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IMODEV
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Irène Bouhadana, docteur en droit, est maître de conférences en droit du numérique et droit des gouvernements ouverts à l'Université Paris 1 Panthéon-Sorbonne où elle dirige le master Droit des données, des administrations numériques et des gouvernements ouverts au sein de l'École de droit de la Sorbonne. Elle est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Elle est aussi fondatrice et Secrétaire générale de l'IMODEV.

William Gilles, docteur en droit, est maître de conférences (HDR) en droit du numérique et en droit des gouvernements ouverts, habilité à diriger les recherches, à l'Université Paris 1 Panthéon-Sorbonne où il dirige le master Droit des données, des administrations numériques et des gouvernements ouverts. Il est membre de l'Institut de recherche juridique de la Sorbonne (IRJS). Il est aussi fondateur et Président de l'IMODEV.

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

Irène Bouhadana, PhD in Law, is an Associate professor in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where she is the director of the master's degree in data law, digital administrations, and open governments at the Sorbonne Law School. She is a member of the Institut de recherche juridique de la Sorbonne (IRJS). She is also the founder and Secretary General of IMODEV.

William Gilles, PhD in Law, is an Associate professor (HDR) in digital law and open government law at the University of Paris 1 Panthéon-Sorbonne, where he is the director of the master's degree in data law, digital administration and open government. He is a member of the Institut de recherche juridique de la Sorbonne (IRJS). He is also founder and President of IMODEV.

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BEWARE THE UNINTENDED CONSEQUENCES: GOVERNMENT TRANSPARENCY, RACIAL DATA COLLECTION, AND MINORITY RIGHTS IN THE UNITED STATES AND ABROAD

by **Lia EPPERSON**, Professor of Law and Associate Dean of Faculty & Academic Affairs, American University - Washington College of Law.

For several decades, the United States government has encouraged transparency by collecting data that details the nation's racial and ethnic composition. The stated purpose of this data collection is to identify racial discrimination and create measures to promote equality. Today, most progressive American policymakers, advocates, and scholars see this effort as a necessary and positive tool for combating racial and ethnic discrimination and promoting civil rights. By gathering statistics on the status of racial and ethnic minorities, the federal government is able to track disparities in a host of areas where systemic racial discrimination continues to impede equality, including education, housing, and employment opportunities. The data also serves as a way to track potential discriminatory behaviors in areas like law enforcement and can illuminate racial disparities in arrests, criminal prosecutions, and sentencing.

Many European nations, including France, however, have eschewed such data collection for political and cultural reasons as well as concerns regarding privacy and data misuse. This is true despite rising calls from policymakers and academics in EU member states to collect racial and ethnic statistics to address long-standing racial and ethnic inequality. Yet, even in nations like the United States where the government has been relatively transparent in its collection, research, and reporting, racial data collection has had unintended negative consequences of the sort contemplated by the very nations opposed to this form of collection. Understanding these historic and contemporary challenges may help shape how nations collect such sensitive information in the future, and can support government efforts in enforcing civil rights protections through the use of such data.

§ 1 – THE FRENCH MODEL: THE PROHIBITION ON GOVERNMENT-SPONSORED RACIAL DATA COLLECTION

In most European countries, governments do not record, process, or publish data on the race and ethnicity of the countries' inhabitants. The reasons are multifold. Yet two of the most significant barriers to the collection of such data may be fundamental cultural and political differences in how countries define equality and view privacy rights.

A) French National Identity and Citizenship

Many European nations, particularly in Continental Europe, view political and cultural identity through a national, rather than racial or ethnic lens. In France, for example, the construction of identity sees the individual as a citizen within the state. The concept of nation centers on pure universalism rather than individualism. This dates back to the Eighteenth Century when, in response to monarchy, the Enlightenment Era ushered in the notion that “each citizen is completely equal before the law.”¹ Specifically, the French democratic universalism grew out of the French Revolution of 1789 and the subsequent Declaration of the Rights of Man and Citizen.² The most recent French Constitution of 1958 incorporated the concepts that “men are born free and equal,” and that “all citizens are equal in the eyes of the law, and eligible to all public positions and occupations according to their abilities.”³

Fundamental to the ideal of equality and citizenship is that the state refrain from making distinctions based on race or ethnicity. Indeed, the French Constitution explicitly bans all distinctions based on racial identity. Article I of the French Constitution provides that “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion.”⁴ The French political theory of equality, therefore, posits that by eliminating cultural differences, the republic may defend against “intercommunity tensions, violence, political and cultural fragmentation, and the destruction of democracy.”⁵ Therefore, making distinctions between citizens is seen as a violation of equality. This is underscored in the 1978 Data Protection Act, which prohibits the collection of racial data of the sort that is commonly collected by the United States government.⁶

The reticence of France and other European nations to collect racial and ethnic statistics is also steeped in the dark history of World War II, the Holocaust, and France’s Vichy regime.⁷ In Vichy France, public authorities racially categorized French citizens,⁸

¹ Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1153 (2006).

