

OPEN SOCIETY JUSTICE INITIATIVE

Ethnic Profiling

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Since 2005, the Open Society Justice Initiative has worked with local, national and regional partners to combat ethnic profiling in Europe via documentation, capacity-building, technical assistance, and legal advocacy. More information on the project, including reports and publications, can be found at http://www.soros.org/initiatives/justice/equality_citizenship/ethnic_profiling.

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I. Ethnic Profiling Defined

“Ethnic profiling” is the use by law enforcement of generalizations based on impermissible grounds such as race, ethnicity, religion or national origin—rather than individual behavior or objective evidence—as the basis for suspicion in directing discretionary law enforcement actions.¹ [This discussion uses to the term “ethnic profiling” to encompass profiling on all prohibited grounds.] Ethnic profiling may take place in law enforcement actions such as identity checks (stop and search); raids; border and customs checks; selection of targets for surveillance; data mining; and other police-initiated actions (as opposed to calls for service from the public). Despite increasing and welcome attention to the issue of ethnic profiling in the European Union and its member states, the problem remains pervasive.

Ethnic profiling is clearly prohibited under European and international law. In its leading judgment on this topic, the European Court of Human Rights found a breach of the European Convention where Russian police officers, acting pursuant to an official policy of ethnic exclusion, barred the applicant from crossing an internal administrative boundary because of his Chechen ethnicity. The Court held that “no difference in treatment which was based *exclusively or to a decisive extent* on a person’s ethnic origin was capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”² More recently, the United Nations Human Rights Committee affirmed that police targeting of persons for suspicion or stop or identity checks based on race or ethnic appearance is unlawful. In the case of *Rosalind Williams*, the Committee ruled that “the physical or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal situation in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted.”³ The Committee ruling explicitly applies these criteria to both police stops for immigration purposes and those conducted in the prevention and detection of ordinary crime.

National courts in Europe have similarly found that ethnic profiling is a breach of domestic (as well as regional and international) anti-discrimination norms. Thus, in striking down the disproportionate denial of permission to enter the UK for prospective Roma visitors from the Czech Republic, the House of Lords explained that singling out Roma for special immigration scrutiny was unlawful, even though “there was good reason” to suspect that more Roma would be seeking asylum in the UK than non-Roma.⁴

This and other case law makes clear that the prohibition against ethnic profiling applies, not only in (the rare) situations in which police target people solely on the basis of their ethnic appearance or religion, but also where – as is more common – ethnicity or religion plays a decisive role, together with other factors in explaining law enforcement action. It is rare that ethnicity is explicitly articulated as a reason for a police action. However, the nefarious function of ethnicity may appear when a pattern of identity checks or stops and searches over time generates a disproportionate impact on members of certain groups.⁵ This standard does not prohibit law enforcement from considering ethnicity, race or religion. Rather, as reflected in official guidance for police officers in

both the UK and the US, it requires that use of such factors must be necessary to the investigation and directly tied to specific intelligence or a suspect description over a limited, reasonable period of time⁶

II. The Requirement of Reasonable Suspicion

The need for information about an individual's behaviour is anchored in the requirement of reasonable suspicion standards for police investigations and actions such as stop and search. The disproportionate focus on ethnic minorities in the conduct of identity checks is one of the most common forms of ethnic profiling throughout the EU. Official statistics from the UK clearly show that when officers are allowed more discretion to stop and search people, disproportionality increases and effectiveness decreases.⁷ As recently as May 23, media have reported that Asians in the UK are up to 42 times more likely than whites to be stopped by police at ports and airports for up to nine hours without the need for reasonable suspicion that they are involved in any crime.⁸ Requiring officers to formulate grounds of reasonable suspicion based on individual behavior is a fundamental safeguard against stereotyping, and is established in EU norms.

In *Gusinski* and other case law, the European Court of Human Rights has established that:

suspicion must be based on reasonable grounds that form an essential part of the safeguard against arbitrary arrest and detention. The fact that a suspicion is held in good faith is insufficient. The words 'reasonable suspicion' imply the "existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offense."⁹

The European Fundamental Rights Agency has noted that reasonable suspicion is the "usual starting point" for police actions, but goes on to state that "[i]n some cases, a lower standard exists which might allow powers to be exercised on the basis of professional intuition".¹⁰ As support for this statement, the FRA cites British case law from 2006 that was overturned by the European Court of Human Rights on January 12, 2010 in the case of *Gillan*. The Court's ruling in *Gillan* makes clear that the legal powers under which police are legally entitled to stop and search a person—including for counter-terrorism purposes—must be sufficiently circumscribed and subject to adequate legal safeguards against abuse. The judgment furthermore noted a "clear risk of arbitrariness in the grant of such a broad discretion to the police officer" and flagged the risk discriminatory patterns of police stops.¹¹

III. False "Justifications" for Ethnic Profiling

Ethnic profiling is clear when there is proof that superiors specifically order officers to target certain ethnic groups, as sometimes occurs in respect of airport searches or immigration stops aimed at rounding people up for deportation. And yet, ethnic profiling frequently results – in less overt though no less pernicious form - from the cumulative

effect of decisions by individual officers. While some officers may hold racist beliefs, many do not and are unaware of the degree to which ethnic stereotypes drive their subjective decision-making about which individuals to subject to law enforcement action.¹² Ethnic profiling may also result from institutional policies targeting certain forms of crime and/or certain areas without consideration for the disproportionate impact such policies and resource allocations may have on minority communities. Ethnic profiling remains persistent and pervasive precisely because it is often the result of habitual, sometimes subconscious, use of widely-accepted negative stereotypes linking entire sub-groups to greater criminal propensities.

