



## PROFILES OF DISCRIMINATION: A CRITICAL ARGUMENT AGAINST RACIAL PROFILING

Marco Goldini

### Resumen:

La conciencia de que la discriminación racial está convirtiéndose en un problema importante para la legislación antidiscriminatoria europea está creciendo, sin embargo, este es uno de esos temas cuya naturaleza está lejos de ser indiscutible. Este ensayo se propone presentar la idea de que la discriminación racial es (1) discriminatoria, (2) ineficiente y, lo más importante, (3) parte del proceso de racialización de ciertos grupos dentro de una sociedad. El ensayo propone un cambio en la comprensión de la cuestión a partir de una perspectiva de Teoría Crítica Racial (CRT).

### Palabras clave:

Discriminación, perfil facial, derecho europeo, Teoría Crítica Racial

### Abstract:

The awareness that racial profiling is becoming a major issue for European antidiscrimination law is growing, yet this is one of those issues whose nature is far from undisputed. This essay intends to put forward the idea that racial profiling is (1) discriminatory, (2) inefficient and, most importantly, (3) part of the process of racialising certain groups within a society. The essay proposes a shift in the understanding of the question by adopting a Critical Race Theory (CRT) perspective.

### Keys words:

Discrimination, racial profiling, European law, Critical Race Theory.

The awareness that racial profiling<sup>1</sup> is becoming *de facto* a major issue for European antidiscrimination law is growing<sup>2</sup>, yet this is one of those issues whose nature is far from undisputed. First, the scope of profiles is rapidly increasing, including new and different factors such as culture and religion, not to mention other open source information available to governments; second, in Europe there is no legal definition of the practice and, until recently, there had not even been any public debate on the topic. Moreover, since Europe has seen mounting waves of immigration in recent years, and given the relevance of the issue in American legal scholarship, it is rather surprising how little attention this topic has received<sup>3</sup>.

This essay intends to put forward the idea that racial profiling is (1) discriminatory, (2) inefficient and, most importantly, (3) part of the process of racialising certain groups within a society. In historically racialised societies (like the US), racial profiling serves to enforce a specific social organisation along racial lines. In societies not explicitly built on racial or ethnic taxonomies, racial profiling becomes part of the strategy through which *de facto* differences among groups are established and enforced. In Europe, it is time to shift attention away from the discussion on the opportunity of using racial profiling in the enforcement of laws to the analysis of how this practice affects the legitimacy of European anti-discrimination laws. One cannot limit the discourse to the level of whether a certain kind of profiling is efficient and discriminatory because, as this paper hopes to highlight, this is methodologically reductive. When race is at stake, the focus should be shifted to the productive role of the law in the construction and in the preservation of racial taxonomies. Without taking the effects of all the various moments of the legal process into account (enactment and enforcement of laws), the impact the legal enforcement of racial profiling has on race cannot be brought to light. Only by focusing on the productive aspects of the enforcement of law can the limits of a formalist neutrality which reduces the question of racial discrimination to the formal respect of seemingly neutral laws be correctly determined.

In the first paragraph of this paper, I intend to focus on the definition of the practice of racial profiling by taking the American scenario as a reference point. This proves to be helpful for two reasons: first, because racial profiling was initially studied and formalised in the American debate; second, an understanding of the different role played by race in Europe and in the US is a necessary starting point to understand why this issue has been neglected for so long in Europe (Möschel, 2007). The second and third sections reconstruct the two most challenging arguments proposed in favour of the legitimacy of racial profiling and they expose their chief flaws, which are mainly, but not exclusively, related to their methodological approach. The fourth section proposes a shift in the understanding of the question by adopting a Critical Race Theory (CRT) perspective. Namely, the intention is to retrieve two foundational ideas taken from CRT, which may also apply to the European context. First, the idea that race is a social construction and law is part and parcel of this construction. Second, the critique of colour-blind (i.e. formally neutral toward races) methods of legal interpretation as a means

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<sup>1</sup> I will use the expressions racial and ethnic profiling interchangeably for stylistic reasons. The first expression is normally used in the US, while the second one is more common in Europe. On the history of the expression see Skolnic & Capovitz, 2001: 413-5.

<sup>2</sup> For an overview, see the report of Open Society Justice Initiative, *Ethnic Profiling by Police in Europe*, June 2005.

<sup>3</sup> In Spain, for example, a case concerning the constitutionality of racial profiling reached the Constitutional Court, which upheld the constitutionality of a stop and search performed by a police officer at a station on the basis of the mere element of race. See Tribunal Constitucional 13/2001 (known as Williams Lecraft Case).

for perpetuating the *status quo*. Through these lenses, a different light is shed on racial profiling. Its nature and its scope become much clearer. The role of law is also stressed as essential in the process of racialisation of which racial profiling is a constitutive factor. In light of the previous remarks, the last paragraph broaches the problem of legal remedies by trying to put forward a modest proposal of normative reform and a final cautionary note.

