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## Ethnic Profiling and Discrimination: The International Context and Hungarian Empirical Research Findings<sup>1</sup>

This paper focuses on ethnic profiling. Besides providing a description of the concept and introducing a recent, groundbreaking Hungarian empirical research project on police profiling, I will also highlight the international context within which profiling should be seen. This does not only include the assessment of the most important legal and political debates and frameworks regarding profiling by law enforcement agencies, but also the

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analysis of the elusive concept of security, based on which the efficacy, and thereby the constitutionality of certain law enforcement measures may be scrutinized. Empirical findings with a thorough methodology on the actual efficiency of law enforcement measures like offender, or potential offender profiling are of corollary importance, because the well-established principle of constitutional balancing, a core feature in jurisprudence, as well as in legislation, policy making and law enforcement refers to the process of weighing how intrusive certain means are in comparison to the ends—provided of course, that the ends are legitimate. The concept of proportionality is central here: in order to assess the relationship between the means employed and the aims sought to be realized, one needs to assess three criteria: effectiveness, necessity, and the degree of harm inflicted. Under the effectiveness criterion, what is meant is the ability of the concrete measure to achieve the ends for which it was conceived and this includes consideration of the extent to which the measure in question has led to identification of criminals, along with the extent to which the measure in question affects the ability of the police to work with minority groups to identify criminals and the extent to which the measure in question may divert the police away from identifying real criminal activities. The necessity criterion refers to the existence or otherwise of other, less invasive measures available in order to achieve the same aim. Finally, the harm criterion involves scrutiny of the extent to which the concrete measure affects the rights of the individual (right to respect for private and family life, right to liberty and security, right to be free from discrimination, etc.).<sup>2</sup>

However, as I will argue, this sort of “security”, a service which law enforcement agencies are designed and authorized to provide, is a highly elusive concept. Thus, the efficacy of policing, i.e. the process of “creating security” is especially difficult and controversial to establish. For example, in a deeply racist or prejudiced society where certain ethnic groups are widely believed to be intrinsically associated with criminality, say the Roma in Central East Europe, the police may feel, believe and even claim that they are doing what the white middle class majority taxpayers want them to do, therefore they are providing “security” if they pull over or stop and search all or many of the Roma they see. Law enforcement-related prejudices against minorities are extremely widespread. As we often hear, the majority of the prison population is Black (Roma, etc.),<sup>3</sup> and almost all of the terrorists are Muslim fundamentalists (mostly from Arab countries). Accordingly, appropriate restriction of the circle of suspects seems easily justifiable. For example, in Hungary, according to a survey in 2006, almost two-thirds (62%) of the Hungarian adult population agreed fully or to some degree with the claim: “the tendency to commit crime is in the nature of the Roma”.<sup>4</sup> A 1997 survey by the Ministry of Interior showed that 54% of

<sup>2</sup> As spelled out in ECRI’s General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing, beyond considerations relating to the individual rights affected, the harm criterion should be understood in more general terms, as including considerations on the extent to which the measure in question institutionalises prejudice and legitimises discriminatory behaviour among the general public towards members of certain groups.

<sup>3</sup> In Hungary, a research was published in the mid-’90s revealing estimates on the ratio of Roma inmates, which showed that based on self-definition of inmates about 40% of the prison population is Roma (see Huszár, L.: *Romák, börtönök, statisztikák* (Roma, prisons, statistics). *Amaro Drom*, 1997 August, 9–11), with prison directors giving much higher estimates, an average of 60%. Women Integration and Prison Project (MIP). Hungarian report “Data on Crime, Judicial and Prison data” 2004. <http://mip.surt.org/> Unpublished)

<sup>4</sup> See <http://www.tarki.hu/kozvelemenyt/kitekint/20060201.html> (02.10.2006)

the police perceived criminality as a central element of Roma identity<sup>5</sup> and in 2002–2003, the Hungarian Helsinki Committee carried out a research on discrimination against Roma in the criminal justice system, finding deep-running traces of racial profiling by the police within Roma communities.<sup>6</sup> Also, it is a general feature of post-9/11 developments in law that when anti-terrorist law enforcement measures are involved, a substantially empty rhetoric—the inherently false dichotomy of the “liberty vs. security”-binary—has been adopted, and with a sweeping move, it has been extended to crime-, and immigration control.

The uniqueness of this New World is, thus, twofold. First, new standards have been set up (required and accepted) for government activism in the sphere of curtailing freedom as an exchange for security. People (the political class, the electorate) appear to be willing to reformulate the traditional balance between liberty and security: a little bit more documents and ID-checks, longer lines and more flexible search-warrants seem an acceptable tax levied in return for more stringent demands for government-provided security. For example, once being convinced that we actually need to be searched and subjected to surveillance for aviation safety, and for a faster process, we are willing to giving up some of our privacy and enter a full body scanner. It seems to be the case that there is broad consensus on the fact that traditional policing principles or, for that matter, the law of the Geneva Conventions (regulating the interrogation of prisoners of war, for example) have become unsuited for handling the peculiar warfare put on by suicide bombers and terrorist organizations. Just about everywhere in the world, the war against terrorism has had the effect of widening the control functions of the national security and immigration services, as well as of other law enforcement authorities. The expanded measures and procedures thus introduced were often ones that legislators and law enforcement officials otherwise only had dreamed of attaining, but this time around, they could take advantage of changes in the public sentiment due to society's shock over the tragic events and fear spreading in their wake. For example, there are certain regulations with respect to banking (and clients' data) that the authorities have been longing for, to aid them in their fight against drugs and organized crime, but beforehand they were unable to attain them due to constitutional misgivings. Under the auspices of anti-terrorist action, all of a sudden, the same regulations become acceptable. Likewise, recent decades saw the prospects of police patrolling based on discriminatory racial profiling fail miserably within the Anglo-American world. All the same, the Arab population became a natural target of the war against terrorism. It looks as though the horrific image of weapons of mass destruction and recurring terrorist attacks have overwritten the previously held principle that it is better to have nine criminals go free than to have a single innocent person punished. What we thus see is that the rhetoric of exceptionalism (that is, the acceptance that in these special, desperate times, special, desperate measures are needed, and for now we can and should put aside the traditional decision-making rules of thumb) is also sweeping: it is not limited to the “war against terrorism”, but is utilized in immigration policies, and for example in the American criminal policies on sex offenders which completely overturn the long-held classic rules of punishment, but it also seen in the general

<sup>5</sup> Csepeli, G.–Orkény, A.–Székelyi, M.: Szertelen módszerek (Insubstantial methods). In: Csányi, G. (ed.): *Szöveggyűjtemény a kisebbségi ügyek rendőrségi kezelésének tanulmányozásához* (A reader for the study of policing minorities). Budapest, 1997, 130–173.

<sup>6</sup> See Farkas, L.–Kézdí, G.–Loss, S.–Zádori, Zs.: A rendőrség etnikai profilalkotásának mai gyakorlata (The current police practice of ethnic profiling). *Belügyi Szemle*, 52 (2004) 2–3, 30–50.

trends of shifting to post-crime and risk societies. A further unique feature concerns the role of the private sector: it becomes both a victim and a willingly cooperating perpetrator in this process: it is charged with carrying out a number of tasks in control and surveillance (or even in the design of privacy-protection enhancing mechanisms against the very risk itself poses on privacy), but this also creates a lucrative business opportunity. As an addition ironic twist: people seem willing to provide crucial and vast amounts of data to private companies in return for commercial services, unaware that due to outsourced state control functions these will end up in the hands of the government—only making it obvious that, despite the discrepancy of the applicable legal framework, in the field of surveillance and control, the “public-private” distinction is completely outdated.

This tendency may be alarming for many, but one can easily say that if this New Security Deal is passed within the habitual pathways of constitutional participatory democracy, there probably is not too much room for complaints against a unanimously empowered protective state. After all, the state is theoretically reconstructed as the outcome of a notional social contract in which individuals agree to trade a quotient of their liberty in exchange for the state’s guardianship of security<sup>7</sup> in the broad sense.<sup>8</sup> The other apparent specialty of this new era, however, is more problematic: the concept of security, which is thus positioned centrally in the political, legal and social discourse does not seem to receive the degree of scrutiny its weight and relevance would require. In other words, not only is “security” a buzz-word for budgetary and policy demands that can easily overrule long-standing constitutional and human rights limits for government power, but while willingly giving in to these demands, we do not even seem to investigate the actual effectiveness of many of these measures, for example, whether they actually provide us security (in exchange for the liberty value offered).

In other words, at least two separate discussions are going on in the “security vs. liberty” debate: a theoretical and a practical one. The theoretical is centred around the reformulation of the traditional “security-liberty” balance-recipe. The other line of inquiry focuses on the actual practical effectiveness of certain political and legal measures the government and law enforcement agencies are allowed to have.

