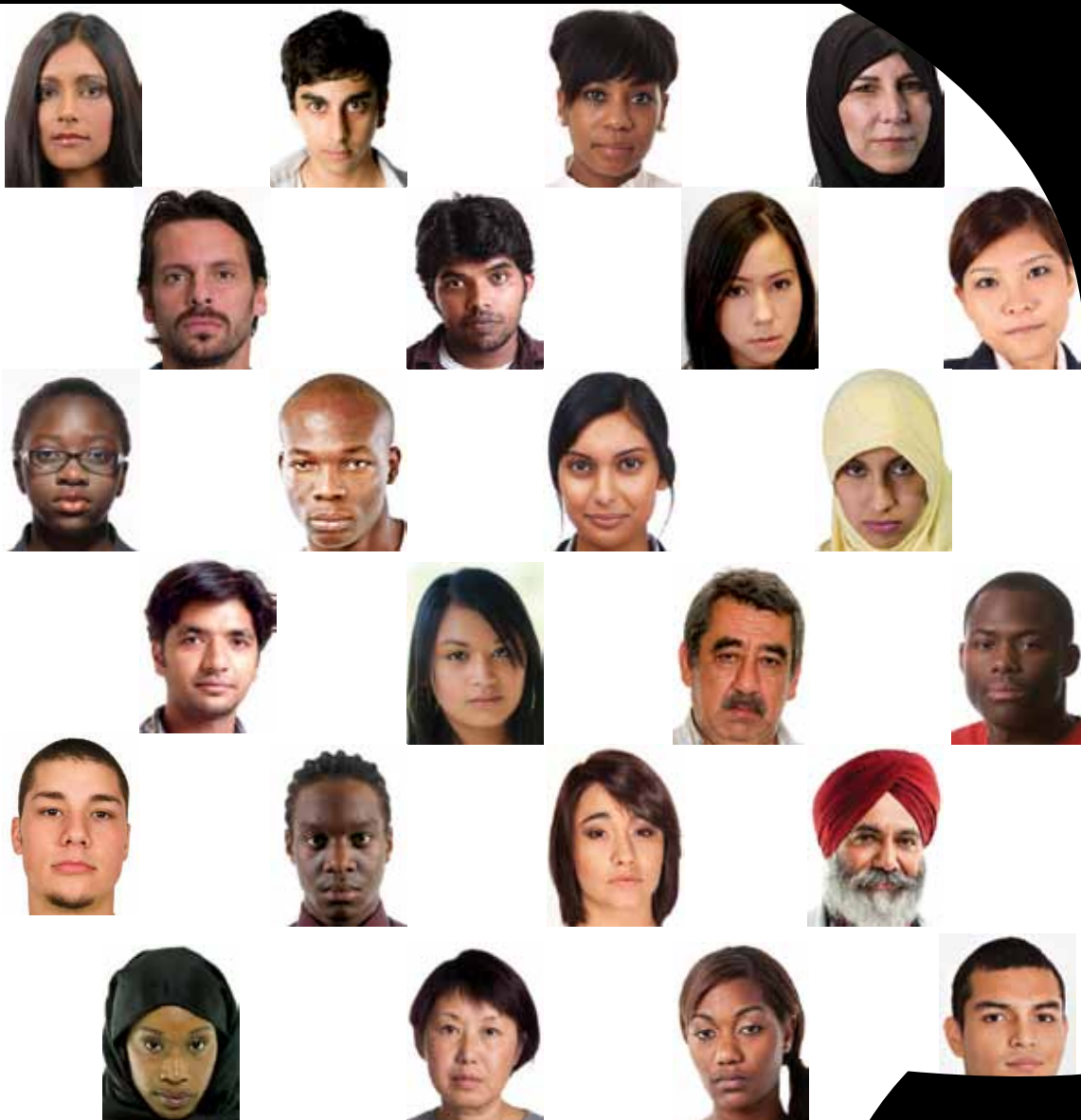


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# *Restoring a National Consensus: The Need to End Racial Profiling in America*

MARCH 2011



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## *Acknowledgements*

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This report is an update of our 2003 report, “Wrong Then, Wrong Now: Racial Profiling Before and After September 11, 2001.” Sadly, 10 years after 9/11, the problem of racial profiling continues to be a significant national concern that demands priority attention. In releasing this report, our goals are to examine the use of racial profiling in the street-level context in which it originally arose, in the newer context of counterterrorism, and in the most recent context of immigration; and to re-establish a national consensus against racial profiling in all its forms. The substance and recommendations of the work are dedicated to the countless advocates for criminal justice reform.

The authors and publisher are solely responsible for the accuracy of statements and interpretations contained in this publication.



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## *Executive Summary*

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Racial profiling—which occurs when law enforcement authorities target particular individuals based not on their behavior, but rather on the basis of personal characteristics, such as their race, ethnicity, national origin, or religion—is an unjust and ineffective method of law enforcement that makes us less, not more, safe and secure. The practice is nonetheless pervasive and used by law enforcement authorities at the federal, state, and local levels.

By way of example, a U.S. Congressman tells the Department of Homeland Security that Muslims should be profiled at airports. A county sheriff conducts a sweep of an Arizona Hispanic community that involves more than 100 deputies, a volunteer posse, and a helicopter. A prominent African-American professor charges he was a victim of racial profiling after he was arrested in his Massachusetts home.

In the months preceding September 11, 2001, a national consensus had developed on the need to end “racial profiling.” The enactment of a comprehensive federal statute banning the practice seemed imminent. However, on 9/11, everything changed. In the aftermath of the terrorist attacks, the federal government focused massive investigatory resources on Arabs and Muslims, singling them out for questioning, detention, and other law enforcement activities. Many of these counterterrorism initiatives involved racial profiling.

In the 10 years since the terrorist attacks, the anti-racial profiling consensus that had developed prior to 9/11 evaporated and the use of racial profiling has expanded, not only in the counterterrorism context, but also in the context in which it originally arose—the fight against drug trafficking and other “street-level” crimes—as well as in the effort to enforce immigration laws.

Now is the time to re-establish a national anti-racial profiling consensus and take the steps necessary to end the practice in all contexts at the federal, state, and local levels. The purpose of this report is to assist in that effort.

In this report, we present quantitative and qualitative evidence to demonstrate the widespread use of racial profiling in each of the three contexts referenced above—*i.e.*, street-level crime, counterterrorism, and immigration law enforcement. We also present evidence to show how racial profiling in the counterterrorism and immigration contexts is encouraged by misguided federal programs that incentivize law enforcement authorities to engage in the practice.

In the counterterrorism context, these problematic federal programs include the National Security Entry-Exit Registration System (which requires certain individuals from Muslim countries to register with the federal government, as well as to be fingerprinted, photographed, and interrogated) and Operation Front Line (which allows federal law enforcement authorities to target immigrants and foreign nationals for investigation in order to “detect, deter, and disrupt terrorist operations”). The federal government claims that these programs do not involve racial profiling, but the actions taken—from the singling out of Arabs and Muslims in the United States for questioning and detention to the selective application of immigration laws to nationals of Arab and Muslim countries—belie this claim.

In the immigration law enforcement context, the federal government has shifted significant responsibility for the enforcement of civil immigration laws to state and local law enforcement authorities through Agreements

of Cooperation in Communities to Enhance Safety and Security (known as ICE ACCESS programs). The most notable of these programs is the 287(g) program, the stated purpose of which is to enable state and local law enforcement authorities to identify suspected undocumented immigrants “who pose a threat to public safety.” In point of fact, the 287(g) program has been widely misused by state and local law enforcement authorities to stop, detain, question, and otherwise treat as suspected undocumented immigrants vast numbers of persons—primarily Hispanics—most of whom are U.S. citizens or legal residents.

Although perhaps the most well-known, the 287(g) program is not the only ICE ACCESS program that raises concerns about racial profiling. Other such programs include the Criminal Alien Program (which involves an immigration screening process within federal, state, and local correctional facilities to identify undocumented immigrants “who pose a threat to public safety”) and the Secure Communities program (which allows local law enforcement authorities to run fingerprint checks against Department of Homeland Security databases, not just FBI databases).

Federal inaction on comprehensive immigration reform has prompted a flurry of activity by state lawmakers seeking to fill the void left by Congress. The most sweeping and controversial of these state laws is Arizona’s S.B. 1070, which is widely seen as encouraging racial profiling.

This report makes the case against racial profiling by showing that the assumptions underlying racial profiling—*i.e.*, that certain crimes are more likely to be committed by members of a particular racial, ethnic, national origin, or religious group, and that members of that group are more likely than non-members to be involved in that type of criminal activity—are false. We also demonstrate the devastating impact that racial profiling has on individuals, families, and communities that are subject to the practice; and explain why racial profiling is in all contexts a flawed law enforcement method that diverts and misuses precious law enforcement resources and destroys the relationship between local law enforcement authorities and the people that they must rely on in carrying out their law enforcement activities.

The End Racial Profiling Act of 2010 (ERPA 2010) was introduced into the House of Representatives during the 111<sup>th</sup> Congress. The 111<sup>th</sup> Congress took no action on ERPA 2010, and it died with the adjournment of that

Congress on December 22, 2010. However, ERPA 2010 warrants continued attention because it provides an appropriate model for an anti-racial profiling statute in the 112<sup>th</sup> Congress, addressed the major concerns about racial profiling expressed in this report, and would have gone a long way toward ending the practice.

Finally, we offer recommendations that are designed to end racial profiling. The key point of each of these recommendations—which are addressed to Congress, the president, Executive Branch agencies, and civil and human rights organizations—is summarized below:

#### **Congress**

- The 112<sup>th</sup> Congress should enact an anti-racial profiling statute modeled on ERPA 2010.

#### **The President**

- The president should urge the 112<sup>th</sup> Congress to enact an anti-racial profiling statute modeled on ERPA 2010, and make enactment of such a statute one of his administration’s highest legislative priorities.
- Pending enactment by Congress of an anti-racial profiling statute, the president should issue an executive order that prohibits federal law enforcement authorities from engaging in racial profiling or sanctioning the use of the practice by state and local law enforcement authorities in connection with any federal program.

#### **Executive Branch Agencies**

- The U.S. Department of Justice (DOJ) should revise its June 2003 guidance on racial profiling to clarify ambiguities, close loopholes, and eliminate provisions that allow for any form of racial profiling.
- The DOJ Office of Legal Counsel should issue an opinion stating that the federal government has exclusive jurisdiction to enforce federal immigration laws, and should rescind its 2002 “inherent authority” opinion, which takes a contrary position.
- The DOJ Civil Rights Division should make the remediation of racial profiling a priority.
- The U.S. Department of Homeland Security (DHS) should terminate the 287(g) program.
- DHS should suspend operation of the Criminal Alien Program, the Secure Communities Program, and other federal programs pursuant to which authority to engage in the enforcement of federal immigration laws has been delegated to state and local law enforcement

authorities, until a panel of independent experts has reviewed the programs to ensure that they do not involve racial profiling.

- DHS should terminate the National Security Entry-Exit Registration System.
- Other federal counterterrorism programs, including Operation Front Line, should be reviewed by a panel of independent experts to ensure that they do not involve racial profiling.

#### **Civil and Human Rights Organizations**

- Civil and human rights organizations should urge the 112<sup>th</sup> Congress to enact an anti-racial profiling statute modeled on ERPA 2010, and provide the American public with accurate information about racial profiling.

## *I. Introduction and Background*

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During a February 2011 hearing of the U.S. House of Representatives Homeland Security Committee, Rep. Paul Broun, R. Ga., told U.S. Department of Homeland Security (DHS) Secretary Janet Napolitano that he recently went through screening at an airport in front of a man that was of “Arabian, or Middle Eastern descent.” According to Broun, neither the man nor Broun was patted down; but behind the man was an elderly woman with a small child, both of whom were patted down. “This administration and your department seems to be very adverse to focusing on those entities that want to do us harm,” Broun stated. “And the people who want to harm us are not grandmas and it’s not little children. It’s the Islamic extremists...I encourage you to maybe take a step back and see how we can focus on those people who want to harm us. And we’ve got to profile these fellas.”<sup>1</sup>

Sheriff Joe Arpaio of Maricopa County, Arizona, has received widespread attention for his stops of Hispanic drivers and sweeps of Hispanic communities in an attempt to identify undocumented immigrants. In April 2008, in the most notorious of his neighborhood sweeps, more than 100 deputies, a volunteer posse, and a helicopter descended upon and terrorized a community of approximately 6,000 Yaqui Indians and Hispanics, in an attempt to identify undocumented immigrants. By the end of the two-day operation, only nine undocumented immigrants were arrested. In addition to his profiling of drivers and neighborhoods, Arpaio has also led raids on area businesses that employ Hispanics.<sup>2</sup>

On July 16, 2009, James Crowley, an 11-year police department veteran responded to a 911 call reporting a possible break-in at a home on Ware Street in Cambridge, Massachusetts. The address, Crowley would

later learn, was the home of Harvard professor Henry Louis Gates, Jr., one of the most prominent African-American scholars in the United States. Within a few minutes of Crowley and Gates’ encounter, Crowley had arrested Gates for disorderly conduct and placed him in handcuffs at his own home. Gates charged that he was a victim of “racial profiling,” claiming that the actions of the police were dictated by the fact that he was African American, and that they would have behaved differently if he were White. The Cambridge Police Department denied the charge, asserting that its actions were prompted by Gates’ confrontational behavior.<sup>3</sup>

Because of Gates’ prominence, this particular incident captured the attention of the media and sparked a much-needed national dialogue about racial profiling in America. Though the national dialogue may not have resolved the narrow question of whether Gates was or was not a victim of racial profiling, it provided ample support for the broader proposition that racial profiling is pervasive and used by law enforcement authorities at the federal, state, and local levels. As President Obama put it during a nationally televised press conference on July 24, 2009, “What I think we know—separate and apart from [the Gates] incident—is that there is a long history in this country of African Americans and Latinos being stopped by law enforcement disproportionately, and that’s just a fact.”<sup>4</sup> Lt. Charles Wilson, chairman of the National Association of Black Law Enforcement Officers and a 38-year veteran of law enforcement, stated that “[t]his is an issue that occurs in every single place in this country.”<sup>5</sup> The factors that account for this troubling reality provide a framework for the analysis in this report and are summarized below.