### I. The Definition of Racial Profiling

The term racial profiling was used for the first time in American legal practice. An established narrative fixes the birth of this technique as a development from the then already available tool of criminal profiling (Harris, 2002: 16-7). The latter is a method that helps identify criminals who have committed crimes through the construction of a profile based on a set of behavioural characteristics typical of the sort of criminals to be detected. It was only during the 1980s that this technique was further developed and employed as a predictive tool for fighting drug-related crime (ibid.: 26-7). Racial profiling was especially used by the police for stops and searches on highways in order to catch drug-couriers. Race resulted as a critical factor in the construction of the drug courier profile for two reasons. The first is that racial profiling seemed to be an efficient way of allocating limited law-enforcement resources; the second is to be found in the fact that the impact this practice had on some minorities would not have generated pressure to curtail police powers (Cole, 1999: 21-2)<sup>4</sup>. This is deemed to be a turning point in the history of profiling techniques, because it marks a shift from a descriptive to a predictive *telos* of the instrument (Harcourt, 2004: 1294). In other words, the focus is no longer on individual behaviour, but it denotes the activity of predicting possible future behaviours. For the sake of the argument put forward here, this turning point plays a major role since it is from this moment on that racial profiling becomes an incisive technique of control which can have a huge impact on certain racial groups. The shift from a reactive to a preventive approach has dramatically increased ethnic profiling as a method of selection for law enforcement scrutiny, in particular in the area of anti-terrorism policies (Moeckli, 2008: 200-10).

However, the definition of racial profiling is far from uncontroversial. Scholars have remarked that racial profiling occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating. The essence of racial profiling is a global judgement that the targeted group is more prone to commit crime in general, or to commit a particular type of crime, than other racial or ethnic groups (Gross & Livingstone, 2002: 1415)<sup>5</sup>.

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<sup>4</sup> The Supreme Court upheld the constitutionality of criminal profiling in *US v Sokolon*, 490 US 1 (1989).

<sup>5</sup> See also this definition: "The emerging consensus is that racial profiling constitutes the intentional consideration of race in a manner that disparately impacts certain racial minority groups, contributing to the disproportionate investigation, detention, and mistreatment of innocent members of those groups": Banks, 2001: 1077. However, despite Banks' definition, whether the presence of intentionality represents or not a constitutive part of racial profiling remains an open question. For a critique of Banks' definition see Wu, 2005.

To sum up, it is accurate to say that criminal profiling occurs when a public official enforces the law while making reference to a set of behavioural characteristics. When these characteristics include race or ethnicity as a factor, then it is correct to refer to this as racial profiling. One may distinguish between racial profiling *stricto sensu*, where the practice is intended to be delimited by the relationship between the police and some ethnic groups, and *lato sensu*, where the agents involved in the practice are not only public officials, but those who are involved in activities which might require taking into account the factor of ethnicity (doctors, for example).

One problematic aspect of the definition of ethnic profiling concerns the role played by the criteria of ethnicity, race, religion or culture in the formation of the profile. In the relevant literature and in jurisprudence, the most common position claims that racial profiling occurs only when race is the sole or the decisive criterion. According to the US Supreme Court, for example, racial profiling amounts to a discriminatory practice only when race is the only or the relevant element in the formation of the profile. On closer inspection, it becomes clear that when race or ethnicity appears in the list of elements comprising a profile, then they almost automatically become the critical elements. This is easily verifiable: compare the case of two people, with the same social condition, education, gender and religion, but of different race. It is clear that the latter feature will become decisive when an official has to decide whom to stop and search.

It is also controversial whether focusing on a single ethnic group because its members fit a description of a suspect constitutes a case of racial profiling or not. In this sense, the case of *Brown v. City of Oneonta* is paradigmatic. In that circumstance, an American court upheld as non discriminatory a police operation that involved the questioning of every young black male in a small town populated mainly by white people (Banks, 2004), on the basis of a description given by the victim of a crime which relied mainly on the colour and the age of an alleged thief<sup>6</sup>.

Before discussing the arguments in support of the legitimacy of racial profiling, it is better, in order to provide a more accurate representation of this practice, to point out two other sub-distinctions. Racial profiling can be formal or informal (Harris, 2002: 26-30). The first one occurs when it is established and disciplined directly or indirectly by legal authorities (De Schutter & Ringelheim, 2008: 362). Informal profiling is *de facto* profiling, applied by public officials on the basis of personal beliefs and prejudices. Both types of profiling are relevant for the issue treated here, even though, as it should become clear later on, the first one is of particular interest and can certainly be contrasted more efficiently by legal remedies.

