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Racial profiling charges: How should Texas respond?

Growing interest in whether law enforcement officers engage in “racial profiling” when making traffic stops has caused many states, cities, and police departments to study police practices. In some cases, statewide legislation or local policies now require law enforcement agencies to keep statistics on traffic stops, while in other cases, agencies are doing so voluntarily. Generally, such measures require law enforcement officers to record information about each traffic stop, including the race and ethnicity of motorists stopped, for compilation and distribution.

Nine states and hundreds of cities have enacted laws or instituted policies to address racial profiling, and many other states and localities are considering doing so. In Texas, the 76th Legislature considered but did not adopt measures to prohibit racial profiling and to study the actions of local police officers. The 77th Legislature may revisit this issue. In the meantime, state and local law enforcement agencies in Texas have begun examining their officers’ actions for evidence of racial profiling.

Racial profiling also has become an issue at the federal level. In June 1999, President Clinton ordered federal law enforcement agencies to record and report the race, ethnicity, and sex of people they stop and search. The order applies to traffic and pedestrian stops, inspections at U.S. borders, and certain other searches. A report on the findings is expected by May 31, 2001. The 106th Congress considered legislation to require the U.S. attorney general to study existing information about traffic stops and to gather additional data from a nationwide sample of jurisdictions. In addition, racial profiling has become the focus of lawsuits filed against law enforcement agencies by motorists, usually with the help of civil-rights organizations.

The 77th Texas Legislature may revisit the issue of whether to require law officers to collect data on the racial and ethnic characteristics of drivers whom they stop for violations.

Racial profiling issues

Issues include how to define racial profiling, whether it exists, and whether it is a negative practice. While most allegations of racial profiling involve police officers stopping motorists or pedestrians, such charges also may involve other law enforcement officials, such as customs officers and border-patrol agents, stopping airport or bus travelers.

What is racial profiling? In its December 1999 survey, the Gallup Poll used what it called a neutral definition of racial profiling: the practice of police officers stopping motorists of certain racial or ethnic groups because the officers believe that these groups are more likely than others to commit certain types of crimes. This definition, according to Gallup, left open the possibility that some could see the practice in positive terms.

Critics of racial profiling usually describe it in negative terms. For example, some critics define racial profiling as police officers stopping motorists either for no reason other than race or ethnicity or on the pretext of a minor traffic violation, such as driving a few miles per hour over the speed limit or failing to signal a turn. The real reason for the stop, they contend, is usually not traffic-related and most often is to search for drugs or to harass the motorist. One issue is whether police officers are stopping minorities for nonexistent traffic offenses; another is whether police are stopping only minorities for negligible offenses while letting other drivers go.

A report on allegations of racial profiling among New Jersey state troopers defined racial profiling as “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.” This definition is broad enough, the report said, to include both the initial decision to stop a vehicle and any actions after the stop, such as ordering the motorists out of the car, asking questions not directly related to the traffic violation, bringing drug-detecting dogs to the scene, and asking consent to search a vehicle and its contents.

Does racial profiling exist? The experiences of minority motorists prove the existence of racial profiling, some observers say, noting the coinage of the phrase “DWB” — “driving while black or brown.” The Internet site of the American Civil Liberties Union (ACLU) presents details on what it calls the racial profiling experiences of many travelers at <http://www.aclu.org/profiling>.

While anecdotal stories of racial profiling abound, evidence also proves its existence, some analysts argue. Almost 60 percent of those surveyed for the December 1999 Gallup Poll said that racial profiling is widespread. When asked whether they felt they had been stopped by police simply because of their race or ethnic background, 42 percent of black respondents said yes, while only 6 percent of whites said yes. About 69 percent of those who said they had been stopped because of their race or ethnicity said that this had happened at least three times. Among black respondents, almost three-quarters of men aged 18 to 34 said they felt they had been stopped simply because of their race or ethnicity.

