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Racial Profiling and its Effects on Black Communities in the United States and France

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Executive Summary

The intention and purpose of this thesis is to highlight the issues of racial profiling by police in the jurisdictions of the United States and France. With supplementary international standards highlighted through the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the underlying theme shows that regardless of whether a nation decides to acknowledge the presence and subsequent issue of race—specifically when it comes to the intersection of race and law enforcement—the perpetuation of racial stereotypes and policing based on one's racial identity remains prevalent and problematic. This relevant issueproblem, personified through racial profiling by police, results in varying outcomes on a case-by-case basis, from unjustified and unconstitutional stop-and-frisk, to unlawful arrest, and even homicide.

Abbreviations

ACLU	American Civil Liberties Union
CCP	French Code of Criminal Procedure
CERD, or the "Committee"	Committee on the Elimination of Racial Discrimination
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
OCH	Operation Clean Halls
SCU	NYPD Street Crimes Unit
NYPD	New York City Police Department
UN	The United Nations
USA	The United States of America

Introduction

> *The practice of racial and ethnic profiling in law enforcement constitutes a violation of human rights for the individuals and groups targeted by these practices, because of the fundamentally discriminatory nature and because it expands on discrimination already suffered as a result of ethnic origin or minority status.*[1]
> - Mutuma Ruteere UN Special Rapporteur on contemporary forms of racism

The use of racial profiling in law enforcement is an unjust and discriminatory tactic which is prevalent in countries throughout the world. Additionally, while racial profiling exists in its own right as a police tactic, is also relevant in the consideration of the more lethal issue of police brutality and homicide—as a distinct phase which leads to reaction of perceived injustice.[2] This thesis serves as an inquiry into its causes and practices in two distinct national jurisdictions—the United States of America and France—with an additional view of the issues presented through the capacity of the International Convention on All Forms of Racial Discrimination. The problem at hand is the concept of racial profiling and its inherent discrimination—while the goal of this thesis is to indicate the origins of the practice, how it manifests in two significant global jurisdictions, and what international standards require and enforce regarding its use and justification. It is curious that the issue is distinct in two jurisdictions which have a different history of construction and subsequent integration of African communities into their respective societies. The specific focus of this thesis of affected peoples of African descent is based on the similar histories alluded to above as well as two distinct

[1] *See http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16172 (2015)*
[2] Naomi Zack, *White Privilege and Black Rights: The Injustice of U.S. Police Racial Profiling and Homicide* (Lanham, Maryland: Rowman & Littlefield Publishers, 2015). Zack's conceptualization states that "Most of the well publicized cases of police killings of unarmed black men have two distinct phases, followed by two distinct reactions to perceived justice," 1) Racial Profiling & a stop, or attempt to make a stop; 2) Application of lethal force (in Homicide cases); 3) Public response to the death of an unarmed black man; and 4) Trial by grand jury/investigation of the officer who committed the lethal force/homicide—these officers are also generally acquitted (*see https://www.huffingtonpost.com/entry/police-killings-no-indictment_us_5682b893e4b0b958f65a7702*)

factors: 1) While other minority communities experience racial profiling in the United States (specifically those who identity as Hispanic and/or Latino[3]), they oftentimes include an added element of immigrant profiling, which warrants a more pointed discussion; and 2) The same goes in the jurisdiction of France with the additional history of labor migration of Africans into France[4] and their subsequent geographical segregation *in* France, specifically the suburbs of Paris. These distinct histories and the countries' recognition and strategies for acknowledging, let alone addressing, the issue of racial profiling warrant a closer look.

A formal introduction to the concept of racial profiling will provide the partial makeup of Chapter 1. This first chapter will additionally serve as a theoretical framework in how the incorporated concepts will be used in analysis of the three following chapters containing the jurisdictions of this thesis. The chapter is subdivided to give proper discussion to the underlying concepts of racial profiling—including the intersection of race and privilege—and the subsequent theories and issues with data sets used to evaluate the prevalence of racial profiling—like the broken windows theory and the benchmarking problem. Additional introductory concepts will also be analyzed in Chapter 1.

Chapters 2 and 3, subsequently, consider more recent and relevant conversations of racial profiling in the legal and political spheres of the United States and France. Addressing the issue of racial profiling in the United States as whole would prove difficult, as scouring through relevant case law and accompanying individual state legislation would amass a reference list far surpassing the capabilities of this thesis. Therefore, Chapter 2 is dedicated primarily to litigation in New York, as the New York City Police Department (NYPD) has been in the courts

[3] The case *United States v. Brignoi-Ponce* will allude to this distinction in section 2.1.2.
[4] This labor migration will be discussed in conversations about the 2005 riots in section 3.3.1. A mention of post-war African relations will also be discussed in section 3.1.

concerning their stop-and-frisk initiative for the better part of the last decade. *Floyd v City of New York* launches the litigation conversation, while its companion cases, critiques of its outcome, and other relevant US Supreme Court cases are discussed for further consideration of the issue and conceptualization of the legal dealings with racial profiling in the U.S. context.

Chapter 3 is not as focused on case law, as it requires the consideration of an added element in France's dealing with racial and ethnic discrimination in their republican model of integration. Discussed in more detail in its chapter, France's constitution, criminal code, and subsequent dealing of racial discrimination and profiling cases in the courts and political and social realms is a construction of incongruent perceptions and rulings that fail to standardize a practice of anti-discrimination in law enforcement.

Finally, Chapter 4 looks at how the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) deals with the mentioned issues in their capacity as an international monitoring body. The ICERD was chosen for this thesis due to its specific function as a United Nations (UN) Human Rights Instrument to—by definition—eliminate all forms of discrimination based on race. Their convention and Committee on the Elimination of Racial Discrimination (CERD) are specifically endowed by the UN with the obligation to monitor issues of racial discrimination amongst their member states through the process state parties' submission of periodic reports and the Committee's responsive concluding observations and recommendations. In theory, this model of having a monitoring committee to assist in the progression of the goal of contesting "racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination" should be an effective way to address the issue in an

impartial, objective global way, and therefore, this thesis will look at its effectiveness in practice.[5]

This outline singles out the issue of racial profiling through three district jurisdictions. This selection, however, does not suggest that commentary and further exploration of the concept and subsequent problems cannot be through the lens of other national, regional, and/or international perspectives. Ultimately, the materials and observations made in this thesis and the subsequent conclusions made based on these perceptions culminate into an explanation of the inequitable lived experiences of black communities.

[5] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations.

1 Conceptualizing Racial Profiling

Before exploring the issues and implications of racial profiling in the context of the United States and France, it is necessary to define and outline the dynamics of racial profiling, starting with the dichotomy that is race and privilege followed by the structural inequalities experienced by people of color, concluding with discourse on a proper definition for and the effects of racial profiling. The concept of racial profiling also posits the use of allied concepts such as the "broken windows theory" and issues with profiling statistics, otherwise known as the benchmarking problem. At this point, I will also note that the terminology used within this thesis will be racial profiling as opposed to ethnic profiling. From the research for this thesis, the term racial profiling is commonly used in the context of the United States, while ethnic profiling is generally used in European perspectives. The difference that I have inferred is that ethnicity is widely regarded as tied to nationality, which goes hand in hand with another aspect of profiling (primarily in Europe) in that of identity checks.[6] Identity checks do occur in the United States as well, but is primarily present through border control, which encompasses a minority not discussed in the limits of this paper.[7] This thesis focuses on the racial implications of profiling by police by people of African descent, an admittedly American approach which, conceptually, will be applied to France as well with attention given to the fact that some mentioned cases can stem from ethnicity and be considered ethnic profiling related to identity checks. The term racial profiling will also be used for consistency, however in conceptualizing the term, definitions from the European ethnic profiling perspective will also be considered.

[6] For example, the Open Society Foundation defines ethnic profiling as: "the use of racial, ethnic, national, or religious characteristics as a way of singling out people for identity or security checks."
See https://www.opensocietyfoundations.org/explainers/ethnic-profiling-what-it-and-why-it-must-end
[7] Racial profiling at borders is noted in the case of *United States v. Brignoi-Ponce* in section 2.1.2

1.1 Laying out the Differences: White Rights v. Black Rights

Oftentimes, discourse on the systematic and structural injustices experienced by black people is tantamount to conversations about race and privilege, particularly white privilege. Racial profiling is a form of racism—the implications of which can be described in conjunction with the concept of white privilege, the notion that white people are not generally pinpointed as being profiled based on their perceived race. Defining white privilege can be delicate, as one's conceptual framework of the idea is essential in the way subsequent conversation of its effects are evaluated. In this section, I will mention different conceptualizations of the terms to comprehensively assess the underpinnings of racial profiling. Conversations on the topic are not new, as distinctions between the ways in which white people are treated in comparison to people of color has a long history, from W.E.B. Dubois's "psychological wage" to rhetoric echoed throughout the civil rights movement.[8] However, in "White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies," feminist scholar Peggy McIntosh serves as an example of a scholar who theorized the idea in her perspective as a white woman in the way it is most commonly talked about today, describing forty-six ways in which she is privileged in her life due to her race.[9] In her personal writings, McIntosh speaks of the realization that as a white person, she was taught about racism in a way that describes the group being discriminated against as being at a disadvantage without regard to the idea that the adverse, white privilege, puts her at an advantage. This provides the basis of an

[8] *See "The Origins of 'Privilege,'"* https://www.newyorker.com/books/page-turner/the-origins-of-privilege
[9] Peggy McIntosh, "White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work in Women's Studies," in *Re-Visioning Family Therapy: Race, Culture, and Gender in Clinical Practice, 2nd Ed.*, ed. Monica McGoldrick et al. (New York, NY, US: Guilford Press, 2008), 238–49.

abstract example of what white privilege is, as the following describe it more in its context of racial profiling.

In defining racism, David Wellman describes the essential feature of such the "defense of a system from which advantage is derived on the basis of race.[10]" In this definition, regardless of whether the racism be overt or subtle, its existence perpetuates the continuation of a privileged relationship.[11] Conversely, in her book "White Privilege and Black Rights, Naomi Zack identifies two different types of white privilege: one, which more closely aligns with the basis of McIntosh's sense of the term wherein whites have the advantage of ease of access to upward mobility and a way of life familiar to an "advantaged society," and the other, emphasizing that whites are more likely to have their rights protected by law enforcement and government institutions, like those enshrined in the Equal Protection Clause of the US Fourteenth Amendment.[12] Zack further distinguishes this as the difference between entitlements and rights.[13] The latter will be better used to explain the legal difficulties black face when it comes to racial profiling, although the former distinction is not stagnant, as advantages experienced by whites and the subsequent disadvantages present in the realities of black people and other people of color amount to structural inequalities which result in inequitable communities wherein people of color are commonly policed.

Expounding on the discussion of rights and privilege, Zack provides theoretical framework for what she refers to as ideal and material rights.[14] She identifies ideal rights as abstract, such as UN declarations, and material rights as physical, or bodily rights to life and

[10] David T. Wellman, *Portraits of White Racism* (Cambridge [England] : Cambridge University Press, 1993, n.d.).
[11] Ibid.
[12] Zack, *White Privilege and Black Rights*.
[13] Ibid.
[14] Ibid., 32

safety, such as those indicated in domestic statute—like constitutions, for example.[15] This section goes on to explain that while the concerns of rights may focus primarily on the "ineffectiveness of ideal rights alone," ideal rights may have a physical, or material, counterpart, suggesting more binding and responsible results. Zack's framework suggests that the privilege experienced by whites is the recognition of given rights, or more specifically, material rights, and people of color do not have these rights realized as overtly. This conceptualization will prove useful in later chapters when the paper expounds on how effective domestic and international jurisdictions are at addressing the issue of racial profiling, keeping in mind that declarations and statements by these institutions condemning racial profiling address the ideal right to not be profiled.

1.2 Racial Profiling: A Definition

In principle, profiling is a tactic used by law enforcement to help in identifying the type of person likely to commit a specific crime.[16] Racial profiling then, by definition, invokes the use of race as an identifying factor in the pursuit if suspects. However, definitions of racial profiling vary, suggesting that there is no consensus across scholarly, political, and legal spheres on the exact definition of racial profiling and its effects. Jack Glaser's "Suspect Race" defines racial profiling as: "…the use of race or ethnicity, or proxies thereof, by law enforcement officials as a basis for judgment of criminal suspicion.[17]" Profiling in this respect also is referenced in law enforcement's generalizations grounded in race—and their proxies (i.e., religion or

[15] Ibid.
[16] Rana Suh, "Racial Profiling," *Research Starters: Sociology (Online Edition)*, 2015, http://it.ceu.hu/vpn.
[17] Jack Glaser, *Suspect Race : Causes and Consequences of Racial Profiling* (Oxford ; New York : Oxford University Press, [2015], 2015).

nationality)—when performing their duties as officers of the law rather than pursuing suspects based on objectivity or individual behavior.[18]

An operational definition of racial profiling for a November 2000 resource guide developed for the U.S. Department of Justice used the perspective of it being identifiable as: "any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.[19]" It further establishes that there is "almost uniform consensus on two corollary principles" that are encompassed in this definition: the prohibition of police using racial or ethnic stereotypes as identifying factors in stop-and-search practices, and that police may use race or ethnicity as identifiers whenever a person matches a specific description of a pursued suspect of the same skin color.[20] Vikas K. Gumbhir references this conceptualization of the term in his book, indicating that this definition is based on "the theory that it is the use of racial/ethnic stereotypes in officer decision-making that causes differential treatment.[21]" He further states that this definition "juxtaposes racial profiling (the use of race/ethnicity or racial stereotypes in officer decision-making) with acceptable law enforcement tactics (reliance on a suspect's behavior and known information on crimes and criminal enterprises), a distinction that can become muddled in light of the daily work performed by law enforcement officers.[22]"

[18] "Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory" (Open Society Institute, 2009), Open access content Open access content star, OAIster, http://it.ceu.hu/vpn.
[19] Deborah Ramirez, Jack McDevitt, and Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned* (Washington, D.C.: US Department of Justice and Northeastern University, 2000).
[20] Ramirex, et. al., 3
[21] Vikas K. (Vikas Kumar) Gumbhir, *But Is It Racial Profiling? : Policing, Pretext Stops, and the Color of Suspicion*, Criminal Justice (New York: LFB Scholarly Pub., 2007), https://catalog.lib.ncsu.edu/record/NCSU2153670.
[22] Gumbhir, 17.

Gumbhir's own conceptualization of racial profiling suggests that current definitions can be sorted in two categories: one, which defines racial profiling as a motivational bias in the decision-making processes of police officers, while the other focuses on the misuse of information on race/ethnicity in the process of profiling criminals.[23] Both perspectives do, however, share common features in the consensus that racial and ethnic distinctions do exist "in terms of the frequency of vehicle stops, searches, citations, and arrests," while also acknowledging the locus of racial profiling being in officer decision-making, as the act of profiling on the basis of race abandons the "institutional aspects of criminal profiling.[24]"

On that note, racial profiling should not be confused with criminal profiling. The American Civil Liberties Union (ACLU) distinguishes racial profiling from criminal profiling by identifying the former as a "discriminatory practice" used by law enforcement to target individuals based on their racial, ethnic, national, or religious origin, while the latter is identified as reliant on characteristics associated with a specific crime.[25] Another distinction made by the ACLU is that a definition of racial profiling should not indicate that the act is based *solely* on a person's race—doing so would, by definition, disqualify an act where an officer stops a person of color in conjunction with the fact that they were speeding, for example, eliminating this act as a case of racial profiling.[26] This definition can be found in some U.S. state laws, which is problematic when law and racial profiling intersect.[27]

[23] Ibid., 17
[24] Ibid., 16
[25] *See* https://www.aclu.org/other/racial-profiling-definition
[26] Ibid.
[27] Ibid.

