

# BIAS-BASED POLICING IN VERMONT

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## INTRODUCTION

Despite the overwhelming reduction of discriminatory practices in the United States over the past several decades, disparate treatment of minorities persists. Specifically, the belief that some police officers base enforcement actions on race, bias, animus, or a combination of these factors persists.<sup>1</sup> Bias-based policing—or racial profiling, as it is better known—has colored the landscape of modern policing and dominates discussions about the scope of appropriate police authority and decision-making.

Numerous police agencies, state governments, and scholars have addressed this issue. The impetus for this particular analysis was the recent release of “Racial Profiling in Vermont” (“Report”), which documented briefings before the Vermont Advisory Committee to the United States Commission on Civil Rights (“Committee”).<sup>2</sup> The Report, which by its own admission was largely anecdotal, was based on testimony from police practitioners, attorneys, community members, and social justice organizations. The Report included numerous findings and recommendations aimed at reducing bias-based police profiling, or the perception thereof. This Article, which pulls from my personal experiences as a veteran law enforcement officer, evaluates two important recommendations from the Committee.<sup>3</sup> First, that police agencies in Vermont begin traffic stop data reporting (TSDR)<sup>4</sup> and second, that the Vermont Police Academy expand training of “anti-bias policing.”<sup>5</sup>

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1. Letter from Caroline Fredrickson, Dir., ACLU Wash. Legislative Office, to ACLU Members (Dec. 10, 2007), *available at* <http://www.aclu.org/racial-justice/aclu-urges-members-congress-co-sponsor-and-support-end-racial-profiling-act-2007>.

2. VT. ADVISORY COMM. TO THE U.S. COMM’N ON CIVIL RIGHTS, RACIAL PROFILING IN VERMONT 26 (2009) [hereinafter ADVISORY COMM.], *available at* <http://www.usccr.gov/pubs/VTRacialProfiling.pdf>.

3. *Id.* at iii–iv.

4. Traffic stop data reporting, or traffic stop data collection, is the process by which police officers obtain race-related data from traffic stops. *See About Us*, TRAFFIC STOP REPORTING, <http://www.trafficstopreporting.com/Aboutus.html> (last visited Apr. 13, 2011).

5. ADVISORY COMM., *supra* note 2, at iv.

## I. THE FOUNDATION

Despite the widespread recognition of this destructive form of profiling, an appropriate term and definition remain elusive.<sup>6</sup> Emblazoned on the front of the committee's report in bold typeface are the words, "Racial Profiling in Vermont." This term appears throughout scholarly literature, in popular culture, and, as here, in government reports.

A. *The Term*

Despite the flagrant use of the term "racial profiling," some commentators suggest that this may not be the best identifier.<sup>7</sup> The term is deficient because it recognizes only one form of inappropriate police profiling. In so doing, it isolates the discussion to race, when in fact discussions of improper police profiling should more broadly encompass other animus or stereotypes.<sup>8</sup> Racial profiling is a subset of what continues to serve as a harmful undercurrent in our society—discriminatory practices. To preserve and advance civil rights, practitioners and scholars must focus on the root of the problem, which is bias, not race. In fact, the police are allowed to profile and can base their actions on race.

For instance, when I was a police officer, I often worked overtime at a local shopping center. This particular center was a hub of activity among teenagers, who often engaged in fights and shoplifting. Thus, the retail complex hired off-duty police officers to provide a presence and ensure rapid response. One evening, a security guard reported that a merchant had been the victim of a theft. When confronted, the suspect fled. A description of the suspect, a young black male wearing a blue jersey, was broadcasted. Seconds later, while patrolling the parking lot, I observed a young black

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6. *Id.* at 3 n.10.

7. See AUBURN UNIV. CTR. FOR GOV'T AND PUB. AFFAIRS, BIAS-BASED POLICING: A STUDY FOR THE COMMONWEALTH OF VIRGINIA 2 (2004), available at <http://www.dcjs.virginia.gov/cple/documents/biasBasedPolicing/main.pdf> ("The focus of this research study was not solely racial profiling, but rather an examination of all aspects of biased practices. . . . [T]he research staff embraced a broad definition of bias-based policing."); DRUG POLICY ALLIANCE N.M., BAN BIAS-BASED PROFILING IN NEW MEXICO 2, available at [http://www.drugpolicy.org/docUploads/nm\\_bbp.pdf](http://www.drugpolicy.org/docUploads/nm_bbp.pdf) ("The term bias-based profiling is preferred over 'racial profiling' to provide a more inclusive definition of individuals who could experience a bias when interacting with law enforcement."); SEATTLE POLICE DEP'T OFFICE OF PROF'L RESPONSIBILITY, REPORT ON SEATTLE'S RESPONSE TO CONCERNS ABOUT RACIALLY BIASED POLICING 4 (June 2003), available at <http://www.seattle.gov/police/opa/Docs/BiasedPolicing.pdf>.

8. See Press Release, The Drug Policy Alliance, Gov. Richardson to Sign Ban on Racial Profiling Today at 2:30 (Apr. 7, 2009), available at <http://www.drugpolicy.org/news/pressroom/pressrelease/pr040709.cfm> (explaining that New Mexico's prospective anti-discrimination legislation "prohibits profiling on many bases").

male, wearing a blue sports jersey, running across the parking lot. My decision to pursue him was based on his race as well as the description provided to me, his presence in the vicinity of the reported crime, and his flight. This act of profiling was partly based on race, which was entirely permissible. My pursuit was not based on any bias that I possessed, but rather on reasonable suspicion that the fleeing person had committed a crime.<sup>9</sup> In the same way that it could be said that I was “sports jersey profiling” or “flight profiling,” I was also engaged in “racial profiling,” which, in this case, should be of no concern. The focus needs to be on bias-based profiling. This may be a hairline distinction, but specifically identifying what needs to be addressed is vital to focusing attention on what is at issue.

Properly characterizing the problem is an important factor in raising awareness and focusing attention on the specific destructive characteristic—bias. Therefore, the term “bias-based profiling” focuses attention on the root of the problem, rather than on one characteristic of the problem. Accordingly, numerous law enforcement agencies have adopted policies that prohibit bias-based profiling.<sup>10</sup> By way of a medical analogy, this term facilitates the treatment of the disease, not merely a symptom.

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9. “We begin with the teaching of *Terry* that reasonable suspicion must involve sufficient specific and articulable facts, which, together with the rational inferences therefrom, reasonably warrant the intrusion contemplated.” *In re Nontestimonial Identification Order Directed to R.H.*, 171 Vt. 227, 231, 762 A.2d 1239, 1242 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)); *see also State v. Lambert*, 146 Vt. 142, 143–44, 499 A.2d 761, 762–63 (1985) (finding that specific facts supported by a reasonable basis satisfactorily justify a stop).

