A Collection of Traffic Stop Information and Biased Enforcement: The Research and Legal Perspective

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Many Americans, especially Americans of color, view policing as discriminatory, either by policy and definition or by its day to day application. Thus, comparable to statutes in many other states, the State of Illinois enacted, The Illinois Traffic Stop Statistical Study Act which requires that every State and local law enforcement agency record data relative to traffic stops made within their jurisdiction. The Act further charges the Illinois Department of Transportation to provide statistical summaries (benchmarks) so that statistically significant aberrations in the race of those allegedly involved in traffic stops can be compared and analyzed against the total population traveling through an area to determine whether these discriminatory beliefs are factually founded. This paper discusses the research and legal perspectives involved in designing, defining and distinguishing behavior based on these benchmarks.

The experience of collecting traffic stop information in Illinois began with an act of the Illinois Legislature entitled *Traffic Stop Statistical Study (625 ILCS 5/11-212: 2003)*. This act requires that every State or local law enforcement agency record data relative to traffic stops made within their jurisdiction. This data collection began January 1, 2004 and is authorized until December 31, 2007. Even with the sunset provision, it is speculated by these researchers that this mandated collection of routine traffic stop data on each traffic stop is here to stay.

Comparable to statutes in many other states, the Illinois information is collected as part of an issuance of any uniform traffic citation or any warning citation for a violation of the Illinois Vehicle Code. Information gathered by the officer is collected on an Illinois Department of Transportation (IDOT) "Traffic Stop Data Sheet." This data sheet would include vehicle and driver stop information including a range of information on stop location, time, vehicle, driver and passenger demographics, and outcomes of the stop. Specifically, this information includes: name and address of the driver; birth date of the driver; gender of the driver, the officer's determination of the driver's race; the traffic violation alleged; the date and time of the stop; and the location of the stop. Further, the information should include a specific reason for the stop (moving violation, equipment violation, or license or registration violation), the make and year of the vehicle, and whether a search was conducted of the vehicle, driver, or passengers. Finally, the disposition of the stop (warning or citation) is recorded, along with any arrest made during or incidental to the stop. The name and badge number of the officer making the stop is another requirement. Some agencies that provide officer-by-officer information on stops (for training or disciplinary reasons) may exchange an officer's identifier into a tracking pin number thereby affording confidentiality of the individual officer information.

The Illinois Traffic Stop Statistical Study Act, like similar acts in other states, charges IDOT and its other contracting agencies to provide statistical summaries (benchmarks) so that statistically significant aberrations in the race of those allegedly involved in traffic stops can be compared and analyzed against the total population traveling through an area. For example, a benchmark of 2.0 would mean that non-whites were twice as likely to be stopped as their representation in the population of drivers within that jurisdiction. By design the benchmark would be based on the census of documented vehicles anticipated to be driven

within a specific area. In reality, IDOT records only stops of traffic law violating offenders within an area. Comparison of the two figures may not reflect the actual driving and stop pattern at all. Household ethnicity statistics within an area that claim a vehicle for census purposes may in fact not represent the actual ethnic percentage of persons engaged in traveling through an area. For example, urban areas typically have a higher percentage of non-white households claiming vehicles than non urban areas. However, the actual traffic flow through the urban area may reflect the reverse. Suburban Caucasians may comprise the majority of drivers who move through the area on their way to destinations within the urban area. Such urbanites may not comprise the "traveling population" due to their use of public transportation.

Furthermore, the legislative enactment charged IDOT with the task of identifying the volume of "false stops," including stops not resulting in the issuance of a traffic ticket or the making of an arrest. In some ways the term "false stops" is a misnomer because it assumes that stops that do not result in either a ticket or an arrest but that the stop was racially motivated. The reality may be that the stop was both legal (based upon objectively valid data) and non- racially motivated. The stop may simply have culminated in an officer using his discretion to warn rather than arrest. The legislative intent was for IDOT to identify "false stops" in order to determine whether disparities in the proportion of citations issued to minorities disparities among officers within the same agency regarding stop patterns and the proportion of searches made of non-white drivers exist. With such an expansive undertaking, the usefulness of such information must be closely scrutinized and questioned from both a research and legal perspective.

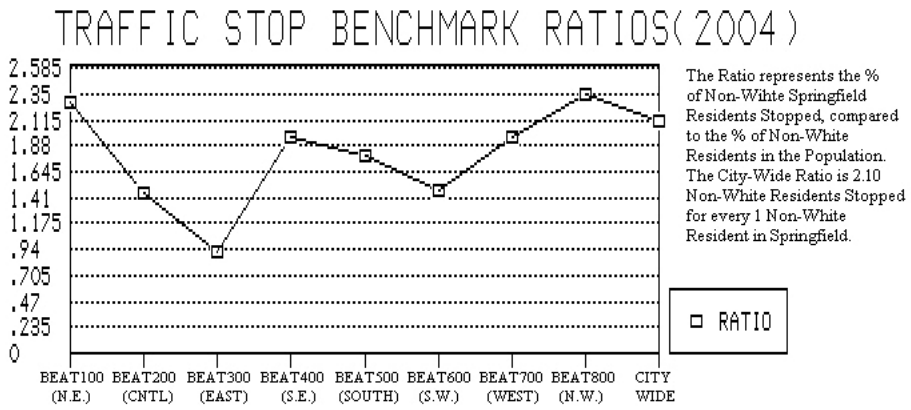
Research Validity Questions Raised by the Stop Data

From a research perspective, the data collected pursuant to the study by IDOT has significant limitations if the intent is to actually document biased enforcement. From the experience of these researchers, the collection effort of IDOT and the established and existing benchmark summaries may not achieve the intent of the legislation, which is to document aberrations in traffic stops and "false stops" by race based upon disparities between the overall population and the proportion of reported traffic violating offenders.