In "Profiled of Injustice: Why Racial Profiling Cannot Work," David A. Harris identifies racial profiling as having origins in criminal profiling.[28] In his explanation, he states that criminal profiling can not only be used in pursuing a suspect for a specific crime, but also to generally identify probable criminals based on personal and behavioral characteristics associated with specific crimes.[29] However, when these characteristics incorporate race into the equation, then it becomes racial profiling, which Harris describes as a "crime-fighting strategy.[30]" Many in law enforcement attempt to justify racial profiling by stating that it yields more arrests, arguing that black and brown people are more likely to be involved in criminal activity. They then state that the disproportionately high statistics of arrests and sentencing of minorities compared to their white counterparts validates their use of the practice—there are more of them incarcerated for criminal activity, so the profiling must be working, and the color of one's skin is a valid identifier for likelihood of committing a crime.[31] However, this logic is self-fulfilling. Due to racial profiling, the heightened suspicion directed towards minorities by law enforcement allows for higher potential for discovery of incriminating evidence. These "high-discretion police tactics" allow for officers to utilize traffic stops, for example, to seek evidence that otherwise weren't immediately available based on their original profiling.[32] A basic example would be the "driving while black or brown" trope, where a person is stopped on a highway for a traffic offense (i.e. broken taillight, expired tags, speeding, etc.) and subsequently subjected to a "voluntary" search which results in the discovery of an illegal drug. This discovery does not immediately mean that a person of color is more *likely* to be involved in criminal activity—they

[28] David A. Harris, *Profiles in Injustice : Why Racial Profiling Cannot Work* (New York : New Press, c2002, n.d.).
[29] Ibid., 11
[30] Ibid.
[31] Ibid.
[32] Ibid.

are just caught more often due the profiling and association of that crime. White people could just as easily be driving around committing the same crimes, but they are not generally *profiled* as doing so, and are less likely to be stopped.

Conversations of racial profiling and its justification are also relevant to the "Broken Windows Theory," a theory first proposed in 1982 by criminologists James Wilson and George Kelling. The theory is said to have inspired notable changes in policing in many parts of the United States, specifically New York City, while also drawing criticism for its encouragement of police use of racial stereotypes and criminalizing homeless and low-income populations.[33] In their article, Wilson and Kelling discuss a police strategy that was used during the 1970s in twenty-eight cities in the state of New Jersey—a pilot project called the Safe and Clean Neighborhoods Program which gave funding to these cities to establish more police on foot patrol in their neighborhoods.[34] Although subsequent data did not show a decrease in crime in these neighborhoods, qualitative analyses showed that generally, people in these neighborhoods felt not only safer, but closer in their relations with the police officers and vice versa.[35]

Wilson and Kelling decided to use these observations along with Kelling's own observations from his frequent accompanying of said officers on patrol, to establish that this form of policing which utilized unofficial, yet understood rules throughout the community acted as encouragement for certain behavior within these communities.[36] The term broken window comes into play with the metaphor that one visible sign of vandalism, like a broken window, can contribute to a catalyst which may, in effect, transform entire communities into an unfavorable

[33] Jim Greene, "Broken Windows Theory," *Salem Press Encyclopedia*, 2017.
[34] George L. Kelling and James Q. Wilson, "Broken Windows: The Police and Neighborhood Safety," *Atlantic*, 1982.
[35] Kelling & Wilson
[36] Ibid.

area.[37] They state further: "The citizen who fears the ill-smelling drunk, the rowdy teenager, or the importuning beggar is not merely expressing his distaste for unseemly behavior; he is also giving voice to a bit of folk wisdom that happen to be a correct generalization—namely, that serious street crime flourishes in areas in which disorderly behavior goes unchecked.[38]" That "unchecked panhandler" is the broken window, and as long as he is there, muggers and robbers will believe that they have a lesser chance of being caught or identified because the streets are riddled with potential victims who are "already intimidated by prevailing conditions.[39]"

Notable application of the broken windows theory is heavily cited its use in 1990s New York City under the guise of Mayor Rudy Giuliani and police commissioner William Bratton.[40] They both pushed for aggressive prosecution of low-level crimes, "resulting in a 70-percent increase in the number of misdemeanor arrests for relatively minor offenses over the course of the 1990s.[41]" That time also saw criminal activity in the city dropping at rates higher than that of the United States as a whole, with violent crime in New York falling by more than 56 percent compared to 28 percent nationwide.[42] Supporters of the broken windows theory cite these numbers as the effectiveness of the practice, however, opponents contribute the declining crime rates to a growth in police force, the economic boom of the decade, and decreased unemployment rates.[43] Justifications of racial profiling through the broken windows theory in other examples throughout New York City will be reiterated and expounded upon in Chapter 2. The theory will also be used in the context of France and the 2005 riots in Chapter 3.

[37] Ibid
[38] Ibid., 5
[39] Ibid.
[40] Greene, "Broken Windows Theory"
[41] Ibid.
[42] Ibid. Additionally, "[Property crime declined by a reported 65 percent in the city, versus 26 percent across the United States."
[43] Ibid.

Discourse on racial profiling and its implications is abundant, and a uniform, agreed on definition of the concept is hard to come by, considering conflicting objectives from both sides: the ones doing the profiling and the ones being profiled. For the purposes of this thesis, the highlighted commentary proves relevant in understanding the perspectives and issues of racial profiling primarily in how it affects black communities in the United States and France. History in both nations show identifiable differences in the social and economic status between black and white communities. Additionally, racial profiling does not stem exclusively from an officer's prejudice of someone being of a different background: structural inequalities created in the development of both nations contribute to a difference in police strategies in neighborhoods of and in the absence of color. Both quantitative and qualitative research and data indicate the pervasiveness of these issues in both jurisdictions, while domestic, regional, and international bodies recognize it as a problem and even go as far as to condemn the practice in statute.

1.3 Issues with Racial Profiling Data: The Benchmarking Problem

In identifying racial profiling, Glaser refers to the *benchmarking problem:* "the main empirical challenge to assessing the effect of suspect race on police decisions to stop and search.[44]" The theory exposes an issue within quantitative data on racial profiling, insinuating that just because minorities are disproportionately being stopped and searched at higher rates in certain locations does not automatically correlate to racial profiling. Benchmarks serve as denominators in the equation where stoprate=stopped/benchmark.[45] This base rate serves as an indicator of "rates at which members of various groups are present and engaged in various behaviors.[46]" The more precise these benchmarks are, the more confidence researchers and law

[44] Glaser, 22
[45] Ibid., 4
[46] Ibid.

enforcement can have in identifying the severity of racial profiling compared between different groups of people.[47] As an analytical approach, the interpretation is that this concept provides a formula from which quantitative racial profiling data can be standardized. This approach is appealing in its use of a consistent data analysis to empirically assess the true presence of racial profiling without being overly vague. Glasser even explains that due to the importance and difficulties associated with obtaining and working from accurate quantifiable data, both the U.S. Government Accountability Office and the state of California's Legislative Analyst's office conclude that most available studies and data concerning racial profiling are ambiguous due to lack of adequate benchmarking.[48] In discussing on the differences between traditional data collection of racial profiling and the inclusion of benchmarking, Glasser puts it plainly: "Simplicity has the benefit of straightforwardness but the detriment of imprecision. Complex, sophisticated approaches, in contrast, are more precise but can require esoteric theoretical assumptions that increase uncertainty and cloud interpretations.[49]"

Jeffrey Grogger and Greg Ridgeway propose an alternative approach for testing racial profiling in traffic stops, specifically, in their article "Testing for Racial Profiling in Traffic Stops From Behind a Veil of Darkness.[50]" In their commentary and recommendation, they also expose issues within the current strategies for obtaining data on the intersection of race and traffic stops. The key issue identified here is estimating the benchmark "against which to compare the race distribution of stopped drivers.[51]" They indicate that the benchmarking problem is generally

[47] Ibid.
[48] Ibid.
[49] Ibid., 5
[50] Jeffrey Grogger and Greg Ridgeway, "Testing for Racial Profiling in Traffic Stops from behind a Veil of Darkness," *Journal of the American Statistical Association*, no. 475 (2006): 878, https://doi.org/10.1198/016214506000000168.
[51] Grogger & Ridgeway, 878

dealt with in one of three ways: 1) Analyst's benchmarks are based on resident populations or drivers license records (even though they have limitations); 2) Traffic surveys are conducted by observers tallying race distribution among drivers/ traffic violators at a specific location; and 3) Analysts ignore "data on stops altogether, looking for racial disparities in other measures of police behavior.[52]" Each of these approaches expose themselves to issues, as demographics of the driving population in a community can differ from the racial makeup of the community (as everyone may not possess a car and/or license), part of the population of drivers tested could be from outside jurisdictions, "the race distribution of the at-risk population may differ even from that of the driving population if drivers of different races differ in their driving behavior," and that same at-risk population may also vary due to different interactions and exposure to police.[53]

Their alternative is an interesting one, as they apply a "veil of darkness" hypothesis, which suggests that "police are less likely to know the race of a motorist before making a stop after dark than they are during the daylight.[54]" They propose that—assuming minimal variance in driver and police behavior from day to night—they can "test for racial profiling by comparing the race distribution of stops made during the daylight to the race distribution of stops made after dark.[55]" Although not proposed in this thesis as an absolute solution to benchmarking issues in data on racial profiling, inclusion of an alternative, and perhaps somewhat radical, approach to dealing with this data proposes a welcome diversification in available data for comparison in legal and scholarly settings.

[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.

This thesis incorporates discussion of the benchmark issue to highlight discrepancies among existing data in identifying the issue of racial profiling—if there are issues with the data wherein the essence of this thesis is based, it warrants discussion. One of the issues, and maybe perhaps one of the more glaring, concerning the inability to adequately address the issue of unjust police profiling may lie within the ways law enforcement and researchers are consulting their data. Subsequently, the ways the featured jurisdictions, the U.S. in France, collect and evaluate their basic data concerning race of their respective citizens vary greatly. Considering this, the benchmarking problem has applicability in these specific jurisdictions in discussions of litigation and statute addressing racial profiling. This will be elaborated further in later chapters.

2 "Stop and Frisk": Profiling in the United States Through the Lens of New York

This chapter will study the issue of racial profiling in the United States through the lens of the New York City Police Department (NYPD), particularly their use of the stop-and-frisk tactic. The city of New York serves an appropriate example for analysis as there is extensive literature and litigation concerning their police practice, including justification for the use of the broken windows theory, and a recent court case of *Floyd v. City of New York*[56]. Other relevant cases, critiques, and a brief history of police practices are also relevant in the conversations of racial profiling in New York. The intention of this chapter is to highlight the severity and relevance of this issue in modern police practices. Even though racism and its use to oppress minorities in the name of the law is widely condemned in political and social spheres, its presence, both subtle

[56] Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y 2013)

and overt, has warranted decades of continuous litigation in the state of New York and throughout the United States.

The Fourth Amendment to the U.S. Constitution guarantees the protection against "unreasonable searches and seizures," unless issued by warrant, with probable cause.[57] The Fourteenth Amendment to the U.S. Constitution defines the citizen and guarantees that no state "deprive any person of life, liberty, or property, without due process of law"—the Equal Protection Clause ensures that no citizen of the State be denied equal protection of the laws.[58] The U.S. Supreme Court decision *Terry v. Ohio* is widely regarded as the first in a string of litigation outlining the standards of legal search by police offices in absence of an official warrant.[59] The case involved the stop and search of three men by plainclothes officers in the street, which resulted in the discovery of weapons on two of the stopped men, with Terry being convicted and sentenced for carrying a concealed weapon.[60] The landmark case dealt with the issue of whether the search and seizure of these men was in violation of the Fourth Amendment, with the court holding that the search performed by the officer was permitted under the U.S. Constitution.[61] Discussion of the case in an encyclopedic entry of the Fourth Amendment sums up the implications of the decision well:

> *In Terry v. Ohio (1968), the Court allowed for searches on the street that did not meet the standard of probable cause. In this case, it upheld the brief detention of a suspect for weapons on the grounds of reasonable suspicion rather than probable cause. Only a limited frisk was permitted with the lowered*

[57] U.S. Const. amend. IV
[58] U.S. Const. amend. XIV, sec. 1.
[59] Terry v. Ohio, 392 U.S. 1 (1968)
[60] Ibid.
[61] Ibid.

> *standard of cause. If the pat-down yielded a basis for an arrest, however, a full search incident to arrest could follow.*[62]

Following this ruling, police encounters with civilians categorized as stop-and-frisk later came to be referred to in some spheres as *Terry stops*.

The case Daniels v. City of New York is a class-action lawsuit that was brought against the City of New York in 1999, a precedent to *Floyd*, which will be discussed in the following section.[63] The plaintiffs in the case challenged the constitutionality of stop-and-frisk practices by the NYPD, particularly their Street Crimes Unit (SCU), in light of allegations that "SCU officers subject residents of high crime areas, particularly Black and Latino men, to stops and frisks based not on reasonable suspicion but on their race and national origin.[64]" The SCU was described as an "elite" group of officers in the department whose purpose was to sanction crime in New York City, with the particular goal to remove the streets of illegal firearms.[65] The plaintiffs in the case sought "declaratory and injunctive relief for themselves and on behalf of a class of similarly situated individuals," in addition to money damages.[66] The plaintiffs' Equal Protection and conspiracy claims were initially dismissed, as they failed to "show that the challenged misconduct had a discriminatory effect and was motivated by a discriminatory purpose," wherein Judge Shira J. Scheindlin, presiding over the case (and also, incidentally, over the *Floyd* case discussed below), indicated that in a case concerning race, "plaintiffs must show that similarly situated individuals of a different race were not subjected to challenge the

[62] Priscilla H. Machado, "Fourth Amendment," *Salem Press Encyclopedia*, 2017.
[63] Daniels v. City of New York, 75 F. Supp. 2d 154 (S.D.N.Y 1999)
[64] Ibid.
[65] Ibid.
[66] Ibid.

conduct.[67]" In regards to the conspiracy claims, the court failed to see any connection of conspiracy between the SCU and the City of New York.[68]

While litigation of the case continued, the NYPD disbanded the SCU, and the parties to the case—with approval of the Court—agreed to a Stipulation of Settlement to last until December 31, 2007.[69] Terms of the stipulation indicated categories concerning: Racial Profiling Policy, Supervision and Monitoring, Training, Incident Documentation, Public Information and Outreach, Confidentiality, and Document Maintenance.[70] Notable highlights include:

> *C(1): The NYPD shall have a written policy regarding racial or ethnic/national origin profiling that complies with the United States Constitution and the New York State Constitution (the "Racial Profiling Police").*
>
> *D(1): The NYPD Quality Assurance Division ("QAD") has developed protocols necessary to integrate review of stop, question and frisk practices into its existing audit cycle of NYPD commands, including determinations as to what material shall be reviewed and what standards shall be applied. QAD shall conduct audits at a minimum to address the following issues:*
>
> a. *Whether , and to what extent, documents (i.e., UF250s, officer activity logs) that have been filled out by officers to record stop, question and frisk activity have been completed in accordance with NYPD regulations; and*

[67] Ibid.
[68] Ibid.
[69] Daniels v. City of New York, 99 Civ. 1695 (SAS 2003)
[70] Ibid.

b. Whether, and to what extent, the audited stop, question and frisk activity is based upon reasonable suspicion as reflected in the UF250 forms.

