

CATO INSTITUTE POLICY FORUM

RACIAL PROFILING:

GOOD POLICE TACTIC--OR HARASSMENT?

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Moderator:

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Featuring:

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Charleston, South Carolina;

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P R O C E E D I N G S

MR. LARTIGUE: Good morning. My name is Casey Lartigue. I'm a Staff Writer here at Cato.

If white males were being stopped after leaving gun shows, we would probably be having a discussion about the Fourth Amendment, or maybe even about the Second Amendment. We wouldn't be having a discussion about crime by white males, in general; we wouldn't be having a discussion about Timothy McVeigh or the UNABOMBER; we wouldn't be having a discussion about school shooters or mass murderers, but when profiling and stop-and-frisk tactics are used on minorities, then the topic turns to crime in general, to justify police stopping law-abiding citizens.

Some say that racial profiling is a myth. That position is increasingly losing traction. Eighty percent of Americans condemn racial profiling. Ten States have passed laws against it, including in Oklahoma, where it is a criminal offense. And there are people who are profiled who definitely believe that it exists.

There is an old joke that a man is asked if he believes in baptism. His response: Not only do I believe in it, but, hell, I've seen it done. And the same is true with racial profiling. Not only do many blacks say that it exists, but 40 percent have told Gallup that they have experienced it firsthand.

And the number is much higher when you talk about young black males; it is more, about 75 percent.

Now, as moderator, I would just like to go ahead and make three points and raise some questions. Point number one: Racial profiling exists. This is no longer a controversial statement to make. Blacks have long complained about being stopped by the police for trumped up reasons. I'm still a young guy, but I do remember the Richard Pryor joke, when he says that he's pulled over and, because he is afraid, he is talking to the officer in a very slow voice: "Officer, I am reaching for my wallet. Please don't shoot me." And that's what I found myself doing earlier this year, when I was stopped in Arlington, which is the inspiration of today's forum. That's why I decided to organize it.

If you don't believe law-abiding blacks who say they have been racially profiled, then you may take the word of the New Jersey Attorney General, John Farmer. He released hundreds of thousands of reports and memos, showing that State authorities knew for more than a decade that minorities were being targeted for traffic stops by troopers.

If you don't believe law-abiding blacks or Attorney General Farmer, that racial profiling exists, then you can pretty much go from State to State, and you will have people there who will tell you that it exists. The Justice Department, in Nevada,

they found that the average time of a car stop is 12 minutes for blacks, 5 minutes for whites. The report found three interesting things. One, police are more likely to stop cars driven by blacks. Two, black drivers are more likely to be arrested or issued tickets. And, three, white drivers are more likely to have drugs.

And that leads to point number two: Racial profiling exists, but does it work? The Attorney General of New Jersey recently testified in hearings there that more than 70 percent of the people searched at the traffic stops are minorities, although reports show that whites carry drugs more often than minorities do. Troopers in New Jersey last year seized drugs in 25 percent of the searches of whites, compared to 13 percent of the searches of blacks, and 5 percent for Hispanics.

And in Sunday's *New York Times*, there was an editorial by David Cole, of Georgetown, and John Lamberth, of Temple. And they pointed out that more than 70 percent of those stopped and searched on a section of Interstate 95 in Maryland are black, yet State Police reported that equal percentages of whites and blacks who were searched statewide had drugs or other contraband.

Point number three: Racial profiling exists, but what can be done about it? Even the opponents of racial profiling recognize that not all police officers engage in racial profiling. Now, a question we can ask is: Why do cops profile?

Ironically, the logic behind it comes from, I would say, a bank robber named Willie Sutton -- actually, he is a white guy -- who was asked why he was robbing banks. His answer was simple: "Because that's where the money is." And for a lot of people in law enforcement, they say that's why they're stopping blacks, because that's where the crime is, in black neighborhoods.

Now, that raises a question: If racial profiling eliminates crime, could it be that with less profiling there will be more black victims? To accept that, we would have to accept that it does work. And we would have to be willing to accept that tradeoff. And then we could say that it's actually a bit unfair to the police, because when they do crack down on crime, some people say that they are unfairly targeting blacks. But, on the other hand, when the police back off, people say the police don't care.

Now, I would like to close with a final quote that I read while I was getting ready for this forum from the Milwaukee County Sheriff. He said, "A black guy in River Hills is just as out of place as a white guy in the inner city late at night." Now, my question is: Who decides who is out of place? People have the right to live or travel wherever they choose, to travel from points A to Z without getting stopped because they happen to fit a profile. At least that's what I believe when I read the Constitution and the Bill of Rights.

So, there we are. Is racial profiling a legitimate police tactic or is it harassment? Here to discuss that question, and hopefully to offer some solutions, are three expert panelists. I will introduce them in turn. Our first speaker today will be Nkechi Taifa. And I hope I said that right. I practiced all week to make sure I got it right. She is Director of the Equal Justice Program at Howard University School of Law.

She has been a major catalyst in raising the visibility of issues involving racism in the administration of justice in the United States. She has served as Legislative Counsel for the ACLU, Policy Counsel for the Women's Legal Defense Fund, and a Staff Attorney for the National Prison Project. She is a 1984 graduate of George Washington University's Law School and a 1977 graduate of Howard University.

NKECHI TAIFA,

HOWARD UNIVERSITY SCHOOL OF LAW

MS. TAIFA: Thank you, Cato, for addressing this very serious issue.

We must seriously address issues of race in the criminal justice system and its disproportionate impact on people of color, particularly African Americans. Because of the severity of the problem and its impact on public confidence in

the criminal justice system, the issue of race as a key influence in the manner in which the criminal justice system in America is administered must be honestly acknowledged.

Black people are subject to unwarranted disparate treatment at every stage of the criminal justice process, from the selective deployment of law enforcement personnel in communities of color to police misconduct and brutality, from stops and arrests premised upon racially biased profiles to the abuse of prosecutorial discretion in decisions of charging and pretrial detention, from the lack of diversity on jury panels to the improper use of preemptory challenges to exclude blacks from juries, and from the racial disparity in mandatory minimum sentencing, including Three Strikes laws and the crack cocaine/powdered cocaine disparity, to the racial application of the death penalty. Such disparate treatment is a direct manifestation, I submit, of institutionalized racism in the criminal justice system.

The topic highlighted this afternoon, racial profiling, represents the disproportionate impact of criminal justice policies at the front end of the criminal justice spectrum, from the initial stop on the street or highway, in the air, or while walking, shopping, dining, or even just trying to hail a cab. In nearly all instances, one is inconvenienced by the experience.

Frequently, the experience will be frightening, humiliating or even traumatic. Sometimes episodes will be deadly.

Let's take a moment to look at what went through the minds of two African American professionals as described in a 1996 article. When Chicago academic and journalist Saleem Mu-Akil hits the road, he employs a careful strategy, gleaned from dozens of police stops. He rents a bland-colored Taurus rather than a flashy Mustang, strictly obeys the speed limit, and definitely does not don his black beret. He honed these techniques after years of driving through the Midwest and being stopped more often than he liked by highway policemen who said he was speeding, driving erratically, or just looking suspicious. But, at base, Mu-Akil thinks he was being stopped for what he called DWB, driving while black.

Similarly, the thought of a police stop flashed through Washington lobbyist Wade Henderson's mind when a rental car attendant, pointed him toward a sporty red coupe for his weekly drive to a law school class that he was then teaching in Richmond. He took one step toward the car and then requested a more conservative model. "Notwithstanding my mixed gray hair and tie, I thought the car might increase my chances of a police encounter," he said. "My concern was sufficient for me to go inside and get another ride." And he eventually made the trip in an inconspicuous sedan.

