

PROFILING - ON LINE

PRESENTED BY:

DPS – Law Enforcement Academy
Santa Fe, New Mexico

Date: _____

INSTRUCTIONAL GOALS:

- 1) This course will provide officers with a legal knowledge of profiling.
- 2) Officers will learn how to avoid profiling or allegations of profiling.
- 3) How to reduce lawsuits with a better understanding of the Fourth Amendment.

INSTRUCTIONAL OBJECTIVES

- 1) Using a scenario to better understand reasonable suspicion and probable cause.
- 2) How to articulate (justify) reasons for a stop or detention.
- 3) How to articulate for an “officer safety” search or pat down.
- 4) How to articulate for asking for consent to search.
- 5) Know the relationship of the Fourth Amendment and profiling.
- 6) Understanding legal definitions that will assist courtroom testimony.
- 7) Learn the legal definition of profiling as it applies to stops and pat downs.
- 8) Learn the legal definition of profiling as it applies to vehicle stops.
- 9) Use an example of a city to understand how profiling happens.
- 10) Identify different kinds of profiling.
- 11) The importance of using integrity to avoid profiling or allegations of profiling.
- 12) How a police department can develop a plan to avoid profiling.

ESTIMATED TIME: Two to eight hours

PREPARED BY: Legal Instructor
Department of Public Safety
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APPROVED: _____
(DATE)

ACCREDITATION NUMBER _____

INFORMATION FOR INSTRUCTORS

- This outline has been used in New Mexico and other states for a number of years. Case law cited is New Mexico law. Instructors in other states may wish to use their own case law.

INTRODUCTION

Profiling? Sounds like a guilt trip. It may be but that's not what this class is about. Nor is it about cultural awareness, sensitivity or diversity. These are important classes but we will be looking at profiling from a legal perspective, especially the Fourth Amendment.

THE NEED TO DISCUSS PROFILING

- No department sets out to practice profiling. And yet some officers – and this has happened many times – profile people without even being aware of it. Profiling . . . it's not what you think. Our goal is to make people aware of what profiling is.
- Why do we want to avoid profiling? Because it's the right thing to do. It's also good policing.

OTHER POLICE DEPARTMENTS DIDN'T ANTICIPATE THE CHALLENGE OF PROFILING . . . AND THE CONSEQUENCES

- Profiling as a criminal offense
In a number of states an officer can be charged with the misdemeanor offense of profiling.
- Data Collection Requirements
A number of states and cities require extensive data collection by police officers each time there is an encounter with a citizen. Some officers believe this may reduce the effectiveness of community policing.
- Lawsuits and Financial Liability
In 2001 the New Jersey State Police paid out twelve (12) million dollars in a profiling lawsuit. That same year the Hobbs (New Mexico) Police Department paid out over \$600,000 in a class action lawsuit by the ACLU.
- Where is Hobbs? It's located in south eastern New Mexico, near the Texas border, with oilfields nearby.
- Hobbs did not have a bad or indifferent police department. In fact, as we shall see, Hobbs was doing what police departments across the country were doing. Learning from these police departments, learning from Hobbs, can help us avoid profiling or the allegations of

profiling.

COMING ATTRACTIONS

- First, a discussion of Hobbs, New Mexico.
- Next, using case law, we will review the Fourth Amendment, especially stops, pat downs, and the legal standard of reasonable suspicion.
- Last, a discussion on profiling.

And now to Hobbs, New Mexico . . .

The following is from the Albuquerque Journal, May 11, 2001:

HOBBS POLICE, ACLU SETTLE DISCRIMINATION SUIT

MINORITIES CLAIMED MALICIOUS PRACTICES

The American Civil Liberties Union and the Hobbs Police Department this week settled a class-action lawsuit that alleged widespread discriminatory practices against minority residents.

The lawsuit, filed in March 1999 in federal court in Santa Fe, alleged that Hobbs police used excessive force, warrantless searches and maliciously filed false charges against residents to the point that black residents became “afraid to walk down the street or sit on their porches.”

The settlement agreement . . . requires the Hobbs Police Department to pay \$605,500 in damages.

Plaintiffs’ lawyers viewed the settlement . . . as vindication for Hispanic and black residents who had endured an alleged “campaign of intimidation.”

But Hobbs Police Chief Tony Knott said . . . the settlement was “a financial, a business decision” intended to avoid paying legal fees that could have exceeded \$1 million if the lawsuit dragged on and Hobbs lost even a few of the allegations.

But Santa Fe attorney Daniel Yohalem characterized the settlement differently, praising the seven plaintiffs who “heroically came forward . . . to address the widespread terror and intimidation felt by minority Hobbs residents in the 1990’s.”

And Peter Simonson, executive director of the state chapter of the ACLU, called the case the “biggest” the organization has handled in New Mexico in terms of its impact on a community. Albuquerque Journal, May 11, 2001.

The final agreement was approved a month later. It required:

- Officers to receive 40 hours of training a year on proper arrest procedures.
- Department must improve its procedures regarding the use of force, detentions, searches, seizures and arrests.
- Must keep statistics on the conduct of individual officers and the race of residents for field contacts and detentions. Albuquerque Journal, June 22, 2001.

NOTE: The consent decree was supposed to last for three years. It ended up lasting seven years.

News item: To'hajiilee (Navajo) players settle lawsuit against police

Albuquerque, N.M. Navajo basketball players singled out for a state police search during a high school tournament in 2006 have settled their lawsuit for \$95,000. The American Civil Liberties Union filed the federal lawsuit in 2007, alleging the search violated the constitutional rights of the nine players.