As for what concerns its object, ethnic profiling can be applied toward individuals as part of a group or directly to a whole group of people. An example of the first is given by the case of “stop and search” on the highway in order to catch drug dealers. By focusing on certain persons, racial profiling affects men and women individually, but it enforces racial prejudices on the whole group. The second case has a devastating impact on the profiled (targeted) group, because it purports to enforce the law by applying it directly to a large part (if not the whole) of a racial group. The most striking example of this practice is represented by the massive internment of American citizens of Japanese descent during the Second World War

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<sup>6</sup> For a view according to which law enforcement actions based on a suspect’s description should not be characterised as racial profiling see Gross & Livingstone, 2002: 1415; for the opposite view, cf Ellmann, 2003: 305.

(Irons, 1983)<sup>7</sup>. However, this latter distinction is not relevant for the scope of this article, because both approaches are part of the same strategy of enhancing certain racial taxonomies in a determined society.

## II. The Limits of the Arguments pro Racial Profiling

In the few European works on racial profiling, its discriminatory nature has mostly been taken for granted, i.e. self-evident (Moeckli, 2006; De Schutter & Ringelheim, 2008). Using race or ethnicity as a proxy for a classification is usually highly suspect in the European scenario, and that is due both to historical reasons and to the current European legal framework on anti-discrimination law. However, even in the *prima facie* non-controversial European scenario, one has to prove that racial profiling amounts to a discriminatory practice. Moreover, in the relevant literature, one can find several solid and qualified justifications in support of racial profiling. In this paragraph and in the next one, the two finest and richest theories in support of racial profiling will be scrutinised and eventually rejected.

The first argument claims that under certain conditions racial profiling can be considered a rational way of enforcing the law. Some economists, for example, have developed an elegant econometric model for justifying the claim that, under certain circumstances, racial profiling amounts to more efficient policing (Persico, Knowles & Todd 2001; Boorah 2001). They contend that profiling on a group trait associated with higher offending rates - what they call 'statistical discrimination' - may, in fact, be the most efficient way to allocate police resources, but only under certain conditions. The logic of their interpretation rests on the central assumption of the economic theory of crime (Becker 1996), namely that any rational individual is less likely to engage in an activity if the cost of the activity increases. This model rests on a few core premises of rational-choice theory. The first premise is that officers seek to maximise the success rate of their stops and searches, given the cost of these interventions. The second premise is that the suspects are also rational and try to maximise their own payoff associated with criminal activity. The third premise is that racism is reflected in the fact that the racist police officer experiences a lower cost for stopping or searching minorities rather than other suspects. The final premise implies that the econometric model stipulates that minorities offend at higher rates than the majority under conditions of colour-blind policing. This hypothesis is known as 'elasticity of offending to policing'. Simply put, the elasticity of offending to policing is the degree to which changes in policing brings about changes in offending. Assuming that potential offenders respond rationally to the probability of detection and punishment, then targeting law enforcement at members of a higher-offending population will not only increase the amount of crime detected, but more importantly decrease the offending rate among those members of the targeted group because of the increased cost.

The economic model suggests that law enforcement should target higher-offending populations until the point where their offending rates have fallen to the same level as the

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<sup>7</sup> Nowadays, racial profiling concerns more and more Arabs and Muslims. In that respect, religion and ethnicity are becoming a significant component in the formation of profiles. This kind of profiling is usually known as 'terror profiling': see Chon & Arzt 2005.

general population. This is the point where equilibrium is reached and where officials maximise the effectiveness of their law enforcement resources. Accordingly, the fact that police disproportionately search minority suspects is not, in itself, proof of racism. The econometric model says that what matters is the rate of successful stops and searches (i.e. those that lead to arrests). This is most frequently referred to as the 'hit rate'. The econometric model suggests that when the hit rates are the same across racial or ethnic lines, the police are not bigoted in their searches because they have no incentive to search more or fewer suspects of any particular race. Accordingly, when the data reveal equal hit rates for different racial groups, the proponents of the economic approach conclude that the disproportionate searches of minority suspects do not reflect a taste for discrimination but an attempt to maximise successful searches.

It should be noted that profiling is a statistical method that draws, methodologically, on an actuarial approach first developed in the insurance industry. But unlike early insurance applications, which were relatively static, profiling in a policing context involves a dynamic form of prediction. The act of profiling itself alters the behaviours of the profiled (Harcourt 2007: 113-4). The economic model functions only if it assumes that the elasticity of the profiled group and that of the other non-profiled groups remains constant, which is an assumption unlikely to be proven, especially when one presupposes a major inclination toward criminal activities in minority communities. There is a hidden assumption in the economic model of racial profiling: the two groups have the same elasticity of offending to policing. Yet the economists are prepared to stipulate that minorities offend more. If they do in fact offend more, there is every reason to believe that they may also be *less* elastic to policing. Whether the different offending rates are due to socio-economic history, cultural forces, or path dependence, the fact is we are prepared to stipulate that there is a difference in offending (ibid.: 123).

