutional structures, the administration of justice, educational materials, cultural representations and media depictions².

Charles Mills conceptualizes this history in terms of the continuum of White supremacy³. In his examination of the Western philosophical idiom, Mills sees direct links between the gender and race of those considered as icons of philosophical thought, the views expressed in their writings and their direct connection to the construction of the ideologies, beliefs and values of the political, cultural and social structures foundational to nations within the Western world. In reviewing how notions of hierarchies became constructed within these discursive formations, Mills examines how White men from Europe and North America have not only dominated the canon of Western thinking but, further, have accrued to themselves the upper rungs of this philosophical tradition and all that it bestows, particularly the obligations of encouraging the enforcement of their level of civilization on others around the world⁴.

¹ See *Police Brutality*, edited by Jill Nelson, W.W. Norton and Company Inc., 2000, at 88

² Ibid. See also: Steven Martinot *The Rule of Racialization: Class, Identity, Governance*, Temple University Press; Michael Omi and Howard Winant *Racial Formation in the United States*, New York, Routledge, 1986, for discussion on social construction of race and groups based on racialization; Carlos Gutterez-Jones *Critical Race Narratives: A Study of Race, Rhetoric, and Injury* New York University Press, 2001; Dominic LaCapara (ed.) *The Bounds of Race*, Cornell University Press, 1991.

³ See *Racial Polity* from *Blackness Visible*, Cornell University Press, 1998, at 119

⁴ Similar views are shared by Lewis R. Gordon in *Fanon, Philosophy and Racism* and Lucius T. Outlaw *On Race and Philosophy*, from *Racism and Philosophy* ed. Susan E. Babbitt and Sue Campbell, Cornell University Press, 1999, at 32-49 and 50-75 respectively. See also: Cornell West *The New*

Similarly, Cornell West argues that "...European breakthroughs in oceanic transportation, agricultural production, state-consolidation, bureaucratization, industrialization, urbanization and imperial dominion shaped the makings of the modern world⁵." Audrey Smedley provides a chronological development of how this history has become racialized, charting European conceptions of peoples of African descent from individuals regarded as civilized to those regarded as racialized others, subordinate, savage and inferior, and the legal regime that codified these views⁶. Further, the work of Michael Omi and Howard Winant has made clear that race is a social construction. They state that "[t]he socially constructed status of the concept of race, which we have labelled the *racial formation* process, is widely recognized...The main task facing racial theory today, in fact, is no longer to problematize a seemingly 'natural' or 'common sense' concept of race... Rather our central work is to focus attention on the *continuing significance and changing meaning of race*⁷."

In terms of the discourse on racialization, this ideological and historical context has laid the foundation for racial profiling. This is particularly evident in the unique treatment of peoples of African descent and how these peoples have been constructed in the U.S., the U.K and Canada. For example, Randall Kennedy asserts that the relationship between Whites and African Americans in the U.S. has been the most difficult racial divide to overcome in that country⁸. With painstaking scholarship, Kennedy unearths the unparalleled history connecting these two groups, making plain the particular discursive formation within which they operate and how this is maintained through the actions of law as well as state sanctioned and mob violence. West, Goldfield and Smedley each chart the particulars of what is called 'anti-Black racism' and White supremacy in terms of political, socio-economic and cultural formations within the U.S and the U.K⁹. Their work suggests that the social construction of race was integral to establishing divisions between peoples of African descent and similarly situated Whites¹⁰.

Consistent with assessments of peoples of African descent by Western philosophers and others, these historical episodes have perpetuated unabashedly stereotyped and dehumanizing images of peoples of African descent as beings who lack human dignity¹¹.

Cultural Politics of Difference in ***Out There: Marginalization and Contemporary Cultures***, edited by Russel Ferguson et al, The New Museum of Contemporary Art, 1991 at 26-27; and Steve Martinot supra note 2, particularly Chapter 4 *The Meaning of White Racialized Identity*, 179-208.

⁵ Ibid. West at 20

⁶ See *Social Origins of the Idea of Race*, in ***Race in 21st Century America***, edited by C. Stokes et al, Michigan State University Press, 2001, at 1-23. See also Michael Goldfield *The Color of Politics in the United States: White Supremacy as the Main Explanation for the Peculiarities of American Politics from Colonial Times to the Present* at 104-133 in Lacapra supra note 2.

⁷ See *On the Theoretical Status of the Concept of Race*, in ***Race, Identity and Representation in Education***, edited by Cameron McCarthy and Warren Crichlow, Routledge, 1993 at 3

⁸ See ***Race, Crime and the Law*** Vintage Books, 1997, at xii.

⁹ See West supra note 4 at 24-29, and Smedley and Goldfield supra note 6 and 2 respectively at 1-23 and 104-133. See also Manning Marable *On Race and History* in C. Stokes et al supra note 6 at 255.

¹⁰ See Smedley and Goldfield supra note 6 at 11 and 109 respectively for their comments on the Bacon Rebellion of 1676 as well as Goldfield's comments at 111-114 on the divisions within the U.S trade union movement. Also, see Martinot supra note 2 at 179 where he writes: "Race comes into existence as an act of definition by Whites who assume the power to dominate, and it functions as a system of social categorization that the power to dominate then constructs."

¹¹ For example, see Jan Nederveen Pieterse ***White on Black: Images of Africa and Blacks in Western Popular Culture***, Yale University Press, 1992; Roger McTair ***The Black Experience in the White Mind***:

These notions remain evident today in the public domain and serve to perpetuate their social, political, cultural, residential and economic isolation.¹² An examination of the historical context reveals the extent to which the inequitable distribution of power rested on socially constructed racial differences. It further reveals the extent to which privileges and disadvantages accrued to socially constructed dominant and non-dominant groups.

Racialized law enforcement has been an extraordinarily important tool in preserving social power, and over the last 150 years police forces have been a central resource to social control¹³. Police forces play a significant role in maintaining the status quo and ensuring social distance between divergent groups. This is particularly true in societies where race plays a critical role in preserving power and privilege. Looking at the histories of peoples of African descent in Western nations, these forms of social control include intense surveillance by law enforcement authorities resulting in increased rates of interaction between police and peoples of African descent that ultimately contribute to higher than average rates of arrests, convictions, incarcerations and acts of violence resulting in physical harm and death. As the Institute on Race and Poverty of the University of Minnesota suggests:

One traditional law enforcement justification for racial disparities in police stops and searches is that it makes sense to stop and search people of colour in greater numbers, because they are more likely to be guilty of drug offences. The reality is that people of colour are arrested for drug offences in connection with vehicle stops at a high rate because they are targeted at a high rate, not because they are more likely than Whites to have drugs in their cars¹⁴.

Meditations on a Persistent Discourse, 1995; Marlene Nourbese Philip *Showing Grit: Showboating North of the 44th Parallel*, Poui Publications, 1993; Carol Tator, Frances Henry, Winston Mattis *Challenging Racism in the Arts: Case Studies of Controversy and Conflict*, University of Toronto Press, 1998; Carl Plasa and Betty J. Ring (eds.) *The Discourse of Slavery: Aphra Behn to Toni Morrison*, Routledge, 1994.

¹² An obvious example of this is in news reporting of crime. See for example: Carol Tator and Frances Henry *Discourses of Domination: Racial Bias in the Canadian English-Language Press, The Racialization of Crime* at 163, University of Toronto Press, 2002; Wendy Chan and Kiran Mirchandani (eds.) *Crimes of Colour: Racialization and the Criminal Justice System*.

¹³ See Edna Erez, James O. Finckenauer and Peter R. Ibarra *Introduction: Policing a Multicultural Society, Police and Society*, 2003, Issue No. 7 at 6 where they write: "The police in all societies are charged with maintaining public order and protecting public safety, and that generally means conserving the status quo in whatever form it may take. The police are inherently conservative in both their actions and their predispositions. They represent the vested economic and political interests and values of the societies in which they perform their policing duties. Where countries are changing and adding cultural and ethnic multiplicity, the police are most likely to be aligned with the old cultural and ethnic guard, or they may be perceived as such by new, or newly empowered, constituents." See also: Gabriella Pedecelli *When Police Kill: Police Use of Force in Montreal and Toronto*, Vehicule Press, 1998, 13-18; and Bell supra note 1 at 92.

¹⁴ See *Components of Racial Profiling Legislation*, University of Minnesota Law School, 2000, at 3-4. See also Peter Verniero and Paul H. Zoubek, Attorney General and First Assistant Attorney General, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling*, April 20, 1999 at 36 where they write "More fundamentally, arrest and conviction rates do not address the critical issue at hand, that is, whether State Police members targeted minorities, using more aggressive investigative tactics that could be expected to a higher percentage of hits. The fact that arrests for Whites was comparatively low does not mean that White motorists are less likely to be transporting drugs, but rather that they were less likely to be suspected of being drug traffickers in the first place and, thus, less likely to be subjected to probing investigative tactics designed to confirm suspicions of criminal activity such as, notably, being asked to consent to a search." Verniero and Zoubek elaborate further on this at 53-56.

These actions have deep community and psychological impacts as well and likely link to individual and group trauma¹⁵. They also contribute to overall group well-being and lack of advancement over time. In most recent years, this matter has become quite pronounced in the U.S., the U. K. and Canada. Whether through anecdotal reports from communities or sophisticated data gathering and analysis employed by universities, social scientists and/or police forces¹⁶, concerns have been raised regarding the practice of racial profiling by police for law enforcement purposes. The following sections will examine this phenomenon in each state.

¹⁵ For example, supra note 1, Bell as well as Katheryn K. Russell "What Did I Do to Be So Black and Blue?" *Police Violence and the Black Community* (135-148) and Patricia J. Williams *Obstacle Illusions: The Cult of Racial Appearance* (149-156). See also: "Why Are Black People So Angry?" *The Question of Black Rage*, Adrienne Shadd in ***Talking About Identity: Encounters in Race, Ethnicity, and Language***, ed. Carl E. James and Adrienne Shadd, 2001, Between the Lines Press, 291-300; and Beverly Daniel Tatum "Why Are All the Black Kids Sitting Together in the Cafeteria?" Basic Books, 1997.

¹⁶ These reports will be discussed later on in this section.

THE U.S. EXPERIENCE

Racial profiling in the U.S. has been increasingly chronicled in media articles, law journals and government reports. This growing source of materials has refocused public attention on the concerns expressed by organizations within the legal community, the Latino and African American communities, policing organizations and government as they relate to racial profiling, its history, practice and impact¹⁷. The current spate of racial profiling has raised concerns about a return to uglier periods in American history where racism was not only publicly practiced but sanctioned by state authority. Analogies have been made to the impact of slavery on peoples of African descent both before and after the Civil War, and to the Jim Crow era, when blatant legislation and jurisprudence reinforced segregation and differential treatment for peoples of African descent¹⁸. Modern day racial profiling has also been compared to the American internment of Japanese Americans and the negative impact of relations between police and peoples of African descent before the 1980s war on drugs¹⁹.

To discuss these issues, it is essential to define 'racial profiling' and how it has become intertwined with criminal profiling. As is widely acknowledged, law enforcement authorities have tremendous discretion in deciding who to investigate. In short, police officers make subjective choices. These subjective choices cannot help but be influenced by social values, including negative biases related to socially constructed boundaries such as race²⁰. Law enforcement agencies and their personnel must be seen as part of the broader society in which individuals and institutions interact daily. This interaction is influenced by social values and norms embedded in laws, culture, policies and procedures that influence individual beliefs and behaviours.²¹ These individual beliefs and behaviours in turn feed into an everyday commonality or accepted understanding of race. For example, Peter Verniero and Paul H. Zoubek, former Attorney General and First Assistant Attorney General for New Jersey, wrote that there are "...more common instances of *de facto* discrimination by officers who may be influenced by stereotypes and may thus tend to treat minority motorists differently during the course of routine traffic stops, subjecting them more routinely to investigative tactics and techniques that are designed to ferret out illicit drugs or weapons²²." Elizabeth A. Knight and William Kurnik define a law enforcement 'profile' as "a set of circumstances, events, or behavior that, when combined with the experience of an officer, may cause heightened suspicion that affects the officer's exercise of discretion in stop and/or

¹⁷ While the U.S. examination addresses the war on drugs as well as terrorism, attention here will be primarily to the former with the latter providing reference for the pervasiveness of the phenomenon and its implications to the racialization of domestic and international issues.

¹⁸ For example, see *Plessy v. Ferguson*, 163 U.S. 537, 1896 where the U.S. Supreme Court supported the provision of separate but equal access to railway cars.

¹⁹ Ira Glasser, former Executive Director of the American Civil Liberties Union, has been deeply engaged in confronting the practice of racial profiling at national and state levels, writes openly about a return to Jim Crow and the internment of Japanese Americans as two distinct periods of *de jure* and *de facto* racism which appears to have returned to American life in the wake of the drug laws and their enforcement. See *Speech: American Drug Laws: The New Jim Crow* The 1999 Edward C. Sobota Lecture/Albany Law School at 1-2; and *Racial Profiling and Selective Enforcement: The New Jim Crow* 2001 American Bar Association at 19 and 20.

²⁰ See Brooks Holland *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule under the Equal Protection Clause* 37 *American Criminal Law Review* 1107, Summer 2000

²¹ See Peter Berger and Thomas Luckmann *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* Anchor Books, Double Day, 1966 as well as Philomena Essed *Everyday Racism*, in *Race Critical Theories*, Philomena Essed and David Theo Goldberg (eds.), Blackwell Publishers, 2000 at 176.

²² *Supra* note 14 at 7

arrest decisions” and that “...the term ‘racial profiling’ appears to broadly connote discriminatory law enforcement practices”. These practices are based on an elective decision by an officer which differs markedly from a response to a call in that the officer is the one to initiate action²³. In other words, racial profiling implies a degree of mental intent or discriminatory purpose.

Similarly, Abraham Abramovsky and Jonathan Edelstein suggest that racial profiling is “...an explicit policy, either written or unwritten, of targeting suspects for search and arrest on the basis of race”²⁴. Taking this analysis one step further, Merrick J. Bobb, Executive Director of the Police Assessment Resource Centre (PARC), notes that there have been racial disparities throughout the criminal justice system and that there is an ongoing need to scrutinize these²⁵. However, he views racial profiling as policing practices employed in traffic and pedestrian stops which result in searches of cars and/or individuals where there is a discriminatory impact and where the illegal use of race or ethnicity is the pretext for such action²⁶. Peter Verniero and Paul H. Zoubek define “racial profiling broadly to encompass any action taken by a state trooper during a traffic stop that is based upon racial or ethnic stereotypes and that has the effect of treating minority motorists differently than non-minority motorists”²⁷.

These definitions provide insights into the blatant racial discrimination experienced by African Americans, experiences which continue the historical oppression of peoples of African descent. For example, David A. Harris discusses the practice of slave patrols and their efforts to ensure the compliance of slave labour to the rigours of plantation life and its harsh regime. Adero S. Jerigan raises the implications of empowering ordinary citizens in the 1600s to ‘take up’ peoples of African descent hanging around and to force them to submit to unreasonable searches²⁸. He goes on to note that “[t]oday, police officers across

²³ See *The Defense Perspective on Civil Rights Litigation*, American Bar Association, 2002 at 3.

²⁴ Abraham Abramovsky and Jonathan Edelstein *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 *Albany Law Review* 725, 2000, at 3. Ibid at 3 Knight and Kurnik examine the definition of profiling as used by the DEA in 1974 in terms of their experience with drug trafficking and David A. Harris in *Profiles in Injustice: Why Racial Profiling Cannot Work*, The New Press, 2002, at 10 looks at the origins of racial profiling and its relationship to criminal profiling. Each of these authors note the deep history of racism in the U.S. and that the current crisis of racial profiling derives out this context.

²⁵ See *Police Assessment Resource Center*, March 2002 at 10. In setting out this definition, Bobb suggests that it is important to separate out disparate impact and discriminatory impact and gives concrete examples of profiling. While stating this, Bobb notes the devastating impact of racial disparities in the criminal justice system and asserts “Whatever their cause, racial disparities are stark throughout the criminal justice system. A recent Justice Department study showed that 70 per cent of the defendants facing the death penalty are black or Latino. As of the end of 1998, approximately 43 per cent of all persons on Death Row in the United States were African-American men. ...Black males comprise 49 per cent of persons in prison... Black males comprise 42 per cent of persons in local jails...Nine per cent of all black adults over the age of 198 are in prison, jail, probation or parole as contrasted to two per cent of all White adults.... At current levels of incarceration, newborn black males in this country have greater than a 1 in 4 chance of going to prison during their lifetimes, while Latinos have a 1 in 6 chance, and White males a 1 in 23 chance of serving prison time...” at 10.

²⁶ Ibid at 1

²⁷ Supra note 14 at 5.

²⁸ David A. Harris *Profiling Revisited: “Just Common Sense” In the Fight Against Terror?* 2002 *American Bar Association, Criminal Justice*, Summer, 2002, 17 *Crim. Just.*36 at 3. Adero S. Jerigan *Driving While Black: Racial Profiling in America* *Law and Psychology Review* Vol. 24:127, at 128, which identifies this practice within Pennsylvania and South Carolina. On the importance of slave patrols, see also Gabriella Pedicelli supra note 13 at 15 who writes “The earliest form of non-professional policing in the United States was the Southern slave patrol. Because black slaves were the

the country continuously target blacks in a manner consistent with the colonial measures instituted over 300 years ago²⁹.”

Randall Kennedy retells numerous episodes of such anti-black racism. In noting that defenders of slavery alleged that peoples of African descent were prone to engage in criminal activities and to committing “horrendous crimes” as a justification for both slavery and lynching³⁰ and, in listing numerous instances where peoples of African descent were not protected by the law, particularly from mob violence and lynching³¹, Kennedy identifies the painful and still unacknowledged impact of racism on peoples of African descent³². He further considers this history through exploring the implications for under-protection within low-income communities as highlighted in such instances as the 1968 Report of the National Advisory Commission on Civil Disorders³³, the ways laws were unequally enforced throughout slavery³⁴ and following Reconstruction up to the current era³⁵. In this context, he draws particular attention to the dismantling of Reconstruction, the period of segregation and racially biased police misconduct and police violence³⁶.

A close reading of the U.S. treatment of peoples of African descent makes it clear that these historical episodes form the foundation for continued mistreatment. Kennedy’s work depicts the clear antagonism between African Americans and various levels of the criminal justice system. Kennedy is not alone in his assessment. The work of Jill Nelson and Carl Gutierrez-Jones³⁷ also illustrate the particulars of racism in U.S. history, particularly anti-black racism. Further, Jernigan describes how ‘profiling’ through the War on Drugs escalated into ‘racial profiling’. He writes:

Profiling is the tool currently used by law enforcement to perpetuate the long standing tradition of targeting blacks for unreasonable searches and seizures. Profiling was originally introduced to help drug interdiction programs and the “war on drugs”...The first profile was based on behavioral characteristics rather than psychological attributes, and was used by Drug Enforcement Agents to detect drug couriers in airports. The agents would usually observe whether the suspect

principal laborers in the South throughout the eighteenth and nineteenth centuries, the patrols were necessary to protect the land owners’ property rights to their slaves.” See also Russell supra note 15 at 144

²⁹ Ibid Jerrgan at 128

³⁰ Supra note 8 at 13

³¹ Ibid 29-75. In terms of the horrendous crime of lynching, see also Bell supra note 1 at 93 who estimates that at least 5,000 African Americans were killed in this way. Also, Barbara Holden-Smith suggests that “Lynching’s legacy, and the failure of the nation to stop it, haunts Americans today...” See *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, *Yale Journal of Law and Feminism*, 31, 34, (1996) as cited in Kennedy supra note 8 at 48.

³² Indeed, Russell supra note 15 at 136-138 suggests that certain racialized issues, particularly the relationship between African Americans and the police and concerns of police brutality, are not considered as serious social problems requiring requisite attention. In fact, she further suggests that this is a “Black thing” and that many argue that peoples of African descent are responsible for their own troubles through their disproportionate involvement in criminal activities.

³³ Ibid 71

³⁴ Ibid 76-84.

³⁵ Ibid 84-135

³⁶ Ibid 113-125

³⁷ Supra notes 1 and 2 respectively, in particular Gutierrez-Jones *Introduction*, 1-15, *Part One: Working through Racial Injury* 21-47, and *The Sociology of Racialized Crime*, 114-145.

appeared nervous, how she paid for her ticket, whether her destination was a known drug area, and whether she was traveling under a false name.

In its most basic form then, a profile is a set of characteristics that police have developed to help them choose potential suspects ... Police departments do not outwardly admit to using race as part of their drug profiles, but race appears to be the motivating factor concerning whom the officers choose to stop³⁸.

Significant evidence confirms that the DEA's approach to the war on drugs in the early 1980s was supported by the federal government and that the DEA Operation Pipeline developed and used training materials which included racial profiles of drug couriers. These materials were employed in the education and training of federal, state and local law enforcement authorities. One example is noted by David A. Harris who writes: "The DEA says that none of its training encouraged the police to use race as part of its profiles, but training materials sometimes showed otherwise. For example, one training video shows officers making several mock stops; in each one, the driver stopped has a Hispanic surname. The DEA and other federal agencies were also disseminating intelligence in the 1980s and 1990s that blamed trafficking in particular drugs on identified ethnic groups³⁹." Harris elaborates further stating:

William Buckman, an attorney who has handled profiling cases in New Jersey, describes another training video in which an off-screen voice tells trainees that Jamaicans dominate certain aspects of the drug trade. A picture shows a black man in informal dress and dreadlocks. The image then changes, showing a similar black man wearing a business suit with short hair. The voice admonishes trainees that they should not be fooled; these drug dealers can look like anything at all.⁴⁰

Evidence linking racial profiling to the war on drugs in Florida has been established through a law enforcement memo in the state of Florida entitled "Common Characteristics of Drug Couriers" which "instructed deputies to watch for 'ethnic groups associated with the drug trade' and several deputies testified that the memo was widely circulated throughout the department⁴¹." Further, in the Maryland law suit filed by Robert Wilkins, evidence surfaced

³⁸ Supra note 28 at 128-129. As indicated by Abramovky and Edelsten supra note 23 at 2 as well as Knight and Kurnik, supra note 22 at 7, while police may loath to admit to such practices, they have nonetheless provided evidence of their use. The former note the increasing admissions of state officials in New Jersey and New York which resulted in the resignation under pressure of the New Jersey police commissioner and the establishment of a New York task force to evaluate racism in law enforcement. Knight and Kurnik introduce similar concerns in reviewing *Chavez v. Illinois State Police* where the plaintiff introduced evidence pointing out that the Illinois State police admit to using race as a factor and provide education and training to their officers which "emphasize the alleged predominance of Hispanics as drug couriers".

³⁹ See David A. Harris *Racial Profiling Revisited: "Just Common Sense" In the Fight Against Terror? American Bar Association, Criminal Justice*, Summer 2002 at 3 and 4.

⁴⁰ See Harris supra note 23 at 48-49 as cited in David Tanovich *Operation Pipeline and Racial Profiling, Criminal Reports*, C.R. (6th), 2003, at 54

⁴¹ See Maria V. Morris *Racial Profiling and International Human Rights Law: Illegal Discrimination in the United States, Emory International Law Review*, Spring, 2001 at 80. See also Jack Kearney *Racial Profiling: A Disgrace at the Intersection of Race and the Criminal Justice System Arkansas Bar Association*, 2001 at 64 who writes "The profile for drug couriers was reportedly developed in the early 1970s by a Detroit DEA agent working at the Detroit airport. This profile composed solely behavioral characteristics soon spread to many other airports. Then, in the 1980s, the War on Drugs let to major changes in criminal justice policy and law enforcement behaviour permitting the use of the drug courier profile. It became a tool used in several kinds of criminal investigations." By 1985, the

during discovery indicating that "...a State Police memo instruct(ed) troopers to look for drug couriers -- described as 'mostly black males and black females' which, when revealed, prompted the State Police to settle with Wilkins⁴².

This history is very well known to individuals from subordinate racialized groups, particularly African Americans, who feel the impact of these matters on a day-to-day basis. As a result of the national focus and furor on racial profiling, this reality is becoming more evident to Whites and is having a very negative impact on perceptions of the criminal justice system by subordinate racialized communities as well as by Whites. It has also led peoples from subordinate racialized communities to develop 'survival techniques' in order to deal with the humiliation and invasion of privacy they feel when confronted by law enforcement authorities⁴³.

NUMBERS DON'T LIE, DO THEY?

Now that the issue has been defined, it is important to look at the numbers and the rates of interaction between police and individuals from subordinate racialized groups, particularly African and Latino Americans⁴⁴. Beginning with the recent War on Drugs and supported by the official and unofficial policies and tactics of the national DEA, the practice of racial profiling in the U.S. was established predominantly as a tool to deter and eliminate drug trafficking. However, as has been described earlier, the criminal profiles created by the DEA

Drug Enforcement Agency trained thousands of state and local police officers to use the 'pretext' traffic stop as a tool to conduct drug-related investigations. 'Pretext' is detention of an individual on suspicion of a minor traffic violation, then investigating for drug violations. Also, by the mid-80s, the Florida Department of Highway Safety issued its Common Characteristics of Drug Couriers including the following: lots of gold, people who 'don't fit the vehicle', and ethnic groups associated with the drug trade."

⁴² See David A. Harris *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 2001 as cited through <file:///E:/ST\tp\SPieters-CHRT\WLdocument.htm> at 115 (document on file with author). The specific memo is cited in footnote 47 of Harris' text as Maryland State Police, Criminal Intelligence Report (April 27, 1992) (unpublished report) (on file with the Michigan Journal of Race & Law). The settlement led to the state of Maryland's initiative to record stop and search data based on race. See also: Jerigan supra note 28 at 128 and 129; Harris supra note 28 at 3 and 4; Glasser supra note 18 at 21 *American Bar Association* for comments on the DEA as spreading practice of profiling; and *Racial Profiling Archive Racial Profiling/News Release* 12/15/00 Drug Reform Coordination Network at 2 citing the DEA as major culprit in N.J. war on drugs and Operation Pipeline training of local and state officers to use race as pretext through traffic stops.

⁴³ See Sherry F. Colb *Stopping a Moving Target*, 2001 3 *Rutger's Race & The Law Review* 191 at 1, 2 and Sean Hacker *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 1997 *Columbia Human Rights Law Review*. In addition, see Jerigan supra note 23 at 127 regarding stories of famous African Americans stopped as well as Anthony C. Thompson *Stopping the Usual Suspects: Race and the Fourth Amendment*, *NYU Law Review* October, 1999 at 990-991. See also Glasser supra note 18 *Speech: American Drug Laws* at 2 and 3 who suggests that racial profiling may be a secret for most but not so to African, Latino and Asian Americans. As Hacker also notes at 2-3, this is also a history which has been acknowledged by legal academics and jurists with, i.e., Professor Kenneth Culp Davis in the 1960s and former Supreme Court Chief Justice Warren Burger who cited the need for standards as a mechanism to guide police in the exercise of discretionary authority.

⁴⁴ In doing this, undoubtedly one of the background issues that must be confronted is the reported prevalence of crime within Black communities. This issue is a chief defense of law enforcement authorities in several jurisdictions as noted by David A. Harris (supra note 42) and by several chiefs of police. While this is certainly an issue, it is no excuse for the continued reliance on aspects of race as contributing to criminal profiles.

were not without strong historical precedents.

The major focus of racial profiling has been the stopping of motor vehicles on highways and streets by state and local enforcement authorities. It is common knowledge that moving vehicle violations are a very difficult matter to assess⁴⁵. Many motorists who have been pulled over by police are often confused about the purpose of their being stopped as they believe that they have not violated any laws. However, they are stopped and, following routine questioning, many motorists of African and Latino descent have complained that they are then subjected to additional questioning or that they are required to leave their vehicles to allow the police to conduct a search. Data on the frequency of these occurrences and comparisons to other motorists will be discussed later on. Here it is important to acknowledge that the alleged traffic violation stop has merely served as a pretext for other concerns, i.e., concerns about drug possession and trafficking.

For some reason, an officer's suspicion has been aroused triggering the stop and search action. Many of these officers use 'race' as a factor in determining which vehicles to pull over. As Verniero and Zoubek point out

...the legitimate criteria for selecting vehicles in these circumstances have never been clearly spelled out in written standard operating procedures or formal training criteria. Rather, the criteria used by troopers in exercising their discretion have developed in an *ad hoc* fashion over the years, passed on through informal coaching, tempered by each trooper's own experiences and enforcement priorities, and strongly influenced by an official policy to reward troopers who find major drug shipments. This situation may invite both intentional and unintentional abuse and provides a management environment that allows the use of stereotypes to go ahead undetected⁴⁶.

In New Jersey, an example of such occurred when State Troopers pulled over a group of African American youth traveling on the New Jersey Turnpike to attend a basketball camp. The youth were subsequently shot by the Troopers who wounded three. In the same state, the then Governor had her picture taken frisking a Black motorist.⁴⁷ This picture later become widely publicized and lent wide credibility to public perceptions of an orchestrated effort by the State and its police to profile motorists of African descent. Statistical data supporting the concerns raised by these anecdotes appeared shortly after in a number of states. These statistics indicate that:

- In public opinion polling, 72% of African Americans between the ages of 18 and 34 believe they have been stopped by police because of their race. Furthermore, of those who believe they were stopped because of their race, 37% have been stopped more than once, and 15% have been stopped more than 10 times;
- From January 1995 through June 1996, in Maryland, 732 individuals were detained and searched by the State Police. Of these, 75% were African American and 5% Latinos. Further, "[o]f the twelve police officers who carried out most of the stops and searches, two stopped only African Americans, one stopped over 95% African Americans, and six

⁴⁵ See Abramovsky and Edelstein supra note 23 at 4 who point to the use of automobiles and suggest that the ever-present potential for road violations creates perfect opportunity for pretextual stops.

⁴⁶ Supra note 14 at 9-10.

⁴⁷ See Gregory M. Lipper 551 *Racial Profiling* 2001 President and Fellows of Harvard College at 31.

stopped more than 80% African Americans". A November, 1996 study on this matter revealed that African Americans were only 16.9% of the driving population compared to 75.6% Whites and, of those drivers violating traffic laws, 17.5% were African Americans compared to 74.7 Whites⁴⁸.

- In Philadelphia, African Americans comprise 79% of those stopped and searched even though they are only 42% of population;
- In Illinois, Latinos comprise 41% of those stopped and searched even though they are less than 1% of the driving population. Further, one in every 75 African Americans are stopped compared to one in every 163 Whites.⁴⁹;
- In Eagle County, Colorado a class action law suit comprising 400 individuals, predominantly African and Latino Americans, was certified by the court regarding the actions of the State's 'High Country Drug Task Force'. In 1993, "...a federal court ruled that the Task Force had violated constitutional protections against unreasonable searches and seizures." The matter was settled before appeals were heard with the County agreeing to pay damages to each person searched and to abandon the Task Force program⁵⁰;
- In New York City, a review of 175,000 stops documenting the race of those stopped indicated that African Americans were stopped six times more often than Whites and, even though only 25% of the City's population is African American, they accounted for 50% of individuals stopped⁵¹.
- In San Diego, the Police Department's first mid-year study on traffic stops indicated that, of the 91,522 stops, Latino and African American drivers were over-represented and more likely to experience searches and arrests⁵².

In noting the current impact of racial profiling on highways and in airports, Ira Glasser writes "On our highways, on our streets, in our airports, and at our customs checkpoints, skin colour once again, irrespective of class, and without distinctions based on education or economic status, skin colour once again is being used as a cause of suspicion, and a sufficient reason to violate human rights." In citing the Maryland profiling statistics, he strongly suggests that such results are not achieved by accident and that similar realities have been demonstrated in Pennsylvania as well as in California, Oklahoma, Tennessee, Texas, Wisconsin, North Carolina, South Carolina, Oregon, Rhode Island, New York, Nebraska, Michigan, Maine, Massachusetts, Kentucky, Florida, Indiana, Connecticut, Colorado, Arizona⁵³.

⁴⁸ Supra note 41 Morris at 80.

⁴⁹ See Kearney supra note 41 at 62 and 63.

⁵⁰ See David A. Harris "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, *Northwestern School of Law Journal of Criminal Law and Criminology*, Winter 1997, at 12.

⁵¹ See Bobb supra note 24 at 6.

⁵² Ibid at 7.

⁵³ Supra note 18 at 2-3 *The 1999 Edward C. Sobota Lecture*. Glasser sums it up succinctly in stating: "It is ubiquitous. It is happening in every state. And you have to ask yourself: in a country in which police power is so decentralized, 14,000 police departments, most of them don't talk to each other, really, how is it that this practice spreads? How is it that it's so uniform? Well, that's not an accident either. It's uniform because in 1986 the Drug Enforcement Authority (DEA) started something called

David A. Harris provides additional data to support Glasser's assertions. In examining the situation in New Jersey, he identifies that Blacks and Whites were equally responsible for traffic violations but that 73.2% of those stopped and arrested were Black even though only 13.5% of the cars on the road had either a Black driver or occupant. He also points out that radio and patrol logs yield the same results. Such disparities in results are statistically significant leading to the conclusion that the racial disparity is not a random result⁵⁴. In examining municipal court records in Ohio (Toledo, Akron, Dayton and Franklin County), it appears that "...Blacks are about twice as likely to be ticketed as non-Blacks are. When the fact that 21% of Black households do not own a vehicle is factored in, the ratios rise..."⁵⁵

Harris also discusses the focus of drug enforcement which he sees as primarily, and wrongfully, targeted on the most visible activity, i.e, street level dealing within African American communities. In raising this issue, Harris underscores the notion that racial profiling is intended as a discriminatory action and suggests that the tactic is aimed primarily at a severely marginalized and unrepresented community. Further, Ira Glasser suggests:

Now, there's another thing about that three out of ten claim (*ratio of stops v. finding contraband*). I will hazard a guess that if you went into any random apartment building on the West Side of Manhattan, and searched every apartment, you would find three out of ten where there was a little marijuana. I don't know anybody who doesn't giggle knowingly when I say that, including when I say it on the West Side of Manhattan. Now, really, the cops even smile. So the real interesting question is, why don't they do that? Why don't they just decide to go in and search all the apartments in some random apartment building the way they decide to stop cars? They don't do it because most of the folks who live in those apartment buildings are

White. They don't do it because if they tried to do it, the outrage would become so big, so

Operation Pipeline. The purpose of this program was to interdict drugs, and to get drug couriers. And to implement this program, they have brought in 27,000 state troopers from 48 states to teach them how to spot a car that is likely to be carrying drugs on the highways." They are taught to look for things like: Is there an air freshener hanging from the rear-view mirror?...If you have a bumper sticker on your car that indicates you've been to Jamaica (not Queens) that raises the odds that there are drugs inside your car, and, of course, there's skin color, especially if the driver is black and the car expensive. The plain fact is that the drug war hysteria has become an engine for the restoration of Jim Crow in this country, just as the real war hysteria was an engine for racial injustice in 1942 (footnotes omitted)."

⁵⁴ Supra note 42 at 114. Harris' data are based on the research of Dr. John Lamberth, a noted statistical expert whose research was pivotal in the Maryland law suit filed by the American Civil Liberties Union on behalf of Black lawyer Robert Wilkins. In concluding his section on New Jersey, Harris quotes Lamberth as stating "Absent some other explanation for the dramatically disproportionate number of stops of blacks, it would appear that the race of the occupants and/or drivers of the cars is a decisive factor or a factor with great explanatory power. I can say to a reasonable degree of statistical probability that the disparity outlined here is strongly consistent with the existence of a discriminatory policy, official or de facto, of targeting blacks for stop and investigation."