In April 1999, New Jersey admitted that state troopers working on the New Jersey Turnpike had engaged in racial profiling. After examining statistics and anecdotes, New Jersey Attorney General Peter Verniero reported that the practice is real and that minority motorists had been treated differently from nonminority motorists, despite official policies to prohibit racial profiling. Both willful misconduct by a small number of troopers and, more commonly, *de facto* discrimination by officers influenced by stereotypes can result in racial profiling by troopers trying to interdict illicit drugs, the attorney general’s report concluded.

About 41 percent of vehicles stopped on the New Jersey Turnpike in the 19-month study period involved black, Hispanic, Asian, or other nonwhite people. While fewer than 1 percent of vehicle stops on the turnpike resulted in a search, 77 percent of the searches involved black or Hispanic motorists, the report said. However, the report cautioned that there is no way to interpret the significance of the data because there is no reliable study of the racial and ethnic characteristics of persons who travel on the turnpike.

Statistics from Maryland, developed for a lawsuit, also show racial profiling, according to the ACLU. The organization compared a profile of drivers on the Interstate 95 corridor with records of searches of motorists. A survey of drivers showed that over a two-hour period, 76 percent of the cars had white drivers and 17 percent had black drivers, and that of those violating traffic laws, 75 percent were white and 18 percent were black. In one 19-month period, Maryland State Police searched 823 motorists on I-95 north of Baltimore, and 80 percent of those searched were black, Hispanic, or other minorities, according to the ACLU’s analysis.

Other observers question whether racial profiling exists at all. They argue that police officers are trained to look at all factors in a situation before making a traffic stop and not to make stops based simply on race or ethnicity. They say that police officers are justified in stopping any motorist who breaks the law and that officers may search a motorist or vehicle only if certain legal standards are met. Anecdotes about perceived racial profiling may not tell the full story of a traffic stop, such as why a car was stopped or what occurred after a stop, they say.

Is racial profiling a negative practice? Those who view the use of racial profiling as a legitimate part of law enforcement say that, in some circumstances, police officers may be justified in scrutinizing persons in certain racial groups more closely because individuals in those groups commit a disproportionate number of certain kinds of crimes. Using race as part of a criminal profile can be a race-neutral practice that varies from crime to crime and does not target any one race or ethnic group, they argue.

For example, law enforcement officers looking for producers of illegal methamphetamines in certain areas might look for white motorists carrying propane canisters. Officers looking for members of a Chinese street gang might look for persons fitting a certain profile in a neighborhood with a large Chinese population. Supporters of such practices argue that the use of race in a profile can occur in affluent, middle-class, and low-income neighborhoods and is an effective crime-fighting tool that can lower the cost of law enforcement.

Others see racial profiling in negative terms no matter what the circumstances. Eighty-one percent of those surveyed for the December 1999 Gallup Poll said they disapproved of racial profiling. Claims that racial profiling is justified because of a relationship between certain races or ethnic groups and crime rates are based on flawed logic, say critics of racial profiling. To argue that race or ethnicity can be used as an accurate predictor of crime because minorities comprise a disproportionate percentage of drug offenders ignores the fact that law enforcement officers often look for drugs mainly among minorities, critics say. They argue that police might be scrutinizing nonminorities less closely and letting their crimes go undetected.

While racial profiling may allow police to arrest some motorists who are guilty of crimes, it does so at the unacceptable cost of persecuting too many innocent persons, critics say. This can erode the trust between police and citizens, lead to questions about the legitimacy of police actions, deter witnesses and others from cooperating with police, and make jurors doubt the testimony of police, they argue. Persons should be judged solely on their own conduct and not on racial generalizations, some argue.

Legal standards for police stops

The U.S. and Texas constitutions, statutes, and case law govern the stopping of motorists by law enforcement officers. The U.S. Constitution's Fourth Amendment and the Texas Constitution's Art. 1, sec. 9 guarantee against unreasonable search and seizure, and the U.S. Constitution's 14th Amendment and the Texas Constitution's Art. 1, sec. 3 guarantee equal protection under the laws. Also, the Texas Code of Criminal Procedure, art. 38.23 prohibits the admission in a criminal trial of evidence obtained in violation of federal or state constitutions or laws.