The lawsuit against the state Department of Public Safety contended officers conducted an unlawful search and seizure. KOB.com, November 27, 2008.

PROFILING AND THE FOURTH AMENDMENT

INTRODUCTION

- The most effective way to avoid profiling allegations – and lawsuits – is to understand the Fourth Amendment, especially reasonable suspicion.
- Peter Simonson, Executive Director of the ACLU in New Mexico, has said:

“When people are being stopped . . . simply because of their national origin or background without any suspicion of criminal . . . involvement, that is the definition of racial profiling. Race is no substitute for **reasonable suspicion** of a crime.” Albuquerque Journal, November 29, 2001.

WHAT HAPPENED AT HOBBS

- Hobbs is helpful because it shows what profiling is all about. A young male African American was arrested for disorderly conduct. This led to tension between some African Americans and the Hobbs Police Department.
- Some Hobbs police officers began stopping African Americans without reasonable suspicion. African Americans were patted down without reasonable suspicion they were armed or dangerous.

- Statistics indicated that an African American was much more likely to be stopped or patted down without reasonable suspicion than members of other groups. This is what led to allegations of profiling.

In the following section, we will discuss:

- The difference between reasonable suspicion and probable cause.
- Cases involved in stopping (detaining) people.
- Cases about stop and frisk (pat downs).
- Cases about vehicle stops and searches.
- Cases about what kind of questions can be asked on a traffic stop.

The strong relationship between reasonable suspicion and profiling will become apparent as we go along.

THE FOURTH AMENDMENT: FROM CITIZEN ENCOUNTER TO ARREST

<u>Police-citizen Encounter</u>	<u>Stop</u>	<u>Pat down</u>	<u>Detention</u>	<u>Arrest</u>
No fourth amendment.	Need	Reasonable suspicion		Need
Officer can always approach a citizen.	reasonable suspicion.	person is armed or dangerous.		probable cause.

REASONABLE SUSPICION AND PROBABLE CAUSE

- What is the difference between reasonable suspicion and probable cause?
There is a lot of confusion. That's because the legal definitions of reasonable suspicion and probable cause leave a lot open to interpretation.

Goal:

We're going to go into extensive detail to understand what reasonable suspicion is. The reason for this is that to understand profiling we need to understand reasonable suspicion.

- The following example may provide a good way to understand these terms.

EXAMPLE

Suppose it's now 2:00 in the morning and we're in a classroom. There is a strip mall across the street. One of the businesses sells televisions and DVD's and so forth. The business is now closed. The area we're in has a high crime rate, especially burglaries.

NO SUSPICION

We look out a window. In front of the strip mall, we see a young man walking across a well-lit parking lot. What is going through your mind at this time?

- Would you question him? (yes, can ask questions during a consensual encounter)
- Can you ask for ID? (yes, can ask for ID during a consensual encounter)
- What if he refuses to give you ID (unless there is reasonable suspicion to detain, nothing)
- Can you arrest for concealing ID? (unless there is reasonable suspicion to detain, no)
- Can you stop (detain) him? (unless there is reasonable suspicion, no)

Note:

In a consensual encounter (where the other person is free to leave), an officer can ask questions and for ID. At this point, however, we do not have reasonable suspicion to detain the young man.

He may decide not to answer questions, not to provide ID, and walk away. If so, we have no authority to stop him or arrest him for concealing ID.

REASONABLE SUSPICION

It's still 2:00 o'clock in the morning. You look outside and see a car in the well-lit parking lot. The business alarm has gone off. A young man, standing near the car, has just closed the car door, and is walking away. You notice a broken window in front of the business.

- What is going through your mind at this time? (could be a burglary, possibly vandalism)
- Would you arrest the young man? (no)
- Why not? (do not have probable cause to arrest nor do we know what the charges are)
- What do you do now? (stop the person and investigate)

But to stop someone to investigate, to stop someone to the point they're not free to leave, we need more than intuition, a hunch or a gut feeling. We need a reasonable suspicion that a crime has occurred, is occurring or is about to occur.

We're suspicious, of course. But it's not enough to say this looks suspicious. Is our suspicion reasonable? Justify your answers. **Articulate your reasons.**

- 2:00 o'clock in the morning.
- Business closed.
- Broken window.
- Man walking away from the only vehicle in the parking lot.
- Alarm is going off.

Do we have reasonable suspicion to stop this person? (Yes)

Do we have enough probable cause to arrest this person? (No)

A simple, common sense definition of reasonable suspicion

You have a **suspicion and it's reasonable** that this person has done a crime or is involved in a crime.

PROBABLE CAUSE

You've concluded that sufficient reasonable suspicion exists to stop this person. But you don't feel we have enough to arrest him. To arrest someone, you need probable cause. We will now try to understand probable cause.

But first: What factors would lead you to arrest this person?
What kind of police investigation would you do?

Logically, there are three ways to approach this crime scene:

- Approach the business.
- Approach the vehicle.
- Approach the person.

Business

- Your partner stays with the subject near the vehicle.
- You notice fresh blood on the window sill, torn clothing and a partial footprint.
- A cinder block is on the floor. The window has been broken from the outside.
- You look inside the business and no one else is there.
- You see a row of TV sets. In the middle of the row one box is missing.