Section E of the Stipulation outlines ten requirements for police training, including "annual in service training regarding the Racial Profiling Policy," training new recruits in "cultural diversity and integrity and ethics," and on "the legal and factual bases for conducting and documenting stop, question, and frisk activity," among other stipulations.[71] No further litigation was involved in this case following the 2003 Stipulation, and under the direction of Judge Scheindlin, a new lawsuit was filed by two of the plaintiffs' counsel in January 2008.[72]

The following sections will continue to expand on the conversation of stop-and-frisk, with analysis given to the *Floyd* case, as it is a recent and relevant Federal Court decision. The combination of legal, political, and social perspectives of the issue provide a comprehensive look at the causes, meaning, and effects of the discriminatory police practice in the context of New York City. Conversations about the NYPD policing minority neighborhoods rarely occur without mention of the practice, warranting a discussion which considers a myriad of perspectives, demonstrated below.

2.1 Litigation and Legal Issues Concerning "stop-and-frisk"

2.1.1 Floyd et. Al. v City of New York

On August 12, 2013, Judge Shira J. Scheindlin of the US District Court Southern District of New York found the NYPD in the case in *Floyd v. City of New York* "liable for a pattern and

[71] Ibid.
[72] *See* https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al

practice of racial profiling and unconstitutional stops.[73]" The federal class action suit was filed by plaintiffs of black and Hispanic descent, claiming that their constitutional rights were violated considering both the Fourth and Fourteenth Amendment.[74] The former alleges that the "stops" were without legal basis, violating the constitution, and the latter alleges that these stops were racially motivated, violating the Equal Protection Clause of the Fourteenth Amendment.[75] For this section, the liability opinion published August 12, 2013 will be referenced as it outlines the malpractices found by the NYPD in relation to racial profiling, however, subsequent documents related to the outcome of this string of litigation will be referenced for clarity. The entire liability opinion is 198 pages long and exceeds the parameters of this thesis, however there are some highlights relevant to the discussion of racial profiling and expectations of law enforcement in policing minority communities, which will be discussed below.

2.1.1.1 Case Summary Highlights

In her introduction, Judge Scheindlin emphasizes the scope of the case as: 1) not determining the effectiveness of the stop-and-frisk police tactic as a law enforcement tool, but rather, 2) the constitutionally of its use, while highlighting that 3) the case is not only about the 19 individual cases of alleged constitutional violations on trial, but whether the "City has a *policy* or *custom* of violating the Constitution by making unlawful stops and conducting unlawful frisks.[76]" She continues to express passionate sentiments of empathy towards those affected by the police practice, stating:

[73] Ibid. The suit was filed on behalf of the plaintiffs by The Center for Constitutional Rights.
[74] Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y 2013)
[75] Ibid.
[76] Ibid., 3, referencing "*Monell v. New York City Dep't of Soc. Servs*., 436 U.S. 658 (1978) 5 (establishing the standards under 42 U.S.C. § 1983 for municipal liability for constitutional torts by employees)."

> *No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police. This alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone.*[77]

Her subsequent executive summary invokes 11 "uncontested" facts, including these highlights:

> *Between January 2004 and June 2012, the NYPD conducted over 4.4 million Terry stops.*
>
> *52% of all stops were followed by a protective frisk for weapons. A weapon was found after 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.*
>
> *In 52% of the 4.4 million stops, the person stopped was black, in 31% the person was Hispanic, and in 10% the person was white.*
>
> *In 2012, New York City's resident population was roughly 23% black, 29% Hispanic, and 33% white*

[77] Ibid., 3.

In 23% of the stops of blacks, and 24% of the stops of Hispanics, the officer recorded using force. The number for white was 17%

Weapons were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites

Contraband other than weapons was seized in 1.8% of the stops of blacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites.[78]

In analyzing the plaintiffs' Fourth Amendment claims, she acknowledges the inherent difficulty" in basing conclusions on the 4.4 million police stops submitted into evidence, stating that it is impossible to individually assess each one of these stops.[79] The information on these stops was obtained via the NYPD database based on "UF-250" forms, which are vulnerable to one-sided versions of the stops on account of these reports were documented by police officers utilizing a procedural form which only obtains a series of check boxes for the officers to explain their accounts of the situation.[80] Although Judge Scheindlin finds that at least 200,000 of the stops reported in this database were "made without reasonable suspicion," the actual number is likely much higher based on the lack of indisputability of the UF-250s reports. These all contribute to an underestimation of the amount and severity of unconstitutional stops performed by the NYPD.

With regards to the plaintiffs' Fourteenth Amendment claims, Judge Scheindlin rejects the City's experts' testimony that "the race of crime suspects is the appropriate benchmark for

[78] Ibid., 6-7
[79] Ibid., 7
[80] Ibid.

measuring racial bias in stops."[81] The reasoning given for this rationalization is that blacks and Hispanics should be stopped at a rate proportionate to the criminal suspect population in their respective communities, however, based on the undisputed statistics, the stopped population is "overwhelmingly innocent—not criminal.[82]" Considering these findings, she concludes it to be more sensible to use the benchmark provided by the plaintiffs' expert witness instead, which utilizes "a combination of local population demographics and local crime rates (to account for police deployment).[83]" Based on the results of that testimony, she finds that "blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion thank whites.[84]"

With both claims, Judge Scheindlin indicates that one way to "prove" the City's use of an unconstitutional custom (in this case, stop-and-frisk), is to display that its employees (the NYPD) acted with "deliberate indifference.[85]" To justify this claim, she cites a 1999 report from the New York Attorney General that indicated the unconstitutionality of the NYPD's use of stop-and-frisk, to which the city did not respond.[86] In the years after this report, she states that department supervisors experienced pressure to increase the number of stops performed by their officers, with subsequent trial evidence revealing that if these officers did not perform as asked, negative consequences were possible should they not reach these stated goals.[87] The summary also purports claims that the aforementioned evidence also revealed that the NYPD has an "unwritten policy of targeting 'the right people' for stops.[88]" This blatant form of racial profiling is not

[81] Ibid., 8
[82] Ibid., 8-9
[83] Ibid., 9
[84] Ibid.
[85] Ibid., 10
[86] Ibid.
[87] Ibid., citing " 2010 Memorandum of Chief of Patrol James Hall, Plaintiffs' Trial Exhibit ("PX") 22 290 at *0096."
[88] Ibid.

permitted under the Equal Protection Clause, with Judge Scheindlin supplementing that, "While a person's race may be important if it fits the description of a particular crime suspect, it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group are criminals.[89]" Additional evidence given revealed that departments provided insufficient monitoring and supervision of these unconstitutional stops, indicating that supervisors would review the productivity of their officers, but not the facts of the stops to determine their legality.[90] Additional shortcomings were stated in regards to supervisors' assurance that officers are making proper records, and insufficient trainings of officers in the lawful ways to "stop-and-frisk," surmounting in a lack of improvement in light of mounting evidence of inadequate policing.[91]

In a summary of the above information, Judge Scheindlin found the City of New York liable for violating the plaintiffs' Fourth and Fourteenth Amendment rights. This is largely based on the "deliberate indifference" the city had toward the NYPD's use of stop-and-frisk. Even if there was not proven indifference of the City, the NYPD's practices were unconstitutional in nature and widespread enough to "have the force of law.[92]" Based on the evidence given, both statistical and anecdotal, it is shown that minorities are treated differently than whites during these stops, making them clearly racially motivated.[93] Additionally, the City and its highest officials' "zeal to defend a policy that they believe to be effective," proactively ignored years' worth of overwhelming evidence proving that their policy was racist in practice.[94]

[89] Ibid., 10-11
[90] Ibid., 11
[91] Ibid.
[92] Ibid.,13
[93] Ibid.
[94] Ibid., 14

2.1.1.2 The Joint Opinion on Remedial Relief: The Relevance of *Ligon v. City of New York*

Ligon v. City of New York is one of four recent cases challenging the constitutionality of the NYPD's use of stop-and-frisk, among the companion cases of *Daniels, Floyd*, and *Davis v. City of New York* (which will be alluded to in the conclusion of this chapter)[95]. The complaint in this case alleged the "abusive stop, question, search, citation, and arrest practices" of the NYPD in Operation Clean Hall (OCH) buildings in New York City "stand in stark contrast to the program's professed purpose, which is to combat illegal activity in apartment buildings with records of high crime.[96]" OCH is indicated as being operated by the NYPD, "existing in some form since 1991.[97]" The enrollment in the program is obtained simply through a "Clean Halls affidavit," a form which can be filled with a building's address and landlord's signature.[98] This affidavit provides NYPD officers the discretion to enter enrolled buildings and arrest anyone within those buildings who are engaged in criminal activity.[99]

The lawsuit alleges that the "NYPD has no meaningful standards concerning which buildings are eligible for the program,[100]" noting that the New Yorkers living in OCH buildings are "disproportionately black and Latino as compared to the City's population.[101]" Further, the lawsuit states that since the NYPD does not gauge the volume and persistence of criminal activity in these buildings, which would justify their enrollment in the program, these racial disparities continue without any substantial correlation to actual criminal activity in the area.[102]

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[95] Ligon v. City of New York, 925 F.Supp.2d 478, (S.D.N.Y. 2013)
[96] Ibid.
[97] Ibid. "The program operated under the names 'Trespass Affidavit Program' and 'Formal Trespass Affidavit Profram' in Manhattan and Brooklyn, respectively."
[98] Ibid.
[99] Ibid.
[100] *See* https://www.nyclu.org/en/cases/ligon-v-city-new-york-challenging-nypds-aggressive-patrolling-private-apartment-buildings
[101] Ligon, No. 1
[102] Ibid., 4

The lawsuit attributes the unjustified stops and frisks to improper and inadequate training and supervision by the NYPD, accusing the defendants of deliberate indifference in light of these allegations while also maintaining that the OCH program has a "disparate impact on blacks and latinos.[103]"

Judge Scheindlin granted the plaintiffs preliminary injunctive relief in light of Article 4 violations in a 157-page opinion on January 8, 2013.[104] Following the liability opinion in *Floyd*, Judge Scheindlin also released a joint opinion on remedial relief in both cases, challenging the NYPD's practice of stop-and-frisk.[105] The opinion is joint as many of the remedies overlap in that both cases require reform in the NYPD's practices and policies related to stop-and-frisk practices to better align them with the requirements of the U.S. Constitution.[106] The opinion is extensive and "as narrow and targeted as possible," however there are a couple of highlights, includes the appointment of an "independent monitor to oversee the reform process[107]," whose responsibility is oversee the reforms provided by the court.[108] Immediate reforms specified in the opinion include revisions to polices and training materials used by the NYPD relating to stop-and-frisk and racial profiling, changes to stop and frisk documentation, and changes to supervision, monitoring and discipline.[109] Rationale for these immediate reforms are alluded to the liability opinion discussed in section 2.1.1.1.

[103] Ibid., Summary of sections 144-196
[104] Ligon v. City of New York, [ECF #96] 925 F.Supp.2d 478 (S.D.N.Y. 2013)
[105] Floyd v. City of New York, 959 F.Supp.2d 668, (S.D.N.Y. 2013)
[106] Ibid., Part I
[107] Judge Scheindlin appointed Peter L. Zimroth, a law partner, formet Corporation Counsel of the City of New York, and former Chief Assistant District Attorney of New York County, the latter two roles which had him working closely with the NYPD.
[108] Ibid., Part II B(1).
[109] Ibid., B(2a, b, c)

2.1.1.3 Responses to the *Floyd* Case

In a commentary about stops and frisks, race, and the constitution, Senior Legal Fellow Paul J, Larkin, Jr. presents a critique of the case outcome in which he claims the Federal district court used the incorrect legal analysis in addressing the plaintiffs' Fourth Amendment claims, while it "may have been correct in its equal protection ruling.[110]" The rationale is that *Terry* stops should be evaluated based on an individual case-by-case basis and not based on statistics, as Judge Scheindlin relied on in this case.[111] In her liability opinion, Judge Scheindlin infers that indication of a *Terry* stop in the context of a police encounter is dependent on "whether a reasonable person would have felt free to terminate the encounter.[112]" According to Larkin, "stops are not like vitamins; each one is different from the other," where for quality control, pharmaceutical companies test each individual batch of drugs in the production process because if said process is running smoothly, then each batch should be the same.[113] This same process cannot be applied to *Terry* stops, he claims, as individual cases in a batch of stop-and-frisks incidents can differ greatly from one another. Judge Scheindlin did analyze nineteen stop-and-frisk cases in the process of making the Floyd decision, yet Larkin argues that those nineteen stops are not reasonably identified as a representative sample of the prevalence of the racist practice in the NYPD.[114]

Additionally, this critique highlights Judge Scheindlin's trouble with the NYPD's reports, which indicated that at least 200,000 of the 4.4 million *Terry* stops were unjust. Larkin focuses

[110] Paul J. Jr. Larkin, "Stops and Frisks, Race, and the Constitution [Comments]," *George Washington Law Review*, no. Special Issue (2013): 1.
[111] Ibid., 2
[112] Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y 2013)
[113] Larkin, 2
[114] Ibid.

on what he calculates to be a ninety-five percent success rate of said *Terry* stops, conflating that: "Apparently, she believed that a ninety-five percent success rate meant that the NYPD had often violated the Fourth Amendment," following with a reiteration that the approach of using statistics is mistaken.[115] This perspective is faulty, as it glazes over the fact that 200,000 unjust stops is more than enough to warrant a probe into whether the NYPD is abusing its authority to over-police minority communities The perspective of a person from the black community[116] would show frustrations with majority groups' infatuation and reliance on statistics and comparable data to indicate whether or not their community is being discriminated against. Concerning police practices in New York, Luiza Maria Filimon argues that in a majority of stop-and-frisk cases, "we are dealing with a criminalisation of poverty, where administrative infractions (summary offences), misdemeanours and regulatory offenses, are treated like felonies, punished as such and hence ensure that all conditions are met for criminal records to become the very stigma that trigger repeat offenses," a phenomenon which she argues "closes the social Darwinist circle of blacks committing crimes and white systems—be it in law enforcement or judicial—restoring justice, law and order." "Larkin's heavy reliance on law—which, remember, ensures material rights that communities of color are often deprived of—is a privileged and narrow perspective which fails to acknowledge structural and social prejudices that contribute to policing of communities of color. He states that U.S. law does "not require certainty that crime is afoot before a police officer can make a *Terry* stop, nor does it demand that an officer know that it is more likely than not that crime is afoot.[117]" These laws are also

[115] Ibid.
[116] I am a member of the black community, and do share this perspective.
[117] Ibid.

contested on their reliability and ambiguity in specifically addressing instances of racist police tactics.

In their Post-Trial Memorandum of Law[118], the NYPD held that the plaintiffs of the case failed to prove a constitutional violation that police were unfairly targeting Black and Hispanic males for *Terry* stops, further noting that: "For years, plaintiffs have employed unsuccessfully a scattershot approach to meet their burden of proof.[119]" In their preliminary statement, the NYPD also claims:

> *Plaintiffs disregarded that NYPD deploys most heavily in the areas with the highest crime rates based on crime reports -- generally majority minority neighborhoods where the victims are majority minority -- and that the racial breakdown of NYPD stops and frisks strongly correlates with the racial breakdown of reported crime suspects[120].*

Including this in their preliminary statement, the NYPD completely disregards the historical relevance in the makeup of these communities, based on biased structural development and unfair police practices. There is also potential issues with the benchmark in this information, as they did not elaborate on the source of the identified data. Following this statement, the NYPD relies heavily on the inconclusiveness of the data given to the court in the form of the UF250 stop forms to show that there is no way to prove a widespread pattern of constitutional violations and deliberate indifference on behalf of the NYPD.[121]

[118] The document was released in June of 2013, two months prior to Judge Scheindlin's decision.
[119] "Defendant's Post-Trial Memorandum of Law, David Floyd, et Al. v. City of New York," June 12, 2013, http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1457&context=historical.
[120] Ibid.
[121] Ibid.