² 1789 Declaration of the Rights of Man and Citizen.

³ 1958 Const. art. 1; art. 6.

⁴ 1958 Const. art 1 (FRN).

⁵ Rosenblum, *supra* note 2 at 1154 (citing GILL ALLWOOD & KHURSHEED WADIA, *WOMEN AND POLITICS IN FRANCE 1958-2000*, 215-22 (2000)).

⁶ Law No. 78-17 of 1978, prohibiting the collection of “any information that shows, directly or indirectly, racial origins, political, philosophical or religious opinions, trade union membership, or moral principles” without the individual’s prior written consent or recommendation of the National Commission for the Information Technology & Civil Liberties (CNIL).

⁷ See generally Julie C. Suk, *Equal by Comparison: Unsettling Assumptions of Anti-Discrimination Law*, 55 AMERICAN J. OF COMPARATIVE LAW (2007).

⁸ Law of October 18, 1940 on the status of Jews.

which facilitated the deportation of French Jews to concentration camps⁹ where more than 75,000 Jews were murdered.¹⁰

In addition, such collection of data on individuals' race and ethnicity may be seen as overly intrusive and a violation of individual privacy. This view may be quite culturally specific.¹¹ For example, in the United States, the government asks individuals to self-identify based on race and ethnicity. Yet, it may be illegal for a potential employer to require an applicant to submit a photograph or information on marital status.¹² Such questions, however, may be routine in other countries.¹³ Thus, cultural context raises substantive differences in how one views the scope of privacy expectations.¹⁴

The result of the French republican universalism and the response to the anti-Semitism of the Vichy regime has been to focus on promoting equality through formal, "color-blind" measures rather than enacting regulations that single out a particular racial or ethnic group for substantive benefits. Instead of viewing racial or ethnic statistics as potential tools for ferreting out discrimination, the enduring belief is that such statistics may legitimize and entrench racist behavior.¹⁵ Courts, policymakers, and even some progressive, anti-racism non-governmental organizations share this belief.¹⁶

B) French Demographic and Political Landscape

Demographically, however, France is quite racially and ethnically diverse. In fact, due to its grant of political asylum to any who face injustice and subjugation, France may have the most diverse

⁹ Suk, *supra* note 8 (citing RICHARD H. WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE 38 (1992)). See also Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998).

¹⁰ Suk, *supra* note 8 at 295.

¹¹ See generally Julie Ringelheim, *Ethnic Categories and European Human Rights Law*, in FIGHTING DISCRIMINATION IN EUROPE: THE CASE FOR A RACE-CONSCIOUS APPROACH (Mathias Moschel et al., eds., 2013).

¹² According to the United States Equal Employment Opportunity Commission, "employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted."

U.S. Equal Employment Opportunity Commission, *Prohibited Employment Policies/Practices*, available at: <http://www.eeoc.gov/laws/practices/index.cfm>.

See also U.S. Equal Employment Opportunity Commission, *Pre-Employment Inquiries and Marital Status or Number of Children*, available at:

http://www.eeoc.gov/laws/practices/inquiries_marital_status.cfm.

¹³ See generally Dirk D. Steiner & Stephen W. Gilliland, *Fairness Reactions to Personnel Selection Techniques in France and the United States*, 81 J. OF APPLIED PSYCH. 134-141 (1996). See also David B. Oppenheimer, *Why France Needs to Collect Data on Racial Identity ...* In A French Way, 31 HASTINGS INT'L & COMP. L. REV. 735, 749 (2008) (citing to case decided by Court of Appeals of Orleans in which a young black woman was denied a job based on her photo and name on resume, but offered the job when she changed her name on the resume and replaced her photo with one of a white friend).

¹⁴ See generally Ringelheim, *supra* note 11.