Vehicle

- What do you think you're going to see when you look in the vehicle? (a television set!)
(you also notice fresh blood on door handle and on television set)
- What do you do about the license plate? (comes back not stolen, from the other side of town)

Person

- How do you go about the investigation of the person?
- What observations will you make about the person?
(fresh cut of blood on hand, torn clothing, shoes that match partial print at scene)
- What kind of questions will you ask?
(this may be the only time to ask the suspect questions)
- The vehicle is registered to him but he lives on the other side of town.
- He tells you he is looking for a friend but doesn't know where the friend lives.
- He cannot explain the television box in the back seat of his vehicle.

Given the above factors, do we have enough to arrest him? (yes)

A simple, common sense definition of Probable Cause

A crime has been committed and this person "probably" did it. The key word is "probably"; this person more likely than not "probably" did the crime.

The difference between reasonable suspicion and probable cause

An easy way to remember the difference:

Reasonable suspicion is when you arrive at a crime scene,
probable cause is when you leave a crime scene.

We will discuss a number of legal scenarios. These are actual cases.

WHAT IS NEEDED TO STOP SOMEONE, TO DO A PAT DOWN?

A definition of a pat down

- A “frisk” or feeling of the outer garments of an individual with the sole purpose of detecting a weapon.

FACTS:

The Terry stop. Stop and frisk, a pat down, a Terry stop . . . it’s all the same thing. Mid-afternoon, October, downtown Cleveland Ohio. A police officer is standing inside a building, across from a jewelry store. He observes two men walk up to the jewelry store (which is open), look in, and continue walking. They come back and look in the window again. They do this about a dozen times. Soon they talk to a third man. All three men are wearing heavy coats. The officer suspects a robbery is about to take place. He confronts them and asks for ID. One of them starts mumbling and the officer pats them down. On Terry he finds a firearm. Terry v. Ohio (1968)

- Is this a good stop? Is this a good pat down?

ANSWER:

We need to look at this in two steps: (1) is this a good stop? (2) Is this a good pat down?

- 1) The stop was good. The officer had reasonable suspicion that a robbery was about to occur.
- 2) The pat down was good.

However, it’s not enough to say the subject was patted down because of “officer safety.” We need to go into more detail, to articulate our reasons for the pat down.

ARTICULATE REASONS FOR PAT DOWN: mumbling, heavy coats, robbery

What is the significance of “mumbling”?

It suggests the person may be advising the others how to jump the officer or make an escape. It also suggests intoxication or drugs which can lead people to do irrational things.

What is the significance of the heavy coats?

The heavy coats were out of season for an autumn day. They can be used to carry weapons or stolen jewelry.

What is the significance of robbery?

In New Mexico robbery can be charged two ways: (1) robbery and (2) armed robbery. Robbery is a potentially violent crime.

Advantages and disadvantages of Terry v. Ohio

Before 1968, an officer didn't need a reason to pat someone down. After Terry v. Ohio, when an officer needed reasonable suspicion, more people began carrying firearms. Many believe cases like Terry v. Ohio led to an increase in violent crimes.

But there is another side to this. The Supreme Court, in Terry v. Ohio, noted that African Americans were often patted down for no reason at all. When officers pat people down who belong to a certain group, and there is no reasonable suspicion, we have profiling.

Following reasonable suspicion guidelines helps to avoid profiling and allegations of profiling. It also helps to improve police-community relations.

Note:

Loitering laws were also declared unconstitutional about the same time. These laws were vague; what is loitering anyway? Also, it was used mainly against – you guessed it – minorities, people in a certain part of town, young males, etc.

You still see NO LOITERING posted on signs. However, in small print, it will refer to trespassing.

Patting down gang members

In the early 1990's approximately 75,000 people lived in an area of Albuquerque known as the "war zone." It had the highest crime rate in New Mexico, with over thirty (30) homicides in one year. Crack cocaine was popular. Gang members were highly visible and often carried guns for "protection." Neighborhood associations were frustrated about crime being out of control. The following case is interesting.

FACTS:

Two Albuquerque Police Department (APD) gang unit officers were walking in the Trumbull park area, located in the heart of the "war zone." On a city sidewalk, less than a block away, the officers saw three males walking towards them. One male was a known gang member and drug dealer. In the past, when they saw him, the routine was to stop and frisk him. All three males were searched. On one person cocaine was found. State v. Jones (1992).

- Is this a good stop? (no)
- Is this a good pat down? (no)

ANSWER:

The prosecution (and others) argued that strong measures were needed to reduce crime.

But the Court of Appeals disagreed. It held the stop was unlawful and ordered the evidence (cocaine) suppressed. The officers had only generalized suspicions about gang members committing crimes. It's not illegal to be a gang member.

There must be a particularized reasonable suspicion that a person is involved in a particular crime. There was nothing connecting this individual to a particular crime except for being a gang member. State v. Jones (1992).

Lesson learned:

- Need to articulate or list reasons why a person is stopped (detained) and why a person is patted down.
- APD now uses reasonable suspicion as a guideline to stop (detain) people.
- Another option for officers is to ask for consent to do a pat down. A high percentage of people will agree to a pat down.
- One result of these changes is that people don't feel they're being targeted because they live in a certain part of town or belong to a certain group.

A justification for a pat down

FACTS:

Officer in Lea County was dispatched to a robbery in progress at a convenience store. There was no robbery but the clerk was very upset. A man, very intoxicated, found he didn't have enough money to pay for items. He cursed and harassed the poor clerk, and walked away. The officer stopped him outside the store.

