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Controlling Racial and Religious Profiling: Article 14 ECHR Protection v. U.S. Equal Protection Clause Prosecution

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ARTICLES

CONTROLLING RACIAL AND RELIGIOUS PROFILING: ARTICLE 14 ECHR PROTECTION V. U.S. EQUAL PROTECTION CLAUSE PROSECUTION

Aaron Baker†

I. INTRODUCTION 285
II. WHY COMPARE THE ARTICLE 14 AND EQUAL PROTECTION CLAUSE APPROACHES TO PROFILING? 288
III. HOW THE ARTICLE 14 ANALYSIS WORKS 292
IV. HOW ARTICLE 14 PROPORTIONALITY SHOULD WORK UNDER THE HRA 295
V. THE IMPACT OF PROTECTION AND PROPORTIONALITY ON U.S. PROFILING CASES 302
VI. CONCLUSION 307

> *Intelligence-led stop and searches have got to be the way . . . We should not waste time searching old white ladies. It is going to be disproportionate. It is going to be young men, not exclusively, but it may be disproportionate when it comes to ethnic groups.*
>
> —Ian Johnston, Chief Constable of the British Transport Police, in the wake of the July 7, 2005, bombings in the London Underground.[1]

I. INTRODUCTION

The phrase "intelligence-led policing" seems to beg for an ironic witticism, but it describes a weapon of the "War on Terror" used in deadly earnest by the state with significant repercussions for the human rights of Muslims, Arabs, and South Asians. Intelligence-led policing ended in the shooting death of the innocent Brazilian electrician, Jean Charles de Menezes, in a London Underground station on July 22, 2005;[2] it was subsequently used by the United Kingdom Home Office to defend the use, in the London Underground, of stop and

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1. Vikram Dodd, *Asian Men Targeted in Stop and Search*, GUARDIAN UNLIMITED (London), Aug. 17, 2005, http://www.guardian.co.uk/attackonlondon/story/0,16132,1550470,00.html.

2. *See* Pete Walker, *Q & A: The De Menezes Investigation*, GUARDIAN UNLIMITED (London), July 17, 2006, http://www.guardian.co.uk/menezes/story/0,,1822504,00.html.

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search profiles that resulted in the disproportionate stopping, searching, questioning, and detention of people of Muslim or South Asian appearance.[3] Intelligence-led policing gave sanction to the rounding up and secret, indefinite imprisonment without charge of hundreds of Muslim and Arab men in the United States after the September 11, 2001 attacks.[4] On the other hand, intelligence-led policing also contributed to the foiling, in early August 2006, of a plot by alleged Muslim extremists (residents in England) to destroy—simultaneously—ten or more jet airliners bound from the United Kingdom to the United States by smuggling aboard liquid explosives.[5] Anti-discrimination protections must come to terms with intelligence-led policing in a way that both controls it and respects its efficacy in appropriate circumstances.

Although "intelligence-led policing" means a lot of things—including, obviously, the use of tips, informants, and surveillance to identify individuals engaged in, or preparing for, criminal activity—it appears also to mean that as long as the police have information suggesting that a terrorist act is more likely to be committed by, say, an Asian than a non-Asian, it is not discrimination to subject individual Asians to more "policing" than individual non-Asians. If counter-terrorism officers decide not to detain, search, and question a white man, but instead to detain, search, and question a similarly situated, attired, and accoutred Arab man because he is Arab, intelligence-led policing means that they have not used ethnicity as a criterion for police attention. Instead, the officers have relied on the extent to which the individual matches an intelligence estimate that portrays Arab men as more likely perpetrators of the particular kind of crime under investigation. In short, intelligence-led policing justifies racial and religious profiling. This profiling is not acknowledged as discriminatory so long as police disproportionately target minority individuals because, on the basis of some intelligence, police consider members of their minority group more likely to be guilty of a crime rather than because they do not like those groups and wish to harass their members.[6]

Counter-terrorism officials in the U.S. and the U.K., arguably the two most significant protagonists in the "War on Terror," have responded to the events of September 11, 2001, and July 7, 2005, with an increasing resort to the use of racial and religious profiles based on

3. *See* Dodd, *supra* note 1.

4. AM. CIVIL LIBERTIES UNION, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11, at 4–5 (2004).

5. *See* Craig Whitlock & Dafna Linzer, *Tip Followed '05 Attacks on London Transit*, WASH. POST, Aug. 11, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/10/AR2006081001654.html.

6. *See* Washington v. Davis, 426 U.S. 229, 239 (1976); Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 2000); United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995); United States v. Weaver, 966 F.2d 391, 394 n.2 (8th Cir. 1992).

https://scholarship.law.tamu.edu/txwes-lr/vol13/iss2/2
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"intelligence."[7] The word "intelligence" is in quotes not because officials use it disingenuously, but because even ingenuous reliance on intelligence (to the effect that most people who commit a certain crime have a certain ethnicity) leads to less favourable treatment of an individual with that ethnicity because of his membership in that group and not because of any act he is thought or known to have committed. The "intelligence" is not about the individual—the police will often have only one relevant piece of intelligence about a stopped-and-searched individual: his apparent ethnicity—and yet the state will claim that it did not stop the individual because of his race, but because of the state's "intelligence." This sleight-of-hand offers a stern test of protections against state discrimination in that it can exploit a superficial jurisprudential conception of discrimination as something that is done rather than something that is experienced.[8] Moreover, the use of such "intelligence" to justify a stop-and-search or detention can simultaneously look like both a least restrictive alternative from the perspective of police with no other ideas and an overbroad, underinclusive, and arbitrary distinction to those stopped, searched, or detained. An arguably disproportionate percentage of such people are innocent and never charged.

In light of the challenges that intelligence-led profiling poses to constitutional provisions against government discrimination, this paper discusses the extent to which, and why, Article 14 of the European Convention on Human Rights ("ECHR"), as applied in the U.K. through the Human Rights Act 1998 ("HRA"), has a greater potential to control such racial and religious profiling in a counter-terrorism context than does the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. My contentions are, in essence, that: (1) Article 14 has been less chipped away at by judicial manipulation of the definition of discrimination than has the Equal Protection Clause ("EPC"), meaning that judges are less trammelled in their ability to find that prima facie discrimination has occurred, and (2) Article 14 provides the judiciary with the tool of proportionality, making it harder for discrimination to stand up to scrutiny. Section II below explains why this comparison contributes to the profiling debate in both the U.S. and the U.K. Section III introduces the Article 14 anal-

7. *See* David A. Harris, *Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 88 (2003); Dale Minami et al., *Sixty Years After the Internment: Civil Rights, Identity Politics, and Racial Profiling,* 11 ASIAN L.J. 151, 154–55 (2004); Daniel Moeckli, *Discriminatory Profiles: Law Enforcement After 9/11 and 7/7*, 5 EUR. HUM. RTS. L. REV. 517, 517–20 (2005).

8. *See* Aaron Baker, *Comparison Tainted by Justification: Against a "Compendious Question" in Article 14 Discrimination,* 2006 Pub. L. 476; Aaron Baker, *Article 14 ECHR: A Protector, not a Prosecutor*, in JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT 1998 (Helen Fenwick et al. eds., forthcoming June 2007) [hereinafter *Protector*]; Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 184.

Texas Wesleyan Law Review, Vol. 13 [2022], Iss. 2, Art. 2

ysis and sets out its strengths in comparison to the EPC. Section IV argues for a particular approach to applying Article 14 proportionality to profiling—a practice with which Article 14 has yet to grapple. Finally, Section V will illustrate the impact an Article 14-style analysis would have on EPC jurisprudence by subjecting U.S. cases to Article 14 scrutiny.

