

# To Catch a Terrorist: The Improper Use of Profiling in U.S. Post-9/11 Counterterrorism

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TO CATCH A TERRORIST:  
THE IMPROPER USE OF PROFILING  
IN U.S. POST-9/11 COUNTERTERRORISM

by

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A thesis submitted in partial fulfillment of the requirements  
for the Honors in the Major Program in Legal Studies  
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at the University of Central Florida  
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## **ABSTRACT**

The attacks of September 11, 2001 (9/11) caused thousands of deaths, national and global panic, and immediate action by the federal government to protect the borders of the United States of America (USA) from terrorism. In response to these attacks, the United States (U.S.) government enacted laws for law enforcement agencies to protect against terrorist activities. Law enforcement agencies are effective in combating terrorism, but their measures contain a major flaw - the improper use of race in profiling to address national security and public safety concerns. Racial profiling is an ineffective measure for preventing terrorism. There are solutions to correct this flaw through reconstructing training and implementing policies for all law enforcement agencies. The intent of this thesis is to discuss the history and the effectiveness of profiling in U.S. post-9/11 counterterrorism through theoretical research of peer-reviewed journals and articles, relevant laws, and United States Supreme Court cases to offer solutions to the problems racial profiling presents. The discussion will generate a search for new ways law enforcement agencies could conduct daily counterterrorism operations.

## **DEDICATION**

To my chair and committee members, thank you for your knowledge and guidance.

To my family, thank you for your love, encouragement, and motivation.

To my friends, thank you for keeping me positive and lifting my spirits.

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## INTRODUCTION

Racial profiling is ineffective in preventing terrorism. Historical accounts of racial profiling include the internment of Japanese-Americans in WWII, the profiling of African-Americans and Hispanic-Americans in the War on Drugs, and the profiling of Middle Eastern-Americans in the War on Terror. These events show racial profiling is not capable of preventing all the crimes it sets out to stop. The effectiveness of racial profiling is not well-documented, but evidence of it is present in the research.

Law enforcement officers (LEOs) have had the responsibility of reducing crime and protecting the American people throughout the course of U.S. history.<sup>1</sup> LEOs needed to increase their level of surveillance, investigation, and enforcement due to planned and imminent threats during World War II (WWII), the War on Drugs, and the War on Terror. LEOs have also taken preventive measures to reduce a perceived threat before its execution.<sup>2</sup> These preventive measures include information sharing and analysis, threat recognition, terrorist interdiction, and any other terrorism prevention activity authorized.<sup>3</sup> Profiling is another of the preventive measures.

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<sup>1</sup> A LEO, for purposes of this thesis, is any person who creates, interprets, and enforces laws, regulations, and legislation to maintain public order and safety in the USA through the laws that govern their authority.

<sup>2</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 120.

<sup>3</sup> A terrorist, for purposes of this paper, is any person who is involved in acts dangerous to human life that violate federal and state law, appear intended to (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the of a government by mass destruction, assassination, or kidnapping, and occur primarily within the territorial jurisdiction of the U.S., 18 U.S.C. § 2331; Terrorism Prevention, 6 U.S.C. § 607 (Aug. 3, 2007).

LEOs profile when they investigate people solely for being of the same race, following the same religion, or possessing the same identifiable characteristics as someone who has committed a serious or deadly crime.<sup>4</sup> Racial profiling has become more acceptable and justifiable in light of continuous terrorist threats.<sup>5</sup> Advocates of racial profiling believe minorities commit most criminal activities, including drug offenses and terrorist attacks, implying race determines conduct.<sup>6</sup> Some may also believe racial profiling is effective for national security because public statistics show particular crimes are committed disproportionately by certain members of particular groups.<sup>7</sup>

Historically, race is a characteristic of who has committed a crime.<sup>8</sup> However, many times race is a variable used primarily to predict and prevent crime, which is ineffective. For example, the internment process of Japanese-Americans included the relocating and concentrating of people to a collection location based upon race. After, surviving Japanese-Americans were given restitutions because the government realized the internment was not the

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<sup>4</sup> Middle Eastern is a nationality not a race. However, in many countries including the U.S. Middle Eastern is used as a race. For example, the U.S. Census' definition of the race white is a person having origins in any of the original peoples of Europe, the Middle East, or North Africa. Many would not refer to someone Middle Eastern as white, they would simply say Middle Eastern to describe their race. For the purposes of this paper, Middle Eastern is a race. UNITED STATES CENSUS BUREAU, *Race*, (1997), <https://www.census.gov/topics/population/race/about.html>.