Recalling Judge Scheindlin's decision to utilize the plaintiffs' expert to analyze the statistics given, the NYPD shares the opinion of Lakin insofar as the data given is not sufficient to prove the constitutionality of a *Terry* stop. The NYPD, however, focuses heavily on the incongruence the data shows in relation to a UF250 form's ability to indicate police misconduct, stating: "A UF250 alone provides no basis to conclude here that a stop was impermissible; the form was not designed to support such a finding in a court of law, and no factfinder would ever rest on a form to conclude that a stop was unlawful.[122]" The defense also notes that "if a single form does not establish that a stop was unlawful, thousands of forms do not establish that thousands of stops were unlawful," concluding that "Fagan[123] cannot have it both ways—either he accepts the credibility of the form, and that 'furtive movement' means 'furtive movement' giving rise to reasonable suspicion or he does not.[124]" Even if the court were to rely on this database, the defendants continue, the six percent—or five percent, in Larkin's perspective—of unjustified stops, is not sufficient enough to show a widespread pattern.[125]

The plaintiffs also failed, the NYPD legal response continues, to show evidence of deliberate indifference, claiming that the NYPD does not have quotas, only performance goals, "an acceptable personnel tool," which "Operations Order 52 legitimately expressly encourages performance goals *in relation to addressing identified crime conditions*.[126]" They further cite that the plaintiffs "have always seemed hard-pressed to identify any *specific* flaws in any of the City's policies," citing their "empty quota theory" as a "red herring," and accusing their legal team of launching "a scattershot attack at all levels of NYPD's managerial operations, hoping to

[122] Ibid., 7
[123] The expert presented by the plaintiffs and used by Judge Scheindlin.
[124] Ibid., 7-8
[125] Ibid., 8
[126] Ibid., 11

hit upon a theory or deficiency that glues together their *Monell* theory of liability.[127]" The NYPD further asserts that their training and supervision procedures are adequate, noting: "Recruits and impact officers receive extensive training on reasonable suspicion, including when a person objectively may not feel free to leave, trespass crimes, Penal laws and Constitutional Law (both NYS and Federal); Characteristics of Armed Suspects; NYPD Policy Prohibiting Racial Profiling; Discretion; Policing in a Multicultural City; Tactics; and Memobook entries/Activity logs.[128]"

In his analysis of the *Floyd* case, Arthur H Garrison states that it is not surprising that the NYPD minimized the plaintiffs and their case, as they inferred that the only thing the plaintiffs proved was the undisputed fact that the amount of blacks and Hispanics stopped in New York City exceeds their representation of the overall population, and that the NYPD did not deploy officers to these communities of colors based solely on the fact that they are made up of black and brown people, but because the crime statistics in these minority communities are disproportionate and warrant excessive policing.[129] Ultimately, the court did not agree with these claims, the liability opinion ultimately deciding:

> *The City and the NYPD's highest officials also continue to endorse the unsupportable position that racial profiling cannot exist provided that a stop is based on reasonable suspicion. This position is fundamentally inconsistent with the law of equal 779 protection and represents a particularly disconcerting manifestation of indifference. As I have emphasized throughout this section, the*

[127] Ibid. 12
[128] Ibid., 14
[129] Arthur H. Garrison, "NYPD Stop and Frisk, Perceptions of Criminals, Race and the Meaning of Terry v. Ohio: A Content Analysis of Floyd, et Al. v City of New York [Article]," *Rutgers Race & the Law Review*, 2014, 65.

> *Constitution "prohibits selective enforcement of the law based on considerations such as race." Thus, plaintiffs' racial discrimination claim does not depend on proof that stops of blacks and Hispanics are suspicionless. A police department that has a practice of targeting blacks and Hispanics for pedestrian stops cannot defend itself by showing that all the stopped pedestrians were displaying suspicious behavior. Indeed, the targeting of certain races within the universe of suspicious individuals is especially insidious, because it will increase the likelihood of further enforcement actions against members of those races as compared to other races, which will then increase their representation in crime statistics. Given the NYPD's policy of basing stops on crime data, these races may then be subjected to even more stops and enforcement, resulting in a self-perpetuating cycle.*[130]

2.1.2 Other Legal Restraints on Resolving the Issues Surrounding Racial Profiling

A search of racial profiling crossed with litigation of the Supreme Court will bring up several questions which some may even claim make it "nearly impossible to sue police for racial bias.[131]" Following *Terry*, University of Nevada constitutional law professor Thomas B. McAffee states that the stop-and-frisk doctrine of the case "has lent itself too readily in supporting law enforcement efforts rooted in stereotypical generalizations and racial profiling," continuing that "the developments in constitutional criminal procedure growing directly out of

[130] Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y 2013)52, 191-192
[131] *See* https://splinternews.com/4-supreme-court-cases-that-made-it-nearly-impossible-to-1793857727

Terry have done nothing but strengthen the tendency of the criminal justice system to work so as to harm the rights and interests of racial minorities.[132]"

The case of *United States v. Brignoi-Ponce*, for example, is considered to be "among the first cases to present the issues of reasonable suspicion and ethnicity to the U.S. Supreme Court following the formulation and acceptance of that concept in *Terry*.[133]" The case ruled that Border Patrol agents stopping and questioning occupants of a vehicle based solely on their appearance is a violation of the Fourth Amendment.[134] In their review of the judicial and legislative literature relevant to discussions on racially biased policing, Delores Jones-Brown and Brian A. Maule take the position that "if it is unreasonable to stop a vehicle near the American-Mexican border simply on the suspicion that the occupants, by appearing to be of Mexican descent, are illegally in the United States, arguably it is also unreasonable to stop an African American on the suspicion that because of his skin color he may have committed or is committing a crime.[135]" The "suspicious association," they continue, in the first case is that of being an illegal immigrant, whereas appearance in the second suggests general criminality—most often accusations of being a drug offender.[136] Overall, Brown and Maule argue that "[I]n the thirty off years since the *Brignoi-Ponce* decision, the Supreme Court of the United States has failed to make so clear a ruling regarding the role of race in police decision making.[137]" They suggest that this is in part

[132] Delores Jones-Brown and Brian A. Maule, "Racially Biased Policing: A Review of the Judicial and Legislative Literature," in *Race, Ethnicity, and Policing: New and Essential Readings* (New York: New York University Press, 2010), 140–73.
[133] Jones-Brown and Maule.
[134] United States v. Brignoni-Ponce, 422 US 873 (1975)
[135] Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y 2013), 148
[136] Ibid.
[137] Ibid., 141

due to the Supreme Court's failure to have a clear position on the permissibility of race in law enforcement practice, a failure which has "kept the race and policing controversy alive.[138]"

The 1983 Supreme Court Case *City of Los Angeles v. Lyons* concerned Lyon's injunction against the City of Los Angeles' police use of chokehold in his case—where he was pulled over for a burned-out tail light and subsequently ordered out of the vehicle and forced into said chokehold—met the necessary legal standing.[139] The court held that he did not have standing in the federal courts as the plaintiff did not show that he "has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct," and that even though he "may have been illegally choked by the police in 1976," he was afforded standing to file against the individual officer involved in the case, but that "does not establish a real and immediate threat that he would again be stopped for a traffic violation, or any other offense, by an officer who would illegally choke him into unconsciousness without any provocation.[140]" It can be said that this "procedural hurdle that the Supreme Court set up in *Lyons* means that is not nearly impossible to use the courts to reform police department practices—including racially discriminatory practices," under the guise that if a man who was choked unconscious by police officers did not have standing in the courts, then who would?[141]

Justice Scalia delivered the opinion of the Court in the case *Whren et al. v. United States* where the petitioners in the case were stopped by plainclothes officers in an area with high drug activity after they were found to be in possession of crack cocaine after observing a traffic

[138] Ibid.
[139] City of Los Angeles v. Lyons, 461 US 95 (1983)
[140] Ibid. *Under Holding:* 2(a), 2(b)
[141] *See* https://splinternews.com/4-supreme-court-cases-that-made-it-nearly-impossible-to-1793857727

violation.[142] In the case, the petitioners argue that in the context of civil traffic regulations, probable cause is not enough to decide on the constitutionality of a stop under Fourth Amendment, alleging that "the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible," reasoning that "a police officer will almost invariably be able to catch any given motorist in a technical violation."[143] Therefore, the petitioners argued, the Fourth Amendment test in this case should be "whether a police officer, acting reasonably, would have made the stop for the reason given.[144]" The Court unanimously ruled that the officer was not in violation of the Fourth Amendment, as an actual traffic violation had occurred, making the search and seizure reasonable, regardless of if the officers had other personal motivations in stopping the vehicle.[145] The Court also acknowledged the balancing test required under the Fourth Amendment between a search-and-seizure's benefits in its discovery and harm it may cause to the individual, however, the test is only generally applied to "unusually harmful searches and seizures," and there was no indication of that harm in this traffic stop.[146]

This case, and countless others[147] highlight the potential of the courts to set standards of what does and does not constitute racial profiling and the constitutionality of these practices, and their subsequent failure to do just that. Reiterating the stance of Jones-Brown and Maule, the

[142] Whren v. United States, 517 US 806 (1996). In his opinion, Justce Scalia describes that while on patrol, the plainclothes officers noticed the petitioners in "a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right." The truck was stopped at the stop sign for "what seemed an unusually long time," alerting the police officers to execute a U turn to pursue the vehicle, after which the truck "turned suddenly to its right, without signaling, and sped off at an 'unreasonable' speed."
[143] Ibid.
[144] Ibid.
[145] Ibid. with supplemental summary via https://www.oyez.org/cases/1995/95-5841
[146] Ibid.
[147] *See* Brown et al, v, City of Oneonta concerning the legality of police stopping and questioning every black male resident in Oneonta, New York; Kelly v. Paschall, a similar case wherein more than 10% of the town of Tulia, Texas' black population were arrested during a drug sting; State v. Soto a case in New Jersey concerning racial profiling.

aforementioned cases and others not mentioned "expand police discretionary authority in ways that, [we] contend, seriously affect the potential for racial minorities to become victims of racially biased policing.[148]" Outside of the courts and law, this has become immediately apparent in the constant reminders of police brutality and racist policing documented and shared throughout social media. It becomes apparent when social and political spheres clash in conversations about whether taking a knee to protest said brutality and racism is un-American, so much so to the point where the nation's own president is moved to use expletives on national television.[149] It is indisputable that inequalities exist when it comes to policing minority communities in the United States, and its effects on the quality of life of these communities are devastating.

3 Racial Profiling in France

In this chapter, I will assess the source and implications of racial profiling by police in France. To address the issue comprehensively, I will first start with introducing and elaborating on the republican model of integration that has been adopted by the French. This is essential in understanding the perceptions of race throughout French society—politically, socially, and economically—as well as an explanation for their procedure of documenting racial statistics. Further, I will analyze the relationship between those who are marginalized and those who are in police positions. This will be done through an analysis of French criminal code and litigation related to police checks and discrimination. Following, I will do a comprehensive analysis of the 2005 riots in the French *banlieues* suburbs, often thought to be a kind of catalyst for the

[148] Jones-Brown and Maul, 142
[149] *See http://money.cnn.com/2017/09/23/media/donald-trump-nfl-protest-backlash/index.html*

increased media presence of racial unrest in French society. Through this analysis, I will look at the implications of structural and institutional suppressors in relation to racial minorities in France. A combination of these perspectives will elaborate on the view that poor race relations and racial profiling are prevalent in French society.

3.1 The Republican Model of Integration

To begin unwinding the entanglement that is racial bias and discrimination in France, it should first be noted the history of the perception of race throughout French society and its implications today. The social construct of race takes a variety of forms in cultures throughout the world. Unique to the United States, France's take on race is one whereby excluding the term has become a long-standing tradition: France does not *believe* in race. This is widely said to stem from the Revolution of 1789 and the subsequent Declaration of the Right of Man and Citizen.[150] Origins of the idea come from the desire post-revolution to leave behind a history of religious persecution and wars and to embrace the idea of Enlightenment.[151] These ideas are reiterated throughout French history and legislation, codified in the most recent Constitution of the Fifth Republic of France.[152] Present-day, this idea of universal equality in France can be summed up in the idea of a republican model of integration.

In the French model, the central principle is that the only "legitimate" group affiliation is that of citizenship, excluding the recognition of minority groups as such.[153] Origins and

[150] Declaration of the Rights of Man and Citizen, 26 August 1789 *See Art. 1:* "Men are born and remain free and equal in rights. Social distinctions may be based only on common utility."
[151] James Alan Cohen, "'Postcolonial Colonialism?' French Struggles Against Ethnic-Racial Discrimination and the 'Postcolonial' Critique of the Republican Model of Citizenship," *Situations: Project of the Racial Imagination* 2, no. 1 (2007): 95–120.
[152] Constitution of France, 1958. See Article 1 of the Preamble" France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion."
[153] David B Oppenheimer, "Why France Needs to Collect Data on Racial Identity...in A French Way," *Hastings International and Comparative Law Review* 31, no. 2 (2008): 735–52.

redefining of the model vary in perspective. In her article "Obscuring Race," Emily Marker purports that race played a central role in the defining of "French nationality and citizenship from the interwar period to the dissolution of France's African Empire.[154]" Starting in 1945, "a small but significant" group of leaders of African, Caribbean, and Malagasy origin started to arrive in France to serve in the Parliament.[155] Political conversations occurring throughout the Fourth Republic—notably the National Assembly's Commission on Overseas Territories—provided an avenue for French and French-African nationals to facilitate discussion in a common place, bringing to light conversations about race in a climate wherein both parties were able to come together face-to-face as what Marker describes as "ostensible equals, for the first time.[156]" These deputies of color utilized this avenue to force conversations about race in their pursuit of equal citizenship in the French Union by encouraging specific reforms that would: "improve working conditions, increase access to education and government jobs, and ensure equal pay for equal work for their constituents.[157]" However, their Anglo counterparts flipped the conversation by adopting code words and rhetoric that, instead, "deflected accusations of systemic racism and ultimately displaced the issue of race altogether.[158]" In a quest to dissociate themselves from the bad overtones of the term colonialism, the Vichy regime, and what Marker refers to as a "deep anxiety about race," the French Republic overcompensated by ignoring claims of systemic racism and for reformation and adopted a rhetoric of a "new Union," by confusingly codifying an

[154] Emily Marker, "Obscuring Race: Franco-African Conversations about Colonial Reform and Racism after World War II and the Making of Colorblind France, 1945-1950.," *French Politics, Culture & Society* 33, no. 3 (2015): 1–23.
[155] Marker, "Obscuring Race"
[156] Ibid., 1-2
[157] Ibid., 18
[158] Ibid., 2

official nondiscriminatory, yet colorblind, association of identity in the Constitution of the Fourth Republic.[159]

When faced with accusations of structural inequalities and differential treatment exhibited in the wide discrepancies in the quality of life between white and non-white citizens of the French Union, representatives of the former contributed these inequalities to remnants of abuses of the Vichy regime, while individualizing the issues of race, "reducing institutional racism to a matter of personal prejudice.[160]" This placed deputies of color in a "double bind" where their attempts to speak on their individual encounters with racism as evidence of these structural inequalities proved useful in only supporting the already established rhetoric of racism only being prevalent in individualized prejudices.[161] This is not an uncommon for people of color to experience in European arenas, but as Markel puts it, "(this) context was novel.[162]" The point in history where this discourse occurred could have been pivotal in post-colonial race relations between France and its former colonies. The inequalities documented by the Deputies of color over a half-century ago are still echoed throughout French society to this day. Based on these statements, there is a clear argument that at least an acknowledgement of the systemic racism—let alone the complete avoidance of a codified stance of colorblindness—could have dramatically impacted the French society we are familiar with today.