II. Why Compare the Article 14 and Equal Protection Clause Approaches to Profiling?

It might seem at first that this comparison is an effort to persuade colleagues in the U.S. to push for European-style proportionality to become a doctrine openly adopted by U.S. courts in equal protection cases. I am neither so quixotic nor so insensitive to the transatlantic differences in legal traditions that might make such a move impossible or undesirable. For U.S. colleagues, this Article seeks to explain only: (1) how the Article 14 and HRA approach differs from the U.S. approach in that it seeks to *protect* against unequal effects rather than *prosecuting* discriminatory conduct, and (2) how the language of proportionality affects what kind of information courts should consider in deciding whether an instance of profiling constitutes unlawful discrimination. This Article contends that constitutional equality provisions that are protective are more effective than those that are prosecutorial, and that proportionality is a more robust scrutiny model than is strict scrutiny of suspect classifications I believe (although space prevents me from defending this belief here) that if academics and advocates in the U.S. urged upon the courts the logic of protection and offered them the impact evidence called for by the proportionality analysis, there is an outside chance that the Equal Protection Clause could develop a bit more muscle.

For U.K. and European colleagues, this Article makes an argument for a particularly muscular Article 14 (whose protective nature is acknowledged and implemented), which focuses on discriminatory effects, not intentions. This Article will also explain that one reason Article 14 can do more than the EPC is that strict scrutiny is one-dimensional, while proportionality is two-dimensional. If a U.S. measure discriminates on the basis of a suspect classification like race or religion, Supreme Court jurisprudence requires strict scrutiny. In the absence of strict scrutiny, measures very seldom violate the EPC, so a finding of discrimination on the basis of a suspect classification is nearly a *sine qua non* of a successful claim.[9] Strict scrutiny asks whether the measure pursues a compelling state interest in a way narrowly tailored to the objective.[10] This focuses exclusively on the reasons for choosing the measure in question, not its impacts—although

9. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).
10. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

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as this Article will discuss later, there is room for the impact of the measure to be smuggled into the question of narrow tailoring.[11] Proportionality, on the other hand, requires that the measure not impose a negative impact disproportionate to the extent to which the measure advances a legitimate state interest.[12] This sets up a two-sided balancing: the extent to which the interest is compelling, and the measure effective in pursuing it (the state's side of the balance) must outweigh the extent of the negative impact (the claimant's side of the balance).

U.K. observers might note that in practice there is not a great deal of difference between the two tests. U.K. courts mostly just look at the impact in terms of discrimination being bad—and discrimination on the basis of race or religion being particularly bad—so the measure must represent a particularly efficacious means of pursuing a compelling objective.[13] This article contends that in doing this U.K. courts are simply finessing the question of what kinds of impacts should be considered and how to measure them. U.K. courts should view the impact side of the proportionality equation as involving an assessment of how far a challenged measure harms affected individuals or groups, transgresses important principles, and causes societal harms by, for example, undermining social inclusion and dignity. A court can only perform this last part of the assessment by considering social sciences evidence: data or studies produced by economists, sociologists, and psychologists, to name a few. Legal commentators clearly recognize that profiling has far-reaching negative effects on social cohesion, minority communities, and minority cooperation with law enforcement, and there is no dearth of empirical evidence on the subject.[14] In the U.S., and indeed in the U.K., this type of information is sometimes brought to bear on assessments of the efficacy or narrow tailoring of a challenged measure,[15] but there is a crucial difference in the effect of applying such information to the impact side of a proportionality analysis. At least in theory, proportionality can lead to the rejection of a measure that is efficacious, narrowly tailored, and pursues a compel-

11. *See infra* notes 49–54 and accompanying text.

12. *See* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [50] (Eng.); Ghaidan v. Godin-Mendoza, [2004] UKHL 30, [19]–[20]; Nat'l Union of Belgian Police v. Belgium, 1 Eur. H.R. Rep. 578, 594–95 (1975) (Eur. Comm'n on H.R.).

13. *See, e.g.*, Bd. of Governors of St. Matthias Church of Eng. Sch. v. Crizzle, [1993] I.C.R. 401.

14. *See* AM. CIVIL LIBERTIES UNION, *supra* note 4, at 8–16; RANDALL KENNEDY, RACE, CRIME, AND THE LAW 159 (1997); Alschuler, *supra* note 8, at 207–23; Reem Bahdi, *No Exit: Racial Profiling and Canada's War Against Terrorism*, 41 OSGOODE HALL L.J. 293, 304–14 (2003); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 22–27 (2004); Tania Branigan, *Terror Laws Target Wrong Suspects, Says Study*, GUARDIAN (London), Sept. 3, 2004, at 8; Rachel Shabi, *Guantanamo in our Back Yard*, GUARDIAN (London), Sept. 11, 2004, at 38.

15. *See, e.g.*, *Grutter*, 539 U.S. at 327–33; Carson v. Sec'y of State for Work and Pensions, [2003] EWCA (Civ) 797, [61]–[71].

Texas Wesleyan Law Review, Vol. 13 [2022], Iss. 2, Art. 2

ling state interest if it proves to exact too high a cost in individual, group, principle, or social terms.[16] In other words, proportionality has the potential to say "no" to the state even when the state has nothing but really good reasons for what it wants to do.[17]

I see racial and religious profiling in counter-terrorism efforts as furnishing illustrative examples of the kind of measure that might satisfy U.S.-style strict scrutiny but should nevertheless fail a proportionality assessment under Article 14 ECHR. This Article does not intend to develop a detailed definition of what is meant by "racial and religious profiling" because it is concerned less with the nature of the phenomenon than with approaches to controlling instances of it.[18] It should suffice to state that this Article intends to discuss how Article 14 and the EPC would deal with situations where government law enforcement efforts (either in the form of centrally adopted surveillance or intelligence-gathering policies) criteria or guidelines for decision making (or individual decisions by law enforcement agents or police) employ race or religion as an outcome-determinative factor in deciding whom to stop, search, question, arrest, detain, or investigate.[19]

16. *See* Moeckli, *supra* note 7, at 528–30; Maria V. Morris, Comment, *Racial Profiling and International Human Rights Law: Illegal Discrimination in the United States*, 15 EMORY INT'L L. REV. 207, 258–62 (2001).

17. Several North American commentators agree that the costs of profiling are too high to justify using the technique even where it is rational to do so in pursuit of a compelling interest, but they struggle to reach this conclusion under the rubric of the Equal Protection Clause. *See* Alschuler, *supra* note 8, at 207–23; Carter, *supra* note 14, at 28; David M. Tanovich, *Using the Charter To Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention*, 40 OSGOODE HALL L.J. 145, 161–65 (2002); *see generally* Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004) (asserting that even if the use of race passes the test of racial profiling, it may still be unconstitutional because of the underlying costs to society).

18. The legal literature offers several efforts at defining profiling, and it tends to fall into one of two camps: (1) those who think that using a description of an alleged perpetrator to justify stopping or searching only people of the race described is by definition justifiable and not profiling, see *infra* note 19; R. Richard Banks, Essay, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1202–04 (2004); Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1202–07 (2003); and (2) those who see profiling as including any use of race as a criterion for police attention, see AM. CIVIL LIBERTIES UNION, *supra* note 4, at 3; Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 11 n.6 (2003); Harcourt, *supra* note 17, at 1345; Kent Roach, *Making Progress on Understanding and Remedying Racial Profiling*, 41 ALTA. L. REV. 895, 896, 900 (2004); Tanovich, *supra* note 17, at 150–51.