¹⁵ Mathias Moschel, *Race Judicata: The Ban on the Use of Ethnic and Racial Statistics in France*, 5 EUROPEAN CONST. L. REV. 199, 205 (2009).

¹⁶ *Id.* at 206.

immigrant population in Europe.¹⁷ As a result of such long-standing immigration policies, France now has a significant group of residents who have been citizens for some time but are still viewed as immigrants due to their different appearance, or the fact that their parents or grandparents were born outside of France. These are the new “visible minorities.”¹⁸ The growing presence of visible minorities make EU member states like France increasingly similar to the United States in ethnic composition, in that the population of racial or “visible” minorities is not necessarily comprised of those born outside of the country.¹⁹

In the twenty-first century, the European Union has joined the debate on the benefits of racial and ethnic data collection for securing minority rights. This is due in significant part to changes in antidiscrimination laws in Europe. In 2000, the Council of the European Union adopted a Racial Equality Directive (RED) to promote racial and ethnic equal treatment.²⁰ The European Racial Equality Directive is designed to address racial inequality beyond the field of employment into private contractual relations and relations with public administrations. It applies to citizens of EU states as well as to those who are not citizens of any member state. Moreover, it provides for individual as well as collective redress.²¹ Importantly, the RED unambiguously permits the collection of statistical evidence of discrimination, and for “positive action” measures to address racial and ethnic discrimination.²² Some European Union member states have adopted similar laws to promote equality.²³

Even with the introduction of the Equality Directive, the reticence to collect “sensitive data” based on race and ethnicity remains. In 2007, the French Constitutional Court declared unconstitutional a piece of legislation designed to facilitate the collection of racial and ethnic data for studies on discrimination and diversity.²⁴ The Court reasoned that the collection of such data infringes Article I of the French Constitution.²⁵ Thus, any legislation directed at ameliorating racial and ethnic discrimination against “visible minorities” in France cannot use such statistics.

¹⁷ See generally Kimberly Hamilton et al., *The Challenge of French Diversity*, MIGRATION POLICY INSTITUTE (2004), available at:

<http://www.migrationpolicy.org/article/challenge-french-diversity/>.

Relatedly, France has the largest Islamic community in Europe. *Id.*

¹⁸ See, e.g., Cris Beauchemin et al., *Discrimination: A Question of Visible Minorities*, 466 POPULATION & SCIENCES (2010), available at:

http://www.ined.fr/fichier/s_rubrique/19134/pesa466.en.pdf; Moschel, *Race Judicata*, *supra* note 16.

¹⁹ Patrick Simon, *France and the Unknown Second Generation*, 37 INT’L MIGRATION REV. 1091 (2003).

²⁰ Council Directive 2000/43/EC of June 29, 2000 implementing principle of equal treatment between persons irrespective of race or ethnic origin 2000 O.J. (L 180) 20-26; Council Directive 2000/78/EC, Nov. 27, 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (OJ L 303 2.12.2000, p. 16).

²¹ Michele Grigolo et al., *How Does Race “Count” in Fighting Discrimination in Europe?*, 34 ETHNIC AND RACIAL STUDIES 1635, 1637 (2011).

²² *Id.* at 1641.

²³ See, e.g., Germany’s General Equal Treatment Act (2006).

²⁴ Decision CC 2007-557 DC, November 15, 2007, point 29.

²⁵ *Id.*

Yet, this creates the unusual predicament of “racism without races.”²⁶ That is, there is an increased understanding of the existence of inequality that disproportionately affects certain groups of people, though there is no state mechanism to systemically identify and address that inequality. Indeed, current events in France and other EU member states have raised awareness of existing racial and ethnic inequality and the need to address such inequities. In 2005, race riots in France received international attention.²⁷ As recently as February 2015, French Prime Minister Manuel Valls cited a deep ethnic divide in the country, which he likened to “territorial, social, ethnic apartheid.”²⁸ Alluding to the terrorist attacks by Muslim extremists that killed seventeen people in Paris, Prime Minister Valls acknowledged that “many of the evils which have undermined [France] from within [include] ‘all the divisions, the tensions that have been brewing for too long... A territorial, social, ethnic, apartheid has spread across our country.’” Valls spoke of “two Frances” with one consigning poor and largely immigrant populations to less desirable suburbs of Paris, and permitting “daily discrimination” against those without “the right family name or the right skin color.”²⁹

§ 2 – THE UNITED STATES MODEL: GOVERNMENT AS RACIAL DATA COLLECTOR

Even though discussions of “difference” in France may center more on religious or cultural assimilation, the recent history of Nazism, or the experience of North African immigrants,³⁰ the United States has a long history of racial and ethnic identity existing as an integral part of national identity. Over time, most of those on the political left have come to see the collection of racial and ethnic data in the United States as an unmitigated good, a necessary tool for protecting minority rights³¹ and fostering equality.³² On the world stage, the United States is seen as a positive model for the benefits of government transparency in collecting racial and ethnic data for the purpose of securing equal rights for its inhabitants.³³

²⁶ See, e.g., Etienne Balibar, *Is There a Neo-Racism?*, in RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 17, 21 (1991).