His intoxication was enough to qualify him for protective custody. The officer knew the man and his record, including prior arrests for disturbances. The man became evasive, moving his arms around, causing the officer to be uneasy about his intentions. A pat down uncovered a pistol. He was charged with felon in possession of a firearm. State v. Haddenham (1990).

Is this a good pat down?

ANSWER: Yes

ARTICULATE (OR JUSTIFY) REASONS FOR THE PAT DOWN

- Person was acting evasive, moving his arms around.
- Officer knew that subject previously had been arrested for disturbances.
- A person highly intoxicated is likely to do irrational things.

Reminder:

- Articulate reasons in the complaint or statement of probable cause and also the police report. Officers need to articulate (give reasons) why a stop or pat down is made
- Another reason to articulate reasons for doing what you do becomes apparent at trial. When you testify, and mention a number of important facts never mentioned before, the opposing attorney is going to use this to challenge your credibility as a witness.

Need to be careful about using “officer safety” to justify a pat down

FACTS:

Hobbs, New Mexico. Officer A stopped offender for speeding (41-25) and smelled marijuana in the vehicle. Upon being asked, offender said he had a rifle in his vehicle and a pocketknife on him. He was acting “real nervous and fidgeting.” After getting consent to search the vehicle, Officer A performed a pat down but didn’t find anything. Eighteen minutes later, with the offender standing next to him, without handcuffs, Officer B arrived.

Officer A searched the car but didn’t find anything. Officer A suspected Offender had drugs and asked Officer B to do a pat down. Officer B saw a bulge in offender’s sock and found methamphetamine. Officers testified at a motion hearing that the purpose of the second pat down was officer safety. State v. Pierce (2003).

- The first pat down was good. What about the second pat down?

ANSWER:

Court of Appeals felt that the motivation for the second search was not officer safety but to look for drugs. Evidence suppressed.

Reminder:

The purpose of a pat down is to look for weapons only. If during a pat down drugs are found, and it’s immediately apparent that the items are drugs, it’s admissible. But if an officer is looking for evidence during a pat down, as happened here, it will be inadmissible.

VEHICLE STOP: QUESTIONS

A review of what kind of questions to ask on a routine traffic stop

Sometimes an officer asks questions on a routine traffic stop that leads to the seizure of contraband. One surprise for officers is to find that it was “one question too many” and the evidence is suppressed. The following situations provide some guidance for us.

FACTS:

Officer in San Juan County stopped Defendant's vehicle for littering. While doing a warrants check, he asked Defendant if he had any guns, alcohol, or illegal drugs in the car. It was a routine question: the officer did not have any reason to believe Defendant had contraband in his car. Defendant gave consent to search his car. In a cigarette package, the officer found several rocks of crack cocaine. State v. Taylor (1999)

- A routine traffic stop. Will the evidence seized be admissible?

ANSWER:

Court of Appeals held the questions were improper and suppressed the evidence. The scope of an officer's activities during an investigative stop is limited by the facts giving rise to the officer's reasonable suspicion.

We would expect the officer to ask questions about littering and the traffic stop. But the officer went beyond the scope of the investigation in asking about illegal drugs and alcohol. These questions had nothing to do with the stop. Additional questions become permissible only when additional facts support them.

Lesson learned

A routine traffic stop, unless there is more, should not escalate into a search for drugs. Numerous studies indicate that "minorities" are asked these questions – even when there is no justification to do so – more often than other groups.

Note:

Some may ask, "Why are we covering all these legal cases? What do they have to do with profiling?" This case gives an indication of where we're going. It will soon become clear that these cases are the heart of profiling.

FACTS:

A Quay County Deputy stopped Defendant for driving without a seat belt. It was a routine traffic stop and Defendant was requested to furnish his driver's license and registration. The deputy also asked Defendant if he had any weapons and conducted a pat down search. A vial of methamphetamine was located in one of Defendant's front pockets. State v. Chapman (1999)

- Are these questions appropriate? Will the evidence be admitted or not?

ANSWER:

In this case the evidence was admitted. That's because the officer added the following: the Defendant did not make eye contact, even at the beginning of the stop. Defendant was unusually nervous and his hands were shaking. These facts justified the additional questions.

Reminder

The reasonable suspicion for a stop or a pat down must go into the complaint/statement of

probable cause and the police report. It doesn't help an officer to testify on the stand months later about important details that were never noted prior to taking the stand.

A good example of how an officer articulates why he or she does something

FACTS:

A state police officer stopped a car on State Road 26 (the Deming-Hatch bypass) for improper display of a temporary tag. He noticed several items in the car: a cell phone, a two-ton car jack, an overnight bag, and the odor of gasoline. There were numerous problems with the bill of sale. The driver was very nervous. Asked about travel plans, the driver and passenger had different stories. All these facts were noted in the complaint/statement of probable cause.

After giving her a citation, the officer asked for consent to search her car. After consent, the officer placed a fiber optic scope in the gas tank and observed numerous bags of marijuana. Supreme Court, based upon the facts given by the officer, held that the questions were appropriate. State v. Duran (2005)

Lesson learned

- This case, and others, point out the need to articulate the reasons we ask drug-related questions on a routine traffic stop.
- If a lawyer can get evidence suppressed at a pre-trial motion hearing, the case will usually be dismissed. That's why so many search and seizure issues are heard at motion hearings.