19. *See* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002) (providing a similar definition as is provided here, although excluding race-focused investigations based on eyewitness descriptions of alleged perpetrators, because this does not involve a "global judgment about a racial or ethnic group as a whole"). There is no point in quibbling over the definition because what this article focuses on is how constitutional equality provisions deal with the use of race to narrow the pool of investigation targets, and the quality of judgment

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"Outcome-determinative" means that profiles can include race or religion as one of several factors. But, if the profile works in such a way that a person who meets all of the criteria other than the profiled race will not get stopped and, but a person who meets the other criteria *and* race will get stopped, this is disparate treatment on the ground of race, and hence prima facie discrimination. The phrase "prima facie discrimination" is used to indicate that there is nothing necessarily unlawful or even immoral about it, but that it technically involves distinct treatment of individuals who differ solely in their race. This only becomes unlawful or immoral if it lacks an objective justification or fails to satisfy the applicable degree of scrutiny.

Although the "classic" profiling scenario involves preventive policing—where a profile is used to narrow the field of targets in efforts to identify terrorists before they commit acts of terrorism—this Article does not exclude situations where: (1) counter-terrorism agents use intelligence information about the racial or religious status of a suspected group of putative terrorists, or (2) police use eyewitness descriptions of the apparent race or religious garb of the perpetrators of a specific crime. In each case, viewed from the perspective of the stopped, searched, or detained individual, his race or religion was a determining factor in being stopped, searched, or detained. The presence of intelligence data or an eyewitness account simply makes the profile arguably more reliable and, hence, more susceptible to justification, but it does not change the prima facie discriminatory nature of the state action.[20] This idea meets with a surprising but persistent resistance from U.S. judges and commentators, many of whom do not appear able to look beyond discrimination as a kind of bad act, involving bias or stereotyping, to see it instead as a thing that happens to people, involving unequal enjoyment of legal protections or social goods.[21] For example, one study, purporting to demonstrate statistically that disproportionate stopping of black motorists does not support an inference of prima facie discrimination, used "bias" as a synonym for "intent to discriminate" and adopted the basic assumption that "unbiased officers will focus their searches on whichever group presents the highest likelihood of success [while] [b]iased police officers, on the other hand, are assumed also to *take pleasure in* searching [minority] citizens."[22] This view, of course, completely ignores the fact that the most stubborn and invidious forms of discrimi-

employed by state actors should factor into the analysis of whether prima facie discrimination—differential treatment—has occurred, but should form part of its justification.

20. *See* Harcourt, *supra* note 17, at 1345.

21. *See* Carter, *supra* note 14, at 33 (noting the U.S. Supreme Court's preoccupation with the "perpetrator's perspective" of discrimination).

22. *See* Nicola Persico & David A. Castleman, *Detecting Bias: Using Statistical Evidence to Establish Intentional Discrimination in Racial Profiling Cases*, 2005 U. CHI. LEGAL F. 217, 224–25 (emphasis added).

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nation arise from flawed (albeit innocent) assumptions, institutional inequalities, and cognitive distortions in what is called "common sense."[23] The need to combat these hidden and less "intentional" forms of discrimination requires an analysis that does not exclude any state distinction in treatment—as viewed from the perspective of the affected individual—from equal protection scrutiny.[24]

The following facts make profiling in counter-terrorism efforts particularly interesting: (1) countering the threat of terrorism will almost always represent a compelling state interest,[25] and (2) terrorism presents such an amorphous target for law-enforcement efforts that often it seems that the only effective actions the state can take must employ broad generalizations that impose burdens on a great many people and society as a whole.[26] This second fact sets up the scenario in which a state measure pursues a compelling interest, through a means as narrowly tailored as possible without forfeiting its law-enforcement effectiveness, and nevertheless imposes an individual, group, and societal burden that is so unacceptable that the method should be rejected even in the absence of a "less restrictive alternative" (the internment of Japanese-Americans during World War II would exemplify this). This Article contends that this scenario would have a different fate under Article 14 than under the EPC. In support of this contention, I will next provide a brief overview of how the Article 14 analysis works. I will then make some arguments about how Article 14 should be applied under the HRA in the U.K. Afterwards, I will look at U.S. profiling cases that got nowhere under the EPC and assess how they would fare under the analysis proposed. In doing this, I do not purport to offer up a fully developed doctrinal model for analyzing racial or religious profiling, but merely to begin a discussion of how a protective approach to controlling state discrimination (that requires any disparate treatment to procure benefits proportional to the individual and social costs imposed by it) can more effectively deal with profiling than a prosecutorial, one-sided scrutiny model.

III. How the Article 14 Analysis Works

The first thing to note about Article 14 is that in one important way it is less robust than the Equal Protection Clause. It does not protect against all discrimination by the state but only against discrimination

23. *See* Brandon Garrett, *Remedying Racial Profiling*, 33 Colum. Hum. Rts. L. Rev. 41, 48–60 (2001).

24. *See* Roach, *supra* note 18, at 896 ("[E]mphasis on effects-based discrimination . . . is a fundamental feature of modern understandings of equality rights, but it is still not widely accepted in popular understandings of racism, which are often tied to the idea of intentional discrimination.").

25. *See* Alschuler, *supra* note 8, at 183–84; *see also* Banks, *supra* note 18, at 1203–07 (opining that profiling is about stereotyping and that definitional problems flow from the difficulty with identifying the true motives of officers).

26. *See* Am. Civil Liberties Union, *supra* note 4, at 8–16.

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Baker: Controlling Racial and Religious Profiling: Article 14 ECHR Prote

in the "enjoyment of the rights and freedoms set out in [the] Convention . . . ."[27] That means that before Article 14 can apply, the challenged measure must affect another ECHR right. Fortunately, for this discussion, most racial and religious profiling in the context of counter-terrorism will engage either the right to liberty (Article 5), to privacy (Article 8), to free exercise of religion (Article 9), or perhaps to freedom of association (Article 11).[28] In truth, this claim is somewhat more controversial than it sounds, but that debate is for another paper. It is at least safe to say that a policy of stopping and searching people who look Muslim or South Asian carrying a backpack into the London Underground would engage the right to privacy and allow Article 14 to apply.[29]

In other respects, however, Article 14 can apply more broadly than the EPC because it is a "protective" provision, as opposed to a "prosecutorial" one. In other words, Article 14 promises to *protect* residents of ECHR signatory states from *experiencing* inequality of treatment, as opposed to promising to identify and punish instances in which state actors transgress the principles of good human rights practice. A prosecutorial anti-discrimination provision seeks to define "discriminatory conduct" and focuses on whether a challenged measure was the product of such conduct. Article 14, on the other hand, attempts to identify unequal treatment resulting from state action—however motivated—and to put a stop to it if its impacts outweigh its benefits to society.

I have defended this conception of Article 14 as a protector extensively elsewhere,[30] but I would like to set out one argument here. There is little "legislative history" of how the Council of Europe arrived at the particular formulation it adopted for Article 14 in 1950, but it is known that the penultimate version put up for debate read, "The rights and freedoms defined in this Convention *shall be protected* without discrimination . . .";[31] the final version adopted, however, provided that "[t]*he enjoyment* of the rights and freedoms set forth in this Convention *shall be secured* without [discrimination] . . . ."[32] This change meant that "[i]nstead of obligations of the Contracting States the position of the individual concerned is placed in the foreground."[33] Guaranteeing that rights "shall be protected without discrimination" suggested that state actors must not *commit*

27. Human Rights Act, 1998, art. 14 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts1998/80042—d.htm.

28. *See* Aaron Baker, *The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' Under Article 14 ECHR*, 69 M.L.R. 714, 721 (2006).

29. *See id.* at 719, 721.

30. *See id.* at 715, 737; *Comparison*, *supra* note 8; *Protector*, *supra* note 8.

31. Karl Josef Partsch, *Discrimination*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 571, 575 (R. St. J. Macdonald et al. eds, 1993).

32. *Id.* (emphasis added).