In other words, the formal assumptions that orientate the economists' argument are already biased. Moreover, despite these well-articulated statements, there are good reasons for claiming that racial profiling is both discriminatory and inefficient. In the context of European law, proving the inefficiency of such a measure is crucial, since European Antidiscrimination Law permits differential treatment of persons on the basis of race, ethnicity, religion or nationality if such discrimination is objective and proportional (Ellis 2005: 29-32). If an alternative method to prevent the violation of the law and of fundamental rights is not available, then, given the efficiency of the means, profiling cannot be considered an illegal form of discrimination. What the economic model lacks is an evaluation of the effects of racial profiling on society as a whole. The long-term consequences on the amount of total crime and on those who are mainly subjected to profiling are simply not factored into the economic model<sup>8</sup>. Furthermore, racial profiling implies several costs, both on a psychological and material level. Racial profiling can be perceived as humiliating by those who belong to the group profiled because they feel they have been scrutinised only on the basis of a collective trait of their identity and not on the basis of their individual behaviour. Being subjected to profiling only because of this reason might cause anguish, stress and fear<sup>9</sup>.

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<sup>8</sup> The problem with the economic model of racial profiling is that it assumes that a non-racist officer seeks to maximise the rate of successful searches. This is an unchallenged presumption based on a certain model of rationality.

<sup>9</sup> On the psychological harms caused by racial profiling see Sanchez-Hucles, 1998.

These effects are due to the fact that profiling is, by nature, over-inclusive. When being a member of a certain racial group is used as a proxy for criminality or dangerousness in a society in which a relative few are criminals, it is unavoidable that profiles based on race will always sweep too widely. A racial profile is simply too blunt an instrument for its alleged statistical accuracy to give an officer more than some very general information. The result 'is that even if the enforcement of law using the profile yields some wrongdoers, it is almost certain to capture far more innocent people in its exceedingly wide net, all of whom will probably be stigmatised and will suffer for this reason' (Harris, 2002: 106).

Racial profiling carries with it costs that go beyond psychological damage. Because profiling has such a strong impact on the mobility of those subjected to it (that is, the diminished willingness of minorities to go where they feel they will get undesirable attention from law enforcement), these tactics participate in the reinforcement of existing segregation in housing and employment. Racial profiling increases the possibility that a city with a multiracial population has a heavily segregated neighbourhood (Stuntz, 1998: 1810). Segregation in housing patterns, reinforced by racial profiling, also has a direct impact on employment and the ability to get jobs; it limits the capacity of movement of some groups and, above all, it weakens the relationships between minorities and the majority (Kennedy, 1997: 153). Furthermore, racial profiling undermines what social scientists call "community policing" (Oliver, 1999; Thacher, 2001), i.e. a practice of co-operation between officers and the community. Officers trust the community to identify the real problems in the neighbourhood and to determine what the priorities of enforcing the law should be. For their part, the members of the community have to trust the police enough to tell them what - and who - are the real problems in the neighbourhood.

Finally, a cost that is always overlooked is represented by the so-called ratchet effect. By ratchet effect we should understand a social phenomenon which produces an offending population disproportionate in comparison with the imprisoned population, due to law enforcement practices. The intensive use of racial profiling causes a warped effect on the targeted group that will operate as a ratchet over time. The logic is quite simple: the more one dedicates resources to profiling one group, the more the condition of that group will worsen. Then, by relying on this group's incremented prison population, more resources will be devoted to profiling it, and so on. The ratchet effect has a tendency to perpetuate and worsen the condition of what is believed to be the highest offending group (Harcourt, 2004: 1330-1).

That racial profiling might be inefficient is not enough to clarify its role in antidiscrimination law. One could think that race should not be counted as a relevant factor in the enforcement of security laws. A closer look, however, reveals that the function of race in the substantial determination of what counts as discrimination is more ambiguous. Interestingly enough, liberals and conservatives tend to switch their positions in debating racial profiling and, for example, affirmative (or positive) action. Comparing these two issues can be very instructive. Affirmative action, in the context of university admissions programs, is the system of using minority status as a positive factor in determining which applicant to accept<sup>10</sup>. The act of

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<sup>10</sup> See *Regents of the Univ. Calif. v. Bakke*, 438 US 265 (1978).

giving extra points to minority applicants in order to remedy widespread societal discrimination is the crux of the liberal argument favouring this policy. Conservatives discredit such policies by alleging they amount to reverse discrimination and that they lead to the disproportionate denial of more qualified white students in favour of unqualified or less qualified people of colour. In comparing racial profiling and affirmative action, it is interesting to note the switch in positions taken by liberals and conservatives. Liberals shun the relevancy of group identification in deciding whether to stop and search a potential terrorist, while embracing the role of race in correcting past societal discrimination. Conservatives, on the other hand, discount individual complaints made by those racially profiled by police but support neutral policies in the context of university selections (Romero, 2002). To restate the problem in other terms, should race always be considered a relevant factor in enforcing the law and if not, when should it be? The answer, clearly, cannot be straightforward. Before moving on to the discussion of this issue, it is necessary to take a brief look at another possible justification of racial profiling.