Asking a passenger in a vehicle for ID

FACTS:

Shortly after midnight, in Chaves County, an officer stopped a vehicle for a faulty license plate light. Asking for ID from the driver was proper but what about the passenger? There was no suspicion that the passenger was involved in criminal activity (or armed or dangerous) but the officer asked him for his ID. After doing a warrants check, he learned that the passenger had a warrant. Upon arrest, and while doing a pat down, the officer found methamphetamine and drug paraphernalia. State v. Affsprung (2004).

- It was a very simple question, asking for ID. What's going to happen in this case?

ANSWER:

Court of Appeals suppressed evidence. If we have a consensual police-citizen encounter, where a citizen is free to leave, an officer can ask for ID. But this was more than a consensual police-citizen encounter; it was an investigatory detention. Even though the officer was pleasant and the passenger voluntarily provided information, the passenger was still being detained.

With no reasonable suspicion regarding criminal activity on the part of the passenger, and

no particularized concern about his safety, the officer had no legitimate basis to ask for ID for the purpose of checking for a warrant.

SOME THOUGHTS ON THE FOURTH AMENDMENT AND PROFILING

- The bottom line in all these cases is that we should not use generalizations to stop people or pat them down or ask to search their vehicle on a routine traffic stop.
- Instead, an individualized reasonable suspicion is required to stop someone or do a pat down of someone. If we ask questions unrelated to a traffic stop – “Don’t mind if I search your car, do you?” –we have to articulate why we’re asking these questions.
- As we continue, it should become evident that the best way to avoid profiling allegations is to follow the Fourth Amendment.
- To gain a better understanding of what profiling is, it would be helpful to look at some words.

PROFILING AND THE USE OF WORDS

INTRODUCTION

A number of years ago a book came out called Men are from Mars, Women are from Venus. The theme of the book was that men look at something and see one thing and women another. Officers who go to court quickly learn that words have one meaning for civilians and officers and another for lawyers and Judges.

In this section we will see how lawyers and police officers interpret words in different ways. By comparing the two different versions, we’ll begin to appreciate what profiling really is. And there’s no need to state the obvious: lawyers and Judges have the final say on this.

STOP

Police and Civilians

Lawyers and officers use the word STOP in different ways. An officer will say, “I stopped Ms. Garcia in the hallway and talked to her.”

To officers and civilians, this can have a different meaning: it may mean an officer stopped Ms. Garcia and she was free to leave or it may mean the officer stopped Ms. Garcia and she wasn’t free to leave.

Lawyers and Judges

To lawyers and Judges, STOP has only one meaning: the person was detained and not free to leave. The legal standard required to stop someone is reasonable suspicion. If we stop someone and they’re not free to leave, and there is no reasonable suspicion, the stop will be

invalid.

Recommendation to Officers

If we stop someone to talk to them, and they're free to leave, we need to make this clear to the court. STOP means not free to leave. More helpful words might be:

- Approach - free to leave
- Made contact - free to leave
- Consensual encounter - free to leave

SUSPICIOUS - REASONABLE SUSPICION

Police and Civilians

You're on the witness stand. How would you answer the following questions?

- “Officer, could we agree that you stopped my client because you had a hunch he was involved in criminal activity?”
- “Officer, would it be fair to say that you stopped my client because you had a gut feeling she had just committed a crime?”
- “Officer, isn't it true that you stopped my client because you felt things looked suspicious?”
- Many officers use these words to describe why they stopped someone. But if you use these words, if you answered yes to any of the above, it may mean dismissal of the case.

Lawyers and Judges

- Why a dismissal? Because lawyers and Judges know that an officer needs reasonable suspicion to STOP someone. Anything less (a hunch, a gut feeling, it looked “suspicious”) is not enough. To justify a STOP, we must have something more: **reasonable suspicion.**

OFFICER SAFETY AND PATDOWNS

Police and Civilians

- Officers in court say it all the time, “I patted him or her down for officer safety.” It seems to have a plain meaning: the officer patted the person down because of concern for his or her safety. But using “officer safety” may mean dismissal of a case.

Lawyers and Judges

- Lawyers and Judges know that the legal standard to pat someone down is a reasonable suspicion that the person is armed and dangerous.
- Lawyers and Judges are not satisfied with the phrase “officer safety” standing alone. They believe it’s a conclusion and an officer will use – or abuse – the phrase to justify every pat down.
- If an officer is going to use the phrase “officer safety,” it’s important to articulate specific facts or details that support his or her conclusion. For example, “I patted the person down for officer safety because he or she was a suspect in a crime, highly intoxicated, acting evasive, and would not make eye contact with me.”
- This is another example of where a word or expression means one thing to officers and another to lawyers and Judges. But an even better example of how a word can mean different things to people comes when we look at profiling itself.

PROFILING - DIFFERENT THINGS TO PEOPLE

Police and civilians

- When we mention profiling, many officers and civilians think of racism. In other words, police officers targeting a particular group because of prejudice or bias.
- Yes, those officers exist, and it is painful when a department is confronted with the actions of this kind of officer. Fortunately, this is the rare exception to the professionalism we’ve come to expect from a modern police department.
- At police briefings one simply doesn’t hear about officers targeting or going after a certain groups of people. It is highly unusual for one officer to make ethnic or racial slurs about another person or group of people.
- But, one may ask, if racism is so rare, why is it that the great majority of police departments that have been sued for profiling have either lost or were forced to settle the lawsuit?

Answer:

Profiling, to an extraordinary degree, is about reasonable suspicion, not racism.