33. *Id.*

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discrimination when protecting Convention rights. On the other hand, guaranteeing that the state will "secure" the "enjoyment" of rights without discrimination suggests that Article 14 binds signatory states to see to it that state action does not abridge the equal enjoyment of Convention rights, whatever the motive behind the action. This makes Article 14 a protector of equality, not a prosecutor of discriminatory conduct. Although the Strasbourg Court has never used the terminology of protection, there is no question under its jurisprudence that a finding of prima facie discrimination requires no evidence of purposeful or even intentional discrimination.[34]

In the U.K., Article 14 fails to be applied under the Human Rights Act 1998 ("HRA"), which makes almost all ECHR rights directly justiceable in U.K. courts. Section 6 of the HRA makes it "unlawful for a [court] to act in a way which is incompatible with a Convention Right"[35] without express authority from Parliament. This prohibition applies to other state entities as well. In theory, it means that all legislative and executive acts have been issued subject to this requirement, but institutionally the courts have the final word because they have the last chance to identify and correct Convention-incompatible state actions and the duty to do so.[36] The courts are bound to apply Parliamentary statutes, but section 3(1) of the HRA requires judges "so far as it is possible to do so" to read and "give effect" to legislation, regulations, or decisions in a way compatible with Convention rights even where a natural reading of the law would violate the Convention.[37] Where a measure cannot be read in a Convention-compatible way without going against the manifest intent of Parliament, section 4 of the HRA requires that the court issue a "declaration of incompatibility," meaning that the court will apply the statute as written, but substantial political pressure will exist for Parliament to amend the offending statute (although it is not obligated to do so).[38] This means that the courts are empowered essentially to change the effects of measures—amend them from what they would have been upon a natural reading—unless the offending effects were consciously intended by Parliament.[39] Clearly, then, whether an act or law amounts to dis-

34. *See* Thlimmenos v. Greece, App. No. 34369/97, 31 Eur. H.R. Rep. 15, 413 (2001) (Eur. Ct. H.R.).

35. Human Rights Act, 1998, c. 42, § 6 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts1998/80042—a.htm.

36. *See* Mark Elliott, *The Human Rights Act 1998 and the Standard of Substantive Review*, 60 C.L.J. 301 (2001); Francesca Klug, *The Human Rights Act—A "Third Way" or "Third Wave" Bill of Rights*, 4 EUR. HUM. RTS. L. REV. 361, 370 (2001); Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review*, 2000 Pub L. 671; Ian Leigh, *Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg*, 2002 Pub. L. 265, 282–86.

37. *See* Human Rights Act, 1998, § 3(1).

38. *See id.* § 4.

39. *See* Aileen Kavanagh, *The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998*, 24 O.J.L.S. 259, 274–77 (2004).

https://scholarship.law.tamu.edu/txwes-lr/vol13/iss2/2
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Baker: Controlling Racial and Religious Profiling: Article 14 ECHR Prote

crimination under the HRA cannot turn on the fact that, for example, a discriminatory effect of a measure was not intended by Parliament or flowed from a pure motive: such an effect would be found discriminatory and "interpreted" away. Thus, although U.K. judges lack the power of U.S. judges to "strike down" acts of the legislature, they are explicitly entrusted with assuring that acts of the other branches of government do not have the *effect* of violating convention rights. The very structure of the HRA, then, makes it a protective, as opposed to a prosecutorial, scheme. It does not seek merely to root out Convention-offending decision making among government actors but to assure that even reasonable decisions do not unnecessarily encroach on human rights. This makes Article 14 as applied under the HRA an emphatically protective equality provision.

Once invoked, Article 14 forbids "unjustified" discrimination by the state on a non-exhaustive list of grounds that includes race and religion.[40] Discrimination includes less favourable treatment than an analogous comparator (disparate treatment) as well as indirect discrimination, or disparate impact, where a neutral measure fails to treat differently a person who is relevantly different.[41] No particular motive is required—it suffices that the impugned characteristic was a "but for" cause of the differential treatment or impact—although motive can affect whether the discrimination is justified.[42] The typical analysis first discovers whether there has been bare discrimination before engaging in a separate assessment of whether the discrimination was justified, where only unjustified discrimination is unlawful.[43] Justification depends on whether the challenged measure pursues a legitimate state objective and whether proportionality is satisfied.

IV. How Article 14 Proportionality Should Work Under the HRA

Proportionality entered into European law through German law, which developed a doctrine of proportionality requiring that state acts or measures be: (1) suitable to achieve a legitimate purpose, (2) necessary to achieve that purpose, and (3) proportional in the narrower sense: it must not impose burdens or "cause harms to other legitimate interests" that outweigh the objectives achieved by the measure.[44] This formulation has not been adopted wholesale into the jurisprudence of Article 14, but the last element, "proportionality in the nar-

40. *See* Belgian Linguistic Case (No. 2), 1 Eur. H.R. Rep. 252, 283 (1968) (Eur. Ct. H.R.).
41. *See Thlimmenos*, 31 Eur. H.R. Rep. at 413.
42. *See* R v. Comm'r of Police for the Metropolis, [2006] UKHL 12, [44].
43. *See* Ghaidan v. Godin-Mendoza, [2004] UKHL 30, [9], [136]–[143].
44. *See* The Rt. Hon. Lord Hoffmann, *The Influence of the European Principle of Proportionality upon UK Law*, *in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 107, 107 (Evelyn Ellis ed., 1999).

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rower sense," was incorporated into the Article 14 analysis in the *Belgian Linguistic Case*,[45] which was in fact the first mention of the doctrine of proportionality by the European Court of Human Rights in Strasbourg ("ECtHR").[46] The formulation adopted there required "proportionality between the means employed and the aim sought to be realized . . . ."[47] It has subsequently been made clear that this requires the rejection of a regulatory distinction that produces "harms to other legitimate interests" disproportionate to the advancement of a legitimate aim secured by the measure.[48] Jurisprudence of the ECtHR has identified "social inclusion" and dignity generally, and racial and religious equality specifically, as common interests of the Contracting States of the ECHR.[49] Proportionality, therefore, contemplates a situation where the harm of a measure, in terms of the extent of invasion of an individual's rights or in terms of the damage to common interests in equal dignity and social inclusion, could outweigh the benefits of even a narrowly tailored measure aimed at a compelling interest. Thus, in theory, a profiling policy of searching all people with an Asian appearance carrying a backpack into the London Underground would treat its targets less favourably than similarly situated non-Asians because they were Asian. The policy would violate Article 14 if the impact of the searches (on, I contend, the claimants, other Asians, and the interest of social inclusion in general) outweighed the counter-terrorism benefits of the policy *even if* the policy was as narrowly tailored as it could be to pursuing the compelling objective of security from terrorist attack.

Of course, for this theory to become a reality, it will require that U.K. courts come to grips with what the doctrine of proportionality requires. U.K. courts, like courts in the U.S., tend to focus their scrutiny of allegedly discriminatory measures on the quality of the state's decision-making: Did the state mean to affect a Convention right?[50] Did the state mean to distinguish on the impugned ground?[51] Did the

45. Belgian Linguistic Case (No. 2), 1 Eur. H.R. Rep. 252, 254 (1968).

46. *See* Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS, *supra* note 31, at 125, 140–41.

47. Belgian Linguistic Case (No. 2), 1 Eur. H.R. Rep. at 254.

48. *See* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [50] (Eng.); *Ghaidan*, [2004] UKHL 30, [19]–[20]; Nat'l Union of Belgian Police v. Belgium, 1 Eur. H.R. Rep. 578, 594–95 (1975) (Eur. Comm'n on H.R.).