10. *See, e.g.*, FRISCO POLICE DEP’T, GENERAL ORDER 6.20, BIAS BASED PROFILING, (July 7, 2008), available at [http://www.ci.frisco.tx.us/departments/police/Documents/Bias\\_Based\\_Profiling.pdf](http://www.ci.frisco.tx.us/departments/police/Documents/Bias_Based_Profiling.pdf) (“Officers shall actively enforce state and local laws in a responsible and professional manner, without bias.”); *City of Bradenton Bias-Based Profiling Policy*, CITY OF BRADENTON, [http://www.cityofbradenton.com/index.asp?Type=B\\_BASIC&SEC=%7B09BDD8FF-B0D1-4F58-88B9-16567AB3D040%7D](http://www.cityofbradenton.com/index.asp?Type=B_BASIC&SEC=%7B09BDD8FF-B0D1-4F58-88B9-16567AB3D040%7D) (last visited Apr. 13, 2011) (“It is the policy of the Bradenton Police Department to protect the constitutional rights of all people, regardless of race, color, ethnicity, gender, sexual orientation, physical handicap, religion or other belief system or physical characteristic . . . .”); Office of Agricultural Law Enforcement, *Bias-Based Profiling Policy*, FLA. DEP’T OF AGRIC. AND CONSUMER SERVS., <http://www.fl-aglaw.com/profilingPolicy.html> (last visited Apr. 13, 2011) (“The policy of [AgLaw] is to treat every citizen with courtesy and respect. The purpose of this position is to reaffirm our commitment to unbiased policing in all its encounters between police officers and citizens.”); *Racial Profiling*, WISE COUNTY CONSTABLE’S OFFICES, [http://www.co.wise.tx.us/Constable/racial\\_profiling.htm](http://www.co.wise.tx.us/Constable/racial_profiling.htm) (last visited Apr. 13, 2011) (“It will be the policy of the Wise County Constable’s Offices not to condemn any citizen contacts based solely on race and address any violation of this policy with appropriate employees.”); *Tyrone Police Dep’t Bias-Based Profiling*, TOWN OF TYRONE, GEORGIA, <http://www.tyrone.org/node/221> (last visited Apr. 13, 2011) (“Our bias-based profiling policy prohibits the use of this tactic in all forms.”); *Warwick Police Dep’t Prof’l Standards Div.*, WARWICK, RHODE ISLAND, [http://www.warwickri.gov/index.php?option=com\\_content&view=article&id=1104&Itemid=323](http://www.warwickri.gov/index.php?option=com_content&view=article&id=1104&Itemid=323) (last visited Apr. 13, 2011) (“Discrimination in any form, including racial profiling, is strictly prohibited and the department will take immediate and appropriate action to investigate allegations of discrimination.”).

### B. The Definition

There are a myriad of definitions for bias-based profiling,<sup>11</sup> which promotes inconsistency and fails to facilitate adequate comprehension of the issue. Thus, police agencies and courts will continue to struggle with the question of whether conduct violates such ambiguous standards.

In the context of traffic stops,<sup>12</sup> courts have defined racial profiling as “[s]elective enforcement of motor vehicle laws on the basis of race.”<sup>13</sup> Another definition is “exercis[ing] . . . discretion to enforce the traffic laws on account of . . . race, which requires proof of both discriminatory effect and discriminatory purpose.”<sup>14</sup> Still another is “unequal treatment based upon . . . race or ethnicity during the course of an otherwise lawful traffic stop.”<sup>15</sup>

Other courts suggest that bias-based profiling exists when the police take action “solely based on racial considerations.”<sup>16</sup> Police entities remain satisfied with a definition that relegates racial profiling to decisions based *solely* on race because it permits them significant flexibility in enforcement and investigatory functions. Critics argue that this definition is excessively limited.<sup>17</sup> As Robert Appel, the Executive Director of the Vermont Human Rights Commission, aptly suggested in his testimony before the Committee, limiting improper profiling to action based solely on race is “unduly restrictive.”<sup>18</sup> Again, a definition of bias-based profiling based solely on race fails to address adequately the animus or improper biases issue. Such a definition allows the police to base enforcement action on race, as long as

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11. Michal Tamir, *Racial Profiling: Who Is the Executioner and Does He Have a Face?*, 15 TEX. HISP. J.L. & POL’Y 71, 73–74 (2009).

12. While racial profiling is most often discussed in the context of traffic enforcement, it is not limited to this setting.

13. *Flowers v. Fiore*, 239 F. Supp. 2d 173, 178 (D.R.I. 2003) (citing *Chavez v. Illinois State Police*, 251 F.3d 612, 635 (7th Cir. 2001)).

14. *Johnson v. Crooks*, 326 F.3d 995, 1000 (8th Cir. 2003) (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)).

15. *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002).

16. *See United States v. Travis*, 62 F.3d 170, 173–74 (Ky. 1995) (reviewing motion to suppress evidence of cocaine found in the defendant’s purse at the airport based on defendant’s claim that the detective racially discriminated against her); *United States v. Avery*, 137 F.3d 343, 346, 353 (6th Cir. 1997) (reviewing motion to suppress evidence of cocaine recovered from defendant’s carry-on bag based on defendant’s claim that “airport officers targeted, pursued and interviewed him solely due to his race”).

17. *See Ruth Singer, Race Ispa? Racial Profiling, Terrorism and the Future*, 1 DEPAUL J. FOR SOC. JUST. 293, 293 (2008) (“[R]acial profiling is difficult to authoritatively define. The term often describes the use of race as the motivating factor for traffic stops, but this definition has been criticized as too limited in context.”) (citing Reginald T. Shuford, *Civil Rights in the Next Millennium: Any Way You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 380 & 372 n.7, 380 (1999)).

18. ADVISORY COMM., *supra* note 2, at 12.

they can create at least one additional factor. The potential message to police officers is, “you can base enforcement on race, as long as you find another reason.” Thus, performing traffic stops on the basis of race is permissible, as long as there is a taillight out, or a vehicle exceeds the posted speed limit by three miles per hour, or the driver fails to wear a seatbelt, or a myriad of other reasons. Accordingly, blacks may be stopped when their license plate is not illuminated, while whites tend to avoid such arbitrary treatment. Therefore, improper profiling can still occur when police conduct technically complies with an accepted definition.

