

## **ABOUT RIGHTS WORKING GROUP**

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Formed in the aftermath of Sept. 11, 2001, the Rights Working Group (RWG) is a national coalition of civil liberties, national security, immigrant rights and human rights organizations committed to restoring due process and human rights protections that have been eroded in the name of national security. RWG works to ensure that everyone in the United States is able to exercise their rights, regardless of citizenship or immigration status, race, national origin, religion or ethnicity. With 275 member organizations across the United States, RWG mobilizes a grassroots constituency in support of a policy advocacy agenda that demands accountability from the U.S. government for the equal protection of human rights.

RWG is led by a Steering Committee, composed of leading organizations representing the key constituencies of the coalition. Steering Committee members include the American-Arab Anti-Discrimination Committee; American Civil Liberties Union, American Immigration Lawyers Association; Arab American Institute; Arab Community Center for Economic and Social Services; Asian American Justice Center; Bill of Rights Defense Committee; Border Network for Human Rights; Breakthrough; Center for National Security Studies; Coalition for Humane Immigrant Rights of Los Angeles; Human Rights First; Human Rights Watch; Illinois Coalition for Immigrant and Refugee Rights; The Leadership Conference on Civil and Human Rights & Education Fund; Muslim Advocates; National Council of La Raza; National Immigration Forum; National Immigration Law Center; New York Immigration Coalition; One America; Open Society Policy Center; South Asian Americans Leading Together; and the Tennessee Immigrant and Refugee Rights Coalition.

The full breadth of the RWG's work can be seen at [www.rightsworkinggroup.org](http://www.rightsworkinggroup.org).

# LETTER FROM THE RIGHTS WORKING GROUP

A year ago, the Rights Working Group (RWG) coalition launched the **Racial Profiling: Face the Truth** campaign to fight all types of racial and religious profiling. The RWG campaign recognized that “traditional” racial profiling, often referred to as being stopped for “driving while black or brown,” persists today, even while new forms of profiling have emerged or expanded significantly in the last decade. Since Sept. 11, 2001, Arab, Middle Eastern, Muslim and South Asian communities in the United States have faced many forms of racial and religious profiling, and increasingly in the last several years racial profiling has been documented in immigration enforcement activities. To combat all types of profiling by law enforcement, the **Face the Truth** campaign seeks to connect the many communities targeted by profiling to work together and to deliver a simple yet powerful message: racial profiling is ineffective, unconstitutional, and a violation of our human rights.

During the past couple of years, a number of events have affected the public debate about racial profiling. Early in 2009, the Center for Constitutional Rights released information gained through a successful Freedom of Information Act suit yielding New York Police Department data that proved NYPD officers disproportionately stopped, searched and used physical force against African American and Latino individuals. Profiling became a hot topic in the popular media later that summer, in part due to the high-profile arrest of Professor Henry Louis Gates, Jr., and the subsequent “beer summit” between Gates, the arresting officer, and President Obama. In December 2009, the failed bombing attempt of a Northwest Airlines airplane struck fear in many, and the Obama Administration responded with the adoption of a new Transportation Security Administration (TSA) policy that required special screening of some passengers based on their national origin. Although the policy was later lifted, concerns about targeting remain. In April 2010, the state of Arizona enacted a law, Senate Bill (SB) 1070, requiring law enforcement officials to inquire about the immigration status of anyone they suspected of being an undocumented immigrant. This law created a national firestorm of controversy and resulted in a lawsuit by the Department of Justice (DOJ) requesting that the courts place an injunction on the provisions of the law that would likely result in racial profiling. The DOJ lawsuit won a temporary injunction in July, but lawmakers in Arizona insist they will continue to mandate immigration enforcement by local police.

So often, the public debate about whether or not racial profiling is happening, or whether it is acceptable under certain circumstances, does not include the voices of those actually

targeted by the profiling. Not surprisingly, the most ardent supporters of SB 1070 or post-9/11 policies that have targeted Arabs, Middle Easterners, Muslims, and South Asians are not from the communities affected by the profiling. The **Face the Truth** campaign decided to seek out those who have been targeted by profiling and to ask them to share their stories and recommendations for stopping this practice. From May to July 2010, RWG worked with partners in six communities around the country to organize public hearings on racial profiling. In Burlington, WA; Detroit, MI; Houston, TX; Los Angeles, CA; Nashville, TN; and Portland, ME, local organizations invited individuals who had experienced racial and religious profiling to testify at the **Face the Truth** hearings. A group of National Commissioners, experts on racial and religious profiling, volunteered their time to attend these hearings, joining local community leaders in each city to listen to testimony and call for reform.

This report seeks to share the voices and stories of the courageous witnesses who testified at the **Face the Truth** hearings in the last few months. The findings of these hearings are clear: racial profiling is a persistent and widespread problem, found in communities across the country. Those who are targeted by racial and religious profiling are deeply affected by their experiences and many continue to live with a fear of law enforcement that creates real risks for public safety. Not only individuals are affected, but their families, friends and neighbors in the community also lose trust in law enforcement, influencing their willingness to report crimes or to serve as a witness. Local police lose their ability to effectively implement community policing strategies, and government agencies lose credibility amongst those communities targeted.

It is time to stop racial and religious profiling at all levels of law enforcement—federal, state and local. We hope that this report demonstrates why urgent action is needed to change laws, policies and practices at every level. For more information, please visit [www.rightsworkinggroup.org](http://www.rightsworkinggroup.org).



Margaret Huang, Executive Director  
On behalf of Rights Working Group

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## ACKNOWLEDGEMENTS

Rights Working Group would like to express deep appreciation to the many individuals and organizations who contributed to the field hearings and this report. In particular, we want to acknowledge our partners who organized and supported the six **Face the Truth** hearings across the country:

**Arab Community Center for Economic and Social Services** (ACCESS), with hearing in Detroit, MI; **Coalition in the Defense of the Community**, with hearing in Houston, TX; **Coalition for Humane Immigrant Rights of Los Angeles** (CHIRLA), with hearing in CA; **Council on American Islamic Relations**, with hearings in Michigan, Greater Los Angeles, Houston, and Washington; **Maine Civil Liberties Union** (MCLU), with hearing in Portland, ME; **Maine People's Alliance**, with hearing in Portland, ME; **Nashville Racial Profiling Committee**, with hearing in Nashville, TN; **One America**, with hearing in Burlington, WA; **Tennessee Immigrant and Refugee Rights Coalition**, with hearing in Nashville, TN.

Each of the hearings was also co-sponsored by other state and local coalitions and organizations, and we are grateful to all of these groups for their support.

At each hearing, representatives of national organizations and local community leaders served as commissioners to receive the community's testimony. We deeply appreciate their support of this effort through their active participation in the hearings.

### National Commissioners included:

**Annette Dickerson**, Education and Outreach Director, Center for Constitutional Rights; **Steve Hawkins**, Chief Program Officer and Executive Vice President, NAACP; **Margaret Huang**, Executive Director, Rights Working Group; **Farhana Khera**, President and Executive Director, Muslim Advocates; **Ricardo Meza**, Midwest Regional Counsel, Mexican American Legal Defense & Education Fund; **Karen K. Narasaki**, President and Executive Director, Asian American Justice Center; **Dennis Parker**, Director of the Racial Justice Program, American Civil Liberties Union; **Thomas Saenz**, President and General Counsel, Mexican American Legal Defense & Educational Fund; **Vince Warren**, Executive Director, Center for Constitutional Rights.

### Local Commissioners included:

**Nabih Ayad**, Michigan Civil Rights Commission; **Hussam Ayloush**, Executive Director, Council on American Islamic Relations of Los Angeles; **David Esquivel**, Conexion Americas, Nashville, TN; **Judge Steven Gonzalez**, King County Superior Court, Washington; **Thomas Harnett**, Assistant

Maine Attorney General for Civil Rights Education and Enforcement; **Pramila Jayapal**, Executive Director, OneAmerica, Seattle, WA; **Maria Jimenez**, Special Projects Coordinator, CRECEN/America Para Todos, Houston, TX; **Ester King**, Community Activist, Houston, TX; **Dr. Christine Kovic**, Associate Professor, University of Houston; **Rev. Eric Lee**, CEO and President, Southern Christian Leadership Conference of Greater Los Angeles ; **Newell Lewey**, Passamaquoddy Tribe and Member, Sipayik Criminal Justice Commission, Pleasant Point (Maine); **Barbara McQuade**, U.S. Attorney for the Eastern District of Michigan; **Salad Nur**, Al Farooq Mosque, Nashville, TN; **Blanca Santiago**, President, El Centro Latino, Portland, ME; **Shirley Sims Saldana**, Metro Human Relations Commission, Nashville, TN; **Robert Talbot**, Civil Rights Advocate and Political Action Chair, NAACP of Bangor, ME; **Rashida Tlaib**, State Representative, 12th District, Detroit, Michigan; **Timothy Watkins**, Executive Director, Watts Labor Community Action Committee; **Hedy Weinberg**, Executive Director, ACLU of Tennessee; **Rev. Neely Williams**, IMF-Peniel, Nashville, TN.

Special thanks must be given to the witnesses who offered their testimonies at the hearings. Their courage and willingness to speak out about injustice should inspire all of us to do more to combat racial profiling.

Rights Working Group is grateful to the foundations that have supported the **Racial Profiling: Face the Truth** campaign and the production of this report. In particular, we wish to acknowledge the generosity of Atlantic Philanthropies, the Foundation to Promote Open Society, The Ford Foundation, and the US Human Rights Fund, whose grants made this work possible.

In drafting this report, law student Amanda Hackett (Howard University School of Law) provided substantial research assistance and material; law student Christina Sinha (University of California Berkeley School of Law) contributed as well.

And last but certainly not least, Rebecca Headen deserves recognition and deep appreciation for serving as RWG's National Fellow for the last year. Headen coordinated the hearings and production and wrote the bulk of this report. Her colleagues Jumana Musa and Aadika Singh contributed to the drafting and editing of the report; Pabitra Benjamin, Nadine Wahab and Mitzi Bowen assisted in organizing the field hearings. Tong Lee also provided support to the **Face the Truth** campaign.

For more information and a full list of Face the Truth campaign endorsements, please visit [www.rightsworkinggroup.org](http://www.rightsworkinggroup.org) or the websites of our core partners.

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# EXECUTIVE SUMMARY

**“W**hen you are profiled, it totally takes away your peace of mind. It totally takes away how you respond to things in the future.”

*—Jolanda Jones, Houston City Council Member, discussing the stories of her own and her sons’ experiences being profiled*

The Bill of Rights clearly states that everyone in the United States is entitled to equal treatment and equal protection under the law, that everyone should be free from unreasonable searches and seizures, and should be afforded a presumption of innocence. However, this is not the reality for millions of people in the United States who have been denied these rights—and many others—due to racial profiling. This report seeks to demonstrate the pervasive nature of this nationwide problem, document its impact on individuals, families and communities across the country, and propose recommendations to end this harmful and ineffective practice.

## What is Racial Profiling?

“Racial profiling” is defined by the End Racial Profiling Act of 2010 as “the 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>1</sup> Throughout this report, the term “racial profiling” is used to describe all of the types of racial, ethnic and religious profiling that are referenced in this definition.

In other words, racial profiling occurs when law enforcement uses one of these characteristics as a factor in deciding who they will investigate, question, arrest, or detain. This practice assumes that certain people or communities are more likely to be engaged in illegal behavior simply because of the color of their skin, their religion, or some other characteristic.

Racial profiling can occur due to an officer’s individual bias, inadequate training, a government program that facilitates or encourages racial profiling, or some combination of these elements. No matter the reason for its occurrence, this illegal practice has been shown time and time again to be a failed law enforcement strategy that is not only morally wrong, but also counterproductive to its goal of preventing crime, so much so that it actually makes communities and the nation less, not more, safe.

In an effort to demonstrate the prevalence of racial profiling, Rights Working Group, working with local and national partners, organized six hearings





across the country to gather people's stories and experiences dealing with racial profiling. The picture that emerges clearly shows that this practice is pervasive throughout the country at the local, state, and federal levels, and these testimonies reveal the devastating impact this practice has on individuals, families and entire communities.

## Voices from Communities: The Impact of Racial Profiling

**"I**m here today to tell my story and because I'm interested in making sure residents of Watts are no longer afraid to leave our houses without getting stopped by police just for being outside in our neighborhood."

*—John Jones, III, Los Angeles resident*

**"R**acially biased policing is at its core a human rights issue. While some may view it as merely a public relations problem, a political issue, or an administrative challenge... it is antithetical to democratic policing. Protecting individual rights is not an inconvenience for modern police; it is the foundation of policing in a democratic society..."

*—2001 Report funded by the Department of Justice's Community Oriented Policing Services*

In 2004, Amnesty International reported that approximately 32 million Americans, a number equivalent to the entire population of Canada, have been the victims of racial profiling. However, it has been proven repeatedly that racial profiling is a failed strategy in multiple law enforcement ventures, whether it is combating the drug trade, fighting terrorism or enforcing immigration law. The discriminatory and ineffectual law enforcement practices described below are all examples of racial profiling, as they all rely on race, ethnicity, religion or national origin as a substitute for relevant indicators of criminal activity.

### *Racial Profiling in the "War on Drugs"*

**"I** have been stopped so many times that I cannot count. I was stopped six times in one week, once. I was stopped with my son in the car and the police asked me if I had any drugs in the car. They dismantled the car right in front of us, and of course, there were no drugs."

*—Los Angeles resident and community advocate Tim Watkins, who has lived in his neighborhood for over 50 years.*

In 1971, President Nixon initiated a "War on Drugs" campaign that criminalized drug addiction and emphasized arrests and prosecutions as a solution to the social ills caused by the illegal drug trade. Forty years later, this program has done little to curb the drug market or drug use; however,

it has been used by law enforcement to single out primarily African Americans and Latinos for drug searches.

In 2002, a national survey conducted by the Department of Justice found that blacks and Latinos were two to three times more likely to be stopped and searched for drugs than whites, but were *less likely* to be found actually in possession of contraband.<sup>2</sup> Numerous other national studies and surveys prove that racial profiling is ineffective, and that when law enforcement instead utilizes a strategy that prioritizes targeting *relevant indicators of criminal activity, such as behavior*, rather than racial or ethnic identity, their productivity rate (the rate at which they actually find drugs on someone they search) goes up.

In 2004 to 2005, the Narragansett Police Department in Rhode Island began basing their decisions to search on probable cause, rather than on race, and seeking supervisory approval. As a result, minorities went from being three times as likely to be searched to only 1.5 times as likely. The department's search productivity rate jumped to 50 percent, one of the highest in the state.<sup>3</sup> While it has been proven that law enforcement officers are more effective when they base investigations on relevant indicators of criminal activity rather than on race, data collected in numerous states shows that racial profiling still continues.

### ***Racial Profiling and Customs & Border Protection (CBP)***

**“W**hen I passed through customs, I was stopped by ICE [Immigration and Customs Enforcement] officers... who stated that I “looked Arab” rather than Mexican.... They asked me about my faith. I told them I was a Catholic and why was it an issue. They asked me if I had been considering becoming converted to Islam and I asked why would I tell them? Why would that be an issue? Is it illegal now to be a Muslim?”

—Francisco Argüelles, witness,  
Houston

After Sept. 11, 2001, the government adopted new programs and policies that severely curtailed civil rights, civil liberties, and human rights in the name of “national security.” As a result, Arabs, Middle Easterners, Muslims, South Asians—and those who are mistaken for them—have become automatically suspect and have been targeted by law enforcement, both at the border and within the United States. They have been subjected to surveillance, stops, interrogations, intrusive questioning, invasive searches, and lengthy and arbitrary detentions.

CBP guidelines allow agents to “review and analyze information” transported by those entering or leaving the country without individualized suspicion.<sup>4</sup> This opens the door to racial profiling. Agents are also given wide latitude to stop, question and detain people, not only at the border and at

checkpoints, but also within 100 miles of an international border. This puts the residents of significant numbers of major U.S. cities, and in some cases, the residents of the entire states, at the mercy of CBP's wide investigative powers.

Other government guidelines are even more explicit about their racial and ethnic bias. A 2007 Transportation Safety Administration (TSA) guideline singled out Sikh turbans and Muslim head coverings for additional screening, despite the fact that they had no evidence that they were being used to transport forbidden items.<sup>5</sup> In late 2007, new screening options that offered greater privacy were negotiated by the TSA and Sikh organizations. Despite the change in policy, Sikhs as well as others with religious head coverings were still targeted in airports, as recounted by Amardeep Singh of the Sikh Coalition:

**“I** was, sadly, forced to take my [18 month old] 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 [books were] searched...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 percent of the time...”<sup>6</sup>

Such programs are not only antithetical to our core values; they are counterproductive— **to the point of making us all less, not more, safe.** Sheldon

Jacobson, an University of Illinois computer science professor with expertise in aviation security, states that “more screening can result in less security when it directs attention and resources to the 60 to 70 percent of people who are not a security threat.”<sup>7</sup> As he points out, the U.S. government has limited resources, technologies, and time to devote to the country's security, and it cannot afford to waste them on an ineffective strategy that consistently prove to be counterproductive.

### ***Racial Profiling and Counterterrorism Measures***

**“O**ne of the problems with racial profiling is that there's a tendency to believe that this is the silver bullet to solve the problem. In other terms, if you're a Middle Eastern or if you're a Muslim, then you must be bad.... But back in 1972, Ben Gurion Airport in Tel Aviv [Israel] was supposed to be attacked by a Palestinian... [it] was never attacked by one. It was attacked by a Japanese terrorist.... And it was attacked in the mid-'80's by a German terrorist answering to the name Miller.”