Additionally, law professor Jim Cohen proposes that the modern incantation of the republican values—making the official move from that of values to the republican *model*—stems from the mid-1980s and Jean-Marie Le Pen's "anti-immigrant National Front.[163]" Cohen claims

[159] Ibid., 5
[160] Ibid., 19
[161] Ibid.
[162] Ibid.
[163] Cohen, 98

the push for the model in its official capacity was a warranted collaboration from both the left and the right to reach a consensus on the condemnation of racism and xenophobia to marginalize the extreme politics of the National Front.[164] Assumingly, the only way to combat this extreme discrimination on the political front was to identify a notion of universal citizenship.[165] Otherwise, Cohen cites, there would be two consequences: 1) the minority groups themselves would organize themselves among community lines, contributing to the rise of *"communautarisme,"* thus, 2) giving the racists pretext for accusations of the dominant order giving special treatment to the immigrants and neglecting the "true" French people, which was feared to result in a rise of the National Front's share of the electoral vote.[166]

While the collaboration of the political right and left in an effort to marginalize the *far* right theoretically shows a general consensus, the republican model's modern-day position has potential contradictory applications in light of its historical ties. Cohen conceptualizes this by pointing out that the vague nature of this consensus allows for too much interpretation from both sides for its framework, with the left version of the discourse "more likely to include a stronger conception of social right," and the right, more conservative side, emphasizing "a more vague 'equity' within a market framework.[167]" Cohen's general critiques of the model also indicate that even within political spheres, inferences of the severity of the republican model can vary, with some being more "unbending" than others in their defense that self-identity of one with a community other than that enshrined in the "republicanist" ideal can be a danger.[168] Additionally, he argues that the republican model "is not always an accurate gauge of social and

[164] Ibid., 100-101
[165] Ibid.
[166] Ibid.
[167] Ibid., 101
[168] Ibid.

political behavior," as the model provides principles in some domains and unwavering rules in others.[169]

Nonetheless, the republican model of integration has been and continues to be vocally praised by many French politicians. As a recent example, former French Secretary of State for Urban Affairs Fadela Amara, the daughter of Algerian immigrants, is of the opinion that official documentation of ethnic statistics is counterproductive.[170] In 2009 she stated, "No one should again have to wear a yellow star," reiterating her stance that maintaining census and affirmative action quotas are "caricatures.[171]" Much of the rhetoric surrounding the republican model of integration and its fault in the absence of quantifiable data on race and racism is reliant on the Constitution of the French Republic—the French consider it illegal to collect statistics on race contrary to the United States, and do not keep a census.[172] The effects of this will be analyzed in subsequent sections.

3.1.1 Data on Racial Identities

The largest issue stemming from France's insistence on using the republican model of integration is the fact that this results in the lack of official, quantitative data on the racial and ethnic makeup of their population. As mentioned above, the justification for this lack of data is referenced as being codified in the Constitution of the French Republic. As a result, the first quantifiable evidence of racial profiling by police in France only became available in 2009 through the report "Profiling Minorities: A Study of Stop-and-Search Practices in Paris, released

[169] Ibid.
[170] See http://content.time.com/time/world/article/0,8599,1887106,00.html
[171] Ibid.
[172] Ibid.

by the Open Society Justice Initiative.[173]" The contents of this report and other data on police profiling will be summarized following a discussion of the political, legal, and scholarly discourse on whether France should collect statistics on race.

David B. Oppenheimer's article "Why France Needs to Collect Data on Racial Identity…In A French Way" begins its framework by providing an example of what kind of data France *could* have through the statistics available in the United States.[174] The United States Census Bureau's consistent and extensive collection of data about American demographics of race and ethnicity make it relatively easy to access and measure the prevalence and severity of racial inequality in the nation.[175] Oppenheimer cites statistics collected by the Bureau that indicate discrepancies of income amongst different racial communities, net worth, workforce representation, public school demographics, and more.[176] It is uncontested that the United States overwhelmingly has objective data that can be used in cases of discrimination, particularly in cases of structural inequalities. The French do not have this counterpart. Oppenheimer does, however, acknowledge that should France pursue the collection of official racial data, it should not exactly mirror that of the United States.

Relaying from the mass of the French riots of 2005—which will be discussed in section 3.2—and its reference as a "wake up call" for France, Oppenheimer comments on two arguments given for the position that France should not collect racial identity data. The first view mimics justifications discussed in the previous section concerning the fear that collecting this data makes

[173] Indira Goris, Fabien Jobard, and Rene Levy, "Profiling Minorities A Study of Stop-and-Search Practices in Paris," Research Report (New York: Open Society Justice Initiative, 2009).
[174] Oppenheimer, "Why France Needs to Collect Data on Racial Identity...in A French Way."
[175] Oppenheimer, 738
[176] Ibid., 738-739

it easier to discriminate.[177] This reluctance, he continues, may be better understood in conjunction with the second argument, which highlights the French's oppressive use of race throughout its history.[178] First, the French Black Codes are cited for its overt discrimination and slavery of African peoples, the distinctions in which were still used far beyond France's abolishment of slavery in 1848 until almost a century later following World War II.[179] An additional example is given in light of the collection of data on racial identity used by the French state during a period of collaboration with the Nazis, resulting in the deportation and murder of more than 75,000 Jews in death camps.[180] This history of abuse is not forgotten in the mind people in modern French society, reciting a previous quote given by Fadela Amara and her opinion that the collection of racial statistics draws too close to associations of that dark time.[181]

In response, the article proposes eight recommendations for France to address the lack of information stemming from the absence of any official data on the nation's racial and ethnic makeup.[182] Oppenheimer provides alternative avenues for conducting research on race without violating law.[183] For example, the 1999 census asked respondents to comment on their experiences as immigrants, the results of which could be codified and used to locate areas of discrimination within those experiences, like rates of employment or household income, for example.[184]Data collected by social scientist are not barred, exemplified by the aforementioned

[177] Ibid.
[178] Ibid.
[179] Ibid.,
[180] Ibid.
[181] Ibid.
[182] Ibid., 747
[183] Ibid., citing the Data Protection Act, Law No. 78-17 of 1978, Journal Officiel de la Republique Francaise [J.O][Official Gazette of France], Jan. 6, 1978, secs 1-8 (amended Aug. 6, 2004). *The Act prohibits collecting "any information that shows, directly or indirectly, racial origins, political, philosophical or religious opinions, trade union membership, or moral principles" without either the written consent of the individual or an advance recommendation of the National Commission for Information Technology & Civil Liberties (CNIL), which must first be approved by the Counsel d'Etat. Section 8-I.*
[184] Ibid., 747-748

report conducted by the Open Society Justice Initiative. In his discussion, Oppenheimer acknowledges approval of the use of audit studies conducted by social scientists in the *Cour de Cassation*, citing its use in proving discrimination in a case concerning racial discrimination against North African immigrants in night clubs and general discrimination discovered using telephone audits.[185] Employers could be required to "redact names from resumes" in the applicant process, eliminating discrimination based on the perceived ethnicity associated with certain names.[186] This proposal was made by the National Assembly—and was later withdrawn—yet is still used voluntarily by some companies.[187]

In November 2007, the French Constitutional Court, *Conseil constitutionnel*, reviewed a case brought to their chambers concerning a controversial immigration bill passed by the French National Assembly and Senate, which included an amendment to the Data Protection Act allowing for the collection—directly or indirectly—of racial or ethnic origins of people for the purposes of studying "diversity of origin, discrimination and integration.[188]" The *Consiel* ruled the amendment unconstitutional, stating: "Although the processing of data necessary for carrying out studies regarding the diversity of origin of peoples, discrimination and integration may be done in an objective manner, such processing cannot, without infringing the principle laid down in Article 1 of the Constitution, be based on ethnicity or race.[189]" This suggests that the *Counsiel*'s opinion it that origins of race and ethnicity are not objective data, and as a result, do not align with the principles of equality and indivisibility laid out in Article 1 of the French

[185] Ibid,. 748
[186] Ibid., 749
[187] Ibid.
[188] "CC Decision 2007-557DC" (2007), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2007557dc.pdf.
[189] Ibid.

Constitution. In fact, it is also notable that the *Counseil's* ambiguity in referring to the principles enshrined in Article 1 allow for interpretation in whether it is referring to the principle of indivisibility, equality, or both.[190] The two are not necessarily mutually exclusive: the former alludes to the combined identity of French citizenship, while the latter relates to issues of antidiscrimination, although the French state has had a tendency to combine the two.[191] Specification in this particular case would have been helpful, and perhaps integral in shaping future legal and political commentary on the presence of intersecting identities.

In light of the *Conseil* decision, Oppenheimer answers with the possibility of the French census bureau collecting data concerning racial identity anonymously.[192] He references a similar practice by American employers in their quest to collect racial data, where applicants are given a "tear off page" on their application, supplying their employer with information identifying their racial identity.[193] This data is then kept in employee personnel files, providing the company with general data on the demographics of their employees.[194] Oppenheimer suggests that a similar practice can be used by a census, however, cites that the *Conseil constitutionnel* would need to change its current view.[195]

The Open Society report was released after the above-discussed article was published, and provides an intricate, yet quantifiable, account of the demographics and experiences underlying police stops in France. The research for the study was carried out from October 2007 until May 2008, ultimately generating information on 525 identifiable stops carried out by National Police

[190] Möschel, 200.
[191] Ibid.
[192] Oppenheimer, 750
[193] Ibid.
[194] Ibid.
[195] Ibid.

and Customs officers in five identified locations throughout central Paris.[196] The selection of the five locations mentioned was based on observations on 21 initial locations throughout Paris, with researchers ultimately choosing these due to the level of police activity in the area being sufficient enough to allow for a reasonable number of stops available for observation, accompanied by the knowledge that these have been sites of multiple altercations between French youth and police.[197] Impartial monitors were selected and trained to perform the observations, with an inter-rater liability test administered by the research team amongst the monitors to gauge their agreeability of different variable categories.[198] Additionally, the observations were comprised of two types: benchmarking and stop observations, the former to define the population available to be stopped by police, and the latter to observe whether a discriminatory stop was conducted.[199] An additional "post-stop outcome" variable was also applied in the stop observations, which included a qualitative interview given by observers with questions aimed to address "the general frequency with which the individuals were stopped, the behavior of the police during the stops, and the individuals' feelings about the stops.[200]"

The parameters mentioned above are necessary steps taken by the researchers to compensate for the lack of demographic data publicly available of French citizens. While a relatively small sample size, the results of this study at a minimum provide a starting point for further discourse on the issues of racial profiling with actual quantifiable data for reference. With that being said, the results of the study showed that across these observational sites, "Blacks

[196] Goris, Jobard, and Levy, "Profiling Minorities A Study of Stop-and-Search Practices in Paris."
[197] Goris, et. al., 26
[198] Ibid.
[199] Ibid. The benchmark observations resulted in demographic data from a sample size of 37,833 people, of which: 57.9% were classified as White, 23% Black, 11.3% Arab, 4.3% Asian, and 3.1% Indo-Pakistani.
[200] Ibid., 27

were overall six times more likely than Whites to be stopped by police; the site-specific rates of disproportionality ranged from 3.3 to 11.5. Arabs were generally 7.6 times more likely than Whites to be stopped by the police, although again, the specific rate of disproportionality across the five locations ranged from 1.8 and 14.8.[201]"

In understanding the data, the researchers utilize the "odds-ratio" statistic, which can be used to quantify the probability that members of a particular group—in this case, Black and Arab—will be stopped compared to other ethnic groups—the White population.[202] Further explanation indicates that an odds-ratio of 1.0 indicates that no ethnic profiling has occurred, a ratio between 1.0 and 1.5 is a benign indicator, between 1.5 and 2.0 "indicate that a review of the stop and search practice should be undertaken to determine if an ethnic bias exists," and any ratio above 2.0 indicate potential targeting of racial minorities by police.[203] The odds ratio for the stops observed yielded a range between 3.3 and 11.5, meaning that in some areas, Black can be expected to be stopped ten times as often as Whites.[204] Thus, the probability nature of these stop-ratios clearly indicates that Blacks are racially profiled.

Issues identified through the process of collecting the data for this study further exemplify the issues faced by French society regarding their approach to racial inequalities. For example, the ways in which the researchers decided to measure discrimination in this sense faced preliminarily difficulties including the differences between that the resident population that they were observing and the passing, or available, population which they would be observing.[205] While this does not undermine the results of this study, it does show how independent

[201] Ibid., 10
[202] Ibid., 27
[203] Ibid.
[204] Ibid., 28, Table 1
[205] René Lévy and Fabien Jobard, "Identity Checks in Paris," *Penal Issues*, 2010, 1–4.

researchers have limited ability and mobility when it comes to quantifying an issue as grand as racial profiling for an entire nation.

3.2 French Criminal Code and Litigation

Regulations of police stops and identity checks in France are enforced with what is identified as Chapter 3 of French Code of Criminal Procedure (CCP), encompassing sections 78-1 through 78-6.[206] While the regulations enshrined in this section are intended to uphold the integrity of French nationality, enforcement of these regulations have been alleged to be discriminatory and particularly targeted to individuals, specifically young men, of racial minorities. This section will encompass a brief overview of the statute followed by its use in French litigation.

Article 78-2 of the CCP identifies and four instances wherein officers are given the discretion to check for a person's identity based on behavior. The check is justifiable if there are one or more actions for reasonable suspicion, including if: 1) the person has committed or attempted to commit a crime, 2) the person is planning to commit a felony or misdemeanor, 3) the person has useful information in relation to a felony or misdemeanor crime, or 4) the person is "the object of inquiries ordered by a judicial authority.[207]" Subsections 2-4 of the same article permit officers to conduct stops and checks without basis on the individual's behavior: 78-2-2 allows for the district prosecutor—in his investigation and prosecuting of acts of terror, offenses relating to weapons and explosives, possession or receiving of stolen goods, or drug trafficking—to endow judicial police officers with the discretion to conduct checks in a specific area for an amount of time, not exceeding twenty-four hours; 78-2-3 allows for judicial police

[206] "French Code of Criminal Procedure," Act No. 2005-1550 § 3 (2005).
[207] French Code of Criminal Procedure.

officers to conduct checks where they believe there is a threat to the public order; and 78-2-4 allows for officers to conduct stops in any transport site accessible to the public, again, with no indication of individual behavior.[208] Further, any discovery of offense as a by-product of the initial police stop "does not amount to a ground of nullity for any incidental proceedings.[209] This is similar to accusations of the NYPD utilizing stop-and-frisk to uncover incriminating evidence against racially targeted suspects.