<sup>5</sup> Racial profiling, for purposes of this paper, relies on race, ethnicity, or national origin and not behavior or information to identify an individual as being, or having been, engaged in criminal activity. Sophia E. Harris, *Seeking out Terrorists: Will Racial Profiling do?*, 36 U. WEST. L.A. L. REV. 249, 1 (2005).

<sup>6</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 120.

<sup>7</sup> Refer to limitations sections of this thesis, 41-42.

<sup>8</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 120.



way to address the Japanese spy concern.<sup>9</sup> More recently, using race to identify African-Americans and Hispanic-Americans as drug traffickers in the War on Drugs has failed to fully prevent the problem. Between 2000 and 2014, the number of overdose deaths from prescription drugs and Opioid pain relievers has tripled, from Benzodiazepines have quadrupled, and from heroin have quintupled.<sup>10</sup> In the War on Terror, LEOs are using the classification of Middle Eastern to identify the group who commit most terrorist acts in the U.S. Racial profiling those who appear to be Middle Eastern is invalid and presents a geographical limitation because there are 40 countries with cells of Al-Qaeda ranging anywhere from Malaysia to the Philippines to Latin America.<sup>11</sup> Profiling will also denigrate and intimidate an entire community of those who may be categorized as Middle Eastern.<sup>12</sup>

This thesis begins with an interpretation of the history of racial profiling in WWII, the War on Drugs, and the War on Terror. A historical overview of the use of racial profiling in U.S. national security efforts provides insight on the influences in current counterterrorism operations and references for future decisions. Next, it will discuss laws and U.S. Supreme Court cases addressing racial profiling. Then, it will discuss the effectiveness of racial profiling through terrorist diversity and consistency. Finally, recommendations are provided for how to maintain national security without racial profiling through reforms in training and policies.

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<sup>9</sup> Kimberlee Candela, *Japanese American Internment*, SALEM PRESS ENCYCLOPEDIA (Jan. 2016).

<sup>10</sup> NATIONAL INSTITUTE ON DRUG ABUSE, *Overdose Death Rates*, (Dec. 2015), <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates>.

<sup>11</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 120.

<sup>12</sup> *Id.*

## HISTORY OF PROFILING AND NATIONAL SECURITY ISSUES

The attacks that occurred on 9/11 shocked the American people. That day, they realized the need for heightened security everywhere, especially at airports, because of a different type of terrorism the U.S. federal government was unprepared for. Four planes and 19 individuals, later identified as Middle-Eastern militants of the Islamic extremist group Al-Qaeda, conducted terrorist acts that killed more than 3,000 people.<sup>13</sup>

Less than two weeks after the terrorist attacks, Pennsylvania Governor Tom Ridge became the first Director of the Office of Homeland Security in the White House. On November 22, 2002, Congress passed the Homeland Security Act, which made the Department of Homeland Security (DHS) an independent, cabinet-level department.<sup>14</sup> As a result, the DHS was able to coordinate, and unify comprehensive national security strategies to safeguard the country against terrorism and respond to future attacks.

The DHS's vital mission is "to secure the nation from the many threats we face."<sup>15</sup> The vital mission branches off into homeland security missions. Two missions that combat terrorism are to (1) prevent terrorism and enhance security and (2) secure and manage our borders.<sup>16</sup> In addition, they specifically focus on maturing and strengthening the homeland security enterprise

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<sup>13</sup> HISTORY, *9/11 Attacks*, <http://www.history.com/topics/9-11-attacks>.

<sup>14</sup> UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *Creation of the Department of Homeland Security*, (Sep. 24, 2015), <https://www.dhs.gov/creation-department-homeland-security>.