*—Rafi Ron, former chief of security for Ben Gurion and consultant to Boston's Logan International Airport.*

As part of the “war on terror,” the FBI has investigated certain communities, particularly members of Muslim charities and religious institutions, mosque attendees and other Muslim groups. Individuals

have been targeted for investigations at their homes, jobs, schools, and places of worship. The FBI has also utilized paid informants to infiltrate mosques and other religious institutions. This climate has made many community members afraid to go about their daily lives normally; many have reported that they avoid attending mosques and community centers and have forgone donating to charities for fear of being profiled by the Bureau.



The FBI's 2008 Domestic Investigative Operative Guidelines (DIOG)<sup>8</sup>, which implements the December 2008 Attorney General's Guidelines for Domestic FBI Operations,<sup>9</sup> explicitly allows the use of race, ethnicity, and religion as a factor in determining whether to start an FBI investigation.<sup>10</sup> Under the Guidelines, an FBI agent can start an assessment with little to no factual predicate,<sup>11</sup> creating a scenario where members of communities singled out for profiling post-9/11 can be subjected to broad surveillance and data gathering based on their race, ethnicity, religion or national origin.

Here again, the government's own findings have shown that these tactics are counterproductive to their aim of keeping the country safe. A 2006 study by the DOJ found that Arab Americans were significantly fearful and suspicious of federal law enforcement. It also found that both law enforcement officers and community members agreed that diminished trust between the two was the most significant barrier to much-needed cooperation.<sup>12</sup> Indeed, these communities have become so fearful of law enforcement in the wake of these policies that they did not request help in a variety of emergency situations, including domestic violence, reporting other crimes, and even, in some cases, failing to seek medical treatment.<sup>13</sup>

### ***Racial Profiling in Immigration Enforcement***

**“**This is not what I was taught the American Dream was. The American Dream in my eyes is everyone having equal rights.... I just want to let America know that this is not fair, what they're doing to us is not fair, because my dad was stopped for no reason. I don't think that wearing landscaper clothes and having brown skin was a crime.”

*—Anna, a high school student whose father ended up in deportation proceedings, witness, Burlington, Washington*

Immigration enforcement is yet another context in which government programs have opened the door to racial profiling.

Until recently, the federal government held primary responsibility for the enforcement of federal immigration law. However, several programs initiated by the second Bush Administration and expanded by the Obama Administration have shifted the responsibility and cost of enforcing civil (that is, noncriminal) immigration law to state and local law enforcement.

The U.S. Congressional Research Service (CRS) has stated that a “high risk for civil rights violations may occur if state and local police do not obtain the requisite knowledge, training, and experience in dealing with the enforcement of immigration laws,”<sup>14</sup> and that without this training, those suspected of immigration violations can become victims of racial profiling.

There are numerous programs that create formal agreements between federal immigration authorities and local and state jurisdictions, including 287(g), the Criminal Alien Program (CAP), and the Secure Communities Initiative. The 287(g) program allows the Department of Homeland Security (DHS) to enter into voluntary, formal agreements with state and local law enforcement that gives these agencies limited powers to enforce immigration law. The stated purpose of the program is to pursue noncitizens suspected of committing serious crimes. However, this program does not give local authorities clear guidelines, which can lead to racial profiling and other abuses.

Moreover, the program does not conform with its stated goal of targeting serious criminals. Several jurisdictions

have been documented using the program to target people for minor traffic offenses as a pretext to check the immigration status of those who look “foreign.” For example, officers in Gaston, North Carolina reported that 95 percent of state charges resulting from 287(g) were for misdemeanors. Eighty-three percent of those were for traffic violations.<sup>15</sup> Both the DHS Office of Inspector General (OIG) and the Government Accountability Office (GAO) have identified numerous major flaws in the program, including a lack of effective training and protection against racial profiling and other civil-rights abuses.<sup>16</sup>

The Criminal Alien Program (CAP) has also shown evidence of targeting individuals through pretextual arrests. This program is an immigration screening process that operates in prisons and jails. Its purpose is to place immigration detainers on noncitizens, with a high priority placed on those who pose a threat to public safety.<sup>17</sup> However, a study of Irving, Texas by the Earl Warren Institute on Race, Ethnicity and Diversity at the University of California, Berkeley School of Law found that, of the ICE detainers issued pursuant to the program, only two percent were for felony cases, while the other 98 percent were for misdemeanor cases.<sup>18</sup> This strongly suggests that CAP incentivized officers to racially profile people in order to execute arrests to check individuals’ immigration status.

Similar trends are also being documented in the “Secure Communities” program, which submits fingerprints for

individuals booked into jails—before they have an opportunity to challenge their arrest and before any adjudication on their guilt—to be checked against immigration databases. This creates an incentive for law enforcement to conduct pretextual stops, or to book individuals in jail rather than issue tickets, in order to check the immigration status of those who look “foreign.” ICE’s own data, revealed through a Freedom of Information Act (FOIA) Request by the Center for Constitutional Rights and the National Day Labor Organizing Network, shows that the vast majority (79 percent) of individuals deported under the Secure Communities program were not criminals or were picked up for low-level offenses.<sup>19</sup>

ICE’s data also reveals that some jurisdictions—such as Arizona’s Maricopa County, which is under a Department of Justice investigation for patterns and practices of discriminatory policing, yet still retains the ability to participate in immigration enforcement programs like Secure Communities and 287(g)—have abnormally high rates (54 percent in Maricopa County) of non-criminal deportations under Secure Communities. Other jurisdictions offer even more troubling statistics. For example, in Travis, Texas, 82 percent of deportations under Secure Communities are of non-criminals. In St. Lucie, Florida, that number is 79 percent, 74 percent in Yavapai, Arizona, 68 percent in Suffolk, Massachusetts and 63 percent in San Diego, California.<sup>20</sup> This data demonstrates that the Secure Communities initiative is not “*prioritizing criminal aliens for enforcement action based on their threat to public safety*” but rather deporting

*individuals for minor offenses and even drawing in U.S. citizens for enforcement actions—further evidence that this ICE initiative is encouraging racial profiling.*”<sup>21</sup> All of these programs damage the safety of the entire community. If community members fear that reporting crimes or assisting the police can lead to immigration investigations, they become unwilling to work with law enforcement. When people do not cooperate with the authorities, all communities are less safe.

## **The Law Regarding Racial Profiling**

### ***Constitutional and Federal Laws and Principles***

The text of the Constitution provides strong protections against racial profiling. Unfortunately, as these protections have been interpreted in a limited, narrow fashion by U.S. courts, their efficacy has been eroded. Courts have given wide latitude to law enforcement, while creating almost insurmountable obstacles for victims of racial profiling, such as the requirement that victims prove that the offending officer intended to discriminate against them.

The Fourteenth Amendment states: “*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside... nor shall any State deprive any person of life, liberty,*

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” However, the U.S. Supreme Court ruled in *Whren v. United States*<sup>22</sup> (1996) that it is not unconstitutional for law enforcement to make a pretextual traffic stop—that is, stopping someone for a traffic violation because they want to investigate some other crime, which they would not be able to do without the “pretext” of the traffic violation—as long as the officers had the required amount of certainty (probable cause) to believe a traffic violation had occurred.

This 1996 ruling gave a green light to racial profiling of motorists. Traffic laws are so numerous and complex that almost anyone can be caught in a technical violation. This means that law enforcement can and often has used traffic laws as a pretext to investigate other crimes for which they do not have probable cause.

The Court’s 2009 decision in *United States v. Brignoni Ponce*<sup>23</sup> went even further by explicitly sanctioning racial profiling in the border context. The Court held that Customs and Border Patrol officers can consider race and ethnicity when deciding whether to perform a stop at or near the border. These and similar limits on the Constitution’s protections, coupled with the requirement that racial profiling victims prove an officer intended to discriminate against them—which requires a large amount of resources and complex legal knowledge to prove—renders meaningless many of the Constitution’s protections.

The Supreme Court has also limited remedies in the context of immigration enforcement. In *Reno v. American-Arab Anti-Discrimination Committee (ADC)*,<sup>24</sup> the Supreme Court decided that a group of immigrants, singled out for deportation because of their political affiliation, could not challenge their deportation on the grounds of selective enforcement as long as there was a valid immigration violation with which they were charged. Citing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Supreme Court Justice Antonin Scalia wrote, “[a]s a general matter—and assuredly in the context of claims such as those put forward in the



present case— an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.”<sup>25</sup>

Like constitutional law, federal laws banning racial profiling appear strong on the surface, but the requirements for their utilization, as interpreted by the courts, have hindered their protections. For example, §1983 of the Civil Rights Act bans those acting under color of law (which includes law enforcement at the local, state and federal level) from depriving individuals of their Constitutional and legal rights and privileges. However, victims are required to prove that they would not have been stopped but for their race, ethnicity or other protected characteristic. As noted above, it is almost always possible for law enforcement to catch motorists in technical violations of traffic laws, rendering this statute useless for many victims. Another statute, §14141 of the Violent Crime Control and Law Enforcement Act, authorizes the Department of Justice (DOJ) to hold law enforcement agencies accountable for violating the rights of persons in the U.S. by conducting investigations into reported violations and reaching settlement agreements, implementing consent decrees or filing suit. But DOJ works on issues of systemic discrimination, not individual cases.

### ***International Law Prohibits Racial Profiling***

International law establishes clear prohibitions against racial profiling. The U.S. has signed and ratified two international treaties: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which prohibits distinctions based on race, color, descent, or national or ethnic origin that have the purpose or effect of impairing the equal enjoyment of their rights; and the International Covenant on Civil and Political Rights (ICCPR), which requires a signed party to ensure that “all individuals within its territory and subject to its jurisdiction [are able to exercise] the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.”

The two committees that monitor compliance with ICERD and ICCPR have found that the U.S. is in violation of its treaty obligations. For example, the Human Rights Committee, which monitors compliance with the ICCPR, criticized U.S. programs that allow local and state law enforcement to enforce federal immigration law, because of the police officers’ lack of training or expertise in this complex area of law. The U.S. reports submitted to treaty monitoring bodies have been criticized for their omissions, deficiencies, and mischaracterizations and have failed to accurately document the pervasive nature and devastating impact of racial profiling in the United States.



## *State and Local Laws*

As with federal law claims, state and local claims challenging racial profiling are extremely difficult to prove. Courts require victims to either show direct, circumstantial or statistical evidence that the person was a target of racial profiling, or, absent that, to show that they were treated differently from someone else in the same situation, but who was of a different race. The former requirement is extremely difficult to prove without access to data on law enforcement practices, which many jurisdictions do not collect. The latter is effectively insurmountable, as most people do not have the time or resources to devote to seeking out someone who was in the same situation, but of a different race.

Most states do not have laws that prohibit racial profiling by law enforcement. Only 29 states even mention racial profiling in their legislation. Of the 29, only 19 states require their law enforcement agencies to collect data on the traffic stops they conduct, and these reporting requirements vary wildly from state to state. Further, five of the states that prohibit racial profiling only ban the use of race as the *sole* factor for initiating a stop, rather than banning its use as any factor in determining whom to stop.

Some cities and municipalities have attempted to fill in the gaps in protection left by federal and state laws by passing their own laws on racial profiling. For example, Cincinnati, Ohio passed an ordinance prohibiting racial profiling by law enforcement that also requires collection

of data on stops. However, no successful racial profiling suits have been filed that were able to overcome the legal obstacles that were put in place after the ordinance was passed. Thus, even where honest efforts are made to introduce effective laws to combat racial profiling, they are often undermined and thwarted, leaving victims with no realistic recourse.

## **Conclusions and Recommendations**

The testimonies from diverse populations that emerged from the *Face the Truth* hearings clearly demonstrate that racial profiling is a nationwide practice that has devastated individuals, families and communities across the US. Further, numerous national studies and government investigations and reports all document the inefficacy of racial profiling as a tool to combat crime. This practice both instills fear of law enforcement in communities—preventing the police-community relations that are necessary to combat crime—and diverts precious resources away from investigating actual crimes and threats to national security. This practice must be eradicated in all its forms. To that end, RWG and our partners in the *Racial Profiling: Face the Truth* campaign offer the following recommendations:

### ***Recommendations to President Obama***

- President Obama should urge Congress to enact the End Racial Profiling Act of 2010, which prohibits profiling based on race, religion, ethnicity and national origin at the federal, state and local levels.
- President Obama should issue an executive order prohibiting racial profiling by federal officers and banning law enforcement practices that disproportionately target people for investigation and enforcement based on race, ethnicity, religion or national origin. The executive order should also require the collection of data by federal enforcement agencies about law enforcement actions broken down by the apparent or perceived race, ethnicity, national origin and religion of individuals targeted by enforcement agents.
- President Obama should state unequivocally that the federal government alone has jurisdiction and authority to enforce immigration laws and halt ICE programs that engage state and local police in immigration enforcement activities.

### ***Recommendations to the Department of Justice***

- The Department of Justice (DOJ) should revise its 2003 “Guidance on the Use of Race by Federal Law

Enforcement Agencies” to eliminate loopholes created for national security and border searches; to include religion and national origin as protected classes; to apply the guidance to state and local law enforcement agencies; and to make it enforceable.

- The 2008 Attorney General’s Guidelines for Domestic FBI Operations and the FBI’s Domestic Investigative Operational Guidelines that implement the 2008 Attorney General’s Guidelines should be revised to ensure that they comport with constitutional and international human rights protections.
- The 2002 DOJ Office of Legal Counsel (OLC) “inherent authority” opinion should be immediately rescinded and OLC should issue a new memo clarifying that state and local law enforcement agents may not enforce federal immigration laws absent formal authority granted to them by the federal government.

### ***Recommendations to the Department of Homeland Security***

- The Department of Homeland Security (DHS) should terminate the 287(g) program.
- DHS should suspend the implementation of CAP, Secure Communities and similar programs unless and until safeguards are put in place whenever collaborating with

state and local law enforcement to ensure that racial profiling and other human rights violations are not occurring, including collecting data on the race or ethnicity of the people arrested, the charges that are lodged and the ultimate disposition of the case.

- DHS should ensure that the Secure Communities program and the Criminal Alien Program only screen people who are convicted of felony offenses, in keeping with ICE's stated priorities of targeting serious criminals and dangers to the community.
- DHS should terminate the National Security Entry-Exit Registration System (NSEERS) and repeal related regulations. Individuals who did not comply with NSEERS due to lack of knowledge or fear should not lose eligibility for, or be denied, a specific relief or benefit. Similarly, DHS should ensure that the federal government provides relief to individuals who were deported for lack of compliance with NSEERS but otherwise had an avenue for relief.
- DHS should conduct extensive training for and oversight of ICE agents implementing enforcement actions. In particular, increased oversight is needed to ensure that ICE does not target individuals on the basis of race or ethnicity but instead upon information related to the individual's immigration status.
- DHS should reform its complaint process to ensure that it is clear, transparent and confidential, including protections against retaliation. It also should be made available to the public in multiple languages.

### *Recommendations to Congress*

- Congress should enact the End Racial Profiling Act of 2010, establishing a federal ban on profiling based on race, religion, ethnicity and national origin at the federal, state and local levels.
- Congress should provide oversight to ensure that the various agencies of the executive branch are undertaking the reforms identified in the recommendations above. If agencies do not adopt these reforms, Congress should adopt legislation mandating the changes in policy.
- Congress should repeal section 287(g) of the Immigration and Nationality Act.
- Congress should eliminate funding for the 287(g) program, the Secure Communities Initiative, the Criminal Alien Program and other programs that utilize state and local law enforcement agencies to conduct civil immigration enforcement, incentivize racial profiling and lack protections for individuals harmed by these programs.

***Recommendations to state and local governments***

- State and local governments should adopt legislation that strongly prohibits profiling based on race, religion, ethnicity and national origin. Such legislation should also mandate that local police departments collect data about stops, frisks, searches, arrests and prosecutions. That data should be broken down by the apparent or perceived race, religion, national origin or ethnicity of those targeted for enforcement actions and outcomes.
- State and local governments should refuse to participate in federal programs expanding responsibility for immigration enforcement to local law enforcement, including the 287(g) program, the Secure Communities Initiative or the Criminal Alien Program.
- Any state or locality that is participating in or cooperating with a federal program delegating responsibility for immigration enforcement to local law enforcement should collect data on the apparent or perceived race, religion, national origin or ethnicity of any person arrested, the reason for the arrest and the ultimate disposition of the case.



### *Recommendations from Field Witnesses*

“I think there needs to be enough training to make sure people understand the rights of individuals in this country as well as checks and balances in the system among the investigators.”

*–Joe Morrison, witness, Burlington, Washington*

“...I think this issue is of considerable concern in the Muslim community... these officers, law enforcement officers or government officers, are they being trained with reliable information on Islam and Muslims as opposed to some bigoted information with sources that [are] not really fully accredited agencies?”

*–Jawad Khaki, witness, Burlington, Washington*



“I think the only way to stop profiling is to have consequences when profiling occurs and that’s what I don’t see at any level...I really believe that we need to do something to force consequences for bad behavior.”

*–Jolanda Jones, witness, Houston, Texas*

# INTRODUCTION

**T**his is not what I was taught what the American Dream was. The American Dream in my eyes is everyone having equal rights and being able to do what they want to do. I just want to let America know that this is not fair, what they're doing to us is not fair, because my dad was stopped for no reason. I don't think that wearing landscaper clothes and having brown skin was a crime."

*—Anna, Washington State high school student whose father was stopped by local police leaving work and ended up in deportation proceedings.<sup>26</sup>*

**T**hey surround the car [at the border checkpoint]... there's nothing—there's no event to spark this. It's just, 'You're going into cuffs. You're coming out of the car' ... And you're in front of so many people. You know, this is like—they're looking at you like, 'Oh, what did you guys plan?' You know? 'Oh, there goes the Muslims. I wonder what they're up to. Who knows what they're thinking.' They're looking at you crazy."