### III. The Expressivist Argument

At the core of the economic argument lies an undeniable consequentialist approach. In itself, this may not be wrong. The problem, as noted, is that it reduces the question of racial profiling to a question of hit rates and measures of proportionality. An alternative to this approach is the expressivist argument (still utilitarian in its approach) for a qualified defence of racial profiling as proposed by Matthias Risse and Richard Zeckhauser (2004). This is probably the most ingenious argument in support of a moderate application of racial profiling. The authors' argumentative strategy presupposes the acknowledgement of the distinction between two kinds of harm: intrinsic and expressive. The first kind of harm does not need to be linked to other underlying practices in order to hurt and cause resentment. The second kind of harm is always attached to a practice or an event and it causes frustration and resentment primarily because of harm attached to other practices. The authors define it in more detailed terms as: a form of harm that is itself parasitic on an underlying oppressive relationship that is independently present in society. And while indeed this sort of harm would not arise were it not for that underlying oppressive relationship [...] the expressive harm does not contribute to that oppressive relationship (ibid.: 154-5).

In the case of racial profiling, the harm is caused mainly by the underlying racism and is unrelated to profiling itself. According to Risse and Zeckhauser, the cost-benefit assessment of racial profiling must be done by taking into account the 'incremental increase' this practice imposes, and not the overall level of harm ostensibly associated with it. Therefore, 'what utilitarians must assess is whether the incremental increase in harm caused by profiling as such, rather than the overall amount that comes to the fore in acts of profiling but is largely caused by underlying racism, outweighs the advantages of crime reduction' (ibid.: 149). And for these authors, the harm done by profiling per se is comparatively modest given the goods that it might bring (enhanced security and increased economic activity in a neighbourhood). This evaluation goes so far as to affirm that if the Supreme Court outlawed racial profiling: the levels of resentment, hurt, and loss of trust among minority group members, we conjecture, would *not* be significantly lowered. Simply stopping the practice of profiling would do little to change society's underlying racism and thus little to alter the *attitudes* that



lead to police abuse and also promote various forms of racism in other segments of life (ibid.: 146).

The limits of this approach are twofold. I will concentrate mainly on the first one, which concerns the distinction between intrinsic and expressive harms, by using the example Risse and Zeckhauser resort to in order to illustrate the idea of intrinsic harms. The second limit concerns the downplaying of the role of legal actors and more generally of government officials in shaping racism in a particular society. On this aspect, as on the underlying theme of the relation between law and racism, more will be said in the next paragraph.

As for the first limit, the difference between expressive and intrinsic harms seems to be too shaky to support a moderate justification for racial profiling. By contrast with racial profiling, whose harm is expressive, Risse and Zeckhauser claim that torture represents a painful practice in itself. In Risse and Zeckhauser's view, the pain inflicted with torture has a direct effect on the body of the torture victim, whose suffering knows no mediation and it is therefore a pain which is independent from some other underlying practices. Moreover, Risse and Zeckhauser seem to trivialise the normative meaning of the suffering caused by torture. It is true that torture is painful no matter why it is inflicted. Still, what Risse and Zeckhauser define as a sort of neutral aspect of the pain of torture strikes us as quite naïve. Indeed, the meaning of this pain is not a brute fact and is usually related to a particular aim (Scarry, 1985; Kahn, 2008). Torture cannot be reduced to an exercise of sadism. It always entails more than the simple infliction of pain on a person. Elaine Scarry (1985) has shown that the forms pain can take, the reasons why it is inflicted, the way it is experienced and the people who inflict and suffer it are all inflected by social prejudices. More precisely, by torturing someone, the expectation is always to obtain something else, either some critical information, like in the ticking bomb scenario.

As for racial profiling, the idea that it causes only expressive harms implies that it is not a form of racism in itself, nor are the harms of profiling themselves forms of racism. As has been noted: this is a deeply implausible picture of the relationship between racism and racial profiling. It requires us to imagine a racist society in which racism has no role in explaining the choice of racial profiling over other ways of responding to racial disparities in crime that are, quite likely, a legacy of racism. Similarly it asks us to suppose that the profiling of black people can be carried out fairly and respectfully in a society that can still be characterised as racist (Lever, 2005: 96).