²⁷ Hamilton et al., *supra* note 19.

²⁸ Maïa de la Baume, *French Premier Says “Apartheid” is Leaving Minorities on the Fringe*, N.Y. TIMES, Jan. 20, 2015.

²⁹ *Id.*

³⁰ Herrick Chapman & Laura Frader, *Introduction*, in *Race in France: Interdisciplinary Perspectives on the Politics of Difference* (2004).

³¹ See, e.g., McKinsey & Co., *Diversity Matters* (2014); McKinsey & Co., *The Economic Impact of the Achievement Gap in American Schools* (2009).

³² There are, however, those on the American political right who oppose racial data collection in the belief that “we won’t get beyond race as long as we keep counting race.” For example, United States Supreme Court Chief Justice John Roberts issued such a statement in denouncing a race-conscious policy employed by school districts to foster racial integration. See *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

³³ The United States model of immigration and policies with respect to ethnicity is frequently cited by French scholars. See, e.g., Eric Fassin, “Good to Think”: *The American*

Clearly, American anti-discrimination legislation and accompanying regulatory directives have served a vital role in uncovering historic and contemporary forms of racial discrimination and spurring more effective civil rights enforcement measures. Yet, state sponsored racial data collection in the United States has not always been, nor is it now, a positive model in all respects. The positive view of racial data collection may be tempered when examined in light of the historical context in the United States, as well as in light of some more troubling unintended consequences of current racial and ethnic data collection practices. This narrative paints a more complex and challenging picture of the benefits of racial and ethnic data collection in promoting equality, which have significant legal and normative implications.

A) State-Sponsored Racial Data Collection as Positive Tool for Civil Rights Enforcement

In the wake of the United States Supreme Court's 1954 decision in *Brown v. Board of Education*³⁴ and subsequent legislative and adjudicatory directives outlawing state mandated segregation, the United States government has used racial and ethnic data to give force and meaning to regulations addressing persistent forms of discrimination. The passage of the Civil Rights Act of 1964 provided some heft to the tepid adjudicatory remedy outlined in the second *Brown* opinion to end racial segregation "with all deliberate speed."³⁵ Along with concurrent American anti-discrimination jurisprudence,³⁶ the Civil Rights Act provided measures to facilitate the collection of racial and ethnic statistics to track national racial disparities and to ameliorate them with targeted policies and practices to promote equality. Such data collection included gathering statistics on employment, housing, and education by race.³⁷ The Act's implementing regulations

Reference in French Discourses of Immigration and Ethnicity, in *MULTICULTURAL QUESTIONS* 224-241 (Christian Joppke & Steven Lukes eds., 1999).

³⁴ 347 U.S. 483 (1954).

³⁵ *Brown v. Bd. of Educ.*, 349 U.S. 295 (1955) (outlining a constitutional remedy to eliminate state-sponsored racial segregation in public education with "all deliberate speed.")

³⁶ See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 21 (1971) (granting district court freedom to fashion remedies to desegregate schools, including court-mandated busing, redrawing of attendance zone lines, and using mathematical ratios); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (holding that freedom-of-choice plans placed an undue burden on black schoolchildren and were unacceptable when more expedient and effective methods of desegregation were available). See also *Green*, 391 U.S. at 435 (listing the factors to be considered in determining whether a public school has fulfilled its duty to desegregate, including student assignments, facilities, staff assignments, faculty assignments, extracurricular activities, and transportation); *Keyes*, 413 U.S. 189, 201-04 (1973) (recognizing Latinos' right to desegregation and holding that school districts have an affirmative duty to desegregate all city schools even if school officials only instituted segregated schools in a portion of said district). See also *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19 (1969) ("The obligation of every school district is to terminate the dual systems at once and to operate now and hereafter only unitary schools").