Lawyers and Judges

- Reasonable suspicion is a useful guideline to determine if profiling exists. If we have reasonable suspicion, and can articulate our reasons, we can stop (and detain) people. If we have reason to believe someone is armed and dangerous, we can do a pat down.

- Having reasonable suspicion, and articulating it, means we don't have to worry about profiling. If we have reasonable suspicion and the next one hundred people we pat down are white males, it doesn't matter. As long as we articulate the reasons for a stop or a pat down, we need not be concerned with what group the person belongs to.

SO WHERE DOES PROFILING COME IN?

- If we're stopping (detaining) people or doing pat downs **without** reasonable suspicion, and a disproportionate number of these people are members of certain groups, we may be guilty of profiling.
- Example: In Hobbs, New Mexico, as noted before, there were bad feelings between some Hobbs police officers and the black community. Some officers began stopping African Americans without reasonable suspicion. Sometimes they did pat downs of African Americans, again without reasonable suspicion.
- Remember, we're only concerned with the bad stops, the bad pat downs, where an officer is unable to articulate why he or she did a particular stop or pat down.
- Suppose Hobbs is 10% African American yet it can be shown that 30% of the **bad** stops and/or pat downs in Hobbs occurred among African Americans. Would this be profiling? (yes)

Note:

What occurred in Hobbs was also occurring in many other cities and towns.

IS THERE MORE THAN ONE KIND OF PROFILING?

- In addition to ethnic and racial profiling, there are other kinds of profiling: age, geographic (a certain part of town), economic, gender, and so forth.

WHAT KIND OF OFFICER IS INVOLVED IN PROFILING?

Numerous studies have been made about the kind of officer involved in profiling.

- Many people assume that "white" officers do all the profiling. And yet, under the legal standard of stopping and patting people down without reasonable suspicion, we find that it's often "minority" officers who profile people within their own group.
- Another surprise is learning what **kind** of officer profiles others. It turns out that a number of officers involved in profiling are outstanding officers. They are pro-active, responsive to the community, and want to fix things. Their actions become profiling, however, when they are unable to articulate the basis for a stop or pat down.

Lesson learned

Profiling is seldom about racism. It can – and does – involve so-called “minority” officers and also some of our most productive officers. The remedy is to articulate reasonable suspicion in the criminal complaint or statement of probable cause for each stop or pat down. That’s why we have spent so much time discussing reasonable suspicion.

VEHICLE STOPS AND PROFILING

Police and Civilians

This is another example of how police officers and civilians differ from lawyers in how they see things. Police officers are surprised to be accused of profiling when stopping vehicles.

- Officers note that in the great majority of vehicle stops the identity of the driver is unknown until the vehicle is stopped. As one officer put it, “a radar gun doesn’t discriminate.”

Lawyers and Judges

When lawyers and Judges refer to vehicle stops and profiling, their focus – unlike police officers – is what happens after the stop. They’re likely to ask these questions:

- Are “minority” drivers and passengers more often asked to exit the motor vehicle?
- Are “minority” occupants more often asked questions not related to the vehicle stop?
- Are “minorities” more often asked for consent to search?

Lesson learned

By now, looking at these questions, you may see a pattern: the need to articulate why we do what we do. If it’s a routine stop and you’re asking questions about drugs, it’s important to articulate why you’re asked those questions. Officers need to articulate (give reasons) why a pat down of a particular person was done. It’s good police work and avoids allegations of profiling.

IS YOUR DEPARTMENT INVOLVED IN PROFILING?

The “stats” don’t look too good for law enforcement

For vehicle stops, in state after state, survey after survey, it’s clear that “minority” occupants are far more likely to be asked questions unrelated to the stop or asked for consent to search their vehicle.

The majority of police officers usually answer yes to the following questions:

- Are officers more likely to search vehicles of young people as opposed to senior citizens?
(without reasonable suspicion) (yes)

- Are officers more likely to pat people down in one part of town than another?
(without reasonable suspicion) (yes)
- Are officers more likely to stop (detain) males as opposed to females?
(without reasonable suspicion) (yes)

Officers doing this, even if members of the same group of the person being questioned, stopped or patted down, may face allegations of profiling.

WHAT IS THE SOLUTION . . . IF THERE IS ONE?

- The majority of police officers acknowledge that profiling is going on. Once we know what it is, the good news is that it's easy to avoid profiling.
- One obvious solution is to articulate individualized reasonable suspicion when we stop (detain) people or do a pat down. We should also articulate why we ask drivers and passengers certain questions.
- We need to articulate reasons in the criminal complaint or statement of probable cause that justify our actions.
- Not only is this good police work but it also goes directly to the question of profiling.

PROFILING AND OBSERVATIONS

By now, we have an understanding of what profiling is. Answering the following questions will give us even more insight.

- September 11, 2001. New York City, the World Trade Center. When it happened, based upon your immediate impression, what did you think the people who did it would look like? (Middle Eastern)
- Newspaper headline says a serial killer who has killed over thirty (30) women in the past ten years has been apprehended. What is your immediate impression of what that person looks like? (white male)
- The radio announces there has been a high school shooting involving students. Males? Race? What is your first impression? (white male)
- Pedophile who has molested numerous children has just been arrested. What do you think the person looks like? (white male)

ANSWER:

Some people confuse observations with profiling. For most of us, the answer to the above questions (except the first) will be white males. It doesn't mean that all white males are involved in these crimes nor does it mean that only white males commit these crimes. But for some reason, and we don't know why, white males are greatly over-represented in these crimes.