⁵⁵ Ibid at 117. Further, Harris explores several issues related to the statistical data gathered to challenge racial profiling as a coordinated state practice. See also supra note 23 at 53-55 where, in citing *New Jersey State v. Pedro De Soto*, Harris discusses the importance of the social science data relied upon by defence counsel, particularly how the data was gathered and then presented to make this case. Also at 60-64, he discusses the approach taken with the State of Maryland in the Robert Wilkins case as well as the Florida data which are discussed further on in this section.

fast that it would become politically impossible to sustain⁵⁶.

Sean Hacker suggests that this data and police behaviour are indicative of police power gone awry in the War on Drugs. In his analysis, he discusses the concept of 'war' and loss of civil liberties citing University of Chicago Law Professor Francis Allen who has commented that "(i)t is characteristic of wars and other periods of emergency that restraints on the discretion of public officers are relaxed and that public powers are expanded at the expense of private rights and individual immunities⁵⁷." With this observation, Hacker reviews data from Florida and the approach of Sheriff Bob Vogel. Referencing the Orlando Sentinel News report on 1084 stops from 1980-1992 which led to 507 searches and 55 arrests, he notes that there were only 9 traffic tickets issued and that, of these stops, 70% (696) were of African Americans and Latinos who incurred an average stop time of 12.1 minutes v. 5.1 for Whites; and that of the 507 cars searched, 414 (82%) belonged to African Americans and Latinos⁵⁸.

While odious to a democratic society, the data is inescapable and gives rise to what Ira Glasser describes as not a matter of 'rogue' police but a matter of 'rogue' policy⁵⁹. Nowhere are these concerns more expressive than in the examination of their supposed success or what is typically identified as the 'hit rates' for police profiling activities. Through his relentless research on this topic, David A. Harris has identified that the 'hit-rates' in the late 1990s showed no distinction between Whites and subordinate racialized groups. Given the significant racial differences in stops and searches and that 'hit rates' through racial profiling yield results that are less than those gained through traditional policing methods, he suggests that it is unconscionable to continue with the practice of racial profiling because the practice provides no improvement in policing and, in fact, makes policing worse since it is less successful, less productive and results in a squandering of public resources as well as increasing racial tension between police and subordinate racialized communities⁶⁰.

For example, while the Minneapolis and St. Paul police data collection have been criticized for not being comprehensive, the results still point out that racial profiling is an unsound policing strategy with hit rates that lead to circular logic, i.e., more stops lead to more arrests justifying more stops and then more arrests and so on. In citing Dr. John Lamberth's work in Maryland, it is pointed out that the hit rate was the same for African Americans as for Whites (28%) despite the increased stopping and searching of African Americans. Similarly, in 1999 New Jersey data indicated an arrest ratio of 10.5% White v. 13.5% African and Latino

American while New York stop and frisk data from 1998/99 indicated a 'hit rate' of 12.6%

⁵⁶ Supra note 18 at 5 *The 1999 Edward C. Sobota Lecture*. See also Harris supra note 24 at 75.

⁵⁷ Supra note 43 at 3

⁵⁸ Ibid at 3-4. While Sheriff Vogel has consistently denied any hint of racism in his policing strategies, he also vehemently supports the legitimacy of stops for (1) traffic violations, and (2) African-American and Latino drivers, because, in his view, people of African and Latino descent are in the drug business. See also Harris supra note 50 at 9 where he also notes that "Looking at figures for all of Florida, seventy per cent is vastly out of proportion to the percentage of Blacks among Floridians of driving age (11.7 percent), all Florida drivers convicted of traffic offences in 1991 (15.1 percent), or to the percentage of Blacks in the nation's population as a whole (12 percent)."

⁵⁹ Supra note 18 at 22 *American Bar Association* at 22 where Glasser writes: "No, we are not talking about rogue cops. We are talking about rogue policy. We are talking about rogue leadership. We are talking about a national policy that is training police all over this country to use traffic violations, which you commit the minute you get into a car, as an excuse to stop and search people with dark skin."

⁶⁰ See Harris supra note 39.

White v. 11.3% Latino and 10.5% African American⁶¹.

Further, the New York Police Department stopped 9.5 African Americans to generate one arrest whereas they stopped 7.9 Whites for the same result. In fact, in New York City, 45,000 stops over a two year period resulted in 9,500 arrests with 50% dismissed for insufficient evidence. Of these, 66% were either African or Latino Americans⁶². As well, of the 3 out of ten caught with contraband, African Americans are no more likely than Whites to be among the three and those caught with drugs were evenly split between Blacks and Whites⁶³. Also, in San Diego, of the 91,522 stops noted earlier, less than six percent resulted in searches and, of these, contraband was found in less than ten percent⁶⁴.

Despite the overwhelming evidence of discriminatory policing, there has been a backlash from law enforcement authorities and their supporters. Rather than accepting the evidence of racial profiling and developing strategies to effectively address it, these individuals and groups have attacked the statistics collected⁶⁵. They argue that the data do not include all stops or violator rates, do not account for different levels of police discretion and are not adjusted to reflect differential police deployment dependent on crime rates⁶⁶. They discuss their 'success' in terms of 'batting averages'⁶⁷ or contend that they use race in conjunction with other factors⁶⁸.

What is frightening is that, in the face of this backlash and denial, official state reports and analysis indicate results similar to those previously noted. For example, Peter Verniero and Paul H. Zoubek have concluded in their report for the State of New Jersey that:

- There is wilful misconduct by some officers and more commonly de facto discrimination by officers influenced by stereotypes⁶⁹;
- The data compiled on traffic stops by race indicate that 4 of every 10 stops involved either African, Latino or Asian Americans with 27% of stops involving African Americans, 6.9% Latinos and 3.9% Asian Americans. Of these groups, 72% of all searches involved African and Latino Americans;
- According to an internal audit, 52.6% of searches were of African Americans⁷⁰;
- Motorists from subordinate racialized groups were disproportionately subject to consent

⁶¹ Supra note 14 University of Minnesota Law School at 2-3. David Harris also points to racial profiling as being over inclusive and, as such, an inherent problem due to over-expenditure of resources. Ibid at 6-7.

⁶² Supra note 18 *The 1999 Edward C. Sobota Lecture* at 4

⁶³ Ibid at 5. See also Glasser supra note 18 ***American Bar Association*** at 23 and 24

⁶⁴ See Bobb supra note 24 at 6-8. Harris supra note 23 at 79-80 reviews "hit rates", i.e., stops and searches that lead to the discovery of illegal substances. He also points: to 'hit rates' and the failure of profiling in Maryland and New Jersey (at 80), the impact on airline passengers (at 83-84), the costs that result from poor policing through and misdirected resources (at 89). See also Anthony C. Thompson supra note 43 at 957-959.

⁶⁵ See Harris supra note 42 at 112-113.

⁶⁶ Ibid at 117-120.

⁶⁷ Supra note 18 *The 1999 Edward C. Sobota Lecture* at 5.

⁶⁸ See Hacker supra note 43 at 6-7.

⁶⁹ See Verniero and Zoubek supra note 14 at 6-7

⁷⁰ Ibid at 26-27.

searches with African American motorists ticketed disproportionately (eg., 18% by the Radar Unit, 23.8% by the Tactical Patrol Unit, 34.2% by the Patrol Unit on exits 1 and 7A of the New Jersey Turnpike)⁷¹.

Similar data is provided in other federal and state reports, including: *The New York City Police Department's "Stop and Frisk" Practices, Vehicle Stop Study Mid-Year Report, Evaluating North Carolina State Highway Patrol Data: Citations, Warnings, and Searches in 1998, Interim Report of Traffic Stop Statistics: January 2000 to June 2000* and *1st Annual Report Denver Police Department Contact Card Data Analysis: June 1, 2001 through May 31, 2002*⁷². In addition to these official reports, there has been considerable media coverage of this phenomenon as well with articles appearing in local and national press, including *MPR News, The Village Voice, Time Canada, Los Angeles Magazine, Jet, Detroit Free Press, Philadelphia Post-Gazette, Seattle Post-Intelligencer, Time, Horizon Magazine* and the *Cincinnati Enquirer*⁷³.

We Are What We Eat:

Aside from statistics and the stories they reveal, there is also the issue of the tactics and training employed by U.S. law enforcement authorities and how they predictably lead to the incredible disparities previously identified. The previous section provides abundant evidence regarding the preconceived and executed approach by the DEA in its War on Drugs campaign. David A. Harris suggests that the DEA set out to study and use Florida Sheriff Bob Vogel's tactics and that this became the basis for training of state and local law enforcement authorities across the U.S.⁷⁴. Harris also suggests that the DEA Operation Pipeline developed stereotyped training material which directly contradicted its stated policy⁷⁵. Ira Glasser underscores the importance of the DEA training program and suggests

⁷¹ Ibid at 30 and 33

⁷² See respectively Office of New York State Attorney General Eliot Spitzer, Civil Rights Bureau (Dec. 1, 1999) www.oag.state.ny.us/press/reports/stop_frisk/stop.html, San Diego Police Department (Sept. 21, 2000) www.sannet.gov/police/general-info/pdfs/stoprpt.pdf, Matthew T. Zingraff et al (North Carolina Center for Crime and Justice Research/North Carolina State University and Center for Criminal Justice Research and International Initiatives at North Carolina Central University), Division of Criminal Justice Office of the Chief State's Attorney, Dr. Deborah Thomas Department of Geography/University of Colorado at Denver.

⁷³ See respectively *Justice in Black and White: the Justice Gap* Dan Olsen, April 13, 2000 and *Racial Profiling Allegations Bring Calls for Statewide Data Collection*, Amy Randall, June 15, 2000; *Walking While Black*, Bryonn Bain, April 26-May 2, 2000; *What's Race Got To Do With It?*, John Cloud, July 31, 2001; *Police Profiling is Vilified As Institutionalized Racism*, Jan Golab, August, 1999; *Justice Department Study Reveals Higher Scrutiny By Police Towards Blacks, Hispanics*, March 26, 2001; *State cops more apt to search black men*, Amber Arellano and David Ashenfelter, July 21, 2000; *Report: Philadelphia police continue racial profiling*, the Associated Press, December 8, 2000; *Thorny racial profiling debate*, Kery Murakami, Tuesday February 12, 2002; *DWB: Driving While Black*, Harriet Barovick, June 15, 1998, Vol. 151, NO.23; *On the Brink of a New Beat*, Bob Stewart, 1999; *Racial profiling perceived: Panel hears complaints*, Marie McCain, Sunday, May 14, 2000, and, *Racial profiling surveys continue: Thousands questioned in effort to settle suit*, Kristina Goetz, Wednesday, August 8, 2001

⁷⁴ See Harris supra note 24 at 23. See also Kearney supra note 41 at 64 where he discusses the DEA and training on pretextual stops.

⁷⁵ Ibid Harris at 19. See also W.H. Buckman *Challenging Racial Profiles: Attacking Jim Crow on the Interstate* www.whbuckman.com/profiling/championart.html where he cites useful resources at the outset: DEA use State Police as proxies to teach profiles; DEA use of State Police as proxies; Training handout; examples of Profiling Joint Operations; examples of Profiling Training. In his comments, Buckman at 1 refers to Jim Crow as being alive on America's highways, trains, airports as a result of

that this situation was not created by 'rogue cops' but, was rather a systemic practice. To support his point of view, he asks the question: how do so many police departments do the same thing? For him, it is clear that there has been a national policy to develop and deliver training to police over the country to use pretextual stops where racial characteristics are a significant feature and that these tactics have been used by immigration officials as well⁷⁶.

Having reviewed the statistical data and the systemic practices that bring about these numbers, it is critical to look at the jurisprudence sanctioning law enforcement's use of racial profiling. Legal challenges on the disproportionate impact of policing and the criminal justice system on subordinate racialized groups, particularly peoples of African descent, have not upheld the concerns of these communities. Beginning with *Terry v. Ohio* in 1968, followed by *Robinson v. U.S.* in 1973 and culminating in *Whren v. U.S.* and *Atwater v. Lago Vista* in 1996, the U.S. Supreme Court has upheld the right of police to take extraordinary actions, which arguably are in violation of the letter and spirit of the 4th and 14th Amendments to the U.S. Constitution⁷⁷.

In particular, the Supreme Court has continued to support such policing practices even in the face of social science evidence as presented to it over the years in several cases, eg., *Terry* and *Whren*⁷⁸. Further, the Court appears to have ignored the NAACP Legal Defense Fund presentation of data on Blacks and stops⁷⁹ and, instead, has relied on the 'police as expert narrative'⁸⁰ which has been central to the post-Terry/pre-Whren era⁸¹. This has been evident in other cases where the Supreme Court took a raceless approach to 4th Amendment jurisprudence and ignored social science data, including use of deadly force, in its approach to 14th Amendment cases⁸².

the War on Drugs.

⁷⁶ See Glasser supra note 18 at 3 and 4 **The 1999 Edward C. Sobota Lecture**. See also Bobb supra note 24 at 6 – 8 where he writes about the systemic aspects of disparate and discriminatory policing and provides examples from New York and numbers from San Diego which demonstrate that collecting data has not deterred disparate or discriminatory impact.

⁷⁷ U.S. Supreme Court respectively *U.S. 414 U.S. 218* in 1973 and *U.S. 517 U.S. 806* in 1996 as well as *533 U.S. 924*. For commentary on the way in which the Supreme Court has upheld police actions and the problems this has created in terms of the 4th and 14th Amendments, see Harris supra note 28 at 4 for discussion on 1973 *Robinson v. U.S. 414 U.S. 218* (1973) where the Supreme Court allowed use of traffic stops for full search and *Whren v. U.S. 517 U.S. 806* (1996) where the Supreme Court allowed pretextual stops despite arguments that they were in violation of 4th Amendment. See also: Harris supra note 23 at 24 and 39 for comments on use of Terry frisks and the Supreme Court; and Glasser **American Bar Association** at 21 where he reflects on the American war for independence and the arbitrary nature of searches conducted by British soldiers as does Thompson supra note 43 at 991-998 where he discusses the purposes of 4th Amendment as establishing constitutional rights to protect future generations from such actions.

⁷⁸ Ibid Glasser at 962-73

⁷⁹ Ibid at 965

⁸⁰ Ibid at 971-972.

⁸¹ Ibid at 973-978.

⁸² See supra note 43 Thompson as well as Colb, both of whom focus on 14th Amendment jurisprudence and the need to demonstrate the intent of the perpetrator as opposed to demonstrating disparate impact. See also Theodore Eisenberg and Sheri Lynn Johnson *The Effects of Intent: Do We Know How Legal Standards Work*, 76 **Cornell Law Review** 1151 (1991); Debra Livingston *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 **S.Ct. Rev.** 141, 176 n. 157; Charles R. Lawrence III *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39, **Stanford Law Review** 317 (1987); and Ian F. Haney Lopez *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 **Yale Law Journal** 1717 (2000). For examples of cases, see: *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673 (2000) where the Court held that the

These cases clearly demonstrate the difficulties in overcoming the evidentiary threshold associated with proving race-based discrimination in the U.S., particularly in the context of the 4th and 14th Amendment. While there are abundant 4th Amendment cases requiring reasonable suspicion to justify an investigatory police stop, the Supreme Court has imposed "constrictions (on the use) of Fourth Amendment protections over the last several decades."⁸³ Furthermore, efforts to press for an examination of racial profiling practices under the Equal Protection Clause have been hindered by the heavy burden of proof necessary under this Clause. As Kevin Johnson observes:

Legally speaking, race profiling in law enforcement implicates complex and interrelated Fourth Amendment and Equal Protection values. Significantly, Fourth Amendment law, with its focus on reasonable suspicion to justify a stop, often remains blind to the influence of race on law enforcement. At the same time, the Supreme Court's reliance on the Equal Protection Clause as the vindicator of the nondiscrimination principle fails to acknowledge how the rigorous evidentiary burden of proving such a claim greatly limit's the number of claims that are brought⁸⁴.

In regard to the Supreme Court's record on racial profiling, several practitioners and legal scholars have cited problems associated with *Whren* in terms of the 4th Amendment doctrine and the War on Drugs. Knight and Kurnik express concern about the narrow view held by the U.S. Supreme Court in examining 'race' in the context the 4th Amendment and Hacker is affronted by the Supreme Court's support for the incredibly invasive and humiliating tactics law enforcement authorities are allowed to use which, in his view, are in clear violation of the 4th Amendment⁸⁵. According to Jernigan, the profiling employed in the War on Drugs has been allowed to escalate into 'racial profiling'⁸⁶ and, in this context, *Whren* has had disastrous consequences for subordinate racialized groups, in particular the failure to

respondent's unprovoked flight from police officers in a high drug area established reasonable suspicion that the respondent engaged in criminal activity and, therefore, the stop was justified; *United States v. Cortez*, 449 US 411, 101 S.Ct.690 (1981) an immigration case where Border Patrol agents acted on inferences drawn from investigatory activities to stop and question motorist suspected of transporting 'illegal aliens' and having discovered several in the vehicle. The defendants sought to suppress the evidence but the Court held that the investigative stop of vehicle was justified. A slight exception to this pattern has been *Brignono-Ponce*, 422 US 873, 95 S.Ct. 2574 (1975), an immigration detention case where Border Patrol agents on roving patrol stopped a vehicle and questioned its occupants regarding their immigration status. This resulted from suspicions based on the perceived Mexican ancestry of occupants. The Court held that the roving patrol stop requires "specific, articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" [884, 2582] and then basically concluded that racial considerations may be permissible as one of a set of factors in immigration detention decisions. [885-887, 2582-2583]. See also Randall Kennedy supra note 8 at 142-144 for discussion of *United States v. Martinez-Fuerte*.

⁸³ See Kevin Johnson *The Case Against Race Profiling In Immigration Law Enforcement*, **Washington University Law Quarterly**, Volume 78, Number 3, 2000 at 686-687

⁸⁴ *Ibid* at 687 where Johnson cites numerous cases in support of his view, including *Washington v. Davis*, 426 U.S. 229, 238-39 (1976) which required evidence that the State had a discriminatory purpose; and *United States v. Armstrong*, 517 U.S. 456, 465-71 (1996) which required evidence demonstrating intent for a selective enforcement claim even though over 90 per cent of convictions for crack-cocaine use were African Americans. See also Holland supra note 19 2-4, 6, 8 and 10 for discussion on the exclusionary rule and the prohibition on the manner in which evidence is gathered, as well as the implications for personal freedoms and 4th Amendment violations.

⁸⁵ See Knight and Kurnik supra note 22 at 4,5 and 7; Hacker supra note 43. See also Johnson supra note 83 at 685-688.

⁸⁶ Supra note 28 at 128-129.

provide protection against arbitrary use of police power⁸⁷.

On the other hand, despite the rulings of the Supreme Court, some state courts have produced judgments more protective of civil rights. For example, Harris notes the problems Chief Vogel's tactics have had in Court⁸⁸. Abramovsky and Edelstein cite the New York State jurisprudence which has deemed pretext stops as constitutionally invalid. They have also cited the turn of events in New Jersey state jurisprudence which initially adopted the *Whren* approach until the *Soto* case and the impact of racial profiling investigations within the State. Since then, courts in New Jersey have looked to other ways to invalidate cases resulting from pretextual stops⁸⁹.

The failure of the Supreme Court to acknowledge the disproportionate impact of policing practices on subordinate racialized groups has undoubtedly contributed to the increased use by law enforcement authorities of criminal profiling which has had a clear racial component. The Supreme Court's decision in *Whren* has had dire consequences for African Americans and Latinos. Providing clearance for law enforcement authorities to continue to rely on racial profiling, the impact of this decision can be seen in the data collected in numerous jurisdictions as discussed earlier, such as Volusia County Florida, Maryland, Illinois, and Eagle County Colorado. What is particularly damaging about *Whren* is its dismissal of both 4th and 14th Amendment approaches of introducing arguments respectively regarding racism and efforts to demonstrate personal intent by law enforcement officers⁹⁰.

Based on the pervasiveness of racial profiling and the extraordinary number of individuals stopped, it is hard to dismiss concerns that racial profiling has amounted to a state orchestrated attack against individuals from subordinate racialized groups, particularly peoples of African descent. Given the 'success' rates in apprehending criminal suspects and the conviction rates of these suspects, one can only wonder as to the continued use by police of racial profiling, particularly given the evidence that such actions are an unproductive use of police resources. Further, it is clear that such actions have a devastating impact on police relations with African American communities.

⁸⁷ See Hacker supra note 43 at 129-136 where he points out that the Supreme Court did not look at reports from states in *Whren* which clearly demonstrate patterns of racial bias in police law enforcement. Jerigan supra note 28 at 133 also discusses the reluctance of the Supreme Court to rely on empirical data showing targeting which, he suggests, leads to increasing the chasm between subordinate racialized groups and the police.

⁸⁸ See Harris supra note 23 at 23.

⁸⁹ Supra note 23 at 5-10 where they note the appellate division approach where the state courts, eg., New York and New Jersey, have neither adopted nor rejected *Whren* and in some instances struck down cases on evidence of pretextual stops. In New Jersey, see *State v. Soto*, 1996, where the court allowed "discovery of concerning the relative incidence of traffic stops by New Jersey state troopers involving various racial groups, and reviewed additional statistical evidence unearthed by defense counsel. The totality of this evidence revealed compelling statistical proof that African-American motorists were disproportionately targeted for traffic enforcement."

⁹⁰ Ibid at 3-6.

THE U. K. EXPERIENCE

While the particulars of the relationship between police and peoples of African descent in the U.K. may differ from that of the U.S., the fundamental nature of the relationship is much the same. For example, in the introduction to his book on *Black Youth, Racism and the State: The Politics of Ideology and Policy*, John Solomos states that "The issue of the position of young blacks within British society, and their role in the future of 'race relations', has been a hotly debated question for nearly two decades. Moreover, in the aftermath of the violent protests that have taken place since the 1980s, numerous state agencies, political organizations, voluntary bodies, academic researchers and media commentators have addressed themselves to the 'crisis of black youth'...It (therefore) came as no surprise when Lord Scarman's report on the Brixton riot of 10-12 April 1981 concluded that: 'The riots were essentially an outburst of anger and resentment by young black people against the police' (Scarman, 1982:8.12)⁹¹." Similar comments about African descendents in the U.S. would be equally apt.

The experiences of peoples of African descent in their relationships with the police in the U.K. suggest a worrying commonality with the U.S. regarding racial profiling⁹². This commonality is related to the uniqueness of the discursive formation contextualizing the relationship between the police and peoples of African descent which appears to defy national borders and vastly different historical developments to arrive at the same axis - police forces treat peoples of African descent quite differently than they do Whites as well as others from subordinate racialized communities and, further, this differential treatment is at the foundation of the hostile relations between these two groups⁹³.

To examine racial profiling in the U.K it is important to look at the impact of immigration from the Caribbean and African countries on the national character and identity of the U.K., the changing demographics resulting from increasing immigration from former colonial territories had an almost immediate impact on law enforcement and the attention paid to these newcomers by police forces across the U.K, particularly in terms of violent racist attacks⁹⁴. In discussing the impact of immigration in the 1950s, Vron Ware suggests that some of these stories:

"...reveal aspects of Britain that help us to understand its current identity crisis, both at home and seen from abroad. The Whiteness that shines through these stories conveys in images of people who ...found it difficult to deal with strangers, particularly those who looked different and who could be prejudged in the light of 'race-thinking' - deeply ingrained views about racial difference bolstered by long histories of colonialism and racial slavery. Here Whiteness does not just represent a way of thinking and feeling that sets light-skinned people apart from the rest of the

⁹¹ Cambridge University Press, 1988 at 1.

⁹² Ibid at 91 and 101-102. In fact, Solomos notes how comparisons between African Americans and peoples of African descent were popular discourse in the early 1970s.

⁹³ In a recent comment on this, a noted thinker on police race relations, Professor Simon Holdaway, writes: "The police now have to demonstrate that they are receptive to change and able to implement reforms that benefit the ethnic minorities. The onus is on the police to reform their policies and actions not on ethnic minorities or any other section of the population to accommodate to present police policies." See *Police Race Relations: A consultative paper written for the Commission on the Future of Multi-Ethnic Britain*,

⁹⁴ See Vron Ware *Perfidious Albion* in *The Making and Unmaking of Whiteness*, Birgit Brander Rasmussen, Eric Klineberg, Irene J. Nexica and Matt Wary (eds.), Duke University Press, 2001 at 184-213.

world, but it is also a belief system that can produce raw hatred, fear, and consequently terror, that main ingredient of White supremacy anywhere in the world⁹⁵.

Paul Gilroy reveals similar views and discusses the importance and impact of English common law on both the development of the English nation state and the borders of race as a key component of that structure. Gilroy cites the signification of the 'other' as the element of danger to this establishment and as something which must be monitored and controlled. He writes:

Explanations of criminal behaviour which make use of national and racial characteristics are probably as old as the modern juridical system itself. The process in which the nation state was formed in Britain in the eighteenth and nineteenth centuries also provided the context in which modern legal institutions grew and developed. The moral regulation of citizens and their property became a primary object of state intervention. The identification of law with national interests, and of criminality with un-English qualities, dates from this process of state formation and has a long history which remains relevant to the analysis of 'race' and crime today⁹⁶.

These concerns are of paramount importance to peoples of African descent in the U.K. who find themselves subject to the constant pressure of violent racist attacks exacerbated by police failures to protect them, combined with pressures of over policing and targeting. The historical development of these ideas and their current impact on racial profiling are discussed below

⁹⁵ Ibid at 204 where Ware discusses the 4-part documentary *Windrush* which depicted the stories of Caribbean immigrants to the U.K. in the 1940s and 1950s. In doing so, it recalled accounts of the 'Teddy Boys', racist Whites who violently attacked these immigrants, resulting in the 1958 street riots in Nottingham and London after the murder of Kelso Cochrane who was stabbed to death by the Teddy Boys."

⁹⁶ See *There Ain't No Black In the Union Jack: The Cultural Politics of Race and Nation*, The University of Chicago Press, 1991 at 77. Similarly, *ibid* at 191 Ware suggests that "(t)he representation of the East End of London as a 'dark continent' is just one example of the racialized discourse of class that operated in late-nineteenth-century industrial Britain."

'The Queen Is Not Amused':

The history of police race relations in Britain has a strong strand of conflict running through it, with pressure for change arising from public inquiries. Change has not been driven spontaneously by the police but required by the findings of various inquiries into insensitive and inappropriate police work. This context begs researchers to take seriously and understand processes of conflict.

Simon Holdaway, *Police Race Relations in England and Wales: Theory, Policy and Practice*⁹⁷

Following WWII, changes to the composition of communities in the U.K. came about as a result of immigration from former colonial territories and recently established Commonwealth nations in the Caribbean, Africa, Asia and South Asia. This change in the racial composition of the U.K. had an almost immediate effect on policing. Beginning with racist attacks on individuals from subordinate racialized groups throughout the 1950s and 60s and combined with the failure of police to adequately protect these new residents of the U.K., the polarization between the police and subordinate racialized groups began to take hold. Moreover, Paul Gilroy suggests that while British police and political leaders in the 1940s and 50s actively constructed images of crime as being perpetrated by individuals of African descent⁹⁸, their failure to protect peoples of African descent from racist attacks became the springboard for the 1958 riots in Nottingham and London⁹⁹.

The linking of crime with peoples of African descent continued in the aftermath of the riots. In fact, Solomos notes that increasing immigration became the fuel for arguments that areas in which "...black settlers moved rapidly became identified as localities with crime-related behaviour and other 'social problems...'. Solomos suggests that "...the 1960s saw a growing politicization of this question, and continuous attempts by the police and by governments to deal with the danger of conflict between the police and black communities." During this time, individuals of African descent increasingly complained of racial discrimination in their treatment by the police. This led to the release in 1967 of the Home Office circular to Chiefs of Police entitled *The Police and Coloured Communities* which put

⁹⁷ See Simon Holdaway *Police Race Relations in England and Wales: Theory, Policy, and Practice, Police and Society*, 2003, Issues No. 7 at 64. In fact, as a significant component of this conflict, both Paul Gilroy and John Solomos discuss the racialization of crime at the beginning of the 20th century, particularly as it impacted on Irish migrants, and also on immigrants of Jewish and African descent. For example, Solomos supra note 91 at 59 writes: "Ideologies linking immigrants in general, and black immigrants in particular, have a long history in British society...(I)t is certainly true that whether one looks at the Irish migrants of the nineteenth century, Jewish immigrants in the period 1880-1914, or other significant groups of migrants the issue of crime has been a common theme in the construction of ideologies and policies ... "Black seamen who settled in port towns of such as Cardiff, Liverpool and London were similarly stereotyped." See also Gilroy, *ibid* at 78-79.

⁹⁸ *Ibid* Gilroy at 79 - 85. Gilroy's assertions are supported in his citing of secret Cabinet memorandum of 30 January 1954 in which then Home Secretary Sir David Maxwell Fyfe described the correlation between criminal convictions of 'colored men'.

⁹⁹ *Ibid* at 81-82. It is interesting to note the importance of police protection against racist attacks as the failure of the police led to the Stephen Lawrence Inquiry. It has also been identified a key component of relations between police and subordinate racialized groups throughout the 1980s and 90s. See *Beneath the Surface: Racial Harassment* Barnor Hesse, Dhanwant K. Rai, Christene Bennet and Paul McGilchrist, Avebury: Ashgate Publishing Limited, 1992, and Holdaway in particular (60-64) who, at 61, cites Bowling's *Violent Racism: Victimization, Policing and Social Context* (Oxford: Oxford University Press, 1999) and writes that "...there is a documented dissatisfaction with police action and a fostering of negative, racialized relationships between the police and ethnic minorities."

forward several recommendations for improving police-black community relations, including officer training and establishment of community liaison initiatives. A series of reports and articles on relations between police and subordinate racialized communities were released subsequent to this circular¹⁰⁰. These actions assisted in politicizing the issue of 'race and policing' and led to advocacy demands by the community for investigations into cases of alleged police harassment¹⁰¹.

Conflict and advocacy pervaded the 1970s. With the introduction of the 'Sus laws' which provided police with powers to stop people without reason, allegations surfaced that the police targeted peoples of African descent for unreasonable stops and searches. In 1971-72, the Select Committee on Race Relations and Immigration had referred to the relations between police and youth of African descent as being 'difficult and explosive' and a representative from the community-based West Indian Conference who reported to the Select Committee wrote that "To state that a sizeable proportion of the West Indian Community no longer trust the police is to confer a euphemism upon a situation which, for many, has reached a level equal to fear...(and)... if urgent action is not taken to give effect to the grave issue at hand, violence on a large scale cannot be ruled out. The solution rests largely in the hands of the police."¹⁰²

Shortly after the Select Committee's report was released, violent interactions between police and youth of African descent occurred in Brockwell Park (South London, 1973) Chapeltown (Leeds, 1973, 1974, 1975), the Notting Hill Carnival (1976, 1977, 1978), Ladywood (Birmingham, 1977) and Lewisham (London, 1977)¹⁰³. These events were exacerbated when the Metropolitan Police reported on the 'uneasy nature of the relationship between police officers and young Blacks' in its 1976 submission to the Select Committee. While the Metropolitan Police had not indicated anything like this in its 1972 submission to the Select Committee, the 1976 submission made clear a growing divide existed and intimated that youth of African descent were disproportionately involved in specific criminal activities.¹⁰⁴ Though the Committee on Race Relations criticized the police submission, the police report reflected a growing public sentiment fueled by the 'drug and mugging crisis' which was popularized by the extreme political right-wing and the U.K. media. This 'crisis' led to increased policing of youth of African descent¹⁰⁵.

These events took place as the police began considering the permanence of these new communities and ways in which to police them. In this regard, Holdaway has written: "Until the early 1980s, the police took the widely accepted view that immigrants would gradually assimilate into our apparently homogenous culture. The initial task for police was to

¹⁰⁰ Supra note 91 at 92-94 where Solomos cites some of these articles and reports, including J. Hunte, *Nigger Hunting in England*, West Indian Standing Conference, 1966; Rose et al *Colour and Citizenship*, 1969; *Immigrants and the police*, IRR Newsletter, September, 1967; H. Rose *The Police and the coloured communities*, IRR Newsletter, October, 1968; D. Nandy *Immigrants and the police*, Race and Immigration, October, 1970; G. John *Race and the Inner City*, 1970; J. Lambert *Crime, Police and Race Relations*, 1970; Select Committee on Race Relations and Immigration *Police/Immigrant Relations*, 1972; *Report of the Commissioner of Police of the Metropolis for the year 1975*; J. Brown *Shades of Grey*, 1977.

¹⁰¹ Supra note 91 at 92.

¹⁰² See Gilroy supra note 96 at 88.

¹⁰³ Supra note 91 at 103 and 109 respectively. Also see Gilroy ibid at 93

¹⁰⁴ As cited in Solomos at 108 supra note 91 and based on *Report of the Commissioner of Police of the Metropolis for the year 1975*. See also Gilroy ibid at 102

¹⁰⁵ This is discussed by Gilroy supra note 96 and by Stuart Hall et al *Policing the Crisis: Mugging, the State, and Law and Order*, London, MacMillan, 1978

understand the different immigrant cultures and for people from those cultures to understand the traditions of English policing.” Holdaway asserts that “This approach had two main effects. It located police race relations within specialist departments, not within routine policing. The problems of policing ‘those people’ became the concern of specialist officers who understood immigrants and their culture. The work of the rank and file was largely unaffected by police community relations policies¹⁰⁶.” As such, “...race relations were of little relevance to a local police commander and his officers¹⁰⁷.”

Despite this approach or, perhaps, because of it, conflicts between police and subordinate racialized communities were inevitable, particularly since this approach did nothing to address the “(n)egative ideas about black people as criminals and drug users¹⁰⁸” that the police had nurtured. This inadequate approach was one of the most significant factors contributing to the Brixton riots of 1981. A police stop-and-search operation was largely targeted at peoples of African descent until a violent community response ensued resulting in three days of looting, fires, property damage and violent exchanges between the police and the predominantly ‘black’ community.

Like others, Holdaway notes the “discriminatory use of stop-and-search powers (as) one of the significant problems the Brixton disturbances highlighted...¹⁰⁹” In supporting this assertion, Holdaway points to D. Smith et al *Police and People in London*, a study of the London Metropolitan Police which noted that in the area where the 1981 disturbances took place “black men on foot were four times more likely to be stopped than were people from other ethnic groups; 49 percent of West Indians who owned or said they had regular use of a vehicle said they had been stopped by police...(and) (w)hen the repetitive use of stops was considered, black youths were found to be stopped ...on an average of 5.06 times each year and White youths 1.94 times.” Based on these patterns, the hit rate was 1 in 12, indicating a vast differential between stops and actual arrests.¹¹⁰

A significant outcome of the Brixton riots was the official report into the incidents headed by Lord Scarman. Scarman disavowed notions of institutional racism at the time of his report and, instead, pointed to individual officer beliefs and prejudices as being the cause of conflict with youth of African descent. Support for police relations with subordinate racialized groups was therefore focused on screening out racist recruits and providing training which addressed individual beliefs and prejudices. However, in assessing the attitudes of this time, Dr. Benjamin Bowling wrote that:

Empirical research on policing conducted in the 1970s, 1980s and early 1990s indicated that racism and racial prejudice in police culture was more widespread and more extreme than in wider society...One study of police culture in London found that ‘racial prejudice and racist talk’... [were] pervasive...expected, accepted and even fashionable’...Studies found that Asians tended to be regarded by police officers as devious, liars and potential illegal immigrants while black people were believed to be prone to violent crime and drug abuse,

¹⁰⁶ See Holdaway supra note 97 at 52.