The expressivist thesis is also instrumental to the 'incremental harm' assessment proposed by Risse and Zeckhauser. It reinforces the assumption that the harms attributable to profiling alone are likely to be quite small and insignificant compared to the harms that certain groups will suffer simply because they live in a racist society. But this thesis seems to minimise the impact of racial profiling in important areas such as housing, transport and employment. To define the harms caused in these areas as relatively incremental against the harms caused by racism is to misunderstand how race becomes a factor of pervasive discrimination in a racialised society.

In light of these considerations, it should have become clear that the expressivist approach does not question at all the role of profiling in building and enforcing racism, probably because it does not take into account the systemic quality of racism (Taylor, 2004: 32-7). It is not surprising, therefore, that Risse and Zeckhauser underestimate the role of law and legal

institutions in the production of racial oppression. This point cannot be underestimated. But in order to assess its importance a more comprehensive perspective on the relationship between law and race must be adopted.

#### IV. A Critical Argument Against Racial Profiling

The two arguments discussed above are inconsistent and dangerously lenient toward racial profiling. But these are not their only deficiencies. The discourse on racial profiling does not concern only discrimination and police efficiency. There is a risk of reductivism not only in the economic and in the expressivist approaches, but also in the liberal approach, particularly in its neutral version. It is indeed too easy to dismiss the reasons supporting racial profiling by simply claiming that race should never matter in legal discourses. As is the case with the expressivist thesis, this perspective ignores the real impact of the law in the formation and consolidation of races and ethnicities.

Among contemporary legal theories, only the movement known as Critical Race Theory has attempted to account for the role of law in the formation of the concept of race (Bell, 2002). While it is true that CRT has a contextual genesis and its works are concerned almost entirely with the US legal system (Möschel, 2007), his main insights could potentially be applied to other legal contexts. Four main tenets are relevant in understanding of the role of law in the formation of racial taxonomies and for assessing the impact of racial profiling on a society. For the sake of accuracy, CRT is not a single, coherent movement (see Crenshaw and *Alii*, 1995; Delgado & Stefancic, 2001). The scope of its doctrine is much wider than the tenets which will be sketched out below, but since a reconstruction of the scope and content of CRT doctrine is beyond the scope of this article, the exposition will be limited to four points which can be deemed relevant to the European context. Unfortunately, this implies that other insights of great interest will be left out of the discussion<sup>11</sup>.

First, the understanding of the logic undergirding the concept of race represents the key tenet for critical race theorists. To repeat what has been defined as the mantra of Critical Race Theory, ‘race is a social construction’. Law is part and parcel of this construction. But law should not be understood in unidirectional and static terms. In that respect, a more sophisticated account of the role of law should be brought into the picture. Law should be considered at two different levels. The first one concerns the law as a system of controlling and sanctioning individual and collective behaviours. This means that the moment of the enforcement of law is as important as the enactment. But law is also, on another level, part of the structure of political and social imagination. It shapes our vision of the world and accordingly our beliefs about reality (Haney López, 2006; Kahn, 1999). In the context of racial issues, it does so by reifying races and ethnicities, hence legitimating their existence as something naturally embedded in the environment. The one-drop rule, that is, the rule of hypodescent which established that any person with discernable black ancestry was black and his ancestors could never be white, is a classic example of how legal and social norms construct race as a social creation. By playing this role, law becomes one of the main causes of ingrained racism and of its perpetuation.

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<sup>11</sup> The issue of intersectionality is certainly among them: cf. Crenshaw, 1991.

A second important tenet concerns the normative relevance of the context. Since races are social constructions, the contexts in which they are created and then enforced should always be taken into account. Without a specific understanding of the legal and social context of a racial classification, any attempt to cope with its specific impact on society and disadvantaged groups is doomed to fail. Also, when tackling issues of racial discrimination, specific attention should be paid to the single race involved in a concrete dispute. Since each race is always the evolving product of a process of racialisation, then the law should be enacted and enforced with this context in mind.

The third tenet is represented by the idea of colour-blindness (Gotanda, 1991). This corresponds to a formal conception of equality, usually understood as equality before the law. Colour-blindness is expressed in rules that insist only on treatment that is the same across the board. Such formal neutrality in enacting laws and decrees may bring some advantages with it and it certainly corresponds to the fair intuition that one should treat all persons equally, without regard to their race. But it completely overlooks the importance of the enforcement of law and how this aspect affects certain ethnic and racial groups. A legal rule may be perfectly neutral *prima facie*, but when applied in a specific context it may exacerbate segregation and discrimination for some targeted groups, while making an exception for one privileged group, usually denoted by the mark of whiteness (a kind of invisibility which protects those belonging to this group from the warped effects of formally neutral laws).