Ideal definitions are broader in their scope.<sup>19</sup> Civil rights are advanced by a definition that encompasses a variety of bias-based characteristics.<sup>20</sup> For instance, the American Civil Liberties Union (ACLU) provides that racial profiling is “the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual’s race, ethnicity, religion or national origin.”<sup>21</sup> This definition appropriately limits the scope of prohibited behavior to “discriminatory practice” but facilitates proper police practice by acknowledging that investigative police functions can be based on race, such as when race is included in a suspect’s description. Broadening the definition of prohibited conduct to include any discrimination based on race acknowledges the potential for improper motivations. Others promote the definition expressed by the End Racial Profiling Act because it encompasses a broader definition:

[T]he practice of a law enforcement agent relying, to any degree, on race, ethnicity, religion, or national origin in selecting which individuals to subject to routine or spontaneous investigatory activities, or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except where there is trustworthy information, relevant to the locality and time frame, that links persons of a particular race, ethnicity, religion, or national origin to an identified criminal incident or scheme.<sup>22</sup>

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19. See Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 738–44 (2002) (endorsing a broader definition of racial profiling than “police initiated conduct that is based *exclusively* or *solely* on the race of the person affected”).

20. The Committee reported that the Burlington Police Department enacted a “‘bias-free’ policing policy,” which would prohibit the consideration of “race, ethnicity, gender, or other potentially improper criteria when making law enforcement decisions.” ADVISORY COMM., *supra* note 2, at 6.

21. *Racial Profiling: Definition*, ACLU.ORG, <http://www.aclu.org/racial-justice/racial-profiling-definition> (last visited Apr. 13, 2011).

22. See Singer, *supra* note 17, at 294 (quoting End Racial Profiling Act of 2005 (ERPA), S. 1238 § 3(6), 109th Cong. (2005)). See also Kristin Connor, Note, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigration Performance*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 567, 582 (2008) (quoting End

Unlike a definition that restricts improper behavior to that based solely on race, this definition does not permit the use of race as the foundation for police action. Quite simply, police should not be permitted to engage in discriminatory practices based on race.

As long as police officers lack sufficient guidance about what conduct and behavior is impermissible, society will continue to suffer from discriminatory practices. It is essential that such guidance focuses on preventing discriminatory purposes or improper motivations that lead to unlawful profiling.

No matter the definition, the underlying concern with respect to bias-based policing should remain whether there is a discriminatory purpose. Regardless, it is challenging to prove a discriminatory purpose no matter how one defines racial or bias-based profiling. Data collection from traffic stops, which will be discussed in greater detail later, addresses this issue. However, data is subject to methodological flaws and interpretation. Bias-based profiling may not be pervasive enough to be revealed by looking at statistics alone. Accordingly, an individual police officer may engage in flagrant bias-based profiling during traffic enforcement, which is subject to data collection, but still evade notice because numbers alone do not reveal improper motivations. While data may infer bias-based profiling, it is not a dispositive measure and must be considered among other factors, such as the demographic makeup of a police officer's geographic area of responsibility. Finally, data alone will not detect the officer who fraudulently reports false statistics.

Data collection problems are most evident in claims brought against police officers alleged to have engaged in race-based or bias-based profiling. These may be based on civil rights abuses,<sup>23</sup> which often allege denial of equal protection<sup>24</sup> and Fourth Amendment violations.<sup>25</sup> Yet, plaintiffs often encounter insurmountable barriers. Absent evidence of overt discrimination,<sup>26</sup> plaintiffs must show that a police officer's actions had a

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Racial Profiling Act of 2007 (ERPA) S. 2481 § 2(a)(15), 110th Cong. (2007) ("Racial profiling damages law enforcement and the criminal justice system as a whole by undermining public confidence and trust in the police, the courts, and the criminal law.").

23. See 42 U.S.C. § 1983 (2006) (codifying citizens' right to sue state actors for deprivation of rights).

24. U.S. CONST. amend. XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

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

26. *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1168 (2003).

discriminatory effect and were motivated by a discriminatory purpose,<sup>27</sup> which “need not be the only purpose, but it must be a motivating factor in the decision.”<sup>28</sup> Accordingly, claims often turn on “statistical comparisons between the number of black or other minority Americans stopped or arrested and their percentage in some measure of the relevant population.”<sup>29</sup> This requires that plaintiffs “make a credible showing that a similarly-situated individual of another race could have been, but was not, [stopped or] arrested . . . for the offense for which the defendant was [stopped or] arrested”<sup>30</sup> in order to prevail in an equal protection claim.

This burden presents a substantial hardship for plaintiffs. For instance, in 1986, the United States District Court for the Eastern District of Michigan found that a plaintiff failed to prevail on his equal protection claim that stemmed from an unlawful arrest allegation where he did not show that he was “treated any differently than a ‘white citizen.’”<sup>31</sup> The United States District Court for the Northern District of California in 1990 denied an equal protection claim after allegations of excessive force and unlawful arrest when the “plaintiffs offer[ed] only conjecture” and no evidence that the police had a discriminatory intent.<sup>32</sup> In 1997, the Superior Court of New Jersey for the Appellate Division denied a claim of selective enforcement when there was “no evidence that . . . specifies the disparate treatment of persons who could have been but were not stopped for traffic violations by the State Police.”<sup>33</sup>

Arguably, one of the most significant patterns of racial profiling occurred in New Jersey, which found itself embroiled in substantial litigation.<sup>34</sup> The United States District Court for the District of New Jersey provided a substantial history of the bias-based profiling issues in that state.<sup>35</sup> In 1996, a superior court judge found “that the [New Jersey] State

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27. *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)). The court noted that “[t]hese standards have been applied to traffic stops challenged on equal protection grounds.” *Id.* (citing *Chavez v. Ill. State Police*, 251 F.3d 612, 635–36 (7th Cir. 2001); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533–34 (6th Cir. 2002)).

28. *Marshall*, 345 F.3d at 1168 (citing *Villanueva v. Carere*, 85 F.3d 481, 485 (10th Cir. 1996)).

29. *Id.* (citing *Chavez*, 251 F.3d at 626).

30. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006) (quoting *United States v. James*, 257 F.3d 1173, 1179 (10th Cir. 2001)) (omissions in original).

31. *Davey v. Tomlinson*, 627 F. Supp. 1458, 1462 (E.D. Mich. 1986).

32. *McKenzie v. City of Milpitas*, 738 F. Supp. 1293, 1301–02 (N.D. Cal. 1990).

33. *State v. Smith*, 703 A.2d 954, 957 (N.J. 1997). In this case, the defendants tried to introduce evidence of newspaper articles quoting former troopers that New Jersey police used racial profiling, and a six-year old report of traffic stop patterns during a different time of day and location “a considerable distance from the arrest site.” *Id.*

34. *White v. Williams*, 179 F. Supp. 2d 405, 408 n.1 (D.N.J. 2002) (citing twenty-three cases since 1999 in New Jersey’s “vast body of racial profiling litigation”).

35. *Id.* at 410–16.