¹⁰⁷ Ibid at 54. See also Solomos supra note 91 at 91. In fact, Solomos at 98 points out that the Select Committee on Race Relations and Immigration recommended “that a programme for action should be implemented to improve communication, including more training and schemes to improve relations with the black communities in ‘problem areas’.”

¹⁰⁸ Ibid Holdaway at 54.

¹⁰⁹ Ibid at 55. See also

¹¹⁰ Ibid at 55-56.

incomprehensible, suspicious, hard to handle, naturally excitable, aggressive, lacking brainpower, troublesome and 'tooled up'.

These findings on racial prejudice and stereotyping have not been restricted to constables, but have been found throughout the ranks. Robert Reiner's study of *Chief Constables* found that race was spontaneously mentioned more often than any other social division in society and mentioned frequently in other contexts... The predominant view was to regard the presence of black people as problematic for the police. They tended to be seen as crime-prone, disorderly, argumentative, irrational, "likely to be carrying drugs or dangerous implements, noisy, and responsible for the antipathy held towards them"¹¹¹.

Other riots occurred across the U.K. throughout the 1980s which pitted police against youth of African descent. These included turmoil in Bristol, Toxteth, Manchester (Moss Side Police Station), London, Liverpool, Birmingham, Wolverhampton, Leicester, Derby, Nottingham, Leeds, Huddersfield¹¹². The Metropolitan Police also released another report providing racial breakdowns of those engaged in street robberies indicating a disproportionate involvement of youth of African descent¹¹³. In addition, during this period individuals from subordinate racialized groups died while in police custody and in prisons. The Independent Race and Refugee News Network compiled a list of these deaths suggesting that, along with those in psychiatric custody from 1969 to 2002, these deaths have not been explained, and are the result of mysterious circumstances or have occurred in circumstances in which there have been allegations of "maltreatment, dereliction of duty or brutality." In total, the Network cites approximately 91 of such deaths¹¹⁴.

In the midst of these riots, the *Police and Criminal Evidence Act* (PACE) was adopted in 1984 to provide national authority for stopping and searching suspects for stolen or contraband items. PACE required reasonable grounds for suspecting that a search will uncover "stolen or prohibited articles" and that police record stops (pedestrian and vehicle) concluding in searches¹¹⁵. PACE powers permitted police to conduct full searches of persons as well as items they carry and their vehicles. In addition, the 1988 *Road Traffic Act* authorized vehicle stops at the discretion of the police but permitted searches only if the PACE criterion of "reasonable suspicion" was met. Further, in 1993, Her Majesty's Inspectorate of Constabulary (HMIC) made it compulsory for all police forces to record the ethnicity of persons searched and the Home Office began monitoring the ethnicity of such persons in 1996¹¹⁶.

¹¹¹ See *Disproportionality and discrimination in the use of stop/search powers by the West Midlands Police Service*, April 2003, at 23-24. Footnotes omitted.

¹¹² *Supra* note 91 at 102, 181, and Gilroy *supra* 96 at 99-102.

¹¹³ *Ibid* Solomos at 115-116. At the release of this report, Solomos notes the varied media responses to it, including which might be described as racist in their perspective about the need for the U.K. to return to its White roots.

¹¹⁴ See www.irr.org.uk/2002/november/ak0000006.html In reviewing this list it must be noted that the term 'black people' appears to include individuals of Southeast Asian as well as African descent.

¹¹⁵ PACE stops not producing searches or PACE-stops and searches such as voluntary or traffic stops are not required to be recorded. For more information on PACE, see *Upping the Pace? An evaluation of the recommendations of the Stephen Lawrence Inquiry on Stops and Searches*, Joel Miller, Nick Bland and Paul Quinton, Home Office, Police Research Series Paper 128, 2000 at 7.

¹¹⁶ See *Final Report on Stop & Search*, Home Office, Police Research Series, December 1999, at 7-8. Section 95 of the *Criminal Justice Act 1991* required police to collect data on an ethnic basis beginning in 1995

While the Scarman Report of 1981 noted the discriminatory impact of police stops and searches of youth of African descent, the practice continued as indicated by research following Scarman which provides evidence concluding “that it was doubtful that searches were always based on reasonable suspicion; (and that) so-called voluntary searches were rarely based on informed consent and often not officially recorded...”¹¹⁷ In fact, a 1997 review of police race relations practices conducted by Her Majesty’s Chief Inspector of Constabulary was of the view that “racial discrimination, both direct and indirect, and harassment are endemic within our society and the police service is no exception...There was continuing evidence during the inspection of inappropriate language and behaviour by police officers, but even more worrying was the lack of intervention by sergeants and inspectors”¹¹⁸.

This research has underscored the concerns of subordinate racialized communities and their lack of trust and confidence in the police¹¹⁹. It was within this context that the Stephen Lawrence Inquiry was held. The inquiry was prompted by the failure of the police to properly investigate the racially-motivated murder of a youth of African descent. The Lawrence Inquiry contrasted with the Scarman Report which studiously avoided notions of institutional discrimination. Led by Sir William MacPherson of Cluny, the Lawrence Inquiry concluded that institutional racism was a central issue in police relations with subordinate racialized groups, particularly those of African descent. MacPherson defined institutional racism as “The collective failure of an organization to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people”¹²⁰.

This definition and the adoption of recommendations from the Stephen Lawrence Inquiry set the stage for significant amendments to the U.K. Race Relations Act and the introduction of requirements for all public authorities, including the police, to develop and implement comprehensive plans to positively support race relations. Further, the police in particular were expected to put into place policies and actions to address the discriminatory impact of stops and searches.

¹¹⁷ Supra note 115 as cited in Bowling supra note 111 at 24

¹¹⁸ Ibid Bowling at 24. Bowling cites this report further stating that it “concluded that there was ‘a direct and vital link between internal culture in the way people are treated and external performance’ and that “[e]ven if the majority of the accounts are dismissed as either the products of third party articulation or even exaggeration, a picture still emerges of pockets of wholly unacceptable racist policing.” These views are similar to those of the former Metropolitan Toronto Auditor, Allan Andrews, as cited in part one of this study.

¹¹⁹ See Miller et al supra who cite research conducted by Willis (1983), Smith and Grey (1985), Young (1994), Bucke (1997) and Brown (1999).

¹²⁰ See *The Stephen Lawrence Inquiry Report*, Sir William McPherson, 1999 at 29. See also Bowling supra note 111 where he notes the support to this definition as provided by John Newing, then head of the Association of Chief Police Officers and Chief Constable of Derbyshire, who appeared before the Lawrence Inquiry and stated in his submission that “institutional racism [is] the racism which is inherent in wider society which shapes our attitudes and behaviour. Those attitudes and behaviour are then reinforced or reshaped by the culture of the organization a person works for. In the police service there is a distinct tendency for officers to stereotype people. That creates problems in a number of areas, but particularly in the way officers deal with black people. I know because as a young police officer I was guilty of such behaviour.” This view is similar to that expressed by the Ottawa Deputy Chief of Police, Larry Hill see *Ottawa police, deputy chief at odds over racial profiling: Conference told phenomenon exists*, *Toronto Star*, Chris Sorenson, March 2, 2003.

The Numbers Across the Atlantic:

As previously noted, current police stop and search powers as well as requirements for ethnic data collection were introduced in the mid-1980s and 1990s. Since that time a plethora of information has been gathered attesting to the practice of police officers in fulfilling their official duties in this regard. For example, a recent media article boldly proclaimed that **Black People 27 times more likely to be stopped**¹²¹. Written one day before the 10th anniversary of the Stephen Lawrence murder and three years following the conclusion of the inquiry into this death, the article is based on a report by Dr. Benjamin Bowling and asserts that "Afro-Caribbean people are 27 times more likely than White people to be stopped and searched under a special police power designed to tackle ravers and football hooligans..."

According to the Home Office, stop and search statistics demonstrate clear disparities as peoples of African descent are; stopped more frequently, cautioned less than other groups and held in custody more frequently than other groups. The use of custody was also found to be higher for Blacks who committed violent offences even though individuals from subordinate racialized groups have a lower reconviction rate and are more likely to be released on parole¹²². Other evidence indicates that stops and searches have a limited disruptive effect on crime while having a destructive impact on subordinate racialized groups, particularly those of African descent¹²³.

The police authority to stop and search is sanctioned under various laws¹²⁴. In exercising their powers under statute, the police are required to use a high level of discretion. As in the U.S. experience, many have noted that these stops and searches are particularly problematic and more demonstrable of police subjective values as well as the values implicit within the structure of the police¹²⁵. As a result, several studies have indicated that 'reasonable suspicion' is often absent in many stops and searches leading to unlawful police action and undermining the integrity of the police within the community. These studies also suggest that stops/searches are based on stereotypes, especially where levels of discretion are highest¹²⁶.

¹²¹ See Vikram Dodd, Guardian Unlimited, April 21, 2003

¹²² See Home Office **Race and the Criminal Justice System** 4-7.

¹²³ See Joel Miller, Nick Bland and Paul Quinton. **The Impact of Stops and Searches on Crime and the Community**. Home Office Research Study No.127 London: Home Office, 2000 at 47.

¹²⁴ Notably, s.1 of the Police and Criminal Evidence Act 1984, s.23 Misuse of Drugs Act 1971, s.60 Criminal Justice and Public Order Act 1994, s.44(1) and (2) Terrorism Act 2000, and s.47 Firearms Act 1968. Vehicles may also be stopped under s.163 Road Traffic Act and searched under s.4 Police and Criminal Evidence Act 1984. Under s.1 Police and Criminal Evidence Act 1984, s.23 Misuse of Drugs Act 1971 and s.47 Firearms Act 1968, police are required to have reasonable grounds to stop and/or search. There are, however, circumstances where this requirement can be held in abeyance, for example, s.60 of the Criminal Justice and Public Order Act 1994 allows for searches without reasonable grounds if authorized by a senior officer. Such permission can be granted based on a "reasonable belief that incidents involving serious violence may take place or that people carrying dangerous instruments or offensive weapons within any locality in the policing area." See **PACE Code of Practice** at 3.

¹²⁵ See Holdaway supra note 97 at 26 and Bland et al supra note 117 at 9.

¹²⁶ Ibid., Bland et al at 1 and Bowling supra note 111 at 3.

Metropolitan Police Authority and West Midlands

In terms of the magnitude of continued stops and searches, a recent report of the Metropolitan Police Authority (MPA) provided a borough by borough racialized breakdown for the years 1997 up to and including 2002¹²⁷. While some of these boroughs indicate a comparable approach for diverse racial groups in stops and searches, others demonstrate a clear trend in disproportionately stopping and searching peoples of African descent. For example, the MPA report indicates that, during this period, searches of peoples of African descent rose dramatically from 75,583 in 1996/7 to 89,916 in 2002/03 while there was a significant reduction in searches of Whites from 187,105 to 130,635. Further, while total searches decreased during this period from 303,546 to 262,903, only individuals from subordinate racialized communities were subject to an increasing number of searches, particularly peoples of African descent¹²⁸.

Examination of police stops and searches in West Midlands indicates that a total of 79,000 stops/searches took place from 1998/99 through to 2001/02, or an average of about 20,000 stops per year. During 2000/2001, Whites comprised 64 per cent of those stopped compared to 16 per cent of peoples of African descent and 19 per cent Asians. However, these latter two figures are significantly disproportionate to their presence in the West Midlands population. In stops/searches under S.60 *Criminal Justice and Public Order Act, 1994* (CJPOA) which do not require an objective basis, West Midlands data indicate that over the past two years individuals from subordinate racialized communities were stopped more frequently in absolute numbers. For example, in 2001/02, 2,209 Whites were stopped compared to 1,921 peoples of African descent and 1,380 Asians. Stops under the *Prevention of Terrorism Act 1989*, "designed specifically to combat terrorism from the Provisional Irish Republican Army", indicate[s] that in 1996/7 11 per cent of the 43,700 stops in England and Wales were of individuals from subordinate racialized groups. In 1997/8, 7 per cent of those stopped were peoples of African descent¹²⁹.

An examination of 2001/02 West Midlands statistics comparing resident populations, shows that 5 Whites, 41 individuals of African descent and 17 Asians were stopped/searched per 1,000 of their relative cohort. This indicates that peoples of African descent were eight times and Asians three times more likely to be stopped/searched than their White counterparts. This is consistent with the national average of racial disproportionality across England and Wales where 13 Whites were stopped per 1,000 of the population while peoples of African descent were stopped 106 times per 1,000 and Asians 35 per 1,000. Further, stops/searches under CJPOA indicate that while 1 White is stopped/searched per 1,000, 26 individuals of African descent and 7 Asians are similarly treated. In England and Wales, this compares respectively as 0.5 per thousand for Whites, 5.5 per thousand for peoples of African descent and 3.6 per thousand for Asians, indicating that peoples of African descent are "28 times more likely to be searched and Asian people 18 times more likely to be searched in comparison with their White counterparts." Consistent with the researched history of stops and searches over the past two decades, surveys indicate a particularly focus on youth of African descent¹³⁰.

¹²⁷ See *Stop and Search Scrutiny MPA Status Report* V1.09.06.03

¹²⁸ *Ibid.*, at Appendix E. Information on arrests is also provided in this appendix and follows a similar pattern. Further, the MPA report provides a borough by borough breakdown included in Appendix H.

¹²⁹ See Bowling *supra* note 111 at 6.

¹³⁰ *Ibid.* at 9-10 and Miller et al *supra* note 117 for tables demonstrating comparative rates of stops for peoples of African descent, Whites and Asians clearly indicating that peoples of African descent "are substantially more likely to be stopped, more likely to experience multiple stops, and more likely

Other Jurisdictions

According to the recent British Crime Survey (BCS), in 1999, Whites and South Asians were less likely to be pulled over while driving (12%), compared to individuals of African, Pakistani and Bangladeshi descent (15%). Further, 80 per cent of Whites had confidence in the explanation offered for the stop compared with 61 per cent of those of African descent and 68 per cent of South Asians¹³¹. In terms of multiple stops, the BCS results demonstrated that 77 per cent of Whites were stopped only once compared to 53 per cent of individuals of African descent and approximately 64 percent of individuals of South Asian descent. In addition, 14 per cent of individuals of African descent reported being stopped five or more times compared with 4 per cent of Whites. Also, only 9 per cent of stops of Whites resulted in a search compared to 34 per cent for individuals of African descent and 14 per cent for Asians¹³².

The BCS data demonstrate that the most common reason for police initiated citizen contact was vehicle stops with peoples of African descent more likely to be subject of pedestrian and vehicle stops than any other racialized group¹³³. For example, peoples of African descent were subject to:

- more multiple vehicle stops with 14 per cent of this community stopped five or more times compared to 4 per cent of Whites, 6 per cent of Indians, 2.7 per cent of Pakistani/Bangladeshis;
- more multiple pedestrian/foot stops with 18 per cent stopped five or more times compared to 12 per cent of Whites, 10 per cent Indians and no Pakistani/Bangladeshis;
- a disproportionate number of police stops since 1987 with 9 per cent of male youth of African descent under 30 stopped in a car in 1999 as compared to 25 per cent of White males under 30, Indians at 32 per cent and Pakistani/Bangladeshi at 27%.
- being stopped (car/foot) and searched where Whites were least likely to be searched while peoples of African descent were most likely to be searched¹³⁴;

to be searched - both in absolute terms, and in relation to any particular stop." They also note that "(i)t is ... notable that disproportionality in searches, at least for black and Asian people, can be found across most police forces in England and Wales (Home Office, 1999)" On this data, Bowling at 20 points out that "Since the *per capita* rate of stop and search is eight times greater for black 'suspects' compared with their White counterparts, while the 'hit rate' is about the same for both ethnic groups, then eight times as many innocent black people are unnecessarily stop/searched in comparison to White people."

¹³¹ Ibid., Miller et al at 54 who cite studies indicating that peoples of African descent and Asians "were less convinced by the explanations of stops given by the police than any other group."

¹³² See See A Clancy M. Hough, R. Aust and C. Kershaw. "**Crime, Policing and Justice: The Experience of Ethnic Minorities - Findings from the 2000 British Crime Survey.**" Home Office Research Study 223. (London: Home Office, 2001) at 59-60 and 71 respectively .

¹³³ Ibid at 57, 58, 60

¹³⁴ Ibid at 60-71. While the authors acknowledge that logistic regression analysis reveals ethnicity may not be a strong predictor of risk of being stopped. However, they also suggest that, after taking into account other factors, being Black (and Pakistani or Bangladeshi) remained a predictor for car stops after considering other demographic elements, particularly being a male of African descent under 25 significantly increased the probability of vehicle stop,

- increased traffic stops/searches with 9 per cent of White people searched compared to 34 per cent of those involving people of African descent and 14 per cent for Asians¹³⁵.

An examination of police forces in Greenwich, Hounslow, Central Leicester, Ipswich and Chapeltown suggests that peoples of African descent are over-represented in stops and searches of pedestrians and cars. For example, according to 1991 Census data for these communities, while only constituting 5 per cent of the population in Greenwich, peoples of African descent comprised 16 per cent of those stopped and 14 per cent of those searched. In Hounslow, they comprised 3 per cent of the population but were 16 per cent of those stopped and 14 per cent of those searched. In Central Leicester they made up 1 per cent of the population but 11 per cent of those stopped and 13 per cent of those searched. Ipswich and Chapeltown reported similar results¹³⁶. The police in these communities demonstrate a tendency for stop and search activity “to focus on areas with a disproportionately high number of minority ethnic residents.”¹³⁷ People of African descent being involved more frequently in police stops/searches of vehicles is also borne out by data¹³⁸.

Cracks in the Roof Over Our Heads:

Interestingly, the U.K. data on racial profiling provides significant evidence of the disproportionate impact of policing on subordinate racialized groups despite substantial under-recording of stops and some doubt about the accuracy of police statistics¹³⁹. The data are also noteworthy given the rationale that stops and searches are primarily related to curtailing drug trafficking. A report on a pilot programme launched by MPA indicated that drug searches range from 38 to 66 per cent of all stops and searches¹⁴⁰ with the total percentage of all searches related to drug arrests ranging from 34 to 54 per cent and with most drug arrests involving cannabis.¹⁴¹ A review of search records indicate that less than 50 per cent of searches for drugs *did not* result in arrest and that such high profiling policing took a significant number of officers away from normal street duties. In addition, of these searches, approximately 25 per cent were low discretion activities while there was a significantly lower arrest rate for high discretion searches¹⁴².

Young males were the majority of persons searched and most searches of individuals from subordinate racialized groups were high discretion¹⁴³. This is consistent with previous studies which found that peoples of African descent in London were stopped three times more often than Whites, and Asians twice as much as Whites. When stopped, individuals from subordinate racialized groups were more likely to be searched. Less than 1 of 10 Whites

¹³⁵ Ibid at 71

¹³⁶ Joel Miller *Profiling Populations Available for Stops and Searches*, Home Office, Police Research Series, Paper 131, 2000 at 13.

¹³⁷ Ibid at 36.

¹³⁸ Ibid at 56 and 59.

¹³⁹ See Miller et al supra note 117 at x and viii respectively. At best, only 33% cent of required encounters are recorded with under-recording being attributed partly to the difficulty in defining a police ‘stop’ as well as to the perception that many officers selectively record stops.

¹⁴⁰ Supra note 116. Initiated in April, 1998, one of the purposes of this report was to improve police stop and search power under s.1 of PACE.

¹⁴¹ Ibid 14-15.

¹⁴² Ibid 21-28.

¹⁴³ Ibid 35-39.

who were stopped were searched as compared to over 1 of 4 for peoples of African descent and 1 in 6 for Asians. In providing this data, Marion Fitzgerald, has expressed concern about the use of PACE arrests for crimes considered serious to the public, arguing that drug use, particularly cannabis, is low on public priorities. However, she acknowledges that "(b)eing arrested for a minor offence following a PACE search can make all the difference to whether some young people get through the peak age for offending without a criminal record¹⁴⁴."

On a related point, given that one of the principle reasons for police stops is to stem illegal drug sales and use, self-reporting of such offences to the U.K. Home Office have indicated throughout the 1990s that drug use is highest amongst Whites. In reviewing this data, Bowling declares: "The findings from these surveys are remarkable in their consistency - they all point to the conclusion that offending rates are no higher among ethnic minority communities than among the White majority community. If these statistics were accepted as accurate, and applied to the West Midlands, then the extent of disproportionality in the use of stop/search will be of similar magnitude to those based on resident population¹⁴⁵."

This is a rather stunning fact, particularly given the controversy surrounding police assertions of high drug use amongst peoples of African descent and the impact of this view on police interactions with this community during the 1970s and 1980s. Unfortunately, these facts are mirrored by other 'hit' rates in terms of policing peoples of African descent. For example, Holdaway "...maintain(s) that the use of negative ideas about black youths, as drug users and offenders, for example, played a key role in the police action that led to the near riots on the streets of Brixton, London, in 1981¹⁴⁶." In a society in which the racialized composition is estimated to be 94.1 per cent White, 1.8 per cent peoples of African descent, 2.9 per cent South Asian, and 1.2 per cent Chinese¹⁴⁷, it is astounding to see the racialized composition of hit rates. Holdaway examines these in South Yorkshire. Based on 1998 data, he discovered that peoples of African descent had a "1 in 3 chance of being stopped per year, Asians a 1 in 6 chance and Whites a 1 in 10 chance (despite the fact that) [b]lack formed 0.8 per cent of the county's population and Asians just over 3 per cent¹⁴⁸."

Bowling points out that all the stop and search data within West Midlands and across England and Wales illustrates that the majority of those arrested are White. Of the total 17,385 people stopped and searched in West Midlands, 75 per cent of all those arrested are White compared to 13 per cent peoples of African descent and 12 per cent Asian. However, in examining the disproportionality of these contacts, Bowling observes that "[I]f stop and search powers reflected the proportions of each ethnic group arrested..., we would expect 13,039 White people to be stopped (compared with the actual 11,047 who were actually stopped), 2086 black people stopped (compared with the 2475 who were actually stopped), 2086 Asians to be stopped (compared with the 3,326 who were actually stopped)."

As well, he suggests that "[I]f arrests were taken as an accurate reflection of involvement in crime in the West Midlands in 2000/01, 1,992 fewer Whites, 659 more blacks and 1,240 more Asians were stopped than would be expected from their arrest rates.." Bowling also found that 3 per cent of Whites are arrested as a result of s.1 PACE stops and searches

¹⁴⁴ Ibid 45 and 57-58 respectively

¹⁴⁵ See Bowling supra note 111 at 14.

¹⁴⁶ See Holdaway supra note 97 at 51.

¹⁴⁷ Ibid at 53.

¹⁴⁸ Ibid at 56. Footnote omitted.

compared to 6 per cent of peoples of African descent and 7 per cent of Asians¹⁴⁹; and that in 1998/9, Whites comprised 13 per cent of stops/searches resulting in arrests compared with 12 per cent peoples of African descent and 10 per cent Asian. This changed in 1999/00 to be fairly equal for Whites and persons of African descent at 16 per cent compared to 15 per cent of Asians; and in 2001/02, arrest rates for peoples of African descent who were stopped was 18 per cent compared to 16 per cent for Whites and Asians¹⁵⁰.

Confirming these findings, *Miller et.al.* point out that arrests from searches for England and Wales make up nine per cent of all arrests nationally. Despite this, the number of searches has increased since 1986 to total more than one million per year. This had led to the conclusion that searches tend to be less efficient and that, even though they produce more arrests, the proportion of searches leading to arrests decreases. This may be because of the reduced quality of reasons for conducting searches. As Miller suggests: "Where police are more ready to use searches, they may often have a lower threshold in terms of reasonable suspicion before carrying them out"¹⁵¹.

These figures make it very clear that racial profiling is a major activity of law enforcement in the U.K.. This is so despite the government's stated intention to stop the practice, despite the requirement to collect data on this practice and despite the requirement for police forces to adopt positive actions within the context of the recently amended Race Relations Act.

¹⁴⁹ See Bowling *supra* note 111 at 16-17

¹⁵⁰ *Ibid.*, at 19.

¹⁵¹ See Miller *et al supra* note 123 at 10, 17, 40 and 41 respectively.

THE CANADIAN EXPERIENCE

First, what we are dealing with, at root, and fundamentally, is anti-Black racism. While it is obviously true that every visible minority community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black community which is the focus. It is Blacks who are shot, it is Black youth that is unemployed in excessive numbers, it is Black students who are being inappropriately streamed in schools, it is Black kids who are disproportionately dropping-out, it is housing communities with large concentrations of Black residents where the sense of vulnerability and disadvantage is most acute, it is Black employees, professional and non-professional, on whom the doors of upward equity slam shut. Just as the soothing balm of 'multiculturalism' cannot mask racism, so racism cannot mask its primary target.

Stephen Lewis¹⁵²

When discussing law enforcement and racial profiling in Canada, attention is predominantly focused on recent experience which tends to support the notion that, like in the U.K., the racialization of this discourse is a recent phenomenon parallel to changes in immigration patterns. As such, there is little exploration of race and criminal justice preceding that described in the previous section¹⁵³. Such a short-sighted perspective, if left unchallenged, ignores the full experiences of peoples of African descent in Canada and their relationship with law enforcement authorities.

Peoples of African descent have a long and unique history within Canada that has been marked by racist laws and public acts that have impacted harshly on African Canadians' opportunities for growth and development. These laws and acts began with the enslavement of peoples of African descent and continued through to the denial of land to those who accompanied the White British Loyalists after the U.S. War for Independence. They have included the passage of legislation for segregated schools, and the drawing of restrictive boundaries that ensured residential segregation¹⁵⁴. Constance Backhouse has documented how restrictive land covenants and practices prevented peoples of African descent from

¹⁵² Letter of S. Lewis to Premier Bob Rae (June 9, 1992), at p.2. See also *R. v. Parks* (1994), 84 C.C.C. (3d) 353 (Ont. C.A.) at 366-71 Jury challenge for cause (racial bias) case "The perceptions of those who claim to be victims of racial prejudice cannot, necessarily, be equated with the reality of such victimization. **However, to reject such perceptions out of hand, especially when they are strong and widespread, is perhaps to demonstrate the very racial bias of which they speak.**" [369] "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 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." [369]

¹⁵³ For rare examples, see the recent work of James W. St. G. Walker "*Race, Rights and the Law in the Supreme Court of Canada*, The Osgoode Society for Canadian Legal History and Wilfred Laurier University Press, 1997; Clayton James Mosher *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems, 1892-1961*, University of Toronto Press, 1998; and Constance Backhouse *Colour-Coded: A Legal History of Racism in Canada, 1900-1950*, The Osgoode Society for Canadian Legal History by the University of Toronto Press, 1999. In particular, Mosher provides at 23 an overview of "Page References to Race and Racial Issues In Canadian Criminology and Criminal Justice Textbooks".

¹⁵⁴ See Robin Winks *The Blacks in Canada: A History*, McGill-Queen's University Press for discussion on anti-Black racism, its growth at 20-23, 113, 141, 288-295 at different times in Canadian history. Also, for example, in terms of such provinces as Nova Scotia (at 38-39, 126-127), New Brunswick (at 132), British Columbia (at 278-287).

accessing land grants and housing, military services, employment, public transportation, religious practices, orphanages and poor houses, burial rights in certain cemeteries, and services in cultural and recreational facilities such as restaurants, hotels, theatres among other services¹⁵⁵.

For example, Backhouse portrays the circumstances surrounding the Ku Klux Klan entering the city of Oakville, Ontario in 1930 fully robed and hooded to forcibly end the marriage between an African Canadian male and a White female¹⁵⁶. She notes that these racist actions were supported by law enforcement authorities and that the charges laid in the case did not specifically address the evident racism in the KKK's actions¹⁵⁷. She later discusses the experiences of Viola Desmond who was arrested, charged and prosecuted for attempting to sit in the White section of a movie theatre in Nova Scotia in 1946¹⁵⁸.

James W. St.G. Walker and Clayton J. Mosher also address particular historical periods in which peoples of African descent were restricted in their attempts to settle in Canada in the early 1900s¹⁵⁹. Like Backhouse, Mosher also cites experiences related to access to housing, employment and services¹⁶⁰. In each instance, Mosher notes the particular impact of the racist actions of White Canadians. For example, he discusses the impact of restricting access to housing and accommodation as resulting in the formation of segregated communities such as the covenant in Hamilton, Ontario which prevented the sale of land to peoples of African descent as well as others. The same regime was in place in parts of southwestern Ontario¹⁶¹. Examining access to services such as hotels, theatres, restaurants and taverns, Mosher concludes that "[d]enial of services to Blacks was pervasive in Canadian society, and Canadian judicial officials frequently upheld the right of businesses to discriminate."¹⁶²

Turning his attention to the criminal justice system, Mosher writes "...I focus on negative stereotypes of Blacks that were frequently invoked by influential public figures in order to justify discriminatory practices and legislation in several spheres of Canadian society. Such practices and legislation played an important role in Blacks' disadvantaged social position in Canadian society, and contributed to their disproportional involvement in the criminal justice system¹⁶³." In this context, Mosher reveals many instances of distinct treatment of peoples of

¹⁵⁵ Ibid at 251. Ibid for comments on segregated churches at 337-345 and Walker supra note 149 at 124-125 for impact of U.S. style "Jim Crow" values on Canadian society.

¹⁵⁶ Supra note 149 at 173. She also identifies at 183 earlier episodes where White men ended inter-racial unions citing Susanna Moodie's 1852 *Roughing It In The Bush* and how these men "dragged the newly wed Black man from the home in which he lived with his White wife. They then 'rode him along the rails' until he died; and at 184 she recounts the story of the Harrison family whose house was burned down by the 'Klux Clan' in London, Ontario in the 1880s.

¹⁵⁷ Ibid at 191-194. See also Walker at 136 where he respectively quotes the Oakville Mayor and Police Chief as stating: "Personally I think the Ku Klux Klan acted quite properly in the matter. The feeling in the town is generally against such a marriage. Everything was done in an orderly manner. It will be quite an object lesson." and "They used no force nor did they create a disturbance of any kind...The conduct of the visitors was all that could be desired."

¹⁵⁸ Ibid at 229. See also Mosher supra note 149 at 106-107 and Winks supra note 150 at 443.

¹⁵⁹ Ibid respectively at 15 and 127-128, and 89-95. See also Winks supra note 150 at 308-312.

¹⁶⁰ Ibid at . See also Walker supra note 149 at 132 for examples of racism in hotel services and clubs

¹⁶¹ Ibid at 96-97.

¹⁶² Ibid at 104 where he cites *Loew's Montreal Theatre v. Reynold* in 1919, *Franklin v. Evans* in 1924, *Christie v. York Corporation* in 1940. See also Walker supra note 150 at for a thorough review and analysis of the latter case.

¹⁶³ Ibid at 82. Some of these officials include MP William Thoburn and the Commissioner of Immigration who expressed concern regarding the immigration of African Canadians to Canada in the early 1900s (at 91-92) as well as the judges involved in determining sentencing of convicted

African descent. In terms of media depictions of criminality, he writes:

While systematic empirical studies concerning the coverage of racial issues by the Canadian press in the early to middle 1900s were apparently not conducted... (there was) a tendency on the part of Canadian newspapers to make reference to the race of the offenders in their coverage of crime and criminal-justice issues. This focus on the racial characteristics of offenders served to identify Asians and Blacks as alien and influenced and to a certain extent seemingly justified, their differential treatment by the criminal justice system¹⁶⁴.

In his account of the racialization of criminal justice, Mosher provides data indicating that:

- Federal enforcement of drug laws in the early 1900s were directed primarily at the Chinese and, to a lesser degree, African Canadian communities¹⁶⁵;
- In six cities in Ontario including Windsor, Hamilton, London and Toronto, 12 per cent of all public order offenses were charged against African Canadians as compared to 11 per cent Aboriginal peoples, and 2 per cent Chinese, vastly disproportionate to their composition in these cities. Of those charged, African Canadians and Aboriginal peoples were more likely to be imprisoned¹⁶⁶;
- In efforts to control public order offences, police in these Ontario cities exhibited a tendency to focus on African Canadians. This resulted in the use of "disorderly-house and other public-morals laws ... to control Black populations¹⁶⁷;
- African Canadians were required to appear in court more often than other groups to defend against charges of property-crime and received longer sentences when convicted¹⁶⁸;
- African Canadians found in the area of where property offences occurred "were often identified as suspects, and the courts often found them guilty on the basis of such limited evidence¹⁶⁹;
- The mean sentence length for African Canadians for property offences was 10.51

African Canadians, eg., Magistrate Dennison at 131

¹⁶⁴ Ibid at 125-126. He later suggests at 129 that "...stereotypes and general fears regarding the criminal proclivities of Blacks were prevalent in media reports of the early 1900s. The descriptions of Black criminals emphasized that, like the Chinese, they were prone to involvement in drug and other public order offences such as gambling and prostitution. However, of greater concern to the public was the notion that Blacks were violent and likely to be involved in more serious forms of violence than the Chinese, and thus posed a greater threat." To support his contention, Mosher cites at 129-134 news reports in several media, including the Hamilton Spectator, the Globe, London Free Press, London Advertiser, Toronto Daily Star, Windsor Evening Record,

¹⁶⁵ Ibid at 146-147.

¹⁶⁶ Ibid at 162.

¹⁶⁷ Ibid at 170. On this point, Mosher suggests at 161-162 that "Similar to the situation with respect to violations of drug legislation, arrests for public order crimes almost exclusively involve proactive police work and the exercise of considerable discretion on the part of police in terms of who they arrest for the commission of such crimes."

¹⁶⁸ Ibid at 176-177. Mosher also suggests at 179 that qualitative data supports the argument that "sentencing judges ...(regarded) the testimony of Black offenders as unreliable, which at least in part explains the greater likelihood of imprisonment."

¹⁶⁹ Ibid at 180.

months compared to 8.33 for Aboriginal peoples and 6.26 for Whites¹⁷⁰;

- In terms of imprisonment decisions for violent offenders, the perception of African Canadians as prone to violence promoted by the media "...may have influenced judicial perceptions of these offenders..." This had a particularly adverse impact on low-income African Canadians¹⁷¹.

Mosher's analysis focuses on the period between 1892 and 1961, an expanse of 69 years. His research provides insight into the media's influence on public values and judicial considerations, as well as the propensity of police to apprehend suspects based on prevalent racial biases. While he demonstrates that Chinese Canadians were often the focal point of police attention, his findings about African Canadians, particularly in terms of property offences and violent crimes, indicate the pervasiveness of anti-Black racism within Canadian society.

More recently, the Commission on Systemic Racism in the Ontario Criminal Justice System addressed similar issues and made some striking conclusions. In addition, the African Canadian Legal Clinic has released a report identifying the cumulative impact of anti-Black racism in Canadian society, including the criminal justice system. Both of these reports build on the many community concerns expressed in section one. Further, the African Canadian Legal Clinic report discusses the apparent unwillingness of governments to hold police accountable for their actions. This is particularly true in Ontario following the 1995 decision of the newly elected Conservative government to eliminate citizen involvement in complaints against police¹⁷².

These accounts clearly indicate that racism has been historically pervasive within the criminal justice system, that it is embedded in the law itself, and that it has had a profound impact on African Canadians. While racism in Canadian society predates the practice of racial profiling, anti-Black racism in law enforcement did not just appear in Canada and its urban centres following changes in immigration. Rather, it has a deep history replete with anecdotes, laws, court room challenges and mob violence. This history has continued and extends itself to the present day in one form or another.

What's Happening Brother?

Following the government reports reviewed in the previous section, more recent reports have attempted to understand the phenomenon of racism in law enforcement. Several of these reports have taken a statistical approach to examining the impact of policing on subordinate racialized groups, particularly African Canadians. Whether limited or expansive in scope, the studies support the same conclusions – African Canadians are treated very differently by the police and other key players in the criminal justice system and this treatment has had an adverse impact on the lives of both individuals within this community and the community as a whole. As well, these studies contextualize the practice of racial profiling and bring into high relief the background against which the practice occurs.