*—Alex Aravanetes, Washington State resident who crosses the border with Canada regularly to see his wife, a Canadian citizen, while they wait for her immigration status to come through*

**W**hen you are profiled, it totally takes away your peace of mind. It totally takes away how you respond to things in the future."

*—Jolanda Jones, Houston City Council Member, discussing the stories of her own and her sons' experiences being profiled*

**I**'m here today to tell my story and because I'm interested in making sure residents of Watts are no longer afraid to leave our houses without getting stopped by police just for being outside in our neighborhood."

*—John Jones, III, Los Angeles resident*

The Bill of Rights states that everyone in the United States is entitled to equal treatment and protection under the law; that everyone in the United States should be safe from unreasonable searches and seizures; and that everyone in America should be afforded the presumption of innocence. Today, these rights are enshrined not only in the Constitution but also in other state and federal laws. Unfortunately, the pervasive practice of racial profiling denies these rights to a wide variety of people in the United States—rights guaranteed them by the U.S. Constitution, state and federal laws and international human rights law.



Racial profiling as defined in the End Racial Profiling Act of 2010 is “the 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>27</sup> Throughout this report, the phrase “racial profiling” is used to describe all of the types of racial and religious profiling that are referenced in this definition.

In other words, racial profiling occurs when law enforcement agents use race, ethnicity, religion, or national origin as a factor in deciding who they should investigate, arrest or detain—except where characteristics such as race, ethnicity, religion or national origin are part of the description of a specific suspect who is linked to a specific criminal activity. Historically, racial profiling has been referred to as “driving while brown or black.” That is to say, African American, Native American and Latino/Hispanic individuals have been and continue to be stopped and searched much more often by law enforcement while driving, walking or otherwise going about their personal or professional affairs, than other individuals.

Since Sept. 11, 2001, members of Arab, Middle Eastern, Muslim, and South Asian communities have increasingly and disproportionately been placed under surveillance, searched, interrogated and detained in the name of “national security.” Law enforcement has singled out members of another population—suspected or perceived migrants—under the guise of immigration enforcement, disproportionately harassing, interrogating, and detaining individuals perceived to be Latino or Hispanic, including U.S. citizens and lawful permanent residents.



When law enforcement agents racially profile, they use race, religion, ethnicity, national origin or perceived immigration status as a basis for assuming that particular communities or religions have a greater propensity for being involved in a crime or for being more likely to lack lawful immigration status. In many cases, racial profiling is not the fault of direct racism or xenophobia on the part of an individual law enforcement agent, but rather is due to insufficient guidance provided to him or her.

*FACES OF RACIAL PROFILING: A Report from Communities Across America*

In other cases, racial profiling is government sanctioned; for example, there is federal guidance that does not prohibit profiling on the basis of religion or national origin, and there are state laws that specifically target those who look or sound “foreign.”

Whether it occurs in the name of the “war on drugs,” or is labeled as “a counterterrorism measure” or “immigration enforcement,” racial profiling is unlawful and counterproductive, stripping individuals of their rights and *making communities less, not more, safe*. To demonstrate this impact, Rights Working Group joined with local and national partners to organize hearings across the country. The racial profiling hearings served to document and call attention to the real impact racial profiling has had on a diverse array of communities. Many individuals devastated by the lasting impact of racial profiling bravely shared their stories before their communities and a panel of local and national commissioners, who bore witness to their powerful testimonies. These voices demonstrate that racial profiling isn’t a problem for just one or two communities or in just one or two cities; it is a nationwide problem that affects us all.

“**T**he problem with racial profiling lies in its pervasiveness. It’s not just about a few bad actors or a bad policy you can point to or bad training. It’s a problem that pervades law enforcement and our criminal justice system at every level. Problems this big are hard to fix and they’re hard to get people to pay attention to and that is what

today’s forum is about. By standing up, by presenting the experiences of people in our community, for these panelists to receive and take back, we can hold this problem up so that lawmakers and policymakers cannot ignore it any longer.”

*–Peter Bibring, Staff Attorney, ACLU of Southern California, testifying on behalf of several clients in Los Angeles*

Many of the voices highlighted in this report clearly show that profiling is still pervasive at the local, state and federal level. The hearing testimonies also demonstrate how racial profiling threatens community safety by diverting law enforcement resources toward targeting people who simply look or sound a certain way, and not toward those who demonstrate criminal behavior. The testimonies highlighted in this report also reflect the insurmountable hurdles most individual victims of profiling face when they attempt to challenge their unlawful treatment through our legal system. It is no surprise, then, that members of communities that are disproportionately subjected to discriminatory profiling develop a fear of law enforcement and are not inclined to cooperate with police investigations, even if they have been witnesses or victims of crime—an unintended consequence of racial profiling that makes all of us less safe.

The United States Constitution appears to provide adequate protection against racial profiling in its text. Unfortunately, constitutional protections against racial profiling have been interpreted by U.S. courts



in a limited and narrow fashion. A patchwork of state laws and the absence of laws in some states also fail to provide adequate and consistent measures to protect all Americans from racial profiling. In many cases, international law provides stronger protections against racial profiling than U.S. law. To date, federal and state efforts to address racial profiling have proven largely inadequate to handle the breadth and depth of this practice. This issue can and should be addressed domestically by passing federal legislation banning racial profiling at the federal, state and local level; by revising existing federal guidance on racial profiling; and by eliminating federal programs that

rely upon state and local law enforcement and criminal justice systems to enforce federal civil immigration laws. In addition to domestic legislation, the United States should comply with its obligations under international law and under international treaties that it has signed and ratified.

This report seeks to document the impact of racial profiling and the experiences of those affected by it. It explains the current legal context of profiling and its gaps, and makes recommendations to eliminate those gaps in order to end the pervasive, ineffective and unlawful use of racial profiling in America.



# VOICES FROM COMMUNITIES ACROSS AMERICA: THE IMPACT OF RACIAL, ETHNIC AND RELIGIOUS PROFILING

“It happens once, it’s okay. You don’t think about it. The second time, you start scratching your head; what’s happening here, you know? You shouldn’t be looked at by the color of your skin or the accent or where you’re from... like I have been asked by officers. For the third time, you gotta think there is racial profiling in Maine. If you haven’t done anything wrong, why should they ask you for immigration status or where you’re from or anything like that?”

–Xaviar Morales, witness, Portland, Maine hearing

“First, racially biased policing is at its core a human rights issue. While some may view it as merely a public relations problem, a political issue or an administrative challenge, in the final analysis, racially biased policing is antithetical to democratic policing. Protecting individual rights is not an inconvenience for modern police; it is the foundation of policing in a democratic society... Failure to achieve a balance in police priorities creates misunderstanding and misdirection. There are grave dangers in neglecting to take the issue of biased policing seriously and respond with effective initiatives. Societal division on racial grounds will leach the vigor from quality-of-life initiatives, regardless of how well intended and well funded. If a substantial part of the population comes to view the justice system as unjust, they are less likely to be cooperative with police, withholding participation in community problem-solving and demonstrating their disaffection in a variety of ways. The loss of moral authority

could do permanent injury to the legal system, and deprive all of society of the protection of the law.”

–A 2001 report by the Police Executive Research Forum and funded by the Department of Justice’s Community Oriented Policing Services <sup>28</sup>

“[U]sing race . . . as a proxy for potential criminal behavior is unconstitutional, and it undermines law enforcement by undermining the confidence that people can have in law enforcement.” <sup>29</sup>

–Former Attorney General (under George W. Bush) John Ashcroft

Across the U.S. today, police routinely single out, stop and search people from targeted communities at disproportionate rates while they are walking, driving, flying or otherwise engaged in the routines of life. Whether under the guise of the “war on drugs” or crime suppression sweeps, traffic stops and “stop and frisks” are often used as a pretext for determining whether these individuals are engaged in some sort of criminal activity. Amnesty International USA reported in 2004 that approximately 32 million Americans—a number equivalent to the population of Canada—say that they have been victims of racial profiling.<sup>30</sup> The *Face the Truth* hearings found evidence nationwide of racial and ethnic profiling. Whether they lived in the Northwest or Southeast, northern New England or downtown urban areas across the country, people who attended the hearings told their own stories of such experiences.



“The witnesses represented a number of races and ethnicities, including African immigrants, Latino and Native Americans. They also had differing citizenship status ranging from native-born Americans to naturalized citizens, and people with varying types of non-resident status. Despite the differences in their backgrounds, the witnesses at the hearing described remarkably similar experiences... Each described the experience of being singled out because of their apparent race or ethnicity and subjected to either hostile interrogation or discriminatory treatment. Particularly striking was the fact that the witnesses described encounters with law enforcement personnel which were not initiated because of any illegal or questionable conduct by the witnesses but instead resulted from suspicion by the law enforcement agent which was aroused by the fact that the witness was a member of a particular racial or ethnic group. The testimony also showed that each witness shared a feeling of frustration, humiliation and anger as a result of being targeted for action by law enforcement, and a sense that the unfair treatment eroded their confidence in law enforcement.”

–Dennis Parker, Commissioner,  
Portland, Maine hearing

In early 2001, there appeared to be a national consensus that racial profiling was widespread and wrong. People of all backgrounds—in terms of race, ethnicity, religion and national origin—disapproved of racial profiling.<sup>32</sup> In the wake of the horrific

9/11 attacks, that consensus evaporated, allowing policies and programs adopted in the name of “national security” to curb civil liberties and human rights. The scale and scope of racial profiling grew dramatically in certain communities in that context, and the consensus and momentum for passing federal legislation banning the practice vanished.

“Some of the younger law enforcement officers out there, they even stop some of our Indian police officers. We see each other. Then when they stop us, they realize it’s us. They don’t recognize us out of uniform.... It’s not done, I believe, intentionally towards the individual officer. I believe it’s because he’s an Indian driving a nice vehicle or something and he just happened to be in the wrong place at the wrong time.”

Woodrow Starr, a tribal police chief of Standing Rock Sioux Tribe, in testimony<sup>31</sup> before the Mayor’s Task Force on Police and Community Relations in Rapid City, S.D. Starr is routinely profiled. His fellow tribal officers are often pulled over by white officers.

## Racial Profiling and the “War on Drugs”

In 1971, President Nixon declared the “War on Drugs” a national priority, named drugs “public enemy No. 1” and commenced a campaign that criminalized drug addiction and emphasized arrest and prosecution as the solution to society’s ills.<sup>33</sup> The policies initiated in that era and continuing over the next 40 years have actually done little to eradicate drug use or curtail the drug market<sup>34</sup> and instead have had a disparate impact on people of color and low-income communities.

Enforcement methods cultivated in the war on drugs paved the way for increased stops and searches of people of color. While law enforcement practicing racial profiling may not be using race, ethnicity, national origin or religion as the *sole* factor in guiding their decisions about who to stop, search or detain, these characteristics are often the *decisive* factor.

Los Angeles Hearing Commissioner Tim Watkins, a community advocate who grew up in the city, has resided in his neighborhood for over 50 years. He testified that he was stopped and questioned by police almost every time he left or returned home:

“I have been stopped so many times that I cannot count. I was stopped six times in one week, once. I was stopped with my son in the car and the police asked me if I had any drugs in the car. They dismantled the car right in front of us and, of course, there were no drugs.”

The Department of Justice (DOJ) conducted a national survey in 2002 and found that blacks and Hispanics were two to three times more likely to be stopped and searched than whites, but were less likely to be found in possession of contraband.<sup>35</sup> Searches based on racial profiling are biased and extremely counterproductive, resulting in extremely low seizure rates of contraband. As the data shows, the argument that certain racial or ethnic communities commit more drug crimes cannot be substantiated. Moreover, once this law enforcement practice becomes routine in a community, trust begins to break down between residents and the police.

## *Stop and Search in Practice Nationwide*

Data from across the country demonstrates that racial profiling is ineffective and that when law enforcement agents revise their enforcement strategy to prioritize criminal behavior, rather than racial or ethnic identity, their rate of contraband seizures goes up. In 2004 to 2005, the Narragansett Police Department in Rhode Island began basing their decisions to search on probable cause instead of on race and requiring supervisory approval to perform a search. As a result, minorities went from being three times as likely to be searched to only one and a half times as likely. The department’s search productivity rate jumped to 50 percent, one of the highest in the state.<sup>36</sup> Although it has been proven that law enforcement officers are more effective when they base investigations on relevant indicators of

criminal activity rather than on race, data collected in numerous states shows that racial profiling still continues in agencies nationwide.

In Arizona, analysis of data related to highway stops made between July 1, 2006 and June 30, 2007 found that Native Americans were more than three times as likely to be searched as whites by officers of the Arizona Department of Public Safety. African Americans and Hispanics were 2.5 times more likely to be searched than whites. Whites, however, were found to be more likely to be carrying contraband than Native Americans or Hispanics; seizure rates of drugs, weapons or other illegal materials for whites and African Americans were similar.<sup>37</sup>

In Los Angeles, analysis of data by Yale University<sup>38</sup> gathered between July 2003 and June 2004 found that the stop rate of blacks and Hispanics, respectively, is 3,400 stops and 360 stops higher per 10,000 residents than the stop rate for whites. Compared to stopped whites, stopped blacks and Hispanics are, respectively, 127 percent and 43 percent more likely to be frisked. Compared to stopped whites, stopped blacks and Hispanics are, respectively, 76 percent and 16 percent more likely to be searched. The analysis also found that these frisks and searches were systematically less productive when conducted on blacks and Hispanics than when conducted on whites. Frisked blacks and Hispanics, respectively, are 42.3 percent and 31.8 percent less likely to be found with a weapon than frisked non-Hispanic whites.

In Connecticut, the DOJ initiated an investigation in 2009 into the East Haven Police Department (EHPD) for “discriminatory police practices, unlawful searches and seizures, and excessive use of force” after receiving a complaint from advocates and a faith-based group who documented allegations of racial profiling. An analysis conducted by Yale University found that 56 percent of all traffic tickets issued by the EHPD between early June

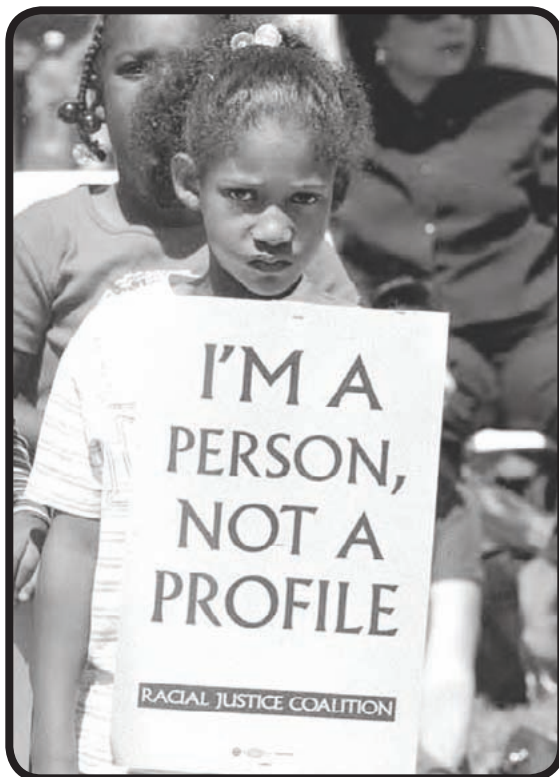


1, 2008 and February 28, 2009 were given to Hispanic drivers, although the Hispanics comprise only 5.8 percent of East Haven residents. Even more troubling, Yale University’s analysis also demonstrated inaccurate reporting by the agents, showing that EHPD officers regularly mischaracterized the race of the individual stopped.<sup>39</sup>

Several witnesses who testified at the hearings spoke of inaccurate reporting of race or ethnicity by law enforcement

officers, which makes it more difficult to track racial profiling. Xaviar Morales spoke of his encounter with an officer while driving near Portland, Maine: “I got stopped by a police officer. He said that I was going five miles over the speed limit. But then later, when I looked at the report and it says he pulled over a Black and an Asian person, which I’m Hispanic. My friend was Hispanic also. I guess you could think how can this be possible? Again, for a second time, we were asked for the same thing: if you are legal if you are not. And you have to provide them all the time with the same type of I.D. or immigration status.”

In Los Angeles, an attorney testified that the LAPD reporting form did not include



separate categories for Arab, Muslim, South Asian, or Asian—creating an inability to track police interactions with those communities effectively. Likewise, in Troy, Michigan, a woman communicated her alarm that, although the city has a significant Asian and South Asian population, an officer had marked “Caucasian” on the traffic ticket of a South Asian friend.

In Maryland, data from 2008 shows that 70 percent of individuals searched by Maryland State Police (MSP) on Interstate 95 were people of color (defined in a related report as African American, Hispanic and other non-white individuals). This is a finding very similar to that revealed by data from 2002, the year prior to a consent decree where MSP agreed to improve procedures for motorists to file complaints of racial profiling and where MSP agreed to investigate all such complaints. When the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) filed a public information request for investigative records related to complaints of racial profiling after 2003, MSP refused to turn over these documents and then appealed the ruling of a judge who stated that the documents should be disclosed.<sup>40</sup>

In New York, the Center for Constitutional Rights (CCR) alleged that the New York Police Department (NYPD) engaged in a policy and practice of illegal racial profiling. In CCR’s lawsuit, *Floyd v. City of New York*,<sup>41</sup> a court ruling during the discovery period of this case ordered the NYPD to release all of its ‘stop-and-

frisk' data from 1998 through the beginning of 2008 to CCR. This data revealed that in 2008, a record 575,304 people were stopped, 87 percent of whom were Black and Hispanic individuals—although they comprise approximately 25 percent and 28 percent of New York City's total population, respectively. Of the cumulative number of stops made since 2005, only 2.6 percent resulted in the discovery of a weapon or contraband. Though rates of contraband yield were small across racial groups, stops made of whites proved to be slightly more likely to yield contraband.<sup>42</sup>

In South Dakota, when the mayor of Rapid City investigated allegations of police prejudice against Native Americans, he found that Native Americans, who comprised only eight percent of the city's population, accounted for 51 percent of adults arrested and 40 percent of juveniles arrested.<sup>43</sup>

“Years ago I was driving through south L.A. around 65<sup>th</sup> and Normandy. It was dusk. I had a Chevy Malibu and I had about four young black men in the car with me and we were leaving Bible study. Well, we were pulled over by seven police cars. They had the shotguns out and demanded that we get out of the car with our hands up in the air and lay prostrate on the ground while they held the shotguns. I was fearful for these children that I was teaching at Bible study. We had done nothing wrong except being in a particular neighborhood, driving a certain type of car, and having four black men in a car—young black men. They did let us go with an apology after the traumatic

experience [saying], ‘it’s somewhere in the neighborhood there was a crime that was committed.’ And so that’s what they did. They apologized and let us go.”