Police endorsed, on at least a *de facto* basis, a policy of racial profiling,<sup>36</sup> which was “defined 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.’”<sup>37</sup> This finding was based, in part, on research that “revealed that African-Americans were 4.85 times more likely to be stopped on the [New Jersey] Turnpike than non-African-Americans.”<sup>38</sup> Additionally, it was discovered that troopers were encouraged to consider ethnicity when engaging in drug interdiction.<sup>39</sup>

In 1999, New Jersey’s State Police Review Team found that minority motorists were subjected to a higher rate of consent searches once stopped and were arrested disproportionately.<sup>40</sup> In the report, New Jersey Attorney General Peter Verniero provided new policies and procedures for the New Jersey State Police.<sup>41</sup> These included the following: conducting consent searches only when troopers have reasonable suspicion of a crime; maintaining written records of consent searches; recording and reporting the racial makeup of all persons subjected to traffic stops; installing video cameras in patrol vehicles; and requiring officers to attend related training.<sup>42</sup> The New Jersey Attorney General also updated the state drug enforcement policy, published State Police statistics, revised procedures for traffic stops, and established an “‘early warning system’ and enhanced computerization of records to detect the disparate impact on minority citizens of individual state troopers.”<sup>43</sup>

Based on the findings discussed above, the United States Department of Justice (DOJ) threatened a lawsuit, which resulted in a consent decree between the DOJ and the State of New Jersey.<sup>44</sup> The consent decree, which used the New Jersey Attorney General’s latest recommendations, added additional sweeping changes to New Jersey State Police procedures.<sup>45</sup> These changes included quarterly reviews of individual troopers to ensure

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36. *Id.* at 411 (citing *State v. Soto*, 734 A.2d 350, 360 (N.J. 1996)).

37. *Id.* at 410 (quoting PETER VERNIERO & PAUL ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 5 (Apr. 20, 1999), [hereinafter VERNIERO & ZOUBEK] available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf)).

38. *Id.* at 411 (citing *Soto*, 734 A.2d at 352–53).

39. *Id.* (citing *Soto*, 734 A.2d at 358).

40. *Id.* at 412 (citing VERNIERO & ZOUBEK, *supra* note 37, at 6, 29).

41. *Id.* (citing VERNIERO & ZOUBEK, *supra* note 37, at 82).

42. *Id.* at 413 (citing VERNIERO & ZOUBEK, *supra* note 37, at 87).

43. *Id.* at 413. In sum, the report included eighteen new measures aimed at combating racial profiling. *Id.* (citing VERNIERO & ZOUBEK, *supra* note 37, at 92, 94, 96, 98, 100, 102, 104–10).

44. *Id.* (citing *United States v. State of New Jersey & Div. of State Police of the N.J. Dep’t of Law & Pub. Safety*, No. 99-5970 (D.N.J. Dec. 30, 1999)).

45. *Id.*

that they were complying with the consent decree, the creation of a Professional Standards Bureau to investigate complaints, enhanced training related to racial profiling and human diversity, and the establishment of a twenty-four-hour hotline to receive citizen complaints.<sup>46</sup>

New Jersey is not alone. As a former Massachusetts Attorney General reported, “Boston police officers engaged in improper, and unconstitutional, conduct in the 1989–90 period with respect to stops and searches of minority individuals.”<sup>47</sup> A recent ACLU study suggests a disproportionate number of arrests in two Louisiana parishes.<sup>48</sup> In New York, dozens of African-Americans brought allegations of racial profiling after an elderly woman was attacked in her home and identified the suspect as a young black male. The police questioned every African-American student at a local college and randomly stopped and questioned African-Americans on the street.<sup>49</sup> The ACLU has also documented widespread improper profiling at border crossings and airports.<sup>50</sup> For instance, a JetBlue passenger, an Iraqi man, was not allowed to board an airplane until he covered his shirt, which read, “We Will Not Be Silent,” in Arabic and English.<sup>51</sup> Additionally, a Muslim family was prohibited from boarding an airplane after they were heard conversing about the “safest place to sit on an airplane.”<sup>52</sup>

While these examples demonstrate profiling that clearly constitutes a discriminatory effect or purpose, plaintiffs may have significant difficulty prevailing on claims that involve less overt bias-based profiling.<sup>53</sup> Often, police officers operate with extremely limited supervision and virtually unchecked discretion. Though officers may be aware of prohibitions on

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46. *Id.* at 415 (citing Div. of State Police of the N.J. Dep’t of Pub. Safety, No. 99-5970).

47. *Illinois v. Wardlow*, 528 U.S. 119, 133–34 n.8 (2000) (quoting J. SHANNON, ATTORNEY GENERAL OF MASSACHUSETTS, REPORT OF THE ATTORNEY GENERAL’S CIVIL RIGHTS DIVISION ON BOSTON POLICE DEPARTMENT PRACTICES 60–61 (Dec. 18, 1990)).

48. Press Release, Am. Civil Liberties Union, Records Suggest Racial Profiling in Homer and Claiborne Parish, (Oct. 1, 2009), available at <http://www.aclu.org/racial-justice/records-suggest-racial-profiling-homer-and-claiborne-parish>.

49. *Brown v. City of Oneonta*, 221 F.3d 329, 334 (2d Cir. 2000).

50. AM. CIVIL LIBERTIES UNION & THE RIGHTS WORKING GRP., THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES 34–39 (2009), available at [http://www.aclu.org/files/pdfs/humanrights/cerd\\_finalreport.pdf#page=25](http://www.aclu.org/files/pdfs/humanrights/cerd_finalreport.pdf#page=25).

51. *Id.* at 38.

52. *Id.* at 38–39.

53. See Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 751 (2004) (“To prove pretext, the plaintiff has the difficult burden of proving that the law enforcement officer would not have stopped the plaintiff but for their race.”); David M. Tanovich, *Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention*, 40 OSGOODE HALL L.J. 145, 181 (2002) (“It is difficult to prove a discriminatory intent.”).

investigatory and enforcement decisions based on a discriminatory purpose, they can easily discriminate without detection.<sup>54</sup> Again, there are abundant opportunities for officers to act with a discriminatory purpose, while offering legitimate justifications for doing so. Accordingly, the most obvious cases are often identified while many other occurrences of bias-based profiling may never be known; even valid allegations may not be redressed due to the difficulties imposed on plaintiffs to present credible evidence of a discriminatory purpose. While our legal system rightfully demands an evidentiary basis for claims, citizens who raise bias-based profiling complaints are presented with a nearly impenetrable barrier. Standards should not be relaxed, but it is necessary to provide manageable methods of identifying and addressing bias-based policing. Statistics may provide an objective reference that can lead to inferences of a discriminatory purpose, but they must be properly analyzed and supported to do so.