Thus, despite increased awareness of ethnic profiling, law enforcement officers and their political superiors commonly argue that disproportionate targeting of areas with large ethnic minority populations is due to supposedly higher offending rates among certain groups. Some Dutch law enforcement authorities contend that disproportionate law enforcement actions that explicitly target Moroccan and Antillean youth are not discriminatory because they respond to statistical evidence of higher offending rates in those groups.¹³ Spanish police make similar arguments about Latin American youth in gangs; and in many countries police assert that shoplifting or pickpocketing by Roma is rampant.¹⁴

Assertions of an association between ethnicity and offending based on criminal justice statistics such as incarceration rates must be taken with caution. They reflect, not just reported rates of offending, but also the actions of the criminal justice system itself, including the discretionary decision-making of police, prosecutors and judges, which is susceptible to bias.¹⁵ For example, drug use is often equally prevalent among young people of all ethnic backgrounds. Yet data across different countries shows that law enforcement often applies drug control laws more aggressively among minority populations.¹⁶

The data used to justify arguments about the purported criminal propensity of certain groups are not just flawed; they are often irrelevant in a fundamental sense. Even where certain facts may be true of a group they may not be true of a significant number of individuals within that group. It is a basic principle of law that justice must treat each individual on their own terms and presume innocence until proven otherwise. As noted by the House of Lords in the *Prague Airport* case, to treat individuals to their disadvantage on the basis of statistical generalizations about group characteristics is not permissible.¹⁷

IV. Profiling in Counter-Terrorism

Similar issues arise with regard to ethnic profiling in counter-terrorism. Here, it is not uncommon to hear that Muslims will inevitably bear the brunt of counter-terrorism attention because of the basis in religion of the threat from Al Qaeda and those inspired by Al Qaeda. It is definitional that Al Qaeda-inspired terrorism is conducted in the name of Islam (as ETA and the IRA reflect nationalist-separatist and, in the latter case, religious identity also). But it is questionable whether this fact is of any investigative

relevance. Many individuals who give no visible sign of Muslim faith or national origin from a Muslim country have been involved in acts of Islamist terrorism.

Experts analyzing the trajectories of known terrorists and past attacks agree that there is no inherent or necessary connection between religious radicalization and violent radicalization.¹⁸ MI5 has noted that adherence to non-violent orthodox or conservative streams of Islam may act as a buffer against violent radicalization and that members of religious groups can be important allies in ‘de-radicalization’.¹⁹ Research from both academic and intelligence sources concludes that there is no consistent set of factors leading individuals to radicalize, even in a particular local context. Factors that do appear to be relevant include perceived discrimination and racism against Muslims; failed integration; foreign policies of Western governments; and identity crises of second and third generation immigrants.²⁰ These variables have nothing to do with specific religious practices, and they are sources of concern among broad swathes of Europe’s population. They are not unlike factors often cited to explain other forms of domestic terrorism in Europe dating back to the late 1960s (separatist; right-wing; left-wing).²¹

Yet many counter-terrorism strategies continue to reflect assumptions about connections to religious practice and act as if these were directly germane to counter-terrorism investigations and to efforts to prevent violent radicalization. The use of information about religion (or ethnicity, race, or national origin) in assembling a profile is legitimate when linked to solid, timely, and specific intelligence concerning individuals’ participation in terrorist activities. But evidence from Europe indicates that police and intelligence agencies are using generalized assumptions about certain religious or ethnic groups’ involvement in terrorism, thus crossing the line from legitimate counterterrorism profiling into discriminatory ethnic profiling.

In some counter-terrorism tactics, the ethnic and religious profiles are explicit, but in other cases the reliance on religion is not always immediately apparent. Frequently, counter-terrorism strategies include some circumstantial evidence in addition to religious beliefs or practices (travel to specific countries; studying chemistry; viewing certain websites; etc) that would seem to justify some level of suspicion. On closer examination, it is clear that the circumstantial evidence is viewed as significant only because the person or organization in question is Muslim or associated with a certain form of Islam. The combination of religious belief (and sometimes also ethnicity or national origin) with circumstantial evidence becomes the decisive factor underlying law enforcement action.

The Open Society Justice Initiative’s 2009 report “Ethnic Profiling in the European Union” describes the targeting of religion in the conduct of mass identity checks outside mosques by police after Friday prayers; the use of counter-terror stop and search powers; data mining; the conflation of immigration control practice and counter-terrorism; arrests under loosely defined laws against criminal association; and raids conducted against Muslim places of business and worship.