These guarantees have been interpreted to mean that law enforcement officers must have a reasonable suspicion that criminal activity is afoot to make a brief investigatory stop of a motorist or pedestrian. This is a less stringent standard than "probable cause," which is necessary for a full search

and seizure. Investigative stops by police generally fall under the standards established by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968) and subsequent cases. Courts have held that observing a traffic violation gives law enforcement officers the necessary authority to stop a vehicle.

After an initial stop, a range of activities — from a warning to a ticket to a search to an arrest — may occur, depending on what a motorist says and does and what a law enforcement officer observes. An officer may search a car with or without the motorist's consent and without a search warrant if the officer has probable cause to believe that another crime has been committed. Because the facts vary with each stop, courts often make decisions about the legality of stops on a case-by-case basis. Many court decisions outline the definition of reasonable suspicion and probable cause to stop a motorist or pedestrian and to

While some observers point to abundant anecdotal evidence of racial profiling, others question whether the practice exists at all.

conduct searches. Law enforcement agencies also have policies about when officers may conduct searches.

A 1975 U.S. Supreme Court decision, *United States v. Brignoni-Ponce* (422 U.S. 873 (1975)), found that ethnic appearance could be a factor in determining whether law enforcement officers had reasonable suspicion to stop a motorist to ask questions about citizenship and immigration status. However, in April 2000, a federal appeals court decision questioned whether the premise on which the *Brignoni-Ponce* decision relied still applies.

In *United States v. Montero-Camargo* (208 F.3d 1122 (2000)), the 9th U.S. Circuit Court of Appeals, which covers nine western states and two Pacific territories, said that the Supreme Court in *Brignoni-Ponce* had relied on outdated demographic information and that subsequent demographic changes had been accompanied by significant changes in laws restricting the use of race in government decision-making. The court upheld a lower court's decision that border-patrol agents had reasonable suspicion to stop three motorists, but the 9th Circuit rejected the agents' use of the motorists' Hispanic appearance or ethnicity as a factor in deciding to make the stop. Because California has such a large Hispanic population, the court said, Hispanic appearance is of little or no use in determining whether someone should be stopped as part of a search for illegal aliens. The 9th Circuit said: "Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection — that they are in effect assumed to be potential criminals first and individuals second."

Some analysts argue that specific laws prohibiting racial profiling are unnecessary because of the general constitutional and statutory protections that can be used in courts to challenge police actions. They say that using skin color or ethnicity as a reason to stop motorists clearly violates their constitutional rights to equal protection and against unreasonable search and seizure. Others counter that an explicit ban against racial profiling is necessary because courts have expanded the authority of police and have broadened definitions of reasonable suspicion.

Some critics of racial profiling note that while a stop by police may be perfectly legal because the officer has seen a violation occur, the issue is whether officers are letting others go free and using traffic violations as a pretext to stop only minorities to search them for drugs or to harass them. While some argue that courts should consider the reasonableness of a traffic stop when deciding

if a stop was legal, others cite the U.S. Supreme Court decision in *Whren et al. v. United States* (517 U.S. 806 (1996)), which said that the constitutional reasonableness of traffic stops does not depend on the actual motivations of law enforcement officers.

The equal-protection clause can be used to challenge law enforcement officers if they apply laws intentionally in a discriminating way, some argue. Others say it is too difficult for individuals to challenge a single traffic stop on the basis of the equal-protection clause because the standards for proving a case generally focus on institutions and policies rather than on individual officers and because of the time and expense required to bring a case.

Studying racial profiling in Texas

In Texas, no statewide study of racial profiling has been conducted. However, the Department of Public Safety (DPS) has reported on the practices of its troopers, the Houston and Arlington police departments are collecting data on stops by their officers, and the Austin Police Department plans to begin collecting such data later this year.