In this article, through the case study of ethno-racial profiling, a specific law enforcement action and a potentially structural human rights risk involved, I will provide some additional arguments to the second debate. I will highlight the importance of defining and testing the security-content of all new government powers before and during the balancing of how much liberty this security is worth. The underlying thesis is that “security” is not an objectively determined social condition, but a socio-psychological construction influenced by a number of irrational features and it is subject to both intentional and

<sup>7</sup> According to Ian Loader, the politics of resources or the politics of allocation is concerned with trying to ensure that all citizens are provided with a “fair” share of available policing goods; something that requires attention both to the unwarranted “over” (or overly invasive) policing of particular individuals or social groups, and to the inability of (disadvantaged) citizens and communities to acquire a proportionate level of such goods. See Loader, I.: *Policing, Securitization and Democratization in Europe*. Monday 18 April 2005, [http://www.libertysecurity.org/article209.html?var\\_recherche=policing%2C%20securitization](http://www.libertysecurity.org/article209.html?var_recherche=policing%2C%20securitization)

<sup>8</sup> See, for example Loader, I.: *Necessary Virtues: The Legitimate Place of the State in the Production of Security*. 19 April 2005, [http://www.libertysecurity.org/article232.html?var\\_recherche=necessary%20virtues](http://www.libertysecurity.org/article232.html?var_recherche=necessary%20virtues)

circumstantial manipulation. I will argue that “efficiency” will have both an objective dimension, on which lawmakers and judges can and should rely, but it will also have a subjective, psychological element, which also needs to be factored into our discussions, because fear and prejudice may indeed make certain policies efficient by the social psychological effect it may have on people, even if it turns preconceptions and prejudices into a self-fulfilling law enforcement prophecy.

### **I. The objective and subjective aspects of “security”**

In the foregoing, it has been demonstrated how important the definition and measurement of security should be in law enforcement, for it is on these that both the pragmatic and political success, as well as the constitutionality of law enforcement measures depend. But easier said than done. Due to the overrepresentation of crime and violence in media and the entertainment and infotainment-business, the public usually vastly overestimates both the crime problem in general, and the actual probability of one’s criminal and especially violent criminal victimization. While in their reports about crime and security in general, high-end newspapers are trying to be factual and analytical, tabloid media tend to be anything but restrained. As David Green put it: “Broadsheets tend to focus on government, quoting professional experts, elites and interest group representatives. The tabloids tend to focus on crime victims and their relatives, offering dramatic testimonials as counterpoint to the more professionalized discourse of the broadsheet press”.<sup>9</sup> Thus, tabloid readers tend to be more fearful of crime than broadsheet readers, particularly about being mugged or physically attacked. For example, results from a British Crime Survey (BCS) indicated that tabloid readers were almost twice as likely as broadsheet readers to believe crime had “increased a lot” over the last several years—43 versus 26%—when it had actually declined.<sup>10</sup>

Take, for example, the widely held belief (depicted in so many movies and novels) that the job of an American police officer is dangerous. But, as Roger Roots<sup>11</sup> points out, police work’s billing as a dangerous profession plummets in credibility when viewed from a broader perspective. According to the National Institute for Occupational Safety and Health,<sup>12</sup> it is true that homicide is the second leading cause of death on the job for all American workers, however, the taxicab industry suffers homicide rates almost six times higher than the police and detective industry. A police officer’s death on the job is almost as likely to be from an accident as from homicide, since approximately 40% of police deaths are due to accidents. When overall rates of injury and death on the job are examined, policing barely ranks at all. The highest rates of fatal workplace injuries occur in the mining

<sup>9</sup> Green, D. A.: Public opinion versus public judgment about crime. Correcting the “Comedy of Errors”. *British Journal of Criminology*, 46 (2006) 1, 139.

<sup>10</sup> Green: *op. cit.* 138.

<sup>11</sup> Roots, R.: Are Cops Constitutional? *Seton Hall Constitutional Law Journal*, Summer, 11 (2001), 686–757.

<sup>12</sup> National Institute for Occupational Safety and Health, Violence in the Work Place, June 1997. National Institute for Occupational Safety and Health, Fatal Injuries to Workers in the United States, 1980–1989: A Decade of Surveillance, National Profile, August, 1993 DHHS (NIOSH) Publication No. 93–108.

and construction industries, with transportation, manufacturing and agriculture following close behind. A full 98% of all fatal workplace injuries occur in the civilian labour force.<sup>13</sup>

The above example shows that it lies within the nature of the concept of “security” that due attention needs to be given to the actual verification of security risks and the effectiveness of the offered security measures in exchange for which we are willing to offer some of our rights and liberties. For instance, take the case of ID cards: not only can terrorists use a wide range of techniques to forge identities, a recent report by Privacy International showed that two-thirds of all terrorists in history have operated under their true identity,<sup>14</sup> thus, identity cards would have little preventative effect. Nevertheless, one hundred countries around the world currently use national identification cards,<sup>15</sup> and (despite concerns raised by privacy advocates) a number of governments are promoting it as a powerful tool to prevent and fight terrorism.<sup>16</sup>

Following Rob Allan’s remark,<sup>17</sup> David Green<sup>18</sup> calls it something of a “comedy of errors” in which policy and practice are not based on a proper understanding of public opinion, which is, in turn, not based on a proper understanding of policy and practice.<sup>19</sup> The process of securitization,<sup>20</sup> a core concept in contemporary socio-political developments, is

<sup>13</sup> Roots: *op. cit.* 711–712. Also, note that about 2% of American soldiers serving in South Vietnam during the Vietnam War died during their service there, yet most Americans would view a one-year tour of duty in South Vietnam during that war as a grave danger. Amitai Aviram, *The Placebo Effect of Law: Law’s Role In Manipulating Perceptions* *George Washington Law Review*, November, 2006, footnote 80.

<sup>14</sup> Privacy Int’l, *Mistaken Identity: Exploring the Relationship Between National Identity Cards & the Prevention of Terrorism 2* (2004). The report also shows that “[a]t a theoretical level, a national identity card as outlined by the UK government – the proposed legislation in question – could only assist anti-terrorism efforts if it was used by a terrorist who was eligible and willing to register for one, if the person was using their true identity, and if intelligence data could be connected to that identity”. See <http://www.privacyinternational.org/issues/identity/UK/id-terrorism.pdf>

<sup>15</sup> See Davies, S.: *Identity Cards: Frequently Asked Questions*, Privacy Int’l, Aug. 24, 1996, [http://www.privacy.org/pi/activities/identity/identity\\_faq.html](http://www.privacy.org/pi/activities/identity/identity_faq.html)

<sup>16</sup> Jennifer Morris, *Big Success or “Big Brother”? Great Britain’s National Identification Scheme Before The European Court Of Human Rights*. *Georgia Journal Of International And Comparative Law*, Winter 2008, 471.

<sup>17</sup> Allen, R.: “There Must Be Some Way of Dealing with Kids”: Young Offenders, Public Attitudes and Policy Change. *Youth Justice*, 2 (2002) 1, 3–13.

<sup>18</sup> Green: *op. cit.* 132.

<sup>19</sup> It needs to be noted that it may very well fall within the interest of politicians to rely on unsubstantiated public opinion. For example (see Green: *op. cit.* 137), following a high profile murder case, the then Shadow Home Secretary, Tony Blair wrote a piece in *The Sun* asserting, “[w]e can debate the crime rate statistics until the cows come home. The Home Office says crime is falling. Others say it isn’t. I say crime, like economic recovery, is something that politicians cannot persuade people about one way or another. People know because they experience it. They do not need to be told. And they know crime is rising”. Blair’s comments imply that there is no substitute for experience, even secondhand, mass-mediated experience, and his piece lent unqualified credibility to tabloid portrayals. He as much as told the public that their fear of crime, irrational or not, is more important than any unbiased assessment of the problem.

<sup>20</sup> According to the constructivist “Copenhagen School” of security analysis, securitization is constituted by the intersubjective establishment of an existential threat with a saliency sufficient to have substantial political effects. The semiotic structure of securitization differentiates between “referent objects”, “securitizing actors” and “functional actors”. A “referent object” of securitization

intertwined with a number of institutional, political and bureaucratic interests, and the entire avalanche is based on perception rather than on objective features. The irony of the case is that no efforts are required from governments to try to assess how certain institutions or law enforcement measures will affect the actual risk of criminal or terrorist involvement, or even risk-perception. Thus, the state is under no pressure or obligation to prove the correlation between the increase in (the perception of) security—which is in most cases only assumed, presumed and forecasted. Presumably, a lack of a proper methodology to test such dynamics lies behind the fact that the public seems to accept “risk prevention” as a proper price to be paid for extended law enforcement authorizations, and social risks are not weighted against the potential benefits. “Prevention of terrorist attacks” appears to be a blank check, where we are waiving our rights to actually control the effectiveness of the preventive measures. If no terrorist attack happens, the government may argue that is exactly due to these preventive commitments that we could have escaped the threatening disasters. If such incidents do take place in our approximate or remote distance, it is even more a reason to strengthen government efforts and establish further law enforcement measures.