In some cases, the ethnic profiles used in these practices are explicit. The conduct of mass ID checks outside mosques—a highly visible practice of some German police

during the early 2000s—visibly targeted Muslims on religious grounds with no individualized suspicion. In France, raids on Muslim businesses have been carried out by specially created “poles against radical Islam.”²² Stop and search by British police under “section 44” counter-terrorism powers has targeted people of Asian appearance but, according to the official reviewer of British counter-terrorism practices, Lord Carlile, “resulted in zero arrests for terrorism offences, and at most morsels of counter-terrorism intelligence”.²³ In March 2010, Lord Carlile called for the power to be repealed, noting that section 44 stops had “caused, and continues to cause, a disproportionately bad effect on community relations.”²⁴

Explicit ethnic and religious profiles have also been used in data mining. In the law enforcement context, data mining often subjects large amounts of information on individuals—derived from multiple public and private sector sources—to computerized searches to identify those thought to merit further investigation. In one of the most obvious cases of explicit ethnic profiling, from late 2001 to early 2003, Germany undertook a massive data mining exercise that trawled through the sensitive personal data of 8.3 million people on the basis of a broad profile that relied primarily on religion and ethnic origin—without finding a single terrorist. The scope and scale of data mining has since vastly increased and is reportedly more sophisticated, but continues to raise concerns about the use of religion as a factor.

V. Profiling in Counter-Radicalization

Counter-radicalization strategies are an early prevention model of counter-terrorism. They aim to detect persons thought to be at risk of sympathizing with or turning toward terrorism, before they have actually taken steps to plan an attack. There is nothing inherently objectionable with such strategies.

However, a form of ethnic profiling has arisen in those efforts to counter “homegrown terrorism” that treat the nature of religious practice and belief as a criterion of suspicion relevant to preventing terrorism. Such approaches tend to blur the distinction between (i) “religious radicalization” towards a conservative or “fundamentalist” practice of Islam (such as Salafism or Wahhabism) and (ii) “violent radicalization” towards active support for, or participation in, terrorist acts. The implication is that all conservative Muslims are potential terrorists—a broad and unfounded generalization that unfairly stigmatizes a group of persons on the basis of their religious beliefs. Implicitly, and sometimes explicitly, Muslims are divided into ‘good Muslims—those with what some characterize as “moderate” religious views – and ‘bad Muslims’—those with more fervent and/or orthodox religious views, who are then excluded as possible partners in, and instead targeted by, counter-terrorism measures. Individuals identified on the basis of indicators which include manifestations of religious expression may then be subjected to a range of different measures including surveillance; integration; “de-radicalization”; interrogation; and even in some cases arrest.

Following the 2002 killing of Pim Fortuyn and the 2004 murder of Theo van Gogh, The Netherlands was one of the first EU member states to develop counter-radicalization

theory and practice.²⁵ The 2007-2011 “Polarization and Radicalization Action Plan” calls for far-reaching measures involving a wide range of local level actors—including social workers, community workers, teachers, youth workers, civil servants—in recognizing, reporting, and assisting in reversing processes of radicalization. The policy aims to address non-violent as well as violent forms of “radical Islam,” viewing the former as a breeding ground and stepping stone to the latter.²⁶ Dutch officials developed “indicators” to help local actors identify signs of radicalization. In some cases, the indicators included behaviors which were considered reflective of orthodox or conservative Islam, such as growing a beard, stopping shaking hands with a woman, or wearing Arabic dress. In a number of regions, local Dutch authorities have in fact discarded this approach, but it continues in others and has been taken up in third countries (see the COPPRA project below).

The United Kingdom has also grappled with the radicalization of British citizens and residents for some time, and in this process has attempted to apply indicators of radicalization. Under the UK’s *Preventing Violent Extremism* (“Prevent”) strategy, the *Channel programme* requires a wide range of local level actors to learn to identify signs of purported vulnerability to violent extremism. Individuals identified through *Channel* are referred to appropriate services to halt or reverse the process of radicalization. Official materials are careful to refer to violent extremism, rather than extremist ideologies that do not promote violence. However, in practice, the expression of radical viewpoints, with no evidence of actual support for violence, appears to be among the key indicators for assessing risk. Materials developed to assist local actors have in the last years been overly simplistic and referred to extremist ideologies or narratives in themselves as possible indicators of radicalization.²⁷ Individuals who practice conservative streams of Islam may therefore find themselves targeted as “vulnerable” under these programmes. Despite considerable controversy and cabinet-level discussion, the new UK government has decided to maintain Prevent, including the Channel project.

Indicators of radicalization (drawn from the Dutch model) are also being applied in a multi-state, European police training project developed with funding from the European Commission. COPPRA, or Community Policing for Counter-Radicalization, is a project led by the Belgian Federal Police, with a further ten member state partners. COPPRA has created a pocket guide for police patrol officers to detect “radicalization indicators” in the early stages and a longer training manual for use by police academies and trainers. These materials include ‘radicalization indicators’ that suggest that—among other factors—officers examine clothing style; changes in physical appearance with a focus on facial hair; changes in religious practice; and participation in closed meetings. Particularly when provided in tandem with the extensive descriptions of Islamist groups and symbols (the guide provides similar information on nationalist, right-wing and other violent extremists), these indicators risk conflating behaviors reflecting forms of conservative or orthodox practice of Islam with a proclivity to violence. The guide cautions officers to rely on a range of factors and that none of the indicators constitute evidence per se that a process of radicalization is taking place, and that all indicators must be assessed in light of background knowledge of the individual. While these cautions are welcome, extensive research has found that factors which fit existing stereotypes carry greater weight than

other information in guiding individuals’—including police officers’—perceptions and discretionary decision making.²⁸ Reportedly, the COPPRA project has applied for further European Commission funding to support the introduction of these materials in basic police training in all 11 project countries, and anticipates receiving this support from the European Commission. Absent modification, COPPRA risks promoting ethnic profiling amongst frontline police officers across EU countries.