Use of the CCP and its effects can be found in the 2017 application to the European Court of Human Rights (ECtHR) by the Open Society Justice Initiative, *Seydi and Others v. France*, which challenges the notion of racial profiling, specifically concerning six applicants who allege racial discrimination in their respective identity checks my French authorities.[210] Although the active case has not yet been brought before the ECtHR in its capacity as a documented case of racial profiling, (and the Court and the individual complaints to do not carry the entire weight of the discriminatory police practices argument), the application highlights many shortcomings of both the CCP and the French Police. The application poses itself as a discrimination case, alleging a violation of Article 14 of the European Convention of Human Rights (ECHR), along with an Article 13 violation, citing a lack of effective remedy.[211] The discrimination claim cites, "(T)he racial profiling carried out on the applicants pursuant to article 78-2 amounted to unlawful discrimination on the basis of their skin colour, race, ethnic origin, or national origin, engaging private life and freedom of movement.[212]"

[208] Ibid., Art 78-2, subsections 2-4
[209] Ibid., Art. 78-2
[210] Open Society Justice Initiative, Seydi and Others v. France (ECHR Application 2017).
[211] Seydi and Others v. France, paras. 23-24
[212] Ibid., para. 23

Of the six applicants, the French Court of Appeal, in the exhaustion of domestic remedies, stated that three of the applicants' stops were justified based on the "dangerous" nature of the towns where they were stopped, while the other three were identified as justified based on lack of sufficient evidence for a claim of discrimination.[213] Notably, Applicant 3 was recorded as being stopped by police three times over a ten-day period, all of which involved physical altercations, from a simple pat-down to the use of excessive force accompanied by verbal abuse.[214] The Court of Appeal in regard to the most egregious stop—which involved an officer slapping the Applicant, pushing him against a wall, calling him fat, and holding him in police custody—did acknowledge that the check "went badly," and disapproved of the officers behavior, but did not contribute these actions, corroborated by witness statements and relevant police check statistics, to racial discrimination.[215]

Frustrations with the lack of acknowledgement of discrimination in these cases are corroborated by a claim of lack of effective remedy under Article 13 of the ECHR. The applicants, along with numerous others affected by discrimination in identity checks under Article 78-2, were not provided with official documentation of their stops, as the CCP does not outline any procedural penal or administrative requirements.[216] The only indication in the CCP of the use of documentation of these police stops is if the individual stopped in the identity check fails to provide his identity, wherein Article 78-3 gives the discretion to the police officer to enter an official report of the grounds which justifed the check and inspection of identity, and the conditions of how the person was stopped, informed of his rights, and given the opportunity to

[213] Ibid., paras. 10-18
[214] Ibid., para. 16
[215] Ibid.
[216] Ibid., para. 24

exercise them.[217] Additionally, the officer is to list the date and time of the check, including how long it lasted, from which the official report is signed by the stopped person (with an indication if the person did not sign), given to said person, and sent to the district prosecutor.[218] Failure of official documentation even closely as elaborate as this "deprived the applicants of an effective remedy for the discrimination against them.[219]" This rationale speculates the lack of effectiveness of the domestic courts to recognize the discrimination in these cases could be due to the lack of documentation of any "official," or otherwise subjective facts of the cases. In its section on "Exhaustion of Domestic Remedies," the case application even identifies that present before the *Tribunal de Grande Instance*, the Court rejected the applicants' claims, adopting the interpretation of law presented by French authorities, effectively placing the entire burden of proof on the applicants.[220]

The six applicants in this case were also involved in a case brought before France's top civil court, the *Cour de Cassation*, which ruled that the statistics and studies presented did demonstrate a pattern of frequent checks against "visible minorities,[221]" with the resulting judgment indicating that these stops are illegal and that "non-discrimination law applies to policing activities as to other sectors of life," contrary to the arguments made by the State.[222] The judgement also touched on the issue of burden of proof in regards to the documentation of the proceedings during these police stops, placing "…the lion's share of the burden of proof on the police to demonstrate that they carry out stop and search activities in a non-discriminatory

[217] French Code of Criminal Procedure.
[218] Ibid.
[219] Seydi and Others v. France., para 24
[220] Ibid., para. 28
[221] Ibid., para. 32
[222] Open Society Justice Initiative, "French Court Victory Calls Police to Account over Racially-Biased Stops," November 9, 2016, https://www.opensocietyfoundations.org/press-releases/french-court-victory-calls-police-account-over-racially-biased-stops.

manner.[223]" The case is regarded as a victory by human rights activists, citing that the acknowledgement of the illegality of discriminatory police checks is paramount in resolving the issue at hand. However, the additional claims and lack of remedy given to the six applicants in the ECtHR case indicate that there is still work to do.

3.3 Up in Flames: An Analysis of the Suburban Riots of 2005[224]

Issues of discriminatory police stops in France are by no means exclusive to this decade. On October 27, 2005, two French youth's 17-year-old Zyed Benna and 15-year-old Bouna Traore were fatally electrocuted following a confrontation by police. For a period of three weeks following, France experienced one of its largest riots in modern history.[225] The rhetoric surrounding the riots range from those which have to do with race, to nationality, to none of the above. This section will highlight the incident, from beginning to end, as a sort of case study insight into the timeline of devastating events which spun from an incident of racial discrimination. This raw and emotional perspective provides a realistic storytelling of racial discrimination, all too common to people of color living in France.

3.3.1 Before

Unrest in the areas in which the violence originated was not completely foreign. In order to begin to understand that underlying issues which may have played a part in exacerbating the intensity of the events that unfolded following the deaths of Benna and Traore, attention should be given to the origins of ethnic minorities in the *banlieues*, or French suburbs, a commonplace for violence, much like the inner-city projects of New York City, for example, in the United

[223] Ibid.
[224] This section is an abridged version of a term paper written for the Critical Race Theory course at Central European University.
[225] Matthew Moran and David Waddington, *Riots. [Electronic Resource] : An International Comparison.* (London : Palgrave Macmillan UK : Imprint: Palgrave Macmillan, 2016., 2016), http://it.ceu.hu/vpn.

States. The rhetoric surrounding the media attention given to the 2005 riots mainly circulated on the direct event (in the form of the deaths of Benna and Traore) rather than the significant and prolonged structural inequalities experienced in the suburbs which culminated to a cusp, strengthening tensions that lead to such a large and wide-spread phenomenon.

The history of racial violence in France can be traced back to the Vichy regime from WWII and the Algerian war.[226] In the context of France in 2005, these historic, institutionalized practices of racism echoed in the social and legal systems of the *banlieues*. Modern patterns of structural inequality and violence in the French suburbs can be traced back to the 1980s, yet the magnitude of unrest reached in 2005 is regarded as a "significant development" in France's history of 'urban violence.'[227] The demographics of these areas draw origin from thousands of North and Sub-Saharan African laborers who were recruited from the former French colonies during what would be later referred to as the "postwar French economic rejuvenation" of the Thirty Glorious Years.[228] Initially a temporary workforce, these workers became permanent settlers, forming a housing crisis for the nation.[229] The resulting response came through an urban policy, placing these workers and their families in high rise housing complexes in the French suburbs—our present-day *banlieues.*[230]

Viewed as a major advancement at the time, bridging the divide between laborers and the middle class through architecturally modern and appealing housing, these massive apartments eventually became subject to 'white flight;' as immigrants moved in, largely due to the sectioned

[226] Cathie Lloyd, "Racist Violence and Anti-Racist Reactions: A View of France," in *Racist Violence in Europe* (New York: St. Martin's Press, 1993), 207–18.
[227] Moran and Waddington, *Riots. [Electronic Resource] : An International Comparison.*
[228] Ibid., 42
[229] Ibid.
[230] Ibid.

off sections of the complex devoted to social housing, the middle class moved out, contributing to what would soon become "concentrations of the poorest members of French society."[231] As the cycle goes, the end of the post-war economic boom led to large-scale unemployment, partially in social housing complexes, becoming a permanent feature to this day.[232] With poverty oftentimes comes violence and separation, causing the French suburbs in this example to be ostracized and seen as the 'other' from the French majority, contradicting, in theory and practice, their vocal stance on a republican model of integration.

However, perhaps the most damning relationship which contributed to the large scale of the '05 riots is the relationship between the community (mainly youth-oriented) and the police. An interview with young participants after the unrest had subsided shows consensus that much of the disorder was motivated by dissatisfaction with the policing and political rhetoric of the government in the relations with the youth in these communities; "[T]hey all felt that the day-today source of their sentiments of injustice and humiliation was primarily their relations with the police."[233] One recollection in particular warrants a blockquote, cited below:

> *That's the kind of thing that enrages me, because with their police badge, they think they can do just anything, they know we can't answer back and they go after us all the time, waiting for us to make the slightest slip, and after that they take you in for insulting them or whatever, so they can keep you in*

[231] Ibid.
[232] Ibid.
[233] Laurent Mucchielli, "Autumn 2005: A Review of the Most Important Riot in the History of French Contemporary Society," *Journal of Ethnic and Migration Studies* 35, no. 5 (2009): 731–51.

custody. That's what happened to me…Since that day, I've got hate. The riots were revenge for all that.[234]

The interactions between youths and the police shifted starting in the early 1990s with the introduction of *adjoints de securité*, contracted security personnel assigned to the "problem districts" of the *banlieues*, considered as the "building blocks of a concept of neighborhood policing.[235]" Following, the 1993 defeat of the Socialists in the parliamentary elections prompted another shift in strategy, resulting in a "more repressive policing approach;" media outlets referred to the introduction of rubber bullets and stun weapons as ammunition needed for the 'struggle against the urban guerillas' in the French suburbs.[236] Finally, new laws passed in 2002 and 2003 brought an end to the aforementioned grassroots policing and re-classed minor regulatory offenses to criminal ones, capping the strategic mixture of the impression of the *banlieues* as a concentrated community of violence, fueling distrust between community members and the authorities meant to keep them safe.

The last contributing factor that I will mention in relation to the 2005 riots is the problematic political and media rhetoric surrounding the French suburbs. Particularly, former Minister of the Interior and eventual President, Nicolas Sarkozy, favored a more hardline approach to policing, the one to thank for the change in laws in 2002 and 2003.[237] As Minister of the Interior, Sarkozy focused his policy agenda on security, emphasizing the importance of republican values, ending community policing, and "preferring to crack down on 'quality of life' crimes, such as aggressive begging, loitering in hallways, and riding without paying on public

[234] Mucchielli, 740
[235] Ferdinand Sutterlüty, "The Hidden Morale of the 2005 French and 2011 English Riots.," *Thesis Eleven* 121, no. 1 (April 2014): 38–56.
[236] Sutterliity, 43.
[237] Note the similarities here between the broken windows theory.

transport."[238] This approach particularly targeted the *banlieues*, which he views as concentrations of crime and commonplace for delinquency, threatening and disrespecting the French republican way.[239] Sarkozy's infatuation with security as a political platform catapulted him into the spotlight of the 2005 riots, using it as a platform for strengthening his views, which, ironically, are partly to thank for the outpour of unrest in the first place. Examples of this rhetoric during and after the riots will be mentioned in the following sections.

3.3.2 During

The unrest of the 2005 French riots occurred between October 27 and November 17 of that year. On the first day, in the suburb city of *Clichy-sous-Bois*, three minors aged 15-17 were chased by police following a football game.[240] Bouna Traore and Zyed Benna were both of African-Maghrebi descent, while Muhittin Altun was from a Turkish family. Traore and Benna were both electrocuted and killed after the three jumped over the fence of an electric transformer. Altun was seriously injured. After news spread, dozens of confrontations began in the surrounding areas between French youth and the police, sparking the unrest which would last for the next three weeks.[241]

In the hours following the incident, the neighborhood responded with what can be described as "a highly destructive two-hour 'rampage' in which some 100 local youths wreaked havoc by inflicting damage on public buildings and setting fire to two dozen cars.[242]" This was only exacerbated by the lack of any attempts by the government to pacify the population through

[238] Moran & Waddington, 49. Also note here the similarities between Sarkozy and Mayors Giuliani and Bloomberg and their police tactics.
[239] Ibid.
[240] Marie des Neiges Léonard, "The Effects of Political Rhetoric on the Rise of Legitimized Racism in France: The Case of the 2005 French Riots.," *Critical Sociology (Sage Publications, Ltd.)* 42, no. 7/8 (November 2016): 1087–1107.
[241] des Neiges Léonard, 1088
[242] Moran & Waddington, 59

condolences toward the two deceased youths, fueled by the rhetoric of Minister of the Interior, Nicolas Sarkozy, an early statement of his accusing the youths of being involved in a theft, but refusing to acknowledge the chase by police which led to their deaths.[243] Placing the police in a vulnerable and sympathetic position in the media by the government only fueled the fire under the inhabitants of the *banlieues*, already distrustful of the police as mentioned before. This response was heard by and resonated with other communities with similar relationships with the police, sparking such a widespread sense of solidarity and unrest throughout France.

By the end of the riots, 4770 individuals were arrested for questioning, 763 of those questioned receiving prison sentences, 118 of them being minors.[244] In addition, anywhere between 10 and 120 of those arrested were identified as foreign nationals and deported back to their home countries.[245] Considering the demographics of the communities involved in the unrest, this outcome is unsurprising, especially considering the additional issue of the use of racially motivated identity checks as a ways to target not only people who may be in the country illegally, but also to identify other offenses.[246] While the riots did cause a lot of structural and economic damage, no bystander causalities can be attributed to participants of the unrest, contrary to the story presented by Sarkozy. On several occasions, he attributed a link between the unrest and the death of a photographer on October 27 and a retiree on November 7.[247] Sarkozy also reported in particular 201 wounded officers during the three weeks of unrest among the tens

[243] Ibid.
[244] des Neiges Leonard, 1089
[245] Ibid.
[246] Racially targeted identity checks can be seen in the case of *Cisse v France* as well as *Lecraft v Spain* and *Jallow v Bulgaria* in wider Europe
[247] Mucchielli, 733

of thousands deployed, however, most injuries were relatively minor and only ten were injured enough to be considered unable to work for ten days.[248]

During the riots, a state of emergency was also declared, enabling a 1955 Act dating back to the Algerian war, having only been used once since that time.[249] This act puts a curfew in place, demobilizing people and vehicles at certain times and in certain places, closes venues of entertainment, enables authorities to place some individuals under house arrest and conduct searches at night, and finally, allows for the pursuit of suspects into private homes.[250] Accounts of the effects of this confirm that the move only inflamed the situation more, rather than minimizing, a resident of *Clichy-sous-Bois* complaining to a reporter, "On the radio they said the last time they used that law was in the Algerian War…[N]inety percent of the people who live here are Arabs. What does that tell them? Fifty years later, you're still different?[251]" The Prime Minister at the time, Dominique de Villepin, justified the rare use of the act by referring to the alleged structured gangs and organized crime in these neighborhoods, sans any hard evidence that such an issue was not only occurring, but if it even had anything to do with the riots.[252] Tactics used to control situations such as these can be valid, but allow for the potential abuse of power by those in authority positions, a sentiment felt by many throughout the areas which these incidents were occurring. Another account of the situation humanizes this feeling of discouragement and attributes explanation to how widespread the riots became:

[248] Ibid.
[249] Ibid., 734
[250] Ibid.
[251] Moran and Waddington, 62
[252] Susan Ossman and Susan Terrio, "The French Riots: Questioning Spaces of Surveillance and Sovereignty," *International Migration* 44, no. 2 (2006): 5–21.

> *Two young people were dead because of the police. We had to show some solidarity, you know? They weren't from our neighborhood but it was the police who killed them. Then they didn't even accept responsibility…and Sarkozy…well they always have the support of Sarkozy. We're all just scum to him! He even said as much!*[253]

Furthering the presence and authority of the police in this situation combined with the rhetoric of Sarkozy showing no remorse or sympathy towards the victims only added fuel to the fire.

The use of fire, mostly in the burning of vehicles, was not a coincidence throughout these communities. An 18-year-old rioter stated,

> *…man, the cops. They're Sarkozy's and Sarkozy must go, he has to shut his mouth, say sorry or just [expletive] off. He shows no respect. He calls us animals, he says he'll clean the cites with a power hose. He's made it worse, man. Every car that goes up, that's one more message for him*[254].

It is also noted that the burning of cars is a way of garnering the attention of media outlets and the government, seen as a way to give a voice to those in this community who do not harbor the political power to speak for themselves in more structured environments. Additionally, the burning of cars is also culturally tired to the *banlieues*, a recognizable signal used in events of disorder since the 1980s.