The fourth tenet is linked to the importance of whiteness in the construction of a racial taxonomy: the identity privilege. One should be aware that race as a concept is built through two constitutive elements: plurality and hierarchy. Plurality means that the determination of a single race always implies the existence (or the creation) of other races. There cannot be a single race. Hierarchy means that races are not deemed to be of equal value, but some of them are more privileged than others. A racial taxonomy always imposes a hierarchy and this usually implies that there is one privileged race.

Finally, as one can infer from these four tenets, CRT proposes careful scrutiny of the way races are formed. Legal analysis should take into account how a racial taxonomy is created and how it evolves. In light of these considerations it should have become clearer why a critical-race-theory-based approach does not look at the question of racial profiling simply from the legalistic standpoint, but also from a race-conscious perspective. In this way, the focus of the analysis is shifted from a means-end question to the problem of whether and how the legal enforcement of racial profiling impacts on the life of minority groups and in which way it preserves or transforms racial categories. Therefore, as a category based on race, profiling immediately becomes suspect. Any assessment of its legitimacy should not be reduced to its controversial efficacy, but should take into account its role in the creation of racial taxonomies.

At this point, it is necessary to enter two caveats. First, all this talk about the role of legal instruments in the construction of racial taxonomies could convey the impression that the law is always an oppressive instrument, in this case a tool of creation and perpetuation of racism. This is not always the case. Indeed, law can function in both ways, either as a building block of a racist society or as an instrument of emancipation and redemption for those who are oppressed due to racial motivations.

Second, as Ian Haney López has noted, it is necessary to avoid a unidirectional understanding of the impact of the law in the elaboration of racial ideas (López, 2006: 102). Society, politics, science and many other forces also affect law when it comes to taking a decision on racial issues. Disaggregating law from these factors can have heuristic functions, but it cannot lead toward a proper understanding of how races are built. So, not only does law have an impact on the way other disciplines think of race, but it is also affected by them.

The adoption of this critical perspective brings to the recognition of the constitutive role played by law in the racialisation of a society. Racialisation is the process which leads to the construction of a racial taxonomy. This process consists of two elements: an ethnic category and a cultural ascription to this ethnicity (Gotanda, 2000). It should be noted that the cultural ascription usually comprises a whole constellation made up of elements such as religion, ethnicity or nationality, social conditions and historical context. In the case of African Americans, all these elements emerge neatly. The group became identified as black. Blackness was part of the racial category and functioned as a marker of enslaveability. Rules – mainly legal – for reproduction of this category were developed (Gotanda, 1991), embedding blackness in the specific context of the slave-labour economy.

#### V. On the Paradox of Race: Legal Remedies and a Cautionary Note

Experts of racial profiling have carefully analysed all the flaws of a race-based law enforcement method. Seldom, however, have they discussed what kind of counter-action should be taken once the discriminatory nature of racial profiling has been demonstrated (with the exception, among others, of De Schutter & Ringelheim, 2008). Evidently, it is not enough to determine the inefficiency of racial profiling in order to stop the practice. In a racialised society it is highly probable that officials will be driven by racial data or appearances even when laws are apparently neutral. However, it is precisely at the level of legal remedies that the problem risks becoming a legal quagmire.

In Europe, racial categories took different forms than those adopted in the legal history of the United States. This is one of the reasons why a European antidiscrimination policy has to face different contradictions. One thorny question concerns the coordination between the principle of antidiscrimination and the right to privacy. To prove the discriminatory features of racial profiling it is necessary to collect data about race or ethnicity, but these very data can be used as discriminating tools. For example, to control how police officers behave, checks through statistical findings are fundamental. In the framework of EU-law this poses some significant legal problems, although some European institutional bodies insist that accurate data is essential to reveal direct or indirect forms of discrimination and to elaborate sound antidiscrimination policies.

In many European states, there is a widespread sense that having the State or private actors collecting data on racial and ethnic affiliation or origin poses major privacy problems. Doubts about the legality of this practice are combined with fears of abuses of these data by State authorities. This understandable anxiety is nourished by historic traumas (Bygrave, 2002: 108-9), above all, the memory of the *Shoa*, where data systems, particularly population registers, played a significant role in the persecution and extermination of Jews and Roma.

Yet, data on racial or ethnic origin can also serve to put into light persistent disadvantages and discriminatory practices; they can be invoked by minorities themselves to claim equal access to economic, social and political resources (Nobles, 2000). Statistical data may be crucial to enable victims to prove discrimination in legal proceedings. The lack of data has been identified as a serious obstacle to policy developments and analysis in the field of antidiscrimination. Accordingly, the European Commission has undertaken practices to encourage Member countries to develop mechanisms designed to gather adequate information on discrimination. The European Union Agency for Fundamental Rights was recently established through Council regulation n. 168/2007 in order to provide data collection and analysis to the authorities of the Union and its Member States<sup>12</sup>.