In response to a question, "Do you conduct your life under the specter of an unwelcome police encounter," Henderson responded, "No. But it would be foolish not to acknowledge reality."

Police officers exercise a tremendous amount of discretion in the exercise of their official law enforcement duties. The decisions to stop, detain or arrest an individual are all left to the discretion of the police officers. And no scenario better exemplifies this discretionary arrest power than the traffic stop. Now, when we think of traffic regulations, we tend to think of what we call moving violations. But State traffic codes actually encompass far more. They regulate every detail of driving, large and small, obvious and arcane.

While most people are not aware that driving is so heavily regulated, the police certainly are. In Maryland, in one case, an officer testified that their rule of thumb was that no driver could travel three blocks without violating the traffic laws in some small way. Indeed, when one sees how comprehensive traffic codes are, the wonder is that anyone can get as far as three blocks without violating the law.

The bottom line is this: Because traffic codes are so extensive, police have virtually unlimited discretion to stop any driver any time for any reason. And because most jurisdictions enact hundreds of traffic regulations, it would be impossible for

a police officer to issue a citation or to make an arrest for every single traffic violation she observed, and nor, trust me, would we as motorists desire such a result. So, we have the exercise of police discretion with the obvious but unavoidable drawback being that such discretion inherently involves treating similarly situated motorists differently.

A police officer may stop and ticket only one driver, even when she observes several motorists exceed the speed limit. The serious disadvantage of discretionary police power lies in its potential for abuse. Pretextual traffic stops exemplify this abuse when race, either consciously or unconsciously, infuses the decision to stop a motorist.

One of the most common rationales for stopping and questioning persons is the drug courier profile. The drug courier profile used to select suspects in airports, bus terminals, train stations, and on the Nation's roads and highways is a set of characteristics designed to guide law enforcement officials in deciding whom to target for investigatory stops. In practice, however, this profile is a scatter shot hodgepodge of traits and characteristics so expansive that it potentially justifies stopping anybody and everybody.

Federal agents have asserted all of the following traits as part of a drug courier profile: Arrived late at night, arrived early in the morning, arrived in the afternoon; one of

the first to deplane, one of the last to deplane, deplaned in the middle; bought coach ticket, bought first-class ticket, used one-way ticket, used round-trip ticket; paid for ticket with cash, paid for ticket with small denomination currency, paid for ticket with large denomination currency; made local call after deplaning, made long distance call after deplaning, pretended to make telephone call; carrying no luggage, carried brand-new luggage, carried a small bag, medium-sized bag -- it goes on and on and on -- traveled alone, traveled with a companion; acted too nervous, acted too calm; made eye contact with officer, avoided making eye contact with officer; wore expensive clothing and gold jewelry, dressed casually -- and this one just always gets to me -- went to rest room after deplaning; walked quickly through the airport, walked aimlessly through the airport; left airport by taxi, left airport by limousine, left airport by private car, left airport by hotel courtesy van.

Needless to say, it would be extremely difficult for anybody not to come within such a profile. Such profiles do not so much focus an investigation as provide law enforcement officials a ready-made excuse for stopping whomever they please.

Throughout the course of the national debate on racial profiling, some law enforcement executives have argued that it is appropriate for law enforcement on patrol to rely upon racial characteristics, provided that the objective crime trend analysis

validates the use of these statistics as risk factors in predicting and responding to criminal activity. Many of the facts that are relied upon to support the relevance of race in crime trend analysis, however, only demonstrate the flawed logic of racial profiling, which largely reflects stereotypes that people of color are more likely than whites to be engaged in certain forms of criminal activity.

And the specific assumption that is at the heart of the racial profiling controversy is the notion that a disproportionate percentage of drug traffickers and couriers are black or Hispanic, so that race, ethnicity and national origin can serve as a reliable, accurate predictor of criminal activity. The proponents of this view point to empirical evidence, usually in the form of arrest and conviction statistics, that would appear at first blush to demonstrate that people of color are disproportionately represented among the universe of drug dealers.

To a large extent, these statistics have been used to propagate a vicious cycle, a self-fulfilling prophecy, where law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources in targeted drug enforcement efforts. And let's look at some of the data.

Under a Federal court consent decree, traffic stops by the Maryland State Police on I-95 were monitored. And one would expect that having been put on notice that their every stop was being monitored, the Maryland State Troopers would be careful not to allow racial factors to influence their actions. However, we nevertheless found that in the two-year period, from January of 1995 to December of 1997, 70 percent of the drivers stopped and searched by the police were black, while only 17.5 percent of overall drivers as well as overall speeders were black. So, again, 70 percent of those stopped and searched were black, yet only 17.5 percent of overall drivers were black.

Next slide.

While black motorists were disproportionately stopped by Maryland State Police on I-95, the instances in which drugs were actually discovered in the stopped vehicles were the same per capita for black and white motorists.

A nationwide study by the U.S. Customs Service revealed that while over 43 percent of those subjected to searches as part of the Service's drug interdiction efforts were black or Hispanics, the hit rates for those groups per capita were lower than for white Americans. And according to the Congressional General Accounting Office, while black female U.S. citizens were 9 times more likely to be subjected to x-ray searches by Customs officials than white female citizens, these black women were less

than half as likely to be found carrying contraband as white females.

In Volusia County Florida, in 1992, nearly 70 percent of those stopped on a particular interstate highway in central Florida were black or Hispanic, although only 5 percent of the drivers on that highway were black or Hispanic. Moreover, people of color were detained for longer periods of time per stop than whites, and were 80 percent of those whose cars were searched after being stopped.

A study of traffic stops on the New Jersey Turnpike found that 46 percent of those stopped were black, although only 13.5 percent of the cars on the road had a black driver or passenger, and although there was no significant difference in the driving patterns of white and non-white motorists.

In 1992, as part of a report by the ABC News program 20/20, two cars, one filled with young black men, the other filled with young white men, navigated the same route in the same car at the same speed through the streets of L.A. on successive nights. The car filled with the young black men was stopped several times by the police. The white group was not stopped, not once, despite observing police cars in their immediate vicinity on no less than 16 separate occasions during the evening.

Even after being proportionally targeted for stops and searches, most blacks and Hispanics are not arrested because the vast majority of those stopped are actually innocent of the conduct police suspected they were engaged in. Less than 10 percent of all blacks are even arrested in a single year. The vast majority of blacks and Hispanics, like the vast majority of whites, are law-abiding citizens.

For example, only nine of more than 1,000 stops in Volusia County Florida in 1992, 70 percent of which were of black or Hispanic motorists, resulted in a ticket, much less criminal charges.

And in Eagle County Colorado, the Sheriff Department's regular use of pretextual stops against people of color did not yield a single arrest for violation of the drug laws, although it did result in a court settlement of \$800,000 in favor of the 400 black and Hispanic drivers who have been subjected to this offensive police tactic.

Despite the fact that blacks are just 12 percent of the population and 13 percent of the drug users, and despite the fact that traffic stops and similar enforcement strategies yield equal arrest rates for minorities and whites alike, blacks are 38 percent of those arrested for drug offenses and 50 percent of those convicted of drug offenses. Moreover, more frequent stops, and therefore arrests, of people of color will also result in

longer average prison terms for people of color because patterns of disproportionate arrest generate more extensive criminal histories which, in turn, influence sentencing outcomes.

Last slide.