³⁷ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, tit. IV, § 402, 78 Stat. 247, 247 (codified as amended at 42 U.S.C. § 2000c-1 (2000)) (requiring a survey to determine educational opportunity by race).

required that racial census reports be submitted to public agencies³⁸ to track many forms of indirect discrimination. Thus, as part of a broad civil rights enforcement program dating back a half century, the United States government actively records, processes, and disseminates racial and ethnic data from individuals to track the status of minorities, identify the nature and extent of discrimination, determine which populations are most negatively affected in specific sectors, and identify legislative and regulatory solutions to promote equality. The collection of such data has successfully ferreted out discrimination in employment, education, and other sectors.

Today, such data provides key information points for determining the status of racial and ethnic minorities in the United States and the ways in which structural racial discrimination continues to hamper opportunity. Two examples of such data collection include the areas of public education and criminal justice. The United States Department of Education collects racially disaggregated data as part of its Civil Rights Data Collection (CRDC), examining the experiences of public school children in the United States.³⁹ In 2014, the CRDC released data detailing stark racial disparities in access to education between white students and black and Latino students. The data showed that American schools are more segregated today than in recent history.⁴⁰ In addition, the schools with the highest concentrations of Black and Latino students have the least access to college preparatory classes that would allow these students to apply to four-year colleges. The CRDC also showed that black and Latino students were more likely than white students to be suspended and expelled from school, even in the earliest years of preschool.⁴¹ Without racial and ethnic statistics, these types of disparities would remain hidden. In light of such statistics, however, the Department of Education in conjunction with the United States Department of Justice has implemented guidelines to address racially discriminatory school discipline practices.⁴²

³⁸ See Owen M. Fiss, *A Theory of Fair Employment Laws*, U. CHI. L. REV. 235, 265 (1971).

³⁹ U.S. DEP'T. OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, available at: <http://ocrdata.ed.gov/>.

⁴⁰ Though beyond the scope of this paper, the aforementioned racial segregation in schools is due to a host of factors, including demographic shifts (whites fleeing inner cities and moving to suburbs) as well as a series of Supreme Court decisions, which facilitated the end of court-ordered school desegregation. For a fuller discussion of these issues, see Lia Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175 (2005).

⁴¹ See, e.g., U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014). For a more detailed analysis of the implications of the racial disparities in school discipline, see Lia Epperson, *Brown's Dream Deferred: Lessons on Democracy and Identity from Cooper v. Aaron to the "School-to-Prison Pipeline,"* 49 WAKE FOREST L. REV. 687 (2014).

⁴² See ED-DOJ School Discipline Guidance Package (2014), available at: <http://www2.ed.gov/policy/gen/guid/school-discipline/index.html>. See also President Obama's My Brother's Keeper Task Force Group to address persistent opportunity gaps for boys and young men of color, available at: http://www.whitehouse.gov/sites/default/files/docs/mbk_one_year_report.pdf.

The example of racial profiling by law enforcement further illustrates the ways in which racial data collection continues to expose current forms of racial discrimination in the United States.⁴³ While criminal justice laws in the United States are enacted to be “color blind,” the criminal justice system remains infected with racial bias that is often undetected without comprehensive data collection. One of the most widespread systems of government sponsored racial data collection with respect to law enforcement is conducted by New York City Police Department.⁴⁴ For more than fifteen years, the Department has been required to collect data on its “stop and frisk” program. This comprehensive empirical study revealed that the overwhelming majority of persons stopped and frisked by the New York Police Department were persons of color.⁴⁵ Armed with this data, advocates filed a court case to challenge the “stop and frisk” practice’s disproportionately negative impact on racial and ethnic minorities.⁴⁶

B) Historic Lessons of Racialized Record-Keeping

Since the nation’s founding, it has been relatively easy to track racial disparities and inequality in the United States. Though there are undoubtedly strong justifications for racial data collection as part of civil rights enforcement practices, the historic basis for and uses of state-sponsored racial data collection in the United States are more troubling. By examining the historic uses of racial data collection alongside some of the present day consequences, the benefits of state-sponsored racial data collection become shadowed by the specter of reinforcing inequality.

Although the word “slavery” is not mentioned in the United States Constitution, the framers crafted the document as an elaborate compromise between Northern states and Southern slave-holding states regarding the continuation of the slave enterprise and the power of slaveholders in the new democracy. The Constitution required the collection of racial data to determine the power and representation that slave-owning states would have in the new nation.⁴⁷ In 1790, the United States Census office collected data distinguishing free persons from slaves for the purpose of apportioning taxes and representation in the national legislature.