First, traffic stop data does not measure biased enforcement directly. Such traffic stop data does not actually reflect all police contacts and enforcement. Ordinance, felony stops, "Terry-type" stops, unreported, and ghost stops are not recorded; thus, they are not reflected. Only events believed to be alleged violations of the Illinois Vehicle Code are mandated to be included within the study. However, some jurisdictions have implemented policies that attempt to reflect all police contacts including traffic, felony or misdemeanor arrests, and other ordinance violations. Such policies may add a greater degree of understanding to the totality of activities involving vehicle stops, but even then the results are only as valid as the integrity of those that initially input the requested data. Second, jurisdiction wide patterns of traffic stops (like agency aggregated benchmarks showing a high ratio of non-white stops) may not actually be principle evidence of biased enforcement due to their aggregation. Such overall findings tell researchers little about individual stops or officers' or drivers' behavior. To assume that these general patterns of traffic stops actually predict individual officer stop activity is to commit what researchers refer to as an "ecological fallacy" (Babbie, 2004). Such a fallacy is similar to individuals who believe that a general link between race and enforcement exists. General patterns of behavior cannot be automatically linked with an individual's decision to stop a vehicle on a particular occasion. Each stop encompasses a complex set of factors and variables that may or may not include race. Factors such as enforcement policies, location and time of stops, the nature of the violation, economic demographics of the area, age of residents, officers' training and experience, and governmental funding issues and policies may cause such benchmarks to vary widely within the same jurisdiction, even though that jurisdiction is being judged only upon the agency wide summary.

Such wide variations were found in a detailed study of the Springfield, Illinois traffic stop patterns, as shown in Figure 1 below (Hazlett, 2005). Concentrations of non-white stops may also be the result of intensive enforcement efforts within certain areas due to drug interdiction efforts ("weed and seed" operations or Project Safe Neighborhood incentives), land use differences (schools, half-way houses, commercial industry, sporting arenas, etc.), or increased calls-for-service. Summary benchmarks comparing non-white stops to non-white residents do not reflect a magic threshold that constitutes racial profiling (is one and one-half times more non-white stops as there are non-white drivers a real bench mark of biased enforcement? Twice as many?). Benchmarks can never account for the detailed patterns of enforcement and deployment (by time and place).

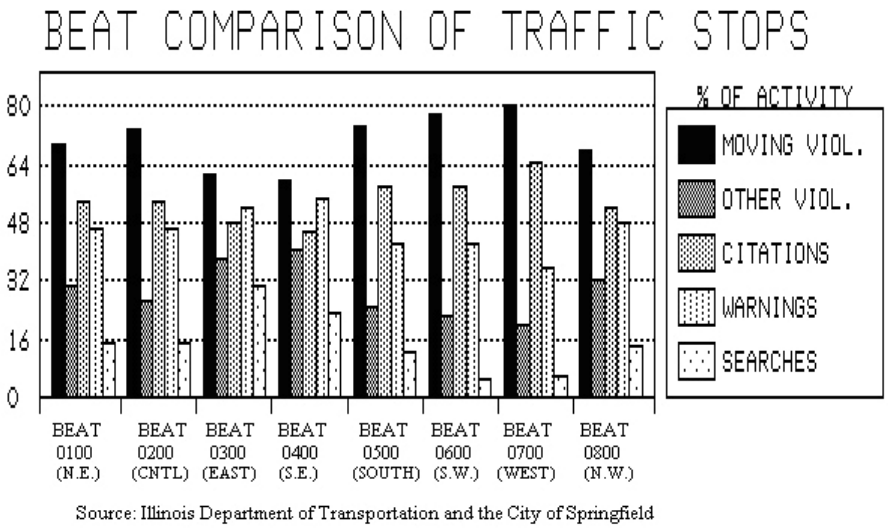
Figure 1 Traffic stop benchmark ratios (2004)



Source: Illinois Department of Transportation and the City of Springfield

Third, there is a tendency to link a single cause to traffic stops, especially when using traffic stop information as documentation of discriminatory enforcement. Multiple measures may give added weight supporting the presence or absence of biased enforcement. Such multiple measures are needed as a cross-check against those who may link race alone with traffic stop patterns. Using multiple factors may lend greater weight to any conclusions one may make from differences on traffic stops – not just race but also age, gender, shift, beat, age of the vehicle and so forth. This is illustrated by differences in stops across areas of the city in the Springfield, Illinois (Hazlett, 2005).

Figure 2 Beat comparison of traffic stops.



Source: Illinois Department of Transportation and the City of Springfield

Fourth, inherent problems exist within the collection process of IDOT traffic stop data itself. Such problems may include: over or under reporting; changing officer behavioral practices due to the now mandatory collection process; incomplete information; different practices or definitional variations used to classify and count certain activity such as “false stops”; record keeping changes or data entry problems; and inconsistent estimates of non-white drivers across jurisdictions. Also, the estimate of the driving public that is non-white may be made on assumptions of driver’s license records or limited traffic information based on old census (2000 Census) materials. Incorrect estimates of the driving population used in the benchmarks could lead to a general lack of validity of such information as agency benchmarks. Such problems can create artificial differences between jurisdictions on key benchmark information provided by reporting agencies or researchers attempting to use the information. As suggested previously, drive through zones may exist which would clearly skew the results if the benchmark was based upon residential census type data. (To date, there is no accurate or reliable mechanism used to collect the racial demographics of the driving population through certain areas. E-Z passes which can accurately count the number of vehicles passing through an area cannot provide this information in that the race of an individual is not listed on either the driver’s license or vehicle registration form.)