Rhetoric on the issue of race during the unrest was largely colorblind on behalf of the French government, with Prime Minister Villepin acknowledging that fighting discrimination is

[253] Moran and Waddington, 61
[254] Ibid.

a priority as well as upholding the French Republican Model of Integration, yet refused to allude to the idea that the riots were in any way motivated by race.[255] Following this statement, Sarkozy in his position as Minister of the Interior called for the immediate deportation of all foreigners guilty of rioting, regardless of their legality in the nation. This blatant discrimination on the part of Sarkozy, and erasure of the issue of race and discrimination on behalf of the Prime Minister consequently worsen the trustworthiness of the rioters in their own government and fuel anti-immigrant and racist rhetoric throughout French society.[256] As I conclude this section and continue with the effects of the treatment of the interrelated social, cultural, and political issues related to the unrest in 2005, it is evident that the resistance to recognize the underlying issues which caused the riots to escalate in the ways that it did only squashed, and perhaps even worsened, the problems which both sides should wish to be solved.

3.3.3 After

The riots eventually died down, and the State of Emergency was subsequently lifted in January 2006. In March 2007, an eyewitness account reflects a scene of a Paris metro stop, arriving in amidst a standoff between police and youths of the *banilieues*: "One African-looking kid was swinging an iron bar and shouting. The bar crashed into a photo booth and a drinks machine. A few yards further on, a fire had been started in a ticked office.[257] This account occurred 18 months after the events during October and November of 2005, yet the sentiments remained the same. Participants in this uprising were reacting to the police using physical force to arrest a young Congolese man who was attempting to dodge a ticket barrier at the metro

[255] Ibid.
[256] Ibid.
[257] *See* https://www.theguardian.com/world/2014/feb/23/french-intifada-arab-banlieues-fighting-french-state-extract

station.[258] Onlookers "waded in to support the underdog" while the cops drew their weapons, and within ten minutes a riot ensued.[259] The demographics of the *Gare du Nord* is not unlike *Clichy-sous-Bois* and the other French suburbs involved in the riots of 2005; it lies only a few steps from Paris, yet "[i]n terms of jobs, housing, making a life, for these young people it is as inaccessible and far away as America. So they cherish this small part of the city that belongs to them."[260] Residents of the *Gare du Nord* and other French suburbs view themselves as soldiers in an ongoing, and perhaps never-ending, war with the French police, a so-called "French intifada."[261]

Fast forward to ten years after the initial 2005 unrest, and residents are still unnerved by the lacking assistance given to their communities post-riot as well as the complete undermining of the issues surrounding the communities before the riots. Close to 4.5 million people live in the *balieues*, considered "priority zones," which are segregated on race and class lines.[262] Former French Prime Minister, François Hollande, whose campaign promise was to "end ghettoes," visited a northern Paris estate to mark the tenth anniversary of the riots, claiming that the neighborhoods were not forgotten, but was met with boos and disappointment from a community wherein a vast majority of its inhabitants had voted him into office.[263] Nadira Achab, a third generation resident of *La Grande Borne* and who was 13 years old during the riots in 2005 recalls a climate of fear and not being allowed to go outside.[264] Ten years later, she has taken her frustrations and channeled it into positive change, co-founding an association named *Our Estate has Talent*, which mobilizes students who grew up in her neighborhood to enter schools and

[258] Ibid.
[259] Ibid.
[260] Ibid.
[261] Ibid.
[262] *See* https://www.theguardian.com/world/2015/oct/22/nothings-changed-10-years-after-french-riots-banlieues-remain-in-crisis
[263] Ibid.
[264] Ibid.

encourage children to continue with their studies.[265] Lack of education is a well-documented crisis in the *banlieues,* and another motivator for many of the participants in the riots. France is regarded as having one of the most unequal school systems in the developed world; student academic status and success is largely dependent on socio-economic constraints.[266] This phenomenon leads to worsening unemployment rates, reigniting the cycle of poverty in these neighborhoods.

Structurally, projects are underway to build up the aesthetic value of some of the project housing in the suburbs. For example, in *La Grande Borne*, a large estate in the town of Gringy, a building renovation was underway at the writing of the article wherein it was mentioned in 2015, yet many felt that although the renovation was needed, it alone would not solve the persistent problems of unemployment, lack of education, and isolation from the rest of the social society of France, a so-called "lack of social mix on so-called ghetto estates.[267]" Mayor Philippe Rio of Gringy, a town which has around 27,000 inhabitants and a shocking 3/5 children living under the poverty line, finds the action plans to help in improving the *banlieues* to be useful, but not sufficient enough to reverse years of what he referred to as unofficial segregation by the state.[268] Years of structural inequality cannot reasonably be undone by housing redevelopment projects, and as Rio and Achab have lamented, focus on education and alleviation of unemployment rates, specifically that of youths, needs to be addressed in order to see any notable, positive change.

However, the largest problem in Gingy, and more than likely similar communities throughout the French suburbs, is the mistrust between police and its inhabitants. The eradication

[265] Ibid.
[266] *See* http://news.yahoo.com/unequal-schools-france-prompt-strike-soul-searching-050236553.html
[267] *See* https://www.theguardian.com/world/2015/oct/22/nothings-changed-10-years-after-french-riots-banlieues-remain-in-crisis
[268] Ibid.

of community policing by Sarkozy in the early 2000s, police units are now unfamiliar with the area and likely to be less than cooperative on an elitist high horse, swoop in and escalate an already tense environment.[269] Additionally, police who were recalled as failing to help Zyed Benna and Bouna Traoré after they were electrocuted, sparking the 2005 riots, were cleared of any wrongdoing related to their deaths.[270] This is a narrative all too familiar with similar police-involved deaths in the United States. Recently, the officer involved in the shooting of concealed-carry permit holder Philando Castile was acquitted of all charges, with dash cam footage of the shooting being released only days following, depicting the entire incident.[271] Unrest has sparked throughout the nation and internationally, namely on social media rather than the streets, but the sentiments are similar. Distrust between police and largely minority and socio-economically disadvantaged communities has been an issue for decades, and without reasonable and responsible reform, positive change is hard to imagine.

In sum, France has a clearly documented problem with racial profiling. The French republican model of integration and citizenship in many ways inhibits the nation's ability to address these issues for what they really are. Perhaps an indication that differences can be honored while also prescribing to the national unity of France would help many of the people who live in these marginalized communities to feel more like they belong to the nation in which they call home. Nadira Achab, the young women who co-founded the education organization mentioned earlier and whose grandparents are Algerian, expressed, "'I'm French, my parents are French, we've been French for two generations, yet I'm still constantly being asked: *Are you*

[269] Ibid.
[270] *See* https://www.theguardian.com/world/2015/may/18/french-police-cleared-in-teenagers-deaths-that-sparked-riots
[271] *See* http://www.aljazeera.com/news/2017/06/philando-castile-killing-police-video-sparks-outrage-170621051241173.html

French'" she said. 'It's unfair. There's a feeling that nothing has really changed, that the unrest could happen again.'"[272]

Clear divisiveness between the economic and social opportunities combined with the unfair police practices within them compounded over decades make the livelihood of residents understandably subpar. In addition, the lack of recognition of French identity, even though these communities consider themselves as French as those outside of the suburbs, only further separation and mistrust in the community of the nation where their families have called home. If France as a nation wishes to see an alleviation of the "ghettoes," as politicians have gone on record as desiring, then a recognition of these minority, immigrant communities as equal in their differences is a bare-minimum requirement in taking steps in the right direction. Undoing decades of "unofficial" structural racism and inequality is not a job to be done overnight, and for the communities of residents and authorities to work together, negative rhetoric towards these residents based largely on their immigrant and ethnic backgrounds needs to end.

[272] *See* https://www.theguardian.com/world/2015/oct/22/nothings-changed-10-years-after-french-riots-banlieues-remain-in-crisis

4 International Standards of Racial Profiling: Effectiveness of The International Convention on the Elimination of All Forms of Racial Discrimination

4.1 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is one of the nine Core International Human Rights Bodies within the UN. Monitored by the Committee on the Elimination of Racial Discrimination (CERD), the Convention was entered force on January 4, 1969. The Convention itself has 7 substantive articles (Part I) as being "Convinced that the existence of racial barriers is repugnant to the ideals of any human society.[273]" Both the United States and France have ratified the convention.

The CERD consists of a body of independent experts which monitors the implementation of the Convention.[274] Each state party is required to update the CERD regularly where in response the Committee subsequently submits a document regarding its concerns and recommendations in the form of "concluding observations.[275]" The Committee is utilized in "[t]he early-warning procedure, the examination of inter-state complaints and the examination of individual complaints.[276]" In relation to individual complaints, the Committee "may consider individual petitions alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination by States parties who have made the necessary declaration under

[273] *See* International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014 (Dec, 21, 1965), *available at* [ICERD]
[274] *See* http://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx
[275] Ibid.
[276] Ibid.

article 14 of the Convention.[277]" In relation to racial profiling, individual complaints in particular can be widely beneficial for those who consider their rights in light of this convention being infringed upon.

Currently, there are 58 states that have recognized the competence of the Committee to handle individual complaints regarding their membership to the Convention.[278] Of the 54 complaints, 3 were on behalf of France, although no violation was found.[279] The United States has not made a recognition considering Article 14, thus inhibiting individual complaints to be made on its behalf. This is one of the many ways that demonstrate the inequalities between member states of the same international conventions as well as the potential threats to equality of people reflecting on the noncompliance of nation states, like the U.S. in this case, and particularly concerning racial profiling.

Before analyzing each of the jurisdictions in this thesis and their respective periodic reports and concluding observations of the ICERD, mention of the case Williams Lecraft v. Spain is warranted to exemplify the view and condemnation of racial discrimination in identity checks from the UN Human Rights Committee.[280] The case concerns an American-born black woman with Spanish citizenship who was asked to verify her identity while on a train platform while no one else on the platform was asked to do so. When asked why she was targeted out of other people available for checks, "the officer replied that he was obliged to check the identity of people like her, since many of them were illegal immigrants," adding that "the National Police were under orders from the Ministry of the Interior to carry out identity checks of "couloured

[277] *See* http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx
[278] ICERD
[279] Ibid
[280] Williams Lecraft v. Spain, Comm. No. 1493/2006, U.N. Doc. CCPR/C/96/D/1493/2006

people" in particular.[281]" The Committee found that there had been a violation of Article 26 of the International Covenant on Civil and Political Rights (ICCPR), another core human rights instrument, and ordered the State party—in this case, Spain—to publicly apologize to Lecraft and "take all necessary steps to ensure that its officials do not repeat the kind of acts observed in this case.[282]" The timeline of the case saw the turn of the century, as the incident occurred and subsequent complaint was filed in December 1992, with an order of apology and obligation for reform from the UN Human Rights Committee being delivered over fifteen years later.[283] This is the most recognizable case brought before a UN committee, and one unique of any type brought against the United State or France. Nevertheless, it sheds light on certain obligations and guidelines that should be followed for the remaining member states, and for the purposes of this thesis, the two jurisdictions discussed below.

4.1.1 The United Stated and the ICERD

The United States signed the ICERD on September 28, 1966, but did not ratify the treaty until October 21, 1994, in practice making it an actor in the "supreme law of the land" considering Article 6 of the Constitution of the United States of America (U.S. Constitution).[284] This, however, did not come without "RUD's," or the U.S.'s reservations, understandings, and declarations.[285] It is important to note these "RUD'S,' especially since it affects use of the convention through any infringements on the rights of citizens of the U.S., greatly inhibiting the effectiveness of the ICERD. Upon signature, the United States noted that: "nothing in the

[281] Ibid., sec. 2.1
[282] Ibid., sec. 9
[283] *See* https://www.opensocietyfoundations.org/litigation/williams-v-spain
[284] U.S. Const. Art 6
[285] McDougall, Gay J. 1997. "Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination." *Howard Law Journal* 40, 571. *LexisNexis Academic: Law Reviews*, EBSCO*host* (accessed December 9, 2016).

Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.[286]'' Upon ratification, however, the U.S. outlined a more substantiated three-point reservation of the ICERD along with one understanding and one declaration

The first substantial reservation relates to the U.S. Constitution and United States' laws guarantees of "extensive protections of individual freedom of speech, expression and association.[287]" In attendance, the U.S. declared that no obligation would be accepted underneath the ICERD—in particular, articles 4 and 7, citing their adequate protections under the U.S. Constitution.[288] It is an interesting declaration, as it shows the nation's way of prescribing to a widely-accepted convention considering its international obligations while rightfully using loopholes within the convention to adapt international law to comply with its domestic policies, which is considered in reverse of what international conventions are meant to do: adapt domestic law to comply with obligations under international treaties.[289]

Articles 4 and 7 contain integral provisions that secure many injustices related to racial profiling, making this "loophole" used by the U.S. particularly disturbing. To start, Article 4 contains the provision wherein incitement of racial discrimination is prohibited.[290] The article declares any offense regarding all spread of ideas based on racial superiority or hatred, violence against others of a different race or ethnicity based on that fact, and any incitement of racial discrimination punishable by law.[291] Additionally, subsection 3 of the Article explicitly states

[286] See: http://indicators.ohchr.org/ under "Declaration"
[287] Ibid.
[288] Ibid.
[289] Harris, Hadar. 2008. "Race Across Borders: The U.S. And Icerd." *Harvard Blackletter Law Journal* 24, 61-67. *Academic Search Complete*, EBSCO*host* (accessed December 9, 2016). 63.
[290] ICERD, US Declarations.
[291] Ibid. Art.4

that the principles prescribed in the convention "Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.[292]" In practice, this provision should hold all public authorities accountable for any act which promotes or incites racial discrimination, like police officers, for example. However, this declaration, which was accepted through the ratification of the Convention, allows for the U.S. to disregard this provision.

Article 7 of ICERD requires signatories "to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information" to assess and proactively combat racial discrimination, promoting "understanding, tolerance, and friendship" among nations and between racial and ethnic groups alike.[293] In light of its entry in 1969 and the United States' subsequent ratification and declaration to this extent more than two decades later, it is certainly important to regard this provision's lack of observance throughout some of the toughest (and continually difficult) race relations in modern day history.

Further, the U.S. cites in its reservation its adequacy through its Constitution and laws throughout the nation to be sufficient in combatting racial discrimination, even beyond the governmental level.[294] The U.S. recognizes the scope of protections in relation to public life as outlined in Article 1 of the ICERD, but reiterates substantially that the U.S. Constitution guarantees certain rights and freedoms regarding the private lives of its citizens.[295] Therefore, the U.S. reserves the right to "not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs(1) (c) and (d) of article 2,

[292] Ibid.
[293] Ibid art.7
[294] US ICERD Declarations.
[295] Ibid.

article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.[296]" This reservation demonstrates the U.S.'s stance that its obligations to protect the discrimination against peoples is protected enough by the U.S. Constitution. Essentially, the position of the U.S. shows that it feels that the protections of the ICERD reach too far considering its own constitution. In effect, the reservation "leaves the private areas of the home, the family, and employment at private organizations unprotected.[297]" This could rise as a potential problem as the international convention—perhaps thought to be more of an objective statute than one of domestic subjectivity—cannot apply to private encounters, many of which are relevant in the case of racial profiling.

The final reservation declared upon ratification of the ICERD by the U.S. regard the use of the International Court of Justice (ICJ) bearing in mind Article 22 as a means of jurisprudence considering the ICERD.[298] The U.S. essentially requires its consent in order to be tried in any case through the ICJ in light of this convention.[299] This eradicates the ICJ from being compulsory jurisdiction for the U.S., effectively making the U.S. immune from being taken to the court.[300] In effect, this also eliminates liability on behalf of the U.S. regaring its compliance with the ICERD; if contested by any other contracting parties, this reservation allows the U.S. to not comply with the rules and jurisprudence of the ICJ. The reservation could also indicate a perhaps "...rhetorical commitment to the international human rights treaty regime...thereby perpetuating the U.S. practice of defensively isolating U.S. law and practice from meaningful

[296] Ibid.
[297] Herndon, Lisa. 2013. "Why Is Racial Injustice Still Permitted In The United States?: An International Human Rights Perspective On The United States' Inadequate Compliance With The International Convention On The Elimination Of All Forms Of Racial Discrimination." *Wisconsin International Law Journal* 31, no. 2: 322-351. *Academic Search Complete*, EBSCO*host* (accessed December 6, 2016).
[298] US ICERD Reservation
[299] Ibid.
[300] Herndon, 2013.

international scrutiny.[301]" These accusations could perhaps be quite detrimental to the promotion of racial equality in the United States.