Race-based policies pit law enforcement against people of color and create an unbreakable cycle. Racial stereotypes may motivate police to arrest blacks more frequently. This in turn generates statistically disparate arrest patterns which in turn form the basis for further police selectivity by race. Actually, I need to conclude now because my time is up, but perhaps during the two-minute part when I get to come up here again I can talk about what can be done, because that was part as well.

Thank you very much.

(Applause.)

MR. LARTIGUE: Thank you.

Our second speaker is Reuben Greenberg. He is Chief of Police in Charleston, South Carolina. And I believe he has been Police Chief for 20 years now. He has appeared on numerous programs discussing issues relating to law enforcement. And actually, I have known who he is for more than a decade, although this is my first time to meet him.

I remember I saw him maybe about 15 years ago. He was talking and being presented as someone tough on crime. And the host of the show said to him: Well, you're not going to stop

crime; you're only going to get the people out of your town. And he said: That's right. That's the point. I'm just trying to get people away. I've always remembered that. So, it is great to get him here today.

Chief Greenberg.

(Applause.)

REUBEN GREENBERG, CHIEF OF POLICE,
CHARLESTON, SOUTH CAROLINA

MR. GREENBERG: Thank you very much.

The speaker who preceded me was able to draw your attention to several of what she purports to be facts. And it turns out that, in most cases, but not all, she is right. There is very little doubt that racial profiling exists in our country. However, it is my estimation and experience that it is a very, very small problem in law enforcement in our country, this idea of racial profiling.

I have had the opportunity to work as a law enforcement officer in nine different police agencies and in a number of States during the past 30 years or so. What I have experienced and what my research indicates is that the so-called racial profiling is a very small problem, and it does not have any appreciable impact on our criminal justice system. A person

doesn't wind up in prison, for example, because he was racially profiled. Somebody winds up in prison because they have been convicted of a statutory crime. And the person who committed that particular crime, there are witnesses and so forth, and rarely are the police the witnesses in most cases.

There is no doubt that large, even extremely large, numbers of young black men are in America's prisons. But this is because of extremely large numbers of victims in America's cities, towns and communities, particularly with respect to more serious crimes like homicide, robbery and rape.

Now, I suspect that the disproportionate contact that young black men have with the police is going to continue and be present as long as there is a disproportionate incidence of victimization within the black community. For example, I am not talking about the traffic agencies, which are only a small part of the law enforcement community of the police officers in our country. I am talking about the deputy sheriffs and the police officers who are dispatched to over 90 to 95 percent of their calls.

They don't just run up on things, but they are dispatched. Somebody calls the police, describes an incident as having taken place or a suspicious circumstance, and those people then give a description of the person who was likely involved and a description of the vehicle or whatever, and the police officers

hear that dispatch and go to that particular location, whether it be a department store where a shoplifting incident has occurred and some store security agent has detained a shoplifter, or some other similar incident.

Police officers, for the most part, are dispatched to look for particular individuals. So, when a police officer looks for somebody who is black, it is because that is one of the descriptive characteristics that is given, in the same way that a person is male or female, or that they are five-foot-seven-inches tall or 160-180 pounds, and so forth. So, if you look upon law enforcement as primarily some source of harassment for no reason with respect to law enforcement officers, I think it is simply erroneous.

As a matter of fact, most of the police chiefs and sheriffs that I know of, most of these people would be very happy if they could get most of our officers to stop anybody for anything. If we could get a day's work out of some of these guys, it would be a great thing for us to accomplish. If we get them to stop anybody for anything, we would be very, very happy.

The situation on the street today is, as most officers will say, all they're going to do is answer the calls that they are dispatched on, and they are going to do very little with respect to investigating anything unless they are specifically dispatched, because people would allege things like racial

profiling or some sort of discrimination or some other kind of allegation of harassment.

Now, this thing of police racial profiling is, as I understand it, the critics say that police officers are stopping black, brown or, in some cases, Asian males, depending on what part of the country the police agency is located in, that they are stopping these persons for no reason. And if that's the case, then I would say, well, what's the point of stopping these people for no reason? And if the statistics are as my colleague indicated, the previous speaker, that very few arrests are made, why would this practice continue over and over and over and over again, as it's alleged, when in fact nothing comes of it, because no arrests were made?

Now, the police view it a little differently. The police say that we are stopping suspects who happen to be black and fit a certain description of a specific crime suspect or who is similar in background to previously arrested suspects in that particular area. You may argue whether this is appropriate or not. That is a valid argument to make. But that is basically the police response. We can't go down the street and just look at somebody and tell that he is likely to have committed a crime, guilty or not guilty, you have to check people out. And many of the people we check out, perhaps even most in the United States for certain kinds of crimes, happen to be black males. And the

reason is because that is the description that we get when we are dispatched on a particular call.

Police know that crime against person suspects, for example, are frequently black males. A black male is described as the perpetrator in many assaults, suspicious persons, disorderly persons, homicides, rapes, robberies, shots being fired, and other kinds of incidents. And the interest in this problem, I suspect, is not fed by anybody's concern for the constitutionality of the practice or for the welfare of black males. Basically, it's an anti-narcotic type of objection that we're talking about. That's the basis of it: people who are trying to weaken the enforcement of narcotic laws, not people who are trying to enhance the rights of American citizens who happen to be blacks. If that ever happens, that would simply be a byproduct.

Now, if you want to look at prison populations in the United States to indicate what the situation is from the far side; that is, out of every 100,000 black males, 3,209 have been sentenced in prisons in the United States, State or Federal prisons. We are not talking about county jails. Hispanic males are sentenced, per 100,000, 1,273. White males are sentenced, per 100,000, 386. That's a big difference, 386 per 100,000 for white males and 3,209 for black males. These people are not sentenced to prison because they were stopped by the police.

These people were sentenced to prison because, in most of the cases, in over 90 percent of the cases, they pled guilty to some particular crime that had occurred that was alleged by someone other than the police.

Now, we talk about black males being stopped. Well, black males have a very significant role in black communities insofar as violent crime is concerned. And I think that a better, more detailed view of black perpetrators or victims is to examine black-on-black crime.

Within the black community, we have, unfortunately, high rates of victimization. Fifty-four percent of the homicide victims in the United States, in the most recent year for which the FBI has statistics, were black Americans. Forty-four percent of all forcible rape victims are black females, while black females equal only 12 percent of our country's female population. Fifty-two percent of aggravated assault victims are black. Ninety-eight percent of forcible rape suspects were described as black in police reports where the victim was also black. Fifty-six percent of all noncommercial armed robbery victims are described as black.

The reason that blacks have a disproportionate contact with, I suppose, even hospitals and clinics and EMS facilities is because of the high incidence of victimization within the black community. People don't like to talk about that, but the black

community is extremely victimized in our country. And the way that our demographic patterns are, most of their victimizers, most of the perpetrators, are likewise black males.

In Charleston, South Carolina, in the community that I come from, we have 41 percent of our local population is black; 92 percent of robbery perpetrators are reported to be black males by their victims. And 56 percent of robbery perpetrators are black males for the entire United States. And think about that, 56 percent for all the robberies in the United States, the FBI reports that the victims said that the person was a black male. So, obviously we have a high incidence of perpetrators within the country with respect to certain kinds of criminal activities that happen to be black males. And they tend to be very serious and the police tend to put a high priority on trying to locate those persons.

But, at the same time, let's take a look at some of the discretionary arrests, the reason why this whole idea of this massive involvement of police forces in the United States with racial profiling makes little sense to me. Driving under the influence, which is a traffic charge essentially, only 11 percent of persons arrested for driving under the influence and charged with driving under the influence are blacks. This is a national figure, only 11 percent. We are 12 percent of the population.