<sup>15</sup> UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *About DHS*, (Jul. 21, 2015), <http://www.dhs.gov/about-dhs>.

<sup>16</sup> UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *Our Mission*, (Jul. 13, 2015) <http://www.dhs.gov/our-mission>.

itself.<sup>17</sup> The three responsibilities of missions (1) prevent terrorism and enhance security and (2) secure and manage our borders are cited below:

(1) prevent terrorism and enhance security (a) prevent terrorist attacks, (b) the unauthorized acquisition, importation, movement, or use of chemical, biological, radiological, and nuclear materials and capabilities within the United States, and (c) reduce the vulnerability of critical infrastructure and key resources, essential leadership, and major events to terrorist attacks and other hazards.<sup>18</sup>

(2) secure and manage our borders (a) effectively secure U.S. air, land, and sea points of entry, (b) safeguard and streamline lawful trade and travel, and (c) disrupt and dismantle transnational criminal and terrorist organizations.<sup>19</sup>

The ways DHS fulfills the missions are through the Transportation Security Administration (TSA), improving screening for passengers, preventing terrorist travel, and enhancing the screening process for cargo and baggage.<sup>20</sup> The DHS implemented these measures to reduce the immediate threat of more attacks and largely relied on the use of racial and religious profiles of the 9/11 terrorists.

On one end of the spectrum, some Americans believe that although these methods may violate civil liberties, they are justified because of national security concerns and public safety.<sup>21</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *Prevent Terrorism and Enhance Security*, (Jul. 20, 2015), <http://www.dhs.gov/prevent-terrorism-and-enhance-security>.

<sup>19</sup> UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *Secure and Manage our Borders*, (Sept. 24, 2015), <http://www.dhs.gov/secure-and-manage-borders>.

<sup>20</sup> UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *Preventing Terrorism Results*, (Jul. 21, 2015), <https://www.dhs.gov/topic/preventing-terrorism-results>.

<sup>21</sup> Sam Howe Verhovek, *Americans Give into Race Profiling*, N.Y. TIMES, (Sept. 23, 2001), at A1 (noting that a CNN/USA Today/Gallup poll taken a few days following the September 11 attacks revealed that 58% supported targeting passengers of Middle Eastern descent); Henry Weinstein et al., *Racial Profiling Gains Support as Search*

On the other end of the spectrum, some Americans believe these programs further invade privacy, mask racial profiling, and violate civil liberties. According to a 1999 Gallup Poll, only 19% of respondents favored racial profiling.<sup>22</sup> Twelve days after 9/11, Gallup conducted a similar poll and 58% of respondents supported racial profiling used to target people of Middle Eastern descent.<sup>23</sup> Surprisingly, some of the respondents were Americans who, themselves, had been subjected to racial profiling prior to 9/11. In 2006, Gallup conducted a poll asking this open-ended question “Are there any security measures currently used in airports that you think should be stopped because they are not effective in preventing terrorist attacks? [Which measures do you think should be stopped?]”<sup>24</sup> Only 2% of the participants responded that they were against racial profiling. 70% of participants responded that no measures should be stopped.<sup>25</sup> In a more recent poll Gallup conducted in 2010, they surveyed 1,023 individuals asking “Some people have suggested that airline passengers who fit the profile of terrorists based on their age, ethnicity, or gender should be subjected to special, more intensive security checks

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*Tactic*, L.A. TIMES, (Sept. 24, 2001), at A22 (68% of polled respondents favored targeting passengers of Arab descent).

<sup>22</sup> Frank Newport, *Racial Profiling is Seen as Wide-spread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE, (Dec. 9, 1999), <http://www.gallup.com/poll/3421/racial-profiling-seen-widespread-particularlyamong-young-black-men.aspx>.

<sup>23</sup> Sam Howe Verhovek, *Americans Give in to Race Profiling*, N.Y. TIMES, (Sept. 23, 2001), at A1. Henry Weinstein et al., *Racial Profiling Gains Support as Search Tactic*, L.A. TIMES, (Sept. 24, 2001), at A22.