VI. Negative Impact of Ethnic Profiling

Ethnic profiling, whether it is explicit and deliberate, or unintended, has direct and harmful consequences for law enforcement and national security, as well as for individuals and communities. As law enforcement officers profile ethnic minorities across Europe, they are, wittingly or not, contributing to a growing sense of marginalization and discrimination in minority and immigrant communities. Profiling stigmatizes entire racial, ethnic, or religious groups as more likely to commit crimes and thereby sends a signal to the broader society that all Muslims, or Roma, or Moroccans, or Turks, constitute a threat. If the police and government security agencies use – or are understood to use – ethnicity to determine who is a terrorist or a criminal, why should not local shopkeepers, restaurant owners, or airplane flight attendants? In this fundamental sense, ethnic profiling cuts against the grain of European and international law which, for important reasons of history and logic, has placed strict limits on distinctions based on ethnicity, race, national origin, and religion.

In addition to the individual and social effects of ethnic profiling, there are direct consequences for law enforcement efficacy. Research from widely varied settings strongly suggests that ethnic profiling is inefficient and may be counter-productive, alienating persons and groups whose assistance is needed by police and law enforcement to prevent, detect and investigate crime and terror threats.²⁹ Policing is profoundly dependent on the cooperation of the general public; law enforcement needs the public to report crimes, to provide suspect descriptions and witness testimony.³⁰ Without public cooperation, law enforcement officers rarely identify or apprehend suspects, or obtain convictions. British and American research shows that unsatisfactory law enforcement-public contacts can have a negative impact on public confidence in law enforcement, not only for the individual directly involved, but also for their family, friends and associates.³¹ Research also demonstrates that bad treatment by law enforcement officers is associated with reduced public cooperation with law enforcement.³²

These lessons apply as much in the realm of counter-terrorism as they do in ordinary policing. Cooperation by Muslim and other communities has been key to the success of counter-terrorism investigations and needs to be supported and encouraged.³³ In order to achieve this, police and intelligence agencies must conduct law enforcement in a manner that is seen to be fair and objective.³⁴ In blurring the distinction between ‘violent radicalization’ and certain Islamic practices and beliefs, counter-radicalization policies, like other forms of ethnic profiling, risk stigmatizing Muslims and other immigrant communities; exacerbating feelings of exclusion from society amongst wide segments of society; feeding Islamophobia; and deepening social tensions. These policies also risk

infringing on key rights such as the right to privacy, freedom of religion or belief, freedom of expression, freedom of association and non-discrimination. The problem is exacerbated where government officials and political leaders portray “Muslims” as a group as potentially violent extremists. Pejorative ethnic and religious stereotypes and other factors identified as contributing to violent radicalization such as perceived discrimination and exclusion are on the rise in Europe today.³⁵ Counter-radicalization measures that risk aggravating identified root causes of radicalization should clearly be avoided, especially when their effectiveness is doubtful and their negative impacts significant.

VII. Recommendations - Alternatives to Profiling and the Need for Evaluation

The threat of terrorist violence, like the everyday reality of ordinary crime, is genuine and must be addressed. The challenge is to do so in ways which enhance, rather than undermine, both security and individual rights. Ethnic profiling strikes at the heart of the social compact linking law enforcement institutions with the communities they serve. It wastes police resources, discriminates against whole groups of people, and leaves everyone less safe.

Fortunately, alternatives exist. Ending the use of ethnic profiling by police does not mean doing nothing; rather, it means changing police practices to make them more effective. This was done by the US Customs Service when they abandoned a “drug mule profile” that was based in large part on ethnicity and national origin, and by a project of the Justice Initiative (funded by the European Commission AGIS programme) called Strategies for Effective Police Stop and Search or STPESS. While using different approaches, in each case, the new policies reduced the number of stops conducted, ended or significantly reduced disproportionate targeting of minorities, and increased effectiveness threefold. In mid-2011, the Justice Initiative will publish a handbook on good practices in addressing ethnic profiling that includes further examples of good practice drawn from across the EU.

The track record of counter-radicalization strategies in the EU, albeit fairly short, raises serious concerns that their negative impacts may outweigh their uncertain positive gains. Despite this track record, counter-radicalization measures in Europe are on the rise, spurred by assessments of increasing domestic terror threats,³⁶ and encouraged under the Stockholm Programme, the EU’s 2010-2014 strategy for regional security, cooperation and action on counter-terrorism, law enforcement and judicial cooperation.³⁷ The risk is that policies are being labeled as “good practice” with little serious evaluation of their effectiveness and impact.

It is important that measures aimed at countering terrorism demonstrate some clear ability to achieve their objectives without generating significant negative side effects. EU programmes and bodies play a key role in fostering shared learning and greater law enforcement cooperation. The identification and analysis of good or promising practices

can be an important contribution in such efforts. Indeed, as our own forthcoming handbook recognizes, few policies have been assessed in any depth and even fewer subjected to rigorous impact evaluations. While the conduct of analytically robust impact assessments can be methodologically challenging and costly,³⁸ it is incumbent on European authorities to refrain from promoting practices that undermine law enforcement objectives and European fundamental values, including equality. The identification and sharing of good practice should be based on evidence-based assessment following consultation with a range of stakeholder perspectives that supports the conclusion that the initiative does in fact constitute a positive practice. An explicit EU imprimatur of good practice should be granted only to those strategies or projects that have been subject to an impact assessment that includes consideration of human rights concerns and compatibility with the fundamental values of the Union.

