

CIVIL LIBERTIES *By Harvey A. Silverglate*

'Race Profiling' Inflicts Injustice on Individuals

TWO RECENT events highlight the contentious issue of "race profiling" in law enforcement—the use of race as a factor in a police officer's determination of whether there is cause for suspicion and for an investigatory stop.

On April 23, two New Jersey State Police troopers stopped a van carrying four young black and Hispanic males on the New Jersey Turnpike. When the van pulled over, the driver slipped the gear into reverse (accidentally, he claimed). The police opened fire and wounded three of the passengers, two seriously. The men claimed they were doing nothing to justify the stop but were targeted because of race. The troopers claimed the van was speeding. However, since it is well-known that nearly everybody on the Turnpike exceeds the unrealistic 55 mph speed limit, even if the men were speeding it would not eliminate the possibility of race-profiling. (The state recently raised the speed limit to 65 mph.)

The second event, reported in early June, was the approval by the U.S. House of Representatives of the "Traffic Stops Statistics Act of 1997," a bill mandating the collection of data concerning the race of the driver in "all stops for routine traffic violations by law enforcement officers." The subject is so sensitive that even Rep. John Conyers Jr., the Michigan Democrat responsible for shepherding the bill through the House, was reported by *The Los Angeles Times* to have expressed surprise at its passage. However, the Senate,

lobbied (as was the House) by such groups as the National Association of Police Organizations and the National Troopers Coalition, may prove a harder sell.

Lack of Candor

One of the biggest obstacles to dealing with race-profiling on and off the highway is the fact that the issue is hardly ever discussed in frank and realistic terms. Those favoring the status quo sometimes deny the phenomenon entirely. Col. Carl A. Williams, the New Jersey State Police Superintendent, for example, in a public statement following the latest turnpike tragedy, insisted that "racial profiling or any form of discrimination for that matter is not and will not be tolerated."

This flies in the face, not only of anecdotal evidence, but also of a conclusion of New Jersey Superior Court Judge Robert E. Francis, who, after a six-month evidentiary hearing in 1996, concluded that troopers stopped black drivers so disproportionately (indeed, 4.85 times more frequently) that "selective enforcement" was the only logical conclusion.

On the other hand, critics of race-profiling sometimes fail to recognize that in a society where crime is a disproportionately minority-group phenomenon, it is natural for police, including many minority officers, to use their common experience to cast suspicion disproportionately on minority citizens.

In the aftermath of the New Jersey Turnpike carnage, Joseph Wambaugh, the veteran Los Angeles Police Department officer and best-selling author of police novels, wrote in *The Wall Street Journal* that "cop instinct," while it may

be shortchanged in the courts, is a valuable law enforcement tool, focusing attention on "acceptably suspicious" persons who are somehow out-of-place in the locations where they are found. "Is the component of race now to be wholly excluded from the probable-cause equation for good street cops doing their best to try to decide whether or not someone fits in a given situation?"

asks Mr. Wambaugh. And as if to give his point legitimacy and to protect against an accusation of racism, he cites the now-famous comment some years ago by the Rev. Jesse Jackson, who admitted that when he walks by young men on a dark street, he is relieved when he sees that they are white. "Apparently," wrote Mr. Wambaugh with sarcasm, "when Mr. Jackson goes for a stroll, he finds racial profiling to be a prudent exercise."

Faulty Conclusion

Mr. Wambaugh, however, draws the wrong conclusions from Mr. Jackson's candid admission. It may be true that, statistically, violent crime is more associated with black than with white males. It may be understandable that a person, black or white, may proceed with more caution in the presence of a group of young black males on a dark street. Human nature will be human nature, and intuitive judgments will depend heavily on the realities of the street.

Race-profiling, however, presents a different issue: the extent to which gov-

A police officer is entitled to his view of what is 'realistic' but not to harass a citizen on the basis of 'instinct.'

ernment officials (including police) should be free to enforce laws—in a society dedicated to the 14th Amendment's mandate entitling citizens to the "equal protection of the laws"—so that an individual is treated badly not because of his actions, but because an officer views him as belonging to a group prone to crime.

An officer is entitled to his view of what is "realis-

tic," but he is not entitled to interfere with the freedom of a black citizen on the basis of nothing more than fear fueled by instinct about group propensities. Indeed, it would be an unconstitutional violation of the officer's liberty to maintain his own inner conscience and world-view to force him to engage in "sensitivity training" in an effort to alter such a view. However, he is not entitled to stop a motorist or pedestrian on account of race, and his training should make this clear.

If the officer feels threatened on the street, he may choose not to turn his back on someone he distrusts for whatever reason. He is not, however, free to force a black citizen to lie spread-eagled to be searched where he would not subject a white to such an indignity. This is the beauty of the 14th Amendment. Its Due Process Clause protects the right of police officers and other citizens to hold whatever views they wish, while the Equal Protection Clause insists that those exercising state power enforce the laws on individuals as individuals, not as statistical representatives of their perceived groups. □