For years, African Americans, Hispanics,<sup>6</sup> and other minorities complained that they received unwarranted



police scrutiny in their cars and on the streets, yet their complaints were routinely ignored. By early 2001, this had changed. Rigorous empirical evidence developed in civil rights lawsuits and studies of law enforcement practices revealed that the so-called “Driving While Black or Brown” phenomenon was more than anecdotal. Minority drivers were in fact stopped and searched more than similarly situated White drivers. The data also showed that minority pedestrians were stopped and frisked<sup>7</sup> at a disproportionate rate, and that, in general, federal, state and local law enforcement authorities frequently used race, ethnicity, and national origin as a basis for determining who to investigate for drug trafficking, gang involvement, and other “street-level” crimes.<sup>8</sup>

Polls showed that Americans of all races, ethnicities, and national origins considered racial profiling widespread and unacceptable.<sup>9</sup> Government actions and words mirrored the public’s concern about the practice. In the mid-1990s, the Civil Rights Division of the U.S. Department of Justice entered into far-reaching settlement agreements in response to racial profiling by certain state and local law enforcement agencies, including the New Jersey State Police and the Los Angeles Police Department.<sup>10</sup> Many states and localities instituted data collection and other requirements to address disparities in law enforcement based upon race and other personal characteristics.<sup>11</sup> And, in 1996, the U.S. Supreme Court held that the Equal Protection Clause of the Constitution “prohibits selective enforcement of the law based on considerations such as race.”<sup>12</sup>

By early 2001, concerns about racial profiling were voiced at the highest levels of the federal government. Then-Attorney General John Ashcroft publicly condemned racial profiling,<sup>13</sup> and on February 27, 2001, President Bush told a joint session of Congress that the practice was “wrong and we will end it in America.”<sup>14</sup>

Backed by a strong national consensus to end racial profiling, on June 6, 2001, Sen. Russell Feingold, D. Wisc., and Rep. John Conyers, D. Mich. introduced the bipartisan End Racial Profiling Act of 2001<sup>15</sup>, and the enactment of a comprehensive federal anti-racial profiling statute seemed imminent.

However, on September 11, 2001, everything changed. The 19 men who hijacked airplanes to carry out the attacks on the World Trade Center and the Pentagon were Arabs from Muslim countries. The federal government immediately focused massive investigative

resources and law enforcement attention on Arabs and Muslims—and in some cases on individuals who were perceived to be, but in fact were not, Arabs or Muslims, such as Sikhs and other South Asians. In the years that followed, the federal government undertook various initiatives in an effort to protect the nation against terrorism. The federal government claimed that these counterterrorism initiatives did not constitute racial profiling, but the actions taken—from the singling out of Arabs and Muslims in the United States for questioning and detention to the selective application of immigration laws to nationals of Arab and Muslim countries—belied this claim.

More recent initiatives by federal, state, and local law enforcement authorities to enforce immigration laws have further encouraged racial profiling. Immigration and Customs Enforcement (ICE) within DHS has shifted significant responsibility for the enforcement of civil immigration laws to state and local law enforcement authorities. And many state and local law enforcement authorities misuse these programs—particularly the Delegation of Immigration Authority, known as the 287(g) program—to stop, detain, question, and otherwise target Hispanics and other minorities as suspected undocumented immigrants, although most of them are U.S. citizens or legal residents. Federal inaction on comprehensive immigration reform has prompted some states to undertake initiatives of their own—including most notably Arizona’s S.B. 1070, which is widely seen as encouraging racial profiling.

The short of the matter is this: The anti-racial profiling consensus that had developed prior to 9/11 evaporated in the aftermath of the terrorist attacks, and the use of racial profiling—in the street-level context in which it originally arose, and in the new contexts of counterterrorism and immigration law enforcement—has expanded in the intervening years.

During the 2008 presidential campaign, candidate Barack Obama promised that, if elected, “Obama and [vice presidential running mate Joe] Biden will ban racial profiling by federal law enforcement agencies and provide federal incentives to state and local police departments to prohibit the practice.”<sup>16</sup> During his 2009 confirmation hearing, Attorney General Eric Holder similarly declared that racial profiling was “simply not good law enforcement,” and that ending the practice was a “priority” for the Obama administration.<sup>17</sup> Now is the time for the Obama administration to make good on these promises and take the steps necessary to end racial profiling in all contexts at the federal, state, and



local levels.

The purpose of this report is to assist in the effort to end racial profiling. In the chapters that follow, we explain what does and does not constitute racial profiling (Chapter II); examine quantitative and qualitative evidence regarding the use of racial profiling in the street-level crime, counterterrorism, and immigration law enforcement contexts (Chapter III); debunk the assumptions that are advanced in an effort to justify racial profiling, and discuss the devastating consequences of racial profiling for persons and communities that are subject to the practice and its adverse impact on effective law enforcement (Chapter IV); review the End Racial Profiling Act of 2010, which was introduced in the House of Representatives during the 111<sup>th</sup> Congress and died with the adjournment of that Congress on December 22, 2010, but which provides an appropriate model for an anti-racial profiling statute in the 112<sup>th</sup> Congress (Chapter V); and conclude with recommendations designed to end racial profiling in America (Chapter VI).

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## II. *What is Racial Profiling?*

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“Racial profiling” refers to the targeting of particular individuals by law enforcement authorities based not on their behavior, but rather their personal characteristics. It is generally used to encompass more than simply an individual’s race. As used in this report, it encompasses race, ethnicity, national origin, and religion—and means the impermissible use by law enforcement authorities of these personal characteristics, to any degree, in determining which individuals to stop, detain, question, or subject to other law enforcement activities. Two points should be emphasized in connection with this definition.

As the qualifying term “impermissible use” indicates, the definition does not prohibit reliance by law enforcement authorities on race, ethnicity, national origin, or religion in all circumstances. Rather, it is aimed at law enforcement activities that are premised on the erroneous assumption that individuals of a particular race, ethnicity, national origin, or religion are more likely to engage in certain types of unlawful conduct than are individuals of another race, ethnicity, national origin, or religion. Thus, it is *not* racial profiling when law enforcement authorities rely on these personal characteristics as part of a subject description or in connection with an investigation if there is reliable information that links a person of a particular race, ethnicity, national origin, or religion to a specific incident, scheme, or organization.

It also should be noted that under this definition, race<sup>18</sup> need not be the *sole* factor used by law enforcement authorities in deciding who to subject to investigative procedures. Even if individuals are not targeted by law enforcement authorities solely because of their race, race is often a factor—and, indeed, the decisive factor—

in guiding law enforcement decisions about who to stop, detain, question, or subject to other investigative procedures. Selective law enforcement based in part on race is no less pernicious or offensive to the principle of equal justice than is enforcement based solely on race.

In order to demonstrate how the foregoing definition would apply in practice, we set forth below several hypothetical examples to illustrate what would and would not constitute racial profiling under that definition:

1. A police officer who is parked on the side of a highway notices that nearly all vehicles are exceeding the posted speed limit. Since the driver of each such vehicle is committing a traffic violation that would legally justify a stop, the officer may not use the race of the driver as a factor in deciding who to pull over or subject to further investigative procedures. If, however, a police officer receives an “all points bulletin” to be on the look-out for a fleeing robbery suspect, who is described as a man of a particular race in his thirties driving a certain model automobile, the officer may use this description—including the suspect’s race—in deciding which drivers to pull over.
2. While investigating a drug trafficking operation, law enforcement authorities receive reliable information that the distribution ring plans to pick up shipments of illegal drugs at a railroad station, and that elderly couples of a particular race are being used as couriers. Law enforcement authorities may properly target elderly couples of that race at the railroad station in connection with this investigation. Assume, however, that the information provided to law enforcement authorities indicates that elderly couples are being used as couriers, but there is no reference to race. Law enforcement

authorities may properly target elderly couples, but may not selectively investigate elderly couples of a particular race.

3. In connection with an initiative to prevent terrorist activity, law enforcement authorities may not target members of any particular race or religion as suspects based on a generalized assumption that members of that race or religion are more likely than non-members to be involved in such activity. On the other hand, if law enforcement authorities receive a reliable tip that persons of a particular race or religion living in a specific apartment building are plotting terrorist acts, they may focus their investigation on persons of that race or religion who live in the building.

4. In an effort to identify undocumented immigrants, border agents may not—even in areas near the Mexican border in which a substantial part of the population is Hispanic—take Hispanic origin into account in deciding which individuals to stop, detain, and question. Border agents may take Hispanic origin into account, however, in attempting to identify undocumented immigrants at a particular worksite if they have reliable information that undocumented immigrants of Hispanic origin are employed at that worksite.

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### *III. The Reality of Racial Profiling*

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The U.S. Supreme Court has held that racial profiling violates the constitutional requirement that all persons be accorded equal protection of the law.<sup>19</sup> The “Guidance Regarding the Use of Race By Federal Law Enforcement Agencies” that was issued by the U.S. Department of Justice in 2003 states:

*“Racial profiling” at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.*

*Racial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society.<sup>20</sup>*

Notwithstanding the fact that racial profiling is unconstitutional, and despite the emphatic declaration from the federal government that the practice is “invidious,” “wrong,” “ineffective,” and “harmful to our rich and diverse democracy,” quantitative and qualitative evidence collected at the federal, state, and local levels confirms that racial profiling persists. Moreover, as the evidence also shows, racial profiling is often encouraged by misguided federal programs and policies that incentivize law enforcement authorities to engage in the practice.

In this section of the report, we consider the use of racial profiling in each of the three contexts referenced

above, *i.e.*, street-level crime, counterterrorism, and immigration law enforcement. To be sure, this breakdown is to some extent artificial, and there are obvious points of overlap among the contexts—as, for example, when Hispanics who are targeted by law enforcement authorities for engaging in drug trafficking or other street-level crimes are also profiled as suspected undocumented immigrants, or when Arabs or Muslims who are targeted as potential terrorists are also questioned about whether they are in the country without authorization. Despite these and other points of overlap, it is helpful to discuss racial profiling in each of the three contexts separately inasmuch as this allows for a more context-specific analysis.

#### **A. Street-Level Crime**

Empirical evidence confirms the existence of racial profiling on America’s roadways. At the national level, the U.S. Department of Labor’s Bureau of Justice Statistics reports that for the year 2005, the most recent data available, “[p]olice actions taken during a traffic stop were not uniform across racial and ethnic categories.” “Black drivers (4.5%) were twice as likely as White drivers (2.1%) to be arrested during a traffic stop, while Hispanic drivers (65%) were more likely than White (56.2%) or Black (55.8%) drivers to receive a ticket. In addition, Whites (9.7%) were more likely than Hispanics (5.9%) to receive a written warning, while Whites (18.6%) were more likely than Blacks (13.7%) to be verbally warned by police.” When it came to searching minority motorists after a traffic stop, “Black (9.5%) and Hispanic (8.8%) motorists stopped by police were searched at higher rates than Whites (3.6%). The “likelihood of experiencing a search did not change for Whites, Blacks, or Hispanics from 2002 to 2005.”<sup>21</sup>

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Quantitative evidence reported in several states confirms this nationwide data:

- A study in Arizona shows that during 2006-2007, the state highway patrol was significantly more likely to stop African Americans and Hispanics than Whites on all the highways studied, while Native Americans and persons of Middle Eastern descent were more likely to be stopped on nearly all the highways studied. The highway patrol was 3.5 times more likely to search a stopped Native American than a White, and 2.5 times more likely to search a stopped African American or Hispanic.<sup>22</sup>

The Arizona study also shows that racial profiling is counterproductive and a misallocation of scarce law enforcement resources. Although Native Americans, Hispanics, Middle Easterners, and Asians were far more likely to be stopped and searched than Whites on Arizona's highways, Whites who were searched were more likely to be transporting drugs, guns, or other contraband. While African Americans were twice as likely as Whites to be stopped and searched, the rates of contraband seizures for the two groups were comparable.<sup>23</sup>

- A February 2009 study of traffic stops and searches in West Virginia found a similar pattern of racial profiling. The data reveal that African-American motorists were 1.64 times more likely to be stopped than White drivers. Hispanics were 1.48 times more likely to be stopped. After the traffic stop, non-Whites were more likely to be arrested, yet police in West Virginia obtained a significantly higher contraband hit rate for White drivers than minorities.<sup>24</sup>
- In Minnesota, a statewide study of racial profiling during 2002 found that African-American, Hispanic, and Native American drivers were all stopped and searched more often than Whites, yet contraband was found more frequently in searches of White drivers' cars. Had all drivers been stopped at the same rates in the 65 local jurisdictions reporting data, 22,500 more Whites would have been stopped, while 18,800 fewer African Americans and 5,800 fewer Hispanics would have been stopped.<sup>25</sup>
- In Illinois, data collected after the 2003 passage of the Illinois Traffic Stops Statistics Act, sponsored by then-Illinois State Senator Barack Obama, shows similar patterns of racial profiling by law enforcement authorities. The number of consent searches after traffic stops of African-American and Hispanic motorists was more than double that of Whites. The

consent searches found White motorists were twice as likely to have contraband.<sup>26</sup>

- A 2005 study analyzing data gathered statewide in Texas reveals disproportionate traffic stops and searches of African Americans and Hispanics, even though law enforcement authorities were more likely to find contraband on Whites.<sup>27</sup>

At the local level, studies of data collected in Sacramento County, California,<sup>28</sup> and DuPage County, Illinois,<sup>29</sup> also report disproportionate traffic stops and searches of African Americans and Hispanics.