The EU can deliver more security for residents by promoting effective use of public resources and policies, the rule of law and fundamental rights. The recommendations below aim to support the EU and member states in their efforts towards these goals.

Recommendations to the members of the Working Party

- Establish a clear definition of ethnic profiling based on existing European standards and case law.
- Ensure that counter-terrorism related agreements and policies concerning the use of personal data by law enforcement authorities contain strong anti-discrimination safeguards and oversight mechanisms. This would respond to the risk, in cases of improper use of ethnic data by law enforcement authorities, of generating unlawful and disproportionate outcomes which, in some cases, may amount to ethnic profiling.
- Drawing on the positive experience of the STEPPS project, OSF recommends the use of EU funds by police and civil society in member states to document law enforcement practices, and to develop, test and share alternatives to ethnic profiling in policing diverse communities. This will help improve police effectiveness, enhance trust between minority communities and law enforcement, and ensure compliance with non-discrimination standards.

Recommendations to the EU

- All data protection standards applying to law enforcement and intelligence bodies should make clear that the processing of sensitive personal data for the purpose of producing anonymous statistics in order to facilitate oversight and compliance with non-discrimination standards is permissible. The generation of anonymous ethnic statistics should be encouraged in any circumstance where concerns about ethnic profiling practices have been raised.

- Impact assessments conducted by EU institutions in preparation of EU measures regarding data collection and processing should have both a privacy and non-discrimination component.
- Enhance cooperation and coordination between EU Council law enforcement working groups such as the Standing Committee on Internal Security, Terrorism Working Group and CEPOL, Europol, Frontex, the Fundamental Rights Agency, the European Data Protection Supervisor and the Article 29 Working Group in order to identify and address any evidence of law enforcement discrimination.
- Given the concerns raised about counter-radicalization programmes, OSF recommends commissioning an independent assessment of the impact and collateral consequences of such programmes to feed into the preparation of the EU ministerial meeting on counter-radicalization planned for 2012. Such assessment would also provide a concrete basis for discussion for the future network of stakeholders on counter-radicalization.
- DG Home should examine EU-funded projects addressing counter-radicalization with specific concern for their compliance with fundamental rights, particularly non-discrimination.

ENDNOTES

¹ The Council of Europe's Commission Against Racism and Intolerance (ECRI) defines ethnic or racial profiling as: "the practice of using 'race' or ethnic origin, religion, or national origin, as either the sole factor, or one of several factors in law enforcement decisions, on a systematic basis, whether or not concerned individuals are identified by automatic means." European Commission against Racism and Intolerance (ECRI), *General policy recommendation No 11 on combating racism and racial discrimination in policing*, adopted on 29 June 2007, Strasbourg: ECRI/Council of Europe, 2007, 39, paragraph 1. Our suggested language, while similar, draws attention to the fact that ethnic profiling is one particular manifestation of a common law enforcement tool, sometimes called "criminal profiling," or "offender profiling," which (in the case of ethnic profiling) is distorted by reliance upon discriminatory criteria to develop profiles, or generalizations as a basis for law enforcement action. The European Fundamental Rights Agency's 2010 guide *Understanding and Preventing Discriminatory Ethnic Profiling* uses the term "discriminatory ethnic profiling" which wrongly implies that there may be permissible ethnic profiling.

² The Court found a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 4. *Timishev v. Russia*, ECtHR, applications nos. 55762/00 and 55974/00.

³ Ms. Williams, a naturalized Spanish citizen was stopped for an identity check by Spanish police on the basis of her racial appearance. On June 30, 2009, the United Nations Human Rights Committee ruled in the case of *Rosalind Williams-Lecraft vs. Spain* that racial profiling constitutes a discriminatory practice that violates Article 26, read together with Article 2, paragraph 3 of the Covenant: "The Committee believes that it is generally legitimate to carry out identity checks for the purposes of protecting public safety and crime prevention or to control illegal immigration. However, when the authorities carry out these checks, the physical or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal situation in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted. This would not only adversely affect the dignity of those affected, but also contribute to the spread of xenophobic attitudes among the general population; it would also be inconsistent with an effective policy to combat racial discrimination." Para 7.2.

⁴ Opinion of Baroness Hale, at 82, in *Opinions of the Lords of Appeal for Judgment in the Cause Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* on Thursday 9 December 2004.

⁵ The European Court of Human Rights, like other courts, has affirmed that patterns of discriminatory impact resulting from a policy not necessarily designed with discriminatory intent may breach Article 14 of the European Convention. See *D.H. and Others v. The Czech Republic*, App. No. 57325/00, Eur. Ct. Hum. Rts., Grand Chamber, Judgment of November 13, 2007.

⁶ In the United States, federal guidance on profiling provides the following: "In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful. In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful." U.S. Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (Washington DC: Department of Justice, June, 2003).

The United Kingdom's Police and Criminal Evidence Act (PACE) is similarly clear: "Reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts, information, and/ or intelligence which are relevant to the likelihood of finding an article of a certain kind or, in the case of searches under section 43 of the Terrorism Act 2000, to the likelihood that the person is a terrorist. Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. For example, unless the police have a description of a suspect, a person's physical appearance (including any of the 'protected characteristics' set out in the Equality Act 2010 (see paragraph 1.1), or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity." Home Office, *Police and Criminal Evidence Act 1984, Code of Practice A*, revised March 7, 2011, para. 2.2.