—Rev. Eric Lee, CEO and President, Southern Christian Leadership Conference and Commissioner, Los Angeles hearing

Racial profiling, of course, is not a new phenomenon. A slew of data-heavy studies, testimony from law enforcement experts and public officials, and major media attention emerging by the late 1990s provided ample evidence that racial profiling was indeed pervasive across America—adding academic support to a widely-recognized reality that communities of color have faced for generations. As Rev. Eric Lee said: “As long as we allow racial profiling to affect one community, it will continue in all of our communities. So we must continue to fight it together in whatever community it strikes.”

## Racial Profiling and Counterterrorism Measures

“[A] Few weeks after 9/11 at around 11am I get a knock at my door as I awake from my sleep. I answer the door only to see a F.B.I agent waiting to enter with a badge and folder in hand, a folder containing all my information and pictures, some pictures of me going to work and shopping. First thing he asked me was to see all my ID—driver license, Social Security, green card,

birth certificate, school ID, anything and everything I had. So it seemed I had been followed after 9/11. For what crime was I being targeted? For what reason was I being made felt so low? How can I, a U.S. citizen, an American, a person that owes his life to this country and a lover of this nation, be accused of the most heinous acts its ever seen. I knew that the only reason I was questioned is because of who I am, where I'm from, and the last name they saw. They didn't see the terrified, innocent, senior in high school student who had not committed any crime, they only saw a Muslim from the Middle East and automatically I'm a terrorist... I guess it's not rocket science anymore to find terrorist, just target ONLY Muslims and you have yourself terrorists."

*—Karwan Abdulkader, witness,  
Nashville hearing*

“One of the problems with racial profiling is that there's a tendency to believe that this is the silver bullet to solve the problem. In other terms, if you're a Middle Eastern or if you're a Muslim, then you must be bad. And if you're a European and Christian, then you must be good. But back in 1972, Ben Gurion Airport in Tel Aviv was supposed to be attacked by a Palestinian, [it] was never attacked by one. It was attacked by a Japanese terrorist killing 24 people. And it was attacked in the mid-'80s by a German terrorist answering to the name Miller.”

*—Rafi Ron, former chief of security  
for Israel's Ben Gurion Airport,  
the president of a consulting firm,  
New Age Security Solutions, and  
a consultant to Boston's Logan  
International Airport in Boston<sup>44</sup>*

Following the tragic events of Sept. 11, 2001, members of Arab, Middle Eastern, Muslim and South Asian communities became automatically suspect as the government, in the name of national security, implemented programs and policies that profiled individuals of these communities based on their perceived race, ethnicity, religion or national origin. Members of these communities were increasingly and disproportionately placed under surveillance, stopped, searched, interrogated, detained and labeled “terrorism suspects.” The government also began aggressively using civil immigration laws, criminal laws and criminal procedures in a sweeping and discriminatory manner to target members of these communities.

### ***Customs and Border Protection (CBP)***

In the years that have followed Sept. 11, 2001 Arabs, Middle Easterners, Muslims and South Asians have been profiled at border stops and airports; individuals are singled out for intrusive questioning, invasive searches and lengthy detentions without reasonable suspicion of criminal activity. Customs and Border Protection (CBP) agents question individuals about their faith, associations and political opinions.

One witness, a Mexican-American man who told his story at the hearing in Houston, was stopped and questioned by airport security when screeners refused to believe that he was indeed a U.S. citizen. Said Francisco Argüelles:



“I was returning to Houston from Mexico City where I traveled to visit my mother who was having serious medical surgery. When I passed through customs, I was stopped by ICE officers who sent me upstairs to be interrogated, who stated that I ‘looked Arab’ rather than Mexican... I even showed a book I co-authored on immigrant rights and U.S. race relations. They said ‘you don’t look Mexican.’ They asked me about my faith. I told them I was Catholic and why was it an issue. They asked me if I had been considering becoming converted to Islam and I asked why would I tell them? Why would that be an issue? Is it illegal now to be a Muslim?”

Travelers’ personal documents, books, laptop computers, cell phones and other electronic devices have been seized and, some believe, copied by CBP agents.<sup>45</sup> At the hearing in Burlington, Washington, Jawad Khaki, a U.S. citizen and software engineer, told of a number of experiences with CBP agents at airports as well as on the Canadian border, including this one: “I was traveling back from Snohomish [Canada].... As was the norm... my passport was flagged for secondary inspection. At least two additional CBP officers came out to the inspection booth, where my vehicle was pulled in. The officer in the booth asked me to pull into the parking area. I go to the building for immigration and customs clearance.... They went through all our wallets, inspected the car, asking us not to be in the vicinity of the car whilst they did this, not even to look at the car. Brought in the vehicle registration document from the vehicle. Asked us for our driver licenses.

Then, made us wait until 12:50 a.m. ... when we were cleared to enter the United States.” This unjust treatment is due partly to a general CBP guidance released in 2008 that allows officers to “review and analyze information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States” without individualized suspicion.



At nearly all of the *Face the Truth* hearings, witnesses testified to such interactions with CBP agents, who are given wide latitude to stop, question and detain people not only at borders and points of entry, but also within 100 miles of an international border. All spoke of similar feelings: humiliation, fear, and frustration.

In Maine, where there is a large border with Canada, in addition to international waters, the entire state is interpreted as

“ I’ve been stopped by the customs officers several times, primarily at LAX [Los Angeles International Airport], but any international terminal that I arrive in. I am an Arab. I am a Muslim American, born in the U.S. And I have about 15 incidents so far that I’ve been stopped at. During [the] initial time that I got stopped, one of the officers was particularly racist. At one point, he—you know, when I’d given him—I was giving him yes or no answers. He said, ‘Listen, if you don’t wanna cooperate, I can make sure you get stopped every time.’ Which, you know, on the spot I told him, ‘Are you implying that you have the power to hold me every time here?’ And that’s when he backed off a little bit, and he said, ‘No, no, I didn’t say that.’ I said, ‘Well, that’s what you’re implying. You know, don’t play mind games with me.’”

Because every time you’re in that zone, they make sure to remind you that they have the power and authority beyond which regular cops have outside, and that we’re in their territory, and while we’re in that zone, they’re God. I mean, that’s the general message that comes across. In other incidents that I’ve been stopped, I’ve been asked which mosque do I belong to. I’ve been asked, do I contribute to any Muslim organizations? Do I donate? I usually answer those with, “Sure, you wanna give back to your community?” And that usually helps diffuse the line of questioning with that. But when—my other incident, and this was a Canadian land border, [I was detained for] three and a half hours, and I missed my flight.

And at the end of it, I asked—requested—to file a complaint. The answer was, ‘We’ll have to take it.’ I said, ‘Why is that? Just give me the forms and I will file them.’ He said, ‘No, we have to take your complaint here.’ I told him, ‘If I’m complaining about your department, why would I give it to you here? I’m guessing it’s gonna get filtered through you before it goes to the higher ups. I’m complaining about you.’ He said, ‘No, if you wanna file a complaint, it’s gonna take an additional 45 minutes and it has to be done here.’ ”

-Anonymous witness, Los Angeles, California hearing

being 100 miles from a border. Abraham Haile, a college student in the northern part of the state, rode six hours to the hearing in the city of Portland to tell his story. Not only did he have a number of experiences to share as a young person originally from Africa and growing up in Portland, one experience actually occurred with border patrol on his bus ride to the hearing. Abraham also spoke about his experience looking at colleges in Maine:

“I went to look at the [University of Maine at Fort Kent] with some friends. After looking at the school we decided to go to Canada. On our way leaving town, I get pulled over by a border patrol. After pulling over, he stayed in his car for about 10 minutes. While he was waiting, two of the Fort Kent police officers show up. The police officers show up to my window. I pulled down the window and [they] asked for my license and registration. So I give them that. He gives it to the other officer to look at. As he was doing that, I asked him why I was pulled over. We just had arrived that morning at Fort Kent. His explanation was the hotel I stayed at had called and told him I was coming into town. Not that I stayed in any hotel. I wasn’t speeding, so I knew I didn’t do anything wrong. Not making the situation worse, I just let him do his thing. I had two friends with me who were from Somalia. One of them was a U.S. citizen. So he starts questioning us about our citizenship and stuff like that. So we give him our passports and he looks it up and about an hour later, they give us all our stuff. He asked to search the car. I had nothing to hide so I let him search the car.

After searching the car, we put everything back in the car, he lets us go and we decide not to go to Canada, we go home. Three weeks later I get a call from the FBI asking if I could come in for some questioning. I asked them for what and they told me for being at the border—“some things happened” when I was pulled over at Fort Kent.”

### *TSA Security Screening*

The Transportation Security Administration (TSA) has had ongoing issues of discriminatory enforcement since its inception. Members of the Arab, Middle Eastern, Muslim and South Asian community report being “randomly selected” for secondary screenings almost every time they go to the airport. These searches are more than a mere inconvenience. Some missed flights, while others were subjected to invasive and humiliating searches, sometimes in full view of the public.

In August 2007, TSA released new guidelines to serve as standard operating procedures for airport security screening. People with Sikh turbans and Muslim head coverings were singled out for screening with higher scrutiny, despite a lack of evidence that these religious head coverings were being employed to hide dangerous items. Widespread profiling of Sikhs occurred as a result, and the Sikh Coalition, an advocacy group, found that nearly all turban-wearing Sikh men were being subjected to additional screening.<sup>46</sup> In late 2007, a set of options for screening Sikhs that allows, for example, greater privacy, was negotiated by the TSA and

Sikh organizations in coordination with the release of TSA's October 2007 "bulky clothing" policy.<sup>47</sup> But in practice, this new policy under which "passengers could be subjected to additional screening to further evaluate any item that could hide explosives or their components"<sup>48</sup> has unfortunately resulted in the continued targeting of this community as well as others, such as Muslim women who wear *hijab*, a religious head covering traditionally worn by Muslim women, or other head coverings.

Amardeep Singh of the Sikh Coalition is well aware that the targeting of Sikhs at airports continues absent all common sense, as he and his toddler were both detained and searched the last time they traveled. Mr. Singh testified in June 2010 before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties:

"I was, sadly, forced to take my [18 month-old] son, Azaad, into the infamous glass box so that he could 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 as he ran through the glass box 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 percent of the time at some airports."<sup>49</sup>

"Ironically, more screening can result in less security when it directs attention and resources to the 60 to 70 percent of people who are not a security threat. That, in turn, diverts attention and resources away from the people who are a legitimate threat... By lavishing billions of dollars on screening the wrong passengers, we're not spending those dollars on the right passengers. Since it takes only one successful act of terrorism for the system to fail, we cannot afford to allocate our finite amounts of time, money and technology in the service of a failed strategy."

*—Sheldon Jacobson, a University of Illinois computer science professor with expertise in aviation security<sup>50</sup>*

### ***NSEERS and Operation Frontline***

One government initiative adopted after Sept. 11, 2001 was the National Security Entry-Exit Registration System (NSEERS), which employed immigration law as a counterterrorism tool. This program required non-immigrant males aged 16 to 45 from 25 countries to register for fingerprinting, photographs, and lengthy interrogations. All but one of the countries were predominantly Muslim; the anomaly was North Korea. More than 80,000 men underwent registration, and thousands were subjected to lengthy interrogations and detention. Many individuals were deported through secret proceedings that took place without due process of law; but equally devastating was the effect this program had on communities throughout

At the hearing in Detroit, Lena Masri, an attorney for the Council on American Islamic Relations of Michigan, testified about her own experience being required to remove her hijab in a public restroom at an airport after she and her sister had passed through security:

“ [W]e were flying back to the United States through Buenos Aires, in Argentina... So my sister and I went through the initial security. We were selected at random. I’ve been traveling—I’m probably one of the most well-traveled people, and every time I travel somewhere, I got accustomed to being pulled aside for the random check. It happens every single time. We did the whole pat down, everything. We had our carry-ons searched. They let us through. We went up to the gate. We had already presented our boarding pass and once we entered into the gate, there were a couple TSA agents that approached my sister and I and they said, “You would not be allowed to board this flight until you remove the head covering off of your head here in the gate and allow us to do a pat down on you.” I explained to them that we had already been subjected to a pat down and that I had no problem, I’m not opposed to being subjected to another pat down, but I would not be able to remove my head covering because it’s a religiously-mandated head covering.

I asked to speak with a supervisor. A supervisor came over and explained that there was a new policy that was passed that mandated them to require us to remove our head covering, otherwise, we would not be able to board the flight. So after a whole back and forth for a while, what ended up happening, I requested that we be searched in a private area, at least by a woman, and they agreed to this, but they had to take us all the way out through the initial security to the general area of the airport. We were taken into a public bathroom, crowded bathroom.... There was another woman there that was putting her head covering back on and she had a TSA agent that had patted her down and she was shaking and her face was red. She was humiliated.

My sister and I both removed our headscarves. The bathroom was packed and I remember, people started to hear that we were being searched in the bathroom, so they started to come in.

I’ve heard these stories happening so many times. It has happened so many times to myself, but what made this incident different is it was the first time I was actually required to remove my head covering. But it seems that after the December 25th incident, there seems to be some sort of pattern where Muslim women, who wear hijab, were reporting that this was happening to them as well. ”

the United States. As men and teenagers began disappearing through detention or deportation, entire neighborhoods appeared boarded up, as family-run businesses were forced to close their doors because those left behind were unable to keep up with the demands of a business on their own. An investigation by the National Commission on Terrorist Attacks upon the United States determined that programs like NSEERS did not demonstrate clear counterterrorism benefits.<sup>51</sup> They instead instilled fear in families and communities, creating a distrust of law enforcement and the government, isolating Arab, Muslim, Middle Eastern and South Asian residents from their larger community.

Additional government programs such as “Operation Frontline,” a DHS program initiated just prior to the 2004 election cycle and designed to “detect, deter and disrupt terrorist operations,” utilized the NSEERS database to identify targets.<sup>52</sup> Data from DHS revealed that 79 percent of individuals investigated were from Muslim-majority countries.<sup>53</sup> The timing of this program further fueled community distrust in government authorities and had a chilling effect on Arab, Middle Eastern, Muslim and South Asian voters.

## **FBI Investigations**

As part of its counter-terrorism measures, the Federal Bureau of Investigations (FBI) has continued to undertake inquiries and investigations of members of Muslim charities, Muslim communities, and even Muslim religious organizations and places

of worship.<sup>54</sup> Targeted individuals have been investigated at their places of employment, their homes, their mosques and their schools and universities, and have had their families, friends, classmates and co-workers questioned and harassed.<sup>55</sup> FBI agents have even gone so far as to use paid informants to infiltrate mosques, religious institutions that, like churches, temples and synagogues, have broad family participation and attendance. These activities have instilled fear and further isolated Arab, Middle Eastern, Muslim and South Asian individuals and communities. Many are afraid to attend their local mosques or get involved with Islamic organizations and events.<sup>56</sup>

For example, in February 2009, it was reported that the FBI had infiltrated several mosques in California, using cameras and other surveillance equipment to record hours of conversations not only in those mosques, but in restaurants and homes of mosque members as well.<sup>57</sup> Local residents report that the surveillance caused them to avoid the mosques and pray at home, to avoid making charitable contributions—which is a fundamental tenet of the Muslim faith—and to refrain from having conversations about political issues such as U.S. foreign policy.<sup>58</sup> People who attend mosques in Michigan became concerned when agents began to use the fear of law enforcement against community members. Imam Dawud Walid testified in Detroit: “In spring of 2009, our Imams Committee wrote Attorney General Eric Holder in regards to a number of complaints we got from a

mosque in Macomb County and Wayne County about FBI agents trying to ask people to become informants on the mosque. Some of them described this as coercion; people with immigration issues or perhaps some type of petty criminal offense.”

***FBI Guidelines and Profiling in the Arab, Middle Eastern, Muslim and South Asian Communities***

The creation of a “suspect community” appears to have been codified in both the Attorney General Guidelines for the FBI,<sup>59</sup> which went into effect Dec. 1, 2008, and the FBI’s Domestic Investigative Operational Guidelines (DIOG), dated Dec. 16, 2008.<sup>60</sup> Each of these documents has significant problems and they have not been amended or modified by the Obama administration, despite the statements of Attorney General Holder, who said that ending racial profiling was a “priority” for the Administration and that profiling was “simply not good law enforcement.”<sup>61</sup>

The Attorney General’s Guidelines give the FBI wide latitude to target the Arab, Middle Eastern, Muslim and South Asian communities. They explicitly allow the use of race, ethnicity and religion as a factor in starting investigations, and relax the rules so that individual FBI agents can start an assessment with little to no factual predicate.<sup>62</sup> The DIOG allows agents to gather information on ethnic or cultural factors.<sup>63</sup> This is the “stop and frisk” of the

war on terror, creating a scenario where Arab, Middle Eastern, Muslim and South Asian communities can be targeted for broad surveillance and data gathering. Such activity not only undermines the DOJ’s own racial profiling guidance,<sup>64</sup> it also isolates those families and communities who are subjected to such scrutiny and sends a message that they are not welcome in the



United States, that they are perhaps “less American” than people of other religions.