¹⁷⁰ Ibid at 181.

¹⁷¹ Ibid at 187-188

¹⁷² See ***Systemic Racism in the Ontario Criminal Justice System*** Margaret Gittens and David Cole (co-chairs) and Charles C. Smith and Erica Lawson ***Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination***, 2002, at 21 – 34. This report was cited as significant evidence in *Quinne v. Borde*, JA Rosenberg.

One of the first of such studies, conducted by Phillip Stenning, points to the differential treatment of African Canadian inmates in three Toronto detention centres¹⁷³. Stenning reveals that:

- African Canadians were significantly over-represented in the 'major' offence category, 58.8% v. 25% for Whites and 28.9% for Others. This category included robbery (Whites, 5%, African Canadians 29.4%, Others 2.6%) and drug offences (Whites 10%, African Canadians 19.6%, Others 15.8%);¹⁷⁴
- African Canadians were treated differently by police generally with police behaviour toward them being unfriendly and less polite.¹⁷⁵ While it may be suggested that these variations are not statistically significant, more dramatic differences are evident in terms of allegations of police verbal abuse where it is indicated that African Canadians were: sworn at more often by police (58.8% v. 38.3% for Whites and 43.6% for Others) and subject to racial epithets more often as well with 31.4% indicating they had been subject to racially derogatory remarks from police officers v. 5% for Others;¹⁷⁶
- In responding to 'minor offences', police drew their weapons in the act of arresting African Canadians more frequently than with other groups (25% v. 6.7% for Whites and 6.7% for Others)¹⁷⁷; and
- Police use of force both at time of arrest and after arrest were significantly different for African Canadians (33.3% and 31.4% respectively v. 25% and 25% for Whites and 30.8% and 23.1% for Others)¹⁷⁸.

Limited in scope, this data provides some insight into the unequal relations between police and African Canadians, Whites and Others. In noting these differences, it must be acknowledged that Whites and Others were, in some instances, treated less favourably than African Canadians. Based on this, Stenning concludes that, while there is evidence of attitudinal differences in police treatment of subordinate racialized groups, particularly African Canadians "...credible systematic evidence of discriminatory use of force by police against members of visible minority groups is not presently available..."¹⁷⁹

Other studies also support assertions of differential treatment of African Canadians. For example, in 1993 the Canadian Civil Liberties Association conducted a survey of 150 youth which revealed that 71 per cent of individuals from subordinate racialized groups v. 50 per cent of Whites who had come in contact with the police had negative experiences. Several of

¹⁷³ See *Police Use of Force and Violence Against Members of Visible Minority Groups in Canada*, Canadian Centre for Police Race Relations, 1994, report prepared for the Solicitor General of Canada. The study was conducted during the spring/summer of 2003 and 150 inmates (60 Whites, 51 Blacks and 39 Other non-Whites). Although Stenning suggested that the research precludes considerations about police-citizen contacts more generally, when contextualized within the scope of both the historical treatment of African Canadians and contemporary and subsequent studies, the results of this limited research indicate of a pattern of treatment that is pervasive within the criminal justice system.

¹⁷⁴ *Ibid* at II.9.

¹⁷⁵ *Ibid* II.10-11.

¹⁷⁶ *Ibid* II.14-15

¹⁷⁷ *Ibid* II.23

¹⁷⁸ *Ibid* II.24-24

¹⁷⁹ *Ibid* III.1

these youth allege they had been subjected to racial slurs by police officers during questioning¹⁸⁰. These statistics are verified by Scot Wortley's 1994 research which found that:

- 28.1% of African Canadians report being stopped by police compared to 18.2% Whites and 14.6% Chinese Canadians;
- 16.8% African Canadians report being stopped twice by police compared to 8.0% Whites and 4.7% Chinese Canadians;
- 11.7% African Canadians report being stopped by police "unfairly" in the past two years compared to 2.1% Whites and 2.2% Chinese Canadians;
- 42.7% African Canadian males report being stopped by police in the past 2 years compared to 22.1% Whites and Asians;
- 28.7% African Canadian males report being stopped twice in the past two years compared to 9.9% Whites and Asians¹⁸¹.

In noting these differences, Wortley argues that:

...racial differences in the frequency of involuntary police contact is a strong indicator of the extent to which people from different racial backgrounds come under police scrutiny. If it can be documented that certain types of people are more likely to come under police surveillance, it is logical to assume that such people are also more likely to be caught for breaking the law. Thus, racial differences in street surveillance practices may help explain profound racial differences in arrest and incarceration rates¹⁸².

Wortley references others who indicate the impact of such treatment on peoples of African descent¹⁸³ and notes the negative impact of such practices on the opinions held by people of African descent of the police¹⁸⁴. These practices have led African Canadians to perceive that

¹⁸⁰ As cited in Mosher supra note 153 at 18. Mosher's references L. Sarick 1993 'Minority Teenagers Accuse Police of Unfair Treatment' *Globe and Mail*, November 3.

¹⁸¹ See *The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice* paper presented to the 48th Annual Conference of the American Society of Criminology, Chicago, 1997. Further, the Canadian Race Relations Foundation reports that: a "...survey showed that more African Canadian Toronto residents (28%) than White (18%) or Chinese (15%) report being stopped by the police between 1993 and 1995; and that the perceptions of differential treatment afforded racial minorities is a significant point in studies conducted by the Quebec Human Rights Commission in 1988 and by Professor Phillip Stenning in his 1994 research for the Canadian Centre for Police-Race Relations.

¹⁸² Supra note 155 (Usual Suspects) at 2.

¹⁸³ Ibid (Usual suspects) at 3 where Wortley quotes Erika Johnson 'A Menace to Society: The Use of Criminal Profiles and Its Effects on Black Males' *Harvard Law Journal* 1995 at 629-664 who argues that "Because these stops occur frequently, the racial harm inflicted on black men is great. Such random stops have led many black males to believe that just by being a black male they become an automatic target of suspicion for virtually every crime ... This mistrust, anger and fear of police authority by black males cannot be quickly erased regardless of how minimally intrusive an investigatory stop may be.". Also, at 4 Wortley references Jerome Skolnick *Justice Without Trial: Law Enforcement in a Democratic Society*, New York: John Wiley and Sons, 1996, who has commented that police view youth of African descent as 'symbolic assailants' and, thereby, stop and question them as a means of crime prevention.

¹⁸⁴ Supra note 155 at 2-3. Also, in *Under Suspicion: Race and Criminal Justice Surveillance in Canada*, at 14 Wortley points out that 28% of African Canadians included in a survey on the matter believe they were stopped solely because of their race and another 13% felt they were stopped for a

their treatment is significantly different from Whites. For example, 75% of African Canadians perceive they are treated differently than Whites by police and this perception is shared by 50% of Whites and Chinese. African Canadians (55%) perceive that they are treated worse than Whites and this perception is shared by Whites (71%) and Asians (79%). Further, 55% of African Canadians perceive police will use force against them more frequently than Whites and Whites (33%) and Asians (42%) share this perception¹⁸⁵.

The anecdotal experiences and statistical data pointing to the use of racial profiling has been supported by the findings of the Commission on Systemic Racism in the Ontario Criminal Justice System which released its final report in 1996¹⁸⁶. The Commission reported the following findings:

- Police stop African Canadians twice as often as Whites, particularly African Canadian males;
- Whites are less likely (23%) to be detained before trial than African Canadians (30%), particularly for drug charges (10%, against 31% for African Canadians);
- Incarceration for African Canadians for drug trafficking increased by 1,164% from 25% of the 524 admissions in 1986/87 to 60% of the 2,616 admissions in 1992/93. This compares to a 151% increase in incarceration for Whites during the same period;
- For drug charges, White accused were released more often than African Canadians. African Canadians were also denied bail more frequently and the conviction rate of African Canadian men was also higher - 69% as opposed to 57% for White men.
- In regard to sexual assaults and bail violations, African Canadians are charged 68% of the time v. 47% for Whites. For drug offences, it is 66% to 35%, respectively. For simple possession, 49% of African Canadian men compared to 18% of White men are sentenced to prison;
- African Canadians are over-represented in the prison population. In the six year period leading up to 1993, it was found that the African Canadian population of Ontario increased by 36% while the number of African Canadian prisoners admitted to Ontario prisons increased by 204%. The number of White prisoners admitted increased by only 23%;
- Older African Canadian women with a university degree have a 16% chance of being stopped by the police, compared to only a 6% probability for older White and Asian females with a university education;
- While young, less educated White and Asian women have almost the same chance (17%) of being stopped as African Canadian women in the same category (18%), young African Canadian women with a university education have a much higher probability of being stopped (22%) than young White or Asian women with similar levels of educational attainment (9%). As well, older African Canadian women with a university

'bogus violation'. He further suggests "These respondents maintain that the police simply made up a fictional violation to justify the stop."

¹⁸⁵ See Wortley *Justice For All? Race and Perceptions of Bias in the Ontario Criminal Justice System – A Toronto Survey*, in Canadian Journal of Criminology, October 1996 at 447, 449 and 450 respectively.

¹⁸⁶ Supra note 172.

degree have almost the same chance of being stopped (16%) as younger White and Asian women without a university education (17%)¹⁸⁷;

- In the prison system, African Canadians and other minorities are subjected to racism on a daily basis. This occurs in the form of racial slurs, and being moved more frequently than Whites to detention centres and prisons outside the jurisdiction where the crime was committed.. Moving a prisoner has the consequence of further isolating them from their families. The isolation lessens inmates' opportunities to get the support they need for effective rehabilitation and transition back to society. Many times poor transition is at the root of recidivism. This is also one way in which police targeting of young African Canadian males leads to their criminalization.

The Commission also noted that “[n]o evidence shows that African Canadian people are more likely to use drugs than others or that they are over-represented among those who profit from drug use. Events of the last few years do show, however, that intensive policing of low-income areas in which African Canadian people live produces arrests of large and disproportionate number of African Canadian male street dealers. Once the police have done this work, the practices and decisions of the crown prosecutors, justices of the peace and judges operate as a conveyor belt to prison”¹⁸⁸. The U.S. practice of drug profiling was introduced into Canada in 1994 and the RCMP trained over some 10,000 law enforcement personnel its use.¹⁸⁹ Despite the Commission findings, the training continued.

And the trail of evidence did not stop there. In another report, African Canadians described other examples of “policing Black” where they, young males in particular, were exposed to excessive policing. The study done by the Committee to Stop Targeted Policing in 2000 found that 2 out of 3 interviewees (of the 167 interviewees, many of them African Canadians, who were from low-income populations and users of social agencies) reported being assaulted or threatened with assault by police. Actual assaults ranged from being beaten, slapped, punched and maced. Threats included threats of death (37%). Other intimidation tactics used included: police harassment (74%), threatening arrest (59%), conducting searches without good cause (54%), arresting individuals on false or improper charges which were eventually thrown out of court (35%) and taking photographs of individuals on the street without their consent (25%)¹⁹⁰.

Recent research by Carl James and Robynne Neugebauer provide remarkably similar

¹⁸⁷ These patterns continue with the same age and educational categories for African Canadian males, leading to a greater perception of racism in policing than educated Whites or Asians. As Wortley describes it, “...to upper and middle class African Canadians...police stops are evidence that despite their social and career accomplishments, despite their law-abiding behaviour and efforts to be good citizens, law enforcement officials continue to see their race....Clearly, for many racial minority people, police stop and search practices reinforce the already strong perception that when it comes to the law - race still matters.”

¹⁸⁸ Supra note 172 at 83.

¹⁸⁹ See *Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention*, **Osgoode Hall Law Journal**, Vol. 40, No.2, David A. Tanovich at 152 where he also writes: “While there is no evidence that OPCJ (Operation Pipeline/Conway/Jetway) explicitly encourages officers to use race-based pretext vehicle stops as an opportunity to discover contraband, this is a reasonable inference given the American experience.” In the footnote to this point, he also adds “We may never know the methodology of OPCJ since access to the RCMP training materials will likely be refused on the basis of public interest privilege.”

¹⁹⁰ See **Handbook to Surviving Bad Policing**, the Ontario Coalition Against Poverty. These findings are validated in Gittens and Cole *ibid*.

findings. Based on interviews with 50 African Canadian youth from six different cities in Ontario, James found that these youth reported being stopped by police was a common occurrence primarily attributable to the colour of their skin. Neugebauer conducted interviews with 63 African Canadian and White youth in Toronto and found the same result.¹⁹¹ These recent studies have been supported in further work by Wortley (with Julian Tanner) based on a survey of 3,400 Toronto high school students which suggests that:

- Over 50% of African Canadians surveyed claim to have been stopped and questioned by the police on two or more occasions in the past two years, compared to 23% Whites, 11% Asians and 8% South Asians;
- Over 40% of African Canadians claim to have been searched by the police in the past two years compared to 17% Whites and 11% Asians;
- 34% of African Canadians who have not been involved in criminal activity claim to have been stopped by the police on two or more occasions in the past two years compared to 4% Whites;
- 23% of African Canadians not involved in 'deviant' activity claim to have been searched by police compared to 5% Whites; and
- 65% of African Canadians involved in selling drugs claim to have been arrested compared to 35% of White drug dealers¹⁹².

In assessing the impact of these statistics, David A. Tanovich suggests:

Racial profiling has, thus, created a disproportionately large class of racialized offenders. It has also criminalized many predominantly black neighbourhoods in Toronto that are commonly referred to by the police as "high crime areas". This criminalization has contributed to the perpetuation of the belief that there is a link between race and crime. For example, a 1995 Angus Reid Gallup poll indicated that 45 per cent of those surveyed believe that there is such a link. The widespread belief that the face of crime is black has stigmatized the black community, and has had a tremendously negative impact on their dignity and self-worth¹⁹³.

Public Perceptions and the Media:

It can be argued that the effects of racial profiling have been magnified through consistent media perspectives which present images of African Canadians as troublesome, criminal and dangerous, thereby, deserving the attention conferred on them by the police. Examinations

¹⁹¹ See James 'Up to No Good': *Black on the Streets and Encountering Police*. In Victor Satzewich (ed.) **Racism and Social Inequality in Canada: Concepts, Controversies and Strategies of Resistance**. Toronto: Thompson 1998 at 157. Also see Neugebauer *Kids, Cops, and Colour: The Social Organization of Police-Minority Youth Relations*. In Robynne Neugebauer (ed.) **Criminal Injustice: Racism in the Criminal Justice System**. Toronto: Canadian Scholars Press, 2000

¹⁹² See Scot Wortley and Julian Tanner **Data, Denials and Confusion: The Racial Profiling Debate in Toronto**, 2003 at 7-9

¹⁹³ *Supra* note 189 at 162. He also cites in footnote 73 that "Overrepresentation has also disadvantaged the black community in other ways. Many individuals leave prison scarred and traumatized while others leave with deadly diseases such as HIV or tuberculosis. Employment and educational opportunities which were scarce prior to incarceration become even scarcer after release from prison. Finally, in many black neighbourhoods, the role model for young black men is their father, brother, or friend serving time in prison."

of media perspectives on policing in the African Canadian community have been touched upon in the first section, particularly in reference to Akua Benjamin's work¹⁹⁴. Benjamin returns to this issue in *The Black/Jamaican Criminal: The Making of Ideology* where she explores in depth approximately 266 articles in the Toronto Sun on 'Black/Jamaicans' involved in criminal activities. In doing so, she observes that the language and discourse of these articles reproduce stereotypes and racist ideologies about African Canadians and crime. Furthermore, being 'othered' in this way, has negative consequences for African Canadians in terms of social exclusion, marginalization and banishment through deportation.¹⁹⁵

Benjamin provides numerous references to media articles in which stereotypes of African Canadians are found. Establishing this foundation, she then focuses on the connections between such stereotypes and the criminalization of African Canadians. In her summary she states: "In the Sun's news reports on Jamaicans and crime, language and discourse readily recognizable and conveying of a racial profile was used to identify the suspect or perpetrator of the crime¹⁹⁶." In drawing this conclusion, Benjamin brings forward findings of several other studies. For example, in citing Wortley's *Misrepresentation or Reality: The Depiction of Race and Crime in Toronto Print Media*, she notes that the analysis is based on over 9,000 stories appearing in Toronto-area newspapers over a four-month period in 1997-98 which revealed that "...90% of the stories involving Black people deal with crime, sports or entertainment. Black people are especially likely to be affiliated with crimes of street violence and drug trafficking ...(and) that Black crimes were often attributed to problems within the Black community or to aspects of Caribbean culture."¹⁹⁷

Benjamin finds additional similarities in the work of Wortley, Hagan and MacMillan, and, Livy Visano in their examination of the "Just Desserts" shootings¹⁹⁸. She quotes the former who wrote: "The mass media provide a symbolic platform on which crimes and criminals are paraded before the public and collectively condemned. These media portrayals can be understood as simple morality plays that reaffirm ideas about right and wrong and consolidate the collective conscience."¹⁹⁹ Such concerns had previously been explored by Frances Henry in her work on racism in the media where she noted that African Canadians are problematized as requiring a disproportionate amount of political attention and public resources²⁰⁰. Henry, Hastings and Freer examined articles in the Toronto Star on April 27, May 5, 9, 12 and June 1, 1996 which lend considerable weight to the view that Jamaicans have been stereotyped as a criminal element²⁰¹. Henry and Tator continue this examination

in *Discourses of Domination: Racial Bias in the Canadian English-Language Press*²⁰². In this

¹⁹⁴ See *The Social and Legal Banishment of Anti-Racism in Crimes of Colour: Racialization and the Criminal Justice System in Canada*, Wendy Chan and Kiran Mirchandani (eds.), 2002, Broadview Press, at 177.

¹⁹⁵ Ph.D. thesis 2003 at 1-8.

¹⁹⁶ Ibid at 250

¹⁹⁷ Ibid at 33. For more on Wortley's work see *Breaking the links between marginality and condemnation*, Schissel, B and Brooks, C. (eds.), 2002

¹⁹⁸ Ibid 33 and 36 respectively for work entitled *Just Des(s)erts? The racial polarization of perceptions of criminal injustice*, *Law and Society Review*, 31: 1997 at 637-676, and, *Crime and Culture: Refining the Traditions* Toronto: Canadian Scholars Press, 1998.

¹⁹⁹ Ibid at 34

²⁰⁰ See with Tator, Mattis and Rees *The Colour of Democracy: Racism in Canadian Society* Harcourt Brace Canada, 1995

²⁰¹ See *Perceptions of Race and Crime in Ontario: Empirical Evidence from Toronto and the Durham Region*, *Canadian Journal of Criminology*, 1996.

²⁰² University of Toronto Press, 2002.

study, they argue that

One of the most important factors in the racializing of crime is the over-reporting of crimes allegedly committed by people of colour – especially Blacks.

There has been considerable concern about how the media represent people of colour, and especially Blacks, as having criminal propensities. However, it should also be noted that the media construct them in ways that are, furthermore, damaging to their personal identity and to their social status in the community²⁰³.

In examining 2,840 news articles on crime from the *Toronto Star*, *Globe and Mail*, and *Toronto Sun* for two months of each of the years 1994, 1996 and 1997, Tator and Henry indicate that:

- 39% of the articles in the *Star* and the *Sun* about Jamaicans related to such issues as crime, justice, immigration and deportation;
- Racial identifiers were used twice as often in reports on individuals from subordinate racialized groups, particularly African Canadians, than Whites;
- 46% of all crime articles in the *Globe*, 38,5% in the *Star* and 25.6% in the *Sun* “used a racial or ethnic descriptor (that) involved Blacks or people of Caribbean origin”;
- Regarding articles on deportation, 44 of the 102 articles in the *Star*, *Globe* and *Sun* focused on African Canadians/Jamaicans compared to 16 for Whites and 15 for Nazis;
- Approximately 33% of all photos in crime stories depicted individuals from subordinate racialized groups with African Canadians comprising 44% of these images despite being only 7% of the Toronto area population²⁰⁴.

Tator and Henry also explore through discourse analysis the media reporting around the previously mentioned “Just Desserts” shootings. In analyzing 210 articles, their critical linguistic analysis suggests that the media developed three discourses on aspects of law and order: (1) the discourse of gun control (51 articles); (2) the discourse of the young offender (18 articles); and (3) the discourse of immigration/deportation (34 articles)²⁰⁵. Following the *Toronto Star* series on racial profiling, Tator and Henry once again reviewed media reports on the controversy surrounding the series and discovered a number of discourses, including:

- The discourse of denial where authority figures, such as the Chief of Police, the Mayor, the Chair and members of the Police Services Board and the President of the Police Association, denied the veracity of the media reports²⁰⁶;
- The discourse of attacking human rights which describes the challenges faced by the Ontario Human Rights Commission when it announced it was conducting an inquiry

²⁰³ Ibid at 164.

²⁰⁴ Ibid 167-68.

²⁰⁵ Ibid 168-180.

²⁰⁶ See *Racial Profiling in Toronto: Discourses of Domination, Mediation and Opposition*, Canadian Race Relations Foundation, 2003 at 28-33

- into racial profiling²⁰⁷;
- The discourse or reverse discrimination which describes how the Chief of Police and others suggested that the *Star* series has victimized them and they have "...become objects of prejudice and discrimination, but also their important work in society is being denigrated, and they even fear for their own safety²⁰⁸."; and
 - The discourse of "Othering" and the focusing on the Jamaican connection to crime²⁰⁹.

This most recent research makes clear the continuum in media attention to African Canadians that is a form of racial profiling itself and, when linked with the content of crime and criminality, support and contribute to police values and beliefs which, in turn, likely result in supporting and contributing to the racial profiling of individuals from this community.

Thank God the Judge Was Awake Some of The Time

While the police and media seem to have developed a common perception of African Canadians, something very different appears to be taking place in court rooms and in human rights commissions. In this context, case law, public inquiry and tribunal rulings have consistently applied a critical lens to police practices of racial profiling, naming such practices directly and indicating quite openly the impact these practices have on African Canadians in particular.

Starting in 1990 with *R. v. Ladouceur*²¹⁰, the Supreme Court of Canada considered whether routine traffic stops violate the *Charter of Rights and Freedoms*, particularly sections 7, 8 and 9. While the majority in this case ruled that there was no violation of these sections, comments from the Court can be interpreted to indicate that these random stops must be of short duration, requiring production of few documents and of "minimal inconvenience" to the motorist²¹¹. In making this comment, the Court expressed its concern about the potential abuse of police power which, while unfounded in the case, caused them to comment on the need for officers to have a legal basis for requiring vehicle stops, such as checking a driver's sobriety or the condition of the vehicle. Further, the Supreme Court established that only questions regarding driving offences may be asked by an officer upon stopping a motorist, and that any additional invasive procedures require reasonable and probable grounds. Furthermore, any evidence uncovered due to an unlawful stop may be excluded in criminal proceedings under s. 24(2) of the Charter²¹²

²⁰⁷ Ibid at 33-35 where the authors cite the opposition to the inquiry from the former Premier of Ontario and the Minister of Public Safety and Security

²⁰⁸ Ibid at 36

²⁰⁹ Ibid at 40-42

²¹⁰ 1 S.C.R. 1257

²¹¹ The operative assumption in this case was that the *Highway Traffic Act* was saved by Section 1 of the Charter given that the devastating implications of road accidents and potential for fatality if proactive intrusive actions were not taken by the police, eg., pulling over a person suspected of driving while impaired [1286]. However, supra note 189 at 168 David M. Tanovich argues that this case may actually allow police to engage in racial profiling through use of pretext stops.

²¹² Ibid . [1287]. See also *R. v. Mellenthin* [1992] 3 S.C.R. 615 where the matter concerned an officer stopping and questioning a motorist regarding a gym bag seen in the car. The SCC found that the main goal of police stops is to check for licenses, sobriety, ownership, vehicle mechanical fitness and insurance and that police use of stops should not go beyond these objectives. "A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over. Unless there are reasonable and probable grounds for conducting the search, or drugs,

In particular, the dissent in this case expressed concern that allowing roving, random stops would give any officer the power to stop any vehicle, at any time and place, even if the reason is based on subjective factors such as the race of the vehicle occupants. The dissent noted:

Indeed, ...racial considerations may be a factor too. My colleagues states that in such circumstances, a Charter violation may be made out. If, however, no reason need be given nor is necessary, how will we ever know? The officer need only say, 'I stopped the vehicle because I have the right to stop it for no reason. I am seeking unlicensed drivers.' If there are bound to be instances where admittedly Charter violations which cannot be justified will occur, can we overlook these and approve a practice even if in its general application Charter breaches can be justified? ... How many innocent people will be stopped to catch one unlicensed driver?²¹³

In *R. v. Simpson*²¹⁴ the issue of whether a vehicle stop constitutes a detention within the meaning of section 9 of the Charter was determined. Given that section 216(1) of the *Highway and Traffic Act* authorizes stops, including random stops, to enforce highway traffic and road safety laws, it was determined that if a stop or detention is unrelated to road safety concerns or operation of a vehicle, a police officer has no general detention power, though this does not prevent detentions (short of arrest) for investigative purposes in all circumstances. In reaching this conclusion, the Court wrote that it is "...essential to keep in mind the context of the particular police-citizen confrontation. Constable Wilken (the officer in this case) was investigating the appellant and the driver of the car....It was an adversarial and confrontational process intended to bring the force of the criminal justice process into operation against the appellant. The validity of the stop and the detention must be addressed with that purpose in mind."²¹⁵

alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted." [¶27]

²¹³ Ibid at 1267. For additional perspectives regarding the courts views on race, it is also useful to look at *R. v. Wilson* (1996), 107 C.C.C. (3d) 87 (Ont. C.A.) at 92 where the trial judge's decision to not allow the defence to challenge jurors for racial bias was deemed to be in error and a new trial ordered. In addition, see *R. v. Williams*, [1998] 1 S.C.R. 1128 where the Court reasoned: "To suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as sworn jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it....It [racial stereotyping] rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so." Further, see *R. v. Borde* (Ont. C.A.) (Feb. 10, 2003) a case where a young African Canadian male committed various offences, 2 particularly violent ones using firearms. The youth was sentenced to 5 years and 2 months at trial. At appeal, the issue was whether the appellant's sentence should be reduced because of systemic and background circumstances. In this regard, the Appellant's counsel entered evidence (e.g., supra note 172 the report of the Commission on Systemic Racism in the Ontario Criminal Justice System and the African Canadian Legal Clinic's Report to CERD), to inform the court about the impact of these circumstances on African Canadian youth. In reviewing this evidence, the youth's, sentence was reduced to 4 years and 2 months. The Court suggested that [¶2]; "Systemic racism and the background factors faced by black youths in Toronto are important matters and in another case I believe that they could affect the sentence.", **and that the** court may consider how such factors "may have played a role in the commission of the offence and the values of the community from which the offender comes.";

²¹⁴ {1993} 12 O.R. (3d) 182 (Ont. C.A.)

²¹⁵ Ibid [492 - 495]. It is important to acknowledge that the officer conceded that the stop was not made for highway traffic concerns, but only to investigate possible drug-related offences at a possible "crackhouse" [499] This was engagement if performing his duty as a police officer [499] but the

Despite this, different criteria may apply in non-adversarial environments where a crime prevention objective may not be at play. For example, the Court expressed concern that "...subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation..." The Court further argued that an articulable cause is required for an officer to detain a person in order to determine a person's involvement with criminal activity. To contextualize this, an articulable cause was described as "...a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation²¹⁶."

*R. v. Richards*²¹⁷ is the case most cited where racial profiling was clearly defined as "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 group²¹⁸."

In *R. v. Golden*²¹⁹ the Supreme Court suggested that "...minority groups in Canada are over-policed and that *Charter* standards need to be developed to 'reduce the danger of racist stereotyping by individual police officers.'"²²⁰ Shortly after this case, *R. v. Peck*²²¹ addressed profiling in a case where two African Canadian youth with two young women who were stopped and searched in an alleyway by an undercover officer who indicated race and other factors (e.g. the street location which was suspected of being a place for drug transactions) as the basis for suspicion. In finding that the race of the accused was a significant factor in the officer's decision to stop them for questioning, the Court determined that there was neither a basis for investigative detention nor reasonable grounds to suspect criminal activity. They found that race, especially that of a "young black male" either alone or in context of facts does not provide a basis for reasonable grounds for suspicion of criminal activity. In this case, the Court concluded that "[s]tereotypical assumptions linking young black men and the illegal use of narcotics do not provide a lawful basis to detain or arrest them."²²²

In *Brown v. Durham Regional Police Force*²²³, the Court determined that a vehicle stop under section 216 of the *Highway Traffic Act* can be lawful even if made for non-highway safety purposes if these other purposes are not improper. Improper purposes "include purposes which are illegal, purposes which involve the infringement of a person's constitutional rights, and purposes which have nothing to do with the execution of a police officer's public duty. Officers who stop persons intending to conduct unauthorized searches, or who select persons to be stopped based on their sex or colour, or who stop someone to vent their personal animosity toward that person all act for an improper purpose²²⁴." Stating strong policy

officer lacked articulable cause since suspects attendance at location was sole the factor for the officer's suspicion of suspects' involvement in crime.

²¹⁶ *Ibid* [500-504].

²¹⁷ (1999), 26 CR (5th) 286 (Ont. C.A.)

²¹⁸ *Ibid* [295, para. 24]

²¹⁹ (2001), 47 C.R. (5th) 1 (S.C.C.)

²²⁰ As cited in David M. Tanovich *Operation Pipeline and Racial Profiling*, **Criminal Reports** 1 C.R. (6th) at 52.

²²¹ [2001] O.J. No. 4581 (Ont. S.C.J.)

²²² *Ibid* [¶16] - [¶18]

²²³ (1998) 43 O.R. (3d) 223 (C.A.)

²²⁴ *Ibid* at 238

reasons for invalidating stops where police were motivated by improper purposes, the Court further determined that:

Highway safety concerns are important but, they should not provide the police with a means to pursue objects which are themselves an abuse of the police power or are otherwise improper. For example, it would be unacceptable to allow a police officer who has valid highway traffic safety concerns to give effect to those concerns by stopping only vehicles driven by persons of colour. Section 216(1) of the HTA does not, in my view, authorize discriminatory stops even where there is a highway safety purpose behind those stops²²⁵.

*R. v. Brown*²²⁶ was determined by the Ontario Court of Appeal on April 16, 2003. This case concerned an African American who argued that he was the subject of a racially discriminatory stop and charged with impaired driving. At trial, defence submitted evidence of racial profiling and raised s. 9 Charter of Rights and Freedoms argument. The trial judge repeatedly assisted crown witness (police officer), denounced the defence counsel's racial profiling allegations as "nasty", and "completely unwarranted" and further suggested that the defendant should apologize to the officer. The Court of Appeal determined that the trial judge's conduct gave rise to reasonable apprehension of bias, overturned the conviction and ordered a new trial.

In addition, a recent publication of the Ontario Human Rights Commission (OHRC) and a ruling of the Nova Scotia Human Rights Tribunal indicate the reality and impact of racial profiling. As noted earlier, following the Toronto Star racial profiling series, the OHRC announced that it intended to conduct a public inquiry on the matter²²⁷. The purpose of the inquiry was to raise public awareness regarding this contentious issue and to respond to community concerns about racial profiling and its effects, on individuals, families and society as a whole. To do this, the inquiry looked at concerns regarding housing, services, education and private security. The OHRC received over 800 responses to its public inquiry with approximately 50 per cent of these concerning racial profiling. Many of the concerns received were about the police and the OHRC includes several anecdotes on this topic.

In December, 2003 Nova Scotia Human Rights Tribunal underscored the work of the OHRC with its ruling in the case of Kirk Johnson, a well-known professional boxer who filed a complaint against the Halifax Regional Police alleging that he had been racially profiled on April 12, 1998 while a passenger travelling on Highway 111 in Dartmouth, Nova Scotia. The Board of Inquiry substantiated the allegation and ruled that the Halifax Regional Police service was obligated to employ two consultants to develop and implement anti-racism and diversity training and that these consultants would prepare a report on this matter. The ruling also required the Halifax Regional Police Service to review their policies on stops and searches and to prepare proposals for the Commission's review on how information on the role of race in traffic stops can be gathered²²⁸.

²²⁵ Ibid

²²⁶ Ont. C.A., C37818

²²⁷ See *Paying the Price: The Human Cost of Racial Profiling*, December, 2002 at 1.

²²⁸ See *Kirk Johnson v. Michael Sanford and the Halifax Regional Police Service, Nova Scotia Human Rights Commission, Board of Inquiry*, Philip Girard, Dec. 22, 2003. See pages 40-41 for specific orders.

What's All the Fuss?

All of these perspectives, based on anecdotal and statistical research, preceded or ran parallel to the Toronto Star series. As such, it should not be surprising that the Star's research replicates and extends the evidence already in the public domain. However, what is significant about the Star's series is the massive amount of data examined and the period of time which came under scrutiny. The data reviewed included information on 480,000 incidents in which an individual was charged with a crime or ticketed for a traffic offence. This data represented the total population of criminal charges (approximately 800,000) from the years following the release of the report of the Ontario Commission on Systemic Racism in the Criminal Justice System (1996-2002). When matched with the findings reported by the Commission, this data enables an examination of over a decade worth of experience (1989-2002), which supports the premise that African Canadians are 'singled out' by the police.

For example, among its findings, the Star revealed the following:

- Although only 8.1% of Toronto's population, African Canadians comprise 34% of drivers charged with out-of-sight violations;
- African Canadians are over-represented by: 4.2 times for out-of-sight driving offences, 3.8 times for cocaine possession and 2.1 times for simple drug possession;
- Despite comprising 63.8% of those charged with simple drug possession (over 10,000 cases), Whites were released at the scene 76.5% of the time compared to 61.8% for African Canadians;
- After being taken into custody, African Canadians were held for court appearance 15.5% of the time compared to 7.3% for Whites;
- For cocaine possession (over 2,000 cases), 41.5% of African Canadians were released at the scene compared to 63% of Whites;
- African Canadians comprise 27% of all violent charges even though they only comprise 8.1% of the population.
- In 51 Division, 40% of African Canadians charged with one count of cocaine possession were held for bail hearings compared to 20% for Whites;
- African Canadians are over-represented in police divisions with low African Canadian populations. For example, they are 4 times over-represented in out-of-sight traffic offences for 42 Division and 7 times over-represented in 52 Division despite the fact that these Divisions do not include significant number of African Canadian residents. This data supports the African Canadian community's anecdotes that they are singled out by police²²⁹.

Based on an analysis of the data, the Star's evidence supports the notion that African Canadians are over-represented in police records and that racial profiling is an alarming

²²⁹ See series of articles authored by Jim Rankin, Jennifer Quinn, Michelle Sheppard, Scott Simmie and John Duncanson, 2002, *Singled Out: An Investigation into Race and Crime*, October 19, *Police Target Black Drivers*, October 20, *Black Crime Rates Highest*, October 26, *Life and Death on Mean Streets*, October 27

reality. It also reveals that African Canadians may be treated more harshly by the police after arrest than Whites and are more likely to be detained and taken in for processing than Whites. At the station, African Canadians are more likely to be held in custody for a bail hearing than Whites.

While racial profiling by the police is critically important in itself, the continued prevalence of this practice must be placed within an overall social and historical context. The experience of peoples of African descent in Canada has served to marginalize and oppress this community. Racial profiling simply serves to reinforce this history and magnify the impact of discrimination faced by African Canadians in every facet of public and private life.