Fifth, even beyond the context of the traffic stop measures are the social factors surrounding traffic enforcement activities. These factors also need to be examined before a comprehensive understanding can be reached as to the cause or underlying force producing such stops is determined. While demographic patterns of stops may not completely defend an agency against litigation, such census patterns of social factors may provide greater weight for a race neutral reason for agency patterns of stops against non-white motorists. For greater clarity, summaries of vehicle stops by beat should be compared with selected demographic rates and percentages from the same area of the city. Such comparisons identify apples-to-

apples rates of traffic enforcement as compared to the proportion of the residents within that area of the city. Such demographic analysis was not undertaken by IDOT. Using comparisons with baseline population, percentages and rates of particular sub-groups in the population (agency wide or for specific patrol areas) may be made. Some of the possible demographic comparisons are suggested below:

Percent of Population by Ethnicity ---------- > Across City Police Beats (% of City Totals)

Percent of Population by Gender/Age ------ > Across City Police Beats (% of City Totals)

Crime and Arrest Information ---------- > Across City Police Beats (% of City Totals)

Calls for Service & Traffic Stops ---------- > Across City Police Beats (% of City Totals)

Demographics of Drivers Stopped ---------- > Across City Police Beats (% of City Totals)

Rates of Traffic Stops and Outcomes -------- > Across City Police Beats (% of City Totals)

Rates of Calls, Crimes & Arrests ---------- > Across City Police Beats (% of City Totals)

Rates of Driver Stop Demographics ---------- > Across City Police Beats (% of City Totals)
(based upon Subgroup Population)

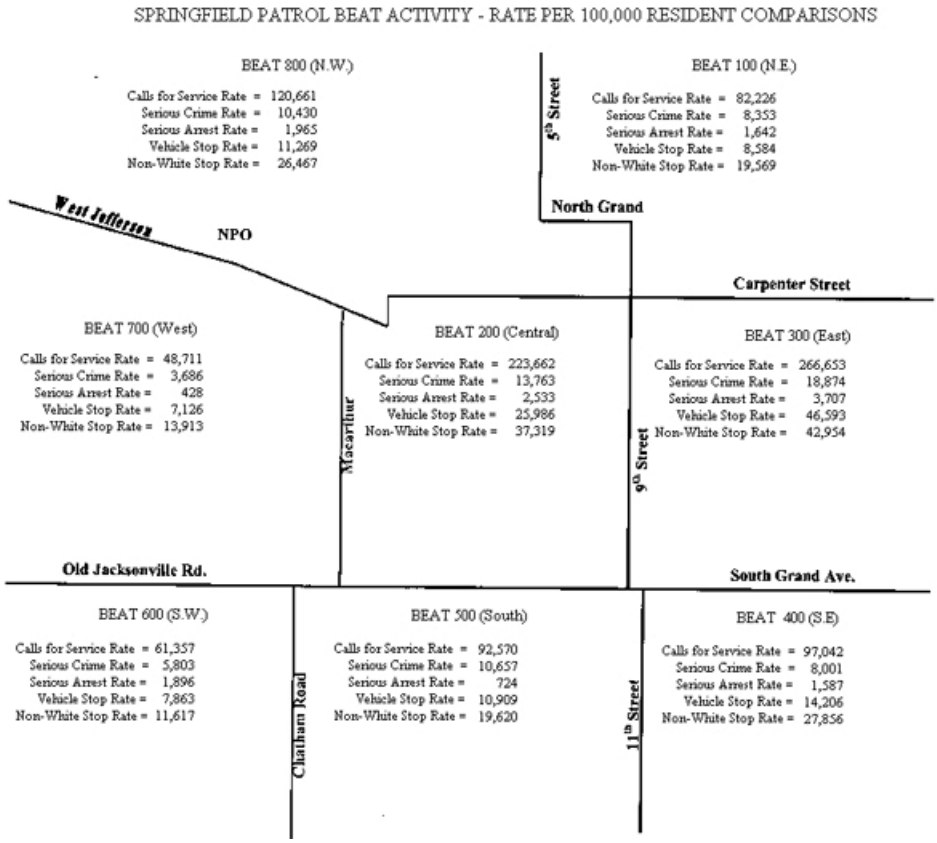
Age of Residents by Beat ---------- > Age Rates & Percentages of Drivers Stopped by Beat

Gender of Residents by Beat ---------- > Gender Rates & Percentages of Drivers Stopped by Beat

Race of Residents by Beat ---------- > Racial Rates and Percentages of Drivers Stopped by Beat

This may give a clearer picture of the where and why such differences in non-white traffic stops occur within a jurisdiction. Such analysis may reveal areas of high non-white traffic stops were also areas of highest calls for service, crime, and arrests. These high non-white stop areas were also areas with a higher than expected rate of white motorists being stopped as well, demonstrating race neutrality in the stops. Higher calls for service, violent crime reporting and serious crime arrest may provide some additional understanding of deployment priorities in response to neighborhood requests or federally funded programs at crime interdiction. This was illustrated in a demographic map summary as found in the Springfield, Illinois research from 2004 (Hazlett, 2005).

Figure 3: Springfield patrol beat activity – Rate per 100,000 resident comparisons.



Sixth, stop card information must also be examined on an individual officer and examined according to the time and location of the stops. Such officer-by-officer comparisons should be done as part of a proactive monitoring of officer conduct as compared to similarly situated officers working at the same time or location. Officers that reveal high rates of non-white stops may be found to be the same officers who worked in areas of high crime or increased deployment. As found in previous litigation and research, there may not exist a systemic problem of biased enforcement. The overall department's record of enforcement may be evenhanded. Instead, there may be an issue with specific officers who demonstrate a pattern of bias. That type of situation could be addressed by proactive supervision and monitoring.

As part of the ongoing practice of supervision and training on a policy of zero tolerance toward biased enforcement, each officer's stop record should be compared against expected norms for all officers' working during the same shift or in the same area. Each officer's non-white stops could be compared and displayed against agency-wide norms and other similarly situated officer's stops, including stops made by other law enforcement agencies within the same area or jurisdiction. Traffic stop activity could easily be posted beginning with the number of actual stops and broken down to the percent of total non-white stops. The actual reasons for the stop could also be posted, including such details as moving violations, equipment violations, and license and registration violations. Dispositions of stops may be summarized to include

whether citations and warnings were issued, whether searches and arrests were made, or whether the stop was a "false stop." An individual officer's record could then be compared against an agency wide norm or the normal percentages for officers working in a similar location or shift.

Such a record of each officer's performance is critical in demonstrating that the department is complying with the intent of the legislation. Further, such detailed personnel summaries reveal a proactive effort to enforce agency policies against biased enforcement. Such measures help to identify officers who have a higher than expected pattern of non-white stops, as well as officers who may reduce their stops (productivity) due to the now mandated collection of information.