⁷ Stops conducted pursuant to Section 1 of the Police and Criminal Evidence (PACE) Act 1984 must be based on a reasonable suspicion that the individual stopped is likely to be involved in criminal activity. In contrast, stops conducted under Section 60 of the Criminal Justice and Public Order Act 1994 do not have to be based on a reasonable suspicion. Data for 2006–2007 show that when U.K. police exercised their authority under Section 60, black people were 16.9 times more likely to be stopped and searched than white people, while Asian people were 3.4 times more likely to be stopped and searched than whites. Ministry of Justice, *Statistics on Race and the Criminal Justice System—2007/8*, at 29, 49, 205.

⁸ "Asian people 42 times more likely to be held under terror law," *The Guardian*, 23 May 2011.

⁹ Gusinskiy v. Russia, App. No. 70276/01, Eur. Ct. Hum. Rts, Judgment of May 29, 2004, § 53
Nechiporuk and Yonkalo v. Ukraine, 21 April 2011, 175. The Court reiterates that a “reasonable suspicion” presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Fox, Campbell and Hartley v. the United Kingdom*, August 1990, § 32, Series A no. 182). The object of detention for questioning is to further a criminal investigation by confirming or dispelling suspicions which were the grounds for detention (see *Murray v. the United Kingdom*, 28 October 1994, § 55, Series A no. 300-A). However, the requirement that the suspicion must be based on reasonable grounds forms an essential part of the safeguard against arbitrary arrest and detention. Moreover, in the absence of a reasonable suspicion, the arrest or detention of an individual must never be imposed for the purpose of making him confess, testify against others or elicit facts or information which may serve to ground a reasonable suspicion (see *Cebotari v. Moldova*, no. 35615/06, § 48, 13 November 2007).

¹⁰ European Fundamental Rights Agency, *Understanding and Preventing Discriminatory Ethnic Profiling*, Vienna: FRA 2010, at 20.

¹¹ In *Gillan and Quinton v. UK* 4158/05, ECtHR 28, 12 January 2010, the European Court of Human Rights ruled on British stop and search powers under Section 44 of the Counter-Terrorism Act. Section 44 was applied through an authorization procedures for set time periods in set locations; however, the power was granted rolling authorities for most of London for many years. Officers can stop people with no grounds for reasonable suspicion under section 44. The Court found that: “In conclusion, the Court considers that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. While only ruling on a violation of privacy rights, the Court also flagged the “clear risk of arbitrariness in the grant of such a broad discretion to the police officer.” At 87.

¹² “As with other systemic practices, racial profiling can be conscious or unconscious, intentional or unintentional. Racial profiling by police officers may be unconscious.” See *The Queen v. Campbell*, Court of Quebec (Criminal Division) (no. 500-01-004657-042-001), Judgment of Jan. 27, 2006, quoted in European Union Network of Independent Experts on Fundamental Rights, “Ethnic Profiling,” CFR-CDF. Opinion 4. (2006) at 7.

¹³ These assertions have been made repeatedly in meetings with Dutch officials attended by Justice Initiative staff. The 2005 creation of a special database of at risk Antillean and Aruban youth (Reference Index of Antilleans) reflects the same concerns. This was struck down by The Hague regional court in 2007. See at <http://www.soros.org/initiatives/justice/litigation/dutchcaribbean> A data base of at risk youth now includes all national origins, but continues to ethnicity among the risk factors.

¹⁴ Interviews with police officers in Bulgaria, Hungary and Spain in 2005 revealed that some police officers held generalized beliefs that young black immigrant males were responsible for drug dealing; that Roma were more likely to be involved with robberies or that those who “looked foreign” were most likely to be illegal migrants. Open Society Justice Initiative, “I Can Stop and Search Whoever I Want: Ethnic Profiling by Police in Bulgaria, Hungary and Spain,” New York: Open Society Institute 2006.

¹⁵ See Michael Tonry (ed.), *Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives*. Crime and Justice: A Review of Research, Vol. XX1, (Chicago: University of Chicago Press, 1997), and Tom Tyler (ed) *Legitimacy and Criminal Justice; International Perspective* New York: Russell Sage Foundation, 2008. Fabien Jobard and Marta Zimmerling, “Jugements pour outrage, rébellion, violence à agents de la force publique,” *Questions pénales*, No. 97, March 2005.

¹⁶ Harry G. Levine and Deborah Peterson Small, *Marijuana Arrest Crusade, Racial Bias and Police Policy in New York City: 1997 – 2007*, New York Civil Liberties Union, April 1, 2008. Self-report surveys in the United Kingdom show similar levels of drug use by black and white people, and lower levels for ethnic Asians.¹⁶ Yet drug searches account for a larger proportion of stops and searches of minorities. In 2006–2007, the search for illegal drugs in the United Kingdom accounted for 40 percent of stops and searches of whites, compared with 47 percent of stops and searches of blacks and 57 percent of stop and searches of Asians.¹⁶ J. Graham and B. Bowling, *Young People and Crime*, London: Home Office, 1999; M. Ramsay and S. Partridge, *Drug Misuse Declared in 1998: Results From the British Crime Survey*, London: Home Office, 1999. Ministry of Justice, *Statistics on Race and the Criminal Justice System - 2006/7*, at 31.