According to Peter Lock “Though once being upgraded to ‘war’, anti-terrorism becomes an open-ended activity because it is intrinsically impossible to define criteria which would unequivocally permit the declaration of victory and put an end to this war. The institutions charged with carrying out the ‘war against terrorism’ emerge as powerful bureaucracies with their own corporate agendas. They are often capable of evading parliamentary oversight. It plays to their advantage in their drive to achieve dominant positions in the state apparatus that many of their activities are shielded from scrutiny for asserted operational reasons. Their claims of effectiveness cannot be measured as the full dimension of their task is by definition unknown as long as the unbounded concept of terrorism rules political discourses. Their persistent exigency that they must be entitled to carry out covert operations at their own discretion is inherently difficult to monitor. Confronted with imagined terrorism as opposed to defined political challenges in a populist political climate elected bodies are not inclined sufficiently challenge the agendas of the institutional security network. The executive is capable of launching a dynamic of circular causation by imaging a hypothetical terror network, which is delineated as invisible (and hence unknowable). Politicians are not inclined to take risks and do not define how much production of alleged security is enough. As a result, measures adopted in the fight against terrorism acquire features of self-fulfilling prophecies. ... In such a context it is virtually impossible to measure progress in the fight against terrorism”.<sup>21</sup> Commentators point out that fear also plays a noticeable role in generating identity and feeling of belonging, and

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is something that is considered to be existentially threatened. In the vast majority of cases the security referent is the state, and the “securitizing actor” is the actor who actually performs the speech act of securitization, by declaring the referent object “existentially threatened”, whereas a “functional actor” is a participant in carrying out the pragmatic consequences of securitization. Security is never objectively given and there is no implicit, objective or given relation between the subject—the security actor—and the object of securitization as this relation is constructed intersubjectively through social relations and processes. See Burgess, P.: *The Ethical Subject of Security*. Tuesday 10 May 2005, [http://www.libertysecurity.org/article248.html?var\\_recherche=ethical%20subject](http://www.libertysecurity.org/article248.html?var_recherche=ethical%20subject)

<sup>21</sup> Lock, P.: *Anti-terrorism and Effects on Freedom of Movement-Assessing the Concept of Progress in the Fight against Terrorism*. Wednesday 20 July 2005, [http://www.libertysecurity.org/article318.html?var\\_recherche=lock%20peter](http://www.libertysecurity.org/article318.html?var_recherche=lock%20peter)

collective insecurity can be understood as the purest form of community belonging. The “dangerization process” facilitates an increasing culture of defence. The security discourse serves as an effective means to stimulate community belonging, and is an effective vehicle of post-industrial political power.<sup>22</sup>

The irony of the case is that inspired by the academic discipline of law and economics, in the past years, a considerable body of literature has focused on estimating the social costs of crime and crime prevention—only these findings have not seem to have made the desirable impact on public policy and discourse. For example, Paul Dolan and Tessa Peasgood developed a methodology to provide estimates of the intangible costs arising from the anticipation of possible victimization; that is, estimates of the costs of fear of crime.<sup>23</sup> These costs are categorised according to whether they result in non-health-related losses or health-related losses. When people feel that they may be about to become a victim of crime, they will experience anxiety and stress. The frequency with which people are in this state and the intensity of the anxiety is one measure of the health-related loss from anticipated crime. Non-health losses are associated with changes in behaviour (where for example people use their own cars or take taxis rather than walk or use public transport because of their fear of crime)<sup>24</sup> and/or changes in how society is viewed.

For example, a survey of public attitudes to quality of life in the United Kingdom in 2001 found that crime was mentioned by 24% of respondents as an important factor affecting quality of life, which made crime the third largest factor after money and health.<sup>25</sup> They claim that the direct costs of security measures, insurance administration expenditure and costs incurred from crime-averting behaviour can be interpreted as revealing people’s preferences to reduce the risks of victimization and the worry about victimization. Also, a further tangible cost attributable to anticipating crime is any loss in productivity caused by the time and energy spent on actions and emotions linked to anticipating possible victimization. This may include leaving work early to avoid walking home alone, or time spent dealing with a burglar alarm that has been accidentally set off.<sup>26</sup> In addition to these, other behavioural changes also involve additional time costs. Based on survey observations in the United States, on average, an adult spends two minutes locking and unlocking doors each day and just over two minutes a day looking for keys, which is valued at \$437 per year.<sup>27</sup> It means that U.S. citizens are estimated to spend nearly \$90 billion worth of time each year simply locking their doors and searching for their keys.<sup>28</sup>

<sup>22</sup> See Lianos, M.: *Hegemonic Security Discourse: Late Modernity’s Grand Narrative*. Tuesday 6 September 2005, [http://www.libertysecurity.org/article386.html?var\\_recherche=michalis](http://www.libertysecurity.org/article386.html?var_recherche=michalis)

<sup>23</sup> See Dolan, P.–Peasgood, T.: Estimating the Economic and Social Costs of the Fear of Crime. *British Journal of Criminology*, 41 (2007) 1, 121–132.

<sup>24</sup> It needs to be added that more expensive forms of transport clearly bring other benefits, such as quicker and more comfortable journeys, and these benefits would need to be controlled for. *Ibid.* 123.

<sup>25</sup> *Ibid.* 123.

<sup>26</sup> *Ibid.* 124.

<sup>27</sup> A study found an average willingness to pay to avoid locking or unlocking assets of \$804 (from a sample of 140 respondents). The extra time taken walking home to avoid potentially dangerous shortcuts could, in principle, be valued in a similar way. *Ibid.* 124.

<sup>28</sup> Anderson, D. A.: The Aggregate Burden of Crime, *Journal of Law and Economics*, 42 (1999) 2, 611, 623–24.



It needs to be added that according to estimates, citizens of the United States spend more on private precautions—"estimates range from \$160 billion to \$300 billion per year—than on the entire public law enforcement budget. That is, citizens spend more on locks, neighbourhood watches, and the like than U.S. governments (state and federal) spend on police, judges, prosecutors, prisons, and prison guards".<sup>29</sup>

This leads us back to the question of available information. Media theory frequently refers to the concept of cultivation. According to this, television is society's storyteller and if a viewer sees a great deal of violence on television, then she will presume that society is violent; once this presumption takes root, it can penetrate the viewer's attitudinal base and become a decision-making factor. Hence, a viewer who believes that society is violent may be more afraid to walk alone at night, inclined to purchase a home alarm system, or likely to support increasing the police force.<sup>30</sup> It is well documented in criminology that individual risk predictions are largely based on interpretations far removed from rational considerations of likelihood based on recorded crime rates.<sup>31</sup> Far more people believe that they will become future victims of a given offence than the number of those who actually become victims. For example, respondents in three waves of a longitudinal crime survey conducted in Trinidad believed that they are "likely" or "very likely" to be murdered in the following 12 months at each of three times at which the sample was questioned. In fact, in 1999, 120 murders were recorded in the population of 1.3 million, that is: 99.8% of those 585,000 expecting to die erred on the question.<sup>32</sup>

To sum up, not only is security an elusive and subjective concept, but most preventive measures will also defy objective verification. In light of these, let us now turn to the case study of ethno-racial<sup>33</sup> profiling.

<sup>29</sup> Mikos, R. A.: "Eggshell" Victims, Private Precautions, and the Societal benefits of shifting crime. *Michigan Law Review*, 105 (2006) 2, 308. The author also draws attention to the fact that literature supports the claim that many of the resources spent in the private war on crime are being wasted because many private precautions only shift crime onto other, less guarded citizens, and this redistribution of crime has no net social benefit, as precautions that only shift crime constitute rent-seeking behavior: individuals expend resources to transfer losses, without reducing the size of those losses. A typical example would be vehicle anti-theft devices which will urge thieves to target other cars but not deter them from stealing. A similar discussion centers on the question of gated communities, which are also found only to divert crime to other communities. (As of 2003, there were nearly seven million households located in gated communities in the US, which adds up to 7% of all households.) It is for this reason that some local governments have simply refused to allow real estate developers to control access to new or existing communities. See Mikos: *op. cit.* 309, 315, 319.

<sup>30</sup> Podlas, K.: The "CSI Effect" and other Forensic Fictions. *Loyola of Los Angeles Entertainment Law Review*, 27 (2006–2007) 2, 98–99. The author notes that cultivation is rooted more in media theory than psychology and that according to other research, media content merely makes the audience aware of an issue (the agenda-setting effect); at other times, it reinforces pre-existing attitudes; at still others, it seems to have no impact on values or direction of response whatsoever. Podlas: *op. cit.* 101–103.

<sup>31</sup> See for example Chadee, D.–Austen, L.–Ditton, J.: The Relationship Between Likelihood and Fear of Criminal Victimization. *British Journal of Criminology*, 47 (2007) 1, 133–153.

<sup>32</sup> *Ibid.* 133, 134.

<sup>33</sup> Despite obvious differences in the terms, throughout this article the two will be used interchangeably.

## II. Ethnic profiling: the concept and its practice

In what follows, I will delineate the general practice of ethnic<sup>34</sup> profiling and ethnicity-based selection, and how these arise in the context of the fight against terrorism. In the profiling process terror-suspects, ethnic, racial, national or religious minorities, immigrants, indigenous or poor people are interchangeable. I will argue that besides the perennial problem with ethnic profiling—that it readily turns into a form of ethnic discrimination—it faces an independent problem: lack of effectiveness.