Yet another practice that strikes fear into local communities is the analysis and mapping of certain geographical areas for the race, ethnicity, characteristics and behaviors of its residents in order to

track and target them for enforcement, a tactic<sup>65</sup> that the FBI has been using since 2008. Authorized by the DIOG, the “domain assessment investigations” are currently the subject of Freedom of Information Act requests by Muslim Advocates, the ACLU and ACLU affiliates nationwide, who are concerned about the broad opportunities of abuse left open by this project. All of these invasive practices result in a chilling effect on communities’ willingness to engage in constitutionally protected political activity and religious practice.

A 2006 study commissioned by the DOJ found that Arab Americans were significantly fearful and suspicious of federal law enforcement due to government policies. It also determined that both community members and law enforcement officers defined diminished trust as the most important barrier to cooperation.<sup>66</sup> Community groups have also reported that members of these targeted communities became so afraid of having any contact with officials after post-9/11 “national security” or “counterterrorism” policies were introduced that they did not report emergency situations, such as domestic violence and other crimes—and, in some cases, did not seek medical treatment<sup>67</sup>.

Following the attempted bomb attack on board a flight bound for Detroit on Christmas Day 2009, the TSA issued new screening standards. In early 2010, TSA, encouraging profiling based on national origin, began subjecting airline passengers holding passports from, originating from or passing through “nations that are state sponsors of terrorism or other countries of

interest” to heavy screening, including pat-down searches and physical inspections of carry-on items, absent any individualized suspicion. In early April 2010, the Obama Administration rescinded this policy and stated that it would instead select passengers for screening based on “real-time, threat-based” intelligence information. It is commendable that the Administration took this action after meeting with advocates and affected communities who highlighted the discriminatory nature of this policy. However, the risk of ongoing, *de facto* profiling by TSA and CBP agents, who have broad discretion to search and question without individualized suspicion, remains a concern for civil and human rights advocates. As Badr Sharif, a witness in Maine, stated:

“**M**y friend and I went to Canada... they actually stopped us [at the border] and we were in a room for like an hour. And they asked us like so many questions.... We had Islamic names. My name is Badr Sharif. My friend was Mohammed. That’s an Islamic name and it’s obvious everybody else was going through. And I asked her, ‘Why are you stopping us? Is it because we have Islamic names?’ And she said, ‘No.’ And I said, ‘Of course you would not admit it.’ Because it’s true. Most people don’t admit it. Muslims are 1.79 billion people. If 1.79 billion people were terrorists do you think we would be safe here? No, it doesn’t really make sense and it’s happening every single day. And the person who speaks out against it is—is being labeled as—as, you know, like it’s—it’s ridiculous really. It just messes up my emotion. I can’t even say the things I want because it’s—it’s wrong. It



says it right there. Face the truth. But many people don't really face the truth."

Former Homeland Security Secretary Michael Chertoff highlighted the ineffectiveness of profiling based on national origin in the days after the 2009 Christmas Day bomb attempt on board for the Detroit-bound flight. He said:

**“W**ell, 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 it to deliberately recruit people who are Western in background or in appearance, so that they can slip by people who might be stereotyping. So, I think the danger is, we get lulled into a false sense of security, if we profile based on appearance. What I do think is important is to look at behavior. And that's something that we are doing and should continue to do more of.”<sup>68</sup>

At a time when Americans may have felt most vulnerable, these “national security” efforts may have created an illusion of safety, but they actually have the opposite effect. Racial profiling in the name of national security diverts precious law enforcement resources away from smart, targeted investigations toward dragnet techniques that stripped many people of their constitutional and human rights. Most

of the individuals targeted during broad post-9/11 sweeps and other actions were never charged of any crime, and if they were charged with anything at all, many were only charged with misdemeanors or minor immigration violations. These actions alienated members of these communities, precluding cooperation from many people who may have provided valuable intelligence to law enforcement in the investigation of actual crimes.<sup>69</sup>

## Racial Profiling and Immigration Enforcement

**“T**hey had me sign a rapid deportation form, even though I hadn't had any problems with the police. Then, I told them, you know, I'm not gonna sign any paper, any deportation papers, not until I have a hearing before a judge. They told me, well, these papers don't have anything to do with seeing a judge and you need to sign them.”

*—Manual Valencia, speaking through an interpreter about his experience after being assaulted and wrongfully detained by Immigration officials in plain clothes while waiting for his son at the bus stop in Mount Vernon, Washington.*

State and local police agents do not possess the requisite training and experience to enforce a complex and ever-changing body of federal immigration laws effectively and fairly. The U.S. Congressional Research Service has noted that a “high risk for civil rights violations

may occur if state and local police do not obtain the requisite knowledge, training, and experience in dealing with the enforcement of immigration laws. Moreover, suspects of immigration violations may become victims of “racial profiling.”<sup>70</sup>

### ***Local Law Enforcement of Immigration Laws: Formal Agreements***

Since the mid-1980s, the Department of Homeland Security (DHS), and before

Illegal Immigration Reform and Immigrant Responsibility Act expanded partnerships with state and local law enforcement agencies to enforce civil immigration laws through formal and informal programs, such as the 287(g) program. The Secure Communities Initiative was established later. The Obama Administration, instead of ending this troubling trend, has expanded the initiatives and sought more funding for such programs. These programs result in sweeping and indiscriminate arrests that divert limited law enforcement resources away from their primary mission of preventing and solving dangerous or violent crimes; they have instead resulted in racial profiling, violating people’s human and civil rights.

### ***The 287(g) Program***

The 287(g) program is a voluntary partnership, so named for its statutory source, Section 287(g) of the Immigration and Nationality Act,<sup>72</sup> that allows the DHS Secretary to enter into agreements with state and local law enforcement agencies to perform limited immigration enforcement duties under the supervision and training of ICE. The stated purpose of this program is to pursue noncitizens suspected of committing serious crimes, “giving law enforcement the tools to identify and remove dangerous criminal aliens.”<sup>73</sup>

State and local immigration enforcement capabilities are defined somewhat in 287(g) agreements, but clear and sufficient guidelines or adequate supervision and training are lacking, leading to abuse by



them Immigration and Nationality Service (INS), has been combing through the populations of jails and prisons to identify people who were deportable. The program has had many incarnations over time and culminated in what is now known as the “Criminal Alien Program,” (CAP).<sup>71</sup> Until 1996, the federal government held sole responsibility for enforcing federal immigration laws. The passage of the

many state and local law enforcement agencies. Reports by universities, think tanks and advocacy groups have documented allegations of racial profiling and have also found that several jurisdictions have mostly employed their 287(g) authority to process individuals brought in for traffic violations and minor offenses, like speeding. ICE-deputized officers in Gaston, N.C., for example, reported that 95 percent of state charges resulting from arrests of individuals under the 287(g) program were for misdemeanors; 83 percent were charged with traffic violations.<sup>74</sup>

Tennessee State Highway Patrol has had a 287(g) agreement since June 2008, and Davidson County, which includes the city of Nashville, has had the program since February 2007. Additionally, Davidson County recently activated the “Secure Communities” program.

The DHS’s own Office of Inspector General (OIG) and the Government Accountability Office (GAO) have found that the 287(g) program has not been consistently implemented; that law enforcement agencies are not in compliance with the terms of the agreements; that it lacks effective training; that it does not provide adequate communications between law enforcement agents and supervisors; that it lacks oversight; and that it is missing protections against racial profiling and other civil rights abuses.<sup>75</sup> Of the 33 recommendations OIG made, ICE rejected only one: the recommendation for data collection that would allow ICE to identify whether racial profiling is occurring. Despite the lack of adequate parameters

and protections, in July 2009, the Obama Administration announced expansion of the program into eleven new jurisdictions.

“To address concerns regarding arrests of individuals for minor offenses being used as a guise to initiate removal proceedings, DHS officials said that the MOA [Memorandum of Agreement] requires participating LEAs [Law Enforcement Agencies] to pursue all criminal charges that originally caused an individual’s arrest. However, ICE does not require LEAs to collect and report on the prosecutorial or judicial disposition of the initial arrests that led to aliens’ subsequent immigration processing under the 287(g) program. This information could help to establish how local prosecutors and judges regarded an officer’s original basis for arresting aliens. Without this type of information, ICE cannot be assured that law enforcement officers are not making inappropriate arrests to subject suspected aliens to vetting by 287(g) officers for possible removal. In one facility that screens all individuals detained, an ICE supervisor described a situation in which a state highway patrol officer transported an accident victim to a participating county jail to determine the victim’s immigration status. The ICE supervisor explained that the accident victim was not brought to the jail to be charged with an offense, but to have a 287(g) officer determine the victim’s deportability. The victim was detained until a 287(g) officer could respond.”<sup>76</sup>

*—U.S. Department of Homeland Security Inspector General Report on the Performance of 287(g) Agreements*

Rachel Jackson, who testified at the hearing in Nashville, TN, was shocked in 2008 when her husband, originally from Mexico and now a lawful permanent resident of the U.S., was detained when riding in someone else's car.

“[I]n 2008 he was picked up by Nashville police for being a passenger in a car driven by someone who did not have documentation to be in the U.S. He was subsequently sent to Oakdale the day before his Bond Hearing with the Immigration Judge in Memphis. I drove to Oakdale to bond him out and after we returned to Tennessee, just a few miles from home we pulled in to get gas. Two police cars pulled in and blocked my car because they saw my husband pumping the gas. At the time, my husband did not drive because he did not have a license. When I noticed the officers, I ran out and told my husband to shut the door. The officers then looked at me and left.

I was so surprised that these police officers would have pulled up to harass my husband just because of the color of his skin. Had I been pumping gas, they never would have looked twice at us. This was obvious when they pulled off when they realized that I was with my husband.

I was born and raised in Tennessee and we own a small farm in Christiana along with my mother, grandfather, husband, and two children. I have always been proud to be from Tennessee—not any more. It is no different than the pre-Civil Rights era where the color of your skin will dictate what type of treatment someone will receive.... I am terrified of [my husband] driving back and forth to work, even though he has a valid license and Green Card. I have always known that he will be subjected to harassment from Metro-Davidson County police; but now, I will have to worry about the entire state of Tennessee.

We are even considering selling the farm and all of us moving north where a brother resides to escape the discrimination my husband has suffered and will continue to suffer if we stay in Tennessee and this new law passes.”

### *The Criminal Alien Program*

The Criminal Alien Program (CAP) is an immigration screening process within federal, state and local correctional facilities designed to identify and place immigration holds or ‘detainers’ on “criminal aliens to process them for removal before they are released to the general public.”<sup>77</sup> CAP is intended to place “a high priority on combating illegal immigration, including targeting illegal aliens with criminal records who pose a threat to public safety.”<sup>78</sup> A recent study by the Earl Warren Institute on Race, Ethnicity and Diversity at the University of California, Berkeley School of Law examining the CAP program in Irving, Texas, found that felony charges accounted for only two percent of the ICE detainers issued, while 98 percent of ICE detainers were issued for misdemeanor offenses.<sup>79</sup> This study strongly suggests that the program was not effective in prioritizing the arrest and removal of individuals who committed dangerous or violent crimes and instead swept up a great majority of individuals who posed no threat to public safety.

### *The "Secure Communities" Initiative*

Much less is known about Secure Communities (SC), a program that enables correctional officers to submit fingerprints of all individuals arrested for alleged

criminal conduct for comparison against DHS immigration databases, as well as state and FBI criminal databases. Like CAP, Secure Communities has been criticized for incentivizing arrests based on racial or ethnic profiling and for pretextual reasons so that immigration status can be checked. ICE states that SC utilizes a “threat-based approach” designed to “prioritize criminal aliens for enforcement action based on their threat to public safety.”<sup>80</sup> However, early data from the initiative indicated that it was flagging a high number of individuals charged with lesser offenses. Between the program’s inception in October 2008 and the time of a joint announcement by the Secretary of the Department of Homeland Security and the Assistant Secretary for ICE in November 2009, Secure Communities had identified only 11,000 individuals charged with or convicted of Level 1 crimes, while more than 100,000 individuals were charged with or convicted of lesser Level 2 and Level 3 crimes.<sup>81</sup> The “criminal aliens” cited in ICE’s numbers even included U.S. citizens, since naturalized U.S. citizens have records in immigration databases. A recent Freedom of Information Act (FOIA) Request revealed that over 5,800 U.S. citizens were incorrectly identified for additional questioning through the Secure Communities program.<sup>82</sup> ICE’s own data, as gleaned through this FOIA Request, further reveal that the vast majority (79 percent) of individuals deported under the Secure Communities program are not criminals, or were picked up for low-level offenses. ICE’s data also shows that some jurisdictions, such as Arizona’s Maricopa County, under a DOJ investigation for patterns and practices

of discriminatory policing—yet still retains the ability to participate in immigration enforcement programs like Secure Communities and 287(g)—have abnormally high rates (54 percent in Maricopa County) of non-criminal deportations under Secure Communities. Other jurisdictions offer even more troubling statistics. For example, in Travis, Texas, 82 percent of deportations under Secure Communities are of non-criminals. In St. Lucie, Florida, 79 percent; 74 percent in Yavapai, Arizona, 68 percent in Suffolk, Massachusetts and 63 percent in San Diego, California.<sup>83</sup> This data demonstrates that the Secure Communities initiative is not “prioritizing criminal aliens for enforcement action based on their threat to public safety” but rather deporting individuals for minor offenses and even drawing in U.S. citizens for enforcement actions—further evidence that this ICE initiative is encouraging racial profiling.<sup>84</sup>

One witness at the Houston hearing became part of the fabric of local immigration enforcement one day in May 2010, when she was called by law enforcement to care for her best friend’s child after her friend was arrested for not making a complete stop at a stop sign. Lucia Dubon testified about her own experience and the arrest as told to her by her friend:

“On May 19, 2010, I visited my friend at the Fort Bend County Jail. She told me she was stopped and she was told that the Sheriff had initially told her that he was giving her a warning. He took her driver’s license and insurance and went to check

her identification in his computer in his patrol car. She saw he was coming back toward her. He then asked her to get out and turn around her and handcuffed her. When she was handcuffed, she was then informed that it was because of a visa immigration violation. She had an expired visa of employment authorization.... My friend was particularly hurt and still cries when she talks about how her son cried and asked her to pick him up when she sat there handcuffed. To this day, I have witnessed when the child sees a police officer, he says: ‘police took mommy away?’ And ‘where is mommy?’ and ‘when will she be back?’ and ‘are the police going to take my daddy away?’ I have seen him cry constantly. After a week in the county jail, I visited my friend in the immigration detention center in Houston. She was desperate and she wanted to be free and to be with her child. She was subsequently deported and her child stayed behind.... She had been in the United States for 18 years. She had studied bookkeeping in the community college. She owned her own home and she had no criminal record. Now her effort to lead a good life in this country is lost. I hope that all is done to rectify these abuses.... I hope that my friend’s case is not forgotten and that she and her family and other families like hers are given justice.”

Lucia’s story highlights an important problem communities face with local enforcement of immigration law: confusion between formal and informal programs and between neighboring jurisdictions that have

different agreements in place. Lucia's friend was stopped in Fort Bend County, which is located in the Houston metropolitan area and has the Secure Communities program, which is only supposed to operate in the detention facility, not by law enforcement working in the field. Neighboring Harris County, where Houston itself is located, has had a "jail model" 287(g) program since July 2008, meaning only officers in a jail facility may be authorized to enforce immigration laws (as opposed to the alternative "task force" model in which officers are deputized to inquire about immigration status on the streets), and the Secure Communities program since October 2008. The question remains: on what authority did the local police officer act when he arrested Lucia's friend on immigration charges as the officer told Lucia?

The Secure Communities program has profoundly affected communities because of the lack of information about the workings of the program and confusion over whether it is still safe to call law enforcement if one needs help. The muddled information about programs like Secure Communities raises fear among community members and reduces their willingness to work with the police, significantly affecting officers' ability to do the police work that protects not just some areas and populations, but all of our communities. A recent unpublished study from Salt Lake City analyzing the effect of laws that deputize state and local police officers to engage in immigration enforcement found that *all residents*, not just Latino citizens or those who may be undocumented, would

be less likely to report crimes if their local police department engaged in civil immigration enforcement. Specifically, the study found that when white and Latino respondents considered a future with such an immigration law, their willingness to report drug crimes was drastically reduced, by approximately 30 percent for both white and Latino respondents. White respondents were also 11 percent less likely to report violent crimes and the unwillingness of Latino respondents to report violent crimes was higher than 25 percent.<sup>85</sup>

Community security suffers when community members perceive state and local police to be acting as or cooperating with federal immigration agents. They lose trust in the officers who are meant to protect them and become less willing to cooperate with police or to report crimes or serve as witnesses. This leads to unsolved and undeterred crimes in immigrant-heavy areas, especially problematic considering that the undocumented population is particularly vulnerable to victimization.