Although the foregoing studies confirm the reality of the "Driving While Black or Brown" phenomenon, statistical analysis does not reflect the human cost of racial profiling. For that purpose, we offer the following examples:

- In Newark, New Jersey, on the night of June 14, 2008, two youths aged 15 and 13 were riding in a car driven by their football coach, Kelvin Lamar James. All were African American. Newark police officers stopped their car in the rain, pulled the three out, and held them at gunpoint while the car was searched. James stated that the search violated his rights. One officer replied in abusive language that the three African Americans didn't have rights and that the police "had no rules." The search of the car found no contraband, only football equipment.<sup>30</sup>
- In May 2009, in Hinds County, Mississippi, Hiran Medina, a Hispanic, was pulled over for crossing the center line of the highway, one of several potentially subjective pretexts for "Driving While Black or Brown" traffic stops. Medina consented to the county deputy's request to search the vehicle. Upon discovering \$5,000 in cash in the car, the deputy handcuffed Medina, seized the money, and issued Medina a forfeiture notice that would require Medina to sue the county for the return of the money within 30 days or forfeit the cash to the Sheriff's Department. Eventually, after much laughter on the scene among the gathered deputies, Medina was released but his cash was kept because, they claimed, it smelled of marijuana, even though no drugs were found in Medina's vehicle. Only after Medina retained the American Civil Liberties Union, which threatened a lawsuit, did he get his money back.<sup>31</sup>

Just as minority *motorists* are subject to racial profiling, so too are minority *pedestrians*. This is especially true following the adoption of community-based

policing strategies that often provide street-level law enforcement authorities with wide discretion to “clean up” the communities they patrol. Professor Angela Davis has noted, “[t]he practical effect of this deference [to law enforcement discretion] is the assimilation of police officers’ subjective beliefs, biases, hunches, and prejudices into law.”<sup>32</sup> As is the case in the “Driving while Black or Brown” motorist context, such discretion in the pedestrian context is often exercised to racially profile minorities who are perceived to pose a threat to public safety even if they have done nothing wrong. Harvard Law School Professor Charles Ogletree, who is African American, has stated, “If I’m dressed in a knit cap and hooded jacket, I’m probable cause.”<sup>33</sup> These anecdotal assessments are supported by statistical analysis.

In 2008, as the result of a discovery request in *Floyd v. City of New York*, a lawsuit filed against the New York City Police Department (“NYPD”) alleging racial profiling and suspicion-less stops-and-frisks against law-abiding New York City residents,<sup>34</sup> the Center for Constitutional Rights received and analyzed data collected by the NYPD for the years 2005 to mid-2008. The Center found that:

- In 2005, the NYPD made fewer than 400,000 stops in comparison to a projected more than 500,000 stops in 2008. Over a period of three and one half years, the NYPD has initiated nearly 1.6 million stops of New Yorkers.
- From 2005 to mid-2008, approximately 80 percent of total stops made were of Blacks and Latinos, who comprise 25 percent and 28 percent of New York City’s total population, respectively. During this same time period, only about 10 percent of stops were of Whites, who comprise 44 percent of the city’s population.
- From 2005 to mid-2008, Whites comprised 8 percent and Blacks comprised 85 percent of all individuals frisked by the NYPD. In addition, 34 percent of Whites stopped during this time period were frisked, while 50 percent of Blacks and Latinos stopped were frisked.
- A significant number of stops resulted in the use of physical force by the NYPD. Of those stops, a disproportionate number of Blacks and Latinos had physical force used against them. Between 2005 and mid-2008, 17 percent of Whites, compared to 24 percent of Blacks and Latinos, had physical force used against them during NYPD-initiated encounters.

- Of the cumulative number of stops made during the three and one-half year period, only 2.6 percent resulted in the discovery of a weapon or contraband. Although rates of contraband yield were minute across all racial groups, stops made of Whites proved to be slightly more likely to yield contraband.
- Arrest and summons rates for persons stopped between 2005 and mid-2008 were low for all racial groups, with between 4 and 6 percent of all NYPD-initiated stops resulting in arrests and 6 and 7 percent resulting in summons being issued during this period.<sup>35</sup>

The Center concluded that “data provided by the NYPD plainly demonstrate that Black and Latino New Yorkers have a greater likelihood of being stopped-and-frisked by NYPD officers at a rate significantly disproportionate to that of White New Yorkers. That NYPD officers use physical force during stops of Blacks and Latinos at an exceedingly disproportionate rate compared to Whites who are stopped, and that this disparity exists despite corresponding rates of arrest and weapons or contraband yield across racial lines, further supports claims that the NYPD is engaged in racially biased stop-and-frisk practices.”<sup>36</sup>

Empirical evidence from Los Angeles obtained as the result of a 2001 federal consent decree between the U.S. Department of Justice and the Los Angeles Police Department (“LAPD”) that sought to remedy past racial profiling and other discriminatory practices against minorities tells a similar story. During the period from July 2003 to June 2004, “after controlling for violent and property crime rates in specific LAPD reporting districts, as well as a range of other variables,” the researchers found that:

- Per 10,000 residents, the Black stop rate was 3,400 stops higher than the White stop rate, and the Hispanic stop rate was almost 360 stops higher.
- Relative to stopped Whites, stopped Blacks were 127 percent more likely and stopped Hispanics were 43 percent more likely to be frisked.
- Relative to stopped Whites, stopped Blacks were 76 percent more likely and stopped Hispanics were 16 percent more likely to be searched.
- Relative to stopped Whites, stopped Blacks were 29 percent more likely and stopped Hispanics were 32 percent more likely to be arrested.
- Frisked Blacks were 42.3 percent less likely to be



found with a weapon than frisked Whites, and frisked Hispanics were 31.8 percent less likely to have a weapon than frisked Whites.

- Consensual searches of Blacks were 37 percent less likely to uncover weapons, 23.7 percent less likely to uncover drugs, and 25.4 percent less likely to uncover any other type of contraband than consensual searches of Whites.
- Consensual searches of Hispanics were 32.8 percent less likely to uncover weapons, 34.3 percent less likely to uncover drugs, and 12.3 percent less likely to uncover any other type of contraband than consensual searches of Whites.<sup>37</sup>

The researchers concluded:

*It is implausible that higher frisk and search rates are justified by higher minority criminality, when these frisks and searches are substantially less likely to uncover weapons, drugs or other types of contraband. We also find that the black arrest disparity was 9 percentage points lower when the stopping officer was black than when the stopping officer was not black. Similarly, the Hispanic arrest disparity was 7 percentage points lower when the stopping officer was Hispanic than when the stopping officer was a non-Hispanic white. Taken as a whole, these results justify further investigation and corrective action.<sup>38</sup>*

Despite this evidence of continued racial profiling by the LAPD—and the researchers’ conclusion that “these results justify further investigation and corrective action”—a federal court in July 2009 lifted the consent decree over the LAPD.<sup>39</sup>

Another example of racial profiling in the stop-and-frisk context is provided by Jackson, Tennessee. In Jackson, police conduct what they term “field interviews” in which they stop, interview, and may photograph pedestrians and bystanders when an officer has “reasonable suspicion to believe a crime has occurred [or] is about to occur or is investigating a crime.” A review of “field cards” generated by the field interviews indicates that 70 percent were for African Americans. The population of Jackson is only 42 percent African American. One African-American college student reported that police in Jackson stopped him on the street while he was walking to his grandmother’s house. They then followed him onto the porch of her home where they conducted field interviews of him and five other African-American visitors, and threatened to arrest them if they did not cooperate.<sup>40</sup>

The use of racial profiling in connection with entry into the U.S. in the counterterrorism and immigration contexts is discussed later in this report, but the practice has long been commonplace in the war on drugs at the nation’s border crossings and airports. For example, drug courier profiles used by the U.S. Customs Service regularly include race as a factor in guiding law enforcement discretion.<sup>41</sup> The case of Curtis Blackwell, a long haul trucker, who tried to cross from Mexico into the U.S. at a border crossing in Lordsburg, New Mexico, is illustrative.

On August 15, 2008, Blackwell, an African American, was driving his truck across the border when he was stopped and searched by officers of the New Mexico State Police. The officers accused Blackwell of being under the influence of alcohol or narcotics, despite the fact that he passed every sobriety and drug test administered. His truck was impounded for 24 hours until it was allowed entry into the U.S. Evidence suggests other African-American truckers entering the U.S. from Mexico at this point of entry have also been detained without reasonable suspicion.<sup>42</sup>

In October 2003, in another case involving an African American who may have “fit” the drug courier profile, state police troopers at Boston’s Logan Airport stopped attorney King Downing as he talked on his cell phone. According to Downing, police demanded to see his identification and travel documents. Downing knew he was under no obligation to provide the documents and declined to do so. Police first ordered him to leave the airport, but then stopped him from leaving, surrounded him with officers, and placed him under arrest. At that point, Downing agreed to provide his identification and travel documents. After a 40-minute detention, he was released. Four years later, in a lawsuit brought by Downing, a jury found the police had unlawfully detained him without reasonable suspicion.<sup>43</sup>

## **B. Counterterrorism**

The 9/11 terrorist attacks on the World Trade Center and the Pentagon were carried out by Arabs from Muslim countries. In response to the attacks, the federal government immediately engaged in a sweeping counterterrorism campaign focused on Arabs and Muslims, and in some cases on persons who were perceived to be, but in fact were not, Arabs or Muslims, such as Sikhs and other South Asians. That focus continues to this day. The federal government claims that its anti-terrorism efforts do not amount to racial profiling, but the singling out for questioning and detention of Arabs and Muslims in the United States, as



well as selective application of the immigration laws to nationals of Arab and Muslim countries, belie this claim.

A prime example of a federal program that encourages racial profiling is the National Security Entry-Exit Registration System (NSEERS), implemented in 2002.<sup>44</sup> NSEERS requires certain individuals from predominantly Muslim countries to register with the federal government, as well as to be fingerprinted, photographed, and interrogated. A report issued in 2009 by the American Civil Liberties Union (ACLU) and the Rights Working Group had this to say about NSEERS:

*More than seven years after its implementation, NSEERS continues to impact the lives of those individuals and communities subjected to it. It has led to the prevention of naturalization and to the deportation of individuals who failed to register, either because they were unaware of the registration requirement or because they were afraid to register after hearing stories of interrogations, detentions and deportations of friends, family and community members. As a result, well-intentioned individuals who failed to comply with NSEERS due to a lack of knowledge or fear have been denied “adjustment of status” (green cards), and in some cases have been placed in removal proceedings for willfully failing to register.<sup>45</sup>*

Despite NSEERS’ near explicit profiling based on religion and national origin, federal courts have held that the program does not violate the Equal Protection Clause of the Constitution, and that those forced to participate in the program have not suffered violations of their rights under the Fourth or Fifth Amendments to the U.S. Constitution, which protect against unreasonable search and seizure and guarantee due process, respectively.<sup>46</sup>

Another example of a federal program that involves racial profiling is Operation Front Line (OFL). The stated purpose of OFL,<sup>47</sup> which was instituted just prior to the November 2004 presidential election, is to “detect, deter, and disrupt terror operations.”<sup>48</sup> OFL is a covert program, the existence of which was discovered through a Freedom of Information Act lawsuit filed by the American-Arab Anti-Discrimination Committee and the Yale Law School National Litigation Project.<sup>49</sup>

According to the 2009 ACLU/Rights Working Group report, data regarding OFL obtained from the Department of Homeland Security show that:

*an astounding seventy-nine percent of the targets investigated were immigrants from Muslim*

*majority countries. Moreover, foreign nationals from Muslim-majority countries were 1,280 times more likely to be targeted than similarly situated individuals from other countries. Incredibly, not even one terrorism-related conviction resulted from the interviews conducted under this program. What did result, however, was an intense chilling effect on the free speech and association rights of the Muslim, Arab and South Asian communities targeted in advance of an already contentious presidential election.<sup>50</sup>*

Lists of individuals who registered under NSEERS were apparently used to select candidates for investigation in OFL.<sup>51</sup> Inasmuch as the overwhelming majority of those selected were Muslims, OFL is a clear example of a federal program that involves racial profiling. Moreover, because OFL has resulted in no terror-related convictions, the program is also a clear example of how racial profiling uses up valuable law enforcement resources yet fails to make our nation safer.<sup>52</sup>

Although Arabs and Muslims, and those presumed to be Arabs or Muslims based on their appearance, have since 9/11 been targeted by law enforcement authorities in their homes, at work, and while driving or walking,<sup>53</sup> airports and border crossings have become especially daunting. One reason for this is a wide-ranging and intrusive Customs and Border Patrol (CBP) guidance issued in July 2008 that states, “in the course of a border search, and *absent individualized suspicion*, officers can review and analyze the information transported by any individual attempting to enter . . . the United States.” (Emphasis added)<sup>54</sup> In addition, the standard to copy documents belonging to a person seeking to enter the U.S. was lowered from a “probable cause” to a “reasonable suspicion” standard.<sup>55</sup> Operating under such a broad and subjective guidance, border agents frequently stop Muslims, Arabs, and South Asians for extensive questioning about their families, faith, political opinions, and other private matters, and subject them to intrusive searches. Often, their cell phones, laptops, personal papers and books are taken and reviewed.