¹⁷ “The person may be acting on belief or assumptions about members of the sex or racial group involved which are often true and which if true would provide a good reason for the less favorable treatment in question. But ‘what may be true of a group may not be true of a significant number of individuals within that group’ (see Hartmann J in *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690, para 86, High Court of Hong Kong). The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group.” Opinion of Baroness Hale, at 82, in Opinions of the Lords of Appeal for Judgment in the Cause *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* on Thursday 9 December 2004.

¹⁸ Jamie Bartlett, Jonathan Birdwell, *The Edge of Violence*; London: DEMOS, 2010. European Commission’s Expert Group on Violent Radicalisation, *Radicalisation Processes Leading to Acts of Terrorism; A concise Report prepared by the European Commission’s Expert Group on Violent Radicalisation*, Submitted to the European

Commission on 15 May 2008. House of Commons Communities and Local Government Committee, *Preventing Violent Extremism; Sixth Report of Session 2009–10*, London: HC 65, 30 March 2010.

¹⁹ A report of MI5's behavioral science unit leaked to The Guardian, and described by Alan Travis, "MI5 Report Challenges Views on Terrorism in Britain," *The Guardian*, August 20, 2008.

²⁰ A recent report that compares the profiles of 58 'homegrown terrorists' to "radicals" who do not support terrorism and Muslims more generally draws attention to a number of additional elements as relevant to the appeal of terrorist activity rather than alternatives. "Five elements are often overlooked, but which suggest that a significant part of the phenomenon shares much in common with other extremist or youth movements: emotional 'pull' to act in the face of injustice; thrill, adventure and coolness; status and internal code of honour; peer pressure; the lack of alternative sources of information." DEMOS, *The Edge of Violence*, 2010.

²¹ These parallels have been clearly articulated by the European Commission's Expert Group on Violent Radicalisation that included a group of Europe's foremost experts in the field who adopt a historical and comparative perspective spanning different types of terrorist violence. See European Commission's Expert Group on Violent Radicalisation, *Radicalisation Processes Leading to Acts of Terrorism*, at 5- 11.

²² Open Society Justice Initiative, *Ethnic Profiling in the European Union; Pervasive, Ineffective and Discriminatory*, New York: OSF, 2009, at 57-109.

²³ Section 44 of the Terrorism Act of 2000 British counter-terrorism powers allows police to stop and search persons in defined areas with no basis in reasonable suspicion. The National Police Improvement Agency's 2008 guidance states that: "Great care should be taken to ensure that the selection of people is not based solely on ethnic background, perceived religion or other personal criteria. A person's appearance or ethnic background will sometimes be a factor, but an officer's decision to search them under section 44 should be made only if it is a result of evaluated intelligence. Profiling people from certain ethnicities or religious backgrounds may also lose the confidence of communities. An effective way of protecting against this is to compare the numbers of people searched in proportion to the demographic make-up of the area where searches take place." National Policing Improvement Agency, *Practice Advise on Schedule 7 of the Terrorism Act 2000*, London: NPIA, 2009. Available at: http://www.npia.police.uk/en/docs/Schedule_7_of_the_Terrorism_Act_2000.pdf In 2007/8, Home Office statistics showed that of those stopped and searched under section 44, 17.7% of the people stopped in England and Wales were identified by the police as Asian, as against 4.7% of the population. 63.1% of those stopped and searched were identified as White, as against 91.3% of the population. Ministry of Justice, *Statistics on Race and the Criminal Justice System 2007/08*, London: Ministry of Justice, 2009.

²⁴ Lord Carlile, "Report on the Operation in 2008 of the Terrorism Act 2000 and of part 1 of the Terrorism Act 2006," June 2009.. In January 2010, the European Court of Human Rights found section 44 powers to violate European Convention rights. The Court was highly critical of the use of such a broad and intrusive power without any basis of suspicion as well as the low threshold of 'expediency' needed to authorize the use of the powers. The European Court of Human Rights highlighted the potential for discrimination and misuse of section 44 stating that: "there is a clear risk of arbitrariness in the granting of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration." *Gillan and Quinton v. the United Kingdom* (Application no.4158/05), European Court of Human Rights, at 85.

²⁵ In an example from the province of Zeeland, from early 2008, "...hundreds of civil servants were trained in spotting the signs of radicalisation that might end in terrorism. An example from the course: someone who regularly comes to the Social Services department in a particular town suddenly starts wearing traditional Arabic/Islamic attire and refuses to shake the hands of female civil servants. As the civil servants learn, anyone who notices this must report it to the police." M. Modde, "Ambtenaren getraind in de strijd tegen terrorisme" (Civil servants trained in the fight against terrorism), *Provinciale Zeeuwse Courant* 7 February 2008 cited in: Bob de Graaff, "How broad? A close look at counterterrorism and radicalisation policy", available at: <http://www.annefrank.org/upload/downloads/Mon8-UK-Ch6.pdf>

²⁶ Ministry of the Interior and Kingdom Relations, *Polarisation and Radicalisation Action Plan 2007 - 2011*, available at: <http://english.minbzk.nl/subjects/public-safety/publications/@108447/polarisation-and>

²⁷ A March 2010 Guide for local partners notes amongst behavioral "indicators that might suggest vulnerability to violent extremism" the following: association with organisations which hold extremist views that stop short of advocating violence in this country. HM Government, *Channel: supporting individuals vulnerable to recruitment by violent extremists a guide for local partnerships*, March 2010 at 9.