DPS practices. DPS never has promoted, encouraged, or permitted racial profiling, according to a July 2000 memo sent by DPS Director Col. Thomas A. Davis to all commissioned employees. The memo said that DPS troopers and officers are supposed to base their decisions to stop motorists only on "an observed violation of the law, credible information that the occupant(s) have committed a violation of the law, or for an emergency reason . . . [A] decision to request consent to search the vehicle shall be based only on articulable reasonable suspicion that the occupant(s) may be engaged in criminal conduct. The occupant's race, ethnic origin, gender, or economic status must have no bearing on either of these decisions." The agency says it has communicated this policy repeatedly to employees.

The memo said that supervisors must ensure that employees do not engage in profiling and that employees understand that profiling will not be tolerated. People found to have used profiling and supervisors found to have condoned, encouraged, or ignored patterns of profiling will incur disciplinary action, according to the memo. DPS delivered a copy of this policy statement to employees with their August paychecks.

Recent State Laws Governing Racial Profiling

State	Statute	Provisions
California	S 1102	Prohibits racial profiling and requires law enforcement officers to participate in training followed by refresher courses every five years. Requires a study and report on information that agencies collect voluntarily.
Connecticut	S 1282	Defines “racial profiling” and requires police departments to adopt written policies that prohibit stopping, detaining, or searching any person solely because of race, color, ethnicity, age, gender, or sexual orientation. Requires uniform recording of identifying information on persons subject to traffic stops.
Kansas	H 2683	Provides for request for proposal for a system to collect and report statistics on race, ethnicity, gender, age, and residency of persons who come in contact with law enforcement activities. Requires a survey of policies of law enforcement agencies relating to investigation of complaints based on alleged race, ethnicity, gender, age, or residency bias, followed by recommendations to the legislature.
Missouri	S 1053	Requires peace officers to record information on persons subject to traffic stops, including age, gender, race, alleged violation, whether a search was conducted, consent for search, and contraband found. Agencies must report this information annually to state attorney general. Provides for local civilian review boards to investigate allegations of misconduct by law enforcement officers.
North Carolina	S 76	Requires collection of data on the number and characteristics of drivers stopped, citations and warnings given, types of violations that lead to stops, searches, physical resistance, use of force, contraband found, and number of arrests.
Oklahoma	S 1444	Defines “racial profiling” and prohibits law officers from engaging in it. Provides for complaints to the state human-rights commission with regard to traffic stops. Requires the commission to establish rules and procedures for such complaints and to prepare annual reports.
Rhode Island	H 7164	Defines “racial profiling” and declares a public policy against its use. Requires state attorney general to report on data collected by state and local police, including race, age, and gender of people stopped and the length of and reasons for stops. Police departments must adopt written policies prohibiting the use of racial profiling. Provides for a civil cause of action by specifically chartered organizations against any police department that does not comply with the law.
Tennessee	S 2415	Defines “racial profiling” and prohibits law enforcement agencies from relying on it in determining probable cause to arrest and reasonable suspicion to detain. Requires agencies to adopt written policies prohibiting racial profiling. Requires each agency to report on the number and characteristics of people stopped, nature of stops, and whether a warrant or search ensued. Eliminates civil liability for officers who record the information in good faith. Requires state comptroller to review and report on this information.
Washington	S 6683	Requires state patrol to collect and report identifying information on persons subject to traffic stops and requires analysis and use of the data in training patrol and local law enforcement officers. Requires the state association of sheriffs and police chiefs to report to the legislature on local collection of data related to traffic stops, including what is collected and how the data are used.

Source: National Conference of State Legislatures.

The Data-Collection Debate

Should law officers be required to gather data about traffic stops? The issues are whether such laws are necessary, whether they would be burdensome or expensive, their effect on police work, and whether problems with racial profiling could be handled instead through training and supervision of officers.

Supporters of such legislation say:

Collecting data is the only way to prove or disprove the existence of racial profiling. While many anecdotes exist about minority motorists' experiences, statistics would help identify problem areas. Enacting a data-collection law would communicate to law enforcement officers that profiling is not tolerated. It is not realistic to expect victims of racial profiling to go through the expense and hassle of using the courts to challenge every ticket or police stop.