49. *See, e.g.*, Thlimmenos v. Greece, App. No. 34369/97, 31 Eur. H.R. Rep. 15, 412–13 (2001); E. Afr. Asians v. United Kingdom, App. No. 4403/70, 19 Eur. H.R. Rep. CD 1, [6]–[7] (1995) (Commission Report); Hoffmann v. Austria, App. No. 12875/87, 17 Eur. H.R. Rep. 293, 304, 312 (1994) (Eur. Comm'n on H.R.); E. Afr. Asians v. U.K., App. Nos. 4403/70–4419/70, 4422/70, 4434/70, 4443/70, 4476/70–4478/70, 4486/70, 4501/70, 4526/70–4530/70, 3 Eur. H.R. Rep. 76, 86 (1981) (Eur. Comm'n on H.R.).

50. *See* R v. N. Tyneside Metro. Borough Council, [2003] EWCA (Civ) 1847, [56], [59], [60].

51. *See* R v. Sec'y of State for Work and Pensions, [2005] UKHL 37, [14]–[17].

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state have any less restrictive alternatives to the distinction employed?[52] This last question is particularly troubling, as it allows the impression that proportionality is really no different from strict scrutiny under the EPC. While I concede that at present, most of the time, there appears to be no practical difference, strict scrutiny and proportionality are in fact two very distinct rubrics. There are plenty of cases in which U.S. courts applying the EPC have considered the impacts of discriminatory laws on the individual claimant or society: it is probably as common in U.S. courts as in U.K. courts.[53] However, when impacts are considered under the EPC, they are factored into the assessment of whether a measure is narrowly tailored. The narrow tailoring required by strict scrutiny of racial distinctions has recently been explained by the Supreme Court in this way: "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'"[54] In theory, this means that impacts are relevant only to the extent they call into question the motive or effectiveness of the measure or the extent to which the state could meet its objectives in a less harmful way.[55] In this analysis, negative impacts lack the potential to outweigh narrowly tailored measures that treat people differently on racial or religious grounds. There may be examples of U.S. judges striking down an effective, narrowly tailored discriminatory regulation simply because of its intolerable effects, but there is no place in the EPC rubric for this. So, the *ratio* of the decision will always be expressed in terms of a fit between the measure and the compelling interest. Proportionality, on the other hand, has a place in its rubric for this kind of decision and gives courts the option openly to declare that an otherwise exemplary law must fall because it results in unacceptable discriminatory impacts.

U.K. courts have not yet generally availed themselves of this option, but there are exceptions. For example, in *A v. Sec'y of State for the Home Dep't*,[56] the House of Lords issued a declaration of incompatibility (which ultimately resulted in a change in the relevant law) in part because the mechanism by which the state sought to "narrowly tailor" its interference with rights had impacts that were simply intolerable.[57] In that case, the Home Secretary controversially detained, without trial, suspected terrorists who: (a) could not be deported and

52. *See* R v. Chief Constable of S. Yorkshire Police, [2004] UKHL 39, [39].

53. *See* Grutter v. Bollinger, 539 U.S. 306, 333–43 (2003); Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor J., dissenting).

54. *Grutter*, 539 U.S. at 333 (quoting, in part, Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

55. *See id.*

56. A v. Sec'y of State for the Home Dep't, [2004] UKHL 56 (Eng.).

57. *See id.* at [73].

(b) did not have a right of abode in the U.K.[58] This meant that suspected terrorists with U.K. nationality were not detained, and those without U.K. nationality, but who could not be deported for fear of torture in their home countries, were imprisoned. In order to impose this burden on liberty in contravention of Article 5 of the ECHR, the government was required to "derogate" from Article 5 on the ground of a national emergency, which it could only do to the extent "strictly required" by the emergency. The government advanced, as one of its reasons for the nationality distinction, the argument that the non-nationals were considered more of a threat, and that therefore the detention of the non-nationals was all that was "strictly required," while detention of the nationals would go beyond what was "strictly required" by the threat.[59] Although this argument satisfied the Court of Appeals, which focused exclusively on the quality of the state's reasoning,[60] the Lords opined, *inter alia*, that even though the distinction was facially on the ground of immigration status, not nationality; and even though the distinction was intended to reduce the impact of the measure; and even though, as a result of the distinction, the measure was as narrowly tailored to its aim as it could be and still be effective, the invidious effects of treating non-nationals so differently from nationals were simply disproportionate to the counter-terrorism benefits of the scheme.[61]

Although *A v. Sec'y of State for the Home Dep't* represents an application that illustrates the difference in potential between proportionality and strict scrutiny, it does not demonstrate the true potential of proportionality. The impact in that case was easy for the Lords to understand. They did not need social sciences literature to prove that incarcerating non-nationals while letting similarly situated nationals go free brings the law into disrepute, would violate compelling interests in equality and social inclusion, and would likely create resentments among resident non-nationals. They were directed by proportionality to give the impacts a weight and to balance them against the benefits. So, they gave the impacts the substantial weight they obviously deserved.[62] But for proportionality to come fully into

58. *See id.* at [2].

59. *See id.* at [10], [78], [24], [31].

60. *See* A v. Sec'y of State for the Home Dep't, [2002] EWCA (Civ) 1502, [47], [56], [103], [153] (Eng.).

61. *See A*, [2004] UKHL 56, [53]–[68], [79]–[84], [176]–[189].

62. I wish to observe at this point that one of the most significant reasons that constitutional equality provisions do not achieve the potential I imagine them to have is that many judges, in the US and the UK, do not give discriminatory impacts the weight that I would give them. I cannot think of any legal arguments that will persuade all people to assign to all competing interests the same value I assign to them. The point is that I am aware that no matter how strong or weak the rubric of scrutiny is, there will be cases where I think the impacts are intolerable or disproportionate, but the court does not agree. My argument in this paper is simply that the proportionality rubric gives advocates a ground for demanding that a court take into account

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its own, courts must be open to having non-obvious impacts proved to them. Advocates on behalf of claimants, and perhaps interveners and *amici* such as human rights advocacy NGOs and equality commissions, must demand that U.K. courts turn their attention to the "other side of proportionality" in discrimination cases. The proportionality rubric gives advocates a ground for insisting that a court take into account evidence of impacts regardless of whether this evidence relates to the individual claimant or to the narrow tailoring of the impugned state action. Human rights lawyers in the U.K. must begin to make an "Inverse Brandeis Brief" a part of every Article 14 case. At least until U.K. courts become accustomed to considering the economic, sociological, psychological, and other impacts of discriminatory laws, advocates must present evidence and research outcomes from these fields of study to demonstrate that, for example, a given policy of stopping and searching young men of Muslim or South Asian appearance contributes to an unacceptable breakdown of social inclusion. If courts are made to perform the proportionality analysis the way it reads on the tin, they will be more likely to assign a fair weight to the impacts of discriminatory laws.

To those unfamiliar with the HRA and the ECHR, the foregoing might sound like so much wishing on a star. One might ask: "If the ECtHR has not given effect to proportionality in this way after all these years, is not asking U.K. courts to give it this effect much the same as asking the Supreme Court to start applying proportionality under the EPC?" The answer is no because the two are not the same for two reasons: (1) the margin of appreciation and (2) the HRA. The Strasbourg Court has had little opportunity to set any precedent for how domestic courts should apply proportionality because of the very distinct roles of the ECtHR and domestic courts. The role of the ECtHR is to supervise the extent to which signatory states comply with their treaty obligations. An underlying principle of the ECHR is that Strasbourg determines the standard to which human rights must be protected, but the Contracting Parties decide how to deliver this level of protection. In other words, the mode of protection of Convention rights is not expected to be the same throughout Europe. The doctrine of "the margin of appreciation"—which refers to an area within which Strasbourg defers to the prerogative of the signatory state to strike its own characteristic balance when human rights must give way to overriding state interests—has emerged from this principle. This does not mean that the ECtHR does not impose limits; it simply means that states are allowed to reach different outcomes when applying proportionality as long as the outcomes are not outside

evidence of impacts, and that this will make it more likely that courts will assign them a fair weight.

the margin of appreciation.[63] As a result, the Strasbourg Court does not really "do" proportionality beyond what is necessary to determine whether the balance struck by the signatory state exceeds the margin of appreciation. In doing so, the Court has definitely cited broader societal impacts as grounds for finding challenged discrimination disproportionate.[64] The actual mechanics of proportionality, however, have always been for the Contracting Parties to sort out, and it is for the state to decide whether the legislature, the judiciary, the executive, or some combination thereof ultimately strikes the balance.[65]

Enter the HRA. Although enacted in 1998, the first judicial decisions did not emerge until 2001. Thus, while the U.K. has had ECHR obligations for decades, U.K. courts and advocates have only had about five years to develop a jurisprudence based on the extent and kind of incorporation of Convention rights affected by the HRA.