There is not one universally accepted and utilized definition for profiling. Profiling in the abstract sense refers to identifying information, making predictions and, finally, inference.<sup>35</sup> The word “profile” (profil in French) was originally used in the artistic field. It denoted the outlines and features of a face seen from one side or, more broadly, the portrayal of an object seen from one side only. Historically, the term “profiling” in law enforcement first came to prominence in connection with the training of crime profilers in the USA. In theory, these people are supposed to be capable of determining a criminal’s personality type by analysing traces left at the scene of the crime. In any abstract profiling operation, three stages may be identified: The first stage is “observation”, often referred to as data warehousing, where personal or anonymous data are collated. If the data refer to an identifiable or identified individual, they will generally be anonymised during this stage. The collected data may be of internal or external origin. For example, a bank might draw up an anonymous list of its customers who are bad payers, together with their characteristics, or a marketing firm might acquire a list of the major supermarket chains’ “shopping baskets” without the shoppers being identified. This first stage is followed by a second set of operations, usually referred to as data mining, which is carried out by statistical methods and whose purpose is to establish, with a certain margin of error, correlations between certain observable variables. For instance, a bank might establish a statistical link between a long stay abroad and one or more missed loan repayments. The concrete outcome of this stage is a mechanism whereby individuals are categorised on the basis of some of their observable characteristics in order to infer, with a certain margin of error, others that are not observable. The third and last stage, known as “inference”, consists in applying the mechanism described above in order to be able to infer, on the basis of data relating to an identified or identifiable person, new data which are in fact those of the category to which he or she belongs. Very often, only this last operation is referred to as “profiling”, it, however, is essential, to see this final stage as part of a process.<sup>36</sup>

Recent developments in information technology, however, make today’s profiling activities increasingly easy and sophisticated, thus the possibilities offered by profiling are numerous and cover different areas of application. For example, in the USA, ATS (Automated Targeting System) has been developed in order to evaluate the probability of a

<sup>34</sup> A note about terminology: besides obvious differences, I will treat racial, ethnic and nationality-based terminology as synonymous.

<sup>35</sup> Dinant, J.-M.–Lazaro, Ch.–Poulet, Y.–Lefever, N.–Rouvroy, A.: Application of Convention 108 to the profiling mechanism. Some ideas for the future work of the consultative committee. Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-Pd), 24th meeting, 13–14 March 2008, Strasbourg, G01 (T-PD). Secretariat document prepared by the Council of Europe Directorate General of Human Rights and Legal Affairs, Strasbourg, 11 January 2008 T-PD(2008)01, 4–11.

<sup>36</sup> *Ibid.* 3.

given individual being a terrorist. Also, data mining is an extremely valuable tool in the area of marketing and customer management. It is one means of moving from mass marketing to genuinely personalized marketing. Data mining can be defined as the application of statistical, data-analysis and artificial-intelligence techniques to the exploration and analysis with no preconceived ideas of (often large) computer data bases in order to extract fresh information that may be of use to the holder of these data. In other words, the value of data mining is that it is an IT tool which can “make the data talk”. Generally speaking, the methods on which data mining is based can be divided into two categories: some are descriptive and others predictive, depending on whether the aim is to explain or predict a “target” variable. Descriptive methods are used to bring out information that is present but hidden within the mass of data, while predictive methods are used to exploit a set of observed and documented events in order to try and predict the development of an activity by drawing projection curves. This method can be applied to the management of customer relations in order to predict a customer’s behaviour.<sup>37</sup> The aim is for example to determine the profile of individuals with a high purchasing probability or to predict when a customer will become disloyal. Likewise, profiling is widely used in the field of risk management, when determining the characteristics of high-risk customers. Such aims may include the adjustment of insurance premiums; prevention of arrears; aid to payment decisions where current account overdrafts exceed the authorized limit in the banking sector; use of a risk “score” in order to offer individual customers the most appropriate loan or refuse a loan depending on the probability of honouring repayment deadlines and the terms of the contract, etc. Cable digital TV provides programme distributors with precise information regarding channel selection and channel hopping by viewers who receive television channels via their telephone cable by means of DSL technology. They can thus create and keep a perfectly accurate viewing profile for each user. It therefore becomes technically possible to tailor advertisements to the user’s profile. Also, a similar methodology is used by Google’s on-line advertising system, where user’s click stream is monitored. In the age of strategic marketing, profiling and data mining is used in creating packages and special offers; designing new products and customer loyalty policy.

The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data defined profiling as a computerised method involving data mining from data warehouses, which makes it possible, or should make it possible, to place individuals, with a certain degree of probability, and hence with a certain induced error rate, in a particular category in order to take individual decisions relating to them. This concept of profiling differs from criminal profiling, where the aim is to get inside and understand the criminal’s mind, but is similar to behavioural analysis since the aim is not to understand the motives which lead or might lead an individual to adopt a given behaviour, but to establish a strong mathematical correlation between certain characteristics that the individual shares with other “similar” individuals and a given behaviour which one wishes to predict or influence. As this approach does not depend on human intelligence, but on statistical analysis of masses of figures relating to observations converted to digital form, it can be carried out by means of a computer with minimum human intervention.

Thus, profiling (i) can be applied in a number of contexts, that can vary from the commercial sector to the field of law enforcement; (ii) it is a mechanism where the task is to narrow down the circle of potential individuals that may fall within the scope of activities

<sup>37</sup> *Ibid.* 8–9.

of a particular agent within the given field: it may involve identifying a group of customers or potential perpetrators; (iii) profiling will always include certain characteristics upon which the process relies; and (iv) there will always be a scheme of reasoning according to which these characteristics and the way in which they are employed are established.

In 2002, the EU's Working Party on Terrorism drew up recommendations for member states on the use of "terrorist profiling", and defined it as using "a set of physical, psychological, or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect".<sup>38</sup> According to Rebekah Delsol,<sup>39</sup> racial profiling refers to the use by the police of generalisations based on race, ethnicity, religion or national origin, rather than individual behaviour, specific suspect descriptions or accumulated intelligence, as the basis for suspicion in directing discretionary law enforcement actions such as stops, identity checks, questioning, or searches among other tactics. Specific definitions of racial or ethnic profiling vary along a continuum ranging from the use of race alone as the reason for the stop to those using race along with other factors as the reason for the stop.<sup>40</sup>

Using a narrow definition, racial profiling occurs when a police officer stops, questions, arrests and/or searches someone solely on the basis of a person's race or ethnicity. A broader definition acknowledges that race may be used as one of several factors involved in an officer's decision to stop someone. A stop is likely to be made on the confluence of several factors such as race or ethnicity along with age, dress (hooded sweatshirts, baggy trousers, perceived gang dress, etc.), time of the day, geography (looking "out of place" in a neighbourhood or being in a designated "high-crime area"). This definition reflects the fact that racial profiling may be caused by the purposefully racist behaviour of individual officers, or the cumulative effect of the unconscious use of racist stereotypes, but may also result from institutional factors, such as the use of enforcement techniques and deployment patterns, which impact on ethnic groups unequally.<sup>41</sup>

Profiling can take place in other stops or contacts with the public by any type of law enforcement officer or other authorities such as traffic stops in cities as well as highways, stopping and questioning of pedestrians in public places in urban areas, sweeps of trains and buses, immigration status checks by immigration officials, and airport security and customs checks or searches. Patterns of profiling can also be seen in discriminatory treatment after a stop has taken place, such as black motorists being given traffic citations while white motorists are let off with a warning, or Latin/o/a youth, but not white youth, being cited for noise violations, mass controls in public places, stop and search and identity checks, data mining and raids on places of worship, businesses and organisations.<sup>42</sup>

Thus, ethnic or racial profiling, that is profiling that includes race and ethnicity as one of the characteristics involved in the process, is a practice that relies on the tenet that ethnicity in itself signals a certain type of criminal involvement, terrorist plotting or illegal border crossing as more likely, and this assumption serves as a sufficient and therefore

<sup>38</sup> See Hayes, B.: A Failure to regulate: Data protection and Ethnic Profiling in the Police Sector in Europe. Justice Initiatives. *Justice initiatives*. June 2005, 37.

<sup>39</sup> See Delsol, R.: *Presentation to the LIBE Committee of the European Parliament*. Brussels, 30 June 2008, <http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

legitimate basis for law enforcement (police, secret service, etc.) suspicion. The peculiarity of profiling lies in the fact that it is not based on illegal behaviour, but is centred around idea to collect legal behavioural patterns or character-traits that may signal criminal behaviour—it is therefore based on an assumed correlation between criminality and the specified characteristics or behavioural patterns, a deduction based on retrospectively judged effectiveness, which is always assumed, rather than checked and confirmed.