<sup>24</sup> GALLUP, *Terrorism in the United States*, (2006), [http://www.gallup.com/poll/4909/Terrorism-United-States.aspx?g\\_source=racial%20profiling&g\\_medium=search&g\\_campaign=tiles%27](http://www.gallup.com/poll/4909/Terrorism-United-States.aspx?g_source=racial%20profiling&g_medium=search&g_campaign=tiles%27).

<sup>25</sup> *Id.*

before boarding U.S. flights. Do you favor or oppose this practice?"<sup>26</sup> 71% of individuals were in favor of this practice.<sup>27</sup>

During WWII with the internment of Japanese-Americans, followed by the War on Drugs with Hispanic-Americans and African-Americans, and the War on Terror with Middle Easterners there has been controversy in the way LEOs were given discretion in the treatment of minority groups.<sup>28</sup> During these times of heightened national security, laws were enacted that impacted these minority groups and legally supported racial profiling by LEOs, regardless of the disadvantages to counterterrorism operations.

The U.S. Department of Justice issued guidelines on racial profiling that prevented the use of race in routine domestic investigative procedures. However, it allowed for particular suspect descriptions incorporating racial characteristics.<sup>29</sup> For example, racial profiling is stating the possible suspect of a grand theft auto is a black man leaving a suburb area off Interstate 4 because only 2/50 homes in the subdivision are owned by black families. However, it is not racial profiling to state, based upon an eyewitness account, the suspect is an unfamiliar African-American male who was seen driving a vehicle, owned by a neighbor, out of a suburb area off Interstate 4. The second statement is using race to describe a suspect who has been seen

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<sup>26</sup> Susan Page, *Poll: Most Support Ethnic Profiling in Air Security*, USA TODAY, (2010), [http://usatoday30.usatoday.com/news/nation/2010-01-12-poll-terrorism-obama\\_N.html](http://usatoday30.usatoday.com/news/nation/2010-01-12-poll-terrorism-obama_N.html).

<sup>27</sup> *Id.*

<sup>28</sup> Leone, R.C., *The Quiet Republic: The Missing Debate about Civil Liberties after 9/11*, In R.C. Leone & G. Anrig. Jr. (Eds.), *The War on Our Freedoms: Civil liberties in an Age of Terrorism*, NEW YORK: PUBLIC AFFAIRS 1-22 (2003); Reddick, S.R., *Point: The Case for Profiling*, INTERNATIONAL SOCIAL SCIENCE REVIEW, 79, 154-157, (2004); Reitzel, J., & Piquero, A. R., *Does It Exist? Studying Citizens' Attitudes of Racial Profiling*, POLICE QUARTERLY, 9(2), 161-183 (2006).

<sup>29</sup> DEPARTMENT OF JUSTICE, *Fact Sheet Racial Profiling*, 6, (Jun. 17, 2003), [https://www.justice.gov/archive/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](https://www.justice.gov/archive/opa/pr/2003/June/racial_profiling_fact_sheet.pdf).

committing a supposed crime, and not predicting who may commit a crime. Appearance does not equal the crime.

The U.S. Department of Justice (DOJ) guidelines state general enforcement responsibilities should be carried out without any regard to race. Also, stereotyping certain races as having a greater predisposition to commit crimes should be absolutely prohibited.<sup>30</sup> Some of the DOJ guidelines are stated as follows:

The guarantee to all persons of equal protection under the law is one of the most fundamental principles of our democratic society. Law enforcement officers should not endorse or act upon stereotypes, attitudes, or beliefs that a person's race, ethnicity, or national origin increases that person's general propensity to act unlawfully.<sup>31</sup>

Other guidelines do not prohibit the use of racial profiling in combating terrorism. The following excerpts are from the guidelines set forth by the U.S. Department of Justice:

In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the nation's borders, federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.

Given the incalculably high stakes involved in such investigations, federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, alienage, and other relevant factors.

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<sup>30</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 120; DEPARTMENT OF JUSTICE, *Fact Sheet Racial Profiling*, 1, 2-3, (Jun. 17, 2003), [https://www.justice.gov/archive/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](https://www.justice.gov/archive/opa/pr/2003/June/racial_profiling_fact_sheet.pdf).