So, if the cops were as bad as people would have you believe, people from the academic community, the media and people who are enemies of safe neighborhoods and streets would have you believe that it was such a problem that's overwhelmed by the police, then you would have more than 11 percent of DUI charged drivers. Because usually the only witness -- usually the only witness -- is the police officer. It's his discretion to determine whether the person is driving under the influence or not.

And it's certainly a serious crime, much more serious than running a red light or speeding or whatever, or perhaps improper lane change or something. It's something that all of us could be very interested in seeing diminished on American roads and highways. But only 11 percent of the DUI charged drivers are blacks, whereas police are most often the only witnesses to these particular incidents.

We have some problems in the law enforcement community, and two of those problems I am just going to mention with the little time that I have left. Problem number one is police assuming, like many people assume, that all blacks and browns are criminals because many crimes, a disproportionate number, are perpetrated by black or brown males. I'm very sorry that that's the case. It's embarrassing to a lot of us, but the fact is a

greatly disproportionate number of crimes, street crimes particularly, are perpetrated by black and brown males.

The second problem is not one of blacks and browns being engaged by the police. I believe that the problem is the police failing to properly disengage. That is, when we come across somebody who might be a suspect, and we find out whether that person is a suspect by checking them out, we do not properly disengage.

For example, a bank is robbed. A description is broadcast. Say the person was a black male, for example, 18 to 24 years of age, 5-foot, 10 inches tall, 160 to 180 pounds, white tee shirt, blue jeans, tennis shoes, black, medium-length hair, clean shaven. A fairly good and fairly detailed description in this particular case. And typically, within a few minutes, perhaps just 30 minutes after the description is reported, eight to 12 possible suspects in the area were stopped and checked by the police. Police stops, in general, are likely to yield arrested suspects in only 20 percent of bank robbery incidents. I am not talking about all incidents as my colleague was but specifically bank robbery incidents. Only in 20 percent of bank robbery incidents would the police actually arrest somebody for the crime of bank robbery.

Police are correct two times in every 10 stops of a possible suspect. And of course we're incorrect eight times in

every 10 stops of a possible suspect. The problem, it seems to me, is that we do not teach police officers what to do when we are wrong. And we are going to be wrong more frequently. Being right 20 percent for a serious crime such as a bank robbery is enough accuracy to be worth the effort. But we are going to be wrong most of the time.

What we don't do among policing is that police training academies, police training officers, and police practical exercises have done a good job in training police, for example, in making the felony stop. And this training is based on the assumption that the persons subjected to the felony stop are highly likely to be actual perpetrators. And this, as my colleague indicated, is in fact not correct. Experience has shown that only 20 percent of felony stops have yielded the actual perpetrators.

Few police agencies or training academies instruct officers in how to disengage or to withdraw from an erroneous or mistaken stop or arrest. We do not teach what to do when it becomes apparent that we are mistaken. Officers should be taught how to un-arrest a suspect, how to un-detain somebody, how to withdraw from a police stop in a dignified manner for all parties, something that is important to the police as well as to the citizens.

But the effort to find persons responsible for crime is one that is so important that we are going to have to make the effort to try to find out who it is. We just don't look at somebody and can tell. We have to check them out. And many of the people we look for on a regular basis, they're described as being blacks. They're not the only people we're looking for, but overwhelmingly with respect to perpetrators and with respect to victims of crimes, people in the black community suffer more than anyone else.

Thank you.

(Applause.)

MR. LARTIGUE: Thank you.

Our third speaker today is a colleague of mine here at Cato. Timothy Lynch is Director of Cato's Project on Criminal Justice. He focuses on issues related to America's criminal justice system, the Constitution and the Bill of Rights. And he wrote what I consider to be the best study about the murder of Amadou Dialo, in New York, focusing on the street crime unit there. And when I see the work that Tim is doing on criminal justice, I regret at least for a moment that I didn't go to law school, but that's the only moment.

(Applause.)

TIMOTHY LYNCH,
CATO INSTITUTE

MR. LYNCH: Thanks, Casey.

I would like to begin my talk by giving you a few examples of some of the abuses that some Americans have experienced at the hands of the police, because I think it's important to see how some of the legal abstractions that I am going to be discussing can have an impact on the lives of real people. Imagine, if you will, if your son or daughter or brother or sister called you one day and said: I'm in Mexico. I don't have any money. Please help me get back home. And you would be thinking, Mexico, how did you get there? And he responded by saying: I was deported this morning by the INS. And you would think, how could that have happened?

But this happened to an American citizen who happens to be an Hispanic American who was in California. He happened to be working on a friend's house outside one day, and he was just in jeans and a tee shirt, and the INS was moving through the area, conducting sweeps for illegal aliens. And this individual didn't have any I.D. to produce to the agents who stopped and questioned him, and they disbelieved his story, and he was deported to Mexico. And he didn't have any money and had to call his family, frantically, for assistance to get him back home.

Another case that came across my desk recently involved a woman who encountered the Customs Service at Miami International Airport. This woman was returning from a vacation to Nigeria, and she was returning on a flight. They stopped in Miami. She lives in Houston. And as she got off the plane -- there were only two blacks, by the way, on this airplane flight, this woman and one other man -- and as she was exiting the plane in Miami, she noticed that the man was being stopped by Customs and they were opening his suitcase and going through all of his belongings.

And she looked at that and she just kind of shook her head like that, like, there they go harassing him. She actually sat next to this man on the flight from Rome to Houston, so she got to know this man on the flight over. And she was just a little upset that he was having his suitcase taken apart.

When the Customs agents saw her make that expression like that, they said, "Come over here." They proceeded to open up her luggage and go through all of the belongings in it. And they asked for her travel documents. They went through this whole thing. And she said she knew her rights and she knew that they were only doing this because she was black, and they just said: Yes, open up the suitcase, let's see what's inside.

After they had gone through her belongings, a Customs supervisor came over, and the agent explained what he was doing.

And the supervisor wanted to go through the luggage himself. So, he went through it a second time, looking through everything. They didn't find anything. The Customs Service then decided that it would be a good idea to give her a strip search. So, she was taken to a rest room, where she was told to disrobe. Nothing was found.

After the strip search, this woman asked if she could use the bathroom. They said: That's fine, but we're going to make sure that these women Customs agents supervise you as you're using the bathroom. And they told her not to flush the toilet; after she was done, they would go in and inspect the contents of the toilet. Again, nothing suspicious.

While this was going on, her name was entered into the Treasury Enforcement Computer System, to search for any travel pattern and to see if she had any criminal record of past arrest. This inquiry returned nothing suspicious.

Now, after her luggage had been gone through, after she had been given a strip search, and after this electronic search revealed nothing, the Customs Service decided that it would be a good idea to take her to a local hospital where they would give her an x-ray and pelvis examination. She was handcuffed and transported to the local hospital in Miami, where she was presented with a consent form and she was told if she refused to

sign, she could be held for 35 days, or indefinitely, until a judge ordered the x-ray.

At that point she requested to speak with an attorney and to call home. And those requests were denied. So, she signed the consent form because she felt she had no choice. She was looking at 35 days or indefinite confinement. So, she was given this examination at the hospital. There was a complete absence of drugs in her system. And it was only at that point where the Customs Service brought her back -- this is 10 hours after she had arrived in Miami International Airport -- and it was only at that point when the Customs Service proceeded to try to make arrangements for her to move on with her trip from Miami to her home in Houston.

Now, I think just about everybody recognizes that, hey, if that's the whole story, something is wrong here. If that is what happened, it was wrong. But why was it wrong?