Thus, stops are not induced by suspicious or illegal behaviour, or by a piece of information that would concern the defendant specifically. Instead, a prediction provides grounds for police action: based on the high rate of criminality within the ethnic group or its dominant (exclusive) involvement in committing acts of terror, it seems like a rational assumption to stop someone on ethnic grounds. Measures are therefore applied not so much on the basis of the (suspicious) behaviour of the individual, but based on an aggregate reasoning. The goal is to make an efficient allocation (based on rational interconnections) of the limited amount of the available police and security resources.

Law enforcement profiling, which mostly takes the form of stop and search, was first developed in the U.S. for detecting drug couriers, and was later implemented in traffic control, and more recently in anti-terror procedures. At the heart of these procedures is the idea that the race or ethnicity of the perpetrator serves as a useful tool for the detection of criminality. Originally, the procedure of profiling was aimed at creating a description profile for suspects, in order to help the authorities in filtering out potential perpetrators based on certain sets of (legal) behavior and circumstances. In the case of drug couriers, such a characterization might include short stop-overs between significant drug sources and the distribution location, cash paid for the airline ticket, and, based on criminal statistics, also ethnicity, sex and age. The inclusion of ethnicity in the profile was reasoned by the fact that gangs that play key roles in organized crime tend to be almost exclusively ethnically homogeneous.

The idea to take race into consideration as a helpful tool to screen offenders was widely accepted among law enforcement officers.<sup>43</sup> American studies on highway patrols for example have shown that blacks, comprising 12.3% of the American population, are significantly overrepresented among those stopped and checked by the police.<sup>44</sup> In New Jersey, between 1994 and 1999, 53% of those stopped by the police were black, 24.1% were Hispanic and only 21% were white.<sup>45</sup> A study conducted on the Moscow Metro found that non-Slavs are on average 21.8 times more likely to be stopped by the police than Slavs although they make up only 4.6% of the riders in the Metro system. A 2006 study in Bulgaria, Hungary and Spain found that Roma and immigrants in Spain are more likely to be stopped on the street for the purpose of identity and immigration checks and once stopped are more likely to be treated disrespectfully by police officers. The report published by the

<sup>43</sup> For example, in 1994, an estimated 2,714,000 juveniles were arrested in the United States. Of those juveniles, 25% were black and 62% were white. Black juveniles, however, comprised only 15% of the total juvenile population, whereas white juveniles comprised 80% of the total juvenile population. Garrison, A. H.: Disproportionate Minority Arrest: A Note on What Has Been Said and How It Fits Together, *New England Journal on Criminal and Civil Confinement*. Winter 1997, 32.

<sup>44</sup> <http://quickfacts.census.gov/qfd/states/00000.html>

<sup>45</sup> See Buerger, M.–Farrell, A.: The evidence of racial profiling: interpreting documented and unofficial sources. *Police Quarterly*, 5 (2002) 3, 290; Harris, D. A.: The Stories, the Statistics, and the Law: Why “Driving While Black” Matters. *Minnesota Law Review*, 84 (1999), 267.

Justice Initiative Program of the Open Society Institute (OSI)<sup>46</sup> found that in both Bulgaria and Hungary, Roma are about three times more likely than non-Roma to be stopped by police and are more likely to report unpleasant experiences. In Germany, racial profiling has been used in the context of the post 9/11 terrorism threats. Between 2001–2003, German police undertook a massive data-mining or Rasterfahndung operation to identify potential terrorist sleeper cells. As mentioned above, the police collected the personal data of approximately 8.3 million people and “trawled” the data using an ethnic profile that included the Muslim religion and nationality or country of birth from a list of 26 states with predominantly Muslim populations. The “hits” generated by the database as potential terrorists were then singled out for further investigation.

Figures for 2003/2004 showed that in the UK the rate of stop and search for black people was nearly six and-a-half times that for whites, while for Asians, the ratio was nearly twice that for whites.<sup>47</sup> Stephen Humphreys noted that the consistent overrepresentation of minorities in United States custodial and correctional facilities is not contested. According to official Justice Department statistics, more than 60% of federal prisoners in 2002 were from minority groups, although they make up only 25% of the population. This figure, the department noted, has been unchanged since 1996. Blacks alone have consistently made up 44–45% of the prison population since 1995, despite comprising only 12% of the total population. By 2002, there were 134,000 more blacks than whites in the country’s prisons, despite there being six times as many whites as blacks in the country as a whole. At the same time, the prison population has risen relentlessly. Between 1995 and 2002 the total number in custody increased by 30% (from 1,585,586 to 2,085,620). Altogether, blacks were seven times as likely as whites to be in prison, comprising 56% of all convicted drug offenders. According to the U.S. Department of Justice, “Overall, the increasing number of drug offenses [to 2001] accounted for 27% of the total growth among black inmates, 7% of the total growth among Hispanic inmates, and 15% of the growth among white inmates”. Human Rights Watch describes the war on drugs as “devastating to black Americans”, partly because it provides the background for ethnic profiling. In Spain, according to one study, about 25% of women in prison are Roma (while constituting only 1.4% of the Spanish population). In Italy, foreigners make up some 30% of prisoners.<sup>48</sup> In the USA, the targeting of minorities for traffic stops became so ubiquitous that it earned its own nick-name: “driving while black or brown” or “DWB”—a twist on the crime of driving while intoxicated or DWI.

After the attacks of September 11<sup>th</sup> 2001, the “war on terror” extended the practice of racial profiling to include Muslims and those perceived to be of Arab or Middle Eastern descent. Racial or religious profiling has been identified as occurring through car stops, aggressive enforcement of immigration laws and alien registration, intrusive security

<sup>46</sup> Miller, J.–Bernát, A.–Dencső, B.–Gounev, P.–Pap, A. L.–Pernas, B.–Simonovits, B.–Wagman, D.: “And I can stop and search whoever I want”: Police stops of ethnic minorities in Bulgaria, Hungary and Spain. *Justice Initiatives*, New York, 2007.

<sup>47</sup> Delsol, R.–Shiner, M.: Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales. *Critical Criminology*, 14 (2006) 3, 241–263. Also, disproportionality is greater under powers that do not require reasonable suspicion, such as those for terrorism and suspicion of violent crime, indicating that where levels of police discretion are highest, generalisations and negative stereotypes play an even greater role.

<sup>48</sup> Humphreys, S.: The Case for Monitoring Ethnic Profiling in Europe. *Justice initiatives*, June 2005, 45, 46 and 48.

screening in airports and removal from planes. Since then, “flying while Arab” has also entered the lexicon of profiling.

Justices of the US Supreme Court have also acknowledged the negative impact of unregulated police discretion on communities of colour. In his dissent in the mentioned *United States vs. Martinez-Fuerte*-case,<sup>49</sup> Justice Brennan predicted that the majority’s decision, which permitted the use of Mexican ancestry as a primary factor in checkpoint stops to investigate undocumented immigration, would frustrate the Mexican American community, and warned “[t]hat deep resentment will be stirred by a sense of unfair discrimination is not difficult to foresee”. Later, in *Florida vs. Bostick*,<sup>50</sup> Justice Marshall’s dissent invoked the concern that the police used race as a factor in deciding which individuals to target in conducting ostensibly “random” bus sweeps. Justices in *Illinois vs. Wardlow*<sup>51</sup> and *Atwater vs. City of Lago Vista*<sup>52</sup> also discussed the impact of increased police powers on people of colour who might have legitimate reasons to fear and flee from the police, or who might experience police harassment as a result of enforcement of a minor traffic law.<sup>53</sup>

### III. The assessment of profiling and some empirical findings

As ethno-racial profiling proliferated, a fierce academic and political debate erupted over the issue.<sup>54</sup> Criticism of such practices is manifold. Some emphasize that ethnic profiling is in principle unacceptable, because it results in the harassment of the innocent minority middle class, which is thus subjected to a kind of “racial tax” that affects all aspects of people’s lives. For example, ECRI’s General Policy Recommendation No 11 on Combating Racism and Racial Discrimination finds that racial profiling constitutes a specific form of racial discrimination. By defining racial profiling as the use by the police of certain grounds in control, surveillance or investigation activities, without objective and reasonable justification, it claims that the use of these grounds has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Thus, even when, in abstract terms, a legitimate aim exists (for instance the prevention of disorder

<sup>49</sup> 428 U.S. 543 (1976)

<sup>50</sup> 501 U.S. 429 (1991)

<sup>51</sup> 528 U.S. 119 (2000)

<sup>52</sup> 532 U.S. 318 (2001)

<sup>53</sup> Sinha, P.: Police Use of Race in Suspect Descriptions: Constitutional Considerations. *New York University Review of Law and Social Change*, 31 (2006) 1, 156.

