

TESTIMONY OF MEAGAN SWAY, ESQ.

**LD 132, An Act To Implement the Attorney General's
Recommendations on Data Collection in Order To Eliminate
Profiling in Maine**

Ought To Pass as Amended

JOINT STANDING COMMITTEE ON JUDICIARY

February 11, 2021

Good morning Senator Carney, Representative Harnett, and members of the Joint Standing Committee on Judiciary. My name is Meagan Sway and I am policy director for the ACLU of Maine, a statewide organization dedicated to the principles of liberty and equality embodied in the U.S. and Maine Constitutions. I am here today to urge you to vote “ought to pass as amended” on LD 132, legislation that would move Maine forward toward understanding and addressing the ways in which racial profiling affects the enforcement of our laws.

The reason for data collection is simple: we manage what we measure. If we are to understand and address the role that racial and other identity profiling play in law enforcement decision-making, we have to get basic information on what police are doing, and with whom. Data helps move us from rhetorical arguments to evidence-based solutions.

Several states have implemented prohibitions on racial profiling and requirements to collect data.¹ Two states in particular, Connecticut and California, have established practical, robust systems of data collection regarding police stops. This means that Maine need not invent this process from scratch and that many of the concerns raised have already been addressed and overcome. I have attached to this testimony a letter the ACLU of Maine sent to Attorney General Frey last year that goes into more details of Connecticut and California’s data collection laws and their implementation. In brief, those states found that robust data collection was

¹ *E.g.*, Alabama (Ala. Code 1975 §32-5B-8(d)); California (West’s Ann.Gov.Code §12525.5, West’s Ann.Cal.Penal Code §§13012(c), 13519.4); Connecticut (C.G.S.A. §54-11 *et seq.*), Florida (West’s F.S.A. §316.614(9)); Louisiana (LSA-R.S. 32:398.10); Maryland (MD Code, Transportation, §25-113); Missouri (V.A.M.S. 590.650); Montana (MCA 44-2-117); Nebraska (Neb. Rev. St. §20-504); North Carolina (N.C.G.S.A. §143B-903); Texas (Vernon’s Ann. Texas C.C.P. Art. 2.132(6), 2.134).

not unduly expensive and did not take more than 1-2 minutes of law enforcement's time to comply with the law. If Connecticut and California can do this, Maine can too.

We understand that the sponsor seeks to amend LD 132 by doing two things: first by requiring data collection that mirrors the current legal prohibition on profiling, *see* 25 MRSA §2803-B, sub-§1(B), and second by removing the section of the bill that would make “the name and personally identifiable information of a law enforcement officer or any other person involved in any activity for which information is collected and compiled under this chapter...confidential” and that would have prevented that information from being “released to the public or disclosed to the public or any person...” We support both changes.

Maine's laws already protect as confidential records “that may result in disciplinary action.” 30-A M.R.S.A. §2702(1)(B)(5), 5 M.R.S.A. §7070. Since racial profiling is unconstitutional, we hope and expect that it will indeed result in disciplinary action if it is found to occur. There is no need for more secrecy than existing law already provides; there have been well-documented reports that current laws are already being used improperly to shield information about police misconduct from the public view.² Moreover, from a public policy perspective, it is bad governance to keep from the public information related to government officials who act under color of law. This is in part why we require officers to wear badge numbers when they are in public—so that we might identify them and their actions. They are public servants, and while that does not mean they should be abused, neither should they be treated differently from other public servants.

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Racial profiling violates the U.S. Constitution by betraying the fundamental American promise of equal protection under the law and infringing on the Fourth Amendment guarantee that all people be free from unreasonable

² *See, e.g.,* Erin Rhoda, *BDN sues Maine State Police for records detailing officer misconduct*, The Bangor Daily News, Jan. 29, 2021, available at <https://bangordailynews.com/2021/01/29/mainefocus/bdn-sues-maine-state-police-for-records-detailing-officer-misconduct/>; Josh Keefe, *In trove of officer misconduct records, Maine sheriffs hide the worst offenses*, The Bangor Daily News, Dec. 2, 2020, available at <https://bangordailynews.com/2020/12/02/mainefocus/in-trove-of-officer-misconduct-records-maine-sheriffs-hide-the-worst-offenses/>; Sean Murphy, *Attorney alleges racism by Cumberland police officers*, The Portland Press Herald, Sept. 29, 2020, available at <https://www.pressherald.com/2020/09/29/attorney-alleges-racism-by-cumberland-police-officers/>.

searches and seizures. In order to ensure that this does not happen, the state must collect data and make that data public.