**T**o demonstrate the fragility of the relationship between the police and immigrants, one mid-western police chief recounted an incident where an unauthorized immigrant was a witness to a crime and agreed to testify in a criminal case. The witness's name appeared on a witness list in preparation for the trial. As the court began to vet the background of this witness, defense attorneys revealed that he was an undocumented alien. A few days after the witness testified in the court case, ICE arrested him and initiated deportation

proceedings. Word of this incident rapidly spread throughout the immigrant community and, as a result, the police have had difficulty securing the cooperation of other immigrant witnesses. Even residents who had been victimized and exploited feared approaching the police because trust between the immigrant community and the police had been destroyed.... In communities where people fear the police, very little information is shared with officers, undermining the police capacity for crime control and quality service delivery. As a result, these areas become breeding grounds for drug trafficking, human smuggling, terrorist activity, and other serious crimes. As a police chief in one of our focus groups asked, 'How do you police a community that will not talk to you?'"

*—From a 2009 Report by the Police Foundation, an independent body that provides research, technical assistance and communications regarding police organizations<sup>86</sup>*

Police have reported increased difficulty in securing the cooperation of immigrant witnesses and a troubling decrease in reports of domestic violence.<sup>87</sup> On this point the Major Cities Chiefs Association released recommendations stating: "Local agencies have a clear need to foster trust and cooperation with everyone in these immigrant communities. Assistance and cooperation from immigrant communities is especially important when an immigrant, whether documented or undocumented, is the victim of or witness to a crime. These persons must be encouraged to file reports

and come forward with information. Their cooperation is needed to prevent and solve crimes and maintain public order, safety and security in the whole community."<sup>88</sup>

### ***Local Immigration Enforcement: Informal Programs***

Even without formal immigration enforcement authority, many state and local agents have taken on immigration enforcement activities. Many are operating on what they believe is their "inherent authority" to enforce federal immigration law, taking cues from a 2002 DOJ Office of Legal Counsel (OLC) memo reversing a 1996 OLC opinion that concluded that "state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability."<sup>89</sup> The 2002 OLC opinion has been interpreted by some state and local law enforcement agents as granting them the ability to arrest individuals they suspect of lacking legal immigration status. State and local agents exercising "inherent authority" act without oversight by the federal government and without training in immigration law enforcement.

An example of an individual targeted solely for a civil immigration violation by local law enforcement lacking formal immigration enforcement authority is the case of Rita Cote. Cote's sister was a victim of domestic violence, and law enforcement responded to a call for help. However, the police in Tavares, Florida—who had no formal



authority to check immigration status—ignored the domestic violence victim and instead arrested her sister, Cote, who was there to translate for the police. Police then left her sister with the accused batterer and took Cote to jail when she could not prove U.S. citizenship. The police blatantly disregarded their duty to protect the victim and curtailed any potential to investigate a reported crime of violence. Cote was held in detention and separated from her husband and three children for nearly three weeks.<sup>90</sup> Cote’s case signaled to immigrant survivors of domestic violence and other crimes—both in Florida and around the country—that a 911 call would lead not to police protection, but instead to detention, deportation and permanent separation with U.S. citizen family members.

Even where no inherent authority is claimed, and no formal immigration enforcement program exists, the line between local government officials and ICE agents has become blurred. An attorney was just one of the witnesses who testified about ICE agents being called in otherwise non-immigration matters to provide “interpreter services,” even though none knew Spanish fluently. Joe Morrison’s client in Mattawa, Washington was targeted by a team of local law enforcement agents and ICE agents, who “divided up into teams of two and three men and fanned out through the town, and began banging on the doors of Latina childcare providers and demanding immediate entry into their homes.

Once inside the homes, the first questions out of their mouths were ‘are you a citizen of the United States? If so, we want immediate proof of that. Not only proof that you’re a citizen, but we want proof that your children are citizens. And we want proof that your husbands, who are off...in the fields, are citizens as well.’ Only two of 30 childcare providers were charged, but all charges against them were later dropped. Morrison asked, “The question is why did this raid happen in Mattawa? And why were they targeting Latina childcare providers?” He provided a clue to an answer: “One of the police officers in Mattawa, prior to this raid was interviewed by the newspaper and was quoted as saying that ‘Mattawa will be lost in five years. I don’t want to raise my kids here anymore. There’s a takeover going on in this community and people choose not to see it.’” Later, during an investigation related to his clients’ lawsuit, Morrison found out more about the cooperation between the local officers and ICE: “ICE’s role was very limited. They got brought in toward the end. What allegedly was said in the paper by the [State Department of Social and Health Services (DSHS)] officials is that they needed some interpreters. And so, they contacted the ICE agents. Well, we took the depositions of the ICE agents. And of the six that were involved, five said that they couldn’t possibly have interpreted at all, and that they weren’t there to interpret... And I think it’s because...[DSHS] also thought that a lot of [the women] were going to be undocumented. They were gonna then convict them of fraud, and then, deport them all, and, of course, none of that happened.”

At the hearing in Burlington, Washington—a state without any formal partnerships between ICE and local law enforcement—Marco Sanchez, a practicing psychologist who manages two community health clinics, testified about his experienced being stopped by police near one of the clinics:

**“ I didn’t know the reasons why this police officer decided to stop me. Of course, I was very surprised, anxious, tried to understand what I did wrong. And the first thing the police officer asked me was, ‘Do you have legal documents?’ Sure, I’ll give you my driver’s license, my registration and my insurance. And he asked me, again, did you have legal documents? I thought that he meant my insurance documents were expired. We received these insurance documents, periodically, and I’m not always on top of the newest one in the wallet compartment. So, I’m, again, looking for those documents. He asked me directly, are you legally in the country? That got me by surprise and I started asking him why did you stop me?... He didn’t say anything. Walked to the patrol car with my driver’s license. Came back. He then asked me to leave. ”**

About a month later, when Sanchez heard about a community meeting with police, he attended, “because I thought it was important for them to hear what happened to me and what was going on:

**“ The Chief of Police began by saying they were not working in conjunction with ICE... that they were just rumors and that never happened... I have to tell and stand up and say, please, I’m sorry, but what you said is not truth. Your police officer stopped me and was asking for legal documents. He was asking me if I was legally in this country. He continued denying that that’s a normal practice in the Lynnwood community, that none of what the community was saying at this particular meeting was true, that they do not share those values, and that they were there to protect the community. In other words, that never happened. These type of incidents never happen in Lynnwood. The ladies and families that were separated—and we’re having difficulties dealing with that—that were at the clinic, where I work, never happened. The fact that this police officer stopped me and asked me if I was legal, never happened. I’m a U.S. citizen. And this is happening. This is truly happening. ”**

Law enforcement officials at the state and local level have themselves declared that their agencies are ill equipped to handle immigration enforcement responsibilities.<sup>91</sup> When state and local law enforcement agents do not have requisite training or experience in immigration law enforcement, they rely on what is easily perceivable—an individual’s appearance or accent. When state and local police attempt to wear the second hat of civil immigration enforcement, they become far less effective at fulfilling their primary mission: fighting crime and ensuring public safety.

### *State Law*

The steady expansion of authority from ICE to state and local law enforcement has paved the way for laws such as Arizona’s Senate Bill (SB) 1070, perhaps the most well-known of a number of state laws intended to allow local and state officers to enforce immigration laws. SB 1070 would have criminalized unlawful presence in the United States and would have required police to demand papers proving citizenships or immigration status from people they stop, based on an undefined “reasonable suspicion” that they are in the United States unlawfully. The law would also give private citizens the right to sue law enforcement agencies if they believed that agents were not fully enforcing the law. In late July, a federal judge considered a lawsuit filed by the DOJ which argued that the Arizona initiative undermines the federal government’s authority to enforce immigration laws. Other lawsuits were filed by several immigrants’ rights and civil rights groups, and just one day before SB 1070

was to go into effect, the judge blocked some of its most controversial sections.<sup>92</sup> U.S. District Judge Susan Bolton ruled that, although the bill would still go into effect on July 29, many of the bill’s sections would be blocked until the disputed issues are heard and resolved by the court.

Among the critics of state and local law enforcement’s involvement in the federal government’s immigration enforcement responsibilities, numerous representatives of law enforcement agencies and associations have flagged local immigration enforcement as a troubling trend. When SB 1070 passed, the Arizona Association of the Chiefs of Police released a statement in opposition to the bill: “The provisions of the bill remain problematic and will negatively affect the ability of law enforcement agencies across the state to fulfill their many responsibilities in a timely manner.”<sup>93</sup> Chief Jack Harris, President of the Arizona Associations of Chiefs of Police emphatically stated, “You have one side saying that we’re going to do racial profiling. You have another side saying we’re not doing enough.... It makes it very difficult for us to police our communities.” Echoes of this statement were heard across the country from law enforcement leaders, including the Los Angeles Police Chief Charlie Beck, who stated that under such laws, “we will be unable to do our jobs... laws like this will actually increase crime, not decrease crime.”<sup>94</sup>

# THE LAW REGARDING RACIAL PROFILING

This section analyzes current Constitutional, national, international, and state and local laws to assess their relevance to combating racial profiling.

## Constitutional Law

Racial profiling is prohibited by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>95</sup>

### *Stops, Searches and the Legal Difficulties of Bringing a Case to Court*

Over the course of constitutional history, the Supreme Court has clarified the meaning of the Fourteenth Amendment in the context of racially-based law enforcement. In *Whren v. United States*,<sup>96</sup> decided by the Supreme Court in 1996, the police stopped a car driven by two African American men in a “high drug” area. They cited a traffic violation as the reason to stop the car and arrested the men—who were not otherwise suspected of committing a crime—on drug charges. The Court held that such a stop, where police may have actually been investigating violations of other laws,—known as a “pretextual stop”—

is not unconstitutional, as long as police have probable cause to believe a traffic violation occurred. In reference to the claim that the stop was racially motivated, the Court stated, “*We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.*”<sup>97</sup>

While the Fourteenth Amendment provides some protections for individuals faced with racial profiling, the burdens of proving an equal protection case are almost insurmountable. First, such a case is extremely difficult to prove because it is not sufficient merely to demonstrate that an officer’s actions were discriminatory. In order to succeed, a plaintiff must establish the offending officer’s intent to discriminate—something that requires complex legal knowledge and strategy. Even if one is able to overcome the legal hurdles, there is the matter of accessing statistics and data that could help prove the case. Access to data about law enforcement stops is not universally available; many states do not mandate data collection and without such mandates, local agencies have little motivation to track this information on their own. Even in states where there is a local or state law mandating data collection, the information is sometimes still difficult for the public to access. As of yet, there is no federal law mandating the collection of information on the race, ethnicity, religion or national origin of those who are stopped or searched by federal law enforcement agents.

Another case that fundamentally defined constitutional protections in the



context of a police stop and search of individuals without a search warrant was the case of *Terry v. Ohio*.<sup>98</sup> In that case, an officer stopped and “frisked”—patted down the outside clothing of—Mr. Terry and two other African American men without a warrant after observing the men. Terry countered that this was a violation of the Fourth Amendment prohibition of unreasonable search and seizure. In its decision, the Supreme Court expanded law enforcement’s power to stop and search individuals without probable cause, while clarifying the limitations to that authority. The Court made a distinction between a “full search”, which requires probable cause, and a “stop and frisk”—which is a search conducted after observation of an individual and the reasonable belief that he has a dangerous weapon.<sup>99</sup>

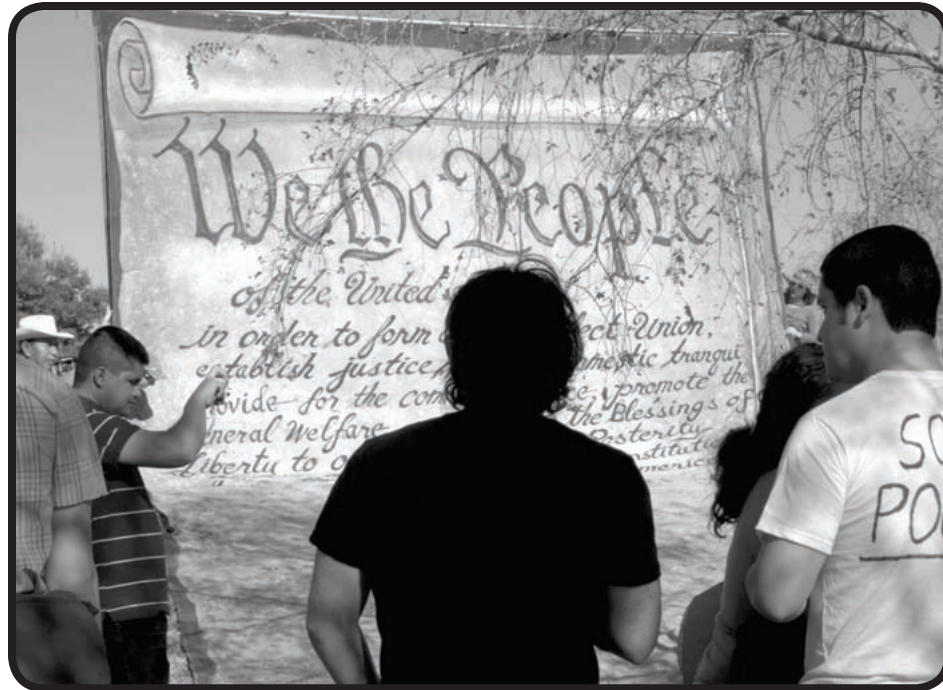
The *Terry* case, which gave police expansive power to stop and frisk individuals, along with the *Whren* case, which gave police the power to conduct pretextual stops, has created confusion for individuals interacting with police. It has caused individuals to have difficulty understanding their rights or proving that they have been violated. Subsequent cases such as *Arizona v. Gant*,<sup>100</sup> decided by the Supreme Court in 2009, have further clarified which searches by law enforcement are and are not constitutional. In the *Gant* case, police arrested Rodney Gant after waiting for him to park his car and walk away from it, yet his car was still searched. The Court found that an officer may conduct a search of a vehicle the arrestee was recently in, but only if the officer reasonably believes the arrestee

might still be able to access the vehicle and put the officer in danger or destroy evidence related to his arrest.

### ***Constitutional Interpretations of Racial Profiling in the Immigration Context***

Complications in constitutional interpretation further arise due to problematic guidance from the Supreme Court regarding racial profiling by Customs and Border Patrol officers. In *U.S. v. Brignoni Ponce*<sup>101</sup>, border patrol officers near, but not at, the U.S. border with Mexico stopped and searched a vehicle, despite having neither a warrant nor probable cause of any violation. The officers questioned the driver and passengers about their immigration status though they had no suspicion that the individuals were in the country unlawfully—except that they looked like they were of Mexican descent. The Court found that stop unconstitutional, because looking Mexican was an unlawful basis to stop and question drivers and passengers about their immigration status. But it also said that immigration officers *can* consider some race and ethnicity-based factors in their decision to perform a stop. For example, Mexican appearance and “mode of dress and haircut,”<sup>102</sup> were listed as two possible factors in the reasonable suspicion that an individual is an undocumented noncitizen.<sup>103</sup>

Also relevant to constitutional rights in the immigration arena is *Reno v. American-Arab Anti-Discrimination Committee (ADC)*,<sup>104</sup> a case in which the Supreme Court decided that a group of immigrants who were



singled out for deportation because of their political affiliation could not challenge their deportation on the grounds of selective enforcement. In this case, the individuals were accused of being part of the Popular Front for the Liberation of Palestine (PFLP). They were denied the ability to seek redress for selective deportation because the Court said that as long as an individual was held for a valid reason in the immigration system (for example, if the individual was out of immigration status), immigration law did not allow federal courts jurisdiction to review whether or not selective enforcement had occurred in the case. Citing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Supreme Court Justice Scalia wrote, “[a]s a general matter—and assuredly in the context of claims such as those put forward

in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.”<sup>105</sup> The Court did, however, leave open the possibility that a case “so outrageous” in its allegation of discrimination might be considered an exception to the rule.<sup>106</sup> This is a somewhat confusing guideline in the already muddled world of immigration regulations and standards.

### ***Constitutional Interpretations of Racial Profiling in the National Security Context***

Case law also provides precedent for allowing racial profiling in the national security context. Some might be surprised

that a case sustaining Japanese-American internment is still law today. In *Korematsu v. U.S.*,<sup>107</sup> Mr. Korematsu refused to join the over 100,000 people of Japanese descent ordered to move from their homes into internment camps during World War II. The Court held that while “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,”<sup>108</sup> the internment of Japanese-Americans was nevertheless deemed constitutional because it was judged by the military to be the proper action in light of “military urgency.”<sup>109</sup>

### ***A Problem of Resources: Practical Obstacles to Bringing a Case to Court***

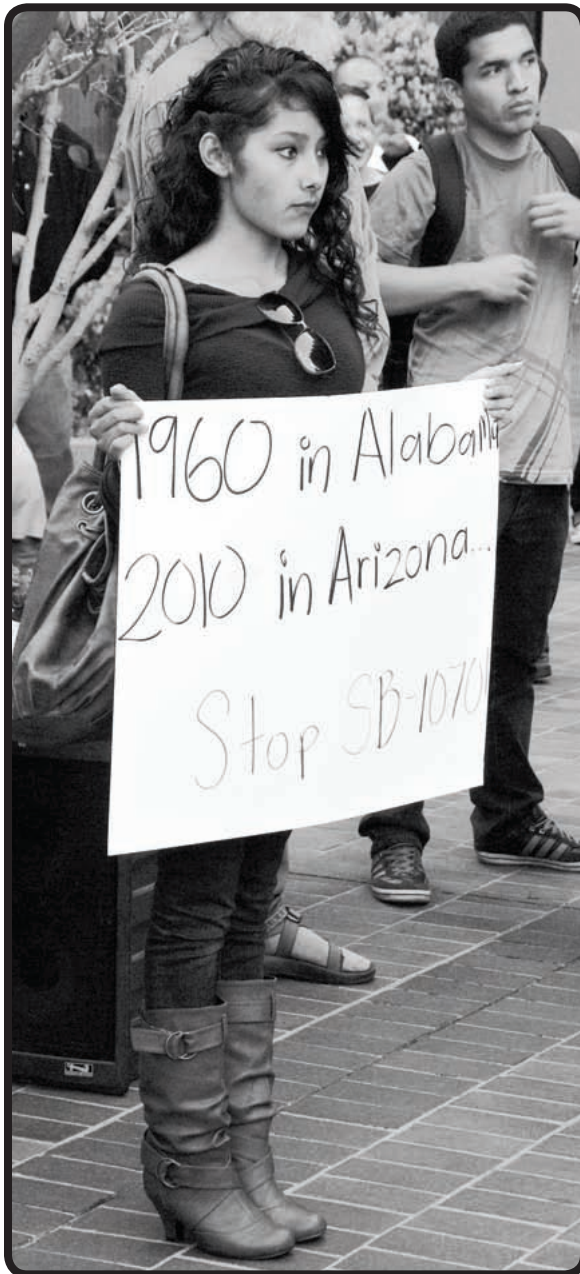
The last and possibly most difficult barrier to taking legal action in the instance of profiling is the amount of resources a victim must have in order to hire an attorney. Realistically, a victim requires a legal team to conduct research, gather information, question witnesses, request and analyze data, if any exists, and communicate with attorneys from the law enforcement agency who are often well versed in such complaints. In short, an individual cannot just file suit in a case of alleged racial profiling but must mount a case against an entire institution, a proposition that curtails many people from seeking relief through the judicial system.