However, many Member States remain deeply reluctant to collect this kind of data. The most commonly voiced objection is that processing data on racial or ethnic origin would infringe upon the right to privacy. Almost all EU countries have adopted far-reaching legislations on personal data protection, based on the EU Directive on the subject (95/46/EC). According to this directive, data revealing racial or ethnic origin, along with data on religion, health or sexual orientation, are defined as sensitive data. And as a matter of principle, the processing of sensitive data is, indeed, prohibited. However, this prohibition is not absolute: the directive allows for exceptions, under certain conditions. It is thus not clear whether it is always illegal in the EU to collect racial or ethnic data for antidiscrimination purposes. Nevertheless, the mere possibility of classifying people in ethnic or racial categories is controversial<sup>13</sup>. This concern can also be related to the right to privacy, insofar as the latter is interpreted as embodying a principle of individual autonomy. Apart from the vexing question of how race and ethnicity should be defined, one may wonder to what extent the assignment of people to a racial or ethnic category is compatible with respect for individuals' right to freely determinate certain issues essential to their self-understanding. This concern will now be treated from a different point of view, that of racial identity and its potential dangers.

*De facto* racial and ethnic profiling has long been tolerated thanks to apparently neutral national laws. However, given the current state of affairs in Europe, the explicit introduction of race and ethnicity as a system of classifying people limited to the collection of data would inevitably become a controversial issue. This is part of what is known as the paradox of race. The more one wants to fight racism, the more one needs to embrace its race-based logic. Racial discourse imposes certain kinds of ambivalent actions: on the one hand, overcoming colour-blind approaches seems to be the only available effective reaction to overt and covert racism; on the other hand, race-based remedies breed a form of race-talk that might consolidate and perpetuate discriminatory racial-based classifications.

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<sup>12</sup> See <http://.fra.europe.eu>.

<sup>13</sup> The range of possible solutions to this problem is extremely wide in Europe. Within the EU, the United Kingdom deserves special attention, since it is, at present, the sole Member State that produces statistics broken down by self-declared ethnic affiliation, as part of its antidiscrimination scheme. The Netherlands has also developed statistical monitoring mechanisms in the antidiscrimination field, but its statistics on "ethnic minorities" or so-called "allochtones" are based on indirect criteria, namely the country of birth of the persons concerned or that of their parents. France, by contrast, represents the other side of this wide range of solutions: its policy on the subject is characterised by a strong opposition, deeply ingrained in the republican political culture, to identifying individuals on the basis of their ethnic origin. See, for a useful presentation of different European systems, De Schutter & Ringelheim, 2010, 110-33.

This process of consolidation can be quite dangerous: it can prevent, for example, a change in race-based classification because a new taxonomy would not be immediately replaced with new race-conscious remedies. Too much pressure on racial identity might be the outcome and this might not always be a desirable one. Moreover, similar practices may generate a process of race-balkanisation<sup>14</sup>, i.e. they may promote a multiplicity of claims grounded in racial identity. Kwame Appiah has shed some new light on the potential problems affecting policies of law which focus excessively on racial identity (Appiah, 1994: 94-106). Pushed to its extreme consequences, the logic of racial identity – as, in general, in any collective identity – can demand too much of individuals and can generate a new kind of despotism. The pride of being, for example, Black, demands respect for people as Black. There will be proper ways of being Black and there will be expectations to be met. At this point, belonging to a racial group may depend on factors that cannot be chosen (even though this is true also for religious or cultural groups); this fact can become a menace for individual autonomy (Appiah, 2005: pp. 62-113). If we want to deal with the versatile problem of racial discrimination in a racial society, we need to adopt some colour-conscious remedies; at the same time, we should view anti-discrimination law's emphasis on social groups as both indispensable but also problematic and try to adopt a minimalist approach, which means minimising the racialising effects of certain legal remedies.

As far as the application of antidiscrimination law is concerned, the challenge facing Europe is outstanding. If ethnic or racial profiling was to be prohibited through legislative means, it would be necessary to determine *when* and *how* racially sensitive data can be legally collected and what kind of ethnic data should be taken into account. This is a tough task considering what is at stake. And it should be pursued while bearing in mind the effects generated by the paradox of race. The European Union will need to answer this challenge in the years to come because the future legitimacy of the Union might partly depend on how these questions are answered.

### Cases

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*US v Sokolow*, 490 US 1 (1989).

*Shaw v Reno*, 509 US 630 (1993).

*Brown v City of Oneonta*, 221 F3d 329 (2000).

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<sup>14</sup> This expression is taken from the opinion of Justice Sandra O'Connor in *Shaw v. Reno*, 509 US 630 (1993).

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