<sup>54</sup> Consider, for example the debate surrounding the European Commission’s proposal for a European Passenger Name Record (PNR), where the European Parliament has raised repeated concerns related to profiling, in particular regarding race, ethnicity and religion, in the context of data protection, law enforcement cooperation, exchange of data and intelligence, aviation and transport security, immigration and border management and treatment of minorities. See for example Pap, A. L.: *Ethnicity- and race-based profiling in counter-terrorism, law enforcement and border control*. Ad-hoc briefing paper, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, European Parliament, Brussels, November 2008, PE 408.326, or the *Working Document on problem of profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control by the Committee on Civil Liberties, Justice and Home Affairs*. Rapporteur: Sarah Ludford, 30.9.2008, DT\745085EN.doc PE413.954v02-00. 2. and 4.

or crime), the use of these grounds in control, surveillance or investigation activities can hardly be justified outside the case where the police act on the basis of a specific suspect description within the relevant time-limits, i.e. when it pursues a specific lead concerning the identifying characteristics of a person involved in a specific criminal activity. In order for the police to avoid racial profiling, control, surveillance or investigation activities should be strictly based on individual behaviour and/or accumulated intelligence. The notion of objective and reasonable justification should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds, thus different considerations should be taken into account in order to assess whether the proportionality test between the means employed and the aims sought to be realized is satisfied in the context of racial profiling. The Recommendation notes that in the same way as racial discrimination, racial profiling can take the form of indirect racial discrimination. In other words, the police may use (without objective and reasonable justification) criteria which are apparently neutral, but impact disproportionately on a group of persons designated by grounds such as race, colour, language, religion, nationality or national or ethnic origin. For instance, a profile that tells the police to stop all women who wear a headscarf could constitute racial profiling inasmuch as it would impact disproportionately on Muslim women and would not have an objective and reasonable justification. The prohibition of racial profiling should also cover these indirect forms of racial profiling. Furthermore, the Recommendation notes that in the same way as racial discrimination, racial profiling can take the form of discrimination by association. This occurs when a person is discriminated against on the basis of his or her association or contacts with persons designated by one of the grounds mentioned above.<sup>55</sup>

In its General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), the Committee for the Elimination of Racial Discrimination also held that ethnic profiling constitutes *per se* a form of racial discrimination. In line with this, the EU Network of Independent Experts on Fundamental Rights<sup>56</sup> draw attention to the fact in its opinion 2006/4 that the use of “racial” or ethnic characteristics as part of a set of factors that are systematically associated with particular offences and used as a basis for making law enforcement decisions is clearly discriminatory, not only because of the absence of any proven statistically significant correlation between indicators linked to race or ethnicity, religion or national origin, on the one hand, and propensity to commit certain criminal offences on the other hand, but also because the principle of non-discrimination requires that only in exceptional circumstances should the race or ethnicity, the religion or the nationality of a person, influence the decision about how to treat or not to treat that person.<sup>57</sup>

<sup>55</sup> Paras 27–34 and 38.

<sup>56</sup> See Opinion 2006/4 on ethnic profiling.

<sup>57</sup> Under the case law of the ECHR, Art. 14 of the European Convention on Human Rights, “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures”. ECHR, *Timishev v. Russia* (no. 55762/00 and 55974/00) (2nd section), judgment of 13 December 2005 (final on 13 March 2006), Para. 58. Also, as concerns differential treatment on the ground of nationality, the European Court of Human Rights includes this ground among those for which “very weighty reasons” are required in order for differential treatment to be justified, ECHR, *Gaygusuz v. Austria* (no. 17371/90), judgment of 16 September 1996, Para. 42.



The Network's opinion demonstrates that European case-law is somewhat uneven in the matter: For example, in the United Kingdom, by the House of Lords in *R (on the application of European Roma Rights Centre) vs. Immigration Officer at Prague Airport*<sup>58</sup> immigration officers operating at Prague Airport were held to have discriminated on racial grounds—contrary to the Race Relations Act 1976, Sec. 1(1)(a)—against Roma seeking to travel from that airport to the United Kingdom by treating them more sceptically than non-Roma when determining whether to grant them leave to enter the United Kingdom. The decision was in stark contrast to a judgment passed by the Second Chamber of the Spanish Constitutional Court on 29 January 2001.<sup>59</sup> Here the Court took the view that the arrest of a woman in a train station, in order to identify her and to control the legality of her administrative situation, could not be considered discriminatory, although she was dark-skinned. The woman concerned was an African-American of naturalized Spanish citizenship. The identity check by the police took place upon her leaving a train. She had no identity documents with her but assured the police that she was of Spanish nationality, and that the documents were at her home. She was travelling with her husband, who was white and was not checked. In contrast to this position, a complaint for discrimination filed in similar circumstances did succeed before the Austrian Constitutional Court.<sup>60</sup> An Austrian citizen born in Ghana and her four-year-old daughter travelled by train from the Netherlands to Austria. During the train ride her luggage was controlled by law enforcement officers without any result. After arriving in Vienna she was controlled a second time without any result and had to declare her consent to an X-ray examination, which passed also without any result. The woman submitted a complaint to the Independent Administrative Tribunal in Vienna, arguing that the above-mentioned treatment has only happened by reason of their colour and place of birth. Their complaint was dismissed but later reversed by the Constitutional Court.

A further unwanted result of ethnic profiling is the strengthening of racial/ethnic essentialism, reductionism to black and white (Roma and Hungarian; Arab and non-Arab, etc.). Another related argument mentions the risks inherent in alienating crucial minority communities in the context of law enforcement (policing and prevention). The model of community policing emphasizes that local policing is most effectively done with active participation from the community. Law enforcement thus should not be an antagonistic, unjust, oppressive power, but a protector of peaceful, law-abiding people, with the criminals pitted as the enemy. With respect to terrorism, we should not overlook the importance of community cooperation. It is no coincidence that the Bush government identified truck drivers, cab drivers and parking meter attendants as high-priority potential informants (helpful in identifying bombers or suicide bombers), and, above all, the Muslim community, which can detect suspicious behaviour.<sup>61</sup> Indeed, most of the American terrorists identified up until recently were caught based on community reports. It is worth considering that one of the very few terrorist arrests where the suspect was eventually charged, in Lackawana,

<sup>58</sup> [2004] UKHL 55, 9 December 2004.

<sup>59</sup> Tribunal Constitucional, Sala Segunda, Sentencia 13/2001 de 29 Ene. 2001, rec. 490/1997.

<sup>60</sup> See Opinion 2006/4 of the Network of Independent Experts on Fundamental Rights on ethnic profiling.

<sup>61</sup> See, for example Brandl, S.: Back to the future: The implications of September 11, 2001 on law enforcement practice and policy. *Ohio State Journal of Criminal Law*, 1 (2003) 1, Osler, M.: Capone and Bin Laden: The failure of government at the cusp of war and crime. *Baylor Law Review*, 55 (2003) 2.

New York, a report from the local Muslim community tipped off the authorities, leading to the arrest.<sup>62</sup> Further, false positives raise a special problem with respect to terrorism: it seems untenable to assume that only Arabs are involved in terrorist attacks. We need only mention a couple of incidents that happened on American soil: Richard Reid (the “shoe bomber”), a Brit from the West Indies; Jose Padilla (the “dirty bomb” terrorist of Chicago’s O’Hare Airport), a Hispanic man who converted to Islam while in jail; not to mention white Americans like John Walker Lindh (the American Taliban), Timothy McVeigh, and Charles Bishop.<sup>63</sup>

Yet another, straightforwardly pragmatic criticism towards ethnic profiling, however, has been calling attention to the practical ineffectiveness of racial profiling: inherent in the *prima facie* plausible reasoning based on statistics is a profound (and provable) error. From the practical point of view, racial profiling could only be justified based on the assumption that the race or ethnicity of the person being profiled is knowable and that there is a consistent and statistically significant relationship between race or ethnicity and propensity to commit crime. In fact, neither of these is consistently true. Ethnic profiling assumes a consistent association, if not a causal relationship, between race/ethnicity and certain kinds of criminal activity. But policies premised on the notion that members of certain ethnic groups are more or less likely to sell drugs, carry firearms, or commit terrorist acts, are both under- and over-inclusive. They thus risk focusing undue law enforcement attention and resources on those who fit the profile, while overlooking others who do not.<sup>64</sup> Racial profiles are, thus, both over-inclusive and under-inclusive—over-inclusive in the sense that many, indeed most, of the people who fit into the category are entirely innocent, and under-inclusive in the sense that many other types of criminals or terrorists who do not fit the profile will thereby escape police attention. James Goldston argues that it is mistaken to believe that ethnic profiling is also problematic in the respect that it assumes that the race/ethnicity of the person profiled is knowable and determinate. But this is not always so.<sup>65</sup> Racial profiling also faces the problems of predictability and evasion: the more predictable police profiles become, the easier it is for perpetrators to adapt to circumvent the profile. In the past decade or so, considerable research<sup>66</sup> focused on the efficacy of ethnic profiling.

<sup>62</sup> Harris, D. A.: *New Risks; New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*. *Utah Law Review*, (2004), 933.

<sup>63</sup> Harris: *op. cit.* 940, see also Baynes, L.: *Racial Profiling, September 11th and the Media. A Critical Race Theory Analysis*. *Virginia Sports and Entertainment Law Journal*, 2 (2002) 1; or Joo, Th. W.: *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*. *Columbia Human Rights Law Review*, 34 (2002) 1.

<sup>64</sup> Goldston, J.: *Toward a Europe Without Ethnic Profiling*. *Justice Initiatives*. June 2005.