<sup>31</sup> Deborah Ramirez, Jack McDevitt, and Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, U.S. DEPARTMENT OF JUSTICE, (2000), <http://www.ncjrs.gov/pdffiles1/bja/184768.pdf>.

Because terrorist organizations might aim to engage in unexpected acts of catastrophic violence in any available part of the country (indeed, in multiple places simultaneously, if possible), there can be no expectation that the information must be specific to a particular locale or event to a particular identified scheme.<sup>32</sup>

It is challenging for LEOs to determine the most appropriate boundaries with which to properly apply the use of race in an investigation or interrogation because these guidelines are so broad. This type of profiling is allowed as long as it occurs under the exception for national security and public safety.<sup>33</sup> There is no restriction on how specific the information or imminent a threat must be before racial profiling can be appropriately used.<sup>34</sup> There only must be a credible threat and these threats are frequent.<sup>35</sup> This has created an environment conducive to the unchecked use of racial profiling. There is an ongoing threat of racial identifiers being abusively used due to the lack of precise language on the limitations of racial profiling. In order to overcome the challenge, lessons from history should be learned and policies should be revised. Evidence has been used to support racial profiling, instead of allowing evidence to lead to the conclusion that racial profiling is an efficient and effective way to provide national security.

## World War II

After the attacks on Pearl Harbor, the U.S. became involved in WWII and the government began the internment of Japanese-Americans into camps. On February 19, 1942, two

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<sup>32</sup> DEPARTMENT OF JUSTICE, *Fact Sheet Racial Profiling*, 5, (Jun. 17, 2003), [https://www.justice.gov/archive/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](https://www.justice.gov/archive/opa/pr/2003/June/racial_profiling_fact_sheet.pdf).

<sup>33</sup> *Id.* at 1.

<sup>34</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 124.

<sup>35</sup> *Id.* at 125.

months after the attack, President Franklin Delano Roosevelt signed Executive Order 9066 for the camps. The order was fueled by fear, race prejudice, and a rumor that Japanese-Americans sabotaged the war effort and assisted in the attacking.<sup>36</sup> It was one of the first public displays of the U.S. government's use of racial profiling of a group of people based upon the actions of a few. More than 110,000 Japanese-Americans were placed in one of 10 relocation centers for the duration of the war.<sup>37</sup>

Most of the Japanese-Americans who were relocated were first generation immigrants who legally immigrated, but were prohibited from becoming a citizen through naturalization.<sup>38</sup> After the bombing of Pearl Harbor, it was not proven to have been carried out by Japanese-Americans. If the intent of the internment of Japanese-Americans was to prevent them from assisting the Japanese from attacking, it is questionable that a mass internment of Japanese-Americans in Hawaii was not done.<sup>39</sup> During WWII, one-third of Hawaii's population was of Japanese descent. The government later offered minimal restitutions to the surviving internees for the ineffective and morally wrong act of racial profiling.<sup>40</sup>

In Michelle Malkin's book, *In Defense of Internment: The Case for "Racial Profiling" in World War II and the War on Terror*, she provides information supporting the internment of

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<sup>36</sup> Eric Foner and John A. Garraty, *The Reader's Companion to American History: Japanese-American Relocation*, HOUGHTON MIFFLIN HARCOURT PUBLISHING COMPANY, (1991), <http://www.history.com/topics/world-war-ii/japanese-american-relocation>.

<sup>37</sup> Executive Order No. 9066, 3 C.F.R. 1092 (1938-1943).

<sup>38</sup> Kimberlee Candela, *Japanese American Internment*, SALEM PRESS ENCYCLOPEDIA (Jan. 2016).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*



Japanese-Americans. Based upon her information, messages to and from the Japanese were being intercepted.<sup>41</sup> The messages were about the help the Japanese were receiving in California.<sup>42</sup> To an extent, the internment may have been justified because of what was and was not known during WWII. However, internment is still an extreme version of racial profiling.