Legal Perspective of Data Collection and Usefulness of Traffic Stop Data

While the collection of information has a number of critical components, perhaps even more important for consideration are the legal issues generated by the collection and use of such data. Many Americans, especially Americans of color, view policing as discriminatory, either by policy and definition or by its day to day application. It is the intent of the Illinois Traffic Stop Statistical Study to scrutinize the collected data for evidence of statistically significant aberrations to determine whether these beliefs are factually founded. The charts and concepts discussed previously suggest that the information collected has, at best, a limited ability to fulfill the desired results sought by the study. To truly evaluate whether statistically significant racial disproportionality occurs during traffic stops for alleged violations of the Illinois Vehicle Code, one must examine the stops (seizures) in light of Constitutional and statutory guidelines and within the parameters of current case law.

Law enforcement's power to stop, detain, and search individuals in traffic scenarios is governed primarily by the Fourth Amendment, the Fourteenth Amendment, 42 U.S.C. Section 1983, and Title VI of the Civil Rights Act of 1964.

Fourth Amendment

The Fourth Amendment to the Constitution prohibits only unreasonable searches and seizures. Thus, each traffic stop must be justified by probable cause or a reasonable suspicion based on specific and articulable facts of unlawful conduct. The probable cause requirement is easily met as any traffic violation listed in the Illinois Vehicle Code provides the basis needed to justify the stop. Further, ulterior motives do not invalidate an otherwise valid traffic stop based upon probable cause. It is entirely irrelevant what the subjective motivation or intent of the officer was as long as the objective circumstances justified the stop (*Whren v. U.S.,* 1996). Simply stated, traffic or equipment violations meet the objective test and make the stop legitimate regardless of the subjective intent of the officer (*Lewis v. City of Topeka,* 2004). The IDOT requirement that the alleged traffic violation or that the reason that led to the stop of the motorist be recorded will most likely provide a legitimate objective foundation for the stop. Thus, as a preliminary matter, the race or ethnic background of the driver or occupant will be irrelevant under Fourth Amendment law.

Once a vehicular stop has occurred, the next consideration concerns the limitations imposed by the Fourth Amendment on those occupants affected by the police action. Court decisions indicate that the limitations on traffic stops require a dual inquiry: first, whether the officer's action was justified at the inception; and second, whether it was reasonably related in scope to the circumstances which justified the interference in the first place (United States v. Hunnicutt, 1998). As the first inquiry has already been addressed herein, the second inquiry will now be discussed in terms of traffic violations and the reasonable detention or seizure of the occupants of the vehicle. The two most common violations relative to this issue involve the duration of the stop and the manner of the stop.

Duration of the Stop

The investigatory detention of a traffic violation must be temporary, lasting no longer than necessary to effectuate the purpose of the stop. In other words, the scope of the detention must be tailored or consistent with its underlying justification (*Florida v. Royer*, 1983). That being said, the application of the rule is often difficult to discern. Although the reasonableness clause of the Fourth Amendment does not hold a stopwatch on the police, courts are often tasked with "Monday morning quarterbacking" of an officer's speed in terms of reasonableness in handling a traffic investigation. For example, during a traffic stop for a failure to yield the right of way, a police officer is permitted to ask questions and examine documents and run computer verifications as necessary and related to the operation of the motor vehicle, e.g., valid license, registration, and insurance. The officer may detain the driver and the vehicle as long as is reasonable to make these operational determinations and to issue a citation or warning.

The scope of the permissibility of the stop's duration is determined by assessing the reasonableness of each detention's length on a case-by-case basis, by considering the facts under a totality of the circumstances including the officers' expertise and training, and the permissible inferences and deductions from the cumulative information available to them. Furthermore, the investigative stops do not need to rule out the possibility of innocent conduct (United States v. Arvizu, 2002). From a review of the case law, it appears that the reasonableness of the duration of the stop involves:

1. whether police were pursuing the investigative purpose that justified the initial stop with due diligence (not whether some other alternative was available) (United States v. Sharpe, 1985);
2. whether the delay seriously interrupted the individual's travels;
3. the seriousness of the offense; and
4. the likelihood of the individual's involvement in criminal activity.

The IDOT statistical data is incapable of ferreting out these nuances that distinguish a reasonably justified duration of detention from an illegal detention. IDOT statistical data does not even remotely include relevant information related to an officer's expertise and training and the permissible inferences and deductions from the cumulative information available to him. Hence, it is impossible to assess, based upon the IDOT evidence whether a statistically significant aberration of minority based unconstitutional stops has occurred.

Manner of the Stop

In conducting a stop, traffic or otherwise, an officer may take such precautions as are reasonably necessary to protect his personal safety and to maintain the status quo. Such precautions may include drawing his weapon when approaching a car to question a driver (Foote v. Dunagon, 1994) and, as a matter of course, ordering a person (driver and passenger) to step out of a vehicle with or without reasonable suspicion. The reasonableness of the manner of the stop depends upon a balancing of the nature and quality of the intrusion of the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. The balancing test was used in *Maryland v. Wilson* (1997) in allowing police to order passengers to exit a vehicle during a routine traffic stop. Therein, the Court weighed the public's strong interest in officer safety against the *de minimis* intrusion on the passenger's privacy interests.

The Fourth Amendment allows the police to make a forcible stop of a person when they have a reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity. Forcible stops have been permitted when an officer had an objectively reasonable belief that the defendant had a gun nearby. In fact, officers have been allowed to reach through car windows to grab an occupant's waist when the officer believed that a gun was hidden at that location (*Adams v. Williams*, 1972). Recently, the Supreme Court upheld as reasonable on Fourth Amendment grounds an officer's tactic of compelling a suspect to identify himself under threat of arrest under a stop and identify statute when the officer demonstrated a reasonable suspicion of criminality (Hiibel v. Sixth Judicial District Court of Nevada, 2004).

The reasonable test requirement needed for Fourth Amendment evaluations does not easily translate into statistically measurable data. The current IDOT data recorded pursuant to the study cannot effectively measure the reasonableness of the manner of a stop. The data does not measure such intangibles as a reasonable belief that an occupant of a vehicle was in possession of an illegal weapon thereby justifying a "Terry" frisk. (Courts, not the participating officers, eventually make those determinations usually after lengthy and often times contested fact finding hearings.) If the data cannot distinguish between acceptable and unacceptable Fourth Amendment conduct, how can the data conclude that race played any role in the situation?