The FBI’s Terrorist Screening Center (TSC) maintains a list of every person who, according to the U.S. government, has “any nexus” to terrorism.<sup>56</sup> Because of misidentification (*i.e.*, mistaking non-listed persons for listed persons) and over-classification (*i.e.*, assigning listed persons a classification that makes them appear dangerous when they are not), this defective “watch-list” causes many problems for Muslims, Arabs, and South Asians seeking to enter the United States, including those who are U.S. citizens.

The case of Zabarria Reed, a U.S. citizen, Gulf War veteran, 20-year member of the National Guard, and firefighter, illustrates the problem. Trying to reenter the U.S. from Canada where he travels to visit family, Reed is frequently detained, searched, and interrogated about his friends, politics, and reasons for converting to Islam. Officials have handcuffed Reed in front of his children, pointed weapons at him, and denied him counsel.<sup>57</sup>

In 2005, a lawsuit—*Rahman v. Chertoff*—was filed in federal district court in Illinois by nine U.S. citizens and one lawful permanent resident, none of whom had any connection to terrorist activity.<sup>58</sup> The plaintiffs—all of whom are of South Asian or Middle Eastern descent—alleged that they were repeatedly detained, interrogated, and humiliated when attempting to re-enter the U.S. because their names were wrongly on the watch-list, despite the fact that they were law abiding citizens who were always cleared for re-entry into the U.S. after these recurring and punitive detentions.<sup>59</sup>

In May 2010, the court dismissed the case, finding that almost all of the disputed detentions were “routine,” meaning that border guards needed no suspicion at all to undertake various intrusions such as pat-down frisks and handcuffing for a brief time.<sup>60</sup> Further, the court held that where the stops were not routine, the detentions, frisks, and handcuffings were justified by the placement of the individuals on the TSC’s database—even when the listing may have been a mistake.<sup>61</sup>

Notwithstanding the adverse decision in the *Rahman* case, and the continuation of these practices on a national level, it is important to note that there have been certain positive changes in government policy since 2005. Specifically, a standard of “reasonable suspicion” is now used before a name can be added to the TSC’s database, which marks a sharp departure from the essentially “standardless” policy previously in effect.<sup>62</sup>

Individuals wearing Sikh turbans or Muslim head coverings are also profiled for higher scrutiny at airports. In response to criticism from Sikh organizations, the Transportation Security Administration (TSA) recently revised its operating procedure for screening head coverings at airports. The current procedure provides that:

*All members of the traveling public are permitted to wear head coverings (whether religious or not) through the security checkpoints. The new standard procedures subject all persons wearing head coverings to the possibility of additional security screening, which may include a pat-down search of the head covering. Individuals*

*may be referred for additional screening if the security officer cannot reasonably determine that the head area is free of a detectable threat item. If the issue cannot be resolved through a pat-down search, the individual will be offered the opportunity to remove the head covering in a private screening area.*<sup>63</sup>

Despite this new procedure, and TSA’s assurance that in implementing it “TSA does not conduct ethnic or religious profiling, and employs multiple checks and balances to ensure profiling does not happen,”<sup>64</sup> Sikh travelers report that they continue to be profiled and subject to abuse at airports.<sup>65</sup>

Amardeep Singh, director of programs for the Sikh Coalition and a second-generation American, recounted the following experience in his June 2010 testimony before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee:

*Two months ago, my family and I were coming back to the United States from a family vacation in Playa Del Carmen, Mexico. At Fort Lauderdale Airport, not only was I subjected to extra screening, but so was [my 18 month-old son Azaad]. I was sadly forced to take my son, Azaad, into the infamous glass box so that he could [be] patted down. He cried while I held him. He did not know who that stranger was who was patting him down. His bag was also thoroughly searched. His Elmo book number one was searched. His Elmo book number two was searched. His mini-mail truck was searched. The time spent waiting for me to grab him was wasted time. The time spent going through his baby books was wasted time. I am not sure what I am going to tell him when he is old enough and asks why his father and grandfather and soon him—Americans all three—are constantly stopped by the TSA 100% of the time at some airports.*<sup>66</sup>

## C. Immigration Law Enforcement

### 1. 287(g) and Other Federal Programs

The federal government has shifted significant responsibility for the enforcement of civil immigration laws to state and local law enforcement authorities. The Immigration and Customs Enforcement agency (ICE) in the U.S. Department of Homeland Security (DHS), which is the agency responsible for enforcing federal immigration laws, has done this through Agreements of Cooperation in Communities to Enhance Safety and

Security (known as ICE ACCESS programs). Most notable among these programs is the 287(g) program, so named for its statutory source, Chapter 287(g) of the Immigration and Nationality Act.<sup>67</sup>

The 287(g) program allows state and local law enforcement authorities to enter into a Memorandum of Agreement (MOA) with DHS that enables them to perform limited immigration enforcement activities, provided there is supervision and training by ICE.<sup>68</sup> The MOAs allow ICE to suspend or revoke the delegated authority at any time.<sup>69</sup> As of June 2009, a total of 66 287(g) MOAs had been signed in 23 states.<sup>70</sup> Funding for the 287(g) program has increased significantly on an annual basis since fiscal year 2006, when \$5 million was allocated for the program, to \$68 million in fiscal year 2010.<sup>71</sup>

Chapter 287(g) was added to the Immigration and Nationality Act in 1996, at a time when the U.S. Department of Justice (DOJ) recognized no inherent authority for state and local law enforcement authorities to enforce federal immigration laws.<sup>72</sup> A 2002 opinion from the DOJ Office of Legal Counsel (OLC), however, reversed that earlier position, and concluded that state and local law enforcement authorities do have such inherent authority.<sup>73</sup>

The stated purpose of the 287(g) program is to pursue undocumented immigrants suspected of committing serious crimes, “giving [state and local] law enforcement the tools to identify and remove dangerous criminal aliens.”<sup>74</sup> A 2007 ICE factsheet describing the 287(g) program states that it is

*not designed to allow state and local agencies to perform random street operations. It is not designed to impact issues such as excessive occupancy and day laborer activities ... it is designed to identify individuals for potential removal, who pose a threat to public safety, as a result of an arrest and/or conviction for state crimes. It does not impact traffic offenses such as driving without a license unless the offense leads to an arrest ... Officers can only use their 287(g) authority when dealing with persons suspected of committing state crimes and whose identity is in question or are suspected of being an illegal alien.*<sup>75</sup>

Unfortunately, these clear statements of intent have not guided the operation of the 287(g) program. Combined with the 2002 OLC “inherent authority” opinion, the program has been used by state and local

law enforcement authorities to stop, detain, question, and otherwise target individual Hispanics and entire Hispanic communities in a broad way to enforce federal immigration laws, thus racially profiling vast numbers of Hispanics—most of whom are U.S. citizens or legal residents—as suspected undocumented immigrants.

In New Jersey, a wide-ranging study found that despite a 2007 directive issued by the state attorney general that limited police to questioning about immigration status only those individuals arrested for indictable offenses or driving while intoxicated, officers routinely ignored these limitations, stopping and questioning tens of thousands of Hispanic motorists, pedestrians, passengers, and others who had committed no crime. During the six-month period following issuance of the directive, police referred 10,000 individuals who they believed were undocumented to ICE. Some of those turned over to ICE were crime victims. Others were jailed for days without charges. Many of those referred to ICE turned out to be legal residents or U.S. citizens. Only 1,417 individuals were charged with immigration offenses by the federal government. “The data suggest a disturbing trend towards racial profiling by the New Jersey police,” said Bassina Farenblum, a lawyer for the Center for Social Justice at Seton Hall University Law School, which conducted the study.<sup>76</sup>

A familiar and troubling pattern has emerged in some jurisdictions operating under 287(g) MOAs pursuant to which local police make traffic stops of Hispanic drivers for minor infractions, if any, and then arrest the driver rather than issue the customary citation. Once an arrest is made, a federal background check can be conducted to determine if the driver is an undocumented immigrant.

The case of Juanna Villegas provides an example. In Nashville, Tennessee, on July 3, 2008, Villegas was pulled over for what the local police termed “careless driving,” another potentially subjective pretext for “Driving While Black or Brown” traffic stops. Villegas, who was nine months pregnant, did not have a driver’s license. Instead of receiving a citation, as is customary in Tennessee in such cases, she was arrested and taken to jail. The arrest of Villegas then enabled a federal immigration officer, operating under a 287(g) MOA with local authorities, to conduct a background check on her. He determined that Villegas was an undocumented immigrant who had previously been deported in 1996, but had no other criminal record. The county authorities then declared Mrs. Villegas a medium security prisoner and jailed her. Upon going into labor, she was handcuffed and transported to a hospital, where her leg

was cuffed to the hospital bed until her labor reached the final stages and she gave birth. She was not permitted to see or speak to her husband, who came to pick up the baby from the hospital as his wife was returned to jail. Hospital personnel offered Villegas a breast pump, but she was not permitted to take it back to her cell. Villegas's breasts then became infected and her newborn son developed jaundice. Five days after her arrest, she pleaded guilty to driving without a license and was sentenced to time served. Villegas was then transferred to the jurisdiction of ICE, which began deportation proceedings, but immediately released her in accord with its policy against separating babies from their nursing mothers.<sup>77</sup>

Local law enforcement authorities now profile entire communities as they assume duties of immigration enforcement under 287(g) MOAs. Nowhere is there a clearer illustration of the abuses inherent in such community-wide policing actions than in Maricopa County, Arizona, where Sheriff Joe Arpaio has received national attention for his aggressive "Driving While Brown" profiling of Hispanic drivers, as well as his sweeps of Hispanic communities. In the most notorious of these neighborhood sweeps, Arpaio sent more than 100 deputies, a volunteer posse, and a helicopter into a community of approximately 6,000 Yaqui Indians and Hispanics outside Phoenix. For two days, this outsized police presence stopped residents on the street, chased them into their homes, and generally terrorized community members so completely that many will not come out of their homes if they see a sheriff's patrol car. By the time the operation had ended, a total of only nine undocumented immigrants had been arrested.<sup>78</sup>

Arpaio has also led raids on area businesses that employ Hispanics, causing a substantial number of U.S. citizens and lawful residents to be stopped, detained, and questioned. As a result, employers are reluctant to hire U.S. citizens or lawful residents who happen to be Hispanic because of the risk of disruption to their businesses that the sheriff's raids may cause.<sup>79</sup>

Responding to outcries about such abuses, the Obama administration revised its 287(g) MOA with the Maricopa County Sheriff's Office (MCSO) to restrict it to conducting background checks only of prisoners in local jails. Perversely, such an arrangement could lead to more arrests of Hispanics for traffic violations that customarily merit only a summons. Perhaps previewing his adoption of this tactic after his 287(g) authority had been restricted, Arpaio commented, "[t]hey took away my authority on the streets. That doesn't matter because I will still pursue illegals on the streets of Maricopa

utilizing the authority I have as the elected official."<sup>80</sup>

Like Arpaio, Sheriff Tom Helder of Washington County, Arkansas, seemed unconcerned about racial profiling and the potential for U.S. citizens and lawful residents to be caught up in his 287(g) dragnets. "There's going to be collateral damage," said Helder. "If there's 19 people in there who could or could not be here illegally, they are going to be checked. Although those people might not be conducting criminal activity, they are going to get slammed up in the middle of an investigation."<sup>81</sup>

In North Carolina, Alamance County Sheriff's Office personnel assured Hispanic residents that the county's 287(g) authority would only be used to deport undocumented immigrants who committed violent crimes. Instead, of 170 roadblocks set up to spot-check licenses, 30 were established outside Buckhorn market on a Saturday or Sunday morning, the customary time when Hispanic residents shop there by the hundreds. Police have also arrested Hispanics at schools, libraries, and sporting events. Five immigrants were arrested for fishing without a license, rarely an offense resulting in an arrest, and then deported. Perhaps this profiling of entire communities should not be surprising in a county where Sheriff Terry Johnson declared about Mexicans, "[t]heir values are a lot different—their morals—than what we have here. In Mexico, there's nothing wrong with having sex with a 12, 13 year-old girl ... They do a lot of drinking down in Mexico."<sup>82</sup>

Although the ICE factsheet provides that 287(g) programs are not intended to be used to impact "day laborer activities" or "traffic offenses," that prohibition is not observed. A 2009 report by Justice Strategies found that 287(g) MOAs were being used in Maricopa County, Arizona, to do "crime suppression sweeps" of day laborer sites.<sup>83</sup> And in a study of the implementation of 287(g) MOAs in North Carolina, the state ACLU and the University of North Carolina Immigration and Human Rights Policy Clinic found that a majority of arrests in several counties came as a result of traffic stops, not criminal acts.<sup>84</sup>

Enforcement of federal immigration laws by local law enforcement authorities under 287(g) MOAs is inherently problematic. As the ACLU explained in 2009 testimony before Congress:

*Because a person is not visibly identifiable as being undocumented, the basic problem with local police enforcing immigration law is that police officers who are often not adequately*



*trained, and in some cases not trained at all, in federal immigration enforcement will improperly rely on race or ethnicity as a proxy for undocumented status. In 287(g) jurisdictions, for example, state or local police with minimal training in immigration law are put on the street with a mandate to arrest “illegal aliens.” The predictable and inevitable result is that any person who looks or sounds “foreign” is more likely to be stopped by police, and more likely to be arrested (rather than warned or cited or simply let go) when stopped.<sup>85</sup>*

As indicated, the stated purpose of the 287(g) program is to give state and local law enforcement authorities the tools to bring in undocumented immigrants who have engaged in serious criminal offenses, and supporters of the program will misleadingly cite cases of dangerous or violent criminals who are also in this country without authorization. Sheriff Charles Jenkins of Frederick County, Maryland, made this point in written testimony that he submitted to the House Homeland Security Committee in March 2009: “Some of the most serious offenses in which criminal aliens have been arrested as offenders and identified include: Attempted 2<sup>nd</sup> Degree Murder, 2<sup>nd</sup> Degree Rape, Armed Robbery, 1<sup>st</sup> Degree Assault, Child Abuse, Burglary, and Possessing Counterfeit U.S. Currency.”<sup>86</sup> But these comments fail to mention that state and local law enforcement authorities can already arrest anyone suspected of committing these offenses without 287(g) authority from ICE, since the authority to arrest is based on the act and not the actor’s immigration status. Giving police the ability to inquire into a person’s immigration status in no way enhances their ability to meet the goals of law enforcement.