The United States submitted one understanding in ratifying the ICERD. The understanding essentially puts the Federal Government in charge of implementing the ICERD, stating, "[t]his Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein.[302] The one declaration says only, "[t]he United States declares that the provisions of the Convention are not self executing.[303]"

The Committee's latest review of the United States Government took place between August 13-14, 2014. Concluding observations were made on August 26, 2014. The applicability of the convention at a national level is a major concern for the Committee, citing the United States inadequacy to properly define racial discrimination at both the federal and state levels to the standards outlined in article 1, paragraph 1 of the convention.[304] Additionally, the Committee voiced "further concern" at the United States' slow development in adjusting their reservation to article 2 of the Convention.[305] The Committee, therefore, stated that the U.S. needs to take concrete steps to address these issues. Concerning racial profiling, the Committee outlined four recommendations concerning the U.S.'s inability to prevent racial discrimination in the criminal justice system and process:

> *(a) Adopting and implementing legislation which specifically prohibits law enforcement officials from engaging in racial profiling, such as the End Racial Profiling Act;*

[301] McDougall, Gay J. 1997. "Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination." *Howard Law Journal* 40, 571. *LexisNexis Academic: Law Reviews*, EBSCO*host* (accessed December 9, 2016).
[302] US ICERD Declarations
[303] Ibid.
[304] CERD/C/USA/CO/7-9
[305] Ibid.

> *(b) Swiftly revising policies insofar as they permit racial profiling, illegal surveillance, monitoring and intelligence gathering, including the 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies;*
>
> *(c) Ending immigration enforcement programmes and policies which indirectly promote racial profiling, such as the Secure Communities programme and the Immigration and Nationality Act section 287(g) programme;*
>
> *(d) Undertaking prompt, thorough and impartial investigations into all allegations of racial profiling, surveillance, monitoring and illegal intelligence-gathering; holding those responsible accountable; and providing effective remedies, including guarantees of non-repetition.*[306]

The Committee did not indicate any requirement for law enforcement to participate in training in the prevention of racial profiling insofar as its recommendation in subsequent paragraph 9 concerning "racist hate speech and hate crimes," where it recommends that "all law enforcement officials and new recruits are provided with initial and ongoing in-service training on the investigation and reporting of complaints and hate crimes."[307]

Regarding subsection (*a*) above, the most current version of the End Racial Profiling Act, the End Racial Profiling Act of 2017, was introduced in the House of Representatives on March 10, 2017. Its last action states that it was referred to the Subcommittee on the Constitution and Civil Justice. The Act is comprehensive, although not new. Versions of "end racial profiling' Acts have been introduced in congress numerous times over the years—the one mentioned in the committee being three years prior to the one I am mentioning now. This latest version does have a companion in the United States Senate—The End Racial and Religious Profiling Act—which was introduced on February 17, 2017, however progress has not been shown to this point.

The Committees recommendations are sound and just. However, enforcement on behalf of the United States is abysmal. Paragraph 6 of the concluding report does include a recommendation of the Committee that the U.S. establish a standalone, effective human rights

[306] Ibid, para. 8
[307] Ibid, para. 9(c)

institution tasked with the responsibility of ensuring the State's compliance with the Convention. The rationale is "to ensure the full implementation of the Convention throughout the State party and the territories under its effective control, monitor compliance of domestic laws and policies with the provisions of the Convention, and to systematically carry out anti-discrimination training and awareness-raising activities at the federal, state, and local levels.[308]" This has been an expressed concern in previous concluding recommendations as well.

Commentary on these concluding observations warrant a discussion on the actual effectiveness of international instruments in the domestic laws and statutes of member states. In theory, provided a member state has ratified said convention, these recommendations and concerns should be taken into stride and result in positive steps in legislation to reflect the commitments made considering what is outlined in the convention. In this case, the United States has made its RUD's, however, and perhaps an equally as concerning issue, the function and communication between the United States and the CERD is slow and repetitive. Since inception, the United States has only submitted three country reports with three concluding observations from the CERD in response. The slow-moving process of this committee is not up to par with the urgency and dangers associated with the issues of racial profiling. Therefore, in the case of the United States, it is my stance that the ICERD and CERD are inadequate in combatting the issues of racial profiling.

4.1.2 France and the ICERD

France acceded to the Convention on July 28, 1971. Concerning the themes and issues prescribed in this thesis, the only relevant declaration was made on August 16, 1982, with France

[308] Ibid, para. 6

recognizing the competence of the CERD to receive communication from individuals or groups within their jurisdiction concerning violations within their obligations of the Convention.[309] Conversely, France has a reservation concerning Article 4 of the Convention, wishing to make it clear: "that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts.[310]" For the purposes of this discussion, state parties reports and concluding observations on behalf of France and the Committee respectively will be reviewed from the year 2004 and onward to reflect relevance and the timeliness of the 2005 French riots. In effect, these will include review of documentation from the 15th-21st periodic reporting sessions.

A recurring them amongst the Committee is that of France's lack of retaining statistics regarding their racial groups. In the concluding observations from 2005, the Committee states their concerns that "efforts to combat racial discrimination" are hindered by France's lack of adequate statistical data.[311] The first recommendation in this respect is that France refine their measures for recording statistics and from there, develop subsequent plans to combat racial discrimination.[312] Next mention of the issue cites France's indication in Article 1 of their Constitution that all citizens are considered equal without regard to their racial or ethnic background—their reasoning behind their lack of statistical data on the matter. In response, the Committee sustains that the purposes of gathering this data is to endow France with the

[309] *See* https://treaties.un.org/Pages/Declarations.aspx?index=France&lang=_en&chapter=4&treaty=323#EndNotesSection
[310] Ibid.
[311] CERD/C/FRA/CO/16
[312] Ibid

information to be able to properly identify their vulnerable groups to better address their needs.[313] The Committee concludes by recommending France obtain their statistics on a voluntary, self-identifying basis.[314] On both occasions, the Committee cites general recommendations Nos. 24 and 30.

The most recent concluding observation, again, reiterated concerns with lack of statistics, in this instance identifying vulnerable groups including indigenous peoples, minorities, and immigrants as those who are negatively affected by the lack of data.[315] This is in response to France's bold statement that they do not legally recognize minorities with their territory, citing that "the application of human rights to all of a State's citizens on the basis of equality and non-discrimination normally provides them, whatever their situation, with the full and complete protections to which they are entitled.[316]" France cites its constitutional requirements which prohibit the discrimination on the basis of racial or ethnic identity, thus insinuating that they also do not admit positive discrimination, which in this case would be used to identify the needs of minority groups. Additionally, the State does maintain that it is in favor of the development of tools that will help in combatting racial discrimination, but holds that objective data should not be based on ethnicity or race, but rather, "can for example, be based, on name, geographic origin or nationality prior to French nationality, elements that make it possible to acquire a detailed knowledge of the population and its needs.[317]" The discourse on this topic in particular is constant and repetitive. It is apparent that the Committee and the state of France disagree on the ways in which to identify those groups who need help but agree that measures and tools should

[313] CERD/C/FRA/CO/17-19
[314] Ibid.
[315] CERD/C/FRA/CO/20-21
[316] Ibid, para 7
[317] Ibid, Para. 11

be put in place to properly address the issues of racial and ethnic discrimination. The fact that this indecision has been back and forth over 7 consecutive periodic reporting sessions is aggravating. This demonstrates one frustration expressed about conventional recommendations in how they are oftentimes taken as suggestions rather than requirements, even though state parties have signed and ratified said conventions.

Another recurring theme in the Committee's concluding observations is the presence of racist and xenophobic rhetoric in French politics. Recalling the severity of repercussions from the political climate particularly in the unfolding of the riots in 2005, the Committee recommends that the Nation:

> *(a) Strongly condemn and distance itself from the racist hate speech and xenophobic, anti-Semitic and Islamophobic discourse emanating from certain political circles or media;*
>
> *(b) Ensure that all instances of racist or xenophobic discourse are investigated and that the persons responsible are prosecuted, convicted and punished appropriately;*
>
> *(c) Reinforce the steps being taken to inculcate tolerance and understanding among the different population groups residing in its territory.*[318]

While not a direct recommendation to the status of racial profiling by police in France, the positions of politicians and those higher ups responsible for the training and assurance of effectiveness by public officials have a high potential of influencing these state of affairs.

[318] CERD/C/FRA/CO/20-21

None of the Committee's concluding observations allude specially to the issue of racial profiling except for in the context of combatting terrorism, noting concerns that the application of France's legislative and judicial measures to combat terrorism "may entail ethnic or racial profiling directed at members of certain minority groups.[319]" This is an issue, as racial profiling should clearly be of concern to the nation of France, and therefore also a concern of the Convention. Inclusion of this issue in concluding observations can aid in the Committee's argument towards France gathering statistics on their racial and ethnic groups. As referenced in the case of *Williams Lecraft v. Spain*, racial profiling in the European context, at least, is in violation of at least one core human rights body within the UN. This lack of recognition of an issue combined with the years-long discourse between France and the Committee on whether France should be required to record ethnic and racial statistics indicate persistent and alarming frustrations of the Committee to effectively address these issues as an international body. Similar to conclusions made considering the periodic reports and concluding observations of the United States, the system of reporting, observation, and recommendation in the model of the ICERD has failed to yield substantial reform in the case of racial profiling for these two jurisdictions.

[319] Ibid.

Conclusion

The discussion above has conceptualized the issue of racial profiling through a look at the diverse jurisdictions of the United States and France. The additional look at the two in comparison through the ICERD allowed for a comprehensive analysis of the issue of racial profiling in the context of different national and international jurisdictions that share a common problem.

Chapter 1 conceptualized the concept by building a framework based on a historical difference of rights between black and white communities. Both nations were built structurally in one way or another through colonization and the implementation of slavery. Inherently, these occurrences provide an initial structural inequality due to a system of hierarchy, one which particularly saw one group (blacks) being oppressed by another (whites). Allusion towards the protection of a privileged society and the subsequent lack of availability to the same rights as their white counterparts, black communities are at a disadvantage, by default, to the pulls of profiling and oppression based on their race.

Section 1.2 suggests that definitions of racial profiling stem from that of criminal profiling, with many in law enforcement relying on that origin to justify the use of race in pursuing suspects. Although many laws have indicated racial profiling as unequal and therefore unjust in the legal realm, criminal profiling based on race is evident in the relevant jurisdictions and many more. This perception has also led to the conceptualization of the broken windows theory which has explicitly contributed to police practices in the NYPD and can be alluded to considering political and social commentary regarding the behaviors of black and brown youth in the French *banilieues* during the riots of 2005. This perception contributes to unsubstantiated stereotypes of predominately black neighborhoods, effectively justifying law enforcement's

unequal distribution of stops, questions, and frisks of minority communities compared to their white counterparts.

Following, section 1.3 briefly discuses concerns with statistics on racial profiling, as it is the only objective, quantifiable way to address the issue. This discussion is relevant in the context of the United States, as the referenced court cases allocate lengthy discussion of whether the information given by relevant parties are admissible. The issue is also mentioned in the context of the only quantifiable data given for racial profiling in France, discussed in section 3.1.1 with the Open Society project.

Chapter 2 focuses heavily on recent litigation in the city of New York concerning the NYPD. Following a summary of the constitutionality of stop-and-frisk, an analysis of *Floyd et. Al. v City of New York* and its companion cases provides a more in-depth look into the consequences of racist practices of the NYPD. The analysis shows that the NYPD was found in federal court to be in violation of the Constitution, with lenghty commentary concerning their shortcomings in training officers, recording stop-and-frisk interactions in an adequate way, and operating in an inequtable way under the guise of programs such as Opearation Clean Hall. Discussion of critiques on the case expose additional concerns that should be addressed, specifically in the form of obtaining statistics on racial profiling, regardless of the critiques' dispute of the decisions of the Federal District Court. Additional court cases mentioned in section 2.1.2 provided examples of Federal court decisisons which further outlined the legality of race considerations in stop-and-frisk cases, rounding off a discussion that clearly indicates a legally discussed and verified difference in the expectations of criminality by law enforcement (in the NYPD at least) of black communities comparted to their white counterparts.

Chapter 3 provided a similar analysis in the context of France, with a less litigation-focus, considering the added element of the republican model in French society and politics. France's historically documented battle with national identity culminated into a declaration of a sole French identity, enshrined in its latest consittution. This disctinciton, unfortunately, provides great difficulty for those wishing to address issues of discrimination and racism, with the courts continually citing this disctinciton for its reasoning in not allowing the entrance of racial and ethnic statistics into the court of law. The size and impact of the 2005 riots and its reverberated impact in present-day relations between black and arab youth, partiularly, and French law enforcement indicate that something need to be done to alleviate the grivecences expereinced by these marginalized communities. If french politicians and mebers of the judicisary insit on denying the recording and use of racial and ethnic statists to alleviate racial discrimination within their terrotieis, then their focus should at the very least shift to alternative means of addressing these issues.

Finally, Chapter 4 looked at both nations through the perspective of a shared international jurisdiction in that of the ICERD. While the Committee has made relevant observations and recommendations on most the issues outlined in this thesis, it did fail to recognize and address the specific issue of racial profiling in the context of France. Additionally, each nation's respective reservations and declarations have made it difficult to implement change, particularly the United State's reservation for Article 2 and France's reservation for Article 4. Each impede the Committee's efforts to address the issues which have been reiterated continuously through their concluding observations and recommendations. While this problem exposes each nation's reluctance to waiver on their initial reservations, it also suggests that the ICERD either explore a

new avenue for compromise on the limited progress considering these reservations or amend their acceptance of these reservations altogether moving forward.

A comprehensive look at the above jurisdictions and a history of the concept of racial profiling insist that the issue has a long history that crosses international lines. Regardless of whether a nation chooses to collectively acknowledge their nation's ethnic and racial differences, the problem of unequal policing still exists. While an absolute solution may not likely come from one comparative thesis, discussion on the issue in two similar but equally different nations attributed to the fact that the problems are not isolated to one way of history. Moving forward, it is an obligation of these nations and others to recognize their historical battle with issues of racial discrimination in their law enforcement practices, and for international conventions and human rights bodies to dutifully use their global presence and resources to engage in discourse on this form of racial discrimination.

Litigation has and should continue to address the racial profiling problem in domestic courts, as the recent cases mentioned above have incited progress in some communities. The cases of *Floyd* and *Williams Lecraft* particularly serve as recent examples of cases that have had a significant domestic impact as well as widespread reach in the media.[320] French litigation has not yet shown the same presence regarding racial profiling in particular, however, the mention of the collection of racial and ethnic statistics in the *Conseil constitutionnel* have at least catapulted a conversation of how it can be used in some cases. Opinions may change and decisions are able to be re-evaluated, and it is the hope of many affected by the unjust police practice of racial

[320] For example, stops in New York City have decreased following the recent stop-and-frisk litigation as well as overall crime. *See https://www.nytimes.com/2017/02/02/nyregion/new-york-police-dept-stop-and-frisk.html*

profiling that their stories and cases continue to be recognized and defended in the minds and courtrooms of politicians, litigators, and communities alike.

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