Reporting information about the race and ethnicity of motorists and the disposition of traffic stops would not be burdensome or expensive. Officers could fill out a checklist at the time of each stop, enter the information directly into computers, or use radio codes to transmit the information to the department. The courts would not become clogged with lawsuits based on the data because of the expense and burden of filing such lawsuits. In any case, racial profiling lawsuits already are being filed without specific data collection by law enforcement agencies.

Collecting data about racial profiling would not discourage good police work. Officers still would make stops and pursue suspects as long as the officers' actions met the applicable legal tests. Officers could be protected from individual scrutiny by analyzing data only in the aggregate. Supervision of the data collection and audits of the information would help ensure its reliability. Analysis of the data can take into account the racial and ethnic makeup of the neighborhoods where police work or of motorists on a roadway. This would ensure that officers working in neighborhoods with large minority populations or on interstate highways would not be criticized unfairly.

Although some argue that supervision and training of officers alone can suffice to combat racial profiling, there still would be a need to gather information about police practices to determine whether training and supervision were working.

Opponents of such legislation say:

It is unnecessary to mandate the collection of specific information to study racial profiling. Persons who feel that they have been stopped or searched illegally can challenge police actions in court.

Collecting data on all police stops would be burdensome and expensive for police officers, law enforcement agencies, and any state office that compiled the data. Also, data analysis would be difficult if not automated, and many local law enforcement agencies might not be able to submit data electronically.

It is unclear how an officer would ascertain the race and ethnicity of motorists in order to record it — by asking or by recording what the officer thinks the person's race is. Also, courts could become clogged with lawsuits using the data to challenge stops, whether or not the data revealed any questionable practices.

Compiling statistics on police stops could impede police work. Officers could become hesitant to stop minority drivers who break the law and discouraged from pursuing suspects. This might result in increased crime and danger to the public because police would identify fewer fugitives with outstanding arrest warrants or criminal charges or persons illegally carrying guns or drugs. Police officers should be free to do their jobs without worrying about what statistics may say about their stops.

Statistics could lead to unfair criticism of officers who work in minority neighborhoods and who might stop large numbers of minorities. It is not fair to examine traffic stops by officers in an area without knowing the makeup of motorists in the area, which is difficult to determine.

Training and supervision of law enforcement officers can combat racial profiling. Cameras can be installed in all police cars to record traffic stops, and tapes can be reviewed if an officer's actions are questioned.

DPS says it believes that its officers are handling traffic stops properly. In October, the department released a report on traffic stops, citations, warnings, vehicle searches, and drug interdiction by troopers from March to July 2000. According to the report, 68 percent of the motorists stopped were white, 10 percent black, 20 percent Hispanic, and 2 percent other. Texas' total population is roughly 61 percent white, 12 percent black, 25 percent Hispanic, and 2 percent other. The report says that vehicle stops are the primary indicator of racial profiling issues.

The percentages of motorists issued citations and warnings were roughly the same as for those stopped, but statistics varied for vehicle searches and drug interdiction. Whites drove 52 percent of the vehicles searched, blacks 14 percent, Hispanics 32 percent, and others 2 percent. Of drug interdictions from January to June 2000, whites were the target 22 percent of the time, blacks 38 percent, Hispanics 39 percent, and others 1 percent. The DPS report says that the high percentage of Hispanic drivers searched is related to drug interdiction efforts along the Texas-Mexico border.

The data are limited to traffic stops after March 2000 because the department deleted the "Hispanic" designation from its traffic citation and warning forms in 1993, and Hispanic violators generally were recorded in the "white" category. However, in March 2000, DPS reinstated the Hispanic category and began recording whether a vehicle was searched. While no record is kept if a trooper stops a motorist but takes no action, DPS reports that almost all stops result in a citation or warning.

DPS cautions that, while trooper activity can be compared with the population of an area, it may be more important to compare trooper activity with the demographic characteristics of drivers on a specific road, which are more difficult to ascertain. For example, in an area with a major interstate highway, the race and ethnicity of drivers on the interstate may differ from that of area residents.