In March 2010, the Department of Homeland Security (DHS) Office of Inspector General issued a comprehensive 87-page report assessing the 287(g) program (OIG report).<sup>87</sup> This Report is highly critical of the operation of the program:

*We observed instances in which Immigration and Customs Enforcement and participating law enforcement agencies were not operating in compliance with the terms of the agreements. We also noted several areas in which Immigration and Customs Enforcement had not instituted controls to promote effective program operations and address related risks. Immigration and Customs Enforcement needs to (1) establish appropriate performance measures and targets to determine whether program results are aligned with program goals; (2) develop guidance for*

*supervising 287(g) officers and activities; (3) enhance overall 287(g) program oversight; (4) strengthen the review and selection process for law enforcement agencies requesting to participate in the program; (5) establish data collection and reporting requirements to address civil rights and civil liberties concerns; (6) improve 287(g) training programs; (7) increase access to and accuracy of 287(g) program information provided to the public; and (8) standardize 287(g) officers’ access to Department of Homeland Security information systems.<sup>88</sup>*

With regard to civil rights violations generally, and racial profiling specifically, the OIG report notes that those critical of the 287(g) program “have charged that ICE entered into agreements with [law enforcement authorities] that have checkered civil rights records, and that by doing so, ICE has increased the likelihood of racial profiling and other civil rights violations.”<sup>89</sup> Crediting these criticisms, the OIG report concludes that “ICE needs to direct increased attention to the civil rights and civil liberties records of current and prospective 287(g) jurisdictions,” and “must include consideration of civil rights and civil liberties factors in the site selection and MOA review process.”<sup>90</sup>

Although perhaps the most well-known, the 287(g) program is not the only ICE-state/local law enforcement authority collaboration program that raises concerns about racial profiling. As the ACLU noted in its 2009 Congressional testimony:

*The problem of racial profiling, however, is not limited to 287(g) field models ....the federal government uses an array of other agreements to encourage local police to enforce immigration law. Racial profiling concerns therefore are equally present under jail-model MOUs or other jail-screening programs. Officers, for example, may selectively screen in the jails only those arrestees who appear to be Latino or have Spanish surnames. Police officers may also be motivated to target Latinos for selective or pretextual arrests in order to run them through the booking process and attempt to identify undocumented immigrants among them.<sup>91</sup>*

Included among the problematic “other jail-screening programs” is the Criminal Alien Program (CAP), which involves an immigration screening process within federal, state, and local correctional facilities to identify and place immigration holds on “criminal aliens to

process them for removal before they are released to the general public.”<sup>92</sup> Although CAP is intended to target “illegal aliens with criminal records who pose a threat to public safety,”<sup>93</sup> a recent study by the Earl Warren Institute on Race, Ethnicity and Diversity at the University of California, Berkeley School of Law, indicates that the program is not effective in prioritizing the arrest and removal of individuals who commit dangerous or violent crimes. The study, which examined the CAP program in Irving, Texas, found that felony charges accounted for only two percent of the immigration holds, while 98 percent were issued for misdemeanor offenses.<sup>94</sup>

Another ICE-state/local law enforcement authority collaboration program that raises concerns about racial profiling is the Secure Communities program. This ICE program, which was launched in 2008, allows local authorities to run fingerprint checks of arrestees during the booking process against DHS databases, not just FBI databases. According to ICE, “[t]he technology enables local Law Enforcement Agencies (LEAs) to initiate an integrated records check of criminal history and immigration status for individuals in their custody ... when there is a fingerprint match in both systems, ICE and the LEA that encountered the individual are automatically notified, in parallel.”<sup>95</sup> Local LEAs can apparently run fingerprint checks of any person in their custody, thus making the Secure Communities program ripe for abuse. With the program in place, police may have a strong incentive “to arrest people based on racial or ethnic profiling or for pretextual reasons so that immigration status can be checked.”<sup>96</sup>

## **2. State Initiatives: Arizona’s S.B. 1070**

In addition to federal programs such as those discussed above that incentivize state and local law enforcement authorities to engage in racial profiling, federal inaction on comprehensive immigration reform has prompted state lawmakers to undertake initiatives of their own. Many of these state initiatives have further encouraged racial profiling.

During the first half of 2010, 314 laws and resolutions were enacted across the country, representing a 21 percent increase over the same period in 2009, as states tightened restrictions on hiring undocumented immigrants, instituted stringent ID requirements to receive public benefits, and increased their participation in programs aimed at removing persons who are in the country without authorization.<sup>97</sup> But no state law has been as sweeping or controversial as Arizona’s S.B. 1070—the “Support our Law Enforcement

and Safe Neighborhoods Act.” The stated purpose of S.B. 1070, which was passed in April 2010, is to “discourage and deter” the presence of unauthorized immigrants in Arizona.<sup>98</sup> S.B. 1070 turns mere civil infractions of federal immigration law, such as not carrying immigration registration papers, into state crimes, and requires police to inquire about the legal status of individuals if “reasonable suspicion” exists during arrests or even traffic stops. The law also gives private citizens the right to sue Arizona law enforcement authorities if they believe that the law is not being fully enforced. S.B. 1070 has provided a template for other states, and within a few months of its enactment, clone bills were being considered in more than 20 states around the country.<sup>99</sup>

Opponents of S.B. 1070 contend that the law will lead to more racial profiling, increase community mistrust of the police, and strain already limited law enforcement resources. The Arizona Association of Chiefs of Police has opposed the law, stating that it will “negatively affect the ability of law enforcement agencies across the state to fulfill their many responsibilities in a timely manner.”<sup>100</sup> And President Obama has criticized the law, calling it a “misguided” effort to deal with a national problem.<sup>101</sup>

In May 2010, a group of civil rights organizations filed a class action lawsuit in federal district court in Arizona challenging the constitutionality of S.B. 1070 on the ground that it is “preempted” by federal law.<sup>102</sup> The U.S. Department of Justice (DOJ) filed a similar lawsuit in July.<sup>103</sup>

On July 28, one day before S.B. 1070 was scheduled to go into effect, the court issued a preliminary injunction in the DOJ’s lawsuit, enjoining implementation of certain key provisions of the law, including those that raised the most significant concerns regarding racial profiling.<sup>104</sup> The state appealed the preliminary injunction to the U.S. Court of Appeals for the Ninth Circuit, and, as of the date of this publication, the Ninth Circuit had not issued its decision.<sup>105</sup>

## **D. The Department of Justice’s 2003 Guidance**

As evidence of its bona fides in attempting to eliminate racial profiling by federal law enforcement authorities, the Bush administration relied heavily on the DOJ’s June 2003 “Guidance Regarding the Use by Federal Law Enforcement Agencies” (2003 Guidance), which was developed in response to a directive from then-Attorney-General John Ashcroft “to develop guidance for Federal officials to ensure an end to racial profiling

in law enforcement.”<sup>106</sup> But this reliance on the 2003 Guidance was misplaced.

At the time of its issuance, The Leadership Conference on Civil and Human Rights—reflecting the views of the broader civil and human rights community—referred to the 2003 Guidance as a “useful first step,” but emphasized that “it falls far short of what is needed to fulfill the president’s promise [in his February 27, 2001, address to Congress] to end racial profiling in America.”<sup>107</sup> As Wade Henderson, then-executive director (and currently president and CEO) of The Leadership Conference explained:

*The guidance falls far short of what is needed in four important ways. First, it does not apply to state and local police, who are more likely than federal agents to engage in routine law enforcement activities, such as traffic and pedestrian stops. Second, the guidance includes no mechanism for enforcement of the new policy, leaving victims of profiling without a remedy. Third, there is no requirement of data collection*

*to monitor the government’s progress toward eliminating profiling. And finally, the guidance includes broad and vaguely worded ‘national security’ and ‘border’ exemptions that could swallow the rule. Many in the Latino, Arab, Muslim, African, and South Asian communities will remain targets of unjustified law enforcement action based on race or ethnicity.*<sup>108</sup>

Despite these and other criticisms made by The Leadership Conference and its allies—including the failure of the 2003 Guidance to prohibit profiling on the basis of national origin or religion—the 2003 Guidance has to date remained unchanged. In his November 18, 2009, appearance before the Senate Committee on the Judiciary, Attorney General Eric Holder stated that “[i]n the area of racial profiling, the Department’s [June 2003 Guidance] has been the subject of some criticism,” and announced that he had “initiated an internal review to evaluate the 2003 Guidance and to recommend any changes that may be warranted.”<sup>109</sup> That review is presently ongoing.



## *IV. The Case Against Racial Profiling*

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### **A. The Assumptions Underlying Racial Profiling**

Defenders of racial profiling argue that it is a rational response to patterns of criminal behavior.

In the context of street-level crime, this argument rests on the assumption that minorities—used in this context to refer to African Americans and Hispanics—commit most drug-related and other street-level crimes, and that many, or most, street-level criminals are in turn African Americans and Hispanics. Thus, the argument continues, it is a sensible use of law enforcement resources to target African Americans and Hispanics in this context. This assumption is false.

The empirical data presented in Chapter III (A) of this report reveal that “hit rates” (*i.e.*, the discovery of contraband or evidence of other illegal conduct) among African Americans and Hispanics stopped and searched by the police—whether driving or walking—are lower than or similar to hit rates for Whites who are stopped and searched. These hit rate statistics render implausible any defense of racial profiling on the ground that African Americans and Hispanics commit more drug-related or other street-level crimes than Whites.<sup>110</sup>

The basic assumption underlying racial profiling in the counterterrorism context, predominantly at airports and border crossings, is the same as that underlying the practice in the street-level crime context—*i.e.*, that a particular crime (in this context, terrorism) is most likely to be committed by members of a particular racial, ethnic or religious group (in this context, Arabs and Muslims), and that members of that group are, in general, more likely than non-members to be involved in that type of criminal activity. As in the street-level crime context, this assumption is false.

While all the men involved in the 9/11 hijackings were Arab nationals from Muslim countries, terrorist acts are not necessarily perpetrated by Arabs or Muslims. Richard Reid, who on December 22, 2001, tried to ignite an explosive device on a trans-Atlantic flight, was a British citizen of Jamaican ancestry. Prior to 9/11, the bloodiest act of terrorism on U.S. soil was perpetrated by Timothy McVeigh, a White American citizen. And non-Arabs such as John Walker Lindh can be found in the ranks of the Taliban, al Qaeda, and other terrorist organizations. As former U.S. Department of Homeland Security (DHS) Secretary Michael Chertoff explained following the December 2001 bomb attempt by Richard Reid:

*Well, the problem is that the profile many people think they have of what a terrorist is doesn't fit the reality. Actually, this individual probably does not fit the profile that most people assume is the terrorist who comes from either South Asia or an Arab country. Richard Reid didn't fit that profile. Some of the bombers or would-be bombers in the plots that were foiled in Great Britain don't fit the profile. And in fact, one of the things the enemy does is to deliberately recruit people who are Western in background or in appearance, so that they can slip by people who might be stereotyping.<sup>111</sup>*

The assumption that underlies the use of racial profiling in the effort to enforce immigration laws is the same as that which underlies its use in the street-level crime and counterterrorism contexts—*i.e.*, that most of the people who are in this country without authorization are members of a particular racial or ethnic group, and that members of that particular racial or ethnic

group are therefore more likely to be in this country without documentation than are non-members. Although, since 9/11, Arabs and Muslims have been subjected to selective and unfair enforcement of the immigration laws, racial profiling in the immigration context traditionally has been, and remains today, aimed primarily at Hispanics.

Although the Supreme Court has held that race, ethnicity, and national origin cannot be the *sole* factors giving rise to a law enforcement stop for suspected immigration law violations,<sup>112</sup> the Court has indicated that there may be certain situations in which it is constitutional for a law enforcement stop to be *partially* based on such considerations. Specifically, in *United States v. Martinez-Fuente* (1976), which involved fixed inspection checkpoints near the Mexican border, the Court concluded that the population demographics were such as to allow law enforcement stops to be partially based on race.<sup>113</sup>

Because racial profiling in the immigration context may be constitutionally permissible under certain limited circumstances does not in any way justify its use. Even if the population demographics in a particular community make it likely that most undocumented immigrants are Hispanic, it does not follow that many, or most, Hispanics in that community are undocumented immigrants. To the contrary, the overwhelming majority of Hispanics in the United States are U.S. citizens or legal residents.<sup>114</sup> And the adverse consequences of the use of racial profiling for the individuals who are subject to it, and for effective law enforcement—consequences that are discussed below—argue forcefully against the use of any form of racial profiling in any context.