As explained above, the Fourth Amendment focuses on an objective standard. An officer's conduct is evaluated both initially when the decision to stop a vehicle occurs and thereafter in terms of scope and duration on reasonableness based upon the totality of the circumstances. The factors relevant in determining the reasonableness of these actions are complex, fact specific, officer experience oriented, and somewhat intangible. Thus, the IDOT collected data has limited value in determining whether the seizure or frisk or search was reasonable. Thus, its utility in illustrating whether race or ethnicity has any connection to traffic stops, false or valid, under a Fourth Amendment analysis is *de minimis.*

Fourteenth Amendment

Those seeking to demonstrate that policing is discriminatory usually seek redress under the equal protection clause of the Fourteenth Amendment. Equal protection claims, unlike Fourth Amendment claims, focus on a police officer's subjective intentions. These claims usually allege that although a specific stop is objectively reasonable (passes Fourth Amendment muster), the facially race neutral traffic and race neutral interdiction policies are applied in a discriminatory manner. To a limited extent such an assertion may be born out by the traffic stop data as illustrated in the shift or area summaries, or individual officer reports of stop activity as discussed above. Although these claims are frequently asserted, it is relatively difficult to successfully litigate a Fourteenth Amendment claim. To meet the burden, the litigant must provide evidence demonstrating that the conduct had both a discriminatory effect and that the conduct was motivated by a discriminatory purpose (United States v. Olvis, 2002).

Courts have established a three-part test for determining whether the claim has been met. First, the litigant must demonstrate that the officer has selected the individual based upon a constitutionally protected right such as race or religion and not selected others not belonging to that group in similar situations. Second, the selection must have been initiated with a discriminatory purpose (racial animus). Finally, the action must have a discriminatory effect on the group to which the litigant belongs (Gardenshire v. Schubert, 2000).

To show a discriminatory effect, the courts require that litigants demonstrate by at least a *prima facie* showing that similarly situated individuals of another group or race are not treated the same (*United States v. Bell*, 1996; *United States v. Armstrong*, 1996). Furthermore, "there is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary; the standard is a demanding one" (Stemler v. City of Florence, 1997). Typically this is done by showing that similarly situated persons from another group were not stopped in the same place under similar circumstances (Gardenshire v. Schubert, 2000).

Because the standard is so demanding, statistical evidence such as stop card data is generally not sufficient to show that similarly situated persons of different races were treated unequally. For example, in *Harris v. City of Virginia Beach* (2001), the court was not persuaded by the plaintiff's statistical evidence because, as the Court noted, Virginia Beach is part of a metropolitan area, and residents of neighboring cities regularly travel through Virginia Beach. Therefore, a statistical comparison to the African- American population within the patrol area was not sufficient to meet this burden. However, a minority of cases suggest that statistics can be used to establish this discriminatory effect provided that the statistics include information about the officer's conduct with respect to similarly situated individuals of another race (*Chavez*

v. Illinois State Police, 2001). Even in cases where the statistics have been allowed to establish the discriminatory effect, the statistics are not irrefutable. Their usefulness will depend on all of the surrounding facts and circumstances.

The IDOT data, to the extent that a reliable baseline can be gathered, has the capability of reflecting whether a statistically significant aberration of minorities were stopped or issued citations or warnings for traffic violations. It is possible to reach that conclusion based upon comparing the global population of traffic law violating offenders with IDOT gathered data. The real difficulty inherent herein relates to the comparison of that data to similarly situated persons of a different race. No data is kept or collected for those who may have committed similar infractions under similar circumstances but who were neither stopped nor issued tickets. Thus, there are no statistics on which to make the comparison. For example, in *Chavez v. Illinois State Police* (1998), Chavez's claim failed because no data was kept concerning stops where no citations were issued or searches conducted.

Certain statistical comparisons can be made. IDOT global figures could discern that Caucasians are stopped twice as often as non-white individuals. IDOT figures could also indicate that of those stopped there are proportionally more non-whites issued citations or more non-whites are the subject of searches. However, one cannot conclude per se, that this statistical evidence indicates that discrimination is involved. Many non-race factors may be included in the decision-making process suggesting that the individuals are not similarly situated. For example, "travel throughs," deployment efforts, policy changes, police expertise, weather conditions, road repair, budgetary constraints, or political events may make the situations very dissimilar.

Even assuming that the statistics are so grossly out of proportion to the global traffic violating public (the decided norm or benchmark) that a statistical comparison could be made to show that similarly situated others were treated differently, the litigant still would not have met his burden of proof. Plaintiffs must also demonstrate that the conduct was motivated by a discriminatory purpose (United States v. Olvis, 2002), or that the decision to stop, investigate, search, etc. was invidious or in bad faith (United States v. Berrios, 1974). Thus, the plaintiff must demonstrate evidence of racial animus. (Brown v. City of Oneonta, 2000; Carrasca v. Pomeroy, 2002). Racial animus can be defined as a view held by the police toward the motorist that influences the officer's decision to stop, cite, or search. Active hostility or ill will by the officer needs to be shown toward the subject demonstrating that the stop or conduct of the officer was motivated by race. In the Carrasca case, racial animus was asserted because one ranger had referred to Mexicans in a derogatory tone.

Statistical differences in stop patterns or an individual officer's stop information cannot measure hostility directly. Statistics alone, showing that traffic enforcement had a disparate impact on one group over another, does not necessarily establish discriminatory intent or hostility (Arlington Heights v. Metro Housing Dev. Corp., 1977). However, one should be aware of the handful of cases that hold that statistical evidence may be sufficient to prove intentional discrimination without the need to identify similarly situated persons (*National Congress for Puerto Rican Rights by Perez v. City of New York,* 1999; *Rodriguez v. California Highway Patrol*, 2000). In the New York case, it was not necessary to demonstrate the disparate treatment of a similarly situated non-minority group because the litigants were challenging a law or policy that contained an express, racial classification, and those classifications are already subject to strict judicial scrutiny with

regard to that precise issue. In *Rodriguez*, the court concluded that the plaintiff's statistical evidence along with other facts, if proven, would support an inference of discriminatory intent of which the defendants were aware but refused to stop. Thus, the statistical evidence alone may demonstrate unconstitutionality because the discrimination is very difficult to explain on non-racial grounds.