The Internment of Japanese-Americans is similar to the War on Terror because the 9/11 hijackers were men from the Middle East who were Muslim extremists with connections and training in the U.S. All people who fit the hijackers' description in the U.S. were required to report themselves or be referred for questioning. The initial reaction, to an extent, was appropriate because the people detained matched the descriptions of those who committed the attacks. However, the continuous classification well after the attacks is not warranted.

### War on Drugs

The War on Drugs began in the 1970s and is still being combated today. President Richard Nixon created the Drug Enforcement Administration (DEA) through an executive order in July 1973 in response to the increasing number of drug activity in the U.S. and globally.<sup>43</sup> The order established a single unified command to combat “an all-out global war on the drug menace.”<sup>44</sup> Although in current times it is overshadowed by the War on Terror, the War on

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<sup>41</sup> Malkin, Michelle, *In Defense of Internment : The Case for “Racial Profiling” in World War II and the War on Terror*, REGNERY PUBLISHING (2004).

<sup>42</sup> *Id.*

<sup>43</sup> DRUG ENFORCEMENT ADMINISTRATION, *DEA History in Depth: 1980-1985*, <http://www.dea.gov/about/history/1980-1985.pdf>.

<sup>44</sup> *Id.*

Drugs, especially in the beginning, was heavily dependent on the pairing of criminal and racial profiling.

On March 24, 2016, the Cable News Network (CNN) released a 22-year-old interview that former Nixon domestic policy chief John Ehrlichman gave to Harper's Magazine writer Dan Baum. This report shows how profiling was used to support an idea instead on an idea being supported by evidence showing profiling is necessary. The published article cites what John Ehrlichman said:

The Nixon campaign in 1968, and the Nixon White House after that had two enemies: the antiwar left and black people... You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we could disrupt those communities ... We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course, we did.<sup>45</sup>

In general, criminal profiling is the practice of describing a person who has committed a particular criminal act, thereby equipping law enforcement officers with investigative mechanisms and information leading to the offender being apprehended.<sup>46</sup> Criminologists use a variety of classifications known as typologies to capture the basic components of a crime.<sup>47</sup> The criminal typologies serve multiple purposes. However, they are primarily used to simplify social

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<sup>45</sup> Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN POLITICS, (Mar. 24, 2016), <http://www.cnn.com/2016/03/23/politics/john-ehrichman-richard-nixon-drug-war-blacks-hippie/>.

<sup>46</sup> Brown, N.D. and Newman, D.W., *Historical Overview and Perceptions of Racial Profiling in an Era of Homeland Security*, CRIMINAL JUSTICE POLICY REVIEW, Volume 20 Number 3, 362 (2009).

<sup>47</sup> McCorkle, R.C. and Miethe, T.D., *The Anatomy of Dangerous Persons, Places, and Situations*, CRIME PROFILES SECOND EDITION, 2 (2001).

reality by identifying homogenous groups of crime behaviors that are different from other clusters of crime behaviors.<sup>48</sup> These classifications are used to increase the understanding of shared features of criminal events and effectiveness of current crime prevention strategies. Crime typologies are focused on one or several of the following elements: (a) criminal behavior, (b) offender attributes, (c) victim characteristics, and (d) situational context.<sup>49</sup>

The focus of crime typologies should be the criminal behavior, the situation, the victim characteristics and then the offender attributes. For example, if a LEO were to say “A homicide was committed on the corner of 5th and 6th avenue. Video footage shows the suspect is a white male, about 69 inches tall, with a buzz cut, wearing a blue hoodie and black shorts who may show signs of prior injuries.” The details are clear and provide an unbiased account of what is going on. Therefore, it is acceptable to provide a racial characteristic of someone who may have already committed a criminal act. The issue arises when someone who has not been proven to have committed a criminal act is profiled based upon their racial characteristic to have most likely committed a crime. It is not acceptable when a LEO states “A white man is the suspect of a murder” without eyewitness testimony, DNA, video, photographic, or any type of substantial evidence.

To assist with the efforts in the War on Drugs, Operation Pipeline was born.<sup>50</sup> Operation Pipeline, created in 1984, monitored highway systems because of the increasing number of drug

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 3.