The HRA is more than a *new* scheme for applying Convention rights in the U.K.; it erects a scheme where there was none before, bringing ECHR rights from the background to the foreground, and effectively starts from scratch in domestic precedential terms. Section 2(1) of the HRA requires that U.K. courts take Strasbourg precedent into account, but it also contemplates and indeed requires that the U.K. courts develop their own understanding of Convention rights to an extent consistent with the baseline established by the ECHR.[66] Recently, the House of Lords indicated that it would not be U.K. judicial policy to "leap ahead" of Strasbourg.[67] However, for reasons already discussed, there is nothing in the Strasbourg jurisprudence that even gives guidance, much less restraining precedent, for how the U.K. should give effect to proportionality, except that it must not allow its protection of rights to fall below the requirements of the margin of appreciation. Therefore, nothing stands in the way of U.K. courts paying increasing attention to weighing the impacts of discrimination in a proportionality analysis and accepting social sciences evidence in aid of assigning a proper weight.

Majoritarians will almost certainly complain that to the extent a signatory state must balance the benefits of a measure against its impacts on social inclusion or equal dignity, surely this should be done by

63. Fleshing out the contours of Strasbourg's margin of appreciation falls outside the scope of this paper. For a thorough discussion, see YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002).

64. *See* Belgian Linguistic Case (No. 2), 1 Eur. H.R. Rep. 252, 283 (1968).

65. *See, e.g.*, Unison v. United Kingdom, App. No. 53574/99 (Jan. 10, 2002), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&sessionid=12127970; Schmidt v. Sweden, 1 Eur. H.R. Rep. 632, 633 (1976) (Eur. Ct. H.R.).

66. *See* David Bonner et al., *Judicial Approaches to the Human Rights Act*, 52 Int. Comp. Law Q. 549, 553 (2003); Roger Masterman, *Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?*, 2004 Pub. L. 725, 727.

67. *See* R v. Chief Constable of S. Yorkshire Police, [2004] UKHL 39, [27]–[28].

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Baker: Controlling Racial and Religious Profiling: Article 14 ECHR Prote

more democratic institutions like Parliament.[68] In the limited space of this Article, I cannot hope effectively to rebut the preposterous but increasingly popular idea that "more responsive to majority pressure" means "more democratic." It suffices for this purpose to note that the HRA does not confer on U.K. courts the task of reviewing acts of Parliament for evidence that Parliament strayed from good human rights practice. Instead, it forbids the courts to act inconsistently with Convention rights except when required to do so by an act of Parliament, in which case the courts are to issue a declaration of incompatibility. Thus, the courts must assess proportionality *de novo*. That does not mean that they act without deference: they must defer to the superior expertise of specialist executive departments and to Parliamentary expressions of majority policy preference.[69] However, the courts have, if anything, more expertise than the legislature or executive with regard to applying the principles of proportionality.[70] Moreover, they are institutionally better suited to the retrospective fact finding necessary to determine the actual impacts of measures.[71] The HRA requires courts to ensure not only that laws or decisions comply with human rights at the time of their birth, as it were, but that the end result of their interaction with the outside world—other state institutions, executive discretion, the actual lives of individual people, and the courts—does not ultimately violate human rights.[72] This is the kind of task that can only be completed after Parliament has performed all the balancing it is going to do, and it can only be done by a court. Finally, it is simply inconsistent with the very concept of protecting the human rights of minorities to suggest that an openly political decision made by a majority-controlled legislative body is the most legitimate way of deciding when state action encroaches on basic individual rights or unacceptably undermines the inclusion of insular minorities. Surely a more legitimate decision is made in a forum where there are two parties of equal importance, each given equal opportu-

68. *See, e.g.*, Alison L. Young, Comment, *Judicial Sovereignty and the Human Rights Act 1998*, 61 C.L.J. 53 (2002).

69. *See* A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [53]–[68], [79]–[84], [176]–[189]; Ghaidan v. Godin-Mendoza, [2004] UKHL 30, [19]–[23], [136]–[143].

70. *See A*, [2004] UKHL 56, [53]–[68], [79]–[84], [176]–[189].

71. *See, e.g.*, Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) (regarding the institutional suitability of courts to the task of weighing public policy concerns against individual rights); *but see* Ian Leigh & Laurence Lustgarten, *Making Rights Real: The Courts, Remedies, and the Human Rights Act*, 58 C.L.J. 509, 522–26 (1999) (arguing that judicial review procedures in the U.K. at the time of the enactment of the HRA were not up to the task of coping with the kind of justification inquiry called for by the HRA).

72. *Ghaidan*, [2004] UKHL 30, [23] ("the compatibility of legislation with the Convention rights falls to be assessed when the issue arises for determination, not as at the date when the legislation was enacted or came into force"); *see* Leigh, *supra* note 36, at 282–86.

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nity to speak and present evidence, and in which decisions are premised on reasoned argument rather than the numbers for and against.

While the HRA jurisprudence begins to take root, yet still appears to change every few months, human rights advocates in the U.K. have an opportunity to force the "other side of proportionality" into the forefront of the jurisprudence of Article 14. The proportionality rubric provides a basis for demanding that courts not only recognise that impacts can outweigh even well-intentioned and narrowly tailored laws, but that they pay as much attention to assigning a fair weight to those impacts as they currently do to assessing the quality of challenged legislation. That Article 14's character is a protective, rather than prosecutorial, anti-discrimination provision is well established.[73] This attribute, coupled with a robust application of proportionality, makes Article 14 capable of reaching any situation in which state action has the effect of exposing people to different treatment because of their race or religion. It can, in effect, set the level of scrutiny to which the state measure will be subjected on a case-by-case basis, depending not on a one-size-fits-all suspect classification, but on the impacts of the discriminatory measure.[74]

V. The Impact of Protection and Proportionality on U.S. Profiling Cases

The Equal Protection Clause does not, on its face, contain any restriction of its application to other constitutional rights—it guarantees equal protection of all the laws—and nothing in its language would lead one to suspect that it offers any less protection from discrimination than Article 14. As suggested earlier, however, U.S. courts have chipped away at the EPC by distinguishing between intentional discrimination (which is covered) and indirect or "disparate impact" discrimination (which is not covered).[75] The phrase "intentional discrimination" is used purposefully instead of the phrases "direct discrimination" and "disparate treatment" that are generally used in Europe and the U.S., respectively, to refer to discrimination resulting from differential treatment on a prohibited ground. This is because the proof of discriminatory motive required under the EPC goes beyond what is generally required under direct discrimination or dispa-

73. *See* Thlimmenos v. Greece, App. No. 34369/97, 31 Eur. H.R. Rep. 15, 412–13 (2001); Petrovic v. Austria, App. No. 20458/92, 33 Eur. H.R. Rep. 14, 311 (2001) (Eur. Ct. H.R.); Belgian Linguistic Case (No. 2), 1 Eur. H.R. Rep. 252 (1968); *see also* David Feldman, Civil Liberties and Human Rights in England and Wales 144 (2d ed., 2002); Stephen Livingstone, *Article 14 and the Prevention of Discrimination in the European Convention on Human Rights*, 1 Eur. Hum. Rts, L. Rev. 25, 32–33 (1997).