We cannot rely on self-reflection to identify racial bias in Maine. We need data, it needs to be reliable and it needs to be widely available. LD 132 mandates broad data collection across law enforcement agencies, and, importantly, tasks the Attorney General with analyzing that data and making that analysis public. We urge you to vote *ought to pass as amended*.

March 6, 2020

The Honorable Aaron M. Frey
Office of the Maine Attorney General
6 State House Station
Augusta, ME 04333-0006

Dear Attorney General Frey:

Thank you for the opportunity to provide information and recommendations regarding the available techniques for the collection and compilation of profiling data. On the local, state, and national stage, police reform and racial equity have become the most pressing and sensitive civil rights issues for many public figures as distrust between police and communities of color remains at a high point.

An evidence-based approach to public safety can turn concerns about biased policing into sound, solution-driven policies across our state. We all want safe communities where people are treated equally, with dignity and respect, and to have the freedom to pursue their dreams and aspirations without fear of being unjustifiably targeted by law enforcement.

The reason for data collection is simple: we manage what we measure. If we are to understand and address the role that racial and other identity biases play in law enforcement decision-making, we have to get basic information on what police are doing. Data helps move us from rhetorical arguments to evidence-based solutions.

I. What is Profiling?

Racial profiling occurs every day, in cities and towns across our state, when law enforcement and private security target people of color for humiliating and often frightening detentions, interrogations, and searches without evidence of criminal activity and based on perceived race, ethnicity, national origin, or religion.

Profiling patently violates the U.S. Constitution's core promises of equal protection under the law and freedom from unreasonable searches and seizures. Just as importantly, profiling is ineffective. Profiling alienates communities from law enforcement, hinders community policing efforts, and causes law enforcement to lose credibility and trust with the people they are sworn to protect and serve.

A. Explicit and Implicit Bias

When the term “racial profiling” first came into use two decades ago, it referred to the explicit use of race by police as a reason to conduct an encounter or search. Since then, our understanding of the role of racial bias, both generally and in particular with respect to police action, has evolved significantly. Specifically, in addition to traditional notions of intentional prejudice, modern research on “implicit bias” shows that race plays a role in decision-making at an unconscious level, particularly with respect to assessments of danger and criminality about people of color. Studies provide that implicit bias occurs not just in a few bad apples, but pervasively throughout American society, even by people who do not describe themselves as racist and are themselves subjects of discrimination.¹

B. Types of Profiling

1. Race/Skin Color

More than 240 years of race-based slavery and 90 years of legalized racial segregation have led to systemic profiling of Black people in our country, as they engage in everyday activities such as driving, walking in their neighborhood, shopping, or attending school. This profiling happens in all areas of the country, including the northeast.

Although data on profiling is not collected in Maine yet, just recently a Lewiston man filed a lawsuit against police in Westbrook, Maine that stemmed from a racial profiling incident. Vincent Oden was stopped by police in Westbrook by police who had previously let cars driven by white people pass by. He was given a field sobriety test, which he passed, yet he was nevertheless arrested and taken to Cumberland County Jail, where his blood was drawn. He was strip searched and put into a jail cell. When he was finally released, his bail was conditioned on not visiting locations that served alcohol, and he lost his job and a business venture he was pursuing.² All charges were dropped against Oden.

This experience was not only humiliating and degrading to Oden, it is now expensive for the City of Westbrook that must defend the lawsuit.

¹ See generally Tracey G. Gove, *Implicit Bias and Law Enforcement*, Police Chief Magazine (Oct. 2011); Jerry Kang, *Implicit Bias: A primer for Courts*, Natl. Ctr. for State Courts (Aug. 2009).