In the brief time that I have with you, I am going to try to pinpoint exactly what is the root of the problem that we are discussing today. Here at Cato we always think it is useful to address thorny legal issues in terms of first principles. We take seriously the principles that are set forth in the Declaration of Independence and the Constitution and the Bill of Rights. To us, it is not just rhetoric. We think that these

documents set forth the proper relationship between the individual and his government.

The Declaration says that people have the right to life, liberty and the pursuit of happiness, and that the whole purpose of government is to help secure those rights. When the government turns around and violates those rights, a perversion has taken place.

Yesterday, in preparing for this forum, I reread a famous Supreme Court case that is probably the most notorious case of racial profiling in American history. And that occurred during World War II, when Japanese Americans were taken out of their homes and put in concentration camps during World War II. The Supreme Court reviewed that case and actually found that that internment was in fact consistent with the Constitution. But there were four dissenting Justices on the Supreme Court, one of whom said:

To infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against an entire group is to deny that under our system of law individual guilt is the sole basis for the deprivation of rights. To give constitutional sanction to that inference in this case, however well intentioned may have been the military command on the Pacific coast is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and

to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow. No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the cases of persons of German and Italian ancestry.

Now, most of the complaints that we are hearing today involve violations of the Fourth Amendment. And it's always helpful to go and check out what the Constitution actually says. The Fourth Amendment says: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. No warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

Now, there are four principles of Fourth Amendment law that are relevant to today's discussion: Warrants, probable cause, the principle of a consent search, and the doctrine of false arrest. And I am going to address each one of these principles in turn.

Warrants, I'm talking about arrest warrants or search warrants. I checked the law on this yesterday to see how particular a warrant has to be, an arrest warrant, for a particular person. And they have to be very specific about the

person the police are going to arrest. If it's not specific, it is in fact a general warrant, which is prohibited by the Constitution. So there is really no legal problem with respect to arrest and search warrants. That particularity requirement is still enforced by the courts.

What about the probable cause standard? This standard basically says it's kind of like a more likely than not standard. If it's more likely than not that this particular person committed this particular crime, then probable cause has been established and the police can conduct a stop or an arrest. Now, there is lots of empirical data out there, and the Chief mentioned some of it, about the percentages of demographic groups that actually commit crimes. But nobody says that just being a black person establishes probable cause. Nobody says that.

Being a black male does not establish probable cause. Being a young black male does not establish probable cause. Being a black young male with a beeper is not probable cause. A young black male with a beeper in a so-called high-crime neighborhood does not even establish probable cause. The courts do not say that, and I have seen nobody make that argument. So, the probable cause standard really isn't the problem.

A consent search. Now, this comes up a lot in drug searches. And this is where the police ask you for your consent to search your car or to stop and answer their questions. This

happens a lot at airports, bus terminals and train stations. Now, it seems to me that a person who consents is not in a very good position to complain afterwards. If the police show up at the threshold of your door and ask to search your house and you say, sure, come on in, and they go through it top to bottom and find something illegal, you are not in a very good position to complain that it was an unwarranted police intrusion, because you let them in.

Now, there are certainly arguments around the margins of this issue about whether or not the person actually thought that they had a choice. Certainly that woman who I mentioned earlier, she didn't feel she had a choice. So, no one would argue, or at least a court should not say, that she consented to have that x-ray examination done. But I don't think that there is a real problem with the law of consent searches.

You have to attack each one of these or address each one of these on a case-by-case basis to find out what were all the surrounding circumstances. But really nobody argues that if you give your consent to the police officer to go through your car and he finds something illegal, it's hard to really complain about that. So, the problem really is not so much in consent searches.

The last doctrine is something that I dealt with at length in the paper that Casey mentioned, in the Amadou Dialo

situation in New York. It has to do with the doctrine of false arrest. Now, for those of you who don't know, the terms "false imprisonment" and "false arrest" are basically synonymous terms. When you think of false imprisonment, most of us in our minds think of somebody who is jailed improperly. But its definition is actually far broader.

It refers to the unlawful detention of the person, of another, for any length of time, whereby he is deprived of his liberty. False arrest or false imprisonment includes any unlawful exercise of force by which a person is compelled to remain where he does not wish to remain or to go where he does not wish to go. Anyone who tries to confine another without legal justification can be sued for false imprisonment.

Some of the other tenets having to do with false imprisonment include these: Police officers are not immune from suit. When a police officer goes beyond the scope of his authority, he can be sued and held civilly liable. Jailing is not necessary. You can show a false imprisonment by being detained on a public sidewalk. Physical force does not have to be shown as long as the victim reasonably believed he was being restrained against his will. Confinement does not have to be for an appreciable length of time, and a suit can be maintained without proof of actual damages.

Now, although there is no problem with consent, probable cause or arrest and search warrants, and the law of false arrest is pretty much in place, the catch has been that the courts have carved out, in between consent, in between probable cause, in between searches that involve warrants, this standard called reasonable suspicion. And the catch with this false imprisonment doctrine is this language that I used: When a police officer goes beyond the scope of his authority, then he can be sued for false arrest. The problem is the courts have greatly opened the door with a standard that they call reasonable suspicion. If a police officer has reasonable suspicion, he cannot be sued for false arrest.

Now, this is where the drug courier profiles come in. The courts have said that if a person fits the profile, it establishes reasonable suspicion, so the officer is within the law. And as Nkechi pointed out, these drug courier profiles are notoriously open ended and they're basically a joke. Anybody can be caught through this.

Now, why did the courts carve out this reasonable suspicion standard? The threshold was lowered, and remains low, because of the drug war. Drug crimes are different from ordinary crimes. Ordinary crimes, you can say, if I was mugged, or if there was a bank robbery like the Chief mentioned, you can give out a specific description of the assailant. Drug crimes are

consensual. The buyer wants to buy drugs, the seller wants to sell drugs, they want to keep the whole transaction away from the police. So, it forces the police to resort to other very intrusive types of tactics: reliance on informers, wiretapping, these drug courier profiles.

In my view, minorities are not the victim of some racist conspiracy; they are the primary victims of a bureaucratic imperative. The police are fighting a drug trade, and this trade is rampant. It's everywhere. There are millions and millions of drug users. The police are totally overwhelmed by it. They simply cannot investigate each citizen until they can establish probable cause. And the courts have caved in to this pressure and lowered the threshold by which citizens can be stopped and searched.

The drug war has given us many ugly side effects: crime, corruption and the curtailment of our civil and constitutional rights. If we want to see a drastic reduction in racial profiling, if we really want to get at the root of the problem, we have to end the drug war.

Thank you.

(Applause.)

MR. LARTIGUE: Now I would like to give the speakers two minutes each, if they would like to have a rebuttal, because

I want to get to the audience, but there might be some loose ends you would like to tie up now.

MS. TAIFA: I just want to say one thing. I was speaking to a colleague before coming in here and he asked me had I ever been stopped before by the police. And I responded, yes, in fact, I had. I was in New York, actually going to speak at a National Lawyers' Guild convention, myself and another attorney. And at the time I had a short afro hairstyle and she did, too. And she had her two young sons in the back.

Well, the police officer put on his sirens, for whatever reason, and pulled us over. And we were really flustered, had not broken any traffic codes, I must admit. But when the police officer saw who we were, he was very embarrassed and flustered and was really quite apologetic, profusely saying, "I'm sorry, I thought you were four boys in the car," and he let us go on our way.