***PERFORMANCE, ACCOUNTABILITY
AND THE URGENT
NEED FOR CHANGE***

SECTION 3

PERFORMANCE, ACCOUNTABILITY AND THE URGENT NEED FOR CHANGE

"The message is uncompromising. A new atmosphere of mutual confidence and trust must be created. The onus to begin the process which will create that new atmosphere lies firmly and clearly with the police. The Police Services must examine every aspect of their policies and practices to assess whether the outcome of their actions creates or sustains patterns of discrimination. The provision of policing services to a diverse public must be appropriate and professional in every case. Every individual must be treated with respect. 'Colour-blind' policing must be outlawed (my emphasis). The police must deliver a service which recognises the different experiences, perceptions and needs of a diverse society."

Stephen Lawrence Inquiry at [¶45.24]

INTRODUCTION:

As is evident from the previous section, the phenomenon of racial profiling goes far beyond the parameters of law enforcement, finding its way into almost all aspects of the lives of those it ensnares. As Chuck Wexler, Executive Director of the Police Executive Research Forum (PERF) writes "[t]he issues involved in 'racial profiling' are not new – they are the latest manifestation of a long history of sometimes tense, and even volatile, police minority relations¹." This history has had horrendous impacts on subordinate racialized groups, particularly peoples of African descent, denying them opportunities to effectively participate in society and relegating them to the most debilitating treatment, including their continuous depiction as dangerous and in need of constant policing.

Racial profiling and the historical treatment of peoples of African descent is untenable and represents an irrational use of policing resources.² However it is clearly supported by a

¹ See *Foreward*, at ix in ***Racially Biased Policing: A Principled Response***, Lorie Fridell, Robert Lunney, Drew Diamond and Bruce Kubu, Police Executive Research Forum, 2001

² See ***A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned***, Deborah Ramirez, Jack McDevitt, Amy Farrell, U.S. Department of Justice at 36 as well as ***How to Correctly Collect and Analyze Racial Profiling Data: Your Reputation Depends On It!***, Joyce McMahon, Joel Garner, Captain Ronald Davis, Amanda Kraus for the CNA Corporation, United States Department of Justice-Office of Community-Oriented Policing Services, 2002 at 87. Both reports comment on the 'hit rates' and the disproportionate number of innocent people stopped and searched to produce a small number of arrests. For example, Captain Ronald Davis writes "Most law enforcement officers believe traffic stops are effective in 'catching bad guys', thereby reducing and preventing crime ... Recent traffic stop data reveal that only three to ten percent of traffic stops result in arrests; over 65 percent of those arrests are traffic-related violations or warrants, not the crime offences used to justify making traffic stops based on perpetrator demographics. (These traffic stop data ... are from several cities, including Oakland)." See also: Joel Miller, Nick Bland and Paul Quinton ***The Impact of Stops and Searches on Crime and the Community***, Home Office Police Research Series, 2000 where they discuss 'hit rates' at 10, 20-25 and 29-30; Simon Holdaway ***Police Race Relations in England and Wales: Theory, Policy and Practice***, ***Police & Society***, 2003, Issue No. 7 at 56 where he notes that there is no significant difference between peoples of African descent and Whites in drug use; and Brandon Garrett ***Remediating Racial Profiling***, ***Columbia Human Rights Law Review***, Fall, 2001 at 5. The matter of "hit rates" has been discussed in depth in the second part of this report.

negative image of people of African descent. This negative image characterizes wider societal understanding of African Canadians and is reinforced by the suspect but sanctioned actions of law enforcement authorities. Despite these influences, there are numerous efforts to assess and remedy this matter. Some of these efforts have been initiated by police departments, others through legislative changes, consent decrees or changes in leadership. Still other changes have come about through unique partnerships between police, political representatives, university researchers and affected communities.

Various efforts have been undertaken to eliminate racial profiling and to positively change the relationship between the police and subordinate racialized groups, particularly peoples of African descent. For example, many police departments have instituted procedures to collect data on the number of stops and searches they make of civilians. They also record the civilian's racial characteristics. Other police departments have placed video cameras within their vehicles to record all interactions with members of the public. In addition, there have been efforts to survey particular populations to assess their relationships with police, particularly as it relates to stop and search activities³. Not related solely to racial profiling, some departments have established advisory groups and complaints functions to address a wide range of issues related to policing, particularly their relations with subordinate racialized groups. Others have initiated recruitment efforts to hire more individuals from subordinate racialized groups. As well, some police departments have instituted what appear to be comprehensive anti-racism organizational change policies and procedures that address each aspect of the police as an organization and its relationships with subordinate racialized groups.

Not all of these changes have come about because of the interest and will of police departments; nor can many of these changes be considered effective responses to the concerns raised⁴. Several studies have identified that the pace of change is slow that the police are not adequately addressing concerns and that their services may be delivered in a biased or discriminatory manner. It has also been suggested that police departments have not developed the capacities to understand how to effectively develop and implement changes in their approach to providing policing services to subordinate racialized groups. These issues will be discussed as they pertain to the planning and deployment of policing services in diverse communities. Areas that will be examined include: data collection on police interactions with the public; legislative requirements and institutional policies; and approaches to accountability, including performance development of individual officers, the handling of complaints, community partnerships and public accountability.

This section describes and critiques 'best practices' in each of these areas. Before doing this, however, it is important to acknowledge that the term 'best practices' may be misleading.

³ See *Crime, Policing and Justice: The Experience of Ethnic Minorities Findings from the 2000 British Crime Survey*, Anna Clancy, Mike Hough, Rebecca Aust, Chris Kershaw, Home Office Research, Development and Statistics Directorate, October 2001; and Bureau of Justice Statistics, *Criminal Victimization and Perceptions of Community Safety in 12 Cities, 1998*, U.S. Department of Justice, May 1999 (NCJ 173940).

⁴ See MacMahon et al supra note 2 at 8-9 where the authors write that "...the status of data collection and evaluation of racial profiling can be characterized as incomplete at this point..." and that "...the body of racial profiling research provides an inadequate basis for setting public policy. Despite the growing number of larger and more sophisticated studies, this assessment is that there are too few studies, over too short a period of time, with too diverse a set of findings, and with too many methodological limitations." See also Brandon Garrett supra note 2 at 15-16 for discussion on the impact of Department of Justice and judicial consent decrees.

'Best practices' as a term has been defined as the actual demonstration of optimum performance in terms of certain modes of production, customer service or public relations based on relational analysis with industry standards in response to or in anticipation of legislative or policy requirements and guidelines. 'Best practices' may also be relational in terms of comparing the performance of one organization to others and, as such, may not be based on an agreed upon statute, criteria or guidelines but still be seen as an important way of defining peak performance in a given industry⁵.

While these perspectives may be helpful in defining optimum standards of professionalism, they are also subject to criticism given the limitations of and differences in legislation, policy and procedures. The practice is also problematic because defining excellence by comparing activities of like organizations may prove inherently limited. For example, a police department that operates a public complaints service, providing sensitive intake and investigative functions, may still likely be seen as an organization that poses inherent barriers to communities, particularly subordinate racialized groups. Members in a number of such communities are loathe to file complaints directly with police departments and have made it clear that no amount of sensitivity will dissipate their concerns about conflict of interest or their anxiety that their complaints about the police - which can range from racist insults to police brutality - are handled by police.⁶ In such a context, comparing the levels of sensitivity in approaches to intake ultimately miss the mark. Therefore, in light of the inherent limitations of the 'best practices' approach, this section adopts a wider methodology. While it points to best practices where appropriate, it also focuses on what is being done, how it appears to be working and what is required to provide effective mechanism(s) to eliminate racial profiling.

⁵ See *Best Practices of Private Sector Employers*, U.S. Equal Employment Opportunity Commission <http://www.eeoc.gov/task/practice.html> at 5 and 24-33 where a 'best practice' is defined as a "practice which comports with the requirements of the law, as manifested in the Commission's statutory mandates: Title VII of the Civil Rights Act of 1964..." and other relevant legislation addressing age discrimination in employment, disability issues, equal pay and civil rights. Such a practice is further described as that which promotes equal opportunity, addresses barriers, manifests management commitment and accountability, ensures management and employee communication, produces noteworthy results, and does not cause or result in unfairness. See also Equity Initiatives Department, Law Society of Upper Canada *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities: Legal Developments and Best Practice*, March 2001 at 2; *Beyond Race and Gender: Unleashing the Power of Your Total Work Force by Managing Diversity*, R. Roosevelt Thomas, Jr., amacom, American Management Association, 1991 at 72-96 and 97-119 for discussion on industry initiatives; and *Human Resources Management Best Practices* at www.workindex.com/extrefs.asp?SUBCATID=1685

⁶ For example, see Judith B.L. Chan *Changing Police Culture: Policing in a Multicultural Society*, Cambridge University Press, 1997 at 225 as well as concerns expressed in Section 1 on the need for an independent civilian complaints monitoring function. Further, as will be evident in this Section, a number of police departments have been prompted to gather racial profiling data in response to individual complaints and reports of independent monitors of civilian complaints, eg., San Jose.

Recent Studies on Racial Profiling Data Collection:

Why would a law enforcement entity begin to collect data about the demographics of its stops? Reasons vary. The most obvious one is that in the long run systematic collection of statistics and information regarding law enforcement activities support community policing by building trust and respect for police in the community. The only way to move the discussion about racial profiling from rhetoric and accusation to a more rational dialogue about appropriate enforcement strategies is to collect the information that will either allay community concerns about the activities of the police or help communities ascertain the scope and magnitude of the problem ... Once data are collected, they become catalysts for an informed community-police discussion about the appropriate allocation of police resources. Such a process promises to promote neighbourhood policing.⁷

...data collection is practical because "you cannot manage what you don't measure". Statistics enable one to make intelligent inferences from data. Proper data collection, utilizing credible benchmarks, not only provides an organizational "snapshot" – a look at the organization at a specific point in time – it assists administrators in identifying institutional and systemic problems.⁸

In response to the interaction between police and subordinate racialized groups, police departments in the U.S., U.K. and Canada recently have instituted racial profiling data collection systems⁹. These police departments have recognized the need to collect data on the racialized characteristics of individuals stopped by police and to assess this data based on a number of variables. Many of the police departments that have acted in this way have openly recognized that threats to the legitimacy of policing services arise in encounters where police officers employ high levels of discretion¹⁰. It is these encounters where it has been

⁷ See Ramirez et al supra note 2 at 13.

⁸ See **Racial Profiling: What Does the Data Mean?**, Captain Ronald L. Davis, 2001 at 1. See also Brendon Garrett supra note 2 at 22 where he writes "Police departments increasingly rely on information systems to guide their policing. New York led the way early in the 1990s with its Compstat system, used to monitor crime and pinpoint areas where more resources should be deployed ..." and further that "Racial profiling, itself defined through statistics, has led to a new expansion of police information gathering. Laws passed and remedies in consent decrees have encouraged police to take advantage of technology in order to modernize their approach to routine traffic stops." Garrett also notes at 79 (FN 239) that such information can be provided to the police by communities and can be very useful to allocating resources, defining when and where to patrol, who the likely suspects of a crime are and other matters

⁹ This is a requirement under legislation across the U.K. as discussed in section 2 in terms of PACE and enhanced as a result of amendments to the 1976 Race Relations Act. In the U.S., over 400 law enforcement agencies have instituted traffic-stop data collection measures and 14 states have passed legislation mandating racial profiling policies. See MacMahon et al supra note 2 at 1 Further, Ramirez et al supra note 2 at 2 that "In California, approximately 75 agencies, including the California Highway Patrol, have begun to implement data collection systems. Florida Governor Jeb Bush directed the Florida Highway Patrol to begin collecting traffic stop data in 2000. In August 1999, Houston's police department began to collect data on its traffic and pedestrian stops..."

¹⁰ See Ramirez et al supra note 2 at 9, 10 and 52. According to the Metropolitan Police Authority (MPA) **Stop and Search Scrutiny: MPS Status Report**, 09.06.03 at 19 'high discretion' stops are defined as "stops where the officer bases the reasonable suspicion needed to justify the stop on the person's movements, behaviour, locality, available intelligence and also the factor of where the officer's patrolling is directed." See also Miller, Bland, Quinton supra note 2 at 41 where they note "One of the reasons for the decline in yield associated with increased search activity may be reduced

alleged that policing services may be inappropriate, prompted by indirect evidence (e.g., a suspect considered to “be out of place”) as well as inaccurate and dated intelligence¹¹.

Many police departments acknowledge the importance of police discretion in dealing with situations as they present themselves. They note that these situations primarily involve field officers who are at the lowest level of the police hierarchy. There is growing recognition that such discretionary decisions involving the public are often characterized by low visibility and hence difficult to review¹². In the U.K. it has been suggested that this visibility is critical because 86% of all police stops are the result of the use of high discretion as are 65% of all searches. Further, police discretion is a greater feature in vehicle stops (93%) and searches (73%) relative to pedestrian stops and searches (52% and 61% respectively). In each of these scenarios, understanding the discretion exercised by officers is critical to assessing the legitimacy of these actions¹³. It has also been noted that some encounters such as highway stops between police and the public, particularly with individuals from subordinate racialized groups, restrict drivers’ freedom and may pose physical risks to the police officers and others should only be done pursuant to reasonable grounds.¹⁴

Many police departments acknowledge that the important role of frontline service delivery by police officers in the field requires a system of accountability in order to assess the degree to which racial profiling is a reality¹⁵. Such systems are considered important to engaging

quality of grounds. Where police are more ready to use searches, they may often have a lower threshold in terms of reasonable suspicion before carrying them out. If this is the case, not only will this involve more searches of innocent members of the public, but these may more often take place without sound reasons.”

¹¹ See Nick Bland, Joel Miller and Paul Quinton. *Police Stops, Decision-Making and Practice*. Home Office Research Paper No. 130 Home Office, 2000 at V and 56-57. They also discuss at 14 issues regarding directness of evidence and accuracy of information or intelligence in terms of the reliability of officer suspicion and any actions taken as a result. In this context, direct evidence is that “which comes from factors which can be linked directly to a specific individual, because of what he/she has been doing...” Accuracy of information or intelligence is described as that “which provides a basis for suspicion.” See also: Janet B.L.Chan supra note 6 at 78 where she writes “In Redfern, Sydney ... an individual ‘out of place’ is an Aborigine driving a red Laser...Young people congregating in parks, shopping malls and pinball parlours are also obvious targets for proactive stops.”; and MPA supra note 10 at 3 as well as Miller et al supra note 2 at vii where they suggest that “Searches should be used in an efficient and targeted way based on strong grounds for suspicion and making the best use of up-to-date intelligence about local crime problems.”

¹² Ibid Bland et al at 15. See also Scot Wotley *The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice*, paper presented to 48th Annual Conference of the American Society of Criminology, Chicago, 1997 at 3-4.

¹³ Ibid at 15-16.

¹⁴ Sherry F. Colb *Stopping a Moving Target* 2001 3 *Rutger’s Race & The Law Review* 191 at 7-10. Colb suggests that there are other alternatives possible, including: taking the license plate and issuing tickets/summons via mail requiring the driver/vehicle owner to appear in court; using other surveillance methods to deal with traffic infractions, eg., cameras to detect cars running red lights which, in England, has resulted in reductions in deaths and serious injuries. Also speed detection and light violation cameras which are used in Australia and are race neutral since they only detect the violation.. See also Ramirez et al supra note 2 at 36 where she quotes the Attorney General of New Jersey stating “From our perspective, the fundamental point that we would want to communicate to others, and that I have said to several other colleagues, is that addressing this issue is not incompatible with promoting officer safety...” See also Bland et al supra note 6 at 9.

¹⁵ For example, see Nick Bland, Joel Miller and Paul Quinton *Managing the Use and Impact of Searches* Home Office Research Paper No. 130 Home Office, 2000. See also: Brandon Garret supra

members of the public, particularly those from subordinate racialized communities, in constructive dialogue around policing and building strong links between police and communities. There are, however, numerous challenges in implementing a data collection system. Some of these relate to how officers determine the racialized characteristics of individuals stopped and searched. Others relate to: the time required to collect the required data; the cooperation of police in these activities; data accuracy and appropriateness criteria used for analysis; use of the data in terms of officer education/training as well as building trust with communities; the involvement of communities as well as others in the process; and the setting of benchmarks for measuring the implications of stop and search activities and their impact.

As a follow-up to the increasing concern of politicians, communities and academics a number of significant studies in the U.S. outlined developments in racial profiling data collection, identified lessons from the process and assessed what remains to be done.¹⁶ Beginning with the recognition that the crime rate in the U.S. has steadily declined over the past 8 years and that "(e)ven with the advances in crime prevention and law enforcement ... there are instances in which distrust and tensions between the police and the community are high ... (and that) (o)ne of the major causes of this mistrust is the controversial practice of racial profiling,"¹⁷ ***A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*** addresses the challenges of racial profiling and data collection systems in California, New Jersey, North Carolina and Great Britain¹⁸.

Based on a project aimed at providing technical assistance to police agencies in Baltimore/Maryland, Phoenix/Arizona, Chattanooga/Tennessee and St. Paul/Minnesota, ***How to Correctly Collect and Analyze Racial Profiling Data: Your Reputation Depends on it***, provides an extensive literature review on racial profiling data collection and examines current and planned data collection and analysis approaches in use by police departments. In addition, the Police Executive Research Forum's (PERF) ***Racially Biased Policing: A Principled Response*** sets out to guide police departments in developing responses to what they term 'racially biased' policing, i.e., "when law enforcement inappropriately considers race or ethnicity in deciding with whom and how to intervene in an enforcement capacity."¹⁹

Consistent with the issues and concerns addressed in the aforementioned reports, the National Organization of Black Law Enforcement Executives released ***Racial Profiling: "What Does the Data Mean?"***²⁰. This report addresses the current conflict that has erupted as a

note 2 at 14-15 for his discussion on the use of 'early warning systems' now used by police in Stuebenville and Pittsburgh to identify officer conduct that requires review. See also: MacMahon et al supra note 2 at 94 for comments on early warning system; and Bob Stewart, Executive Director of NOBLE, ***On the Brink of a New Beat: On race relations, police brutality and racial profiling***, 1/3/03 www.horizonmag.com/4/noble.asp

¹⁶ See Ramirez et al supra note 2, MacMahon et al supra note 2, Fridell et al supra note 1, Davis supra note 8.

¹⁷ Ibid Ramirez et al 2 at iii

¹⁸ Ibid at 1-2. This report points out that collecting accurate data is a critical first step to eliminate profiling and develop trust between police and the public, particularly subordinate racialized communities. Several models of racial profiling data collection systems have been in operation in the U.S. since 1999 when Connecticut and North Carolina first initiated their data collection process as required by law

¹⁹ See Fridell et al supra note 1.

²⁰ See Captain Ronald L. Davis supra note 8. Significant components of this report are also cited in

result of racial profiling and discusses the importance of data collection and analysis as it relates to: the type of data to collect; how to identify race; the importance of involving stakeholders; data analysis and benchmarking; community responsibilities; when data indicates profiling; officer identification; and the purposes and benefits of collecting data. The Oakland Police Department is also identified as having a model racial profiling data collection system.

In the U.K., one of the intentions of the Stephen Lawrence Inquiry was to build public confidence and trust in police stop and search activities. In this regard, the Inquiry's recommendations for recording all stops and searches sought to "...provide a basis for accountability in three ways: (i) *individual accountability* – directly to anyone stopped through the requirement to provide a written explanation of the stop; (ii) *supervisory accountability* – it might allow supervising officers to hold officers to account for their use of stops and searches; and (iii) *public accountability* – statistics generated from these records might form the basis for forces to be held publicly accountable for their use of stops and searches."²¹

To assess the impact of the Stephen Lawrence Report on policing services, a number of significant studies have been released, including: ***The Impact of Stops and Searches on Crime and the Community; Upping the PACE?: An Evaluation of the recommendations of the Stephen Lawrence Inquiry on stops and searches; Police Stops, Decision-making and Practice; Managing The Use and Impact of Searches: A review of force interventions and Stop and Search Scrutiny: MPA Status Report***²². These reports address the changes piloted in various police departments across the U.K. and within the diverse boroughs of London. The focus on issues such as: defining a "stop" and "disproportionality"; identifying the racial characteristics of individuals stopped and searched; examining management and frontline officer responsibilities and accountability; working with communities; and being publicly accountable for stop and search data collection, analysis and publication of results.

These reports will be discussed below as they relate to issues concerning:

MacMahon et al supra note 2.

²¹ See Nick Bland, Joel Miller, Paul Quinton ***Upping the Pace? An Evaluation of the recommendations of the Stephen Lawrence Inquiry on stops and searches***, Home Office, Police Research Series Paper 123 at 12-13

²² See respectively: Miller et al supra note 2; Bland et al supra note 6; Quinton et al supra note 15; and Metropolitan Police Authority supra note 10. The first paper is part of a broader research on stops and searches following the Stephen Lawrence Inquiry and which examined a number of issues, including: public views on stops and searches; police stops, decision-making and practice; profiling populations available for stops; and interventions to improve the management of searches. The second paper is part of the same series as the preceding paper and undertakes to assess: the impact on stops and searches on crime and communities, particularly respecting the role of stops and searches in policing, their impact on public perceptions of police and the impact of the Stephen Lawrence Inquiry on stops and searches. The third paper is based on interviews with over 100 officers and 340 hours of observation of officers in order to evaluate the recommendations of the Stephen Lawrence Inquiry concerning stops and searches. The fourth study focuses on various promising practices implemented by police departments to improve the quality of officer searches. The Metropolitan Police Authority paper sets out to assist understanding police stop and search activities in the recent past and in current implementation. While there are numerous other reports which are very informative, these were chosen because of their focus on initiatives of racial profiling data collection following the Stephen Lawrence Inquiry and because they provide data comparing different police departments.

1. The definition of racial profiling and other key terms.
2. Legislative requirements and data collection initiatives now underway; and
3. Analysis and implications of research, including critical areas requiring attention, i.e., scope of data collection activities, organizational culture of policing, police performance management and development, the role of education and training, mechanisms for systemic accountability, and approaching anti-racist change models in policing services.

Developing An Operational Definition of Racial Profiling:

In reviewing the literature on racial profiling and current initiatives to address it, there is a significant concern about both the term and its definition²³. Much of the difficulty lies with the dramatic difference in perspectives between police and members of subordinate racialized groups. As Captain. Ronald L. Davis of the Oakland Police Department and Vice President of NOBLE²⁴ describes it, there is a “60/60 dichotomy in which 60 percent of police chiefs (in a PERF survey) say that racial profiling is not occurring in their departments, while 60 percent of the people say that it is occurring.”²⁵

Further, there is disagreement about the appropriate term to use to describe what has come to be known in the public domain as racial profiling²⁶. For example, Davis has characterized racial profiling as a symptom of “bias-based policing” which is defined as “The act (intentional or unintentional) of applying or incorporating personal, societal or organizational biases and/or stereotypes in decision-making, police actions or the administration of justice.” In this context, Davis sees ‘bias-based policing’ as a systemic issue that “requires strategic and comprehensive strategies to affect reform”. He also sees data collection and analysis as a tool integral to reform and supports legislation requiring data collection, analysis, training and policy implementation²⁷.

Davis’ approaches are supported by Fridell *et. al.* who have also identified significant differences between police and subordinate racialized groups in the definition of racial profiling, noting that the former use the term very narrowly and related to police stops and searches while the latter use it more broadly to suggest all organizational policies and

²³ In addressing the definition of racial profiling, it is useful to reference the discussion provided in section 2 of this report. For example, in *Racial Profiling in Law Enforcement -- The Defense Perspective on Civil Rights Litigation* American Bar Association, Summer 2001, 30 *The Brief* 16 at 2-3, Elizabeth A. Knight and William Kurnik set out some of the challenges in defending racial profiling cases and emphasize the importance of data gathering and analysis, including appropriate benchmarks, before reaching conclusions. In this context, they define ‘profiling’ in law enforcement as referring to ‘specific reasonable inferences that a police officer is entitled to draw from the facts in light of his experience, as set forth in *Terry v. Ohio*’ and notes both experience and training as contributing factors.

²⁴ NOBLE is the National Black Law Enforcement Executives, a U.S. organization representing the concerns and interests of African American law enforcement officials.

²⁵ See Davis *supra* 8 at 2 and MacMahon *et al supra* note 2 at 82. See MacMahon *et al supra* note 2 at 5 as well where the authors write “Polls indicate that the majority of citizens believe that police departments engage in racial profiling, while most police chiefs do not believe their officers engage in racial profiling.” The nature of this division is elaborated on by Ramirez *et al supra* note 2 at 4 which provides indicators of recent citizen polls conducted by Gallup and by the Department of Justice. See also: MacMahon *et al supra* note 2 at 17; Fridell *et al supra* note 1 at 14-15; Miller *et al supra* note 2 at 1; and MPA *supra* note 10 at 1.

²⁶ *Ibid* MacMahon *et al* at 8. Based on their research and data obtained from police, police unions, community representatives and operational experts, the authors write that “...there are sharp differences of opinion among and between police, union, and community representatives, and the operational experts. First and foremost, the participants struggled with an operational definition of racial profiling. It seems clear that racial profiling means different things to different people...”

²⁷ *Ibid* at 21. In MacMahon *et al* at 97 Captain Davis elaborates on this point writing that “Bias-based policing impacts all aspects of policing, and many feel it should be considered the most serious problem facing law enforcement today. Racial profiling can be considered a symptom of bias-based policing..” See also *supra* note 8 at 2.

practices²⁸. Acknowledging this lack of agreement at the definitional level, Fridell et al recommend using the term “racially-biased policing” which they define as actions that “occur when law enforcement inappropriately considers race or ethnicity in deciding with whom and how to intervene in an enforcement capacity.”²⁹

Despite the lack of consensus regarding definition, the research conducted by McMahon et al and by Ramirez et al has found a significant number of police departments employ the term ‘racial profiling’ and have instituted data collection systems based on their understanding of this term. For example, Ramirez et al define ‘racial profiling’ as “any police-initiated action that relies on race, ethnicity, or national origin rather than the behaviour 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.”³⁰

In the Canadian context, Professors Scot Wortley and Julian Tanner have written that: “In the criminological literature, racial profiling is said to exist when the members of certain racial or ethnic groups become subject to greater levels of criminal surveillance than others. Racial profiling, therefore, is typically defined as a racial disparity in police stops and searches ... increased police patrols in racial minority neighborhoods and undercover activities or sting operations which selectively target particular ethnic groups.”³¹

In the U.K., concerns have been raised regarding how a “stop” should be defined as well as what constitutes “disproportionality” in police stops and searches. For example, Bland et al indicate that there is “...inherent difficulty in developing any definition to cover the range and variation of stop encounters. The definition and guidance developed for (their research) did not ... provide absolute clarity about what constituted a stop³².” In discussing this challenge, they note that police officers stop individuals for a variety of reasons, including to: search them; issue a summons for a moving violation; ask a simple question or follow-up on a suspicion³³.

Issues concerning ‘disproportionality’ are discussed throughout the MPA Status Report³⁴.

²⁸ See Fridell et al supra note 1 at 3-5.

²⁹ Ibid at 5

³⁰ Supra note 2 at 3. Ramirez et al also note that “There is almost uniform consensus on two corollary principles that follow from adopting this definition of racial profiling: police may not use racial or ethnic stereotypes as factors in selecting whom to stop-and-search, and police may use race or ethnicity to determine whether a person matches a specific description of a particular suspect (footnote omitted).” See also Kathryn K. Russel “*Driving While Black*”: Corollary Phenomena and Collateral Consequences, *Boston College Law Review*, 1999 at 1.

³¹ See *Data, Denials and Confusion: The Racial Profiling Debate in Toronto*, 2003 at 4-5 citations omitted.

³² See Bland et al supra note 21 at vii.

³³ Ibid at 8. The authors elaborate on this point at 14 stating “There is no formalized definition of what a police stop is.” In drawing this conclusion, they reference PACE Code A which states “This code does not affect the ability of an officer to speak to or question a person in the ordinary course of his duties (and in the absence of reasonable suspicion) without detaining him or exercising any element of compulsion. It is not the purpose of this code to prohibit such encounters between the police and the community with the cooperation of the person concerned and neither does it affect the principle that all citizens have a duty to help police officers to prevent crime and discover offenders.” See also Brendon Garrett supra note 2 at 66 footnote 170.

³⁴ See also Joel Miller *Profiling Populations Available for Stops and Searches*, Home Office, Police Research Series Paper 131, 2000 5-9 for a discussion on understanding disproportionality and

Clarity of this term is deemed critical because of its implications to policing. Disproportionality is defined by the Association of Chief Police Officers “as a difference in policing outcome between different ethnic or other groups in respect of police power. *Disproportionality raises concerns that discrimination may be occurring, and the presence of disproportionality in stop and search monitoring figures may serve to reinforce the perception in some communities that police officers exercise their powers in a discriminatory way* (added emphasis)...Disproportionality raises concerns and must be investigated and explained; in the absence of an explanation ... unfairness may be reasonably inferred³⁵.” However, the MPA report suggests that this concept is difficult to assess as there is little agreement on what constitutes credible benchmarks in terms of police stop and search activities. For example, should police stops and searches be measured against census data of the population, against the street population or against the number of those involved in criminal activities?³⁶

As might be expected, the difficulties involved in defining “racial profiling”, police “stops” and “disproportionality” have led to difficulties with initiatives set out to address the phenomenon, particularly given that there is no “consistent set of criteria to determine the nature and extent of racial profiling.”³⁷ However, it is crucial to note that these objectives cannot be accomplished in the absence of an operational definition of these terms³⁸.

Current Racial Profiling Data Collection Activities in the United States:

In 1997, Representative John Conyers of Michigan introduced the “Traffic Statistics Study Act” in the U.S. Congress³⁹. The proposed legislation aimed to establish a systematic process across all states to gather comprehensive data on the racial distribution of traffic stops and to enable the Attorney General to review the collected data on racial profiling and complaints. The scope of the legislation was fairly detailed and would require collection of data on all police stops and searches. It would also require collection of data concerning age, gender, race/ethnicity, number of people in the suspect vehicle, the purpose of the stop, whether

availability, particularly explanations for, and resolving debates about disproportionality.

³⁵ See MPA supra note 10 at 7.

³⁶ Ibid at 8-9 where the MPA borough police indicated a preference for benchmarking against street population and where the MPA provides information on its working with the Home Office to “develop a method for estimating street population that can be used throughout the MPA.” The MPA has also set up Disproportionality Sub-Group to measure how people are treated throughout the criminal justice system in order to provide “...a better indication of what impact stereotyping and social exclusion may have on treatment and outcomes.”. See also: MPA at 18-19 for further discussion on benchmarking disproportionality; Miller supra note 34 at 8-11 and 32-41; and Brendon Garrett supra note 2 at 18 for comments on consent decrees and concerns about defining disproportionality.

³⁷ See MacMahon et al supra note 2 at 39 - 42 where they provide tables and narratives indicating the differences in approaches between police departments in St. Paul and North Carolina. See also 8-9 where they write that the “status of data collection and evaluation of racial profiling can be characterized as incomplete at this point. Cities in general appear to be working in two different directions. First, they are working to set up lines of communications and structures that foster ongoing dialogue with community groups. These efforts will be very useful to defuse tensions, restore trust, and sharpen the focus on profiling issues. Second, many cities are engaging in data collection efforts followed by data analyses. For this effort, the picture is still somewhat unfocused.”

³⁸ Ibid at 5.

³⁹ The *Traffic Stop Statistics Act* did not make it through the U.S Congress when first introduced. In 1999, the proposed *Act* was updated to add categories for information gathering based on gender and immigration status. See Kathryn K. Russell supra note 30 at 2. See also Brendon Garrett supra note 2 at 33 footnote 3; and Gregory M. Lipper 551 *Racial Profiling* 2001 President and Fellows of Harvard College.

there was a request for consent to search the vehicle, and the results of the stop and search. Conyers argued that this would assist in assessing the extent and scope of racial profiling by law enforcement authorities and respond to the serious and increasing allegations about the profiling of African and Latino Americans.

Even though such legislation has not been adopted, there has still been much profiling activity to undertake the type of research the Conyers' legislation calls for. While it is hoped that progressive systems of data collection and analysis are put into place voluntarily by police departments, implemented in good faith and with clarity of key concepts and terms, many jurisdictions have found it necessary to enact legislation compelling police departments to undertake these and other measures to re-build public confidence in policing services. Further, several courts as well the Department of Justice have issued consent decrees mandating racial profiling data collection and analysis by state and local police departments⁴⁰. Despite these requirements, it has been suggested that administrative regulations concerning policy, its implementation, performance management, the handling of complaints, organizational accountability as well as data collection and analysis are equally required to bring about needed changes⁴¹.

Despite these measures, there are numerous concerns regarding the limited nature of the legislation and consent decrees adopted to date and the actions taken in response. For example, while state constitutions are taking different approaches than suggested by the U.S. Supreme Court's approach to 4th Amendment cases⁴², it is suggested that there is a strong need for extra-judicial approaches, including mandating significant authority to police-

⁴⁰ There are fourteen states within the U.S. that now require racial profiling data collection and where legislation addresses the need for (1) mandatory collection, (2) the establishment of data categories and (3) ongoing data collection. In 1999 Connecticut and North Carolina were the first states to begin data collection as required by law to collect information on race, ethnicity, gender, age and to note actions taken (citations, warnings, tickets, search through consent/probable cause/reasonable suspicion of a crime and mandatory data collection is now underway in such states as Connecticut, Missouri, Rhode Island, Tennessee and Washington. Wyoming has also made a clear declaration against racial profiling and has provided support for law enforcement agencies to take action to identify/eliminate the practice. The declaration addressing this was signed by Wyoming State Highway Patrol, Wyoming Division of Criminal Investigation, Wyoming Law Enforcement Academy, Wyoming Association of Sheriffs and Chiefs of Police and others and includes a full Non-Discrimination Resolution 1-2. See State of Wyoming/Office of Governor **Governor Signs Resolution Against Racial Profiling**, Jim Geringer, Governor News Release www.state.wy.us/governor/press_releases/2001/july_2001/racial.html See also: Brendon Garrett supra at 14 where he addresses consent decrees impacting on Pittsburgh/Pennsylvania, Stuebenville/Ohio, Columbus/Ohio, Los Angeles/California and the state of New Jersey.

⁴¹ David A. Harris *Driving While Black: and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops* **87 Journal of Criminal Law and Criminology** 544, Winter 1997 at 16-19

⁴² See Adero S. Jernigan *Driving While Black: Racial Profiling in America* **Law and Psychology Review** Vol. 24 at 136-137 where he points to the need for solutions that require reversal of the U.S. Supreme Court *Whren* decision and suggests that the police should take their own action on data collection and analysis. He also argues that state and federal laws are needed for same. See also Anthony C. Thompson *Stopping the Usual Suspects: Race and the Fourth Amendment* **NYU Law Review** October, 1999 at 959-960 where he discusses official investigations in response to crises and the obligation of legislatures to address. Critical of the U.S. Supreme Court *Whren* decision, he argues at 983-998 about what he perceives as the flaws in the Supreme Court's approach, particularly where the Court ignored social science data and the importance of data to demonstrate impact.

community advisory bodies and establishing police-civilian review boards⁴³. In this context, the African American community as well as the American Civil Liberties Union (ACLU) are providing leadership and advocacy on the need for civilian review of police activities through entities specifically set up to address complaints against police as well as policy and procedural issues. To date, police departments have resisted giving authority or resources to such entities while the ACLU has been critical of the minimal level of resources dedicated⁴⁴.

In terms of specific racial profiling data collection initiatives, McMahon et al and Ramirez et al have identified numerous model approaches. For example, based on examinations of police departments that had initiated these activities, McMahon et al explored initiatives in: Chattanooga, Tennessee; Baltimore, Maryland; St. Paul, Minnesota; and Oakland, California. These are summarized below.