<sup>65</sup> Goldston: *ibid.* For example, according to a study by the World Bank in Romania, 61% of those classified as Roma by the interviewers, did not claim themselves as such (the discrepancy in the identification rates was 24% in Bulgaria and 38% in Hungary). The country has a population of 23 million, with 2–2.5 million Roma, according to unofficial estimates, yet only 409,111 identified themselves as such at the 1992 census. See Ringold, D.–Orenstein, M. A.–Wilkens, E.: *Roma in an expanding Europe. Breaking the poverty cycle*. (A World Bank Study 2003) 29., [http://www-wds.worldbank.org/servlet/WDSPContentServer/WDSP/IB/2003/01/07/000094946\\_02122404075867/Rendered/INDEX/multi0page.txt](http://www-wds.worldbank.org/servlet/WDSPContentServer/WDSP/IB/2003/01/07/000094946_02122404075867/Rendered/INDEX/multi0page.txt). When a person interviewed identifies herself as Roma, it will always be in accordance with the interviewer’s classification. Ahmed, A.–Feliciano, C.–Emigh, R. J.: *Ethnic Classification in Eastern Europe*. 10, <http://www.sscnet.ucla.edu/soc/groups/ccsa/ahmed.PDF>

<sup>66</sup> Stuntz, W. J.: *Local Policing After the Terror*. *Yale Law Review*, 111 (2002) 8; Gross, S. R.–Livingston, D.: *Racial Profiling Under Attack*. *Columbia Law Review*, 102 (2002) 5; Cuéllar, M.-F.:

Studies conducted in New Jersey and elsewhere have targeted stops based on racial profiling, involving vehicle checks and body searches. The aim was to discern how effective these measures were in detecting drug possession and illegal possession of weapons. The studies have clearly demonstrated that there was no significant, tangible difference between the proportional hit rate within the white population and the non-white population. Not only did the study find that the authorities habitually stopped a disproportionate number of non-white drivers, but they have also confirmed that the hit rate does not justify the utility of ethnic profiling. Evidence thus refutes the proposition that minorities are more likely to be involved in crime and highlights that racial profiling is an ineffective use of police resources, by engaging in stopping and searching practices that are likely to be unproductive. For example, despite the collection and trawling of the data of 8.3 million people, the mentioned Rasterfahndung operation in Germany “failed to identify a single terrorist”. In 1998, the U.S. Custom Service responded to allegations of racial and gender profiling and low hit rates across all ethnic groups. In 1998, 43% of searches that Customs performed were on African-Americans and Latino/as. US Customs changed its stop and search procedures removing race from the factors considered when stops were made and introduced observational techniques focusing on behaviours such as nervousness and inconsistencies in passenger explanations; intelligence improved the supervision of stop and search decisions. By 2000, the racial disparities in Customs searches had nearly disappeared. Customs conducted 75% fewer searches and their hit rate improved from under 5% to over 13%, the hit rate for all ethnic groups had become almost even. Using intelligence-based, race-neutral criteria allowed Customs to improve its effectiveness while stopping fewer innocent people, the vast majority of whom were people of colour.<sup>67</sup> Other attempts to address profiling have included improving internal supervision, training and the development of early warning systems to identify officers who are potentially racially profiling. We might sum up the results thus: the retrospectively judged effectiveness (which was always assumed, rather than checked and confirmed) turns out to be illusory and does not provide an appropriate policing, prevention and security policy.

Racial profiling thus relies on the assumption that ethnicity and a high rate of criminality are connected, so the hit rate must be higher among, say, African-Americans. For a long time, no-one was asking for a proof of this seemingly sensible connection; after all, a sufficient number of criminals were found among the disproportionately high number of minority members stopped. But researchers argue that this does not yield a cost-effective

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Choosing Anti-Terror Targets by National Origin and Race. *Harvard Latino Law Review*, 6 (2003) 9; Harris, D. A.: Using Race as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description Yes; Prediction, No. *Mississippi Law Journal*, special ed., 73 (2003); Banks, R.: Beyond racial Profiling: Race, Policing, and the Drug War. *Stanford Law Review*, December, 56 (2003) 3; Banks, R.: Racial profiling and antiterrorism efforts. *Cornell Law Review*, 89 (2004) 2; Harris, D. A.: Racial profiling revisited: “Just common sense” in the fight against terror? *Criminal Justice*, 17 (2002) 2; Davies, Sh.: Reflections on the Criminal Justice System after September 11, 2001. *Ohio State Journal of Criminal Law*, 1 (2003) 1; Ramirez, D.–Hoopes, J.–Quinlan, T. L.: Defining Racial Profiling in a Post-September 11 World. *American Criminal Law Review*, 40 (2003) 3; Braber, L.: Korematsu’s Ghost: A Post-September 11th Analysis of Race and National Security. *Villanova Law Review*, 47 (2002) 2.

<sup>67</sup> ENAR-OSJI: Ethnic Profiling. 2009, 14. [http://www.soros.org/initiatives/justice/focus/equality\\_citizenship/articles\\_publications/publications/ethnic\\_20100512/Factsheet-ethnic-profiling-20091001-ENG.pdf](http://www.soros.org/initiatives/justice/focus/equality_citizenship/articles_publications/publications/ethnic_20100512/Factsheet-ethnic-profiling-20091001-ENG.pdf)

method because the number of false negatives and false positives is bound to be much too high.<sup>68</sup> In other words, the measures have a disproportionate negative impact on the black (Roma, Arab) population that is law-abiding, while also reducing the possibility of finding perpetrators that belong to the majority population.<sup>69</sup>

A recent pilot research project<sup>70</sup> organized by the Helsinki Committee (HHC)<sup>71</sup> focusing on police stop and search practices and their discriminatory effects on Hungary's largest ethnic minority, the Roma showed results that are very much in line with findings in other countries. Since previous research has showed that discriminatory ID check methods are relevant to the differential treatment of the Roma,<sup>72</sup> Strategies for Effective Police Stop and Search (STEPSS), an international project supported by the AGIS Program of the European Commission and the Open Society Institute and organized by the Open Society Justice Initiative was launched to change police stop and search policy and practice. For the purposes of the research, for the first time in Hungary, broad-spectrum data collection on the ethnic aspects and general efficiency of ID checks has been conducted.

The project involved the close cooperation of the HHC, the National Police Headquarters (NPH), the Hungarian Police College (HPC) and selected representatives from the Roma community who performed the internal monitoring of the project. The research was carried out for six months in three pilot sites across Hungary: Budapest's 6<sup>th</sup> District, Szeged and Kaposvár. These three locations represent a broad range of different police districts with differing populations, crime profiles and resources. Budapest's 6<sup>th</sup> District covers a busy city-centre area and includes the capital's main railway station. Szeged, with a population of 200,000, is a medium-sized district on the Romanian border. Kaposvár is a relatively rural police district with 120,000 inhabitants.

The projects most important findings were the following: the effectiveness of ID checks was determined by examining what percentage of ID checks are followed by further police measures. The project identified three main types of follow-up procedures (i.e.

<sup>68</sup> See, for example Cuéllar: *op. cit.*; Baynes: *op. cit.* 12–13; Ramirez, D.–Hoopes, J.–Quinlan, T. L.: *op. cit.* 1213.

<sup>69</sup> Consider the fact that the name of Yigal Amir, Yitzhak Rabin's assassin would not have cropped up based on any kind of assassin profile; nor would the person who first blew up a commercial aircraft—she was a woman who wanted her husband dead in 1949. Nojeim, G. T.: Aviation Security Profiling and Passengers' Civil Liberties. *Air and Space Lawyer*, 13 (1998) 3, 5.

<sup>70</sup> For more detailed descriptions see Kádár, A.–Pap, A. L.: A Police Ethnic Profiling in Hungary—An empirical research. *Acta Juridica Hungarica*, 50 (2009) 3, 253–267 or Kádár, A.–Pap, A. L.–Tóth, B.: Police ethnic profiling in Hungary. *European Police Science and Research Bulletin CEPOL*, November, (2009) 2, 4–6.

<sup>71</sup> For the full report see Kádár, A.–Körner, J.–Moldova, Zs.–Tóth, B.: Control(led) Group. Final Report on the Strategies for Effective Police Stop and Search (STEPSS) Project. Budapest, 2008. The report is available on the Helsinki Committee's website: [http://helsinki.hu/dokumentum/MHB\\_STEPSS\\_US.pdf](http://helsinki.hu/dokumentum/MHB_STEPSS_US.pdf)

<sup>72</sup> In 2005, a research carried out under the aegis of the Open Society Justice Initiative found that the Roma are indeed discriminated against in the context of ID checks by the police. Discrimination was especially conspicuous in the practice of stopping pedestrians, with Roma pedestrians disproportionately stopped are more likely to experience disrespectful treatment. See: Pap, A. L.–Miller, J.–Gounev, P.–Wagman, D.–Balogi, A.–Bezlov, T.–Simonovits, B.–Vargha, L.: Racism and Police Stops—Adapting US and British Debates to Continental Europe. *European Journal of Criminology*, (2008) 5, 161–191 and Pap, A. L.: Police ethnic profiling in Hungary—Lessons from an international research. *Regio*, 10 (2007), 117–140.

positive results proving that the check was well-grounded): (i) arrests, (ii) short-term arrests and (iii) petty offence procedures initiated (including on-the-spot fines).