Now, I just bring that up to say that I shudder to think what would have been the situation if we had in fact been four young black males in that vehicle as opposed to two black females and two boys in the back seat. There was no dispatch in that situation, saying there was a lookout for four young black men. We simply were pulled over because of what the officer subjectively thought and felt and he, for whatever reason, wanted to investigate. That happens time and time again, and it is all

generated by what Tim says, the whole fallacy of the war on drugs.

So, I just wanted to bring that up. The vast majority of people are not arrested because, in fact, the vast majority of black people who are stopped are not guilty of any crime. There is no evidence, there is no drugs, there is no contraband. They are in fact innocent. And that is why the majority of them are not arrested.

MR. LARTIGUE: Anyone else burning to say something?

(No response.)

MR. LARTIGUE: Excellent. Then we will go on to the questions. We have about 30 minutes left. When you do get the microphone, please say your name, give your affiliation. And we do have a police chief here on the panel, but I'm the law for the next 30 minutes, so please keep your comments short and please try to give questions.

Who has the first question?

MS. LANEY: I'm Garrine Laney. I'm with the Congressional Research Service of the Library of Congress.

I would like to hear a definition of racial profiling. In my research on the subject, what the Police Chief, Mr. Greenberg, has referred to is an urban setting, and Ms. Taifa has talked about on interstate highways perhaps, and Mr. Lynch has talked about at port of entries. I have noticed that the

statistics can be very skewed in each one of those settings. And if you're not very careful in your definition, you come away with, I think, some bad conclusions. So, would someone define what racial profiling is?

MS. TAIFA: Let me just start by saying that all of the examples that you gave and all the examples I gave here exhibit examples of racial profiling. It is where the color of one's skin, one's race, infuses the decision to make a stop, as opposed to other criteria or other characteristics. As I was saying throughout my presentation, police officers exercise a great deal of discretion. That is the nature of their job and their duty. But when a suspect is identified solely on the basis of race, that is unacceptable.

MR. GRIEB: Chris Grieb. I don't really have any affiliation.

I was wondering if Prohibition had the same amount, or if something like racial profiling existed in Prohibition. Were young Italian males singled out for bootlegging arrests? Were young Irish males singled out? Was it something that existed from an earlier time? Because you frequently make the point that drug prohibition and alcohol prohibition are very close. And that was my question.

MR. LYNCH: I don't know the answer to that question. Certainly, as I said, when you're dealing with a criminal

offense, where you don't really have a complainant that goes to the police and says, look, I was mugged or I was attacked or my purse was snatched and here is the description of the assailant, when you're dealing with a consensual crime, where both parties to the transaction do not have an interest in the police finding out about it, then the police have to resort to these other investigative techniques: reliance on informers, going undercover, wiretapping. And that's where these drug courier profiles come in.

I do not know if the Treasury Department used bootlegger profiles back in those days. I wouldn't be surprised if they did, but I really don't know.

MS. TAIFA: I don't know the answer to that, either. You're the expert on that.

But going back to what you're saying, were persons singled out based on their race or ethnicity at that time as being suspect of trafficking in alcohol and the like, I think the issue that we are faced and confronted with today is that you should not automatically think of black people when you think of drugs. All races use drugs. All races abuse drugs. But we have the problem with the disproportionate law enforcement targeting in the black community. But it should not automatically be synonymous with African Americans.

MR. BENS: My name is Milton Bens. I'm Chairman of the Douglass Policy Institute.

I have a couple of questions. One, to Mr. Lynch. Mr. Lynch, you seem to have said -- and I hope I wrote down what you said -- that until we end the drug war -- and I believe I heard you say this -- that we cannot expect any significant or drastic reduction in this particular problem we have with respect to how the law interacts with African Americans or Hispanic Americans or other particular groups who might be identified in these particular groups with respect to these issues. The question is really, and I really want you to address this, what you are saying to me, if I'm a young African man, is that until we end the drug war, I cannot expect any solution or any particular improvement in addressing this problem. And I want you to address this problem.

The other question is to Mr. Greenberg. As a person who is responsible for administering the law, it seems to me that these issues that you are raising all have to do with a very basic statement: The law is no better than the people who administer the law. And I want to say that again: It is no better than the people who administer the law.

I don't think we, as African Americans, need any additional laws in this country. What we need is leadership and people who are responsible for administering the law to

administer the law. And if you have bad cops who are not doing it or if you have bad policies, then you have to really address the issue.

I would like for Mr. Greenberg to address that question.

MR. GREENBERG: I certainly would agree with you that the application of the law is going to be no better than the fairness of the application of the people who administer the law. Unfortunately, in real life, it's impossible to pave a road without blocking it. In other words, if you're going to pave a road, you've got to block that road in order to pave it. There is going to be some degree of inconvenience. And that inconvenience in law enforcement is based upon a very, very subjective model. There is nothing scientific about it. We try to put a little science into it from time to time, but there is really nothing scientific about it.

It's subjective, highly subjective, based upon the background of the particular person who is observing the situation and making a determination as to whether or not to subject someone to the criminal process by giving them a citation or taking them into custody, or whatever. That is part of the price that we pay for being in a democracy and having certain types of laws in our country. We just can't look at something and tell that it is this or that, one way or the other, every

time. In some cases, that's the case. In most other cases, it's not the case.

The police officer, as the Professor indicated, has to exercise some degree of discretion. We are not automatons and we are not machines, where we can be exactly the same, right, even under the same circumstances, day after day after day. We make mistakes, and we have to admit the fact that we make mistakes. Most of the time when we stop somebody, whether the Customs police, whether you are talking about the local police, most of the time we stop somebody based upon even a description of somebody who has detailed information about what the person looked like, and we are hearing it third-, fourth- or fifth-hand.

So, when we stop somebody, we are going to be wrong, and we have to recognize that. We have to recognize the fact that we are more likely to be wrong in stopping this person than being accurate. But, nonetheless, we have to, in order to get the job done, stop people and check them out, and recognize that and act upon it. I think that is where the problem is.

Now, in our agency, we came across something, and I don't know what the effects are going to be, and a serendipitous result may occur. We decided to start giving speeding citations from the air on certain roads in our area from an airplane. And we now have a sufficient number of those citations that we have sent those citations to Charleston Southern University Criminal

Justice Department to take a look at those citations, to compare those citations, the races of the persons, even the sexes of the persons, or any other information that they wish, with those that are made by the individual officers when they see the race or perhaps even the sex of the person on the street.

It will be interesting to see what that result is. And that is only on the major highways and only with respect to the crime of speeding. It is very difficult to enforce from the air whether a light was red or whether they had a signal on or something like that, but it is very easy to determine whether they were speeding or not. That can be easily and scientifically determined. We'll see. We will be able to determine whether or not our usual practice is different than what that special practice is with the airplane. It will be interesting for us to find that out.

MR. LYNCH: And in response to the question posed to me, you did hear me correctly. You will not see a drastic reduction in racial profiling until we end the war on drugs. President Bush has promised that we will end racial profiling and, at the same time, he is appointing a drug czar who is going to step up enforcement efforts. You talk about some of the proposals that are being bandied about to address the problem of racial profiling; we'll have the police gather statistics and

this sort of thing. In four years, the problem is still going to be with us. You cannot have it both ways.

MR. LARTIGUE: We have two questions in the back.

MR. HUGHES: Johnny Hughes, with the National Troopers Coalition. I'm a retired major, 29 years with the Maryland State Police.

Reuben, I have been following your career the last 25 years. I admire you work. I would like to add that we are seeing that it's reason, not race, on traffic stops. Probable cause we're seeing. Representing 45,000 State troopers, from California to Florida to Alaska, what we are seeing, again, is demographics. The Southwest border, a 2,200-mile stretch, San Diego to West Texas, we are not seeing African Americans. We are not seeing Caucasians. We are seeing Hispanics.