The Chattanooga Police Department records every moving citation written by a police officer as well as their field interviews. The "Field Interview and Vehicle Stop Report (FIVSR)" gathers data on the primary contact involved as well as with three associates of the primary contact and on the vehicle. The information collected includes name, date of birth, social security number, address, identifying characteristics, demographic information and aliases. The Chattanooga Police are now voluntarily participating in the State of Tennessee Vehicle Stop Form program where such forms are completed each time an officer stops a vehicle. The data collected on the FIVSR is summarized on two one page reports given to the Chief every month. The first report, the Moving Citation Log, captures the number of citations written altogether as well as those issued by the traffic unit and in each geographic zone. The data is reported by race, gender and these variables are cross-tabulated with geographic zone⁴⁵.

The Baltimore Police Department provides receipts to civilians following officer-initiated encounters. The receipt provides information on the: date/time/duration/location of the stop; the officer's name/ID number/assignment; the person's name/date of birth/address/phone number/gender/race; reason for the stop and action taken; the driver's license, ID card and state where issued; the license or ID number, license plate number and state; the year/make/model of the vehicle; whether a search was conducted and the type of search (eg., consensual or otherwise); and whether an item was seized. The Baltimore Police were interested in the results of their data collection activities in terms of influencing management decisions and perceived an improvement in community relations once they had initiated the process⁴⁶.

The St. Paul Police Department has been collecting data using their CADS system and has shared these data with academic researchers at the University of Minnesota for formal analysis. There is community involvement in the data collection process through representatives of the National Association for the Advancement of Colored People (NAACP) which was at first sceptical of the exercise⁴⁷.

⁴³ See Sean Hacker *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards* 1997 *Columbia Human Rights Law Review* at 11-12.

⁴⁴ *Ibid* at 15-16.

⁴⁵ See MacMahon et al *supra* note 2 at 72-75

⁴⁶ *Ibid* at 75-77.

⁴⁷ *Ibid* at 78. In fact, MacMahon et al report that the NAACP at first "resisted data collection efforts because they considered it insulting that racial profiling would have to be proven."

The Oakland Police Department uses a multivariate analytical approach to examine and compare data. This approach purports to provide a “logical, systematic, and comprehensible” method useful in the absence of multivariate research⁴⁸. Oakland is comprised of 36 percent African Americans, 23 percent Whites, and 26 percent Latinos. The city is geographically divided along racial lines. The Police Department is divided into three districts and the Oakland approach examines local demographics in the context of criminal activity. Before compiling racial profiling data, the Department sets benchmarks to construct ‘perfect’ data sets and statistical matches, eg., matching stops with the composition of the local population. It then decided to use racial-geographic statistics rather than aggregate census data or precinct demographics. This is followed by identifying staffing deployments relative to racial-geographic boundaries. The Department looks at the relationship of traffic stops compared to searches and crime. It also considers other variables such as the number of people stopped and searched who are on probation and parole, the number of repeat offenders and the implementation of special programs, eg., ‘drunk driving’, all of which require targeting/profiling specific segments of the population through stop and search interventions. These factors are considered in assessing the racial profiling data⁴⁹

⁴⁸ Ibid at 81 and 82 where it is noted that. “The Oakland methodology approximates more conventional multivariate research methods and may be more easily understood by police department personnel, community and media representatives.” The Department is partnering on this research with RAND. In discussing the Oakland Police Department and the scope of racial profile data collection, Captain Ronald Davis suggests it is important to define racial profiling as well as to understand why racial profiling data is being collected and how policies will be assessed based on the results of the data collection.

⁴⁹ The Oakland Police Department’s initiative is described in detail by Captain Ronald L. Davis supra note 8. It must be noted, however, that some of Davis’ logic is remarkably similar to concerns discussed in section 2 regarding the circular logic of policing, i.e., deployment of police in particular communities will yield high results in terms of stops, searches and arrests which, in turn, are then used to argue that law enforcement focus is necessary in these areas. In this context, it is interesting to see contradictions in Davis’ acknowledgement of low ‘hit’ rates when contrasted with his argument concerning high crime areas. It is also interesting to see Davis identifying an 18% disparity in stops and searches as not being an issue as multivariate analysis explains away the marked difference (supra note 8 at 7-8, and 9 respectively). . See also **Police Assessment Resource Center (PARC)** Merrick J. Bobb (Executive Director) et al at 8-9 March 2002 regarding the Sacramento data collection model which looks to the causes of police stops and relies on data collection to assist in offering as insight into policing practices/priorities and individual officer motivation, including early warning system. In addition, see: **Florida Highway Patrol Racial Profiling** www.fhp.state.fl.us/html/census/profile.html which contains summary information on the *Memorandum on Profiling, Florida Highway Patrol’s Perspective on Profiling, Identification of the Problem, Prohibition on Profiling and Analysis on Data* See also: **Attorney General Ashcroft Prepared Remarks at the Signing of a Historic Agreement with the Cincinnati Police Department**, Cincinnati Ohio 12 April 2002 which identifies the impact of events on April 13, 2001 as prompting the Department of Justice Civil Rights Division to review practices, procedures and training of the Cincinnati police department and to advise the Police Department on steps to improve its relations with African Americans. After reviewing the Justice Department report, Attorney General Ashcroft directed the Civil Rights Division to work with the Cincinnati Police Department and community leaders to improve policing and rebuild community confidence and trust in the police. The agreement addresses new policies on use of force, engagement in foot pursuits and dealing with mentally ill. It also provides for enhanced training, higher levels of accountability and provides procedures for investigating uses of force and complaints of misconduct. Ashcroft also acknowledges the importance of having community partners as integral to new arrangement. See also Captain Ronald L. Davis supra note 8 at 3.

Ramirez et al explored a number of city and state initiatives. Their findings are summarized below as they pertain to: San Jose and San Diego, California; North Carolina; and New Jersey.

San Jose⁵⁰. San Jose, is the 3rd largest city in California and 11th in the U.S. The City's population of 900,000 is very culturally and racially diverse comprised of 43 percent Whites, 31 percent Latinos, 21 percent Asian and 4.5 percent African Americans. San Diego's initiative was partially in response to numerous complaints each year (over 500) received by the city's independent police auditor as well as in anticipation of state-wide legislation that had been introduced in 1999. A highly publicized racial profiling incident⁵¹ also motivated the San Diego Police Chief to institute the data collection effort and to have the police department voluntarily track the race, gender, age and reason for stopping motorists.

The new data collection system was initiated in June, 1999 and was supported by a mobile data terminal which had been installed in all police vehicles in 1996. The racial profiling data collection effort built on previous stop procedures which required officers to advise the communications dispatcher that a traffic stop was being made and provide information on the driver's gender. Following the stop, the officer would then use specific 'alpha' codes to inform the dispatcher of the result of the stop, eg., warning, citation, etc. Under the new data collection system, the 'alpha' codes indicate the reason for the stop as well as the race and age of the driver. Specific coding had been assigned to designate diverse racialized groups, eg., A=Asian American, B=African American, H=Hispanic and so on. Other codes were used to designate the purpose of the stop, eg., V=Violation of California vehicle code, P=Penal code violation, M=Municipal code violation and so on. Further codes were used to indicate the disposition of the traffic stop, eg., A=Arrest, B=Warrant arrest, C=Criminal citation issued, D=Traffic citation issued/hazardous, etc.

Under the new data collection system, this information is provided by computer over radio, relayed to the automated computer dispatch system and automatically entered into a new data base. Several challenges were overcome in putting this data collection system together. Ultimately San Jose found:

- It was best to allow police officers to identify the race/ethnicity of drivers stopped based on their perceptions since it is those perceptions which have been challenged and need to be assessed;
- Costs for the project were negligible (\$10,000 excluding cost of data analysis) because officers are not required to collect an inordinate amount of information and the data can be gathered quickly. The additional time required by the officer is "3 seconds" and the newly allocated funding covers costs for the required computer software, training and training materials, and plastic pocket-sized reference cards for all officers;
- Traffic stops have increased since the system has been in place indicating that officers have not disengaged from the process.

⁵⁰ Captain Ronald L. Davis supra note 8 at 4 suggests that San Jose Police Chief William Lansdowne "is considered by many as the 'father' of traffic stop data collection."

⁵¹ This incident involved the stopping of a Black youth minister, Michael McBride, who later alleged that "he was the victim of a racial profiling stop and a subsequent search and assault by San Jose police officers." See Ramirez et al supra note 2 at 17

Despite the success of the San Jose system, it has its limitations. In particular there is only routine supervision of the data collection procedures and the system does not record whether a search was conducted. In fact, the data only records information related to four possible reasons for the stop, i.e., an all-points bulletin, municipal code violation, penal code violation, vehicle code violation. It does not gather information related to all high or low discretion stops.⁵²

San Diego⁵³. San Diego is a border city that “routinely deals with violence along the border with Mexico and the drugs that travel across.”⁵⁴ Its population includes Latinos (23.2 percent), African American (8 percent), Asian (5 percent) and White (63 percent). It has a police force of 2,683 officers for a population of 1.25 million, considered small by comparison with other large U.S. cities. The City has reduced crime for 9 successive years, its homicide rate has decreased by 75 percent and the policing strategy is based on developing strong links with communities that provide 1,100 volunteers donating near 200,000 hours of community service each year.

In 1998, the San Diego Police made approximately 200,000 traffic stops and issued 125,000 citations for these stops. In February, 1999, it was the first big city in North America to voluntarily institute a racial profiling data collection process. Numerous factors led to this project, notably: complaints by local community groups regarding racial disparities in traffic stops; a high profile incident in 1997 in which a San Diego Charger football player was pulled over by the police. Police had identified the football player and his companion as suspected car thieves and they were handcuffed and detained for half-an-hour.

The Police Chief recognized that public trust was being undermined by the allegations of racial profiling and that a response was needed to address these allegations in order for San Diego to maintain its successful community policing process. To address concerns, the Chief met with local African American community representatives, the Urban League, NAACP, the Human Relations Commission and the American Civil Liberties Union. The data collection process was initiated in January, 2000 and each of the police department’s 1,300 patrol, traffic and canine officers was issued a laptop computer to enter data related to racial profiling. The 45 motorcycle officers were issued wireless handheld computers.

The San Diego process focuses on all traffic stops and captures 14 basic elements related to: district, date and time, cause for stop, race, gender, age, disposition of the stop, arrest (yes/no), search (yes/no), basis for search, obtained consent form (yes/no), contraband found (yes/no), property seized (yes/no)⁵⁵. Officer perception of race is relied on to

⁵² Ibid Ramirez et al at 17-20. See also MacMahon et al supra note 2 at 84 for discussion of San Jose model.

⁵³ See David A. Harris *Racial Profiling Revisited: “Just Common Sense” In the Fight Against Terror?* 2002 *ABA Criminal Justice, Summer*, 2002, 17 *Crim. Just.*36 where he notes San Diego and Boston as models of police forces working with communities to reduce crime. He also discusses the San Diego police department methods of addressing racial profiling: (from chap. 7 of his book **Profiles in Injustice: Why Racial Profiling Cannot Work** The New Press, 2002:)- collection of analysis of data on traffic and pedestrian stops and their aftermath- use of technology (video/audio recording/real time data tracking) for police actions on the street. See also Bob Merrick supra note 50 at 8.

⁵⁴ See Ramirez et al supra note 2 at 23

⁵⁵ Ibid at 25, according to Ramirez et al “These elements provide the information that would have been required in the 1999 California Traffic-stop Data Collection legislation, except that San Diego elected not to collect information on the nature and amount of contraband discovered during a

designate the personal characteristics of individuals stopped/searched and the department uses specific codes to designate different racialized groups. These codes are: A=Other Asian, B=Black, C=Chinese, D=Cambodian, F=Filipino, G=Guamanian, H=Hispanic, I=Indian, J=Japanese, K=Korean, L=Laotian, O=Other, P=Pacific Islander, S=Samoan, U=Hawaiian, V=Vietnamese, W=White, and Z=Asian Indian.

Any officer making a traffic stop must advise the radio communications dispatcher of the stop and its location. The officer then runs a check on the license plate and then talks to the driver, asking for license and registration before returning to the patrol car to decide on the outcome of the stop. After informing the driver of the disposition, the officer completes a data entry form on the laptop or handheld computer. This must be done before the dispatcher clears the call, allowing the officer to return to service.

The costs for the initiative were not prohibitive as the department was able to use a previously installed in-house data collection system, all patrol cars had a mobile dispatch terminal, each officer already had a lap top and hardware costs were "minimal". Microsoft Access was used to develop pull-down menus for the data collection elements and the department developed its own soft-ware eliminating programming costs. Moreover, the department estimates that it takes about 20-30 seconds to enter the data on the appropriate forms, thus personnel costs are relatively low. As there is no independent mechanism to check the data's accuracy, traffic and patrol supervisors are responsible for officer compliance and all officers must record their individual actions in their daily journals.

In collecting the data, neither the officer nor motorist are identified by name and only aggregate data is collected and analyzed. This both provides confidentiality to motorists and assures police officers that they will not be 'punished' for their conduct.⁵⁶

North Carolina. The state of North Carolina has a population of 6.5 million comprised of 75.6 percent Whites, 22.2 percent African Americans, and 2.2 percent other subordinate racialized groups. The North Carolina Highway Patrol (NCHP) is the state's primary law enforcement organization with 1,417 troopers and a 12-member interdiction team. In 2000, the NCHP issued 684,721 traffic citations. Over a number of years, African Americans alleged that the NCHP had targeted them. In 1996, the *Raleigh News and Observer* reported that the NCHP drug interdiction squad stopped and charged African American drivers almost twice as much as other troopers. Further, based on 1998 statistics, *Raleigh News and Observer* reported that African Americans and other individuals from subordinate racialized groups were twice as likely as Whites to be subjected to searches by the drug unit. In tandem with these events, the American Civil Liberties Union worked with local politicians to introduce racial profiling data collection legislation which was enacted in April, 1999. North Carolina was the first state to enact data collection legislation which applies to all law enforcement entities such as the Department of Fish and Wildlife and State University Police.

The NCHP began collecting data in January, 2000 through the use of a Mobile Data Terminal (MDT) within each trooper's vehicle. Microsoft Access is used to record the data

search."

⁵⁶ Ibid 23-28. See also Brendon Garrett supra note 2 at 22 where he writes "One example of the revolutionary possibilities information technology can provide to communities is a website maintained by the state of North Carolina. The website allows one to select a police department and view statistics each month, broken down by race, sex, age and ethnicity, initial reason for stop, basis for search, and what enforcement action was taken."

which is entered on pull-down menus. Officers are required by law to specify the age, race and gender of every driver and passenger they stop. The legislation compels officers to record: the initial reason for the stop; the personal characteristics of the driver; the type of enforcement action taken, if any; whether physical resistance occurred or a search was conducted. In the event of a search, the officer is required to record: the type of search and the basis for it; whether the vehicle, driver, passengers were searched; personal characteristics of individuals searched; description of contraband found and property seized. As with other police departments, the officer's perceptions are relied upon to provide information on the personal characteristics of those stopped and searched.

It is estimated that each officer needs less than 5 minutes to complete the required forms electronically⁵⁷. Costs to implement this initiative were \$50,000 which included the purchase of a new computer server, hardware, and software developed with the assistance of the International Association of Chiefs of Police. Providing a Mobile Data Terminal to each car costs \$8,000 per car but these units are used for other functions in addition to racial profile data collection. Once collected, the data is used to assess patterns in traffic stops. Initial data results indicate that while African Americans were stopped in proportion to their percentage of the population, they were disproportionately searched and arrested.⁵⁸

New Jersey. New Jersey perhaps represents the location U.S. where concerns about racial profiling have been raised and policies implemented. . A large state with a population comprising 79 percent Whites, 15 percent African Americans and 4 percent others from subordinate racialized groups, the New Jersey State Police (NJSP) has been required to develop and implement a racial profiling data collection system through a consent decree with the U.S. Department of Justice.

The NJSP employs approximately 2,800 state troopers and, as discussed in chapter two, numerous allegations had been made that racial profiling practices are routine amongst these troopers. Some of these incidents had been reported by the media dating back to as 1989 when WWOR-TV Channel 9 ran a special program entitled "Without Just Cause" which revealed through interviews with state troopers their widespread use of racial profiling. In 1996, a New Jersey State Superior Court dismissed a case involving 19 defendants pursuant to a motion to suppress evidence obtained through use of racial profiling stop and search activity⁵⁹. Further, in February, 1999, the Newark Star-Ledger released statistics indicating that 75 percent of all motorists arrested on the New Jersey Turnpike during 2 months in 1997 were African Americans. This was followed by the report of then New Jersey Attorney General Peter Verneiro⁶⁰.

The NJSP initiated its racial profiling data collection in May, 2000 using its already operating computer aided dispatch (CAD) system which requires each trooper to report to the

⁵⁷ While some might consider this an unreasonable burden that may result in service delays, the NCHP Colonel Richard Holden argues that "How much is 5 minutes when it means stopping the perception that exists about police misbehaviour? It is not much time to ask out of an officer's day." *Ibid* Ramirez et al at 30 (footnote omitted).

⁵⁸ *Ibid* 28-31.

⁵⁹ It was this case that introduced expert evidence on racial profiling provided by Dr. John Lamberth of Temple University. The results of this evidence are discussed in chapter two at . In addition, it was while this case was underway that the New Jersey State Troopers fired 11 shots into a van with 4 African American youth en route to a summer basketball camp. This is also discussed in chapter 2 at

⁶⁰ Some of the key findings of this report are discussed in Section 2.

CAD operator the following information: the name and identification number of all troopers involved in the stop; the location, date, time the stop was commenced and ended; the license plate number and state in which the car was registered; a description of the car; the personal characteristics (eg., age, race, gender) of the driver and passengers, if any; the reason for the stop and action taken (eg., summons or warning) and the category of violation (eg., moving or non-moving violation). Before approaching a stopped vehicle or conducting a search, troopers are required to call the communication centre, unless it is impractical to do so. This information is recorded manually but, in future, the NJSP plan to purchase laptops for all patrol cars. The communications centre assigns an incident number to each stop and post-stop enforcement action is entered on a Motor Vehicle Stop Report (MVSr) for those incidents where a trooper orders the driver and passengers, if any, out of the car, requests a consent search, conducts a search, requests a drug-detection dog, frisks a driver or passenger, makes an arrest, finds contraband or uses force.

In terms of identifying the personal characteristics of driver and passengers, the NJSP relies on officer perceptions and uses specific racial/ethnic categories: White, Black, Hispanic/Latino, Asian Indian, Other Asian, American Indian/Native American. The NJSP anticipates that the time involved in gathering and recording the required data is not significant and the State Attorney General anticipates that it will take troopers several minutes to fill out information on the MVSr forms. It has been estimated that modifications to the CAD cost \$130,000 and that \$1.43 million has been required for officer training. Also, \$12.581 million has been budgeted to purchase and install mobile video recorders and mobile data computers.

The Attorney General is required to conduct a random sample survey of motorists who had been stopped by the NJSP. This is done to determine if the stops were conducted appropriately and the behaviour of the trooper(s) involved. The consent decree also requires supervisors to review regularly trooper reports on post-stop enforcement and video-tapes of traffic stops. The data is analyzed including individual officer identification to allow analysis to assess systemic policies and procedures as well as individual behaviours. The NJSP provides semi-annual reports containing aggregate statistics on law enforcement activities, including traffic stops. The data is provided to; the state, a federal monitor and the New Jersey Department of Law and Public Safety. The federal Department of Justice conducts a survey of persons traveling on the New Jersey Turnpike to develop a sample of the personal characteristics of those traveling on the Turnpike. This is done to provide a group against which the racial profiling data can be compared⁶¹.

Current Racial (Ethnic) Profiling Data Collection Activities in the United Kingdom:

According to 1991 census data, the population of the U.K. is comprised of 81 percent Whites, 7.5 percent persons of African descent, 7.3 percent Asian and 4.2 percent other subordinate racialized groups. As discussed in chapter two, systematic data collection of police stops and searches was underway in the 1980s. Further, as a result of changes in the Criminal Justice Act in 1991, the Home Secretary was obligated to make public information needed to assess racial discrimination in policing practices. 'Ethnic' monitoring of police stop and search activities was first introduced in 1993⁶² and, following amendments to the *Race Relations Act (2000)*, racial profiling data collection requirements were enhanced with

⁶¹ Ramirez et al supra note 2 at 32-37.

⁶² Bland et al supra note 15 at 10.

specific provisions recommended in the Stephen Lawrence Inquiry⁶³. Given this legislative impetus, each police department is required to undertake similar procedures in terms of recording all police stops and searches⁶⁴. This is part of an overall process of organizational change and accountability aimed at ensuring law enforcement organizations are implementing good race relations initiatives and are politically and publicly accountable for such. More on this point will be discussed later on in this section. The focus here will be on the racial profiling data collection systems.

A number of high-profile events led to the expanded scope of racial profiling data collection activities. In particular, the brutal murder of Stephen Lawrence, a young person of African descent, and the failure of the police to adequately investigate this murder led to significant allegations of police insensitivity and racism, including public protests and an inquiry headed by Sir William McPherson. The latter's inquiry and final report revealed numerous allegations based on community complaints, of racial discrimination by police in their stop and search activities.

As a result of the Stephen Lawrence Inquiry⁶⁵, the *Race Relations (Amendment) Act*⁶⁶ now ensures that all police forces are subject to the full force of race relations laws. In this context, the *Act* allows for Chiefs of Police to be vicariously liable for discriminatory acts of subordinate officers. Further, two Parliamentary Orders require police authorities and Chiefs of Police to publish a Race Equality Scheme detailing policies and functions relevant to their duties and methods of taking them forward⁶⁷. As a supporting piece of legislation, royal

⁶³ Ibid at 1 where the authors quote recommendations 61, 62 and 63 which respectively state that all police forces are required "To record all police stops and searches and give a copy of the record to the person stopped. The record should include the reason and outcome of the stop or search, and the self-defined ethnicity of the person"; "For forces and Police Authorities to monitor and analyze records of stops and searches, and for information to be published."; and "For Police Authorities to ensure that the general public are aware of police provisions for stops and searches and of their right to receive a record of the encounter."

⁶⁴ For example, see Bland et al supra note 21 at 7 regarding the provisions of PACE Code A which require officers to make a record of a search and to inform the person searched for their rights to the record.. Further, the Metropolitan Police Authority has issued **Special Notice 12/01: Metropolitan Police Service guide to the use of stop and search** which identifies principles governing the use of stop and search powers and details specific minimum standards for senior management teams, first line supervisors and team managers and officers. See MPA supra note 22 Appendix "B"

⁶⁵ In this report, matters concerning stops and searches are addressed in Recommendations 60 to 63. The report also recommends that all Police Services and Police Authorities should monitor and evaluate above-mentioned records; the Her Majesty's Inspectorate of the Constabulary (HMIC) should review the records on inspections. Information and analyses should be published. Publicity by Police Authorities to make public aware of 'stop and search' provisions and the right to be given record. Other recommendations made on subjects of: the definition of racist crime; reporting and recording of racist incidents and crime; police practice and investigation of racist crime; family liaison; victims and witnesses; prosecution of racist crimes; first aid training; racism awareness and valuing cultural diversity training; and prevention and the role of education. See also Bland et al supra note 10 at 10 and 65 where they point out that it has also been suggested that the PACE Code should spell out if, and to what extent, officers can rely on generalizations; adequate measures needed to ensure any generalizations used reliably and not used unfairly Notion of reasonable suspicion and its application need to be clearly defined through training, supervision and guidance. Legal framework for developing grounds requires clarification due to range of officer practices.

⁶⁶ In effect as of April 2, 2001.

⁶⁷ This requirement came into effect on December 3, 2001 and such schemes were to be submitted by May 31, 2002.

assent for the *Freedom of Information Act* (the "Act") was provided in November 2000 with the Act coming fully into force by November 2005. The Act covers all policing functions subject to an appropriate harm test which allows for two exceptions: (1) for information from informants; and (2) for information held for prosecution or investigation⁶⁸. In addition, in terms of complaints and discipline, the Police Reform Bill included provisions for a new Independent Police Complaint Commission (to replace Police Complaints Authority). The legislation set out that the IPCC will have its own investigation teams independent of police and "have a call in power to investigate, manage or supervise other cases."⁶⁹ All serious cases will be referred to it.

Specifically related to racial profiling data collection, police departments across the U.K. record data related to stops and searches on an Information for Persons Searched form, a paper form which must be completed after a search has been conducted. The form is carbon copied so that the individual searched can have a full copy of the data recorded by the officer at the time of the search or within 12 months following the search. It is estimated that it takes 5-10 minutes to complete the form after each search⁷⁰. During this time, officers are required to provide information supporting the reasonableness of the stop and search (eg., search for stolen property, drugs, firearms) or that the search has been authorized by a superior officer with no reasons provided. The forms are divided into a number of sections where officers are required to record: the name, address, birth and telephone number of those stopped/searched; a description of the person(s) searched (eg., height, weight, gender); the extent of the search of the person(s), eg., clothing searched/private parts exposed; the results of vehicular searches, eg., type of vehicle, property found; and the time, date, location of the activity.

In terms of racial characteristics, following the McPherson report this information is no longer gathered based on officer perception as it had in the past but primarily through the self-identification of individuals who are stopped or searched. Currently, there are 17 categories provided for self-identification, including: White/Northern Europe, White/Southern Europe, White/other, Black/British, Black/Caribbean, Black/African, Asian/Indian, Pakistani, Bangladeshi, Chinese, Asian/Other, Arabic, Other, Mixed Origin/Black-White, Mixed Origin/Asian-White, Mixed Origin/Other. As the data is captured on paper, each police district pays approximately \$8,000 per year for data entry⁷¹.

In several pilot initiatives, specific codes have been used to categorize the data on racial characteristics. These include information related to all searches whether they are conducted based on suspicion, suspected of drinking and driving, traffic warnings, monitoring or check-up, establishing background, reprimand, peacekeeping and other concerns⁷². Specific police department initiatives in the U.K. have been implemented in several areas. Some of these are described below.

⁶⁸ See Home Secretary's Action Plan - Second Annual Report at 10.

⁶⁹ *Ibid* at 11. This was introduced on January 24, 2002. The Bill allows for the complainant to be provided with a complete description of the investigation, i.e., the summary of evidence, proposed actions, explanation of findings. If a complainant feels that a written account is unsatisfactory, s/he has the right to appeal to IPCC, which can provide additional information

⁷⁰ While this is the average time, in Hounslow it requires 2 minutes to complete the form.

⁷¹ See Ramirez et al *supra* note 2 as well as MPA *supra* note 10 at 13 (2.27) which sets out specific categories for matching information on racial characteristics such as: arrests, cautions, reprimands and final warnings, police complaints/deaths in police custody, homicide, stop and search, vehicle defects, fixed penalty notice, negative breath test, police personnel.

⁷² See Bland et al *supra* note 21 at 32

Avon and Somerset. Strategies to improve monitoring and recording of police stops and searches were initiated in 1999. This included extending 'ethnic' monitoring to include Fixed Penalty Notices and Vehicle Defect Rectification Scheme (VRDS) forms. Each form included a four-point classification system (eg., White, Black, Asian, other) based on officer perception. The information recorded was then inputted into a new data base. The force further extended monitoring to include HO/RT1, forms provided by constables to motorists which require drivers to produce their traffic documents at a police station in seven days.

It was anticipated that these steps would result in improved quality control and monitoring of records as well. The process reinforced the need for sergeants to sign each form and check that they had been completed to standard. Officers were also required to provide a 'know your rights' card to individuals stopped and searched, particularly those between the ages of 14-25 who, through community outreach, were given such cards through youth agencies. In addition, these police forces added two new positions: the District Corporate Development Officer and the Performance Inspector. Individuals appointed to these positions were placed in all police divisions. The District Corporate Development Officers "act[ed] as the data-handler for all the local management information, producing statistics and further evaluation as necessary" and they also "monitor[ed] the quality of officers' records." The Performance Inspector was authorized to ensure officers completed records in a satisfactory manner. The Inspector could take remedial action to ensure officers failing to do so complied in future.

Analysis of activity and results are carried out at a local level to identify officers who have used stops and searches disproportionately. This is done for the Ethnic Monitoring Group which is comprised of police and members of the Bristol Race Equality Council. Division commanders are required to report to this group on 'unusual' results⁷³.

Northhamptonshire. The Northhamptonshire initiative is premised on the importance of maintaining a "rigorous quality control framework". Following information identifying a disproportionate use of searches against peoples of African descent, the Equality of Service Monitoring Group (EOSMG)⁷⁴ set up a process to examine the reasons for the disproportionality. The examination analysed data collection procedures and the design of the search form used by officers. Following the Stephen Lawrence Inquiry Report, the work was expanded to look at policy issues as well. As a result, a new force policy on searches was developed following consultation with local communities, particularly with the local "African Caribbean community association".

In an effort to improve public confidence in police searches, a number of strategies were recommended and implemented, including:

- The introduction of a new form for recording searches with information on police search powers and peoples' rights and a larger space for recording information on the reason for the search;

⁷³ See Bland et al supra note 15 at 11 and 12

⁷⁴ Ibid at 14. This Group is "responsible for monitoring service delivery across a wide spectrum of activities through a regular review of figures, and consists of police and support staff, as well as representatives from the REC (Racial Equality Council), the local Police Authority and a range of external agencies."

- A prompt card for use by officers to ensure the use of search powers is fair, effective, focused on crime, legal and minimizes costs to the community;
- Discontinuation of voluntary searches;
- Provision of officer training on searches, emphasizing the communication skills needed for conducting a search in a polite and respectful manner;
- Inclusion of search training as a priority for management and a quality control framework based on self-inspection and auditing to improve supervision of search records⁷⁵;
- Ongoing monitoring by the EOSMG and nominated local officers;
- Provision of a 'know your rights' booklet to people searched and promotion of the booklet through community agencies followed by a survey of people searched.

The process for monitoring was based on examination of those issues within the domain of central oversight such as monitoring statistics, reports to the Police Authority and circulating information within the community. As well area level data analysis was carried out by officers who identified trends in disproportionality and made recommendations to the EOSMG for remedial action. The central monitoring conducted by the EOSMG requires police to justify their performance and has resulted in a focus on individual officer practice and shift teams where appropriate.

Leicestershire⁷⁶. The annual publication of data monitoring statistics identifying the disproportionate use of searches on peoples of African descent was the catalyst for intervention in Leicestershire. This initiative involved both community and field officers working together to identify the reasons for the disproportionality. The joint initiative involved research which prompted discussions with the Service Delivery Monitoring Group consisting of the Assistant Chief Constable, area commanders, departmental heads and representatives from two local Racial Equality Councils.

The force's Community and Race Relations Inspector was authorized to review officers who had conducted quality searches in order to identify good officer practice and share these

⁷⁵ Ibid. This is discussed at 16-17 as comprising: "Supervision – on- a day-to-day basis search forms are submitted to an officer's immediate supervisor. Training is also planned to improve sergeant's understanding of supervision. "Area self-inspection – in each area, a dedicated officer (or group of officers) reviews a sample of search records against an inspection template. Like the Avon and Somerset example, this involves checking search records against other force systems ... to ensure that forms have been submitted. The reviews are recorded, as are the results and any remedial action required. "Force audit – twice yearly, the force Audit Unit examines a sample of the self-inspection reviews against a sample of non-reviewed search records to ensure that self-inspection is carried out correctly. "System ownership – a senior manager has been given ownership of the quality control process and has responsibility to ensure that action is taken against problems identified through supervision, self-inspection and force audit."

⁷⁶ Bland et al supra note 15 at 24-28. See also 29 – 31 for discussion of similar approach by the Metropolitan Police Service and comments regarding issues needing attention in terms of force training, local level training and use of force intranet.

results across the force. The findings of this research were well-received and had two main results: (1) the development of a force intranet page to encourage quality use of searches; and (2) implementation of similar studies at a more local level.

In selecting officers to participate in the research, Leicestershire had to rely on their management systems and data collection activities in order to identify officers who employed quality practices in their searches. In terms of the consultations among selected officers, several key findings emerged as integral to the effective use of searches. These were: use of intelligence and local knowledge; observation of suspect behaviour and body language, self-motivation, good communication skills; knowledge of search powers; and use of backup.

Bedfordshire⁷⁷. In terms of increasing public confidence in the polices' use of stops and searches, it has been suggested that it is important to address concerns and complaints and promote community ownership as well as providing communities with opportunities to review police practices and, equally, to increase the public's awareness of police powers and people's rights. An initiative to address these concerns was introduced in Bedfordshire following criticism from the local Police Community Consultative Group about disproportionality in searches.

Disproportionality was justified by the police because it was the result of targeted and intelligence-directed patrols in high crime areas which were also populated by significant numbers of subordinate racialized groups. The police engaged the community, particularly through local agencies and the local Racial Equality Council, in an open forum every six weeks to discuss the use of searches. To facilitate these meetings, a report prepared by intelligence officers identifying the grounds for each search of a subordinate racialized person and the background information leading to the search was provided

Watford Area, Hertfordshire⁷⁸. Community involvement in strategic planning has been implemented in Hertfordshire where community representatives have become involved in the Watford Ethnic Monitoring Group (WEMG). Established in 1999 the WEMG is comprised of 7 police officers, 3 civilian researchers, 3 academics from Hertfordshire University and 3 community representatives. The initiative of the WEMG was to analyze 268 search forms for a three month period, conduct research into available populations and conduct consultations with police officers to assess their understanding of search powers and procedures and their effectiveness. Research was also conducted through a survey of key groups in the community⁷⁹.

Analysis and Implications of the Research – Moving Toward Transparency, Accountability and Effectiveness:

There are numerous issues stemming from the current racial profiling data collection research suggesting much needs to be done to develop a common approach to data collection and

⁷⁷ Ibid at 36-37

⁷⁸ Ibid at 39-45.

⁷⁹ For description of other model activities, see Bland et al supra note 21 at 15-22 for review of Metropolitan Police Services, Suffolk, Leicestershire and West Yorkshire and at 37 for discussion on monitoring stops and searches. See also MPA supra note 10 Appendices A, B and C respectively on **Questionnaire for Boroughs to provide evidence for Disproportionality**, and **Recruits study notes for stop and search**.

analysis in order to assist in enhancing effective policing services. However, it must be pointed out that much of this research indicates that it is important to go beyond simply addressing racial profiling through data collection and analysis. Studies strongly suggest that research is only part of the solution. It is important that there are equitable policing services which meaningfully engage subordinate racialized communities in all aspects of policing, including: lodging complaints against police, instituting measures for political accountability and changing the culture of the police. There must be an impact on performance development and officer practices, education and training, employment and community relations, and mechanisms for monitoring and accountability.

These issues will be discussed below beginning with the scope of data collection activities, followed by comments on the organizational culture of policing, the importance of a policy context in which to address racial profiling and how to ensure effective monitoring and accountability of policing practices.

Scope of Data Collection Activities:

Despite the lack of an agreed upon definition of racial profiling and what constitutes a police 'stop' or 'disproportionality' in stops and searches, there are currently over 400 law enforcement agencies in the U.S. that have initiated traffic-stop data collection activities while 14 states have adopted legislation requiring such initiatives and 24 reports have been written assessing "more than three million records of police stops from more than 700 law enforcement agencies." Issued by federal, state and local law enforcement agencies⁸⁰, these reports generally reveal that "most of the analyses reported show that police traffic stops are not proportional to the racial distribution of that jurisdiction's resident population, but most studies do not conclude that the police are engaged in racial profiling."⁸¹

There are significant differences in how these reports were designed, implemented and interpreted. Most studies have used a single-variable design where they collect data on traffic stops and compare the percentage of stops of subordinate racialized groups to their number in the population⁸². Based on such research design, MacMahon et. al. found:

- Most use official police records (23) of a single municipal (10) or statewide police agency (11);
- There is "great variability" in the scope and depth of the analyses conducted with two reports using information from most law enforcement agencies within a single state and one study using information from a representative sampling of households to assess public contacts with police across the U.S.;
- The Lamberth study in New Jersey covered 25 days with information from 3,000 traffic stops while the California Highway Patrol covered 10 months and more than 2.5 million traffic stops and 11 other reports use data on more than 100,000 traffic stops;

⁸⁰ MacMahon et al supra note 2 see Appendix A.