74. I leave it for another paper to explore the potential under Article 14 for some uses of profiling to be *more* likely to pass muster than under the EPC, because the impact is sufficiently light as to be outweighed by less than a compelling state interest.

75. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976).

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rate treatment analyses. The Supreme Court, in *McCleskey v. Kemp*[76] and *United States v. Armstrong*,[77] established that before strict scrutiny can apply, the claimant bears the burden of proving intent to discriminate on a suspect ground:[78] it cannot be inferred from the same kind of evidence that can create an inference of discrimination in statutory claims of direct or disparate treatment discrimination. U.S. courts will accept the same kind of statistical evidence that was rejected in *McCleskey* and *Armstrong* as support for a statutory employment discrimination claim.[79] This is not only a distinction in burden of proof: employment discrimination statutes in the U.K. do not require an ultimate factual finding of conscious intent to discriminate on the basis of race or religion, but generally accept a but-for relationship between the prohibited ground and the differential treatment.[80] The point here is that the EPC not only offers no protection against indirect or disparate impact discrimination (except where the disparate impact together with other evidence is found to disclose the requisite intent), it fails to apply to—and hence requires no heightened scrutiny of measures that employ—arrangements that give rise to disparate treatment on the grounds of race or religion, but are not intended to burden individuals because of their race.[81]

This is an important distinction in relation to Article 14, which will require a justification involving "very weighty reasons" as long as the facts disclose: (1) that like cases were treated unlike, or (2) that unlike cases were treated alike, resulting in a negative impact on the claimant, and (3) that "but for" the race or religion of the claimant, the less favourable treatment or impact would not have occurred.[82] This flows

76. McCleskey v. Kemp, 481 U.S. 279 (1987).

77. United States v. Armstrong, 517 U.S. 456 (1996).

78. *See McClesky*, 481 U.S. at 292–93 (holding that statistical proof of a strong correlation between race and subjection to the death penalty could not support an inference of discrimination in the absence of proof that "the decision makers in [this] case acted with discriminatory purpose"); *Armstrong*, 517 U.S. at 458, 465 (finding that proof that every person prosecuted for the relevant offence in the relevant year was African-American could not furnish evidence of discriminatory prosecution, in the absence of proof that at least one similarly situated white person was not prosecuted).

79. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993); Tex. Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 253 (1981); Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994); *see also* Carter, *supra* note 14, at 41.

80. *See* James v. Eastleigh Borough Council, (1990) 2 All E.R. 607, 612 (H.L.).

81. *See* United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995); Michael R. Smith, *Depoliticizing Racial Profiling: Suggestions for the Limited Use and Management of Race in Police Decision-Making*, 15 GEO. MASON U. CIV. RTS. L.J. 219, 237 (2005) ("Purposeful discrimination does not require proof of racial animus but does require evidence that the decision-maker 'selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.'" (citing Wayte v. United States, 470 U.S. 598, 610 (1985) (quoting Personnel Adm'r of Mass v. Feeney, 442 U.S. 256, 279 (1979)))).

82. *See Comparison*, *supra* note 8, at 89–96; Thlimmenos v. Greece, App. No. 34369/97, 31 Eur. H.R. Rep. 15, 413 (2001); E. Afr. Asians v. United Kingdom, App.

from the fact that Article 14 is a protector whereas, in my dichotomy, the EPC is clearly a prosecutor. Under the EPC jurisprudence, if a state entity acted reasonably, and without discriminatory intent, the unequal or discriminatory impact is irrelevant. This means that there are cases Article 14 can reach that the EPC cannot reach, regardless of whether proportionality is stronger than strict scrutiny.

For example, in *United States v. Travis*,[83] the Sixth Circuit U.S. Court of Appeals held that where law enforcement officers use race as one of a list of criteria on the basis of which to decide whom to interview, no EPC implications arise: "when officers compile several reasons before initiating an interview, as long as some of those reasons are legitimate, there is no Equal Protection violation."[84] The court, in essence, viewed the police as not intending to distinguish on the basis of race, but on the basis of satisfying a profile sincerely calculated to narrow down the field of suspects. The fact that white individuals who met all of the criteria other than race would not be interviewed eluded the EPC analysis altogether. Under Article 14, however, that fact would lead to the conclusion that the state conduct at issue resulted in less favourable treatment on the ground of race, and must be justified.[85]

A more powerful illustration of Article 14's full potential is provided by *Brown v. City of Oneonta*,[86] where the Second Circuit U.S. Court of Appeals held that no race discrimination had occurred when the police used race as part of a neutral policy of stopping and searching persons who matched an eyewitness description.[87] The police in a small college town had an eyewitness account to the effect that a burglary had been committed by a young, African-American male who allegedly received a wound to the hand in a struggle with the victim.[88] The police reacted by interrogating every black student in the local college (roughly 75) and "stopping and questioning non-white persons on the streets and inspecting their hands for cuts."[89] The litigation arose from outraged African-American residents of the town who complained that the whole investigation was a massive violation of their civil rights. The court, however, ruled that the entire incident arose from the police use of a race-neutral policy: "to investigate crimes by interviewing the victim, getting a description of the assail-

No. 4403/70, 19 Eur. H.R. Rep. CD 1 (1995); E. Afr. Asians v. U.K., App. Nos. 4403/70–4419/70, 4422/70, 4434/70, 4443/70, 4476/70–4478/70, 4486/70, 4501/70, 4526/70–4530/70, 3 Eur. H.R. Rep. 76, 86 (1981) (Eur. Comm'n on H.R.).

83. *See* United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995).

84. *See id.* at 174.

85. *See, e.g.*, A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [53] (Eng.).

86. Brown v. Oneonta, 221 F.3d 329 (2d Cir. 2000).

87. *See id.* at 333–34.

88. *Id.* at 334.

89. *Id.*

ant, and seeking out persons who matched that description."[90] Thus, the fact that "but for" their race the claimants would not have been interrogated or stopped and searched (for cuts) did not prove discrimination in the absence of evidence that there was a racial motive behind the policy. As a result of the finding that no race discrimination had occurred, no strict scrutiny was applied, with the predictable result that no violation of the EPC was found.[91]

It should be clear by now that under Article 14, provided that the interrogations, detentions, and physical examinations were found to involve rights to privacy or liberty under the Convention,[92] a justification incorporating proportionality would be required on the facts of *Brown*. Because white people similarly situated in every relevant respect (young, male, and walking down the street or young, male, and attending the local college) were not stopped, examined, or interrogated, and because the claimants would not have been treated less favourably than those white people "but for" the fact that they were black, prima facie discrimination would have been established and Article 14 would call for a justification of the state action.[93] This is not, however, the only way in which Article 14 would get a firmer purchase on the case than would the EPC. The blanket stopping and interrogating of young black men could offend the principle of proportionality and, hence, fall afoul of Article 14, whereas it might well satisfy strict scrutiny had it been applied.

This point is well illustrated by Bernard Harcourt's strong critique of the reasoning in *Oneonta*. Harcourt takes the court to task for assuming that a profile based on eyewitness testimony differs in kind, rather than degree, from a profile based on, for example, an alleged statistical probability that a Muslim or South Asian man is more likely to be planning a terrorist attack than other people entering an airport.[94] In either case, he observes that law enforcement officers consciously use the race of targets as a reason to stop and interrogate them, and the eyewitness case differs only because the police employed an arguably more valid predictor: "whether race functions sufficiently to narrow down the suspect pool."[95] Harcourt argues that the court should have treated the case as one of race discrimination requiring strict scrutiny.[96] Tellingly, however, he appears to assume

90. *Id.* at 337.

91. *See id.* at 336–39.