When analyzing statistical information for evidence of discriminatory intent in racial profiling, one must look for guidance to appellate court cases. Two recent cases serve as a model for equal protection litigation: *Batson v. Kentucky* (1986) (involving the jury selection process) and *United States v. Avery* (1997) (a drug interdiction case). These cases suggest the following approach:

1. Statistical or circumstantial evidence may demonstrate a *prima facie* (on the surface) finding of discriminatory practice. Statistics, particularly in situations where no direct proof of discrimination exists, may be used to infer that race is the motivating factor behind the police action. For example, through persuasive statistical evidence one might infer (make a *prima facie* showing) that race is the motivating factor to explain more non-white searches although there are more overall Caucasian stops (*United States v. Travis*, 1995, referred to herein as "*Travis A*").

   However, many courts, including the *Avery* court, have considered similar statistics and held that the statistics do not provide a reliable basis for an inference of discrimination. Therein, the court, relying on the statistics from a previously reported decision, *United States v. Travis* (1995), noted that although airplane passengers nationwide are estimated at 88% white, 5% African American, and 1% Hispanic, a showing of a 53% African American based contact does not provide the necessary basis for an inference of discrimination. The finding merely supports a disparity in the ratio of Black travelers to Black persons reportedly stopped at the airport. Thus, concluding therein that the statistics were still lacking and no *prima facie* showing was established.

2. If, however, statistical evidence of a disparate impact is established, its role is limited to a creation of a refutable *prima facie* case that race is a motivating factor in the challenged action. Once the *prima facie* case is created, the government must articulate a race neutral reason for its action, or give a compelling governmental reason to justify its action. Race and gender alone will rarely rebut the presumption of discriminatory intent but coupled with other data, like the need to interdict the interstate trafficking in drugs, sufficient justification to constitute a compelling governmental interest might be established to refute the claim (*United States v. Travis*, 1995).

   Much of the IDOT required captured data will not provide the government with sufficient ammunition from which to rebut this presumption of discriminatory intent. Adequate rebuttal will most likely require an independent case by case assessment to accurately dispute the claims. This could involve expensive and labor intensive research including massive document review, witness interviews, policy guideline, and historical crime fighting statistics and deployment materials. (Race neutral reasons such as road construction, new officer training programs, new policy approaches may explain and justify the statistics sufficient to rebut the discriminatory claim.) In Batson situations, the rebuttal approach is relatively simple to apply as the numbers involved in jury selection are small, the data is finite, and the information is fresh. The party rebutting the discrimination claim does so almost contemporaneous with the claim. The rebuttal process, in light of the statistics generated pursuant to the IDOT Study, might involve massive amounts of

information and dated, as well as currently, undocumented information. In fact, the Traffic Stop Statistical Study might result in further mandatory data collection legislation such that officers may be so burdened with paper work that they would be unable to perform their duties.

3. If the government meets its burden of rebuttal (sufficiently refutes the claim of discriminatory intent by either showing an adequate race neutral reason or providing a compelling governmental need to support their actions) then the plaintiff challenger bears the ultimate burden of proving discrimination by demonstrating particular evidence of racial animus. Only in extremely rare cases will a statistical pattern of discriminatory impact conclusively demonstrate a constitutional (Fourteenth Amendment) violation (McCleskey,v. .Kemp, 1987). Furthermore, in the context of stops, a defendant would have to demonstrate by a preponderance of the evidence that a police officer decided to approach or pursue solely because of race.(*United States v. Travis* (A),1995).

4. Finally, it is essential that the complaining citizen must show that each defendant is personally involved with the alleged constitutional violations. Presence alone is not enough. The plaintiff must show that each defendant officer acted with racial animus – motivated by active hostility or ill will based upon the plaintiff's race. Hence, it is essential that the plaintiff identify the specific officers by badge or name who violate the constitutional rights of the plaintiff.(*White v. Williams,*2002; Rode v. Dellarciprete, 1988). Next, in order for liability to occur, the plaintiff must demonstrate that the defendant engaged in the constitutional violation through affirmative misconduct shown through allegations of personal direction or of actual knowledge and acquiescence. (*Randall,* v. *Prince George's County, Maryland* 2002) In Randall, the plaintiff's claim of racial animus was asserted under a theory of a tacit collaboration. Specifically, the plaintiff claimed affirmative misconduct of a bystanding officer, who stood by and did nothing when confronted with a fellow officer's illegal act, when the officer had the power to prevent it and to assist the victim.

42 U.S.C. Section 1983 Claims

Section 1983 imposes liability upon any person who acting under color of state law deprives an individual of rights secured by the Constitution or law. There is no dispute that whenever a State or local law enforcement officer issues a citation or warning or stops a motorist for an alleged traffic violation, they are acting under color of state law. The issue becomes whether the officers violated an individual's rights under either the Fourth or Fourteenth Amendments of the Constitution.

Section 1983 claims predicated on Fourth Amendment grounds require a showing that the plaintiff was seized by an officer and that the seizure was unreasonable. As previously mentioned, the observation of a traffic violation gives the officer probable cause to stop a motorist. The troubling aspect of the Fourth Amendment concerns the requirement that the detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Detentions that extend beyond the original purpose of the stop, the original traffic violation, require that an officer have either probable cause or a reasonable,

articulable suspicion that there is criminal activity afoot. This requires a particularized objective basis for continuing the detention of the motorist beyond the time needed to write a ticket for the traffic violation.

Fourth Amendment violations occur when the officer is unable to articulate reasons sufficient to distinguish the driver from the large category of presumably innocent travelers. Courts have held that some of the factors documented pursuant to the IDOT Study are not sufficient to justify the continued detention. For example, claims that a motorist possessed indicators of possible drug activity based upon the make and model of the vehicle, the direction, time, or location of the stop (source or recipient city), the color size and mileage of the vehicle, maps, nervousness, blood shot eyes, and partial permission to search were deemed innocuous factors not sufficient to justify a continued detention beyond the scope of the original traffic stop. Much of the IDOT collected data that is available is insufficient to negate or confirm the discriminatory claims, which was the primary purpose of the legislation.