## **B. The Consequences of Racial Profiling**

Racial profiling forces individuals who have engaged in no wrongdoing to endure the burdens of law enforcement in order to prove their innocence. For each criminal, terrorist, or undocumented immigrant apprehended through racial profiling, many more law-abiding minorities are treated through profiling as if they are criminals, terrorists, or undocumented immigrants.

The 2009 experience of Elvis Ware, a 36 year-old African-American veteran of Operation Desert Storm, is illustrative of the humiliation and stress experienced by a person who has been a victim of racial profiling. In 2009, police in Detroit, Michigan, conducted a stop-and-frisk of Ware. While in a public parking lot, one officer “shoved his bare hand down Ware’s pants and squeezed his genitals and then attempted to stick a bare finger into Ware’s anus.” Other young men of African

descent report that the same two officers who stopped Ware conducted similar outrageous and inappropriate searches on them without warrants, probable cause, or reasonable suspicion. In accepting a settlement from the city of Detroit that included monetary damages, Ware said, “I not only wanted justice for myself, but I wanted it for others who were treated this way.... If, by coming forward, I prevent just one person from having to go through this, I have succeeded.”<sup>115</sup>

Ware’s humiliation is not unique. Texas State Judge Gillberto Hinajosa, the subject of immigration-related profiling on many occasions, has stated that Southern Texas “feels like occupied territory ... It does not feel like we’re in the United States of America.”<sup>116</sup> Such alienation is a common consequence of being profiled.

Exposure to racial profiling has behavioral as well as emotional consequences. Many minorities who are entirely innocent of any wrongdoing choose to drive in certain automobiles and on certain routes, or to dress in certain clothes, to avoid drawing the attention of police who might otherwise profile and stop them.<sup>117</sup> Or they choose to live in areas where they will not stand out as much, thereby reinforcing patterns of residential segregation.<sup>118</sup>

An example of behavioral changes in an effort to avoid racial profiling in the counterterrorism context is provided by Khaled Saffuri. Saffuri, a Lebanese man living in Great Falls, Virginia, has said that he shaves closely and wears a suit when he flies, then remains silent during flights and avoids using the aircraft’s bathroom. Sometimes he avoids flying altogether in favor of long drives to his destination.<sup>119</sup>

Defenders of racial profiling argue that profiling is necessary and useful in the effort by law enforcement authorities to fight street-crime, combat terrorism, and enforce the nation’s immigration laws. The opposite is true: racial profiling is in all contexts a flawed law enforcement tactic that may increase the number of people who are brought through the legal system, but that actually decreases the hit rate for catching criminals, terrorists, or undocumented immigrants. There are two primary reasons for this.

To begin with, racial profiling is a tactic that diverts and misuses precious law enforcement resources. This became clear in 1998 when the U.S. Customs Service responded to a series of discrimination complaints by eliminating the use of race in its investigations and focusing solely on suspect behavior. A study found that

this policy shift led to an almost 300 percent increase in the discovery of contraband or illegal activity.<sup>120</sup>

Consider the inefficient allocation of scarce police resources in New Jersey when, as described in Chapter III (C) of this report local law enforcement authorities stopped tens of thousands of Hispanic motorists, pedestrians, passengers, and others in a six-month period. Just 1,417 of the tens of thousands stopped were ultimately charged with immigration offenses by the federal government.<sup>121</sup>

Or, consider the April 2008 assault by more than 100 Maricopa County, Arizona deputies, a volunteer posse, and a helicopter on a small town of 6,000 Yaqui Indians and Hispanics outside of Phoenix, as described in Chapter III (C) above. After terrorizing the residents for two days, stopping residents and chasing them into their homes to conduct background checks, Sheriff Joe Arpaio's operation resulted in the arrest of just nine undocumented immigrants.<sup>122</sup>

Turning to the counterterrorism context, the use of racial profiling—and the focus on the many Arabs, Muslims, Sikhs, and other South Asians who pose no threat to national security—diverts law enforcement resources away from investigations of individuals who have been linked to terrorist activity by specific and credible evidence.

A memorandum circulated to U.S. law enforcement agents worldwide by a group of senior law enforcement officials in October 2002 makes clear that race is an ineffective measure of an individual's terrorist intentions. The memorandum, entitled "Assessing Behaviors," emphasized that focusing on the racial characteristics of individuals was a waste of law enforcement resources and might cause law enforcement officials to ignore suspicious behavior, past or present, by someone who did not fit a racial profile.<sup>123</sup> One of the authors of the report noted: "Fundamentally, believing that you can achieve safety by looking at characteristics instead of behaviors is silly. If your goal is preventing attacks ... you want your eyes and ears looking for pre-attack behaviors, not characteristics."<sup>124</sup>

In sum, ending racial profiling will result in the more efficient deployment of law enforcement resources. As David Harris, a professor of law at the University of Pittsburgh Law School and a recognized expert on racial profiling, explained in his June 2010 testimony before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the U.S. House of Representatives Judiciary Committee:

*From those who advocate racial profiling, one frequently hears what we may call the profiling hypothesis: we know who the criminals are and what they look like, because we know what societal groups they come from; therefore using racial or ethnic appearance will allow police to better target their enforcement efforts; and when police target those efforts, they will be more effective, because they will get higher rates of "hits"—finding guns, drugs, criminals—than when they do not use racial targeting ... [T]he data do not support the profiling hypothesis; the data contradict it. It is not, in fact, an effective crime-fighting strategy.*

*The reasons for these results originate with what profiling is supposed to be: a predictive tool that increases the odds of police finding the "right" people to stop, question, or search. Using race or ethnic appearance as part of a description of a person seen by a witness is absolutely fine, because that kind of information helps police identify a particular individual. On the other hand, using race as a predictor of criminal behavior, in situations in which we do not yet know about the criminal conduct—for example, when we wonder which of the thousands of vehicles on a busy highway is loaded with drugs, or which passenger among tens of thousands in an airport may be trying to smuggle a weapon onto an airplane—throws police work off. That is because using race or ethnic appearance as a short cut takes the eye of law enforcement off of what really counts. And what really matters in finding as-yet-unknown criminal conduct is the close observation of behavior. Paying attention to race as a way to more easily figure out who is worthy of extra police attention takes police attention off of behavior and focuses it on appearance, which predicts nothing.<sup>125</sup>*

An additional reason why racial profiling is not an effective law enforcement tactic is that it destroys the relationship between local law enforcement authorities and the communities that they serve. This is particularly true with regard to the enforcement of federal immigration laws by local police under the 287(g) program and other ICE ACCESS programs.

When local police function as rogue immigration agents, fear—as opposed to trust—is created in Hispanic and other immigrant communities. U.S. born children with parents who are either U.S. citizens or lawful residents

may avoid coming in contact with police or other public officials (including school officials) out of concern that they, their parents, or family members will be targeted by local law enforcement authorities for a check of their immigration status. Victims of domestic violence who are immigrants may fear interacting with the police because of their immigration status, or the status of their families, or even their abusers, and the consequences of that fear can leave them in dangerous and violent situations. Respect and trust between law enforcement authorities and immigrant communities are essential to successful police work.

Racial profiling has a destructive impact on minority communities. How many community members will step up to be “Good Samaritans” and report crimes or accidents, or offer help to a victim until the police arrive, if the risk of doing the good deed is an interaction with a police officer that may result in a background check or challenge to immigration status? Perversely, the ultimate result of racial profiling in minority communities is precisely the opposite of the goal of effective local law enforcement. It is for this reason that many police executives and police organizations have expressed concern that the enforcement of the immigration laws by local law enforcement authorities has a “negative overall impact on public safety.”<sup>126</sup>

The use of racial profiling in the counterterrorism context—as in the immigration context—alienates the very people that federal authorities have deemed instrumental in the anti-terrorism fight. Arab and Muslim communities may yield useful information to those fighting terrorism. Arabs and Arab Americans also offer the government an important source of Arabic speakers and translators. The singling out of Arabs and Muslims for investigation regardless of whether any credible evidence links them to terrorism simply alienates these individuals and compromises the anti-terrorism effort. In particular, to the extent that federal authorities use the anti-terrorism effort as a pretext for detaining or deporting immigration law violators, individuals who might have information that is useful in the fight against terrorism may be reluctant to come forward. For a special registration program such as NSEERS, those individuals will choose not to register, thereby defeating the very purpose of the program.<sup>127</sup>

Professor Harris made this point in his June 2010 congressional testimony, when he stated that racial profiling “drives a wedge between police and those they serve, and this cuts off the police officer from

the most important thing the officer needs to succeed: information.”<sup>128</sup> As he explained:

*For more than two decades, the mantra of successful local law enforcement has been community policing. One hears about community policing efforts in every state. The phrase means different things in different police agencies. But wherever community policing really takes root, it comes down to one central principle: the police and the community must work together to create and maintain real and lasting gains in public safety. Neither the police nor the public can make the streets safe by themselves; police work without public support will not do the whole job. The police and those they serve must have a real partnership, based on trust, dedicated to the common goal of suppressing crime and making the community a good place to live and work. The police have their law enforcement expertise and powers, but what the community brings to the police—information about what the real problems on the ground are, who the predators are, and what the community really wants—can only come from the public. Thus the relationship of trust between the public and the police always remains of paramount importance. This kind of partnership is difficult to build, but it is neither utopian nor unrealistic to strive for this kind of working relationship. In other words, this is not an effort to be politically correct or sensitive to the feelings of one or another group. Thus these trust-based partnerships are essential for public safety, and therefore well worth the effort to build.*

*When racial profiling becomes common practice in a law enforcement agency, all of this is put in jeopardy. When one group is targeted by police, this erodes the basic elements of the relationship police need to have with that group. It replaces trust with fear and suspicion. And fear and suspicion cut off the flow of communication. This is true whether the problem we face is drug dealers on the corner, or terrorism on our own soil. Information from the community is the one essential ingredient of any successful effort to get ahead of criminals or terrorists; using profiling against these communities is therefore counterproductive.<sup>129</sup>*

Because racial profiling diverts precious law enforcement resources and destroys the relationship between local law enforcement authorities and the

communities they serve, it is a flawed method of law enforcement in any context. But it is particularly ineffective in the counterterrorism context for two additional reasons.

First, even if one accepts the false assumption that terrorists are likely to be Arabs or Muslims, the application of the profile is fraught with error. The profile of a terrorist as an Arab or Muslim has been applied to individuals who are neither Arab nor Muslim (*e.g.*, Sikhs and other South Asians). Profiling of Arabs and Muslims amounts to selective enforcement of the law against anyone with a certain type of “swarthy” foreign-looking appearance even if they do not in fact fit the terrorist profile. The profile is then useless in fighting terrorism, as well as offensive to an ever-broadening category of persons.

Second, using racial profiling in the counterterrorism context is a classic example of refighting the last war. Al Qaeda and other terrorist organizations are pan-ethnic:

they include Asians, Anglos, and ethnic Europeans. They are also adaptive organizations that will learn how to use non-Arabs such as Richard Reid to carry out terrorists attacks, or to smuggle explosive devices onto planes in the luggage of innocent people. Chertoff, the former DHS secretary made this point when, in his statement following the bomb attempt by Reid, he observed that “one of the things the enemy does is to deliberately recruit people who are Western in background or in appearance so that they can slip by people who might be stereotyping.”<sup>130</sup> In short, the fact that the 9/11 hijackers were Arabs means little in predicting who the next terrorists will be. In a situation analogous to the one facing Arabs and Muslims today, the 10 individuals found to be spying for Japan during World War II were not Japanese or Asian, but Caucasian. They clearly did not fit the profile that caused America to order the internment of thousands of Japanese Americans.<sup>131</sup> Racial profiling in any case is a crude mechanism; against an enemy like al Qaeda, it is virtually useless.



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## *V. The End Racial Profiling Act of 2010*

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Before 9/11, polls showed that Americans of all races, ethnicities, and national origins considered racial profiling a widespread and unacceptable practice.<sup>132</sup> On June 6, 2001, Sen. Russell Feingold, D. Wis., and Rep. John Conyers, D. Mich., introduced the End Racial Profiling Act of 2001 (ERPA 2001) into the 107<sup>th</sup> Congress.<sup>133</sup> The bill had bipartisan support, and the enactment of a comprehensive federal anti-racial profiling statute seemed imminent. On 9/11, the consensus evaporated, and the Bush administration took no action to encourage Congress to pass ERPA 2001. The suggestion—which, as this report indicates, is fundamentally wrong—that racial profiling could not be addressed without compromising the counterterrorism effort, prevented any rational discussion of ending the practice, not only in that context, but in the street-level crime and immigration contexts as well. End Racial Profiling Acts were introduced into Congress in 2004, 2005, 2007, and 2009,<sup>134</sup> but Congress failed to enact legislation to ban the practice.