⁸¹ Ibid at 23. See also Brendon Garrett supra note 2 at 2 where he discusses the challenges facing police forces in terms of identifying the data to collect and the significance of the data once collected.

⁸² Ibid at 7.

The Lamberth study in Maryland involved 823 traffic searches during a 21 month period and 12 other studies gather data from a period less than 12 months while six other reports cover 12 months and still six more reports go beyond 12 months;

- Four involved police contacts with the public outside of traffic stops and one of these investigates pedestrian stops;
- Sixteen addressed stops and searches while four collected and analyzed data about stops but not searches and three of these assessed searches but not stops;
- The California Highway Patrol captured data related to arrests, citations, written notices of correction, warnings, motorist services, and collisions while the Baltimore Police captured data on traffic and non-traffic stops;
- The Bureau of Justice Statistics captured data from citizens directly through its national survey of households. It did not rely on police data and, during six months of 1999, it added a special section on police public contacts which was completed by 80,543 residents with more than 25 percent indicating they had face-to-face contact with police in the past year. It is the only report to indicate if force was used by the police;
- Local police departments issued ten reports with two of these (San Diego, California and Lansing, Michigan) involving academic researchers. Further, state-level agencies released reports in Connecticut, Missouri, New Jersey and New York with the former two identifying academic expertise involved in the report's preparation;
- Two reports (New Jersey and Maryland) were produced by litigants involved in legal action and one report was produced by social scientists (Knowles and Persico/Maryland);
- Four (Michigan, Minnesota, Washington State and Bureau of Justice Statistics) relied on estimates of the subordinate racialized groups within the driving age population while four studies (Maryland, New Jersey, Sacramento - check) developed independent surveys of the subordinate racialized group composition of drivers at specific locations and times of day;
- Three jurisdictions (New Jersey, Richmond Virginia, St. Paul Minnesota) found racial profiling in traffic stops while the results from New York City indicate racial profiling in non-traffic stops. Further, two areas (Missouri and North Carolina) provide mixed evidence while nine jurisdictions found no evidence of racial profiling (California, Connecticut, Florida, Lansing, Oakland, Sacramento, San Jose, Texas and Washington State)
- Three jurisdictions (New Jersey, San Diego and the U.S.) report insufficient evidence to make a finding and three others (Baltimore, Chattanooga and Michigan) make no statement as to what the data they have gathered signifies;
- Four jurisdictions (Maryland, New Jersey/Attorney General, St. Paul and Washington State) found evidence of racial profiling in traffic searches while four others (Connecticut, Lansing, Richmond and Sacramento) did not;

- Mixed evidence was determined in three areas (Maryland/Knowles-Persico, Missouri and North Carolina) while six jurisdictions (California, Chattanooga, Florida, New Jersey/Lamberth, New York City and San Jose) do not address searches at all⁸³.

In addition, based on a survey of 2,251 police departments⁸⁴, Fridell et. al. learned that of responding police departments:

- 37.4 percent had formal internal discussions on racial profiling or stereotyping;
- 18.9 percent had developed new policies on this matter and 12.3 percent had modified existing policies;
- 17.5 percent had modified their training;
- 17.5 percent had initiated data collection projects and 17 percent had enhanced their outreach to the community to address issues of race⁸⁵.

Similar concerns are also evident in the U.K. research where all police forces are required to collect racial profiling data. For example:

- Substantial variations for the use of searches exist between police departments “even among forces with similar characteristics and crime rates.” While Cleveland records 101 searches per thousand, Humberside records only 6; and the Cleveland Police rely on searches to provide 18% of arrests whereas West Midlands does so for 3%⁸⁶;
- Data on use of searches by other police departments per 1,000 persons indicates that the police forces in Essex, Humberside, Dorset, Nottinghamshire and Sussex conduct between 5 and 7 searches whereas Kent, Merseyside, London, Dyfed Powys conduct between 40 and 51 searches⁸⁷;
- In the Metropolitan Police Services, police differed from borough to borough in identifying individuals stopped. For example, in Leicestershire and Greenwich individuals stopped were asked to describe their personal characteristics whereas in Suffolk, Hounslow and West Yorkshire individuals stopped chose their personal characteristics from a ‘closed’ response list⁸⁸;
- Each borough in the Metropolitan Police Services “has their own way of gathering and using intelligence and suspect profile to prepare briefings for officers” and the borough of Lamberth uses a different method to build community confidence in the use of police

⁸³ Ibid 24-29. See also Brendon Garrett supra note 2 at 14 for comments on the fairly broad scope of consent decrees in the U.S. and at 59 footnote 137 citing collection of pedestrian data as taking place in Kansas.

⁸⁴ The survey was conducted during October, November and December 2000 with a response rate of 48.7 percent (1,087 police departments). See Fridell et al supra note 1 at 17-19.

⁸⁵ Ibid at 24. See also Brendon Garrett supra note 2 at 13-14 where he discusses the lack of a control group established for comparison and monitoring purposes.

⁸⁶ See Miller et al supra note 2 at v.

⁸⁷ Ibid at 12 and 13. In commenting on these differences, the authors note that “It is particularly surprising ... that similar police forces often record very different levels of search activity. The most striking finding ... in this regard, is the difference between Cleveland ... and its closest relative, Humberside ... It is also notable that Essex, with just five searches per 1,000 populations, is markedly different from its closest relative, Kent, which has 40.”

⁸⁸ See MPA supra note 10 at 11

stop power. For example, “any individual stopped more than 4 times in a month, they are flagged up, and explanations sought”⁸⁹; and

- There are significant variations in the manner in which police officers fill out required forms. For example, some officers stop individuals infrequently, if at all, while others conduct numerous stops⁹⁰. As well, some officers did not fill out forms for encounters included within the recording rules. This was strikingly evident in stops where police did not fill out required forms 79% of the time out of 118 observed encounters⁹¹.

Such discrepancies in approaches, methodologies and results present a rather critical dilemma in terms of the scope of what should be investigated to assess the degree and impact of racial profiling, as well as what issues need to be addressed. Ramirez et. al. note that there are many reasons to collect racial profiling data but improving police-community relations and assisting effective deployment of police resources are the prime reasons. They also point to the significance of providing an early warning system which can help identify areas where there is contention and individual officers whose performance may be suspect and require remediation. In addition, racial profiling data collection may assist with identifying effective stop-and-search procedures by furnishing information related to the types of stops made, the time involved in high discretion stops and the results of these actions⁹².

Similarly, McMahon et. al. cite the importance of cooperative work with communities and academics at each level of the data collection process., including its early stages of planning the activity, designing, implementing, analyzing it and then publicizing the results to the media and to the community at large. They suggest that, in order to address existing patchwork approaches, all concerned need to work together and develop a common approach that supports community involvement, increases public awareness and gains media participation along with police union involvement.⁹³ They also cite the importance of going beyond data collection and that the use of a single variable in data design, implementation and analysis is not a very useful way of conducting such initiatives⁹⁴.

The Culture of Policing -- Organizational Rigidity or Flexibility:

In addition to the studying complexity and differing methodologies of racial profiling data collection systems, it is critically important to assess police culture and its capacity to change. There is general agreement that the policing institution has a hierarchical structure where there are different value systems attached to each level of the organization, i.e., senior management, middle management and frontline officer.⁹⁵ Some of the implications of this have been noted in the first section in reference to the reports and articles on policing in Toronto, Ontario and Canada by Allan Andrews, Philip Stenning and Clare Lewis⁹⁶. Recent

⁸⁹ Ibid at 17 and 20.

⁹⁰ Bland et al supra note 21 at 27. The authors note that “This variation seemed to be the result of differences in the policing style of individual officers or a function of the work or shift pattern they were doing.”

⁹¹ Ibid at 31

⁹² See Ramirez et al supra note 2 at 13-14.

⁹³ See MacMahon et al supra note 2 at 63-67

⁹⁴ Ibid at 7-8

⁹⁵ For example, see Judith B.L Chan supra note 6 at 66.

⁹⁶ See also references provided by Simon Holdaway in *Police Race Relations: A consultative paper*

literature on this topic confirms the importance of addressing the 'commonsense' culture of frontline officers in order to effect organizational change, particularly in terms of relations with subordinate racialized groups and supervisory responsibilities to ensure effective change in these relations.

For example, Judith B. L. Chan discusses the often inflexible and rigid value system of field officers despite legislative and policy contexts which require sensitivity to issues of race and racism in policing services⁹⁷. Her Australian focus is interesting, because there are political and demographic parallels to Canada in terms of an increasing racial diversity in large urban centres as a result of immigrant and refugee settlement as well as the implications of multicultural policies to all aspects of public life and services. Despite these social changes, Chan notes the apparent rigidity of the police frontline in developing appropriate knowledge and skills to improve working relations with subordinate racialized groups.⁹⁸

Simon Holdaway goes further in his comments on the culture of policing as it pertains to the difference between police policy and practice⁹⁹. While agreeing with Chan on the importance of addressing the occupational culture of the police organization, he points out that it is essential to acknowledge and address the negative and biased attitudes of individual police officers toward individuals from subordinate racialized groups.¹⁰⁰ Similarly, Ellis Cashmore suggests that individual officers hold racist views and that this is critical to fitting into the organizational culture of the police. He further asserts that White officers 'test' officers from subordinate racialized communities to determine their views on race and how they will respond to overt expressions of racism. In this context, Cashmore discusses the

written for the Commission on the Future of Multi-Ethnic Britain where he sites research conducted by: J. Skolnick *Justice Without Trial: Law Enforcement in a Democratic Society*, New York and London, Wiley, 1966; E. Bittner, *Police discretion in emergency apprehension of mentally ill persons*, *Social Problems* 14(3):699-714 1967; S. Holdaway, *Changes in Urban Policing*, *British Journal of Sociology* 28(2):119-137, 1977, *The reality of police race relations: towards an effective community relations policy*, *New Community* 6(3): 258-267, 1978, and, *The British Police*, London, Edward Arnold, 1979; P. Manning, *Police Work*. Cambridge, Mass, MIT Press 1977; D. James *Police Black Relations: The Professional Solution*. S. Holdaway, London, Edward Arnold, 1978; M. Chatterton, *The supervision of patrol work under the fixed points system*. The British Police. H.S. London, Edward Arnold, 1979, and, *Rational Management in Police Organizations: A Comparative Study in Two Forces*, Unpublished paper, 1993; and M.A. McConville, Sanders et al *The Case for the Prosecution*. London, Routledge, 1991.

⁹⁷ Also, *ibid* Holdaway at 9 where he discusses this in terms of the challenges posed by traditional policing culture learned over generations and passed on and the challenges this poses to bringing about new ways of policing.

⁹⁸ See *supra* note 6 at 223. See also Carol Tator and Frances Henry *Racial Profiling In Toronto: Discourses of Domination, Mediation and Opposition*, Final Draft, Canadian Race Relations Foundation. In this text, Tator and Henry assert at 11-13 that there is "...evidence of a strongly developed culture and value system within the organization that produces, supports, and reinforces racial bias and discrimination." In making this assertion, they cite the research of Charles Ungerleider (*Issues in Intercultural Awareness and Race Relations Training in Canada*, Solicitor General of Canada, 1992) "who studied two Canadian municipal police forces. Based on a sample of 251 officers, he examined the judgments that police officers made about others, and found that 25 percent expressed views that could be categorized as reflecting 'confusion' and as being 'irrationally negative' towards visible minorities." Tator and Henry also cite the work of P.A. Waddington *Police (Canteen) Sub-Culture*, *British Journal of Criminology*, Spring, 1999, 39(2) at 287.

⁹⁹ *Supra* note 2 at 49.

¹⁰⁰ *Ibid* at 51-52. Holdaway argues at 54 that such views were key contributors to both the Brixton riots of 1981 and of the inordinate disparities of police stop and search activities.

importance of going beyond notions of institutional racism and dealing with officers' day-to-day commonsense expression of racist prejudice and bias in order to discover how such beliefs influence practice¹⁰¹.

The concerns of Holdaway and Cashmore are strongly underlined in the work of Vanessa Stone and Rachel Tuffin who conducted extensive research into the attitudes of subordinate racialized groups to a career in policing.¹⁰² The general findings of their research suggests that the "(a)ttractive aspects of police work could... be far outweighed by the drawbacks envisaged." Respondents were discouraged by the following perceptions:

- "The thought of having to work in a racist environment, having to face prejudice from both colleagues and the general public on a daily basis.
- The isolation of minority ethnic officers in a predominantly white male culture leading to them having to deny their cultural identity in order to fit in.
- The danger of the job and having to deal with unpleasant situations coupled with a lack of confidence in (racist) colleagues assisting them in circumstances where their life or physical safety were at risk.¹⁰³"

Stone and Tuffin also point out that focus group participants indicated they would not join the police force until racism was dealt with aggressively and openly through such strategies as: establishing an independent panel to review how police forces deal with racism; developing a recruitment process that excludes racists; providing education and training on racism; providing support structures to enable officers from subordinate racialized communities to advance in the police force¹⁰⁴.

¹⁰¹ See *The experiences of ethnic minority police officers in Britain: under-recruitment and racial profiling in a performance culture*, in *Ethnic and Racial Studies Vol.24 No.4*, July 2001 at 648-654. This study is very interesting in that it is based on uncensored interviews with African Caribbean and Asian officers in a number of U.K. police departments following the Stephen Lawrence Inquiry.

¹⁰² See *Attitudes of People from Minority Ethnic Communities towards a Career in the Police Service*, Police Research Series Paper 136, Home Office, 2000.

¹⁰³ *Ibid* at vi. Cashmore *supra* note 101 at 264 shares similar views on this point and has written: "It is imperative that colleagues, even those who are known to hold racist views, need to be trusted. You're going to need back up at some time and a delay of thirty seconds can mean the difference between life and death ... Tolerating or even countenancing racism may be an expedient decision on behalf of ethnic minority officers who may feel their safety is compromised if they report a racist colleague."

¹⁰⁴ *Ibid* at viii-ix. It is worth reviewing Stone and Tuffin's research to see the concerns expressed by those involved in the research. Some examples may be helpful. For example, in explaining why officers are reluctant to press formal complaints against racism exhibited by White police colleagues, a focus group participant at 12 said: "The atmosphere has to be right when you go to work, these are the people that you're working with, if your [police] colleagues don't like it then what about the next time you're on the street and you're getting your head shoved in? Well they'll just turn a blind eye, you know. It's not like any other office job, if you don't like someone you can say 'oh bollocks, I won't talk with him for a week' ... This chap that you don't like, you could be on the front line with him, you could be relying on him to save your life." In addressing why individuals from subordinate racialized groups are reluctant to join the police force, another focus group participant at 19 said "A lot of people from ethnic minorities who actually go into the police force, there's articles in the paper that they're discriminated. They're trying to make a difference and they still face the hardship." Another focus group participant at 22 said "There's so much hatred in the police force. Before I was never negative about [the] police and from a bad experience, I can't stand them. And if someone like me who is so open-minded - like I was - can change, then oh god." These stories offer gripping accounts of personal experiences between individuals from subordinate racialized groups and the police in the

Chan assesses the implications of these concerns in terms of the loyalty field officers have toward each other and how this serves to underpin a culture of secrecy¹⁰⁵. She argues that:

In simplistic terms, not only is the police culture responsible for racist attitudes and abusive behaviour, but it also forms the basis for secrecy and solidarity among police officers, so that deviant practices are covered up or rationalized. Police culture can be a powerful source of explanation for the existence and toleration of racism in police forces; it can also account for the ineffectiveness of police reforms in changing police practice¹⁰⁶.

Holdaway looks to the basis of institutional life to discuss the influence of historical and societal racism and its impact on the police as an institution. He notes the importance of taking a social constructionist perspective and suggests that "(i)nstitutions are objectified, but they should be researched as social processes that construct, sustain, and objectify them. This is where the concept of racialized relations is particularly germane."¹⁰⁷ Such a

U.K. They are strongly reminiscent of the comments provided to Maureen Brown in her report *In Their Own Words*, African Canadian Community Coalition on Racial Profiling, 2004.

¹⁰⁵ See Chan supra note 6 at 67 and 69.

¹⁰⁶ See Chan supra note 6 at 225. This was a particularly concerning issue in the recent *Ohdavi et al v. Detective Martin Smith et al* (Supreme Court of Canada, February 13, 2003 and December 5, 2003) and in numerous community concerns regarding the failure of the police to cooperate with the Special Investigations Unit as discussed in Section 1. Further, in a recent paper entitled **Community and Policing Partnership** and presented at the National Policing in a Multicultural Society Conference, Multiculturalism Sector, February 2003, Valerie Pruegger at 11 writes: "For anti-discrimination and anti-racism policies to work, members must believe that they work in an environment where calling attention to behavioural breaches of policy will not result in peer sanction, and will garner support from senior staff. "A number of police officers have told me that they believe reporting the inappropriate behaviour of a peer or superior is the kiss of death for their careers. Whether this perception reflects reality, creating a safe environment where these issues can be raised may be the biggest challenge facing police services in Canada." See also Holdaway supra note 2 at 59 where he quotes the Metropolitan Police Service Black Police Association's comments to the Stephen Lawrence Inquiry as follows: "We should not underestimate the occupational culture within the police service as being a primary source of institutional racism in the way that we differently treat black people. Interestingly, I say we because there is no marked difference between black and white in the force essentially. We are all consumed by this occupational culture." This view is also supported by Cashmore supra note 101 who discovered much the same attitude amongst the African Caribbean and Asian officers he interviewed. Further, see: Jerome Skolnick *Corruption and the Blue Code of Silence* **Police Practice and Research** 3 at 7, 2002; Gabriel Chin and Scott Wells *The 'Blue Wall of Silence' As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, **University of Pittsburgh Law Review** 59 at 233, 1998; Dianne Martin *Organizing for a Change: A Community Law Response to Police Misconduct* **Hastings Women's Law Journal** 4 at 131 1993.

¹⁰⁷ *Ibid* Holdaway at 59. In making this argument, Holdaway references the work of Peter Berger and Thomas Luckman, **The Social Construction of Reality**, Harmondsworth, Penguin, 1967. To such an assessment, one might also refer to Philomena's Essed's work on every-day racism at 177-78 and 185-190 in *Everyday Racism: A New Approach to the Study of Racism* in **Race Critical Theories** (eds., Philomena Essed and David Theo Goldberg, Blackwell Publishers, 2002), particularly her discussion on the "everyday" as a "problematic ... often used to refer to a familiar world, a world of practical interest, a world of practices we are socialized with in order to manage in the system." In this context, she further suggests that "The concept of everyday racism counters the view ... that racism is an individual problem, a question of 'to be or not to be a racist' ... The fact that it concerns repetitive practices indicates that everyday racism consists of practices that can be generalized. Because everyday racism is infused into familiar practices, it involves socialized attitudes and behaviour.

perspective may well be at the core of actions needed to effect short and long-term change in police relations with subordinate racialized groups. In this sense, issues of race and racism in policing need to be looked at with due regard to the factors which influence it – social values, institutional norms, individual beliefs – and how they have become pervasive within employment practices, service delivery, education and training, and monitoring and accountability.

While Holdaway references a social constructionist perspective, Chan similarly addresses notions of the 'field' and 'habitus' of policing culture and organizational reality. Chan argues that one must look at the agency of individual police officers and the 'field' that surrounds them and that they surround themselves with. In this context, Chan raises concerns regarding the 'practical' world of policing in terms of what is counted as 'real police work', such as arrests and apprehending criminals, and how this becomes enmeshed with approaches to service delivery that rely on stereotypes, practical consciousness and commonsense assumptions¹⁰⁸.

In order to address these challenges, Chan and Holdaway argue that it is important to take the organizational culture of frontline officers very seriously and to provide support to field officers that require them to understand the link between historical and social exclusion, marginalization and the perpetuation of such by policing services. In this context, they suggest that it is critical to see issues of race as central to policing and to provide police with models of desired changes in terms of practices and professional knowledge. As well, both point to the importance of accountability mechanisms that address both organizational and individual officer accomplishments¹⁰⁹.

Finally, its systematic nature indicates that everyday racism includes cumulative instantiation. These arguments make clear that the notion of everyday racism is defined in terms of practices prevalent in a given system. Note that practices are not just 'acts' but also include complex relations of acts and (attributed) attitudes."

¹⁰⁸ See Chan supra note 6 at 70-76 who bases her analysis on the work of the French theoretician Pierre Bourdieu. In doing so, Chan at 71 defines 'field' as 'a social space of conflict and competition, where participants struggle to establish control over specific power and authority, and, in the course of the struggle, modify the structure of the field itself... In terms of police work on the streets, for example, the field may consist of the historical relations between certain social groups and the police, anchored in the legal powers and discretion that police are authorized to exercise and the distribution of power and material resources in the community. "Habitus, on the other hand, is closer to what has earlier been described as cultural knowledge. It is a system of 'dispositions' which integrate past experience and enable individuals to cope with a diversity of unforeseen situations ... Habitus generates strategies which are coherent and systematic, but they are also ad hoc because they are 'triggered' by the encounter with a particular field...It embodies what police officers often refer to as 'commonsense' and what are commonly known as policing skills (references omitted)". This issue was also discussed in Section 2 in terms of Verniero and Zoubeck's assessment of the reward system for the New Jersey police that contributed to racial profiling.

¹⁰⁹ For example, supra note 6 at 232 Chan writes "Changing police culture requires changes in the field at both management and street levels. These may include the restoration of land rights to Aboriginal communities in recognition of the injustices done in the past; a stronger commitment by the government to monitoring access and equity in policing; a more adequate allocation of resources for community assistance; the enactment of a statutory right to interpreters; the establishment of a more accessible and efficient complaints procedure; and increased internal and external auditing of police practices." See also Pruegger supra note 106.

Performance Development:

Central to addressing organizational change is acknowledgement that all policies and procedures guiding the actions of police officers must be implemented by each officer. As such, the responsibility for each officer to effectively implement statutory duties and/or organizational policies and procedures is paramount. Without this, the best statutes, policies, procedures and guidelines are insignificant. Given the resistance of police officers and police associations to the discourse on racial profiling and solutions to it, addressing this issue successfully is particularly important.

In Toronto, the Police Association rejected outright all notions that their members had engaged in racial profiling. To assert their point of view, they have undertaken to sue the Toronto Star for libel and have threatened to withdraw their services from particular communities.¹¹⁰ The Chief of Toronto's Police Services was equally affronted by the Toronto Star series and, as part of his response, retained the services of experts to refute the Star's data collection. These all-too familiar patterns of resistance and denial are seen in many instances within Canada and elsewhere¹¹¹. Such actions dismiss the concerns of individuals and communities as being outlandish and an insult to the professionalism of law enforcement authorities. By responding to criticism as a personal insult the police ignore the validity of the data gathered and the analysis given to it. They ignore the historical context which has led to the moment of crisis and they leave unanswered the mountain of data described in the previous sections

Many police forces that have instituted data collection activities do not hold individual officers accountable for the stops and searches they conduct; nor do they even identify the policing units that the data are collected from. Both of these practices make it difficult to assess the practice of individual officers, local policing units or areas of command. Opaque data obstructs efforts to address racial profiling in concrete tangible ways, either to reward good

¹¹⁰ See Wortley and Tanner supra note 31 at 1-4, and, Tracy Tyler *Judge dismisses suit against Star, Toronto Star*, June 25, 2003.

¹¹¹ For example, see: Wortley and Tanner supra note 31 at 2 and 3; Fridell et al supra note 1 at 15; Ramirez et al supra note 2 at 21, 27, 30, 40-41; MacMahon et al supra note 2 at 1, 66, 71 and 74; Garrett supra note 2 at 4; Bland et al supra note 21 at 9, 16-17 and 31. This is critical to addressing racial profiling as some reviews of policing practices indicate that there is substantial under-recording of stops and that this casts doubt on the accuracy of police statistics. For example, in their evaluation of stop and search procedures in the U.K., Bland et al ibid at x and viii indicate that, at best, only 33 per cent of such encounters are recorded and that under-recording is due partly to difficulty in defining police stops with many officers using their discretion to selectively record stops. While under-recording has been identified as a serious issue to address, it has also been noted that the active application of progressive supervision has improved regarding the recording of stops and searches, making officers think twice about whether they have proper search grounds. However, as Marion Fitzgerald suggests in *Final Report on Stop & Search (December 1999)* at 64-65 and 71, near complete lack of supervision at street level, not exclusive to stop and search practices, combined with a widespread sense of wariness by officers in terms of their encounters with persons of African descent, have become closely related to their mixed fear and resentment at accusations of racism. There is also palpable frustration at what officers perceive as obstacles to work and constraints on their discretion and judgment. This is often accompanied by a loss of morale over the sense of injustice and perceived attacks on the professional integrity of police officers, including claims of "institutional racism". In this context, Fitzgerald notes that "It will be difficult for officers to acknowledge and respond positively to such fears since they are based on perceptions which many officers deeply feel to be unjust. But perceptions for these young people - and for much of the public at large - are reality and ways have to be found 'to move on from there.'"

performance or to intervene in areas that require attention. It is for this reason that statutory obligations, including methods of accountability for the organization and its officers are needed. Viable mechanisms for communities to articulate their concerns are needed, as well as processes to register complaints individuals may have against police and a system to track how those complaints are handled. Individual police departments have initiated several methods to provide such assurances but few have done so in a comprehensive manner and there is little literature on what has been implemented to date.

Another issue which has been debated is the knowledge and skills officers need to work effectively with subordinate racialized groups. This issue has been discussed in depth in the many reports concerning the Toronto Police reviewed in the first section. The vast number of repeated recommendations speak volumes to the importance of individual officers and the role they can and must play. Nonetheless, the consistent sense that these officers have learned little, if anything, of value on these matters is increasingly evident. As the direct line of service to the public, it is critical that police officers have the knowledge and skills to provide effective and sensitive services to diverse communities, particularly to individuals from subordinate racialized groups. In tandem with this knowledge and skills, officers must be given every opportunity to increase their capacities and they must be held individually accountable for their actions. This can only be supported through an assertive and consistent process of performance management and evaluation. For example, the use of early warning systems can be useful to help supervisors work with and manage officers. Requirements for enhanced supervisory responsibility of police middle management for actions of officers under their command along with better training to address pre-existing bias and to demonstrate bias-free policing can also be useful. Such measures must be instituted in concrete ways, such as improving officer conduct during traffic stops, or providing officers with alternatives to the use of deadly force, which are two issues that have been at the heart of complaints by many individuals and communities¹¹².

There are many other suggestions aimed at improving officer performance related to stop and search activities and working with subordinate racialized groups. These include:

- Holding supervising officers accountable for their direct reports and ensuring senior officers regularly require supervisors to provide information on the extent to which records are challenged for such things as improper completion or inadequate follow-up; particularly in relation to variations in search patterns of individuals from subordinate racialized;¹¹³

¹¹² See David Harris *Racial Profiling Revisited: "Just Common Sense" In the Fight Against Terror?"* **ABA Criminal Justice, Summer, 2002, 17 Crim. Just. 36.** where he examines various police forces methods to address racial profiling. See also Fridell et al supra note 1 at 56. Further, Fitzgerald supra note 111 at 68 has suggested that officers consider ways to record gains from searches other than through arrests and to use technology to capture needed intelligence without having officers use non-PACE sanctioned searches as an intelligence gathering tool. Some of this can be done by taking immediate steps to maximize use of intelligence at the local level and improving the quality of intelligence provided to officers. As well, Fitzgerald has suggested that officers need to improve the quality of their briefings and create more intelligence data geared to stop and search approaches by undertaking such measures as requiring officers to record those searches conducted based on receipt of prior intelligence.

¹¹³ Ibid Fitzgerald at 69 for discussions concerning some jurisdictions where officers with more than one form returned due to unsatisfactory grounds had to report to a senior officer and, upon the return of three forms, were sent to special training.

- Providing officer identification in racial profiling data. This could help pinpoint both good practices and officers who may need specific attention¹¹⁴;
- Identifying and designating clear roles and responsibilities for supervisor and officer accountability in terms of recording and reviewing individual officer racial profiling data¹¹⁵;
- Establishing early warning systems to identify problem officers and to provide them with the support they need to curtail unacceptable practices¹¹⁶;
- Mandating officers to note all searches, even voluntary searches and provide a record of such activity to citizens who have been searched¹¹⁷;
- Training officers on the best use of the data collection form emphasizing that officers provide a clear explanation about form's purpose to persons stopped¹¹⁸;
- Providing an explanation for stops and searches in order to encourage those stopped to be more co-operative, more comfortable and unlikely to feel being targeted¹¹⁹;
- Restricting searches to valid reasons and providing a form to citizens citing reason for the stop, stop outcome, summary of police search powers and citizen rights and name of officer¹²⁰;
- Supporting officers to develop a problem-solving approach to policing and providing them with concrete rewards and consequences for activities related to racial profiling and stop and search activities¹²¹.

To address the supports required to implement these and other strategies, the final parts of this section will look at the critical role of policy for organizational change and racial profiling in particular. It will also discuss the key role of education/training and accountability mechanisms to support needed changes.

¹¹⁴ See MacMahon et al supra note 2 at 83 and 94.

¹¹⁵ See Ramirez et al supra note 2 at 35-39, MPA Study supra note 10 at 3-5 and Bland et al supra note 6 at 56-61.

¹¹⁶ See Garrett supra note 2 at 15, Ramirez et al supra note 2 at 13

¹¹⁷ See Bland et al supra note 21 at 95 where they note the positive response by citizens to such procedure.

¹¹⁸ Ibid at 95.

¹¹⁹ See V. Stone and N. Pettigrew **The Views of the Public on Stops and Searches** . Home Office Research Study No. 129, London: Home Office, 2000, at 31

¹²⁰ Ibid at 45 where they note that citizens wanted form used to raise police accountability to public and that some suggested that there should be an departmental body to monitor and publish stop and search statistics to develop more confidence and credibility in results of stop and search data, particularly relating to statistics for individual officers as a way to monitor biases. They also suggest at 50 that a telephone hotline number be provided, for citizen comments/ complaints and that terminology be simpler and use less jargon. They further note at 51 others suggest use of audio tapes or videotapes for accountability and monitoring purposes and, at 34, that the recording form is seen as important instrument in making the encounter with a police officer appear more fair.

¹²¹ See Chan Chapter 10 supra note 6 at 233-235, Holdaway supra note 96 at 20 and Garrett supra note 2 at 25.

Organizational Policy as a Construct to Guide Change:

To bring about the changes noted and implied in the previous section, it is essential to position racial profiling data collection and analysis within the context of systemic changes that stress organizational and individual officer accountability, policy development, recruitment from subordinate racialized communities, education and training, and 'minority' community outreach¹²². This has been discussed in depth by Fridell et. al. who dedicate considerable attention to these subjects¹²³.

In addressing the importance of systemic change, Captain Davis suggests it is critical to "create systems that 'blindfold' people from bias' in which 'agencies must analyze formal and informal operating systems and identify more efficient and equitable practices in each of the following domains: mission statement, recruiting and hiring, training, assignment rotation, promotion, discipline/accountability, community relations and leadership"¹²⁴." Holdaway also points to the importance of this matter. In commenting on the Home Secretary's response to the Stephen Lawrence Inquiry report, he writes:

After the Lawrence Inquiry report was published, the Home Secretary, Jack Straw MP, drew up a national action plan for police race relations. This was a novel approach for a U.K. government and marked an important moment for police race relations and race relations generally. The statement was one of intent. It included a commitment by the government to build an antiracist society, with a priority for all government ministries to eliminate prejudice and discrimination from its policies, taking into account the need for interministerial cooperation when formulating policy. All public sector organizations, including the police, now have to demonstrate how they have taken steps to eliminate discrimination from the delivery of their services, personnel policies, and so on.

Constabularies are required to place race relations at the center of their work and integrate policy and practice into routine policing, taking into account the culture of policing¹²⁵.

To achieve this, it is essential that police leadership understand the importance of change

¹²² Fridell et al supra note 1 at 6-9. See also Holdaway supra note 2 at 67-68 where he discusses the actions of the Home Office. See also **Stephen Lawrence Inquiry: Home Secretary's Action Plan – Third Annual Report on Progress**, June 2002, as a model comprehensive strategy addressing the simultaneous implementation, assessment and evaluation of action plans addressing: (1) priorities and indicators; (2) policing authorities; (3) legislation; (4) complaints and discipline; (5) leadership and development; (6) recruitment, retention and progression; (6) and stop and search.

¹²³ See supra note 1 for commentary on the following: recruitment and hiring at 65; education and training at 79; and minority community outreach at 99.

¹²⁴ As cited in MacMahon et al supra note 2 at 136-144. See also Bland et al supra note 21 at 92-95. While Davis' supra note 8 outlines key areas requiring attention and is committed to the importance of comprehensive systemic change, his use of the word "blindfold" is somewhat objectionable, particularly in light of the excerpt from the Stephen Lawrence Inquiry report used at the outset of this Section.

¹²⁵ Supra note 2 at 67-68. For more information on U.K. initiatives, see Charles C. Smith **Hamilton at the Crossroads: Anti-Racism and the Future of the City**, Strengthening Hamilton Community Initiative, 2003. See also Chan supra note 6 for her comments on the impact of the Avery Commission, another government led initiative to address policing.

and develop their knowledge about the implementation of change in such sensitive areas as antiracism.¹²⁶ In considering these issues as part of the overall framework for systemic change, Fridell et. al. have learned that there is a need for specific policy tailored to address “bias-based” policing and that this policy needs to clearly articulate its purpose. They set out a suggested scope for the policy as guidelines which:

1. “Emphasize that arrests, traffic stops, investigative detentions, searches, and property seizures must be based on reasonable suspicion or probable cause;
2. Restricts officers’ ability to use race/ethnicity in establishing reasonable suspicion or probable cause to those situations in which trustworthy, locally relevant information links a person or persons of a specific race/ethnicity to a particular unlawful incidents¹²⁷;
3. “Applies the restrictions above to requests for consent searches and even those ‘nonconsensual encounters’ that do not amount to legal detentions;
4. “Articulates that the use of race and ethnicity must be in accordance with the equal protection clause of the 14th Amendment; and
5. “Includes provisions related to officer behaviour during encounters that can serve to prevent perceptions of racially biased policing (footnotes omitted).”¹²⁸

Given the broad range of interpretations of racial profiling, Fridell et. al. underline the critical importance of policy to ensure a common and consistently applied definition and purpose¹²⁹. They also make strong references to “(e)nsuring (e)quitable (t)reatment” suggesting that:

The policy provisions discussed above do not go far enough to describe and prohibit racially biased policing activities ... (t)hey are insufficient alone as they do not prohibit officers from disproportionately targeting certain racial/ethnic groups who are suspected or guilty of breaking the law. Nor do they prohibit officers from otherwise treating people differently (eg., without dignity or respect) based on race/ethnicity. We need the second provision reflecting the general principle of equal protection.

...this second provision prohibits an officer from stopping a white traffic violator and releasing that violator because he or she is white, and then stopping a black traffic violator and requesting consent to search *because* that violator is black¹³⁰.”

¹²⁶ See Holdaway supra note 96 for a good discussion on this point.