² Christopher Williams, *Lewiston Man Sues Westbrook Cops Over Arrest*, Lewiston Sun Journal, Jan. 30, 2020, available at <https://www.sunjournal.com/2020/01/30/lewiston-man-sues-westbrook-cops-over-arrest/>.

2. Ethnicity/National Origin

Numerous examples of profiling based on perceived ethnicity or national origin have emerged publicly in Maine, although we know from our friends at the Immigrant Legal Advocacy Project (ILAP) that many of their clients have been turned over to Immigrations and Customs Enforcement as a result of pretextual law enforcement stops. In 2017, attorneys in federal court alleged that a state trooper engaged in racial profiling when he pulled over a van driven by Honduran men and gleefully exclaimed to his colleague, “This is the (expletive) ICE motha load right here” and “ICE is gonna be coming out here with their (expletive) SWAT team on this one.”³ And, in October of last year, a U.S. Customs and Border Patrol agent admitted in an affidavit submitted to federal court that he pursued a family in Bangor because they “appeared to be of Central-American origin” and were “overheard speaking Spanish.”⁴ The U.S. Attorney’s Office later dropped the felony charges against a man arrested as a result of that profiling.

Ethnicity and national origin profiling is often—though not always—combined with racial profiling. In the current climate of brutal federal immigration enforcement, it is especially important that Maine protect against this profiling.

3. Religion

The number of people practicing Islam in Maine has risen over the past twenty years, and now there are well over 5,000 Muslims in our state. Islamophobia has risen during this time, and has seen a recent surge with rhetoric from the president of the United States attempting to enact bans on emigration from “majority Muslim” populations. As the federal government ratchets up its rhetoric on this point, we are likely to see local and federal law enforcement increase profiling of people they believe are Muslim immigrants.

C. Harms Caused by Profiling

People who are stopped, interrogated, or searched by the police on the basis of an identity characteristic often recall the experience for a lifetime. The humiliation of being ordered out of your car, hands and feet spread apart, frisked while neighbors or strangers pass by, having your car searched or torn apart in a futile search for

³ Randy Billings, *Attorney Alleges Racial Profiling by State Police in Portland Traffic Stop*, Portland Press Herald, December 21, 2017, available at <https://www.pressherald.com/2017/12/21/attorney-alleges-racial-profiling-in-portland-immigration-stop/>.

⁴ Charles Eichacker, *Border Patrol Questioned Family in Bangor Because They Looked Central American and Spoke Spanish*, Bangor Daily News, October 17, 2019, available at <https://bangordailynews.com/2019/10/03/news/bangor/border-patrol-questioned-family-in-bangor-because-they-looked-central-american-and-spoke-spanish/>.

drugs, being interrogated about your personal life, whether you live in the neighborhood or what business you have in this part of town—these experiences are hard to forget, and they color one’s view of law enforcement and the criminal legal system for the rest of a person’s life. A letter from the American Psychological Association (“APA”) states that the effects of profiling on victims include post-traumatic stress disorder and other forms of stress-related disorders, perceptions of race-related threats and failure to use available community services.⁵

People of color in our state, but especially Black people, are disproportionately arrested, punished, and left to suffer the years of disenfranchisement that comes with a criminal record—including dire consequences for employment, income, and housing. Every comprehensive study has shown that people of color are no more likely than whites to be carrying drugs or other contraband in their vehicles. However, because they are stopped and searched for drugs at grossly disproportionate rates, they are also arrested and incarcerated at grossly disproportionate rates.

The racial composition of our prisons and jails today is, in large part, a product of racial profiling. In Maine, Black people are disproportionately arrested for all crimes, but especially drug crimes. In 2018, for example, black people made up one percent of Maine’s population, but 5 percent of all arrests, 8 percent of all drug arrests, 15 percent of all Class B drug arrests, and 21 percent of all Class A drugs arrests in our state that year were of Black people.⁶ This is despite the fact that Black and white people use drugs at roughly similar rates and white people sell drugs at higher rates than Black people.⁷

Profiling is especially damaging to youth. It sends the powerful message that no matter how hard you try in school, no matter whether you play by the rules and obey the law or not, because of your identity characteristics—because of who you are—you are more likely to be viewed as and treated like a criminal than white people who do not play by the rules or obey the law.