Overall, including traffic related checks, only 1% of ID checks led to an arrest, 2% led to a short-term arrest and 18% to petty offence procedures. If ID checks related to traffic offences are removed, the remaining checks result in 2% arrest, 3% short-term arrest, 19% petty offence procedure and 76% no further action taken. For comparison, in the UK nationally 10–13% of stop and searches lead to arrest.<sup>73</sup> On the whole, it appears that the police use of ID checks is ineffective; large numbers of people are being inconvenienced with little result. This data refutes the argument that extensive checks are an efficient tool against criminality, and highlights the sheer amount of police time wasted conducting stops.

It is noteworthy, that there was significant variation in the rate of efficiency depending upon what ground was recorded as the basis for the ID check. Most ID checks, 37%, took place during the course of traffic controls. A relatively high proportion of checks, 19%, were based upon the suspicion of a petty offence, 8% of all checks were pursuant to intensive controls, and only 2% of checks were related to the suspicion of a criminal act. ID checks recorded under the “other” category make up a third of all stops; this proportion rises to 50% when we removed traffic control stops from the data. The examination of the efficiency rate of the ID checks relative to their different grounds showed that the most frequently quoted grounds were the least efficient.

Arrests and significant percentages of short-term arrests only followed those ID checks that were related to the suspicion of a crime, petty offence or finding a wanted person. Out of these latter cases, however, only those checks that were initiated due to the suspicion of a petty offence made up a substantial portion of all the checks. Overall, traffic control constituted the largest reason for the ID checks, though in 84% of these cases no further action was taken.

Based on the data collected, it appears that the majority of ID checks take place on public premises (streets, parks and roads account for 78%), while relatively few checks are performed in pubs, discos or similar places (6%). The temporal distribution of the checks is relatively even, with 21% occurring in the morning (from 6 a.m. till noon), 29% in the afternoon (from noon till 6 p.m.), 30% in the evening (from 6 p.m. to 10 p.m.), and the remaining 20% at night.

Police officers stop and check more men than women (75% and 25%, respectively), and in line with international trends, young people are more likely to be checked. Individuals belonging to the age group 14–29 represent 43% of all checks, whereas their ratio within the population is 22%.<sup>74</sup> Based on the overall data collected, police in Hungary are most likely to check young men between the ages 14–29.

The data also shows that Roma are disproportionately targeted for ID checks. Within the framework of the project, 22% of all persons checked by the police were of Roma origin (according to the assessment of the officer performing the check), as opposed to 75% being identified as “white”. The remaining 3% were identified as “black”, “Asian”, “Arab” or other. According to reliable sociological research, the estimated proportion of Roma

<sup>73</sup> See: Jones, A.–Singer, L.: *Statistics on Race and the Criminal Justice System–2006/7*. London, 2008.

<sup>74</sup> Based on the figures of the 2001 census, see [www.nepszamlalas.hu/hun/kotetek/18/tables/load1\\_12.html](http://www.nepszamlalas.hu/hun/kotetek/18/tables/load1_12.html).

people within the total Hungarian population (of 10,045,000) is approximately 6,2% (i.e. their actual number is around 620,000).<sup>75</sup> Thus, Roma are more than three times more likely to be stopped than their percentage of the general population would indicate.

The results show that Roma youth are especially likely to be targeted for ID checks. The proportion of Roma youth between age 14 and 16 who were stopped and checked during the project period was significantly higher than the already high general representation of Roma within the sample (32% as opposed to 22%).

The data in the research shows that ID checks of Roma are no more likely to yield results than measures enforced in relation to non-Roma. It is often argued that a disproportionate targeting of ethnic minority groups is justified by differential rates of criminal involvement. The hit rate of police checks, however, shows no significant differences by ethnic group. On a national level, 78% of ID checks involving Roma were “unsuccessful” in the sense that no further measure was required after the check. For non-Roma this ratio was 79%. The percentage of checks followed by a petty offense proceeding for Roma and non-Roma was 19% and 18%, respectively. Rates of arrests and short-term arrests are practically the same within the Roma and the non-Roma sample. In the country’s capital, Budapest: 80% of the checks of Roma did not require any further police action, whereas the same proportion for non-Roma was 59%. If we compare this with the fact that 33% of all the persons checked are of Roma origin (which is a serious over-representation relative to their proportion of 5–10% in Budapest), we can see that the problem is more acute in Budapest than in the other pilot sites.

In sum, in Hungary, the annual number of ID checks (per 1,000 people) is high when compared with other nations in Europe. The police practice behind this result is based on the conviction that randomly initiated ID checks constitute an efficient crime prevention and detection strategy. However, in the sample, only approximately 20% of the ID checks were followed up by any measure, and of these measures, 18% merely involved the initiation of a petty offense proceeding (i.e. proceedings launched due to transgressions of minor significance). Arrests followed only 1% of the checks in our sample. Another important conclusion of the research is that Roma are disproportionately targeted by ID checks. Even though their proportion of the general population is only between 6 and 8%, persons perceived to be of Roma origin by the acting officers constituted 22% of those who were ID checked. The research also refuted the ostensibly rational argument that is frequently presented to justify disproportionality; namely that the Roma are over-represented among offenders, therefore the practice of checking them more often is objectively reasonable.

## Concluding remarks

Using Rebekah Delsol’s words, to summarize the racial profiling discourse, we can say that there is no evidence that profiling works, considerable evidence that it does not, and some disturbing indications that it may actually hamper law enforcement. When police or immigration officials act on prejudice, they blind themselves to genuinely suspicious forms of behaviour. Profiles are both under- and over-inclusive; that is, they risk being too narrow and missing real suspects or they are too broad, in which case they are expensive to apply

<sup>75</sup> Hablicsek, L.–Gyenei, M.–Kemény, I.: *Kísérleti számítások a roma lakosság területi jellemzőinek alakulására és 2021-ig történő előrebecslésére*, (Experimental methods for predicting the territorial characteristics of the Roma population until 2021). 63, see <http://www.nepinfo.hu/index.php?p=605&m=1003> (hereafter: Hablicsek).

in terms of manpower and target large numbers of completely innocent people. More broadly, profiling feeds and aggravates existing mistrust and consequent hostility and lack of cooperation in fighting crime and terrorism among the very communities where support is most needed for counter-terrorism and immigration control.<sup>76</sup> Critics have noted that racial/ethnic profiling exacts a high price on individuals, groups, and communities that are singled out for disproportionate attention. For the individual stopped and detained the experience, sometimes of frequent encounters with the police, can be frightening and humiliating. Racial/ethnic profiling stigmatizes whole groups, contributing to the overrepresentation of ethnic minorities in other parts of the criminal justice system, legitimising racism, scapegoating and fostering mistrust between communities and the police. This in turn destroys the trust of those communities in the police and reduces their willingness to cooperate in criminal or terrorism investigations and turn to the police to control crime in their neighbourhoods.<sup>77</sup>

Given the elusive nature of “security” in general and the peculiarity of the post 9/11-world, the practice of racial profiling nonetheless remains persistent and to a considerable degree popular amongst not only law enforcement officers, but also the civilian majority middle class. It is ironic that it was right around the time of the World Trade Center attacks that racial profiling suffered decisive rejection within professional as well as political circles in the USA. In the fall of 1999, 81% of those asked opposed stops and vehicle control based on ethnic profiling. By contrast, in a poll conducted a few weeks after September 11, 2001, 58% approved of the idea that Arabs (including American citizens) be subject to stricter security checks before a flight.<sup>78</sup>

This article has argued that besides the doctrinal debate between “security” and “liberty”, there is another important and slightly overlooked question to be investigated: the actual efficacy value of policies and law enforcement measures that trigger the entire “liberty vs. security” polemics. What needs to be kept in mind is that “security” itself is a social construct, and affected by prejudices and preconceptions within society. We also need to bear in mind that neither “security” nor “efficacy” can be seen as absolute and isolated concepts. Even if the majority would actually feel secure when law enforcement officers stop members of a minority which is being perceived as potentially dangerous or prone to criminality, this cannot and should not make these measures constitutionally acceptable—not even if, given the peculiarities of the securitarian dynamics, the efficacy standards would have been met. A possible solution would be to abandon the shallow and hollow rhetoric of “liberty vs. security” and return to the well-beaten path of traditional constitutional jurisprudence—and reinstate balancing mechanisms which operate with flexible and complex schemes (including for example dignity or equality) when assessing the harm criterion.

<sup>76</sup> Delsol, R.: Presentation to the LIBE Committee of the European Parliament. Brussels, 30 June 2008, <http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

<sup>77</sup> *Ibid.*

<sup>78</sup> Gross, S. R.—Livingston, D.: *op. cit.* 1413.