## II. VERMONT'S SOLUTIONS

### *A. Traffic Stop Data Reporting*

Traffic stop data reporting (TSDR) is a relatively new means of reducing bias-based profiling.<sup>55</sup> This technique has been made possible with the use of modern data collection abilities of computers. Typically, computer-aided dispatch (CAD) systems record a series of codes, which are provided at the end of an officer's call for service.<sup>56</sup> For instance, when an officer encounters a suspicious person, takes no official action, and does not utilize backup officers, that officer would transmit the code "314 Q A" to the dispatcher, who would record the code. A "451 H B" code occurs when an officer, requiring the assistance of a second officer, stops and tickets a driver for speeding.<sup>57</sup> Based on a three-digit code, analysts could report the

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54. Tanovich, *supra* note 53, at 181 ("Police officers are adept at ensuring that their notes and testimony conform to expected standards of conduct.").

55. One of the earliest uses of traffic stop data occurred in 1993. For a discussion of how the courts unveiled "indications that race was inappropriately being used in investigatory traffic stops," see Deborah A. Ramirez, et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1198 (2003) (citing *Wilkins v. Maryland State Police*, Civil Action No. CCD-93-483 (D. Md. Filed 1993)) (noting that "[e]mpirical data on stop and search practices . . . originated through actions of the court").

56. See TOM MCEWAN, INST. FOR LAW AND JUSTICE, COMPUTER AIDED DISPATCH IN SUPPORT OF COMMUNITY POLICING 1 (Jul. 2002), available at [http://www.ilj.org/publications/docs/CAD\\_Community\\_Policing\\_Exec\\_Summ.pdf](http://www.ilj.org/publications/docs/CAD_Community_Policing_Exec_Summ.pdf) (finding "that CAD systems have much to offer community policing because of the richness of the basic data that is collected").

57. *E.g.*, PENSACOLA FLA. POLICE DEP'T, TRAFFIC STOP DATA REPORTING (2007) (on file with author).

number of suspicious persons encountered, the number of speeding motorists stopped, what action the officer took, and whether additional officers were required. This information can provide an invaluable resource for allocating limited workforce among shifts and geographic areas, particularly when coupled with data providing the time of day, the day of the week, and the location.

TSDR supplements this information with codes providing information on the race and gender of the driver, the age of the driver, the number of passengers, the reason for the stop, whether a search was conducted, and whether evidence was seized. While a helpful tool in data collection, traffic stops become a cumbersome burden for patrol officers who are required to fumble with lists of codes to ensure proper data coding. The use of coding also contributes to an increase in police radio traffic to communicate the codes.

At least one commentator suggests that the data should be documented on a form, a copy of which should be provided to the driver. This way, the driver would be able to verify the officer's accuracy.<sup>58</sup> Absent a form provided to the driver, accurate data collection relies on the willingness and competency of police officers. For instance, one of my fellow officers, convinced that our agency was engaged in a sweeping campaign of mistrust and that such data collection was unfair, only used codes reserved for unknown males and unknown females. While this code was reserved for times when officers were legitimately unable to determine the ethnicity of the driver, this particular officer provided these codes for every traffic stop. Thus, records revealed that he was never able to discern the race of the drivers of numerous traffic stops, which drew a rebuke from members of the administration.

This officer's actions were unacceptable, however, his argument had some, albeit minimal, merit. Specifically, one of the challenges is determining how to view data from a Caucasian officer who is assigned to patrol a predominantly African-American community and stops only African-Americans—not by virtue of animus, but the lack of ethnic diversity. In my experience, some Caucasian officers profiled other Caucasians based *solely* on race in the belief that Caucasians traveled to African-American communities to purchase illegal drugs. Thus, it was common for officers to follow Caucasians in such neighborhoods until they committed a minor traffic infraction, stop them, and focus on their presence in a given community. More often than not, these traffic stops would not begin with, "May I see your license?" or "Did you know that your taillight

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58. Weatherspoon, *supra* note 53, at 744–45.

was out?” Rather, officers, admittedly myself included, were more likely to inquire, “What are you doing here?” This occurrence is not simply possible, but likely.

The benefit of traffic stop data collection far outweighs its pitfalls. Reflecting what many other law enforcement agencies have done and taking a step in the right direction, the Vermont Advisory Committee recommended that the Vermont State Police mandate traffic stop data collection,<sup>59</sup> but only encouraged other Vermont police agencies to engage in data collection.<sup>60</sup> Sadly, the Committee’s recommendation focused on whether collection should be mandatory or voluntary and avoided a substantive discussion about the methodologies of data collection.

The Committee received testimony that mandatory data collection was not wise.<sup>61</sup> Specifically, T.J. Donovan, State’s Attorney for Chittenden County, suggested that voluntary participants “will become the best advocates of the practice.”<sup>62</sup> William Sorrell, Vermont’s Attorney General, argued that “law enforcement agencies will face staffing challenges associated with the need to do in-depth analysis of massive records, particularly if a study were to cover post-arrest proceedings in addition to traffic stops.”<sup>63</sup> Mr. Donovan and Attorney General Sorrell both expressed concern about funding a mandate.<sup>64</sup> Trevor Whipple, Chief of Police for the City of South Burlington, Vermont Police Department, argued that mandates, such as data collection and the presence of video cameras in patrol vehicles, “could be viewed as evidence of distrust, and . . . engender resistance from law enforcement officers.”<sup>65</sup> The late Professor Michael Mello of Vermont Law School, suggesting a data collection mandate, argued that the way to “bridge the reality divide” between the perception of the public and law enforcement was to analyze data.<sup>66</sup> Notably, the Committee reported that few Vermont police agencies voluntarily collect data.<sup>67</sup>

Several states have legislatively imposed mandatory data collection,<sup>68</sup> so it is not beyond the realm of possibility that Vermont will do the same.

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59. ADVISORY COMM., *supra* note 2, at iii.

60. *Id.* at 31.

61. *Id.* at 19.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 22.

66. *Id.* at 24.

67. *Id.* at 30.

68. For a list of and discussion of different state statutes and legislation, see Weatherspoon, *supra* note 53, at 740–43.

The Committee cited the positive attributes of mandatory data collection, such as consistency and reliability,<sup>69</sup> but cited disadvantages as well, such as “the perceived implication that Vermont law enforcement officers engage in discriminatory policing methods and therefore cannot be relied upon to institute appropriate voluntary monitoring.”<sup>70</sup>

Despite the potential hardships of implementing mandatory reporting, a mandate should be viewed as a proactive approach, not a remedial measure. Clearly, Vermont’s experience with bias-based profiling is not as egregious as New Jersey’s. There is no reason to reach that point. When the decision is left to individual agencies, few will engage in data collection. Therefore, a mandate that comes before bias-based profiling has reached a point of crisis in Vermont demonstrates only the state’s willingness to prevent potential hardships, not to correct deficiencies.