The difference between observations and profiling

- It's okay to have observations about groups of people. Some groups are over-represented: over ninety percent of robbers and burglars are males, few senior citizens commit crimes, serial killers tend to be white male, etc.
- There are many different theories but we don't know why certain groups are over-represented for certain kinds of crimes.
- However, we don't stop people based upon our observations, our generalizations, or our stereotypes. We may have these **observations** but that's not why we stop people.
- We stop (detain) people or do pat downs based upon individualized reasonable suspicion. Yes, we do profile. But we don't profile groups, we profile **criminal behavior**.
- Example: A nervous traveler buys a roundtrip airline ticket from a drug source city to a distribution hub with only hours before the turnaround. He or she pays cash and carries no luggage. This fits a courier profile known to well-trained narcotics investigators, justifying an investigative detention.

Observation:

"I hate to admit it, but I have reached a stage in my life that if I am walking down a dark street late at night and I see that the person behind me is white, I subconsciously feel relieved."

- - Rev. Jesse Jackson

Reminder:

Some officers worry that if they work an area of people belonging mainly to one group that they will arrest people mainly belonging to that group. But remember: if you have reasonable suspicion to stop and probable cause to arrest, the numbers will not be an issue.

PROFILING AND INTEGRITY

The following case is helpful in understanding profiling. What would you have done differently?

- Mr. Martinez sold a large quantity of drugs to an undercover officer near Gallup, New Mexico. Gallup is a historic town near the Arizona border. The case was heard in federal court. One other fact: based upon his appearance, there was no question that Mr. Martinez was Hispanic.
- The defense attorney was losing the case and was desperate. She asked the officer this

question: “Isn’t it true that the reason you arrested my client is because he is Hispanic?” The officer replied, and this was somewhat of a surprise, “I didn’t know he was Hispanic.” One could hear a pin drop in the courtroom.

- He was found not guilty. What do you think the jury was thinking? How would you have handled this question?

Recommendation:

- The officer, caught off guard, was nervous. The question implied he was profiling and arrested the defendant because he belonged to a certain group.
- The officer could have answered, “I know Mr. Martinez is Hispanic but the reason I arrested him was because he sold me a large quantity of drugs.”
- In doing so, the officer would be telling the truth. He also would be addressing the issue of profiling head-on; we stop people because we have reasonable suspicion to do so, we pat people down because we have reasonable suspicion to believe the person is armed and dangerous, and we ask additional questions because the facts justify doing so.

DOES THIS CLASS TEACH HOW TO PROFILE AND GET AWAY WITH IT?

- No. An officer who is racist or sexist will do what they want to do.
- For the rest of us, our goal is to be as professional as possible. Law enforcement is a noble profession and we’re proud of it. Part of our legacy, however, is that many police departments have profiled people in the past.
- Using reasonable suspicion and articulating why we do what we do is the most effective way to avoid profiling or allegations of profiling.

WHAT SHOULD A DEPARTMENT DO IF THERE IS PROFILING?

- In numerous polls a significant number of Americans believe profiling is going on. We also have comments from “minority” law enforcement officers who not only believe its going on but state they have been victims of it.
- An expression often heard is DWB: Driving While Black. It can also mean Driving While Brown.

- A Chief or Sheriff believes there is profiling going on. What should your department do?

ANSWER:

This involves many things, including diversity training and cultural awareness. But the heart of avoiding profiling relates to legal training, especially articulating facts and reasonable suspicion.

- How can a Chief or Sheriff set up a system to measure or detect profiling?

ANSWER:

Request that the District Attorney's office inform you of complaints and cases dismissed because of insufficient reasonable suspicion and probable cause. This will help you, as an administrator, to decide what kind of training to do.

The officer whose complaint or case has been dismissed should also be told. It will help that person learn from his or her mistakes.

News item: Cops still 'consent search' minorities' cars more often

A 2008 study on who gets pulled over by police shows once again that minorities are more likely to be the subject of consent searches in Illinois although police are more likely to find contraband in the vehicles of white drivers.

The ACLU as well as other civil rights groups have pushed for some time for the state to ban consent searches. www.chicagotribune.com, July 26, 2009.

PRESIDENT OBAMA, PROFILING & BEER

Note:

The following is an excellent case to understand and appreciate what profiling really is.

Facts:

In 2009 a police sergeant in Cambridge, Massachusetts (a city outside Boston) was dispatched to a possible residential burglary. Actually, the resident of the house, an African American and well-known Harvard professor, had just returned from China and found his door was jammed.

He was inside his house when the sergeant arrived. The professor showed the sergeant his ID but then became angry and accused him of racism. It should have been a routine call. The sergeant, however, arrested him for disorderly conduct. The charge was dismissed.

The professor said the incident was about racism, poor people and minorities.

The sergeant denied his actions were motivated by racism. Numerous police organizations supported him. Indeed, he had taught race profiling at the police academy for five

years with an emphasis on cultural awareness. The incident sparked an extraordinary debate on race profiling.

REACTION OF PUBLIC OFFICIALS

President Obama

President Obama and the professor are friends. Initially, he said the police “acted stupidly” in arresting a person in his own home who proved he lived there. Later, he said his words were ill-chosen and he didn’t mean to malign the sergeant or his department. A “beer summit” was held and both the professor and the sergeant were invited.

President Obama said the controversy showed that race profiling is a very sensitive issue. All parties agreed that lessons could be learned from the incident.