⁴³ See, e.g., David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. OF L. & PUBLIC POL’Y 853 (2014) (conducting survey of 56 police departments and their data collection practices for “stop and frisk” procedures conducted by law enforcement officers and concluding that increased data collection “could broaden and deepen the debate ... and better inform the larger debates over the impact of race on criminal justice, particularly with respect to the question of whether stop and frisk necessarily has a disparate impact on racial and ethnic minorities, as New York City data indicates.”).

⁴⁴ Id. at 864.

⁴⁵ Id. at 854.

⁴⁶ *Floyd v. City of New York*, No. 08 Civ. 01034 (SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013).

⁴⁷ “Representatives and direct Taxes shall be apportioned among the several States ... according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, ... and excluding Indians not taxed, three fifths of all other Persons.” U.S. Const. Art I. para. 2, cl. 3.

Rather than simply distinguishing free persons from slaves, the Census distinguished *white* persons from all other free persons and slaves.⁴⁸

One of the most insidious uses of U.S. Census data in recent history dates back to the Second World War. The government engaged in a practice that is strikingly similar to the practices of the Vichy regime in France. Although detailed evidence did not emerge until 2007, the United States government used individual census data to facilitate the identification and internment of Japanese Americans in the wake of Pearl Harbor.⁴⁹ The United States Census Bureau provided neighborhood information to the United States Secret Service, which then used the data to locate and imprison Japanese Americans in internment camps in California and six other states.⁵⁰ While the U.S. Census Bureau is legally forbidden from sharing individual names and addresses to other government agencies, the Second War Powers Act of 1942 provided an exception to the prohibition.⁵¹ In Washington, DC such “microdata” was used to locate individual Japanese Americans. In 1944, the Supreme Court upheld the constitutionality of the practice of “interning” the Japanese in the United States.⁵² Thus, rather than flushing out inequality, the government used racial data to entrench racial inequality and subordination, lending credence to the concerns raised in France and other European Union states. While the collection of racial data is seen as a foundational mechanism for civil rights enforcement protection today, those in the civil rights movement first viewed such efforts as a threat to equality and a lever for entrenching segregation. Given such historic uses of racialized data in the United States, it is not surprising that civil rights advocates and other liberals in the 1950s and 1960s questioned the benefits of such data in the hands of the government. Many of the opponents of racial data collection in the European Union echo the concerns of American civil rights advocates in the mid-twentieth century. Initially, advocates viewed this kind of data collection as antithetical to principles of antidiscrimination and equality, much like contemporary criticisms in France and other European nations.

Given the strong concerns of activists at the time, both the federal executive and judiciary branches eschewed some forms of state-sponsored racial data collection. Amidst pressure from civil rights groups, President Dwight Eisenhower banned the practice of racial record-keeping in 1955. President John Kennedy reaffirmed the prohibition against racial record-keeping in agency employment

⁴⁸ Jennifer Hochschild & Brenda M. Powell, *Racial Reorganization and the United States Census 1850-1930: Mulattoes, Half-Breeds, Mixed Parentage, Hindoos, and the Mexican Race*, 22 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 59-96 (2008).

⁴⁹ Margaret Hu, *Snowdengate and German Surveillance Exceptionalism* 19 (2015) (on file with author). See also J.R. Minkel, *Confirmed: The U.S. Census Bureau Gave up Names of Japanese-Americans in WW II*, SCIENTIFIC AMERICAN (Mar. 30, 2007), available at: <http://www.scientificamerican.com/article/confirmed-the-us-census-b/>.

⁵⁰ Minkel, *supra* note 51.

⁵¹ *Id.* The prohibition was reinstated in 1947.