Section 1983 claims founded on the Fourteenth Amendment equal protection violations require that the plaintiff prove that the officer's actions had a discriminatory effect and were motivated by a discriminatory intent or purpose (*United States v. Armstrong*, 1996). To prove discriminatory effect, the plaintiff may present statistical evidence of bias by the police or other evidence showing how similarly situated motorists of a different race were treated differently by the police.(*Chavez v. Illinois State Police*, 2001). In fact, most claims where there is no blatant or overtly discriminatory policy or direct evidence of police motivation demonstrating bias are based on statistical comparisons (*Marshall v. Columbia Lea Regional Hospital*, 2003). The statistics usually compare the number of black or other minority Americans stopped or arrested with their percentage in some measure of the relevant population. The difficulty with such comparisons is to determine a reliable measure of the demographics of the relevant population. How does one determine whether the data truly represents similarly situated individuals so that a point of comparison to the actual incidence among different racial or ethnic segments of the population can be made (*United States v. Armstrong*, 1996). In such cases, agencies may have to conduct a random traffic study of apparent race of drivers during different times of day and at different locations. This would allow estimated race proportions by area and time. Still such a traffic study is expensive – usually beyond the budgets of many law enforcement agencies.

The use of statistics to make a successful equal protection claim requires acquiring the appropriate statistics to demonstrate that an officer's actions, or a department's official practice, had a discriminatory effect on particular motorists. The statistics must provide reliable data on the number of white motorists who were within the violating public pool (the benchmark) and compare them to the statistics of non whites. If the disparities between the two pools show significant aberrations, that element of an equal protection claim will be met. Thus, it is essential that the benchmark be based on a realistic footing as to who comprises the driving public and that no generalized or universal concept be used as the baseline for all areas. Refer to figures citied above that note the deviations in activity based upon the single factor such as beat locations within the City of Springfield.

Stop card information analysis that examines an individual officer against himself and others similarly situated because of shifts and location of the stops has already been deemed sufficient statistical evidence to demonstrate the discriminatory effect. In *United States v. Mesa-Roche* (2003), sufficient statistical evidence was introduced to demonstrate that the law enforcement officer disproportionately stopped Hispanic drivers compared to white drivers. The Hispanic motorist produced statistical information

including data on the ethnicity of the motorists stopped by the defendant sheriff, other officers in his particular sheriff's office, and officers from other departments (the state police) who also patrolled the same general vicinity as the defendant sheriff. The Kansas court concluded that the statistics sufficiently demonstrated that the defendant sheriff stopped Hispanic motorists at a significantly higher rate when pitted against other officers patrolling the same area. Such differential stop patterns can be verified by the individual officer-by-officer breakout of traffic stop patterns.

The second requirement needed to make a Section 1983 claim under the Equal Protection clause involves a demonstration that the officer's action was motivated by a discriminatory intent or purpose. Statistics can create the inference of discrimination where they present a significant disparity in numbers of minorities stopped as compared to white motorists and are undisputed provided the comparison is between the racial composition of the motorist population violating the traffic laws and the racial composition of those arrested for traffic infractions on the relevant roadway patrolled by the police agency (Statee v. Soto, 1996; McCleskey v. Kemp, 1987).

It is also not necessary that the plaintiff prove that the officer's action was motivated solely for discriminatory purposes. It is enough that a discriminatory purpose was a motivating factor (*Village of Arlington Heights v. Metro Housing Dev. Corp*, 1977). Most law enforcement activity is based upon a multitude of factors. Whether invidious discriminatory purpose was a motivating factor requires research or an inquiry into such circumstantial and direct evidence of intent as may be available. Evidence of intentional discriminatory purpose can be gleaned from factors showing a departure from the norm; for instance, whether the officer's pattern of conduct bears more heavily on one race than another. Statistical aberrations could certainly support this claim. For example, IDOT data reflects how many consensual searches were conducted per officer. Abnormally skewed numbers as compared to similarly situated officers could potentially support a claim of "invidious purpose."

Supervisor Liability and 1983 Litigation

Holding a supervisor liable under 1983 requires a resulting constitutional violation by a subordinate. Three elements must be met to establish supervisory liability under Section 1983 (*City of Canton v. Harris*, 1989).

1. The supervisor needs actual or constructive knowledge that the subordinate was engaged in conduct that presented a pervasive and unreasonable risk of constitutional violations to the plaintiff's class;
2. The supervisor's inaction in the face of that risk amounted to a deliberate indifference or tacit authorization of the offensive practices; and
3. There must be an affirmative causal link between the supervisor's inaction and the constitutional harm suffered by the plaintiff.

Statistical data available to the agency through the IDOT study may provide the requisite knowledge of the illegal conduct to meet the first hurdle. Ordinarily, examples of a single incident or isolated incidents will not satisfy this requirement because a supervisor cannot anticipate all misconduct or promulgate rules and procedures guarding against every conceivable occurrence within the area of his

responsibilities. However, in *Shaw v. Stroud* (1994), supervisory knowledge of three previously alleged incidents of unconstitutional action by an officer was sufficient to show actual knowledge of misconduct. Thus, reports generated pursuant to this Traffic Stop Statistical Study may provide the "notice" of differences in individual officer's conduct and activity or systemic discrepancies such that proactive reviews, training, and closer scrutiny may become necessary.

When potentially "discriminatory activity" is noted or suspected due to the IDOT generated data, the supervisor and/or agency should respond by investigating the matter and determining whether the suspicion is founded or unfounded. Continued inaction in the face of well documented pervasive and unreasonable risk of harm or abuse has been found sufficient to support a finding of deliberate indifference (*Owens v. Haas*, 1979; Orpiano v. Johnson, 1980). Statistical evidence supporting these investigations should be maintained. This type of statistical data could potentially be used to defeat the claim that there was deliberate indifference or tacit authorization if the claim is raised. For example, in situations where an officer's rate of arrest based upon race appears disproportionate, documentation of contact and concern, or actual discipline, over the elevated figure could be used to form the basis for granting a summary judgment as to supervisory liability.