²⁸ For example: J.L. Eberhardt, Philip Atiba Goff, V.J. Purdie, and P.G. Davies, "Seeing black: Race, representation, and visual perception," *Journal of Personality and Social Psychology*, 87, 876-893, 2004. Michael R. Smith, Geoffrey Alpert, "Explaining Police Bias A Theory of Social Conditioning and Illusory Correlation," *Criminal Justice and Behavior*, Vol. 34, no. 10, 1262-1283, October 2007.

²⁹ The reform of the United States Customs Service (which searches travellers at U.S. borders for contraband) in the late 1990s demonstrates that profiling based on individual behaviour is more effective than profiling based on race or ethnicity. In 1999, when the Customs Service abandoned a profile based on ethnicity and instead focused on behavior, its productivity and efficiency soared. The number of searches declined from 10,733 in the first quarter of 1999 (pre-

reform) to 2,814 searches in the first quarter of 2000 (post-reform), but the percent of searches that yielded contraband leaped from 3.5 percent to nearly 11 percent. U.S. Customs Service, *Personal Searches of Air Passengers Results: Positive and Negative, Fiscal Year 1998*, U.S. Customs Service 1998.

In 2007-2008, the Open Society Justice Initiative in collaboration worked with the municipal police of Fuenlabrada, Spain, to introduce stop forms to generate data and support dialogue with the local residents, including large minority communities. In a four-month period, the number of stops declined from 958 per month to 396 per month, but the percentage of successful stops (i.e. stops that uncovered a crime or other infraction) rose from six percent to 28 percent. Open Society Justice Initiative, *Addressing Ethnic Profiling by Police: A Report on the Strategies for Effective Stop and Search (STEPSS) Project*, New York: Open Society Justice Initiative, 2009, at 30-31. These results have been sustained over time by the Fuenlabrada municipal police.

³⁰ The European Court of Human Rights has underscored “the need ... to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.” *Nachova v Bulgaria* (2005) Grand Chamber, at 160

³¹ Joel Miller, Nick Bland and Paul Quinton, “The Impact of Stops and Searches on Crime and the Community,” *Police Research Series Paper 127*, London: Home Office, 2000; Ronald Weitzer and Steven A. Tuch “Determinants of Public Satisfaction with the Police” in *Police Quarterly* No. 8 (3) 2005: 279-297; Joel Miller, Robert C. Davis, Nicole J. Henderson, John Markovic and Christopher W. Ortiz, “Public opinions of the police: The influence of friends, family, and media,” *National Institute of Justice Technical Report* (2001-IJ-CX-0038); Dennis P. Rosenbaum, Amie M. Schuck, Sandra K. Costello, Darnell F. Hawkins, and Marianne K. Ring “Attitudes toward the police: The effects of direct and vicarious experience,” *Police Quarterly* No. 8 (3) 2005: 343-365.

³² McCluskey, John D., Stephen D. Mastrofski, and Roger B. Parks, “To acquiesce or rebel: Predicting citizen compliance with police requests,” *Police Quarterly* No. 2:389-416.

³³ Muslim Public Affairs Council “Post 9/11 Counter-Terrorism data Base,” a regularly updated resource available at <http://www.mpac.org/publications/policy-papers/post-911-terrorism-database.php> finds that in the US, “Muslim communities helped U.S. security officials to prevent over 2 out of every 5 Al-Qaeda plots threatening the United States since 9/11. Muslim communities helped law enforcement prevent two-thirds of all Al-Qaeda related plots threatening the U.S. since the December 2009 “underwear bomber” plot.”

³⁴ Huq, Aziz Z., Tyler, Tom and Schulhofer, Stephen J., *Mechanisms for Eliciting Cooperation in Counter-Terrorism Policing: Evidence from the United Kingdom*, Chicago: University of Chicago, Public Law Working Paper No. 340; NYU School of Law, Public Law Research Paper No. 11-12, February 7, 2011. Available at SSRN: <http://ssrn.com/abstract=1757266>

³⁵ Council of Europe, Group of Eminent Persons Report, *Living Together: Combining diversity and freedom in 21st-century Europe*, May 11, 2011.

³⁶ Europol’s most recent annual terrorism trends analysis report indicates that EU citizens are increasingly involved in terrorism although the number of separatist terror attacks continues to vastly outweigh “jihadi terror” attacks. It states that: “Islamist terrorist groups are changing in composition and leadership. Terrorist groups are becoming multi-national, command and control from outside the EU is decreasing and more lone actors with EU citizenship are involved in terrorist activities.” It later notes that “These [radicalized] individuals are often hard to identify as they act alone and their activities can be unpredictable and difficult to prevent.” EUROPOL, TE-SAT, *European Terrorism Situation and Trend Report 2011*, at 17.

³⁷ The Stockholm Programme defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice in accordance with Article 68 Treaty of the European Union.

³⁸ This is clearly recognized in the study commissioned by the European Commission and carried out by The UK-Based Change Institute. The 2008 report “Study of best practices in cooperation between authorities and civil society with a view to the prevention of response to violent radicalization” outlines many important principles and lessons derived from its analysis of these programmes. It does not, however, undertake a direct consideration of project impacts on fundamental rights and non-discrimination, although it does flag many issues of singling out certain groups within Muslim communities and the dangers of “securitizing” relationships, among other cautions. The Change Institute, *Study on the best practices in cooperation between authorities and civil society with a view to the prevention and response to violent radicalisation*, A study commissioned by DG JLS of the European Commission, London: July 2008.