¹²⁷ Supra note 1 at 55 Fridell et al assess the importance of this point stating that “We identified this need through our focus groups, in which it became very clear that practitioners at all levels - line officers, command staff and executives - have very different perceptions regarding the circumstances in which officers can consider race/ethnicity.

¹²⁸ Ibid at 49-50. Also, at 51-53 Fridell et al provide a model policy which defines the policy purpose and discusses policing impartially, preventing perceptions of bias, compliance, supervision and accountability.

¹²⁹ Ibid at 55 where the authors write: “Specifically, the policy sets forth limits on when officers can consider race/ethnicity to establish probable cause or reasonable suspicion. We identified this need through our focus groups, in which it became very clear that practitioners at all levels ... have very different perceptions regarding the circumstances in which officers can consider race/ethnicity.”

¹³⁰ Ibid at 59-60. As noted earlier, in their survey, they have found that 12 law enforcement agencies have modified existing policies and 19 per cent of those surveyed have adopted new policies. See also State of Wyoming **Law Enforcement Non-Discrimination Resolution** supra note 40 at 2. The Wyoming Law Enforcement Non-Discrimination Resolution reads as follows:

Whereas, the men and women of Wyoming law enforcement have historically demonstrated a commitment to professional and high integrity service to the citizens they serve; and

Similarly, the Metropolitan Police Authority has issued guidelines addressing principles governing the use of stop and search, as well as minimum standards for stop and search activities pertinent to senior management, first line supervisors and team managers and frontline officers. The guide provides information on PACE, the implications of the *Terrorism Act, 2000*, the *Race Relations (Amendment) Act 2000*, practical tools for police officers, sections of the *Human Rights Act 1998* and other legislation related to the right to liberty and security, privacy and family life, and freedom of expression¹³¹.

Ramirez et. al. also point to the importance of a systemic approach in addressing racial profiling. In their analysis of model activities, they note that "...the New Jersey experience shows that allegations of racial profiling may be part of larger structural or organizational problems within a police organization. For example, in New Jersey, the state police were trained and rewarded for high numbers of arrests, as opposed to making quality arrests¹³²." They also point out that "Although jurisdictions may decide to widen or limit the scope of their data collection process, at a minimum data should be collected on all stops regardless of whether a warning or citation is issued."¹³³ Taking such issues into consideration, they suggest numerous areas for future development of racial profiling data collection, including consistency in future data collection activities with research undertaken with the following components in place:

Whereas, the effective performance of law enforcement services depends on the integrity of law enforcement and its partnership of trust and cooperation with our law-abiding citizens; and

Whereas, responsible law enforcement agencies do not endorse, by training or policy, enforcement practices utilizing racially based profiling; and

Whereas, traffic laws serve to promote the safe and efficient use of the transportation system, and the enforcement of traffic laws is an essential element in reducing deaths and injuries in traffic crashes; and

Whereas, proactive traffic enforcement efforts based on probable cause, reasonable suspicion, and other constitutional practices have resulted in the reduction of street crimes and the capture of criminal offenders; and

Whereas, traffic enforcement nationwide annually leads to the interdiction of vast amounts of illegal substances, stolen property, and the capture of criminal fugitives; and

Whereas, nationwide, there is a reported perception that some law enforcement officers engage in racial profiling as a basis for conducting traffic enforcement activity; and

Whereas, that reported perception is of paramount concern to law enforcement agencies, officers, leaders, and the communities they serve; and

Whereas, traffic stops made on the basis of a motorist's race violate fundamental civil and constitutional rights and numerous law enforcement mission and value statements, as well as our duties under the Wyoming and United States' Constitutions; now, therefore, be it

Resolved, that all Wyoming law enforcement agencies and training resources are urged to promote the strict prohibition of the use of racial profiling as a basis for enforcement activities; examine and if appropriate refine their policies, training, supervision, evaluation and response to related citizen complaints; and to require that citizens are treated with the utmost courtesy, respect, and fairness, as law enforcement agencies carry out their mandate of enforcement of the law and criminal detection and apprehension.

¹³¹ The guide also provides other useful information related to recruit education/training, analysis of stop and search activities and other MPA policy that may impact on use of stop and search powers. See also Metropolitan Police Authority supra note 10 Appendices.

¹³² Ramirez et al supra note 2 at 36.

¹³³ Ibid at 43

- **Establishing a local task force** . Such a task force should be convened at the start of the process and include representatives from the police, the community, ‘citizen’ groups and academic or research associates. Such a group can help design a data collection project that is tailored to specific needs¹³⁴.
- **Developing a data collection pilot program.** It is suggested that following the above, this program should be instituted for a 3 to 6 month period to test the data collection program and, based on the results of the test, to modify as required.
- **Designing the data collection exercise.** This allows for those engaged in developing the data collection to examine ways to streamline the project, i.e., use of systems already in place such as laptops or MDTs with software capacity and use of existing data collection systems such as dispatch, citations, officer logs.
- **Considering routine data collection elements.** This allows the data collection exercise to address issues related to any traffic stop as well as to collect information specific to racial profiling. Such measures include: assigning a stop identification code to each dispatch or MDT communication for traffic stops and linking this information with other information related to stops and searches.
- **Routine Data Collection Elements.** Based on the site specific research, it is recommended that the following information should be gathered in all stops and searches: the date, time, location of the stop, the license number, state and vehicle description; the length of the stop; the name and identification number of the officers involved; the date of birth of the suspect; the suspect’s gender, race or ethnicity; the reason for the stop; the disposition of the stop; and whether or not a search was conducted¹³⁵.

Ramirez et. al. also elaborate on the importance of ensuring data integrity and establishing appropriate benchmarks to assess the degree, if any, of racial profiling. Like McMahan et. al., they note the usefulness of consumer satisfaction surveys and that such an activity could be used strategically to assist in addressing racial profiling.¹³⁶ In terms of constructing appropriate benchmarks, like McMahan et al they suggest the importance of establishing credible external and internal indicators to assist in understanding those who may be at risk of stop and search activities (eg., violators of traffic laws), and, internal indicators (eg., comparing stop data of the same policing unit over time or comparing one unit to another)¹³⁷.

¹³⁴ MacMahon et al supra note 2 also strongly suggest community involvement from the outset of the data collection project. They state at 2: “It does not matter how accurate data collection and analysis is if the community does not feel engaged in the process.” They also support the involvement of academic expertise working alongside police operational resources. See also: Metropolitan Police Authority supra note 10 at 6; and Brendon Garrett supra 2 at 13 for comments on Rhode Island and at 84 (footnote 292) for comments on Tacoma. Holdaway supra note 2 at 68 notes that such a group had been set up to monitor compliance with the Stephen Lawrence Inquiry Report

¹³⁵ Ramirez et al supra note 2 at 43- 51. See also MacMahon et al supra note 2 at 30-31.

¹³⁶ Ibid Ramirez et at 51. Ibid also MacMahon et al at 46-50 who encourage such research to take into consideration specific analytical issues such as: controlling for resident status; allocation of agency resources; missing data and missing cases; undertaking traffic surveys to assess the areas in which there is violation of traffic laws so that this can be used as a comparator for racial profiling research.

¹³⁷ Ibid at 53-54. In addition to these points, see supra note 2 at 2-3 and 9-11 where MacMahon et al indicate that a number of issues require attention in order to effectively collect and analyze racial

In addition to these concerns, McMahon et. al. suggest that it is critical to have a systematic plan in place that will ensure the effective and transparent development and implementation of all aspects of the research. It will also enable the research to focus on the issues requiring attention, the benefits of previous studies, the scope of the behaviour that will be studied, the data items that will be collected and how they will be used in the analysis, the timeframe for the research, the criteria for analyzing the data and who is responsible for each necessary activity¹³⁸.

They also strongly suggest that a multivariate approach is preferable to a bivariate research model. They focus considerable attention on this methodological issue because “[i]t is more likely to improve the understanding of the nature and extent of racial profiling if future analyses are more attentive, not simply to the comparison group issue, but to a series of analytical issues that have not been identified or have not been addressed well in prior research.”¹³⁹ McMahon et. al. suggest such an approach should take into consideration:

- Development of standardized base rates which will look at all individuals stopped and searched by the police in terms of the number of stops/searches per year, per day and per resident, the length of the data collection period and the number of residents in a jurisdiction;
- Have access to accurate or reliable information on racialized characteristics of individuals within the population and those stopped and searched;
- Assessment of police allocation of resources based on geographical and functional demands so that police operational considerations, which are systemic issues, are addressed;
- Address multiple predictors related to stop and search police activities, such as., age, race, geographical location, gender, time of day, etc.¹⁴⁰

Education/Training, Recruitment/Selection and Enhancing Community Policing:

To bring about effective implementation of legislative and policy initiatives it is essential that all police officers are provided with appropriate, timely, consistent education, training and other opportunities for professional development.¹⁴¹ Given the resistance of police to the types of changes required for successful implementation of measures to address racial profiling, it is important that such education and training is comprehensive, challenging, mandatory, provided on a continuous basis and refined to support police at all levels work within an anti-racist framework. In this context, it has also been suggested that such

profiling data. These include: ensuring analytical methods address the complexities of police procedures and operational methods and include multiple influences (i.e., using a multivariate approach); and ensuring guidelines and procedures are in place to support research partnerships as well as the education of the public on all aspects of the research, including release of research results.

¹³⁸ Ibid McMahon et al at 44-45.

¹³⁹ Ibid McMahon et al at 32.

¹⁴⁰ Ibid McMahon et al at 32-39.

¹⁴¹ See Bland et al supra note 21 at 18; Ramirez et al supra note 2 at 21, 27, 30 and 41; Fidel et al supra note 1 at 55, 77-99; MPA supra note 10 at 16. Also, specific training has been provided to support the implementation of many of the models previously referenced.

education and training needs to examine police use of force in terms of appropriate application and alternative measures¹⁴².

As well, Bland et. al. have suggested the importance of education and training to develop 'good stoppers and searchers' who have effective communication skills, confidence, experience, possess adequate knowledge of local intelligence, are flexible in their approach and are conscious of establishing reasonable grounds for stops and searches.¹⁴³ They recommend that training is needed as guidance in order to reduce multiple interpretations and the application of 'reasonable suspicions' and that officers obtain accurate and timely intelligence information for basing stop and search decisions. In terms of communication skills, they also point to the need for citing proper grounds and being courteous in handling public encounters, especially stops and searches. Officers should be made aware of their unconscious decision-making process to conduct such activities and the ramifications of these on public confidence in the police¹⁴⁴.

Significant attention is also required to establish an equitable employment system that eliminates discriminatory outcomes and promotes anti-racist objectives in recruitment, selection, retention, promotion and advancement, including the assigning of officers to interim and acting positions or as leads on specific internal or externally driven organizational initiatives¹⁴⁵. Furthermore, community policing involving proactive service delivery, problem-solving and partnerships with residents has been cited as providing successful outcomes. Just as critical is the need for police accountability for identifying potential problems, problem officers and providing opportunities to intercede more quickly¹⁴⁶. For example, in another study, Bland et. al. identified that while members of the public may not mind being asked to self-identify their racial heritage when the purpose of any questions are explained in advance¹⁴⁷. They also note that the need for documentation on all stops and searches has caused officers to increasingly 'think twice' about conducting racial profiling and has allowed them to consider how they treat others, and offer reasons for the stop and search. In fact, they note that many officers have supported the idea of providing the public with more information, especially related to the police power to stop and search as this was felt to add to legitimacy of such activities and could benefit police-community relations. While some officers thought this might encourage public complaints, others felt the documented record could be viewed as important safeguard¹⁴⁸.

¹⁴²See George Rice **Racial Profiling: Prejudice or Protocol** www.horizonmag.com/6/racial-profiling.asp 1/3/03 at 1-2 for discussion concerning the importance of training and experience along with academy training and ongoing in-service updates as well as on the street training and addressing allegations of police brutality in terms of challenges on knowing when to use force and how use of force escalates. Rice provides examples of police departments. The importance of training and the continuum of education on anti-racism issues have also been reviewed in the context of reports in Ontario summarized in section 1. See also: Holdaway supra note 2 at 1 with simulations cited on page 2.

¹⁴³Supra note 6 at vii.

¹⁴⁴Ibid at 65-67. Bland et al also suggest that officers should develop fuller understanding of routine activities in local area and to know when and what types of persons living, socializing and working in area.

¹⁴⁵See Fridell et al supra note 1 at 65-79, Cashmore supra note and Holdaway supra note 2 and 97.

¹⁴⁶See **On the Brink of a New Beat: On race relations, police brutality and racial profiling** www.horizonmag.com/4/noble.asp 1/3/03 Bob Stewart at 1 - 5.

¹⁴⁷Supra note 21 at 80-91 and 93-95 regarding building community trust and confidence.

¹⁴⁸Ibid at 71-78.

In addition, Ibarra has examined contacts with police in terms of specific communities, noted differences based on group identities and suggested that these differences need to be taken into consideration in providing neighbourhood policing services¹⁴⁹. Fridell et. al. give considerable attention to community relations as a critical underpinning to addressing both racial profiling as a project and to building police-community relations and cooperative working relations overall.¹⁵⁰ MacMahon et. al. suggest that good community relations builds confidence in policing, particularly if enhanced with mechanisms of officer accountability and a complaint process that has community support¹⁵¹. Further, in order to build effective community relations, Pruegger points out that "...more effort is needed to integrate policies and practices throughout police organizations. Recommendations for achieving this are offered in: organizational support and culture; policy development; staff development; evaluation; training and education; recruitment, selection, retention and promotion practices; community relations and development."¹⁵² She elaborates on these points identifying key issues for each of these areas as follows:

- Organizational support and culture that: ensure support for community policing models and organizational change from police leadership; build public commitment through transparency and accountability in terms of community policing and anti-racism practices; break the code of silence among police officers in addressing discriminatory behaviour;
- Anti-racism and diversity training and education programs based on day-to-day police work integrated into all police education and training;
- Policy development with an anti-racist perspective addressing systemic issues;
- Employment systems focused on the recruitment, selection, retention and promotion of individuals from subordinate racialized groups. The inclusion of an anti-racist perspective in selection procedures;
- Ensure reward systems reflect the importance of community policing and are supported by a change in the organizational structure from a "paramilitary model where loyalty is to the hierarchy to a community model where loyalty is to the Charter of Rights and Freedoms, the Criminal Code, the common law and the community;"
- Staff development activities that develop coaching and mentoring for individuals from subordinate racialized groups.
- Develop training resources and provide continuing education on anti-racism and diversity issues.

Pruegger also addresses actions needed to: support community relations and development; evaluate policies and services; promote accessibility to the public; provide transparency in complaints procedures; conduct organizational audits; establish meaningful mechanisms of

¹⁴⁹ See *Contacts with Police: Patterns and Meanings in a Multicultural Realm*, **Police & Society**, 2003, Issues No.7 at 134-135 and 139.

¹⁵⁰ Supra note 1 at 99. See also MPA supra note 10 at 5 (1.18) and 22 (6.1-6.2).

¹⁵¹ Supra note 2 at 95-96.

¹⁵² Supra note 106 at 1

accountability; and monitor the organizational change process¹⁵³. Several of these concerns have been noted in the model activities noted above and will be discussed in more detail below.

Accountability and Anti-racism – Approaching Systemic Change:

One thing is abundantly clear in reviewing much of the research on racial profiling data collection models discussed in this section. The efforts underway now are very new and will need time in order to gauge whether they are effective. There are still too many differences in data design and collection activities to assess and state appropriate benchmarks or to compare one police force to another in any meaningful way. Given the challenges discussed concerning single versus multiple variable approaches, officer or suspect identification of racial characteristics, establishing benchmarks to interpret disparities in stops and searches, developing mechanisms for community and academic involvement, focusing on individual officers or on systemic policies and procedures, conducting public surveys and proceeding beyond anecdotal data – all of these factors are still being contested in various jurisdictions and will likely continue to be so in the coming years¹⁵⁴.

It is for this reason, if for no other, that mechanisms to promote transparency and ensure accountability are needed to keep focus on the issue at hand and engage in the process of data design, implementation, collection, analysis, publication of results and undertaking remedial action¹⁵⁵. Numerous states as well as the U.K. have adopted legislation requiring data collection and analysis and, within the U.S. and Canada, there are continuing pressures for a legislative solution to ensure data collection and analysis are required of law enforcement agencies. In addition, some states have established independent monitors and audit functions to ensure compliance with legislation and consent decrees¹⁵⁶.

In terms of accountability functions, current research suggests there are at least three distinct measures which can be used. These enable oversight of police through:

1. the administration of citizen complaints against police activities;
2. the auditing of police departments and specific activities; and

¹⁵³ Ibid at 11- 17

¹⁵⁴ As noted by David A. Harris, administrative regulations, organizational policy and implementation, performance management, data collection and analysis as well as political accountability are essential. See *Driving While Black: and All Other Traffic Offences: The Supreme Court and Pretextual Traffic Stops*, **Journal of Criminal Law and Criminology** 544, Winter 1997 at 16-19.

¹⁵⁵ See MacMahon et al supra note 1 at 94 and 97-98; Brendon Garnett supra note 2 at 2-3, 16 and 24.

¹⁵⁶ Or as Professor Scott Wortley puts it “Indeed, every major investigation of police-race relations in Canada and the United States has recommended that civilian oversight bodies be established to monitor police misconduct and increase accountability to the public (references omitted).” As cited in ***Civilian Governance and Policing in a Multicultural Society: A Discussion Paper***, February 2003, prepared for the Multiculturalism Directorate, Canadian Heritage. See also Brendon Garrett supra note 2 at 17 and MPA supra note 10 at 3. See also ***Best Practices in Police Accountability*** a project of the Police Professionalism Initiative, Department of Criminal Justice, University of Nebraska at Omaha www.policeaccountability.org

3. a combination of the above within the context of a planning framework and political/public accountability process for anti-racist organizational change.

There are initiatives in each of these categories. For example, regarding the administration of citizen complaints against police separate evaluative reviews have been authored by Scot Wortley and Samuel Walker¹⁵⁷ who suggest a number of civilian review models. Wortley describes these as:

- the in-house model where complaints are investigated and adjudicated by the police;
- the externally-supervised model where complaints are investigated and adjudicated by the police but with an external body that can review cases;
- the police investigation with independent adjudication model where the investigation is conducted by the police but the adjudication is done by a civilian body;
- the independent investigation with police adjudication model which reverses the aforementioned roles; and
- the independent model which puts the entire complaint process in the hands of a civilian oversight body¹⁵⁸.

Walker includes the first three categories in Wortley's analysis but adds two additional models that: (a) audit or monitor the police department's complaint process; and (b) involve non-officers employed by the police who have some form of control over the complaint process¹⁵⁹. Wortley and Walker assess the qualitative impact of these various models. While Walker suggests that the best models are those that engage a civilian review and auditor function,¹⁶⁰ Wortley expresses concern that there is not a substantial amount of research to evaluate the impact of civilian oversight on complaints systems.¹⁶¹

¹⁵⁷ Ibid Wortley and Walker. See also: Andrew W. Goldsmith and Colleen Lewis, eds., *Civilian Oversight of Policing: Governance, Democracy and Human Rights*, Portland: Hart Publishing, 2000; Tammy Landau *When Police Investigate Police: A view from complainants* *Canadian Journal of Criminology*, 1994, *Public Complaints Against Police*, Centre of Criminology University of Toronto, and *Back to the future: The death of civilian review of public complaints against the police in Ontario, Canada* in Goldsmith and Lewis, eds., *Civilian Oversight of Policing: Governance, Democracy and Human Rights*; Samuel Walker's *Police Accountability: The Role of Citizen Oversight* Belmont, Ca: Wadsworth, 2001; David Brereton *Evaluating the Performance of External Oversight Agencies in Civilian Oversight of Policing: Governance, Democracy and Human Rights*.

¹⁵⁸ Ibid Wortley at 7-8. The importance of independent and other model systems for investigating complaints against police are also discussed in *Feasibility of an Independent System for Investigating Complaints Against Police*, KPMG, Home Office, Police Research Series Paper 124, 2000, commissioned by the Home Office as one of several measures in response to the Stephen Lawrence Inquiry which put forward the framework for revamping the system of citizen complaints against police and, in effect, recommending an independent function. The latter article is based on a conference in

¹⁵⁹ See Walker supra note 152 at 1 *Models of Citizen Oversight*.

¹⁶⁰ Ibid

¹⁶¹ Supra note 152 at 21. Wortley makes this assertion following his review of the literature on civilian review of police at 10 which he suggests falls into four general categories: (i) advocating or opposing civilian review; (ii) examining case studies on political controversies on civilian review; (iii) reviewing descriptions of such systems; and (iv) attempting empirical evaluation of the effectiveness of such systems.

In discussing the independent civilian review board and the auditor model, Walker identifies jurisdictions in which these models are in operation¹⁶² and comments on the qualities that make these mechanisms effective, such as the full power to independently investigate citizen complaints, the authority to examine any and all aspects of the police department and to audit controversial incidents¹⁶³.

Wortley, on the other hand, examines this issue in terms of the impact on the number of police complaints, case outcomes, complainants' satisfaction with the process, public perceptions and police satisfaction¹⁶⁴. In each instance, Wortley indicates that the data compiled on each of these areas leads to his conclusion and suggests that more research is required to substantiate the impact of civilian review functions. He does, however, suggest that the Criminal Justice Commission in Queensland, Australia makes "...a very significant contribution to the process of police reform and accountability"¹⁶⁵. Further, in discussing 'best practices', Wortley suggests that there are "seventeen points (which) deserves the attention of policy makers when thinking about the design and implementation of civilian oversight initiatives", including: external reporting mechanisms, accessibility, provision for third party complaints and informal resolutions, independent as well as proactive investigations, monitoring police management, establishing early warning systems, representing minority interests and monitoring and evaluation¹⁶⁶.

Such approaches to civilian oversight are being developed in other parts of the world as well. For example, Brazil has established police ombudsmen's offices in nine of its states as a response to the number of deaths in police custody. Peru has reconstituted its Police Service Commission following the departure of former President Fujimori and South Africa has established the Independent Complaints Directorate. Similar structures have been instituted in Kenya (its Human Rights Commission) and India (the Institute of Communication and Development, Chandigarh). Generally, these offices respond to citizen complaints about police misconduct, analyze trends and take complaints from police officers who wish to report misconduct of their colleagues to an independent body. They also investigate allegations and determine punishment¹⁶⁷.

¹⁶² Supra note 152 at 1-2 *Models of Citizen Oversight* where Walker cites the Minneapolis Civilian Review Agency www.ci.minneapolis.mn.us/citywork/other/cpra.html and the San Francisco Office of Citizen Complaints www.ci.sf.ca.us/occ in terms of independent review boards; and the San Jose Independent Police Auditor www.ci.san-jose.ca.us/jpa/home.html, the Los Angeles County Special Counsel www.co.la.ca.us/bobb.html and Portland Oregon Independent Police Review www.ci.portland.or.us/auditor.

¹⁶³ Ibid at 2-4. See also: Sean Hacker *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board* **Columbia Human Rights Law Review** at 17-18 for discussion on civilian review boards in San Francisco Office of Civilian Complaints, Denver Public Safety Review Commission; Brendon Garnett supra note 2 for a discussion of the Pittsburgh model at 18 and 74, footnote 221; and Bob Stewart supra note 146 at 1 - 5.

¹⁶⁴ Supra note 152 at 11-20.

¹⁶⁵ Ibid at 20 where, following its establishment in early 1990s, he points to reductions in incidences of serious assault by police, the frequency of drinking while on duty and improper practices related to search and seizure. He also notes "There have also been signs of a positive cultural change, including an increased willingness by rank and file officers to report the misconduct of their colleagues."

¹⁶⁶ Ibid at 22-27. The other points are related to the rights of police, standard of proof in context of a civil as opposed to criminal standard, appropriate discharge of disciplinary decisions, case processing, expertise in investigations, policy review and maintaining a strong internal affairs unit.

¹⁶⁷ See Emma Phillips and Jennifer Trone, *Building Public Confidence in Police Through Civilian Oversight*, Vera Institute of Justice, September 2002.

The final system of accountability is one that is now being attempted in the U.K. in response to the Stephen Lawrence Inquiry and was discussed in the previous sections. It is a system where police departments are required to engage in comprehensive organizational change activities that include, proactive planning in key organizational areas, such as:

- recruitment/selection/retention/promotion of officers from subordinate, racialized groups;
- meaningful engagement of subordinate, racialized groups on police service planning, particularly on racial profiling data collection activities;
- Anti-racist policy development, education and training.

Such an approach to policing strongly suggests that real change in addressing racial profiling will be more effectively supported and maintained within an organization that is examining every aspect of its values, policies and services to ensure that it is non-discriminatory and promotes anti-racism as a core value. For example, the Commission on Racial Equality has indicated the importance of clear definitions and the need for each police force "...to measure its performance against a range of indicators, including numbers of recorded racist incidents, rates of detection, policies and outcomes on stop and search, levels of recruitment and retention and promotion of ethnic minority officers."¹⁶⁸ The Commission document also identifies the need for clear leadership, community and race relations audits and appraisal, supervision and disciplinary procedures to make clear to all staff that the service will not tolerate racist conduct. Anti-racist education and training are also recommended and that such training be independently evaluated and monitored against a set of national standards¹⁶⁹.

Such initiatives address strategic implementation, assessment and evaluation of police action plans addressing: (1) priorities and indicators; (2) legislation; (3) complaints and discipline; (4) leadership; (5) recruitment, retention and progression; and (6) and stop and search activities¹⁷⁰. In this regard, the Home Office in the U.K. has set itself as a national example and developed a useful organizational change model and comprehensive planning process with an accountability framework to ensure leadership and commitment to implementation. In this context, it has set:

- Management, inspection and accountability measures with clear priorities and indicators aimed at increasing public trust in the police. This includes the setting of qualitative and quantitative performance indicators linked with Best Value audits and inspection requirements;
- An independent complaints function to investigate allegations of police misconduct known as the Independent Police Complaint Commission which has its own investigative team and the jurisdiction to address all serious cases as well as the power to investigate, manage, supervise other cases;

¹⁶⁸ See *The Stephen Lawrence Inquiry: Implications for Racial Equality*, March 1999 at 3.

¹⁶⁹ Ibid at 4-5. Similar perspectives are also evident in Fridell et al in the U.S. as well as in Pruegger's work in Canada supra note 1 and 106 respectively. See also: Garnett supra note 2 at 3 and 18 for comments on the importance of public accountability and ongoing institutional change.

¹⁷⁰ See *Stephen Lawrence Inquiry: Home Secretary's Action Plan – Third Annual Report on Progress*, June 2002.

- Requirements to undertake employment recruitment, retention and progression goals in order to increase the number of officers from subordinate racialized groups;
- Guidelines for stop and search activities that indicate the importance of fair searches, and to promote public awareness regarding the rights of civilians when stopped;
- Training and education initiatives to ensure all courses include racism awareness and that new occupational standards for community/race relations are in place to enable police to benchmark training design/delivery and to provide professional service to subordinate racialized communities; and
- Processes to involve communities in these efforts and the publication/promotion of best practices as well as the review of racism awareness training in other services.¹⁷¹

Based on this model, the Thames Valley Police Authority has undertaken several actions to comply with these new directions.¹⁷² In this context, this police authority has set clear strategies with designated responsibilities and a process to monitor progress. They have also assessed the specific requirements of the *Race Relations Act (Amendment)* and the need for a race equality scheme in order to change the policing styles and values to focus on problem solving, restorative justice, local community engagement, and addressing systemic racism¹⁷³. Specifically, such actions include:

- establishing a commitment to the *Race Relations Act (Amendment)* and setting four key community/race relations strategies to reduce and investigate hate crimes, develop partnerships and consultations, develop equality service through training, and recruit/retain and advance officers from subordinate racialized groups¹⁷⁴;
- establishing an internal Equality Service Management Group and clarifying responsibilities for the Police Authority to set a Race Equality Scheme, monitor and scrutinize the Force's implementation and identify/review policies/practices related to its implementation. This includes producing an annual report that addresses these matters along with the promotion of Best Value in employment and service delivery, arrangements for community consultations, review of the Force's investigations of complaints, and performance auditing¹⁷⁵;
- setting out specific components within its Race Equality Scheme in terms of: policy review and monitoring for adverse impact; reporting publicly on assessments/consultations; ensuring access to information and services; undertaking and enhancing staff training; and setting goals to increase the representation of officers from subordinate racialized

¹⁷¹ Ibid at 1 – 9.

¹⁷² See Thames Valley Police Authority and Thames Valley Police *Race Equality Scheme – May 2002*. A similar approach is evident in *Thames Valley Police Community and Race Relations Strategy Action Plan – 2001*, particularly respecting the commitment of Chief Constable (at 1); Hate crimes and agency/police support (at 4); development of partnerships and consultations to address community and race relations, stop and search activities, youth and schools, recording and intelligence (at 12 – 22); and development of equality service through training, recruitment, retention, career development; and ongoing policy development (at 23 – 35).

¹⁷³ Ibid 2-7.

¹⁷⁴ Ibid 8-9.

¹⁷⁵ Ibid 10-12.

groups; and managing internal complaints and grievances¹⁷⁶;

- ensuring the Race Equality Scheme is understood and implemented as a proactive, strategic plan with clear implications for management decision-making, lines of responsibility, reporting procedures, resource requirements and deployments, and with transparent mechanisms to review progress and evaluate effectiveness, as well as providing leadership¹⁷⁷.

To implement these actions, the Thames Valley Police Authority provided detailed action plans related to policy development and service delivery, employment, and annual reporting. These plans explain: the specific duty, action necessary, who will undertake the action, the timeframe for implementation as well as the goals of the actions. The Authority has also set a process to review its action plans every year with an overall review every three years in order to monitor results¹⁷⁸. Further, it has established performance indicators for all areas of its operations, particularly respecting police stops and searches, and has committed to an ongoing process of community consultations and publishing of its plans/activities, including its management of civilian complaints.¹⁷⁹ It has also identified the list of policing policies and functions to be audited and has published its auditing methodology and template¹⁸⁰.

Specific to racial profiling, the Thames Valley Police Authority has developed a cultural diversity training program in partnership with the Reading Racial Equality Committee.¹⁸¹ Action on this project commenced prior to the **Stephen Lawrence Inquiry Report**. The project was initiated as a result of management acknowledging the “lack of understanding amongst operational officers about searches and, in particular, the way they were perceived by local communities.” Management also recognized that the “performance culture...had resulted in a high number of searches and arrests. This was skewed, with black people more likely to be arrested for public order and breach of peace offences as a result of a search.” Further, it was felt that the community had little faith in the complaints process and that police consultations did not include ‘hard to reach’ people.¹⁸²

Responding to these issues, a program of change was developed and implemented, including community forums, eg., Racial Attacks Forum and Black Advisory Group, and a review of searches in relation to management information and officer training. This resulted in officers receiving a half-day of training on formal search powers. While the partnership with the Reading Racial Equality Committee did not focus specifically on racial profiling, it did focus on improving relations between the police and local communities. In this context, the Racial Equality Committee assisted in organizing community contributors for the training, which covered such topics as:

- the diverse communities in Reading and the role of the Racial Equality Committee;
- the *Crime and Disorder Act* in regard to racially motivated crimes and reporting of racial incidents;

¹⁷⁶ Ibid 14-17.

¹⁷⁷ Ibid 18.

¹⁷⁸ Ibid 19 - 31.

¹⁷⁹ Ibid 33-34.

¹⁸⁰ Ibid 37-39 and 46-51.

¹⁸¹ Supra note 21 at 47 - 51.

¹⁸² Ibid 47.

- challenges that may arise in encounters with individuals from subordinate racialized communities.¹⁸³

Part of an ongoing educational program, the training was to be evaluated after six months and the issue of race and stop/search activities would comprise the next phase of training.

The Thames Valley Police partnership with the local Racial Equality Committee provided opportunities for both to discuss information received by the latter regarding the experiences and perceptions of youth of African descent as well as grassroots organizations and community leaders.¹⁸⁴ The training program provided unique opportunities for the police and community members to assess and develop a partnership aimed at involving community contributors in police training. This was done by:

- clarifying the training aims so that all agreed on the aims and content of the training course, particularly in terms of balancing legal and cultural knowledge;
- managing the introduction of community contributors so that they would be welcomed by the officers engaged in the training;
- resourcing and planning the training with community involvement particular to ensure balanced recruitment of community representatives (eg., Asian, African descent, South Asian);
- preparing the contributors to facilitate police education and awareness raising;
- addressing the challenges of representing diverse community perspectives and ensuring the program was not 'diluting the message'¹⁸⁵.

While the program had not been formally evaluated, anecdotal accounts from both the police and community members suggests that the initial training has been successful in meeting its objectives.

¹⁸³ Ibid 45.

¹⁸⁴ Ibid 45

¹⁸⁵ Ibid 49-50.

CONCLUSION

The purpose of this report was to provide an overview of police racial profiling of subordinate racialized groups, particularly peoples of African descent. In doing this, the recent history of crises within the African Canadian community was outlined, the numerous reports and their recommendations reviewed, and the challenges faced by governments, the courts, communities and the police portrayed. This report puts forward a critical race analysis contextualizing the current crisis within a white supremacist framework evident in social values, laws and their enforcement. It then provides abundant evidence from across North America and the United Kingdom demonstrating the unique focus of domestic law enforcement on peoples of African descent. The review of academic, state and community reports makes it abundantly clear that police racial profiling is primarily targeted at this community. Such a review also demonstrates the historical development of this phenomenon and the way in which the media influence this discourse.

The report also reviews efforts to identify and eliminate this practice. Examining studies from various jurisdictions, it is evident that the efforts to do so are in their early stages, are varied in their methodologies, field of study, terminology and other key factors. The analysis of these initiatives also indicates the importance of focusing on the culture of the police as an institution as well as the values and behaviours of individual officers. The report ends citing various models aimed at changing the institutional values and practices of the police while, at the same time, influencing the behaviours of individual police officers. Such an approach requires consistent, transparent and rigorous methods of accountability, both politically and publicly; and with clarity regarding rewards and consequences. It is also important that this type of approach is solidly integrated in a comprehensive anti-racist organizational change process with clear policies, procedures and guidelines in place to ensure progress in addressing institutional racism and its impact on subordinate racialized communities.

It is suggested that the latter approach will transform policing as an organization and ensure that its efforts to recruit, retain, develop and promote individuals from subordinate racialized communities will be supported by equally focused community outreach activities, education and training programs, and systems of civilian complaints which are arms length and adequately resourced. Further, such approaches require regular and spot auditing to assess their implementation, ensure efforts are meeting desired results and to ensure the policing organization learns from its experience. They will also require particular strategies involving communities and academics in challenging racial profiling.

In preparing this report, it is evident that many of the most significant changes now being implemented in cities in the U.S and across the U.K. were recommended in Ontario over a decade ago through the work of the Metropolitan Auditor, Stephen Lewis, the Race Relations and Policing Task Force and the Commission on Systemic Racism in the Ontario Criminal Justice System. While it is regrettable that many of the recommendations put forward by these processes have not been successfully implemented, if at all, it is important to note that these reports and their analysis can provide a good point to initiate work toward changing the police today.

It is with this hope that this report was written. The crisis engendered by police racial profiling of the African Canadian community is critical to address now and must be addressed now. Failure to do so will only perpetuate the historical impact of anti-Black racism and further exacerbate the conflict between the African Canadian community, the police and other institutions, eg., education and zero tolerance policies, which may feed into law enforcement. Failure to do so will also contribute to straining the relationship between the African Canadian community and other communities. On the other hand, a successful

approach to the challenge of police racial profiling will build relations between the African Canadian community and the police as well as between this community and other concerned communities. This, in turn, will build a stronger city, province and nation.