## **Federal Law**

### ***Addressing Racial Profiling by Statute: Section 1983***

As an alternative to citing Constitutional protections, an individual who believes he or she has been unlawfully profiled can attempt to use a federal statute, section 1983 of the Civil Rights Act of 1871,<sup>110</sup> (§1983) to bring a lawsuit to court. The Act was passed in 1871 to give individuals a legal remedy when federal laws were violated. It was passed in large part because of ongoing Klu Klux Klan activities that terrorized Southerners in the United States and went unpunished in the existing state or local judicial systems.<sup>111</sup> Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.<sup>112</sup>



This statute provides that a person can sue a state official for depriving them of a constitutional right, even if the person depriving them of that right acted under color of state or territorial law. “Color of law”<sup>113</sup> means a person is using authority given to them by a state or territorial agency, which can include law enforcement personnel performing their law enforcement duties.<sup>114</sup> To use this law in a racial profiling claim, the victim must prove that the stated reasons for the stop were a pretext to cover up the true race-based—and therefore illegitimate—reason for the stop.<sup>115</sup> The victim also has the responsibility to prove that he or she would not have been stopped but for his or her race<sup>116</sup>, an extremely difficult task. As the petitioners in the *Whren* case noted, “...the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.”<sup>117</sup>

Unfortunately, it is almost impossible for a victim of racial profiling to acquire direct evidence to prove an inappropriate use of race. As the Supreme Court stated in *Washington v. Davis* in 1976, “Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another [...or] in various circumstances the discrimination is very



difficult to explain on nonracial grounds.”

<sup>118</sup> This case was brought by two African Americans whose applications to work for the Washington, D.C., police department were turned down. Citing evidence that African American applicants failed certain application tests at a disproportionate rate, the applicants claimed the department had racially discriminatory hiring practices. The case demonstrates that inferring an intent to discriminate from all the relevant facts involves a significant amount of judicial discretion and thus can be a matter of chance whether the facts are decided on behalf of the plaintiff or the defendant. Even if an individual attempted to produce “direct, circumstantial, or statistical evidence that he was a target of racial profiling,”<sup>119</sup> such evidence is difficult and expensive to acquire. Individual victims rarely have the resources to requisition a study, and currently fewer than half of all states require law enforcement to collect demographic data on any stops they initiate. The information that victims need to prove their racial profiling claims in a court is largely unavailable to them.

***Addressing Racial Profiling through the Department of Justice:  
Section 14141***

While it is difficult for one person to pursue relief after an incident of profiling, Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994<sup>120</sup> attempts to provide an avenue for systemic

change that can have a larger impact on communities rather than individual cases. Section 14141 states:

**(a) Unlawful conduct**

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

**(b) Civil action by Attorney General**

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1)<sup>121</sup> has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

Section 14141 empowers the DOJ to hold law enforcement agencies accountable for violating the rights of persons in the United States. The DOJ does this by conducting investigations into reported violations and reaching settlement agreements or implementing consent decrees—non-litigated agreements between local law enforcement and the DOJ—to reform offending agencies. This avenue of law enforcement accountability does not address individual cases, but rather seeks to address the larger problem.

When an investigation determines that police misconduct, which includes racially discriminatory behavior such as racial profiling, has occurred or is occurring as a pattern or practice within a department, the DOJ works with the law enforcement agency to make policy and practice changes, or may file a lawsuit if the agency is uncooperative.<sup>122</sup>

DOJ litigates a pattern or practice claim only if it is unable to negotiate a consensual resolution to the problems identified. The Department emphasizes its preference for providing technical assistance to local government and law enforcement by identifying deficient policies and management practices and suggesting a variety of possible solutions. Since 1997, there have been approximately 20 public investigations conducted by the DOJ pertaining to the conduct of law enforcement agencies. These investigations ranged from Portland, Maine to the U.S. Virgin Islands to the Los Angeles Police Department. These investigations have provided insight into improving the use of force by police officers and have underscored the need for consistent and explicit policy and training of law enforcement. Most recently, the DOJ has launched investigations of the Maricopa County Sheriff's Office in Arizona, and the East Haven Police Department in Connecticut. Though a DOJ investigation can have a significant impact on a law enforcement agency and the community being affected by profiling, the DOJ Civil Rights Division has limited capacity to respond to complaints and

initiate investigations. This is due in part to funding and time allocation, but also because the office can only respond to issues it knows about; complaints must be filed in order for the division to become aware of the problem.

## **International Law**

### ***International Instruments Prohibiting Racial Discrimination***

In many cases, international law provides stronger prohibitions against racial profiling than U.S. law. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the U.S. ratified in 1994, defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."<sup>123</sup> Under this international human rights instrument, binding on the United States, a government is responsible for stopping both intentional *and* effective discrimination. Actions that effectively *result* in discrimination are seen as violations of the law, even if one can't prove what a particular agent *intended*.<sup>124</sup>

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD, ratified by the U.S. in 1994) binds all levels of the U.S. government (federal, state and local) to comply with the requirements of the treaty.

Part I of Article 1 states, “In this convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Part I of Article 2 says, “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.”

The *International Covenant on Civil and Political Rights* (ICCPR, ratified by the U.S. in 1992) binds all levels of the U.S. government (federal, state and local) to comply with the requirements of the treaty:

Part II, Article 1: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.”

Because the U.S. has signed and ratified ICERD and the ICCPR, both international human rights treaties, U.S. officials report periodically to the human rights treaty bodies that monitor compliance with these laws. U.S. advocates have appealed to the treaty monitoring bodies as an additional avenue through which to hold U.S. federal, state and local law enforcement accountable to the principles of equality and non-discrimination. U.S. advocates have sought to demonstrate the pervasiveness of racial profiling in the United States and, indeed, a number of these bodies have found that the U.S. has failed to comply with its international human rights obligations to honor the principles of equality and non-discrimination.

### ***International Bodies Call for an End to Racial Profiling***

Two United Nations (UN) human rights treaty bodies have explicitly called upon the U.S. government to take action to end racial profiling in order to meet its treaty obligations: the Human Rights Committee, which monitors compliance with the ICCPR, and the Committee on the Elimination of Racial Discrimination, which monitors compliance with the ICERD. In paragraph 24 of its 2006 Concluding Observations of U.S. compliance with the ICCPR,<sup>125</sup> the Human Rights Committee called upon the U.S. government to “continue and intensify its efforts to put an end to racial profiling used by federal as well as state law enforcement officials,” particularly in state police stops and searches. In paragraph

27, the Committee recommended that “agents who have received adequate training on immigration issues enforce immigration laws,” criticizing U.S. programs and policies that delegate immigration enforcement authority to agents who do not have the requisite training to enforce this complicated body of law and that result in allegations of racial profiling.<sup>126</sup>

In paragraph 14 of its 2008 Concluding Observations of U.S. compliance with the ICERD,<sup>127</sup> the Committee on the Elimination of Racial Discrimination (CERD) recommended that the United States “strengthen its efforts to combat racial profiling at the federal and state levels.” In both 2008 and 2009, the CERD urged the United States to review the National Security Entry-Exit Registration System (NSEERS) and to stop this and other programs promoted as counter-terrorism measures that have encouraged racial profiling of Muslims, Arabs and South Asians since September 11, 2001. In 2009, the CERD raised concerns about the use of racial profiling in migration policies and urged the U.S. government to reconsider its policy under section 287(g) of the Immigration and Nationality Act. In 2009, the CERD additionally urged the United States to eliminate loopholes in the 2003 Department of Justice (DOJ) Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. To date, the Obama Administration has fallen short of meeting the CERD’s recommendations, although the DOJ Guidance is currently under review.

### ***Government Inaction on International Agreements***

The United States helped create and shape the universal human rights framework and participated heavily in the drafting of the international agreements cited above. However, it has failed to meaningfully respond to many of the observations and recommendations made by the bodies that monitor compliance with universal human rights law. Moreover, in the case of ratification of ICERD and the ICCPR, the United States attached a “non-self-executing” provision to both documents. Essentially, this provision denies private citizens the ability to use these international laws as a legal basis for seeking protection and redress in U.S. courts for violations of rights recognized by these documents. Even so, under the Vienna Convention on the Law of Treaties, a government that signs a treaty “is obliged to refrain from acts which would defeat the object and purpose” of that treaty.<sup>128</sup>

The U.S. government has complied with its treaty reporting obligations by filing mandatory status reports with the treaty monitoring bodies—although not always in a timely fashion—in the recent past. However, the government’s reports on the state of racial profiling in America and the programs and policies that enable this unlawful practice have been marked by omissions, deficiencies and mischaracterizations.

The United States has an opportunity to be a global human rights leader on the issue of racial profiling. By doing so, the U.S. could regain moral standing in the

broader international community, a standing severely harmed by post-9/11 policies and programs that curbed civil liberties and human rights. The U.S. appears eager to criticize human rights violations everywhere but within its own borders. This perceived “U.S. exceptionalism” undermines U.S. moral authority abroad, posing a national security risk.

The Obama Administration has publicly committed to promoting and protecting human rights around the world. Clear evidence exists that federal, state and local law enforcement agencies continue to racially profile individuals and groups, and the U.S. government has taken some action to investigate, prosecute or combat these practices. However, because it has not adequately addressed and eradicated those policies and programs that encourage racial profiling, the United States is in violation of its treaty obligations requiring state parties to condemn racial discrimination and to undertake policies to eliminate the practice in all its forms.

In August 2010, the Obama Administration submitted its first formal report to a U.N. human rights body in conjunction with the Universal Periodic Review procedure. In the sections of the government’s report that address racial profiling and immigration enforcement, the Administration acknowledged that racial profiling is not consistent with the United States’ commitment to fairness in the justice system. It noted that the government is in the process of evaluating programs and policies that have resulted in racial profiling. However, the government’s report does

not offer any new, improved or expedited measures to combat the practice. The failure of the U.S. government to respond to the specific criticisms raised by the U.N. human rights treaty bodies will likely be highlighted in the U.N. review scheduled for Nov. 2010.

## State and Local Laws

Because racial profiling cases have proven difficult to file under federal law, a number of individuals have sought relief through state law, but they, too, have largely been disappointed. Similar to the challenges faced by federal claims, state and local claims against racial profiling are difficult to prove without access to data on law enforcement practices in stops, searches and detentions. Without this information, it is difficult to produce “direct, circumstantial, or statistical evidence that [an individual] was a target of racial profiling.”<sup>129</sup> Without such evidence, a person bringing a claim must show that they were, “similarly situated yet received disparate treatment by identifying individuals who were treated differently.”<sup>130</sup> There are few individuals with the time or financial resources available to them to identify other individuals like themselves, but of a different race, who were treated differently in a similar situation by law enforcement. This requirement is effectively insurmountable. Furthermore, not all people with a viable claim of racial profiling have access to adequate counsel; they might attempt to represent themselves or hire an inexpensive lawyer focused more on the immediate matter and less on systemic



racial profiling. In the case of noncitizens, many are deported before they can file a complaint, much less a court claim. While cases can be appealed, lack of access to legal representation is yet another hurdle to preserving issues so that higher courts will even consider them.<sup>131</sup>

A review of reported decisions in state courts suggests that plaintiffs typically find it difficult to meet the required standards with claims of racial profiling. Most states do not have prohibitions in place to protect motorists and pedestrians against racial profiling. The laws in existence vary in their intent, prohibitions and effectiveness. Only 29 states address racial profiling in legislation at all. Some states have passed legislation prohibiting racial profiling, while

others focus just on a requirement that law enforcement agencies collect data on the race of individuals at traffic stops. Data collection allows the problem to be made known to a wider community and can reveal patterns that are invisible to all but those who experience the problem. While data collection can be useful in monitoring law enforcement's use of discretionary stops, it is not the only measure needed to curb unlawful profiling.

## ***Provisions of Racial Profiling Statutes: Prohibitions, Bans, Data Collection and Training Mandates***

### ***Data Collection***

In the 29 states that do have racial profiling legislation, such legislation is often ineffective at preventing abusive practices. Currently, only nineteen states require data collection by law enforcement for traffic stops.<sup>132</sup> Without the data collected from such stops, it is impossible to know exactly how prevalent racial profiling is. The Racial Profiling Data Collection Resource Center at Northeastern University clarifies: “These data collection efforts are an attempt to provide the tangible numbers that will enable police and community leaders to better understand their policing activities. With this understanding, departments will be able to examine and revamp policing strategies based on effectiveness, reconfigure deployment of police resources, or take other measures.”<sup>133</sup>

Not all data collection requirements are equal. For example, in Louisiana police officers are required to keep data on all vehicle stops unless the agency or department has a written policy against racial profiling.<sup>134</sup> It is not then surprising that cases that claim racial profiling in the state are seldom brought before the courts. Although, on paper, the law seems to address racial profiling, it actually becomes a policy that effectively shields law enforcement from liability for profiling in practice. An agency need only establish

a written policy against racial profiling to excuse itself from keeping data that might provide clues as to whether or not patterns of profiling exist.

Data collection is not only beneficial to individuals with a legal claim; it can be helpful to law enforcement agencies as well. As Sgt. Michael Snyders, former Illinois State Coordinator of Operation Valkyrie, a drug interdiction program and a named defendant in *Chavez v. Illinois*, stated: “One reason for collecting such data was to respond to potential questions about whether officers were targeting motorists because of their race.”<sup>135</sup> *Chavez* was a case brought by Peso Chavez and Gregory Lee, two drivers who were stopped in Illinois. They alleged that program agents, or “Valkyrie officers,” routinely stopped and searched African American and Latino drivers without probable cause, on the belief that they were involved in criminal behavior. The plaintiffs were assisted by an academic research center to analyze forms filled out by Valkyrie officers after enforcement actions and found “a systemic overrepresentation of African-Americans and individuals of Hispanic origin in Valkyrie police activity.”<sup>136</sup> But because Illinois did not have a comprehensive, standardized format for collecting data, the court would not accept the forms Valkyrie officers used in stops to draw a conclusion about the potential discriminatory effect of their practices.<sup>137</sup>

There are few individuals with the time or financial resources available to produce the type of statistical data collection and

analysis that was required of the plaintiffs in Chavez and similar cases. Few cases successfully allege racial profiling at the state level. Although social science research, reports by advocates and anecdotal evidence by victims of profiling express a prevalence of racial profiling, the court system is stacked so heavily against potential plaintiffs that virtually no cases make it through the system, and an even smaller percentage resolve in the plaintiff's favor.

### ***The "Sole Factor" Definition***

Five states that prohibit racial profiling—Connecticut, Kentucky, Montana, Oklahoma, and Tennessee—ban the use of race as the *sole* factor for initiating a stop.<sup>138</sup> While these laws seem to address the issue, in order to be effective, a statute or other measure should ban the use of race as *any* factor. Race should only be used as part of a specific description of a suspect. Under a law in which race is not allowed to be the *sole* factor for initiating a stop, as long as officers can point to one other reason for the stop, they can use race to decide whom to stop. As discussed earlier, the heavily regulated nature of traffic laws means that a minor violation can almost always be named as an additional factor other than race—used in the decision to stop someone.<sup>139</sup> In addition, most definitions exclude law enforcement surveillance or monitoring of individuals or locations as a potential basis for racial profiling, a practice often used to target Arab, Middle Eastern, Muslim and South Asian communities, who are then precluded from seeking potential legal protection in that area of enforcement.

The code in Texas is less explicit than others, but appears to prevent stops that are based solely on race. The Texas code states: "Racial profiling' means a law enforcement-initiated action based on an individual's race, ethnicity, or national origin rather than on the individual's behavior or on information identifying the individual as having engaged in criminal activity."<sup>140</sup> This definition also excludes religion as a basis of profiling. Unsurprisingly, claims in these states are rarely filed, and those do bring a claim are largely unsuccessful when a claimant must prove that race was the sole factor in initiating a stop.

Connecticut was one of the few states where statewide racial profiling legislation covered not just state troopers but all law enforcement, but this law is set to change soon. The statute prohibits any member of the Division of State Police or any other law enforcement agency from racial profiling.<sup>141</sup> The law only prohibits disparate treatment that relies solely on the basis of race,<sup>142</sup> but this law is currently being amended to make it less effective at preventing racial profiling. The pending revision removes the prohibition against racial profiling and instead calls for local police departments to adopt written policies against profiling.<sup>143</sup> This change seems to be the result of budgetary considerations.<sup>144</sup> There is just one successful case alleging racial profiling in Connecticut.<sup>145</sup>

Oklahoma also has a statute prohibiting racial profiling by any municipal, county or state law enforcement agency, and it makes profiling a misdemeanor.<sup>146</sup> However, there



have been no cases alleging racial profiling based on this statute.