MR. LARTIGUE: Do you have a question that you wanted to ask?

MR. HUGHES: No. I'm just stating this. We are seeing on 95, heroin. We are seeing crack cocaine, powdered cocaine. I am just adding what we are seeing as troopers. We are seeing meth. We are seeing Ecstasy. We're seeing oxy-codon. And we are seeing Caucasians there. We are seeing African Americans on 95 a lot with heroin, powdered cocaine and crack cocaine. So, just an observation from the National Troopers Coalition.

MR. LARTIGUE: Thank you.

MR. ZIGLAR: My name is Diago Ziglar. I work here at the Cato Institute.

I would just like to say I've been stopped so many times, I can't even count on both of my hands how many times. I am 26 years old. I'm originally from Michigan. I graduated from college. And not too recently after Casey told me about this forum, I was, I would say, intimidated to the point I was sweating. I pulled up at a traffic light. I was following a friend to the Howard University campus and it was not a patrol car but it was a detective's car.

He pulled up behind me, and we were just casually going through traffic, and he was on my bumper so close I thought he was going to hit me. So, I turned on my blinker and proceeded to slowly get over in the other lane. He went by. Not five minutes later he was sitting on the side of the road, waiting for me to come past again. Then he proceeded to get behind me again. When we stopped, my friend said, "Did you see that?" I couldn't understand why. I had no drugs. I had my seat belt on. I was driving the speed limit.

Mr. Greenberg, is intimidation towards young black men a tactic that police officers use to get us to make a move to signal that we are in a guilty state of mind, so to speak?

MR. GREENBERG: The answer to that, obviously, is no. But, more particularly, I don't know, with the information you

just told me, I don't know that you were stopped because you were black. I have been stopped by the police, as well. And I knew exactly the reason why I was stopped every time: I was speeding. Or, on one occasion, I wasn't speeding but I was weaving in the road because I was trying to put my CD in. It was 4 o'clock in the morning. I was with a friend of mine. We were going hiking in the mountains.

It was about a four-hour drive up there, and we had something to talk about during the four hours up there, because he was absolutely convinced that we were stopped because we were black. And we were stopped because I was wobbling the wheels because I was trying to lean over, trying to put the CD in. And I understand that, as a law enforcement officer, when the guy pulled us over. I saw him over there and I expected to be stopped.

At that time of the morning he probably thought I had come from one of the bars along that road. That's what he probably thought, and that I was perhaps impaired. I was not, but he checked me out, and off I went. I found no problem with it. But my friend was absolutely convinced.

I know that there is no way in the world that I could have told the race of the deputy sheriff that pulled me over at that time of the morning in the dark. I couldn't tell whether he was black or white from the side of the road. And he couldn't

tell whether I was black or white from the side of the road, either. There was no way he could tell what race I was, but he stopped me because of the activity.

But my friend, if you were to talk to him today, he would describe the same incident that I just did to you, but he was absolutely convinced, and still is absolutely convinced, since everybody wants to be a victim in our society, that we were stopped because he was black. But I'm sure that that wasn't the case.

MR. LARTIGUE: We have about 14 minutes left and we have a couple of questions in the front here.

MR. PILON: I'm Roger Pilon, with the Cato Institute.

After listening to the trooper in the back and Chief Greenberg up front, I have reached the conclusion that the problem is rather less racial profiling than reasoning. A list of drugs unconnected to racial profiling does not make a case for racial profiling. You, Chief Greenberg, have given us a series of arguments which are non sequiturs. You say a person does not wind up in prison because he is racially profiled. I don't believe anybody here argued any such thing. We are talking about racial profiling, not winding up in prison. We are talking about harassment.

You said, "Harassment for no reason? No, that doesn't take place." That, again, is not the issue. The issue is

whether you are stopped for insufficient reasons. That's the question. You said that the police say that the person fits the description of the suspect. Again, that's not the issue. The idea of racial profiling is not being stopped because the police are out looking for a particularized or a described person; we are talking about people stopped in airports and on I-95 and elsewhere because they fit a certain racial profile. That is the issue.

But as long as you argue as you did about the other side being people who are enemies of safe neighborhoods and streets -- I dare say, Mr. Lynch and Ms. Taifa are not enemies of safe neighborhoods and streets -- as long as you argue in that manner, you will fail to see what the issue is. Would you please address the issue: racial profiling?

MR. GREENBERG: That's the reason why I said I recognize that racial profiling exists, but it's a very, very small problem. Because the kind of police agencies that you described that are engaged in racial profiling, the Customs police -- most people don't have to worry about Customs agents anyplace -- is a very small agency with a specialized role, and the traffic police, the highway patrol, the State troopers and so forth. As I indicated before, most of the law enforcement stops are made by local police, sheriff and police departments, and are made as a result of a dispatch or information that comes from

another party, not that is generated from the police officer himself.

And I turned around and gave the information about the DUI, because those are exactly the kind of arrests I am talking about, but yet anybody could argue discrimination there or racial profiling with respect to driving under the influence. Again, that is the reason why I also believe that this whole argument, whether intentionally or unintentionally -- I think very much intentionally done by a lot of people -- is really an argument against drug enforcement. And that is the reason for this whole issue of racial profiling. They are looking for allies. If they can find allies among blacks, they're willing to use them. It is mainly an anti-drug enforcement type of issue with respect to many people in our society. That's my judgment.

MR. TOLLETT: My name is Kenneth S. Tollett. I am on the faculty at Howard University in the graduate school and not the law school although I'm a lawyer. I've been a lawyer since 1955. And maybe I should add, when I was first admitted to the Bar in Chicago, I was going to be introduced to the judges in the court, and the senior lawyer with me said: The law can get you if they want you. If you just spat on the street, that's an ordinance violation. The law can arrest you. They always can have a pretext.

But my question is to Mr. Greenberg. And maybe I should add, I have a positive attitude toward even chiefs of police. I used to work for Joseph Lohman. I used to be his trouble shooter. He later became Dean of the School of Criminology at Berkeley. I have three degrees and went to the University of Chicago and so forth, and I want you to explain this to me, Chief Greenberg. I would like for you to comment on the statistics that my colleague stated. Thirteen percent of drug users are black. These are Justice Department figures. Thirty-five percent of arrests for drug possession are black. Fifty-five percent of convictions for drug possession are black. And 74 percent of prison sentences for drug possession are black.

Now, with all my education, I can't understand that unless there is some racism and white supremacy involved, which apparently you are totally unaware of or perhaps you never experienced it. I don't know. Would you explain those statistics to me and tell me that there is not a serious problem, at least for blacks?

MR. GREENBERG: I can't explain those statistics because I am not familiar with them. And I am not an apologist or a person who tries to explain the activities of those interested in narcotics enforcement. Narcotics enforcement is only one aspect of the kind of enforcements that I have been involved in in the last 30 years. So, I can't respond to it.

MR. TOLLETT: They're filling up the jails and the prisons.

MR. GREENBERG: I would suggest that those are excellent questions to make to someone who is in the narcotics enforcement aspect of the thing. But that is such a minimal part of the enforcement that our agency does. Our activities are almost all oriented towards other kinds of activities.

MR. STERLING: I'm Eric Sterling from the Criminal Justice Policy Foundation.

Chief, you were mystified about why the stops might take place. What's the point? Why would any police officers engage in this practice? Why would it continue? And what I'm struck by is the ahistorical character of your asking that question. The 20th century began with Plessey v. Ferguson as the law. Racial segregation was the law, and the police enforced the racial segregation laws. Those laws were not reversed or outlawed until the end of the 1960's, at which point a war on drugs was declared and at which point incarceration rates skyrocketed.