At a minimum, in order to defend against claims of discriminatory activity and supervisory deliberate indifference, statistical evidence of stop patterns by officers must be reviewed with regularity (*Maryland State Conference of NAACP Branches v. Maryland Department of State Police,* 1999). Such reviews should include deployment data as well as demographics in statistics showing a compelling necessity versus race or ethnic background for deployment. Inadequate and imprudent responses do not necessarily result in a finding of deliberate indifference particularly when they are viewed in hindsight. In fact, agencies are more likely to successfully defend against 1983 litigation when:

1. The agency is proactive in reviewing its statistics (stop patterns and demographic necessity for such patterns);
2. The agency has established guidelines of conduct and policies against toleration of any form of biased enforcement;
3. The agency heads and supervisors review the files of offending officers and discipline those officers when appropriate;
4. The agency documents citizen complaints of discrimination and its response to said complaints; and
5. The agency documents its disciplinary action and its link to an officer's record of traffic enforcement. The documentation clearly demonstrates that there was no deliberate indifference or tacit authorization of the conduct by the officers, and that such behavior led to sanctions.

Title VI of the Civil Rights Act of 1964

Those seeking redress under a Title VI claim must prove that the defendants engaged in intentional discrimination based on "race, color, or national origin" and that the defendant administers a program or activity which receives Federal financial assistance. The intentional element may be proved by demonstrating unreasonable and deliberate indifference to acts of discrimination. As previously mentioned,

statistics may be useful in establishing this requirement. Statistical analysis puts the officials and their respective agencies on notice of a pattern or practice of discrimination (*Maryland State Conference of NAACP Branches v. Maryland Department of State Police,* 1999). Statistics will provide data to support or dispute whether corrective action was taken or whether the agency acted with deliberate indifference with regard to the illegality. Furthermore, statistical data can provide evidence to support whether an agency's response to discrimination was reasonable or unreasonable. For example, providing evidence of a statistical analysis on each officers record of stop and stop activity as it compares to other officer's working in similar circumstances and in similar areas; anti-discrimination training activities; policy and managerial efforts; and reactive and proactive approaches to alleged violations of racial discrimination are all potential methods to establish or refute the allegations.

At the very least, statistical data could be used to establish a *prima facie* case of intentional disparate treatment based on race, color or national origin. Statistical data could also be used to rebut the case by articulating legitimate, non-discriminatory reasons to explain the allegations. This may be supportable that more non-white stops occur in areas with high calls for service – similar to the map of activity for Springfield, Illinois presented as the first illustration in this article. Again, this map shows coincidence of highest area of non-white stops with calls for service, serious crime and arrest rates and total traffic stops – all occurring within beat 300 (Hazlett, 2005).

Specific Legal and Data Collection Recommendations

Specific recommendations may be developed regarding agency data collection and policies. First, comprehensive analysis of traffic stop data will allow identification of possible officer conduct outside the norms and policies of an agency. Second, a general order prohibiting profiling and discriminatory practices toward public and fellow law enforcement personnel are essential as part of the data collection and monitoring of officer conduct. General orders that specifically address or renounced the challenged conduct may show that no deliberate indifference or tacit authorization of the offensive practices is tolerated (*Rizzo v. Goode,* 1976).

Sensitivity and related training are essential for an agency to defend against claims of deliberate indifference or tacit authorization of the offensive practices. Failure to train subordinates in necessary skills is a sufficient basis for liability provided the supervisor demonstrated a reckless or callous indifference to the rights of citizens (Febus-Rodriquez v. Betancourt-Lebron*,* 1994).

Agencies are encouraged to develop statistical benchmarks for discrimination. The inclusion of specifically required agency data collection items within the Illinois law should intimate that the legislation was not established to highlight general patterns of conduct or to provide a broad overview of discriminatory activity. The legislative purpose was to provide a detailed and comprehensive comparative analysis, by time, place, and vehicle and driver information, of the population of individuals cited for violations of traffic offenses. The required IDOT data, linked with demographic data and documentation of deployment, could significantly assist state law enforcement agencies in a defense against claims of biased enforcement. The combined data, along with training, evaluation, and supervision of individual officers, could serve as a baseline for monitoring and correcting problems that may lead to litigation.

It is also recommended that agencies use video or audio surveillance to record traffic stops. An officer's conduct of racial bias is easily monitored by such video and audio surveillance. The totality of factors, including those not collected by the IDOT study, surrounding the stop may also be clearly discovered by reviewing audio and video information from the stops.

In addition to the data collection, along with officer training and monitoring as a means to avoid litigation, comes enhanced community outreach. Discussion with and feedback from various groups within the community may allow the dialogue to detect and understand perceptions of bias. Involvement of community groups and citizen reviews of agency policies allow for greater legitimacy or perceived legitimacy when patrol enforcement strategies target areas with higher concentration of non-white residents. Knowledge of the problems and issues can diffuse or mitigate law enforcement's response or solution to crime based problems.

As part of this outreach, it is also recommended that increased minority recruitment efforts be undertaken. Such efforts again show a proactive effort to promote diversity within the agency and to promote an agency culture that does not support or tolerate bias within the work place or in dealings with citizens.

Departments should establish a program for promotions and disciplinary actions for officers who exemplify a culture of diversity, as well as officers that reflect racial bias in their behavior without a compelling reason for such behavior. Documentation of officer stop records, with individual officer promotions, commendations or disciplinary action should be undertaken as part of the officer stop record compiled by an agency. Linking documented behavior with appropriate administration action (rewards or sanctions) may demonstrate that the agency has renounced biased conduct by it's employees and that no deliberate indifference or tacit authorization of the offensive practices is tolerated.

Although an agency that ceases to practice biased enforcement, proactively monitors data for discrimination among its employees, trains, and disciplines employees for illegal conduct, is not immune from litigation, these steps certainly reduce the numbers of allegations or make them much easier to defend. Furthermore, just because an agency ceases its illegal conduct, this does not make all potential lawsuits moot as conduct could be resumed in the future. These agency efforts may make it difficult for a plaintiff to show that the government will again engage in prohibited practices.

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