Wisconsin requires law enforcement and tribal officers to be trained on the prevention of racial profiling.<sup>147</sup> However, training that leads an officer to follow laws that are incomplete or ineffective does little good. -

***"Any Use of Race": Statutes with a Broader Definition***

States that prohibit relying on race to any degree offer much greater protection to persons.<sup>148</sup> They are not hamstrung by the requirement of proving an officer's motivations or the necessity of paying for data collection and statistical analysis. Arkansas' law, which prohibits "relying to any degree on race, ethnicity, national origin, or religion in selecting which individuals to subject to routine investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial routine investigatory activity," is one of the few in the country that has resulted in a case wherein the plaintiff received relief.<sup>149</sup> In *Giron v. City of Alexander*,<sup>150</sup> a group of Latino motorists alleged racial profiling by an officer who routinely stopped Latinos for having rosary beads or air fresheners hanging from rearview mirrors because of the supposed "windshield obstruction" violation. This officer, to the common knowledge of the entire police department and the local towing service, created a game of targeting Latinos which he called "Tow My S--t." The city was apparently in the midst of a budget crisis and received money every time an officer had a car towed. The

officer was not held completely, personally liable for his profiling but was still required to pay punitive damages, in part because he would not ticket non-Latinos when he pulled them over for the same violation. Punitive damages are a form of punishment and not intended to correct the actual loss suffered because of the defendant's conduct; they are appropriate where a defendant acted with recklessness, malice or deceit. In one instance, this officer pulled over a French citizen and, upon realizing he was not Latino, chose not to make an arrest or write a ticket. The chief was also found liable for the officer's equal protection violation, as was the city for failing to supervise him adequately.

While California has a broader racial profiling definition, which is "the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped",<sup>151</sup> there have been no cases successfully proving racial profiling.<sup>152</sup>

A Massachusetts court in the case *Commonwealth of Massachusetts v. Lora* was particularly concerned about statistics and the appropriate population benchmarking (how to determine the racial composition of the people in cars on a particular stretch of road). The Court found that "statistical evidence demonstrating disparate treatment of persons based on their race may be offered to meet the defendant's burden to present sufficient evidence of impermissible discrimination so as to shift the burden to the Commonwealth

to provide a race-neutral explanation for such a stop.<sup>153</sup> In that case, where Andres Lora was pulled over for traveling in the left lane when he was not passing other cars (there were no other cars on the road)—the court ruled that Lora did not present credible evidence establishing a reasonable inference of racial discrimination in violation of equal protection sufficient to rebut the presumption that the stop of his vehicle by the law enforcement officer was undertaken in good faith, without an intent to discriminate.

In *Evertson v. City of Kimball*, two residents of Kimball, Nebraska, sued to access the findings of an investigation ordered by the city's mayor after allegations surfaced that police officers were racially profiling Latinos—allegations that the city did not want to disclose to the public. The court ruled that the report was a public record, but also ruled that the city was exempted from having to release them to the public.<sup>154</sup> Interestingly, the court used a “law enforcement” exemption to rule the records exempt from release, holding that, because the mayor ordered the investigation to “enforce” Nebraska’s racial profiling law, citizens could not have access to the records.

### ***Racial Profiling As a Criminal Offense***

Some states go so far as to criminalize racial profiling. In New Jersey, a violation of the state’s racial profiling law is a third-degree offense that can result in three to

five years’ imprisonment.<sup>155</sup> In one case, *New Jersey v. Lee*, the court found Calvin Lee was entitled to another trial because the lower court judge did not allow him access to discovery to effectively present a racial profiling claim.<sup>156</sup> Lee’s case fell under a general management order issued by a New Jersey judge on September 12, 2000 which provided that defendants “perceived to be African-American, Black or Hispanic” from cases that arose between 1988 and 1999 were “entitled to discovery for motor vehicle stops that originated as a result of observations made by State Troopers on the New Jersey Turnpike” and several other New Jersey roadways.<sup>157</sup> Calvin Lee’s case ends here. There are no other citations to say whether his claim of racial profiling was found to be valid.

In a similar New Jersey case, the defendant, Kermit Ball, was also allowed, post-conviction, to “obtain discovery relevant to his racial profiling claim.”<sup>158</sup> Like Calvin Lee’s case, Mr. Ball’s case ends here in the record, and there have been no other cases in New Jersey since that state signed a consent decree with DOJ to end racial profiling practices,<sup>159</sup> wherein racial profiling was actually found to have occurred. This is alarming considering the previous finding that there was a ten-year period in which the courts presumed that racial profiling occurred.

***Local Initiatives and Ordinances***

Cities and other municipalities have attempted to address racial profiling by filling in the gaps in federal and state law. Initiatives in Cincinnati and Columbus, Ohio are representative examples of how cities are trying to handle this problem. Cincinnati’s ordinance prohibits all racial profiling by law enforcement and includes the possibility of disciplinary action up to dismissal for violating the prohibition against profiling.<sup>160</sup> The Cincinnati Police Department is also required to collect data on stops to be evaluated by independent analysts.<sup>161</sup> Columbus successfully passed a racial profiling ordinance specifying that “[t]he use of race or ethnicity as a factor for determining the existence of reasonable suspicion and/or probable cause in the absence of actual physical evidence or observations linking that individual to a crime constitutes a violation of Section 2331.07 of this chapter.”<sup>162</sup> However, in neither of these cities has a successful racial profiling suit surmounted the legal obstacles in place after these ordinances were passed.

In the context of immigration, several municipalities across the United States have passed ordinances that discourage local law enforcement from entering into agreements with ICE to enforce immigration law. Other jurisdictions have passed more general ordinances or proclamations that emphasize treating all residents equally and banning local officials from inquiring about an individual’s immigration status. However,

such measures do not exist in a vacuum; elected officials must have the cooperation of law enforcement for these ordinances to work. One example comes from Durham, North Carolina where local community members and advocates were confident that a city ordinance banning the inquiry by government officials into immigration status would preclude the city from enforcing immigration law. Yet they were unhappily surprised when the police chief entered his department into a 287(g) agreement with ICE, utilizing one definition of a clause in the ordinance that allowed the entire measure to be sidestepped when federal laws were involved. The 287(g) program became the avenue for local officials to partner with ICE.

## CONCLUSIONS AND RECOMMENDATIONS

“**A**nd I think, to all of the people that have spoken today, certainly about their personal experience just with law enforcement—but what’s troubling to me is that we saw we’re afraid to lean on law enforcement, or call upon law enforcement, when we are the very people that they’re there to serve and protect us. And so there appears to be a level of dysfunction, if you will, and I think as a community, as a state, as a country, we have a fundamental responsibility to fix that. Because certainly, our objectives, or the goal is certainly not to be against law enforcement, but we need to work with law enforcement so that these types of practices don’t occur anymore.”

–Dolores Escobar, witness, Los Angeles

“**W**e can all certainly agree that racial profiling is unlawful and cannot and should not be tolerated. However, I think we also need to agree that racial profiling does exist, and that we need the community, the police, and the local advocates to work together to stop this illegal activity. When you harm an individual who has committed no crime, you harm the entire community, and I look forward to hearing the testimony tonight.”

–Ricardo Meza, Midwest Regional Counsel, MALDEF, Detroit Hearing Commissioner

Racial profiling in every form and in every context is unjust, ineffective and counterproductive. It is a degrading practice and the humiliation experienced by

the person targeted cannot be overstated. It is pervasive across the United States, affecting people of many diverse races, ethnicities, religions and national origins. It also continues largely unchecked, violating constitutional and international human rights. The discriminatory law enforcement practices described in the sections above all constitute racial profiling, because they all rely on race, ethnicity, religion or national background as a proxy for suspicion of engaging in criminal activity. Racial profiling presupposes a correlation between an individual’s race or ethnicity and his/her likelihood of being a criminal<sup>163</sup> when no such correlation exists.<sup>164</sup>

To combat racial profiling in all of its forms, the RWG coalition and our partners in the *Racial Profiling: Face the Truth* campaign offer the following recommendations:

### Recommendations to President Obama

- President Obama should urge Congress to enact the End Racial Profiling Act of 2010, which prohibits profiling based on race, religion, ethnicity and national origin at the federal, state and local levels.
- President Obama should issue an executive order prohibiting racial profiling by federal officers and banning law enforcement practices that disproportionately target people for investigation and enforcement based



on race, ethnicity, religion or national origin. The executive order should also require the collection of data by federal enforcement agencies about law enforcement actions broken down by the apparent or perceived race, ethnicity, national origin and religion of individuals targeted by enforcement agents.

- President Obama should state unequivocally that the federal government alone has jurisdiction and authority to enforce immigration laws and halt ICE programs that engage state and local police in immigration enforcement activities.

## Recommendations to the Department of Justice

- The DOJ should revise its 2003 Guidance on the Use of Race by Federal Law Enforcement Agencies to eliminate the loopholes created for national security and border searches to include religion and national origin as protected classes; to apply the guidance to state and local law enforcement agencies; and to make it enforceable.
- The 2008 Attorney General's Guidelines for Domestic FBI Operations and the FBI's Domestic Investigative Operational Guidelines that implement the 2008 Attorney General's Guidelines should be revised to ensure that they comport

with constitutional and international human rights protections.

- The 2002 DOJ OLC "inherent authority" opinion should be immediately rescinded and OLC should issue a new memo clarifying that state and local law enforcement agents may not enforce federal immigration laws absent formal authority granted to them by the federal government.

## Recommendations to the Department of Homeland Security

- DHS should terminate the 287(g) program.
- DHS should suspend the implementation of CAP, Secure Communities and similar programs unless and until safeguards are put in place whenever collaborating with state and local law enforcement to ensure that racial profiling and other human rights violations are not occurring, including collecting data on the race or ethnicity of the people arrested, the charges that are lodged and the ultimate disposition of the case.
- DHS should ensure that the Secure Communities program and the Criminal Alien Program only screen people who are convicted of felony offenses, in keeping with ICE's stated priorities of targeting serious criminals and dangers to the community.

- DHS should terminate the National Security Entry-Exit Registration System (NSEERS) and repeal related regulations. Individuals who did not comply with NSEERS due to lack of knowledge or fear should not lose eligibility for or be denied a specific relief or benefit. Similarly, DHS should ensure that the federal government provides relief to individuals who were deported for lack of compliance with NSEERS but otherwise had an avenue for relief.
- DHS should conduct extensive training for and oversight of ICE agents implementing enforcement actions. In particular, increased oversight is needed to ensure that ICE does not target individuals on the basis of race or ethnicity but instead upon information related to the individual's immigration status.
- DHS should reform its complaint process to ensure that it is clear, transparent, confidential, including protections against retaliation, and that it is made available to the public in multiple languages.

## **Recommendations to Congress**

- Congress should enact the End Racial Profiling Act of 2010, establishing a federal ban on profiling based on race, religion, ethnicity and national origin at the federal, state and local levels.
- Congress should provide oversight to ensure that the various agencies of the executive branch are undertaking the reforms identified in the recommendations above. If agencies are not adopting these reforms, Congress should adopt legislation mandating the changes in policy.
- Congress should repeal section 287(g) of the Immigration and Nationality Act.
- Congress should eliminate funding for the Secure Communities Initiative, the Criminal Alien Program and other programs that utilize state and local law enforcement agencies to conduct civil immigration enforcement, unless and until safeguards are put in place whenever collaborating with state and local law enforcement to ensure that racial profiling and other human rights violations are not occurring, including collecting data on the race or ethnicity of the people arrested, the charges that are lodged and the ultimate disposition of the case.

## Recommendations to state and local governments

- State and local governments should adopt legislation that strongly prohibits profiling based on race, religion, ethnicity and national origin. Such legislation should also mandate that local police departments collect data about stops, frisks, searches, arrests, and prosecutions, broken down by the apparent or perceived race, religion, national origin, or ethnicity of those targeted for enforcement actions and outcomes.
- State and local governments should refuse to participate in federal programs expanding responsibility for immigration enforcement to local law enforcement, including the 287(g) program, the Secure Communities Initiative or the Criminal Alien Program.
- Any state or locality that is participating in or cooperating with a federal program delegating responsibility for immigration enforcement to local law enforcement should collect data on the apparent or perceived race, religion, national origin or ethnicity of any person arrested, the reason for the arrest and the ultimate disposition of the case.

## Recommendations from the field hearing witnesses

“I think the only way to stop profiling is to have consequences when profiling occurs and that’s what I don’t see at any level...I really believe that we need to do something to force consequences for bad behavior... If you go and file [Internal Affairs] reports, it’s dangerous for a lot of reasons. The police know you, they have the ability...to check your record, they know who your family members are because the police databases, they could share. So they can harass your family, it’s been done...So that puts a chilling effect on citizens and we share our experiences.”

–Jolanda Jones, witness, Houston, TX

“In the Muslim community, there’s been a lot of consternation about insensitive material that have been used by some of the law enforcement agencies with regards to Muslims and Islam. And I think this issue is of considerable concern in the Muslim community that are these officers, law enforcement officers or government officers, are they being trained with reliable information on Islam and Muslims as opposed to some bigoted information with sources that [are] not really fully accredited agencies.”

–Jawad Khaki, witness, Burlington, Washington

“If LAPD is refusing to analyze data and refusing to implement straightforward systems to identify outlying officers, the dozens of other police agencies in Southern California that are less in this stream have done nothing at all to address the problem. That just underscores the need for a national mandate to embrace some of these reforms.”

*–Peter Bibring, ACLU Attorney, witness, Los Angeles, California*

“I tend to see from a position of being a police officer for 28 years, being a sergeant for 11 years, and I, in no way, would want to give the police those extra kind of powers to do anything [immigration related] because obviously they haven’t been able to do it well and I just – I believe that we have constitutional protections that we should abide by.”

*–Shelby Stewart, retired police officer, witness, Houston, Texas*

“I think there needs to be enough training to make sure people understand the rights of individuals in this country as well as checks and balances in the system among the investigators.”

*–Joe Morrison, witness, Burlington, Washington*

Whether it is terrorism, war, the drug trade or illegal immigration, any crisis situation has the potential to test our nation’s commitment to equality for all under the law. History has taught us to regret the unfortunate World War II internment of Japanese Americans, which was justified by rationale similar to that used today in the form of phrases such as “national security” or “counterterrorism measures.” Whether taken in the so-called war on drugs, war on terror or war on illegal immigration, government policies driven by fear should never allow the erosion of fundamental constitutional and international human rights.



 RIGHTS working group

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Rhode Island (RI ST § 31-21.1-6); South Carolina (Code 1976 § 56-5-6560); Tennessee (a one-year pilot program) (Tenn. Code Ann. § 4-7-119); Texas (Vernon's Ann. Texas C.C.P. Art. 2.134); Utah (U.C.A. 1953 § 53-1-106); Washington (data collection "within fiscal constraints") (West's RCWA 43.101.410); and West Virginia (WV ST § 17G-1-2).

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162. See Columbus Ohio, Code § 2331.01(A)(13) (2004).
163. Charu A. Chandrasekhar. Note & Comment, "Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians", 10 Asian L.J. 215, 224, 2003.

164. NYU School of Law, Center for Human Rights and Global Justice. "Irreversible Consequences: Racial Profiling and Lethal Force in the 'War on Terror'", 2006, <<http://www.chrgj.org/docs/CHRGJ%20Irreversible%20Consequences.pdf>>. "Profiling is based on the faulty premise that race, religion, ethnicity and/or national origin correlate with terrorism," citing to various authors who have shown that "profiling is based on a tenuous factual premise that race, religion, ethnicity and/or national origin correlate with terrorism."). See, Kevin Lapp. "Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative 29", N.Y.U. REV. L. & SOC. CHANGE 573, 575N11, 2005; David Cole. "Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism", pp. 183-97, 2003; Christopher Edley, Jr. "The New American Dilemma: Racial Profiling Post-9/11", in *The War on Our Freedoms: Civil Liberties in an Age of Terrorism*, p. 170, Richard C. Leone & Greg Anrig, Jr. eds., 2003; and Tanya E. Coke. "Racial Profiling Post-9/11: Old Story, New Debate", *Lost Liberties: Ashcroft and the Assault on Personal Freedom*, p. 91, Cynthia Brown ed., 2003. Together, these analyses demonstrate that profiling is (1) based on a tenuous factual premise that race, religion, ethnicity and/or national origin correlate with terrorism, (2) ineffective as compared to other strategies, such as carefully watching behavior at increasing hit rates, (3) counterproductive in that it alienates members of the overbroadly targeted community of people, and (4) an institutionalization of prejudice. See also, William J. Stuntz, "Local Policing After the Terror", 111 *Yale L.J.* 2137, 2142 (2002) ("[T]here is nothing new about, and nothing wrong with, the claim that after September 11 law enforcement authority should increase."). See also, Chandrasekhar at 225. ("Airline racial profiling treats passengers as "criminals in the absence of specific evidence of individual criminality, and [treats] passengers unequally" on the basis of an immutable characteristic that has "no causal relationship to terrorist activity (citing Gregory T. Nojeim, *Aviation Security Profiling and Passengers' Civil Liberties*, 13 *Air & Space Law*. 3, 6 (1998)."). See also, David A. Harris. "Racial Profiling Revisited: 'Just Common Sense' in the Fight Against Terror?", p. 17, *Crim. Just.* 36, 2002 (discussing post-9/11 racial profiling), and Samuel R. Gross & Debra Livingston. "Racial Profiling Under Attack" 102 *Colum. L. Rev.* 1413, 2002 (discussing post-9/11 racial profiling).

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