92. *See* R v. Comm'r of Police for the Metropolis, [2006] UKHL 12, [25], [28], [44] (finding that a stop and search, even if it lasted for several hours, did not necessarily violate the Article 5 right to liberty or the Article 8 right to privacy, but specifically noted that discriminatory stops and searches would be another matter (which the judges reserved for a more appropriate case)).

93. *See* Baker, *supra* note 8.

94. *See* Harcourt, *supra* note 17, at 1342–45.

95. *Id.* at 1345.

96. *See id.* at 1345.

that the mass stops and interrogations in *Oneonta* would have satisfied strict scrutiny.[97] His quarrel was not with the result, but with how the court got there. His claim was that the extent to which a particular kind of information "narrows down the suspect pool" is a matter of the effectiveness of the measure and whether it is "narrowly tailored" to achieving the compelling state interest.[98] If it reliably and significantly narrows the pool, it is narrowly tailored to its objective. This is consistent with the orthodox approach under the EPC, which does not take into account the extent of the impact of the measure as a separate consideration. The requirement that a measure be narrowly tailored takes impact into account, but only insofar as it can be shown that the state could achieve its aim with less impact, and, thus, that the challenged measure was not, in fact, narrowly tailored. The *Oneonta* profile could satisfy strict scrutiny because: (1) there were only four pieces of information offered in the eyewitness statement (young, black, male, cut); (2) using these would narrow down the field significantly; (3) dropping any one of the traits from the list would render the profile ineffective; and (4) not searching everyone who had the relevant characteristics would not be effective. The state could not more narrowly tailor its investigative technique and retain its effectiveness in pursuing the compelling state interest in apprehending burglars.[99]

Unfortunately, nowhere does the EPC jurisprudence require the court to ask if the impact was so unacceptable that the state should drop the technique altogether. As suggested above, had the *Oneonta* case made it to strict scrutiny, a U.S. court might well be moved by the breadth and notoriety of the investigatory sweep to rule that the plan was not narrowly tailored to the objective of catching the burglar. However, the logic would be strained. What is it about the challenged investigation that did not "fit" the interest of crime prevention? If the interests of society required that the burglar be apprehended, and there was not a single lead other than the race, gender, age, and wounding of the suspect (and assuming there were good reasons to believe that the burglar came from and remained in the vicinity), the method seems to fit the objective like a glove.[100] The police could not very well check just half of the young black men because that could easily deprive the investigation of 100% of its effectiveness. One could argue that the impacts of the mass interrogations would under-

97. *See id.* at 1345–46.

98. *See id.* at 1345.

99. *But see* Alschuler, *supra* note 8, at 184 (arguing that calling the *Oneonta* sweep "narrowly tailored" would not "survive the laugh test"). The tone of Alschuler's discussion suggests that he really means that it *should not* survive the laugh test, but this article contends that in the hands of the same judges who found the sweep not to amount to discrimination, a finding of narrow tailoring is not even a stretch.

100. *See, e.g.*, R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1119 (2001).

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mine future law enforcement efforts and, thus, were not narrowly tailored, but the more bothersome aspect of the practice is the simple, gut-level wrongness of treating every young black man in a small American town as a potential criminal. The act itself is just so wrong and divisive, so destructive of social inclusion for reasons unconnected to law enforcement objectives, that it simply should not be tolerated. The need, imposed by the EPC rubric, to weave such intolerable impacts into the narrow tailoring analysis requires sympathetic courts to engage in embarrassing pettifoggery to get to the "right" result and allows unsympathetic courts to avoid seeing the problem.

An EPC analysis performed by the United States Supreme Court, as currently constituted, could quite easily wave the *Oneonta* investigation through strict scrutiny, assuming that there really were no less restrictive means of pursuing the investigation effectively and of taking useful advantage of the eyewitness account. And of course, the practice never received strict scrutiny because somehow separating black students out from white classmates in identical situations in every respect except skin colour did not amount to racial discrimination under the EPC. On the other hand, if the stops and interrogations implicate the right to privacy under Article 8 of the ECHR, Article 14 would find discrimination and require the state to proffer a proportionality justification complete with "weighty reasons." This proportionality justification should fail because the impact on individual rights, group rights, and society in general of interrogating every young black man in a small American town simply outweighs the state's interest in catching one small-time burglar. Proportionality could, for example, take into account what has been referred to as the "social meaning"[101] of profiling, and the "racial (or religious) tax"[102] exacted by it from minority groups. Proportionality would not treat all policing objectives as having the same "compelling" weight, but would ask on a case-by-case basis whether the law enforcement aim justified the burden imposed. Following that rubric, even the *Oneonta* court would find it hard to conclude that the need to find people to question about a thwarted burglary outweighed the social and individual impacts of the police's sweep of the town.

VI. CONCLUSION

Law enforcement efforts to uncover terrorist plots and to prevent terrorists from bringing weapons or explosives into public places or transportation networks can always be characterized as pursuing a "compelling state interest." The fact that counter-terrorism officers have so few avenues for identifying who might perpetrate these acts means that police will often believe they have no effective alternative

101. *See* Alschuler, *supra* note 8, at 207–23.
102. *See* KENNEDY, *supra* note 14, at 159.

means of pursuing that interest other than, for example, stopping and searching young, South Asian or obviously Muslim men carrying backpacks into the London Underground. In the face of this kind of challenge, the Equal Protection Clause seems a very crude tool. The Equal Protection Clause as currently applied simply has no way to deal with regulatory or enforcement distinctions driven by (at least consciously) neutral intentions, but that nevertheless cause individuals or groups to experience unequal treatment under the law. Even if it did, once a state objective clears the one-size-fits-all "compelling" threshold, as counter-terrorism always will, it triggers a one-sided "narrowly-tailored" analysis that scrutinizes the measure or act only from the perspective of the state or the police, offering no place in its framework for a nuanced balancing of the interests of the state against the interests of affected minorities and against burdens on the social fabric.

By comparison, Article 14 of the ECHR seems custom made to tackle racial and religious profiling in a counter-terrorism context. It applies to any state distinction that burdens the equal *enjoyment* of rights regardless of government intention. It can prohibit as unjustified the use of lazy, unimaginative, or insensitive law enforcement techniques whose social costs outweigh their counter-terrorism benefits even if they are the only, and thus by definition the least restrictive, techniques the police can think of.[103] In short, it makes it possible, if the evidence supports a finding that using a generalized racial profile in a given case only modestly advances law enforcement aims and profoundly undermines social inclusion, to tell the police that if they can come up with nothing better than to stop and search every young Arab or South Asian man, then they must search everyone until they think of something more effective and less divisive.[104]

This will, of course, only happen in the U.K. if U.K. judges begin to take greater notice of social science evidence in assigning a weight to the "other side of proportionality"—the costs to the individual, group, or society as opposed to the importance of the state interest and the efficacy of the means used to achieve it. This comparison helps show the importance of Article 14's potential to make impacts and social costs a fundamental part of the state discrimination analysis in the U.K. It also shows the relative weakness of the Equal Protection Clause analysis. It is unlikely that Equal Protection jurisprudence will be strengthened any time soon by the adoption of European proportionality with the necessary concomitant jettisoning of decades of suspect classification and strict scrutiny precedent. However, it is not too much to hope, that the Equal Protection Clause conception of discrimination could mature over time. If presented with the argument

103. *See* AM. CIVIL LIBERTIES UNION, *supra* note 4, at 8–16.

104. *See, e.g.*, A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, [53]–[68], [79]–[84], [176]–[189].

Baker: Controlling Racial and Religious Profiling: Article 14 ECHR Prote

often enough, even judges can begin to see that what the claimant experienced is as important, or more so, than the actions of the state actor, that we routinely subject each other to discrimination whether we mean to or not, and that equal protection must be *protective*.

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