<sup>50</sup> Ramierz, D.A, Hoopes, J., & Quinlan, T. L., *Defining Racial Profiling in a Post September 11 World*, CRIM. L. REV., 40(3), 1195-1239 (2003).

traffickers who established their networks within the U.S. borders. The DEA desired efficient cooperation between their organization and state and local LEOs. They also provided classes and materials to teach LEOs the interdiction laws and policies. The training classes focused on (1) the law, policy, and ethics governing highway stops and drugs and (2) drug trafficking trends and key characteristic, or indicators, that were shared by drug traffickers.<sup>51</sup>

The DEA's profile incorporated behavior cues, which led local and state law enforcement to become more aware of certain items in their surroundings. These items included: rental vehicles, out-of-state license plates, and tinted windows. In addition, the training of state and local police officers involved teaching them how to identify drug couriers based partly on race. Criminal profiling and typologies were eventually used to proactively prohibit crimes, which lead to disproportionate arrests and convictions of minorities.<sup>52</sup> By the end of the 20th century, law enforcement methods of using race as the single or influencing factor to stop, search, and question minorities became known as racial profiling.<sup>53</sup> Consequently, racial profiling shows more Hispanic-Americans and African-Americans are stopped, searched, and arrested during the War on Drugs, which has not been successful in winning the War on Drugs.<sup>54</sup> Many people were not aware of this until victims of racial profiling began taking legal actions and filing complaints

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<sup>51</sup> DRUG ENFORCEMENT ADMINISTRATION, *DEA History in Depth: 1980-1985*, <http://www.dea.gov/about/history/1980-1985.pdf>.

<sup>52</sup> Brown, N.D. and Newman, D.W., *Historical Overview and Perceptions of Racial Profiling in an Era of Homeland Security*, CRIMINAL JUSTICE POLICY REVIEW, Volume 20 Number 3, 362 (2009).

<sup>53</sup> Warren J. and Raymer, V.M., *To Catch a Terrorist: Can Ethnic Profiling Work?*, THE ROYAL STATISTICAL SOCIETY, 165 (Dec. 2010).

<sup>54</sup> Coke, T.E., *Racial Profiling Post-9/11: Old Story, New Debate*. In C. Brown (Ed.), *Lost Liberties: Ashcroft and the Assault of Personal Freedom*, NEW YORK: THE NEW PRESS, 91-111 (2003).

against law enforcement agencies. As a result, the phrase, “driving while black,” was used to describe the disproportionate number of African-American drivers operating vehicles compared to the rate of African-American motorists stopped or searched.<sup>55</sup>

Officers rarely kept accurate records of the stops made, which further complicated the issue. Therefore, when arrests were made and showed, disproportionately, Hispanic-Americans and African-Americans were arrested, it supported the idea that racial profiling worked.<sup>56</sup> Critics of racial profiling were at a disadvantage because the data collected showed that the practice was at least somewhat effective and good policing.

Many LEOs rely on race to decide who to stop and search. However, only a tiny proportion of people stopped and searched are drug traffickers.<sup>57</sup> Many people in the drug units of law enforcement claim drug trafficking in the U.S. is dominated by Hispanic-Americans and African-Americans, but there is no evidence the drug culture in this country is dominated by Hispanic-Americans and African-Americans. In fact, a great majority of illicit drug users are white.<sup>58</sup> Racial profiling on the highway produces no discernible benefit to interdict drug crimes. The War on Drugs has been fought with ambivalence and ambiguity.<sup>59</sup> The idea of reducing drug

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<sup>55</sup> Harris, D.A., *Profiles in Injustice: Why Racial Profiling Cannot Work*, NEW YORK: THE NEW PRESS (2002).

<sup>56</sup> Deborah Ramirez, Jack McDevitt, and Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, U.S. DEPARTMENT OF JUSTICE, (2000), <http://www.ncjrs.gov/pdffiles1/bja/184768.pdf>.

<sup>57</sup> *Id.* at *supra* notes 27-28 and accompanying text; Gross, S.R., and Livingston, D., *Racial Profiling under Attack*. COLUM. L. REV., Vol.102, No.5, 1413-1438 (Jun. 2002).