⁵ American Psychological Association, Letter to U.S. House in Support of the End Racial Profiling Act, H.R. 2074 (9 August 2001), *available at* <http://apa.org/ppoi/issues/pracialprof.html>.

⁶ Council of State Governments, Justice Reinvestment in Maine, *Second Presentation to the Maine Commission to Improve the Sentencing, Supervision, Incarceration and Management of Prisoners* (12 November 2019), *available at* <https://csgjusticecenter.org/jr/maine/publications/justice-reinvestment-in-maine-second-presentation/>.

⁷ See, e.g., Christopher Hamilton, *White People Are More Likely To Deal Drugs, But Black People Are More Likely To Get Arrested For It*, The Washington Post, Sept. 30, 2014, *available at* <https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-black-people-are-more-likely-to-get-arrested-for-it/>.

Frustration, rage, and cynicism are the predictable by-products of racial profiling. These justifiable emotions can last for years. A 2009 Harvard Kennedy School study of the Los Angeles Police Department showed that minorities who were unfairly targeted experience years of continued mistrust and fear.⁸ These emotions also render healthy police-community relations impossible. According to a study conducted by the Ontario Human Rights Commission, distrust in civic institutions, like policing organizations, is "...heightened by [an] unwillingness on the part of the institutions to acknowledge the concern and engage in a constructive process to address it."⁹

D. Workable, and Working, Profiling Data Collection and Analysis Systems

As your office looks to the best ways to collect and compile data on racial profiling, you will encounter several states with laws prohibiting profiling and requiring data collection.¹⁰ We wish to highlight two states that we think have especially good data collection and compilation practices: California and Connecticut. These states show that data collection and analysis from law enforcement stops, when implemented thoughtfully, are not onerous to law enforcement and potentially save the states money by investing a little up front, and avoiding costly and time-consuming lawsuits on the back end.

Both California and Connecticut have features that any good data collection system implemented in Maine should have: first, they are explicit and detailed in the kind of data that must be collected by law enforcement;¹¹ second, they have advisory boards built into their laws that are not just made up of law enforcement, but a variety of voices from the community that have expertise in the issue, to analyze the

⁸ See Ranjana Natarajan, *Racial Profiling Has Destroyed Public Trust in Police. Cops are Exploiting Our Weak Laws Against It*, Washington Post, Dec. 15, 2014, available at <https://www.washingtonpost.com/posteverything/wp/2014/12/15/racial-profiling-has-destroyed-public-trust-in-police-cops-are-exploiting-our-weak-laws-against-it/>

⁹ Ontario Human Rights Commission, *The Effects of Racial Profiling*, Website, <http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling/effects-racial-profiling>

¹⁰ *E.g.*, Alabama (Ala. Code. 1975 §32-5B-8(d)); California (Government Code §12525.5, Penal Code §§ 13012, 13519.4); Connecticut (C.G.S.A. §54-11 *et seq.*); Florida (tit. XXIII, §316.614(9)); Louisiana (LSA-R.S. 32:398.10); Maryland (MD Code, Transportation, §25-113); Missouri (V.A.M.S. 590.650); Montana (MCA 44-2-117); Nebraska (Neb. Rev. St. §20-504); North Carolina (N.C.G.S.A. §143B-903); Texas (Vernon's Ann. Texas C.C.P. Art. 2.132(6), 2.134).

¹¹ Including the requirement that the law enforcement officer's perception of a person's race, national origin, gender, etc. be recorded, rather than what is on a person's birth certificate. While claims were made at the hearing for LD 1475 that it would require law enforcement to racially profile in order to collect information on the race of people they stop, that is simply not the case.

data received; and third, the laws were implemented after robust input from all stakeholders and a careful, deliberate system was put in place to ensure that data was collected from all law enforcement in a uniform manner that was practical both for law enforcement and for meaningful data analyses.

1. California

California has implemented a robust and useful data collection and analysis system in an attempt to measure racial profiling by law enforcement, following the passage of The Racial and Identity Profiling Act of 2015 (the “Act”). The Act created a uniform system for law enforcement departments to report basic information on police activity to the California Department of Justice for analysis.