⁵² *Korematsu v. United States*, 323 U.S. 214 (1944).

records in 1962.⁵³ At the same time, federal courts were slow to embrace the notion that racial and ethnic data collection should be required, particularly in areas where it appeared such statistics could be used to further establish discriminatory policies. In 1963, the Supreme Court barred the compulsory designation of race on a ballot on the grounds that it constituted “the placing of power of the State behind a racial classification that induces racial prejudice at the polls.”⁵⁴ In a similar ruling one year later, the Court invalidated laws that separated voting and property records based on race.⁵⁵

Even after the passage of the Civil Rights Act, the NAACP, the nation’s oldest and largest civil rights organization, came out in opposition to government sanctioned racial identification.⁵⁶ In presenting testimony, the chief lobbyist explained:

The history of the reason why we do not include this is sadly and surely proven, that the minute you put race on a civil service form, the minute you put a picture on an application form, you have opened the door to discrimination and, if you say that isn’t true, I regret to say I feel you haven’t been exposed to all of the problems that exist in this country.⁵⁷

The NAACP continued to oppose the practice⁵⁸ for some time after the United States Secretary of Labor reversed the government prohibition on racial data collection in employment records in 1966.⁵⁹

C) Contemporary Consequences of United States Racial and Ethnic Data Collection

The areas of education and criminal justice, the very sectors where racialized data collection has proven beneficial, also exhibit some of the dangers associated with state sponsored data collection. The example of data collection in the realm of education provides an interesting counter to the prevailing theory from the American left that racialized data collection is an unmitigated good. Enacted in 2001, the federal No Child Left Behind Act (NCLB) requires that student performance data be collected and disaggregated into subgroups so that the federal government may track the progress of the most vulnerable student populations. These included racial minorities, students with disabilities, and students for whom

⁵³ Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972*, 199 (1990).

⁵⁴ *Anderson v. Martin*, 375 U.S. 399, 402 (1963).

⁵⁵ *Tancil v. Woolls*, 379 U.S. 19 (1964) (affirming per curiam lower court decision from *Hamm v. Virginia State Board of Elections*, 230 F. Supp. 156, 158 E.D. Va. 1964); *Whitus v. Georgia*, 385 U.S. 545, 551 (1967) (finding an unlawful opportunity for discrimination in state’s selection of jurors from racially segregated tax digest).

⁵⁶ *Id.*

⁵⁷ *Id.* (quoting Transcript, White House Conference on the Equal Employment Opportunity Commission).

⁵⁸ CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS 32 (2006) (citing testimony of William R. Morris, House Judiciary Committee/Civil Rights Oversight Committee, Dec. 2, 1971).

⁵⁹ *Id.*

English is a second language. While in theory, the data should prompt schools to create policies promoting equal opportunity for the most vulnerable populations and provide increased services for the student populations with the greatest need, in some areas the law had the opposite effect. If the data showed that students from more vulnerable populations did not perform as well on standardized tests, instead of supporting those students, some school districts sought to eliminate those students from the school populations altogether.⁶⁰ In other words, rather than directing efforts to specifically aid the vulnerable groups, schools sought to eliminate them in order to boost their overall achievement scores.⁶¹ Furthermore, in the criminal justice arena, the United States government currently employs racialized data collection measures that trigger the serious privacy and equality concerns highlighted by EU member states. In the aftermath of the September 11, 2001, attacks on the World Trade Center, the United States government has increased its use of biometrics and the collection of data that targets minorities.⁶² The government collects even more detailed racial and ethnic data as part of President Obama's new Deferred Action for Child Arrivals policy (DACA), which offers a path to citizenship for children of undocumented immigrants. DACA requires undocumented persons to "register" with the federal government.⁶³ Such information provides the government with the type of detailed information that could facilitate the deportation of those individuals if the American electorate chooses a president whose views on immigration are antithetical to those of the current administration. As Professor Margaret Hu has noted, the advent of "big data" collection by the United States government is a civil rights issue in its potential to be used to further entrench disparities.⁶⁴ Racial and ethnic minorities are the groups most likely to be subjected to government surveillance, and thus most likely to

⁶⁰ See, e.g., James Ryan, *Perverse Incentives of NCLB*, 79 N.Y.U. L. REV. 932, 933 (2004).

⁶¹ See, e.g., *School Push-Outs: An Urban Case Study*, CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 684-89 (2005).

⁶² See *Gill v. DOJ*, No. 14-cv-03120-RS, 2015 WL 757278 (N.D. Cal. 2015) (denying government's motion to dismiss plaintiffs' challenge to Nationwide Suspicious Activity Reporting Initiative); *Latif v. Holder*, 28 F. Supp. 3d 1134 (2014) (striking down as unconstitutional the government's system for challenging inclusion on the No Fly List); see generally, ACLU, MAPPING THE FBI: UNCOVERING ABUSIVE SURVEILLANCE AND RACIAL PROFILING, available at:

<https://www.aclu.org/mapping-fbi-uncovering-abusive-surveillance-and-racial-profiling>.