Al Blumstein, at Carnegie-Mellon, wrote a very famous paper in 1972, "A Theory of Punishment," arguing that not only is imprisonment punishment, but all kinds of sanctions. And I would hypothesize that segregation was a punishment which was no longer available, but it is now the use of racially neutral law

enforcement that carries on the segregation that has been the history of the last century. I think that's the explanation.

I am curious of your reaction to that, when you said, "What's the point?"

MR. GREENBERG: Thank you very much for your statement.

MR. LARTIGUE: We have about five minutes left.

Afterwards there will be time, and we can have a luncheon upstairs so you can have more time to ask questions.

MR. FELDMAN: My name is Paul Feldman.

I would like to ask Chief Greenberg a couple of questions about policing. As I understand it, a lot of departments these days are going into what's called community policing, in which the officers are supposed to get to know the people in their communities. If we could assume, for example, that there is no racial distinction, say an area is completely black, so that you cannot worry about whether or not they are unfairly enforcing laws against blacks, is there some level of stopping stop-and-frisk, as in New York, for example, that would be appropriate depending upon the level of perpetrators that the police think exist within a given population?

In other words, profiling is fine; you say that they could be young, they could be male, they could be five-10, they could wear white tee shirts, that could all be a group of

criminals. Is there some appropriate level of stop-and-frisk that goes along with that kind of profiling?

MR. GREENBERG: The answer to your question is I don't believe so. The U.S. Supreme Court and most of the State supreme courts around the country have very -- it is not a mystery to law enforcement persons or people in the criminal justice community the circumstances that justify a stop-and-frisk situation. *Plessey v. Ohio* spoke about that in the 1960's. And those decisions have been replicated throughout that particular time. And I think even a rookie police officer is familiar with most of those circumstances. But none of them have a racial factor, as exemplified by the decisions of the State or the Federal courts.

MR. FELDMAN: But given the certain level, is there some level of stopping that is appropriate?

MR. GREENBERG: Not that I am familiar with. But I do know that many times I have detained -- that doesn't mean I handcuffed them and put them in the back seat -- but detained or interfered with the forward progress of people due to a police investigation that I have been involved with, because I didn't know what the circumstances were or the perpetrator.

And sometimes there was no perpetrator at all, but I heard somebody scream or yell and saw somebody run out of a house and I thought the screaming person may have been screaming because of something the person who ran did. I stopped them,

checked them out, found out what had happened. And the courts have held that we can do that. But that is not the kind of thing that we are talking about here with respect to racial profiling.

QUESTION: My question is to Mr. Greenberg. You asserted that in some cases racial profiling is a positive thing, it has some merit. But how do you address incidents such as the one described by Mr. Lynch at the Miami International Airport, where evidently there was no justification for search and there was no justification for taking this passenger to the hospital and the routine they were put through? How do you address issues such as those where there is no justification? Do you think that that is good policing taken a bit too far?

That's my question. Thank you.

MR. GREENBERG: I believe I have some of the same kinds of questions that you do about the incident that was described here that happened at the airport. I can't give you any possible explanation, maybe because I don't know enough about the Customs process or whatever. But I don't know why that happened, either. I just don't know. It seems unusual and improper to me, as well, but I just don't know.

MR. LARTIGUE: Last question here.

MR. LEVY: Bob Levy, with the Cato Institute.

I'm wondering if our panelists are saying that under no circumstances may race be included as part of a statistical

profile. If, for example, there were a statistical profile that, absent race, would not establish probable cause, but with the inclusion of a race variable would establish probable cause, is it permissible to include then race as part of a profile? Or are you suggesting that under no circumstances may race be included?

MS. TAIFA: The courts have held that race can in fact be included, and in fact is used, particularly when you have an eyewitness account and the like. But race can never be the only variable that is used. Race cannot be the factor, the only factor, that is used to stop someone as being suspected of a crime. The courts have held that race can tip the scales to probable cause, but it cannot be the factor, the only factor, that is used.

MR. GREENBERG: I think the contrapositive of that would be I and many other police officers have used race as the factor and the only factor in deciding not to make a stop. For example, if we have been given a description of somebody that meets a particular racial background, and then a person who obviously isn't a member of that race so they're not likely to be confused with being a member of that particular race passes by, that factor alone, before you get a chance to worry about the height, the weight, the clothing and everything else, this person passes by and you assume that that's not the person, and no point in fooling with them because they are too far out. And the only

thing you really saw was the racial factor and you used that factor not to stop them, but not for the purpose of stopping him. It doesn't make sense. Legally, you can't do that. It doesn't make sense in a practical sense to do that, either, to stop them because of that reason.

MR. LYNCH: The important thing, in my view, Bob, is what is the police officer trying to do. A police officer who stops a passenger at an airport and just asks if he will answer a few questions, that he is working with the DEA and they're conducting a drug investigation, I don't think you can stop police officers from doing that sort of thing. They can stop, they can ask you, but you have to stand on your rights and say, no, thank you, I've got a plane to catch, good-bye. If the police officer then takes another step and tries to prevent you from catching your plane or from getting a cab because you fit some type of general profile, that's where the line is crossed, in my view.

MR. LARTIGUE: The Chairman of Cato has raised his hand, so I will allow him one last question, but please, let's keep everything brief.

MR. NISKANEN: One of those rare occasions in which I have the last word.

There are three forms of injustice in the incidents that are mentioned, but racial profiling per se I think is not

one of them. Racial profiling has to be narrowly interpreted as taking account of race, among other things, in deciding whether to stop a person for a possible crime. But I think there are three forms of injustice.

One is a racial basis in the decision. And that is indicated by whether, of those people who are stopped, whether they find contraband in a very small proportion in one group and a high proportion in another group. That clearly reflects a bias. My understanding is that the data do not suggest that kind of bias as a rule. Of 100 people stopped, maybe 10 percent of the people, blacks, have contraband and 10 percent of the whites have contraband. That suggests no racial bias in the decision.

The second form of possible injustice is what I'll call overzealousness. If you stop 100 percent and only 10 percent of them have contraband or are subject to arrest on any other grounds, then you are being overzealous in the application of the law, in the sense that 90 percent of those people are subject to being stopped, having conducted no illegal activity whatsoever. Now, you can't expect that, however, to be zero. You can't hold cops to a standard of never making a mistake.

So there will always be some proportion of people who are stopped, who have not participated in an illegal act, and that has to be tolerated. But I think it has to be a function of the seriousness of the crime. If you are trying to stop somebody

who might be a Timothy McVeigh, you are going to stop more people, I think, or ought to, than whether you are trying to stop somebody who might have smoked pot at a party. So, that has to be a function of the nature of the crime.

The third form of injustice is whether the police are enforcing bad law. The police themselves cannot be held responsible for that, however. And that is an injustice that we all bear responsibility for if we have created law that, in order to be enforced, requires unjust procedures to enforce. And going back to the beginning, I think racial profiling itself is not the issue. All that racial profiling indicates is whether race, among other things, is taken into account as to whether to arrest somebody or stop-and-frisk or stop somebody on the street. And that itself I think is not the issue.

MR. LARTIGUE: I'm the law, but he's the Chairman.

We will have a luncheon upstairs, so please don't run away. I would like to also announce that this will be available online. Please check www.cato.org, and you will be able to watch it later.

Let's thank the speakers.

(Applause.)

(Whereupon, the Policy Forum was concluded.)