Reaction of General Colin Powell

Former Secretary of State Colin Powell (and a Republican) said he had been a victim of racial profiling many times. He noted that “there is no African American in this country who has not been exposed to this kind of situation.” He said the professor should have been more patient. He also faulted the Cambridge Police Department for escalating the situation by arresting and handcuffing the professor. CNN.com, July 29, 2009.

Reaction of African American leaders in Albuquerque

News item: Local Leaders Sound off on Gates Arrest

Joe Powdrell, coordinator for the African-American Alliance of New Mexico:

Powdrell felt everyone overreacted. He said he thought the officer went too far but the professor could have addressed his concerns better.

E. Lena Brown, president of the Albuquerque chapter of the NAACP:

“It could happen here. I’d like not to see it happen. I’m giving our police department the benefit of the doubt. Albuquerque Journal, July 30, 2009.

Note:

[Police agencies in Bernalillo County \(Albuquerque\) have had extensive training on profiling, with an emphasis on reasonable suspicion, since 2001.](#)

PRESIDENT OBAMA, THE PROFESSOR AND SERGEANT

Conclusions about Professor Obama, the professor, and the police sergeant

President Obama

- Many people felt President Obama's initial comments were not helpful. He agreed and his "beer summit" helped defuse the controversy.

The professor

- Many people felt the professor was wrong to accuse the sergeant of racism.

The sergeant

- But legally, it comes down to the sergeant. A person yelling at an officer inside his own house is not committing disorderly conduct. Regardless of the verbal provocation, the arrest was invalid.
- The disorderly conduct charge was immediately dismissed. Many people felt the professor had been arrested for being in "contempt of cop."
- Profiling? That probably depends on what group a person belongs to or their experiences with law enforcement. But with studies showing profiling going on across the United States, some people will find it in an incident like this.
- A number of people have noted, for example, that it's unlikely that a white professor in a similar situation (in his own house, yelling at an officer) would have been arrested.

HOW THIS SITUATION COULD HAVE BEEN AVOIDED

- The sergeant had taught race profiling (cultural awareness) for five years. But being aware that police come in contact with different groups, or that groups have differences, didn't help the sergeant here.
- Even people who believe the professor is at fault are troubled by the fact that he was arrested.
- If the sergeant had used the legal standard of reasonable suspicion and probable cause, the arrest and handcuffing would never have happened.
- If the professor had not been arrested, there would not have been a controversy.

Lesson learned:

Profiling is mainly about reasonable suspicion and probable cause. Following the legal standards is good police work and avoids allegations of profiling.

WHAT HAPPENS WHEN THE CHARGES OF PROFILING ARE BOGUS?

- Dr. Wen Ho Lee worked at the National Lab in Los Alamos, New Mexico – “the little town that won the cold war.” This is where they develop nuclear weapons.
- Dr. Lee removed forty hours worth of material from his computer over a period of seventy days. Even after losing his security clearance, he made numerous attempts to enter the weapon design area, including one trip at 3:30 a.m. on Christmas Eve.
- In his book, My FBI, former director Louis Freeh notes that, at the urging of Lee’s lawyers, several Asian American groups got involved. They began demonstrating outside the federal courthouse in Albuquerque. They accused the FBI of profiling.
- A decision was made (US Attorney) to reduce sixty charges to one count of mishandling public records. An upset Mr. Freeh observed “the gods of political correctness were satisfied.” How could this case have been handled differently?

ANSWER:

Assuming there was sufficient evidence, an argument could have been made that Mr. Lee was being prosecuted not because he is Asian American but because there was probable cause based upon the evidence.

PROFILING AND IMMIGRATION

News item: Roswell Won’t Detain Undocumented Immigrants

Roswell police have stopped detaining undocumented immigrants for the Border Patrol. Police Chief Rob Smith said that recent conversations with the Border Patrol and Immigration and Customs Enforcement cast doubt on the practice.

The legal people are saying, “Well, we’re not sure.” The American Civil Liberties Union has argued that holding undocumented immigrants without a criminal charge constitutes unlawful detention. Being in the country without proper documents is a civil violation.

Chief Smith added that the Roswell department has detained suspected undocumented immigrants since he became an officer 32 years ago.

Racial tensions were publicized after residents charged police with racially profiling Hispanics. Albuquerque Journal, May 29, 2009.

NOTE:

The profiling allegations in Roswell (and also tension in Farmington) led the state legislature to enact profiling legislation in 2009.

NEW MEXICO LEGISLATION ON PROFILING

The state legislature of New Mexico passed legislation in 2009 regarding profiling. Some highlights of the “Prohibition of Profiling Practices Act” are:

A law enforcement agency shall:

- Maintain written policies and procedures to eliminate profiling practices,
- provide training to officers during orientation and at least once every two years regarding profiling,
- investigate complaints of profiling,
- take appropriate measures to discipline officers involved in profiling, and
- submit a copy of the complaint and disposition to the Attorney General.

The Attorney General of New Mexico:

- Shall establish procedures for receiving and maintaining a record of complaints alleging profiling by a law enforcement agency,
- may initiate an investigation of profiling and take necessary actions as deemed appropriate, and
- may publish a report or summary regarding profiling.

CONCLUSION

- Your understanding of what profiling was before the class started and what it is now should be different.
- As police officers, we want to do the right thing. We don’t want a single person to believe that he or she is being stopped or asked questions because they belong to a particular group or live in a certain part of town.
- If we know what profiling is, if we recognize it, we can avoid profiling or allegations of profiling in the future.