Looking toward the introduction of another End Racial Profiling Act, the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House of Representatives Committee on the Judiciary held a hearing in June 2010 on “Ending Racial Profiling: Necessary for Public Safety and the Protection of Civil Rights.” Shortly thereafter, on July 15, Conyers, chair of the Judiciary Committee, introduced into the 111<sup>th</sup> Congress H.R. 5748—the End Racial Profiling Act of 2010 (ERPA 2010).<sup>135</sup> The 111<sup>th</sup> Congress took no action on ERPA 2010, and it died with the adjournment of that Congress on December 22, 2010. But ERPA 2010 warrants continued attention because it contained all of the elements that are necessary for an effective federal anti-racial profiling statute and provides a template for action by the 112<sup>th</sup> Congress.

Those who advocate for a federal statute to end racial profiling agree that the centerpiece of any such statute should be an explicit and unqualified prohibition against use of the practice in all contexts, including the street-level crime, counterterrorism, and immigration law enforcement context. They further agree that, for purposes of this prohibition, the term “racial profiling” should be broadly defined to encompass at least race, ethnicity, national origin, and religion, and that law enforcement authorities should be prohibited from relying on these factors, to any extent, in deciding which individuals to investigate or subject to other law enforcement activities. There is agreement, moreover, that the prohibition should apply to law enforcement activities at the federal, state, and local levels, and that there should be a “private cause of action,” which would allow those who have been the victims of racial profiling to file a lawsuit to enforce the prohibition. The centerpiece of ERPA 2010 was a prohibition against racial profiling that met all of these criteria.

The first section of Title I of ERPA 2010 (PROHIBITION) provided as follows:

*No law enforcement agent or law enforcement agency shall engage in racial profiling.*

The statutory definitions of the terms used in the foregoing provision confirmed the broad reach of the prohibition. Thus, “law enforcement agency” meant

*any federal, state, local, or Indian tribal public agency engaged in the prevention, detection, or investigation of violations of criminal, immigration, or customs laws.*

And the definition of “racial profiling” was essentially

the same as that used in this report. The term was defined to mean:

*[T]he practice of a law enforcement agent or agency relying, to any degree, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except when there is trustworthy information, relevant to the locality and timeframe, that links a person of a particular race, ethnicity, national origin, or religion to an identified criminal incident or scheme.<sup>136</sup>*

With regard to remedy, ERPA 2010 provided that the United States or “an individual injured by racial profiling” may enforce the prohibition by filing an action “for declaratory or injunctive relief” in state or federal court against “any governmental body that employed any law enforcement agent” who engaged in racial profiling, the law enforcement agent in question, and anyone with supervisory authority over the agent. An individual plaintiff who prevailed in such a lawsuit could recover reasonable attorneys’ fees.<sup>137</sup>

Although the relief available to an individual plaintiff under ERPA 2010 did not include monetary damages, the limitation to declaratory or injunctive relief must be read in conjunction with the bill’s Savings Clause.<sup>138</sup> This provision preserved for plaintiffs all “legal or administrative remedies,” including damages, which they may have under Section 1983, Title VI of the Civil Rights Act of 1964, and certain other federal statutes.

In addition to its broad and unqualified prohibition against all forms of racial profiling, ERPA 2010 was responsive to other recommendations made by proponents of a federal statute, both at the June 2010 hearing before the subcommittee of the House Judiciary Committee and in other forums. Thus, for example, in his June 2010 testimony, Hilary O. Shelton, director of the NAACP’s Washington Bureau and senior vice president for advocacy and policy, outlined the provisions that he believed should be included in a federal anti-racial profiling statute. Emphasizing first and foremost the “need for a clear definition of what is racial profiling as well as an unambiguous and unequivocal ban on its use by all law enforcement officials,” Shelton continued as follows:

*Second, we need data collection to truly assess the extent of the problem. In simple terms, “in order to fix it, you must first measure it.” The only*

*way to move the discussion about racial profiling from rhetoric and accusation to a more rational dialogue and appropriate enforcement strategies is to collect the information that will either allay community concerns about the activities of the police or help communities ascertain the scope and magnitude of the problem. Furthermore, implementing a data collection system also sends a clear message to the entire police community, as well as to the larger community, that racial profiling is inconsistent with effective policing and equal protection.*

*If it is done right, data collection will also lead to the third element of an effective anti-racial profiling agenda: training. Law enforcement officials at all levels, from the unit commander to the desk sergeant to the cop-on-the-beat and of all jurisdictions, from federal agents to state and local police, should all be required to be able to not only identify racial profiling, but also to know of its short-comings and be able to put an end to it while increasing their effectiveness in protecting our communities and our Nation.<sup>139</sup>*

Shelton is not, of course, alone in recommending that a federal statute provide for data collection and training of law enforcement authorities at all levels. Similar recommendations were made by others who testified at the June 2010 hearing;<sup>140</sup> are included in a 2003 report by The Leadership Conference Education Fund and the 2009 report by the ACLU/Rights Working Group;<sup>141</sup> and provisions dealing with these matters were included in predecessor versions of ERPA 2010 tracing back to 2001.<sup>142</sup>

ERPA 2010 required federal law enforcement agencies to “include ... training on racial profiling issues as part of federal law enforcement training,” and provided for the “collection of data in accordance with the regulations issued by the Attorney General under [a later section of the bill].”<sup>143</sup> Similar requirements were imposed on state, local, and Indian tribal law enforcement authorities as a condition for receiving federal funding under specified federal criminal justice programs, and of eligibility for competitive law enforcement grants or contracts.<sup>144</sup>

Another recommendation that has consistently been put forth by proponents of a federal statute to end racial profiling is that the statute require law enforcement authorities to establish administrative complaint procedures for victims of racial profiling.<sup>145</sup> ERPA 2010 also responded to this recommendation: it required



federal law enforcement authorities to establish “procedures for receiving, investigating, and responding meaningfully to complaints alleging racial profiling by [federal] law enforcement agents,”<sup>146</sup> and imposed a similar requirement on state, local, and Indian tribal law enforcement agencies as a condition for receiving specified federal program and grant funding.<sup>147</sup>

In sum, ERPA 2010 addressed the major concerns about racial profiling expressed in this report, and would have gone a long way toward ending the practice. Accordingly, ERPA 2010 provides an appropriate model for an anti-racial profiling act in the 112<sup>th</sup> Congress.

## *VI. Conclusion and Recommendations*

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As this report demonstrates, racial profiling is a pervasive nationwide practice: federal, state, and local law enforcement authorities repeatedly stop, detain, question, and otherwise target individuals based on their race, ethnicity, national origin, or religion. As this report also demonstrates, racial profiling is in all contexts an unjust and ineffective method of law enforcement.

In early 2001, a consensus had emerged on the need to end racial profiling in America, but in the aftermath of the 9/11 terrorist attacks many people, both in and out of government, re-evaluated their views, and the consensus evaporated. It is now time to establish a new national anti-racial profiling consensus, and do what is necessary to stop the use of the practice. Toward that end, we offer the following recommendations, addressed to Congress, the president, Executive Branch agencies, and civil and human rights organizations.

### **Congress**

- The 112<sup>th</sup> Congress should enact an anti-racial profiling statute modeled after ERPA 2010. Such a statute would address the major concerns about racial profiling expressed in this report, and go a long way toward ending the practice at the federal, state, and local levels.

### **The President**

- President Obama should urge Congress to enact an anti-racial profiling statute modeled after ERPA 2010. Consistent with his campaign promises, the president should publicly support such a statute, and make its enactment one of his administration's highest legislative priorities.
- Pending enactment by Congress of an anti-racial profiling statute, the president should issue an

executive order that prohibits federal law enforcement authorities from engaging in racial profiling or sanctioning the use of the practice by state or local law enforcement authorities in connection with any federal program. For purposes of this prohibition, the executive order should use the definition of "racial profiling" in Sec. 2(6) of ERPA 2010 (and in this report), and incorporate the provisions of Title II, Section 201, of ERPA 2010 regarding the training of federal law enforcement authorities, the collection of data, and the procedures for receiving, investigating, and responding to complaints alleging racial profiling.

### **Executive Branch Agencies**

- The U.S. Department of Justice (DOJ) should revise its June 2003 "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies" to clarify ambiguities, close loopholes, and eliminate provisions that allow for any form of racial profiling. Specifically, the revised guidance should add national origin and religion as prohibited bases for profiling; eliminate the national and border security exceptions; explicitly state that the ban on profiling applies to intelligence activities carried out by law enforcement authorities subject to the guidance; establish enforceable standards that include accountability mechanisms for noncompliance; and be made applicable to all state and local law enforcement authorities as a condition for the receipt of appropriate federal funding.
- DOJ should take the position that it has exclusive jurisdiction to enforce federal immigration laws. Consistent with that position, DOJ's Office of Legal Counsel should immediately rescind its 2002 opinion that state and local law enforcement authorities have "inherent authority" to enforce federal immigration laws, and issue a new opinion declaring that state

and local law enforcement authorities may enforce federal immigration laws only if the authority to do so has been expressly delegated to them by the federal government.

- The Civil Rights Division of DOJ should make the remediation of racial profiling a priority. The activities of the Civil Rights Division in the 1990s were critical to exposing the widespread existence of racial profiling. The division's continued involvement will be critical to ending the practice—both pursuant to Sec. 14141 of the Violent Crime Control and Law Enforcement Act of 1994 and other federal laws prior to the enactment of a federal anti-racial profiling statute, and in ensuring that any federal anti-racial profiling statute that is enacted by Congress is properly implemented.
- The U.S. Department of Homeland Security (DHS) should terminate the 287(g) program (and Congress should repeal the statutory basis for the program—*i.e.*, Section 287(g) of the Immigration and Nationality Act).
- DHS should suspend operation of the Criminal Alien Program, the Secure Communities program, and other federal programs pursuant to which authority to engage in the enforcement of federal immigration laws has been delegated to state and local law enforcement authorities until a panel of independent experts reviews their operation and makes such recommendations as it deems appropriate to ensure that the programs do not involve racial profiling. Unless the president directs otherwise, the programs in question should remain suspended until the panel determines that its recommendations have been properly implemented.

- DHS should terminate the National Security Entry-Exit Registration System, and provide appropriate retroactive relief to individuals who were unjustly harmed by the operation of the program.
- Operation Front Line and other federal counterterrorism programs should be reviewed by a panel of independent experts. The panel should be charged with the task of making such recommendations as it deems appropriate to ensure that the programs do not involve racial profiling. Unless the president directs otherwise, DHS should implement any such recommendations as expeditiously as possible.

#### **Civil and Human Rights Organizations**

- Civil and human rights organizations should take the lead in calling for prompt introduction into the 112<sup>th</sup> Congress of an anti-racial profiling statute modeled after ERPA 2010, and should push for its enactment.
- As indicated in this report, racial profiling is often predicated on the mistaken belief that the practice will make us safer and more secure. Civil and human rights organizations should undertake a public education campaign to refute the erroneous assumptions underlying racial profiling; demonstrate the devastating impact that racial profiling has on individuals, families, and entire communities that are subject to the practice; and explain why racial profiling is in all contexts an ineffective and counterproductive method of law enforcement that makes us all not more, but less safe and secure.

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## Endnotes

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  5. "Barack Obama Response to Arrest of Henry Louis Gates Jr. Causes Stir Among Police," *Associated Press*, July 23, 2009, [http://www.nola.com/news/index.ssf/2009/07/barack\\_obama\\_response\\_to\\_arres.html](http://www.nola.com/news/index.ssf/2009/07/barack_obama_response_to_arres.html).
  6. The terms "African American" and "Black" are used interchangeably in this report, as are the terms "Hispanic" and "Latino."
  7. A search is an examination of a person's body, property, or other area that the person would reasonably be expected to consider as private, conducted by a law enforcement officer for the purpose of finding evidence of a crime. A frisk is a pat-down of a person to discover a concealed weapon or other contraband. *See Black's Law Dictionary*, 7<sup>th</sup> Ed.
  8. *See generally* "Wrong Then, Wrong Now: Racial Profiling Before & After September 11, 2001," The Leadership Conference on Civil Rights Education Fund, 2003 [http://www.civilrights.org/publications/wrong-then/racial\\_profiling\\_report.pdf](http://www.civilrights.org/publications/wrong-then/racial_profiling_report.pdf)
  9. In a 1999 Gallup Poll, 77 percent of African Americans believed that racial profiling was widespread and 56 percent of White Americans agreed. Frank Newport, "Racial Profiling is Seen as Widespread, Particularly Among Young Black Men," *Gallup News Service*, Dec. 9, 1999. David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (The New Press 2002), at 121, n. 71. *See also* Julia Vitullo-Martin, "Fairness Not Simply a Matter of Black and White," *Chicago Tribune*, Nov. 13, 1997 (citing poll by the Joint Center for Political and Economic Studies indicating that 81 percent of Blacks and 56 percent of Whites agree that police are more likely to harass and discriminate against Blacks than against Whites). Even conservative minorities, such as African-American commentator Armstrong Williams, acknowledged the existence of, and the need to eliminate, racial profiling. E.g. Armstrong Williams, "Police and Profiling," *The Washington Times*, March 24, 2001.
  10. Consent Decree between the city of Los Angeles and the Department of Justice, entered by the court on June 15, 2001, [http://www.lapdonline.org/assets/pdf/final\\_consent\\_decree.pdf](http://www.lapdonline.org/assets/pdf/final_consent_decree.pdf); Consent Decree between the State of New Jersey and Division of State Police and New Jersey Department of Law and Public Safety and the Department of Justice, entered by the court on December 30, 1999 [http://www.nj.gov/education/assessments/consent\\_decree.pdf](http://www.nj.gov/education/assessments/consent_decree.pdf)