Police officers should not be afraid of data collection. Moreover, the amount of authority and discretion that modern police officers possess is outstanding. It stands to reason that accountability is paramount when entrusting someone with a gun and the authority to deprive citizens of their liberty. While it may be a difficult argument to make, officers should not view added mechanisms of accountability as mistrust, but as essential guardians of their continued ability to police effectively without hypersensitive means of scrutiny. For instance, police officers could be restricted from engaging in proactive police work—only allowed to respond when they are summoned. Standing alone, the goal of earning the trust of citizens serves as a sufficient reason to impose mandatory collection. Failure to collect and provide data only fosters the belief that agencies are concealing inappropriate police conduct. Providing data can help demonstrate that agencies and police officers are not engaged in bias-based profiling.<sup>71</sup> The Committee readily admitted that while racial profiling may not be a problem, the perception of it is.<sup>72</sup> That acknowledgment alone demands the need for mandatory reporting. If inaccurate, the perception can largely be cured by collecting and disseminating data to Vermont’s residents and visitors. If the perception is accurate, data collection provides the perfect impetus for positive changes. Turning a blind eye to the potential occurrences of bias-based profiling only serves to frustrate citizens and diminish, if not eliminate, the chances for positive improvements.

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69. ADVISORY COMM., *supra* note 2, at 30.

70. *Id.*

71. Suzanne Leone, Note, *Massachusetts Addresses Racial Profiling Head On: The Efficiency of Chapter 228 of the Acts and Resolves of 2000*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 335, 367 (2002).

72. ADVISORY COMM., *supra* note 2, at iii, 26.

While collection may pose a roadside hardship, analysis obstacles, and added expense, data collection and distribution is an effective tool in building trust in the police among citizens.<sup>73</sup> An innovative approach that could ease potential hardships of analysis for law enforcement agencies is to develop partnerships with local universities. Often, institutions of higher education have the expertise to analyze data, and employ a staff of professors and graduate assistants with the skills to conduct thoughtful statistical analysis. When law enforcement agencies encounter internal obstacles, it is imperative that they explore innovative ways to achieve important goals even when that necessitates external collaboration.<sup>74</sup> Conventionally, a disconnect exists between law enforcement practitioners and academia. While the reasons vary, there is a broad belief that each side fails to consider the other's perspective. An effective way to combat this dilemma is to recognize vital strengths and weaknesses of each side. While some police agencies employ data analysts equipped to conduct studies regarding benchmarking, many do not. On the other hand, academia is poised to provide valuable analysis. Accordingly, such recognition could bridge the disconnect by enabling each entity to value the other's contributions. While this may present some obstacles, such as maintaining data privacy, this avenue is worthy of consideration.

The Committee's discussion lacked recommendations about what data should be collected, how to use the data, and how it could reveal the discriminatory purpose required to show unequal treatment. While the Committee should be applauded for its efforts to promote data collection, it significantly limited the effectiveness of its recommendation by failing to provide law enforcement entities with sufficient guidance.

Some argue data that reveals a disproportionate number of minorities stopped by the police suggests racial profiling, and requires corrective action.<sup>75</sup> While a disproportionate number of minorities stopped should raise the attention of law enforcement agencies, it does not necessarily require the conclusion that police officers are engaged in bias-based profiling. It is not sufficient to simply look at quantitative data and conclude that there is, or is not, a discriminatory motive. Evaluating data should assume a qualitative approach using sound methodology.<sup>76</sup> Numbers alone,

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73. Leone, *supra* note 71, at 367.

74. See Keith Clement et al., *Partnering With a Purpose*, POLICE CHIEF, Nov. 2007, at 66, available at [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=1325&issue\\_id=112007](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1325&issue_id=112007) (describing the benefits of cooperation between higher education institutions and law enforcement agencies, particularly in training, education, and technical assistance).

75. See Weatherspoon, *supra* note 53, at 747.

76. See *id.* at 744–45 (“The mere fact that a particular officer has disproportionately stopped a racial or ethnic group should not result in automatic disciplinary action.”).

which can only support inferences, do not reveal the underlying motivations for specific actions.

Evidence of disparity, if it suggests cause for concern, should be followed by a thorough analysis, not a foregone conclusion. Such analysis should include an examination of whether an officer's action was based upon a description provided to the officer or self-initiated conduct by the officer. Analysis should also include: the demographic characteristics where the contact occurred<sup>77</sup>—not just the overall racial makeup of an entire metropolitan area; conversations with the officer who conducted the contact(s); and other circumstances that may have supported a reason for the stop. While potentially laborious, a sound evaluative approach must encompass the totality of any statistical findings, not only a showing of disparity. Accordingly, the Committee's recommendation to collect data should have been accompanied by some consideration of factors related to analysis.

Specifically, while a comparison of the ethnic makeup of a population segment to a segment of persons stopped is inherent, the source of the population segment is a critical concern. Arguably, the most readily accessible data would stem from Census statistics. However, this data is inadequate because the demographic makeup of citizens who actually use the roadway may differ from Census data.<sup>78</sup> Moreover, the Census does not count everyone.<sup>79</sup> Therefore, other methods of comparison are needed.

Accordingly, the internal benchmarking method achieves a reliable measure of statistics regarding race or bias-based profiling by using sound methodology.<sup>80</sup> As of 2003, internal benchmarking was in use or under development at the Pittsburgh, Pennsylvania Bureau of Police; Cincinnati, Ohio Police Department; and the Phoenix, Arizona Police Department.<sup>81</sup>

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77. See Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 8 (2005) (suggesting that "disproportionate statistics could also be caused in part by police departments' more frequent patrolling of 'high-crime' areas, which at times correlate with minority neighborhoods").

78. Melissa Whitney, Note, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 268–69 (2008).

79. *Id.* at 269.

80. *Id.* at 277 (citing Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON CIV. RTS. L.J. 219, 248 (2005)); SAMUEL WALKER, INTERNAL BENCHMARKING FOR TRAFFIC STOP DATA: AN EARLY INTERVENTION SYSTEM APPROACH 1 (Apr. 2003), available at <http://www.policeforum.org/library/racially-biased-policing/supplemental-resources/internalb%5B1%5D.pdf> (advocating for an internal benchmarking system "by which the traffic stop activity of officers is compared with other officers working the same assignment"). Notably, this method has been applied to traffic stops, but its effectiveness may vary in a border or airport setting, depending on the method of data collection and the type of data collected.