Some analysts say the DPS report indicates a racial profiling problem because it shows that Hispanics and African-Americans are more likely to be searched if they are stopped. Reports by the *Dallas Morning News* and the National Association for the Advancement of Colored People back up that conclusion, they say. For example, the *Dallas Morning News* examined data about tickets written by troopers in 1999 and concluded that, while blacks across the state received about the same proportion of tickets as their driving-age population, blacks in 28 mostly

rural counties received more than twice as many tickets as would be expected from their population. Some have criticized the two studies because they do not compare tickets with the population of drivers on specific roads.

Police practices. The Houston Police Department has been developing a database of information about officer-initiated contacts with citizens since 1999. The Arlington Police Department began gathering traffic-stop data in September 2000, and the Austin Police Department plans to begin collecting similar data by the end of this year.

The Houston Police Department said it does not believe it is engaging in racial profiling but that the best way to prove that officers are fair and to identify any problems is to gather and share data. Collecting data also will send a message of no tolerance for racial profiling, the department said. In August 1999, Houston began requiring its police officers to collect information whenever an officer initiates contact with a citizen. The information includes the reason for the stop, the race, sex, and age of the person stopped, and the date, time, location, and outcome of the stop. The department plans to examine information on the individual, beat, district, and station levels but has not yet released any report based on the information.

In the months immediately after Houston began collecting data on its officer-citizen contacts, the number of traffic tickets dropped when compared with the number issued in the same month of 1998. Some analysts say this occurred because officers who had been using racial profiles to stop motorists began writing fewer tickets once they came under scrutiny. Others say the drop cannot be attributed to the data gathering and that several factors — including personnel changes and the expiration of some federal grants to enforce traffic laws — may have contributed to the reduction. Recently, the number of tickets issued has risen again.

State laws on racial profiling

The issue of racial profiling arose during the 76th Texas Legislature when Rep. Domingo Garcia attempted to amend SB 370 by Brown, the DPS sunset bill, to prohibit the agency from using racial profiling in the enforcement of highway or traffic laws. The House adopted the amendment by a nonrecord vote, but a conference committee removed the amendment.

Rep. Senfronia Thompson offered a floor amendment dealing with racial profiling to the same bill. The amendment, later withdrawn, would have required local law enforcement agencies to report to DPS demographic information such as the observable racial or ethnic background, age, and sex of motorists who are stopped, searched, or arrested. DPS would have had to analyze the information and report to the Legislature and governor.

Nine other states have enacted laws dealing with racial profiling (see box, page 5) and many other states have considered them. The ACLU reports that at least 300 law enforcement agencies are collecting information voluntarily about traffic stops, including police departments in Oakland, San Diego, San Francisco, Salt Lake City, Minneapolis, Ann Arbor, Mich., and Richmond, Va.

Most laws and voluntary programs dealing with racial profiling require police officers to report information about each traffic stop, including the race or ethnicity of motorists, the reason for the stop, whether a ticket or warning was issued, whether the person or vehicle was searched, and the result of a search. State laws can apply to the state police force or to local law enforcement agencies. The latter usually require local agencies to send

the information to a state agency for compilation and reporting. Some laws specifically prohibit racial profiling or require local law enforcement agencies to prohibit it.

New Jersey has been in the forefront of the racial profiling issue since the state's attorney general admitted that state troopers working on the New Jersey Turnpike had engaged in racial profiling. His report recommended updating police procedures, including those dealing with searches; developing criteria to use when deciding which vehicles will be stopped from among those that are violating the law; and developing an early warning system that would identify individual officers whose performance should be reviewed by supervisors. It also recommended a study of persons and vehicles traveling the turnpike so that the early warning system would have a benchmark to trigger future scrutiny of officers.

In December 1999, New Jersey and the U.S. Department of Justice settled a lawsuit that alleged racial bias among state troopers. The consent decree required New Jersey to implement many of the recommendations in the attorney general's report. The state police department says it has implemented the vast majority of the report's recommendations and the consent decree's requirements.

— by *Kellie Dworaczyk*

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