To implement this law, the California Attorney General developed extensive regulations that detail how information is to be collected and analyzed, and by whom. We have attached a copy of the rules to this letter. Also attached are comments the stakeholders submitted in response to the Attorney General’s notice of proposed rulemaking, and a letter that stakeholders sent to the Attorney General after his office met with them shortly before promulgating its regulations. The stakeholders recommendations would be as useful in Maine as in California; we urge you to adopt them.

We also urge you to visit the Attorney General’s website on these regulations¹² for an in-depth discussion of why the regulations look as they do, and why law enforcement is now required to collect data in the manner that it is. The regulations detail an extremely comprehensive system of collection and aggregation, and is one of the two states whose data collection most closely mirrors best practices in this area.

From our point of view, the important parts of California’s system are that it: (1) requires almost all law enforcement officers in California, other than probation officers, to collect and report data on stops that occur in non-custodial settings; (2) establishes a Racial and Identity Profiling Advisory board (the “RIPA Board”), comprised of diverse stakeholders, to analyze law enforcement stop data, training programs, and policies and practices; and (3) details and describes the points of information that must be collected by law enforcement—and how they must be collected—so that law enforcement have sufficient guidance to apply the law uniformly and timely.

While California is a state with more resources than Maine, it also faced logistical hurdles that luckily we do not face. According to the U.S. Department of Justice, as of 2008, California had 509 law enforcement agencies and employed nearly 80,000

¹² California Racial and Identity Profiling Act of 2015 (AB 953), *available at* <https://oag.ca.gov/ab953/regulations>

sworn officers.¹³ By comparison, Maine had 146 law enforcement agencies employing 2,569 sworn officers.¹⁴

California estimated that it would take \$2.1 million over five years to implement the data collection system, but when divided over the number of law enforcement agencies and the longer period of time, the departments were able to absorb the costs with their existing resources.¹⁵

2. Connecticut

In 1999, Connecticut passed the Alvin W. Penn Racial Profiling Prohibition Act. After the Act's implementation, Connecticut quickly encountered challenges with compliance. That bill was significantly updated in 2012, to streamline the process and ensure that law enforcement had clear guidelines on what data to collect and how the data would be aggregated and analyzed.

Connecticut's data collection system requires police to collect 26 data points per traffic stop (as compared to California's 17). Filling the form is estimated to take only one to two minutes of law enforcement's time. The total cost to the state of Connecticut was less than \$250,000.

Attached is a letter from Ken Barone of the Institute for Municipal and Regional Policy at Central Connecticut State University, describing the implementation process for Connecticut's law. Mr. Barone has already considered a law enforcement system that uses several different record management systems. He has offered himself as a resource to your office as you examine how to collect racial profiling information in Maine; we urge you to contact him.

E. Federal Funding

Finally, we understand that at the public hearing on this bill, there was considerable testimony about the prohibitive costs associated with a project of tracking profiling. Although we believe that California and Connecticut show that the cost is not prohibitive, you should know that the federal government also provides funding to states for the collection and evaluation of data on racial profiling.¹⁶ In order to receive this funding, Maine has to meet certain qualification

¹³ U.S. Department of Justice, Census of State and Local Law Enforcement Agencies 2008 (July 2011) at p.15, *available at* <https://www.bjs.gov/content/pub/pdf/cslla08.pdf>.

¹⁴ *Id.*

¹⁵ See Economic and Fiscal Statement for AB 953 Stop Data Reporting Regulations to Implement Gov. Code Section 12525.5, *available at* <https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/stop-data-reg-std399-signed-110817.pdf>?

¹⁶ See 23 CFR §1300.28.

criteria, which are defined in federal regulations.¹⁷ We urge you to ensure that the regulations you propose qualifies Maine for these federal funds.

Conclusion

Thank you for soliciting our input on this matter. The experience of other states shows that the most successful programs to reduce racial profiling involve a diverse set of stakeholders and advocates at every step of the process, and we would be happy to continue to work with you as you move forward to implement the Act to Eliminate Profiling in Maine.

Sincerely,



Alison Beyea, Executive Director



Meagan Sway, Policy Council

¹⁷ *Id.*