81. WALKER, *supra* note 80, at 7–8; see also GREG RIDGEWAY, RAND CTR. ON QUALITY POLICING, CINCINNATI POLICE DEPARTMENT TRAFFIC STOPS: APPLYING RAND'S FRAMEWORK TO

This method simply compares police officers within a given geographic area, at a specific time of day or night, and by assignment, such as uniformed patrol.<sup>82</sup> In so doing, the need to obtain a valid population sample is eliminated. Accordingly, specific characteristics of the motoring public, and only the motoring public, are considered in a specific area that is consistent from day to day. Thus, the only variable that changes is the individual police officer. Discriminatory intent is inferred by comparing the actions of the police officers while all other variables remain constant. Then, disparities among police officers are evaluated to determine whether significant differences give rise to evidence of race or bias-based policing. Of course, the determination of what constitutes a significant disparity is challenging. It has been suggested that a 5% disparity is significant.<sup>83</sup>

In any event, a disparity should only create a presumption, never be dispositive, and always be considered on a case-by-case basis. While an objective analysis is a crucial component in determining the existence of bias-based profiling, it should include a subjective element. Specifically, an individual police officer should be permitted to rebut the presumption with evidence that his action was not based on a discriminatory purpose.<sup>84</sup> A variety of factors might demonstrate a lack of discriminatory purpose,<sup>85</sup> thus, a police officer should have the opportunity to provide reasons for any disparity. In this way, the internal benchmarking method is a reliable objective measure that can reveal the presence of discriminatory purpose, but can incorporate a subjective element by allowing an individual police officer to rebut the presumption.

Additionally, internal benchmarking may serve as a component of early intervention,<sup>86</sup> a suggestion that has been endorsed by the U.S. Department of Justice, the U.S. Civil Rights Commission, the International Association of Chiefs of Police, and the Commission on Accreditation for Law

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ANALYZE RACIAL DISPARITIES (2009), available at [http://www.rand.org/pubs/monographs/2009/RAND\\_MG914.sum.pdf](http://www.rand.org/pubs/monographs/2009/RAND_MG914.sum.pdf) (explaining Cincinnati's internal benchmarking program).

82. Whitney, *supra* note 78, at 277.

83. *Id.* at 267. Typically, an evaluation is based on a rather complex statistical analysis that attempts to establish a value for what would constitute a lack of racial profiling in a given area. Then, that figure is compared with actual traffic stops. *Id.*

84. *See id.* at 297 n.252 (citing Smith, *supra* note 80, at 247) (advocating a burden-shifting approach that requires the government agency to justify statistics that suggest racial profiling).

85. *Id.* at 270 (acknowledging that “[p]olice may take a wide variety of other factors into consideration when stopping a vehicle, such as traffic patterns, the behavior of drivers or passengers, and the characteristics of the vehicle itself”).

86. *See* WALKER, *supra* note 80, at 16 (“When properly used, internal benchmarking of similarly situated officers (IBSSO) can have an immediate impact on the officers whose performance has been identified as problematic.”).

Enforcement Agencies.<sup>87</sup> Early intervention, which does not involve formal discipline,<sup>88</sup> identifies a number of performance indicators such as citizen complaints and use of force reports.<sup>89</sup> Then, individual officers can be identified when they reach or exceed a certain number of performance indicators within a specified time.<sup>90</sup> In regard to bias-based policing, a police officer's enforcement action against persons of a specified ethnicity exceeding a given value could trigger a review.<sup>91</sup> Officers can then receive counseling about their performance,<sup>92</sup> preferably before the need for formal disciplinary action.

Admittedly, there are disadvantages to the internal benchmarking method. Most notably, it would be difficult to detect discriminatory intent if an agency was engaged in widespread bias-based profiling.<sup>93</sup> Additionally, in smaller agencies, there may be an insufficient number of officers assigned to specific areas to warrant a valid comparison.<sup>94</sup> This may be an especially valid concern in Vermont because many agencies are small. Nevertheless, the data is only one aspect of the evaluation and can still provide a credible basis for an inference of a discriminatory purpose.

### B. Enhanced Police Officer Training

Police officer training standards differ by state. In Vermont, police academy attendees complete 803 hours of basic training and an additional 100 hours of "post-basic training," some of which is optional.<sup>95</sup> Remarkably, of those 903 hours of training, the Vermont Police Academy offers only two hours of mandatory diversity training<sup>96</sup>—hardly enough time to give adequate attention to an issue as sensitive and complex as bias-based policing. Once certified, officers must complete twenty-five to thirty hours each year<sup>97</sup> of continuing education, which includes firearm

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87. *Id.* at 6.

88. *Id.* ("They are designed to intervene early, before an officer's performance results in a serious problem.")

89. *Id.* at 6–7.

90. *Id.* at 7.

91. *Id.* at 12.

92. *Id.* at 7.

93. *See id.* at 19 ("The major limitation of [internal benchmarking] is that it focuses on individual officers and cannot address situations where racial or ethnic bias pervades an entire unit or an entire department.")

94. Whitney, *supra* note 78, at 278.

95. *Full-Time Basic Training*, VT. CRIMINAL JUSTICE TRAINING COUNCIL, [hereinafter *Basic Training*], <http://www.vcjc.state.vt.us/basic.htm> (last visited Mar. 16, 2011).

96. ADVISORY COMM., *supra* note 2, at 21; *Basic Training*, *supra* note 95.

97. The number of hours varies depending on full-time or part-time status.

requalification and first aid. While the Vermont Criminal Justice Training Council can request that agencies offer specific training, it remains at the discretion of the agency what training is offered.<sup>98</sup> Theoretically, the diversity training in the academy may be the only such training a police officer ever receives regarding bias-based profiling.

Vermont maintains a statutory procedure for police officer certification,<sup>99</sup> but offers limited grounds for certification revocation.<sup>100</sup> Procedures in other jurisdictions, such as Florida's Criminal Justice Standards and Training Commission (CJSTC),<sup>101</sup> not only certify officers,<sup>102</sup> but offer a comprehensive disciplinary framework.<sup>103</sup> While the Committee found Vermont's typical redress for citizen complaints is deficient,<sup>104</sup> Florida's broad sanctions allow reprimands, suspensions, or revocations.<sup>105</sup> In Vermont, an officer's certification can be revoked for: 1) a felony conviction subsequent to receiving the certification; 2) failure to comply with continuing education requirements;<sup>106</sup> 3) finding that the officer's certification was issued as a result of fraud; 4) finding that the officer's certification was issued as a result of error; and 5) "any other reason for which decertification is specifically authorized by statute."<sup>107</sup> Florida, on the other hand, takes disciplinary action against police officers who engage "in conduct that constitutes a felony or a serious misdemeanor involving perjury or false statement, or is not of 'good moral character.'"<sup>108</sup> Moreover, in addition to suspension, decertification, and reprimands, the CJSTC can impose other penalties.<sup>109</sup>

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98. VT. CRIMINAL JUSTICE TRAINING COUNCIL, RULES & REGULATIONS [hereinafter RULES & REGULATIONS], available at <http://www.vcjtc.state.vt.us/rules.htm> (last visited Apr. 13, 2011).