- www.justice.gov/crt/split/documents/jerseysa.php; see also New Jersey State Police Consent Decree Status/Progress Reports <http://www.state.nj.us/lps/progress.htm>.
11. A state-by-state list of jurisdictions that have been collecting data, either voluntarily or through legislation, consent decrees, or settlements is compiled by the Data Collection Resource Center. <http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php>.
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  13. Eric Ferkenhoff and Noah Isackson, “Ashcroft Calls on Police to End Racial Profiling,” *Chicago Tribute*, April 7, 2001.
  14. Presidential Address Before a Joint Session of the Congress on Administration Goals, February 27, 2001, Weekly Compilation of Presidential Documents, Vol. 37, no. 9 (March 5, 2001) at 354.
  15. H.R. 2074/S. 989, 107<sup>th</sup> Congress, 1<sup>st</sup> Session (June 6, 2001).
  16. Obama ’08, “Blueprint for Change: Obama and Biden’s Plan for America”, 65 (2008), [http://www.barackobama.com/issues/civil\\_rights/index\\_campaign.php#racial-profiling](http://www.barackobama.com/issues/civil_rights/index_campaign.php#racial-profiling).
  17. “Hearing to Review Funding and Oversight of the Dep’t of Justice” Hearing Before the Senate Appropriations Subcommittee On Commerce, Justice and Science, and Related Agencies”, 111<sup>th</sup> Congress (2009) (statement of Eric Holder, Attorney General).
  18. For purposes of simplicity in discussion, the term “race” is sometimes used in this report as a shorthand reference for the four personal characteristics—*i.e.*, race, ethnicity, national origin, and religion—encompassed by the definition of racial profiling.
  19. *Whren v. United States*, 517 U.S. at 813.
  20. Department of Justice “Guidance Regarding the Use of Race By Federal Law Enforcement Agencies,” June 2003, [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.php](http://www.usdoj.gov/crt/split/documents/guidance_on_race.php).
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  32. Angela J. Davis, “Prosecution and Race: The Power and Privilege of Discretion,” 67 *Fordham L. Rev.* 13, 27 (1998).
  33. Ellen Goodman, “Simpson Case Divides Us By Race,” *Boston Globe*, July 10, 1994, (quoting Professor Ogletree).
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  37. Ian Ayres, “Racial Profiling and the LAPD: A Study of Racially Disparate Outcomes in the Los Angeles Police Department,” Oct. 2008, <http://www.aclu-sc.org/documents/view/47> at page i.
  38. *Id.*
  39. Joel Rubin, “U.S. Judge Ends Federal Oversight of the LAPD,” *Los Angeles Times*, July 18, 2009.
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  44. See announcement by Department of Justice of implementation of National Security Entry-Exit Registration System <http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>
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  47. See Joint Press Release, American-Arab Anti-Discrimination Committee (ADC) & Yale Law School National Litigation Project, ICE Targets Immigrants from Muslim Majority Countries Prior to 2004 Presidential Election. Oct. 20, 2008, <http://www.adc.org/PDF/frontline.pdf>.
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57. *Id.* at 36.
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  80. Miriam Jordan, “Arizona Sheriff’s Powers Cut,” *Wall Street Journal*, Oct. 7, 2009, <http://online.wsj.com/article/SB125487274278469239.html>. In addition to the problems that have existed with regard to the operation of the 287(g) MOA with the MCSO, DOJ filed a lawsuit against Maricopa County and MCSO in Arizona federal district court on September 2, 2010. The lawsuit alleges that the MCSO has refused to cooperate with DOJ’s investigation of national origin discrimination in violation of the Civil Rights Act of 1964, which prohibits discrimination in programs that receive federal funds. The lawsuit—which DOJ has characterized as “unprecedented”—charges that Sheriff Arpaio has refused to provide access to documents and facilities in connection with its investigation of alleged discrimination against Hispanics in MCSO’s police practices and jail operations. *See U.S. v. Maricopa County et al.*, <http://www.justice.gov/opa/documents/maricopa-complaint.pdf>; “Justice Department Files Lawsuit Against Maricopa County Sheriff’s Office for Refusing Full Cooperation with Title VI Investigation” Press Release, Sept. 2, 2010, <http://www.justice.gov/opa/pr/2010/September/10-crt-993.html>.
  81. ACLU and Rights Working Group, “The Persistence of Racial and Ethnic Profiling in the United States,” Aug. 2009 at 44, [http://www.aclu.org/pdfs/humanrights/cerd\\_finalreport.pdf](http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf).
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  83. Justice Strategies, “Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement,” Feb. 2009, <http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice-print.pdf>
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  88. *Id.* at 1.
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  91. ACLU Written Statement, *supra* note 85, [http://www.aclu.org/pdfs/humanrights/cerd\\_finalreport.pdf](http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf).
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  93. *Id.* [http://www.ice.gov/pi/news/factsheets/criminal\\_alien\\_program.htm](http://www.ice.gov/pi/news/factsheets/criminal_alien_program.htm).
  94. Trevor Gardner II and Aarti Kohli, The Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity, University of California Berkeley, Berkeley Law School, “The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program”, 2009, at 7. [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf).

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100. The Arizona Association of Chiefs of Police Statement on Senate Bill 1070, [http://www.leei.us/main/media/AACOP\\_STATEMENT\\_ON\\_SENATE\\_BILL\\_1070.pdf](http://www.leei.us/main/media/AACOP_STATEMENT_ON_SENATE_BILL_1070.pdf).
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103. Press Release, Department of Justice, Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law,” <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html>.
104. *U.S. v. State of Arizona*, 10-CV-1413, Order preliminarily enjoining the State of Arizona and Governor Brewer from enforcing sections of Senate Bill 1070, <http://www.azcentral.com/ic/pdf/0729sb1070-bolton-ruling.pdf>. To date, no other state has passed a law replicating S.B. 1070, and several states that were moving that direction are reassessing their position. Confronted with budgetary problems, these states are, among other things, concerned with the cost of implementing such a statute, as well as the potential for legal challenges. *See* Lois Romano, “Arizona Inspired Immigration Bills Lose Momentum in Other States,” *Washington Post*, Jan. 29, 2011.
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108. *Id.*
109. Hearing entitled “Oversight of the Department of Justice,” Before the Committee on the Judiciary United States Senate, Statement of Eric H. Holder, Jr. Attorney General, Nov. 18, 2009, at 10, [www.justice.gov/olp.sjc-oversight.pdf](http://www.justice.gov/olp.sjc-oversight.pdf).
110. The argument made by some defenders of racial profiling that minorities commit more violent crimes than Whites ignores the nature of racial profiling, which has nothing to do with violent crime. In the violent crime context, racial profiling is rare because it is unnecessary. Such crimes typically feature a complaining victim who provides police with a specific suspect description. In contrast, profiling is used to address offenses without complaining witnesses—in particular drug-related crimes. And, while there is clearly a connection between certain acts of criminal violence and the drug trade, the incidence of violent crime is less a function of who uses or sells drugs than of who lives in poor and dangerous neighborhoods.
111. Campbell Brown, “Investigating the Christmas Day Terror Attack: Obama Administration Downplaying War on Terror?” CNN, Dec. 30, 2009, <http://transcripts.cnn.com/TRANSCRIPTS/0912/30/ec.01.html>.
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112. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).
113. Congressional Research Service, “State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona’s S.B. 1070,” May 3, 2010, at p. 23. The Court indicated, however, that a different conclusion might be reached at locations further removed from the U.S.-Mexican border with different population demographics. *Id.* In 2000, the Ninth Circuit ruled that the border patrol could not take Hispanic origin into account when making stops in southern California, concluding that in areas “in which the majority—or even a substantial part of the population—is Hispanic,” as was the case in southern California, the probability that any given Hispanic person “is an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.” *Id.* This ruling would seem to preclude Arizona law enforcement authorities from using Hispanic origin as a relevant factor in the “reasonable suspicion” test under S.B. 1070, at least in areas with population demographics similar to those in southern California. The Ninth Circuit’s ruling goes further than the position taken by Arizona Governor Jan Brewer in an executive order issued on the same day that she signed S.B. 1070 into law, which stated that “an individual’s race, color or national origin *alone* cannot be grounds for reasonable suspicion to believe that any law has been violated.” (*emphasis added*) Arizona State Executive Order 2010-09, Establishing Law Enforcement Training for Immigration Laws, Apr. 23, 2010, *available at* [http://www.azgovernor.gov/dms/upload/EO\\_201009.pdf](http://www.azgovernor.gov/dms/upload/EO_201009.pdf).
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117. David A. Harris, *Profiles in Injustice*, 98–99 (2003).
118. *Id.* at 102–06.
119. “Arab Travelers Alter Habits While Flying,” *Associated Press*, Sept. 11, 2002.
120. Lamberth Consulting, “Racial Profiling Doesn’t Work,” <http://www.lamberthconsulting.com/about-racial-profiling/racial-profiling-doesn-t-work.asp>.
121. *See* “Study Says Police Misuse Immigration-Inquiry Rule,” *supra* note 76.
122. *See* “The Persistence of Racial and Ethnic Profiling in the United States,” *supra* note 95.
123. Bill Dedman, “Words of Caution Airport Security: Memo Warns Against Use of Profiling as Defense,” *Boston Globe*, Oct. 12, 2001.
124. *Id.*
125. Professor David Harris, testimony before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights and Civil Liberties, “Ending Racial Profiling: Necessary for Public Safety and the Protection of Civil Rights,” June 17, 2010, <http://judiciary.house.gov/hearings/pdf/Harris100617.pdf> (hereinafter Harris testimony).
126. Anita Khashu, Police Foundation, “The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties XII” (2009), <http://policefoundation.org/indexStriking.html>; *see also* Press Release, ACLU of Florida, “Lake County Sheriff’s Office Investigation of Immigrant Mother’s Unlawful Arrest and Detention a Whitewash, Says ACLU” (April 2, 2009) (describing a case in Florida where local police, responding to an emergency call reporting domestic violence, assumed the authority to enforce immigration laws and did not follow Florida’s statutory requirements for dealing with domestic violence resulting in fear among victims and witnesses to domestic violence and other crimes in the community), [http://www.acluf.org/news\\_events/?action=viewRelease&emailAlertID=3725](http://www.acluf.org/news_events/?action=viewRelease&emailAlertID=3725).
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127. As one commentator has suggested, the federal government could easily allay the fears of Arab immigrants who are here without authorization, by promising to use the information gathered through the registration process only to fight terrorism and not to enforce the immigration laws. *See* Sadiq Reza, “A Trap for Middle Eastern Visitors,” *Washington Post*, Jan. 10, 2003, <http://old.nyls.edu/pages/744.asp>.
128. *See* Harris testimony *supra* note 125, at 2.
129. *Id.* at 2–3.
130. *See* “Investigating the Christmas Day Terror Attack,” *supra* note 111.
131. Editorial, “Hindsight and Foresight,” *Fort Worth Star Telegram*, Sept. 20, 2001 (citing historians Debra LaFountaine and Pei P. Wang).
132. *See supra* note 9 and accompanying text.
133. ERPA 2001 – End Racial Profiling Act, HR2074/S.989/ (107<sup>th</sup> Congress, 1<sup>st</sup> Session) <http://www.gpo.gov/fdsys/pkg/BILLS-107s989is/pdf/BILLS-107s989is.pdf>.
134. Then-Senator Obama was a co-sponsor of ERPA in 2005 and again in 2007.
135. H.R. 5748, *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h5748ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h5748ih.txt.pdf).
136. *Id.* at 4. §2(6).
137. *Id.* at 8. §102(a)(b).
138. *Id.* at 19–20 § 602.
139. Hilary O. Shelton, testimony before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights and Civil Liberties, at 3, June 17, 2010, *available at* <http://judiciary.house.gov/hearings/pdf/Shelton100617.pdf>.
140. *See e.g.*, testimony of Deborah Ramirez before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights and Civil Liberties, June 17, 2010, <http://judiciary.house.gov/hearings/pdf/Ramirez100617.pdf>; testimony of Amardeep Singh before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights and Civil Liberties, June 17, 2010, <http://judiciary.house.gov/hearings/pdf/Singh100617.pdf>.
141. “Wrong Then, Wrong Now: Racial Profiling Before and After September 11, 2001,” The Leadership Conference on Civil Rights Education Fund, at 34, [http://www.civilrights.org/publications/wrong-then/racial\\_profiling\\_report.pdf](http://www.civilrights.org/publications/wrong-then/racial_profiling_report.pdf); ACLU and Rights Working Group, “The Persistence of Racial and Ethnic Profiling in the United States,” Aug. 2009, at 69.
142. H.R. 2074/S. 989, 107<sup>th</sup> Congress, 1<sup>st</sup> Session, June 6, 2001, §§ 201 and 302.
143. H.R. 5748, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h5748ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h5748ih.txt.pdf), at 8, §201(b)(2)(3).
144. *Id.* at 9, §301(b)(2)(3).
145. *See, e.g.*, H.R. 2074/S. 989, 107<sup>th</sup> Congress, 1<sup>st</sup> Session, June 6, 2001, § 201; S.2138, 109<sup>th</sup> Congress, 1<sup>st</sup> Session Dec. 16, 2005, § 302; H.R. 4611, 110<sup>th</sup> Congress, 1<sup>st</sup> Session, Dec. 13, 2007, § 302.
146. H.R. 5748, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h5748ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h5748ih.txt.pdf), at 9, §201(b)(4).
147. *Id.*
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