See *Morgan v. Woessner*, 997 F.2d 1244, 1254 (9th Cir. 1993) (rejecting as unreasonable tips that "[ma]ke all black men suspect[s]").

⁶³ See *Dep't of Homeland Sec. Consideration of Deferred Action for Childhood Arrivals (DACA)*, available at: <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>.

⁶⁴ Margaret Hu, *Biometric ID Cybersurveillance*, 88 IND. L. J. 1475, 1555 (2013) (exploring the legal consequences of "big data" cybersurveillance, concluding that "[a] digitalized biometric national ID could be used to record our movement or create a virtual security checkpoint by recording our whereabouts at the time of the card swipe or smartphone read ... such a system could facilitate 24/7 tracking of anyone who possesses and carries such devices."). See also David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 144 (2013) ("granting the government unfettered access to these technologies opens the door to a surveillance state and the tyranny it entails.").

be stifled by the potential negative consequences of such surveillance.⁶⁵

§ 3 – NORMATIVE IMPLICATIONS

While France and other members of the European Union have long eschewed racialized data collection like those of the United States as antithetical to notions of universal equality and individual privacy, an examination of the uses and abuses of racialized statistics by the United States government underscores the potential dangers of racial data collection in securing minority rights. In the wake of the 1964 Civil Rights Act, most have come to see racial data collection in the United States as a foundational mechanism for identifying racial discrimination and developing policies to promote equality. Nonetheless, there are clearly dangerous abuses of the data that directly impede the sorts of civil rights enforcement protections contemplated by the regulations emanating from the Civil Rights Act.

Specifically, there are a number of potential normative implications. Although beyond the scope of this essay, there are ways in which the French and American models may provide lessons for one another. First, while the United States is more adept at measuring racial and ethnic inequality, such metrics have not fully solved the problem, as evidenced by the current state of racial disparities discussed above. In fact, in recent years, American constitutional jurisprudence has shifted away from explicit recognition of race, racial disparities, and the benefits of race-conscious policies to ameliorate persistent effects of historic racial discrimination. For example, in a 2007 opinion, United States Supreme Court Chief Justice John Roberts denounced race-conscious policies employed by public school districts to foster racial integration.⁶⁶ This shift mirrors a shift in the definition and recognition of equality as a concept that is substantive in nature to one that is concerned more with formalistic definitions of equality.⁶⁷ With a more “race-blind” or “race-skeptical” jurisprudential model, it may be that the traditional civil rights enforcement structures of the United States should not be viewed as successful models to be wholly replicated.

⁶⁵ Gray & Citron, *supra* note 66 at 79. (“Because racial, ethnic, and religious minorities are particularly vulnerable to governmental suspicion and profiling, they are more likely to refrain from both exploring their own conceptions of the good life and participating robustly in public life when they are subjected to surveillance.”). See also, FREDERICK F. SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 18, 22, 134–36, 158–60, 219 (2003) (looking at the way in which even “statistically sound but non-universal generalizations” prompted by gender and race can be problematic predictive models that disproportionately affect minorities and women).

⁶⁶ See *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

⁶⁷ Compare *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (striking down key provision of the Voting Rights Act) and *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Federal Defense of Marriage Act’s denial of equal benefits to same-sex married couples).

At the same time, an increased awareness and understanding of racial and ethnic inequality in France has fostered some non-governmental ethnic data collection and policies meant to address the persistent inequalities existing in the nation.⁶⁸ For example, “proxies” for race have been used in both France and in the United States.⁶⁹ Such measures suggest that, even in France, there is an understanding that some uses of racial and ethnic data and proxies for such data may be necessary to assist in breaking down historic segregation and inequality.

Those who are in favor of collecting racial and ethnic statistics for the promotion of anti-discrimination directives should be aware of the complex challenges related to such data collection. There are valid reasons to expand the practice to other countries seeking to address structural racial discrimination. Yet, in the United States, it is critical to view existing racial data collection structures with a keen awareness of the unintended consequences.

⁶⁸ See, e.g., *Trajectories and Origins: Survey on Population Diversity in France, Initial Findings* (INED-INSEE, 2010) available at:

http://teo.site.ined.fr/fichier/s_rubrique/20232/dt_teo_168_english.fr.pdf.

⁶⁹ See, e.g., Daniel Sabbagh, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting “Diversity” in Selective Institutions of Higher Education in the United States and France*, in 3 *WORLD POLITICS* 63 470-508 (2011).