99. VT. STAT. ANN. tit. 23, § 2351 (2006).

100. RULES & REGULATIONS, *supra* note 98, Rule 20.

101. The CJSTC is a division of the Florida Department of Law Enforcement.

102. According to the Florida CJSTC, police officers receive 770 hours of initial training. See *Criminal Justice Standards and Training Curriculum*, FLA. DEP'T OF LAW ENFORCEMENT, <http://www.fdle.state.fl.us/Content/getdoc/b2d3193a-ca22-4e1c-8eec-c258c3511d10/2009-CJSTC-Curriculum-List.aspx> (last visited Apr. 18, 2011).

103. *Professional Compliance (Disciplinary) Process: Penalty Guidelines*, FLA. DEP'T OF LAW ENFORCEMENT, [hereinafter *FDLE Penalty Guidelines*], <http://www.fdle.state.fl.us/Content/getdoc/3fedac1b-6c81-4779-b143-d30c33fa66ef/PC-Process---Penalty-Guidelines.aspx> (last visited Apr. 18, 2011).

104. ADVISORY COMM., *supra* note 2, at 27 (citing accountability and oversight failures).

105. *FDLE Penalty Guidelines*, *supra* note 103.

106. This only occurs after an opportunity to correct the deficiency. RULES & REGULATIONS, *supra* note 98.

107. *Id.*

108. *Professional Compliance (Disciplinary) Process: Overview*, FLA. DEP'T OF LAW ENFORCEMENT, [hereinafter *FDLE Overview*], <http://www.fdle.state.fl.us/Content/CJST/Professional-Compliance/PC-Process.aspx> (last visited Apr. 13, 2011).

109. *FDLE Penalty Guidelines*, *supra* note 103. Other penalties include reprimands, probationary status subject to terms and conditions imposed by the CJSTC, and training—which could include attending

Like Vermont, Florida requires continuing education,<sup>110</sup> but specifically requires periodic retraining for “discriminatory profiling and professional traffic stops”<sup>111</sup> and “human diversity.”<sup>112</sup> Training should not merely encompass cultural diversity, but provide meaningful methods of policing without bias. Specifically, training should remind officers about the standards of reasonable suspicion and probable cause and the factors that constitute both. With this training, police officers would be aware not only of important cultural characteristics that define our society, but would also gain an important foundation of accepted investigatory and enforcement tools.

Further, employment standards should fully address this area of concern. Specifically, cultural diversity and policing without bias should be components of written tests, oral interviews, psychological examinations, and polygraph testing. It is not sufficient or safe for agencies to assume that rookie police officers received adequate training in a police academy. Moreover, field training programs, which provide on-the-job training at many (if not all) modern police agencies, should specifically evaluate whether new officers appear to be engaging in bias-based profiling, include training about race-neutral police practices, and stress the need to base investigatory and enforcement actions on reasonable suspicion and probable cause, not bias.

The Committee found that the training related to bias-based profiling was inadequate in Vermont.<sup>113</sup> Further, the Committee argued that training imparts expectations and that training should continue through a police officer’s career.<sup>114</sup> The Committee recommended that police officers be made aware of their agency’s policy related to bias-based policing and comply with the procedures that are established by the policies.<sup>115</sup> While this may happen at some police agencies in Vermont, it probably does not occur at every agency. The initial training that one receives in the academy is a substantial primer in establishing future expectations and developing the traits that eventual leaders will possess. Continuing education can only

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the basic recruit academy. *Id.*

110. Forty hours of continuing education is required every four years. *Officer Requirements*, FLA. DEP’T OF LAW ENFORCEMENT, <http://www.fdle.state.fl.us/Content/CJST/Officer-Requirements/Mandatory-Retraining-requirements.aspx> (last visited Apr. 13, 2011).

111. *Id.*

112. Discriminatory profiling and professional traffic stops may satisfy the human diversity requirement at the discretion of the agency administrator. The amount of time spent on these issues in the basic recruit academy is not clear, but they are most likely addressed during a forty-hour component entitled “Human Issues.”

113. ADVISORY COMM., *supra* note 2, at 29.

114. *Id.*

115. *Id.*

succeed if Vermont agencies create a lasting first impression in the academy that bias-based policing will not be tolerated. From this analysis, it follows that Vermont should pursue a comprehensive framework of initial training and continuing education.

It is absurd that the Vermont Police Academy requires only two hours of “diversity training,”<sup>116</sup> and that officers may then never revisit the issue for the duration of their career. This is insufficient, and society’s concern with preventing bias-based policing—which can result in litigation—stresses the need for officers to be exposed to related continuing education. Unfortunately, America has not yet found itself in a place where it can declare victory and rest on its civil rights laurels.

#### CONCLUSION

Bias-based policing exists, whether in actuality or perception. Ignoring the potential for bias-based practices, or worse, their actual existence, diminishes the effectiveness of credible law enforcement efforts. Law enforcement should recognize potential and actual bias-based practices, and address them. Fortunately, Vermont has taken the first step towards addressing the problem by fostering a dialogue prior to litigation or consent decrees.

Properly defining bias-based profiling is essential for the advancement of civil rights. First, the term must acknowledge that there are forms of discrimination beyond race, which can degrade civil rights. The term “racial profiling” fails to address adequately other forms of discrimination. The term “bias-based profiling” acknowledges the underlying motivations that promote unlawful police practices and broadens the understanding of this important issue.

Settling on a proper definition is vital. A narrow definition that confines improper police action to conduct based solely on race permits officers to base their decisions on race while searching for a legitimate reason for action. Critics argue that this definition is too limited and allows officers to engage in discriminatory, bias-based practices, as long as they can also justify their decisions on other grounds. A broader definition that restricts bias-based profiling to any discriminatory action based on race (or other identifying characteristics) acknowledges that officers cannot base their actions on impermissible characteristics. Of course, this does not prohibit proper criminal profiling when race or other characteristics are provided as a component of a suspect’s description.

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116. *Basic Training*, *supra* note 95.

The Committee advanced several means to combat bias-based profiling including data collection and enhanced training requirements. Proactive steps are an ideal means of addressing this issue, and both of these recommendations facilitate the reduction of bias-based police action.

Data collection and distribution demonstrates transparency and builds trust among citizens. Furthermore, it can uncover evidence of bias-based practices. While law enforcement may be resistant to data collection, it is imperative to address bias-based profiling. Vermont must adopt a sound methodological structure of analysis such as the internal benchmarking method, described above, which has been used successfully by several large police agencies.

Further, enhanced training properly conveys expectations to police officers. While initial training must be augmented, Vermont must also ensure that continuing education reminds officers of appropriate conduct. Doing so will diminish occurrences of bias-based profiling.

Passive responses, or complete denial, are insufficient. Whether bias-based profiling is real or perceived, it is sufficiently prevalent to address. Doing so will heighten the credibility of law enforcement and increase trust among citizens.