<sup>58</sup> Department of Health and Human Services, *Summary of Findings from the 2000 National Household Survey on Drug Abuse*, COLUM. L. REV., 21-22 (Sept. 2001).

<sup>59</sup> Steven B. Duke & Albert C. Gross, *America's Longest War*, 203-07 (1993); Ethan A. Nadelmann, *The Case for Legalization, in the Crisis in Drug Prohibition*, 13, 21 (1990); Samuel Walker, *Sense*

consumption by limiting the supply is failing.<sup>60</sup> Racial profiling in the War on Drugs is ineffective because it requires searching hopelessly in a continuous stream of cars to eliminate drug traffickers.<sup>61</sup>

### War on Terror

The War on Terror has been in effect since the 1920s. However, after the attacks of 9/11, the U.S. began to focus more on counterterrorism efforts and creating federal agencies specifically for that purpose, such as the DHS. As with WWII and the War on Drugs, the demands from society for better and safer neighborhoods brought about the need for law enforcement to use racial profiling to help with the War on Terror. The phrase “flying while brown” spins on “driving while black”, is used to represent the disproportional amount of Middle Easterners flying and walking compared to the number of Middle Easterners stopped, searched and detained since 9/11.<sup>62</sup>

President George W. Bush declared that “...we must be mindful that as we seek to win the war that we treat Arab-Americans and Muslims with the respect they deserve.”<sup>63</sup> Contrary to this statement, a little over a year after the attacks on 9/11, the government, through The USA

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*and Nonsense about Crime and Drugs*, 262 (3d ed. 1994).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Coke, T.E., *Racial Profiling Post-9/11: Old Story, New Debate*. In C. Brown (Ed.), *Lost Liberties: Ashcroft and the Assault of Personal Freedom*, NEW YORK: THE NEW PRESS, 91-111 (2003).

<sup>63</sup> Statement from President Bush (Sep. 13, 2001).

PATRIOT Act, created a “Special Registration.”<sup>64</sup> The “Special Registration” required thousands of Middle Eastern men and boys with Visas from Middle Eastern countries to report to the U.S. Immigration and Naturalization Services (INS) for questioning, fingerprinting, and photographing. If they did not report, they faced prosecution and deportation.<sup>65</sup>

Without abandoning its statement on racial profiling, the DOJ created an exception for counterterrorism efforts. By 2003, the DOJ took a position where their “efforts to defend and safeguard against threats to the national security or integrity of the Nation’s borders were distinguishable from racial stereotyping in criminal investigations.”<sup>66</sup> The “Special Registration,” by DOJ’s standards, is distinguishable. However, it still had a particular effect on southeastern Michigan.

Southeastern Michigan has the largest concentration of Middle Eastern Americans and visitors in the country.<sup>67</sup> Approximately 87% of residents were on the Justice Department’s initial interview list.<sup>68</sup> Those who were contacted by letter received the following notification from the local U.S. Attorney and were asked to call the office by a given date to set up an interview appointment:

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<sup>64</sup> The USA PATRIOT Act is an acronym for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.

<sup>65</sup> David Rudovsky, *Debate: Racial Profiling and the War on Terror*, 155 U. PA. L. REV. PENUMBRA. 173, 174 (2007), Others have listed the percentage much lower at 60% but still well over a majority of the public; David Harris, *Racial Profiling Revisited: “Just Common Sense” in the Fight Against Terror?*, 17 CRIM. JUST. 36, 36 (2002).

<sup>66</sup> *Id.* at 175.

<sup>67</sup> Gross, S.R., and Livingston, D., *Racial Profiling under Attack*. COLUM. L. REV., Vol.102, No.5, 1413-1438 (Jun. 2002).

<sup>68</sup> *Id.*

Your name was brought to our attention because, among other things, you came to Michigan on a visa from a country where there are groups that support, advocate, or finance international terrorism. We have no reason to believe that you are, in any way, associated with terrorist activities. Nevertheless, you may know something that could be helpful in our efforts.<sup>69</sup>

The interview was described as completely voluntary. However, the recipients of the letter included people who were on visas from governments who were authoritarian and even considered abusive. Some recipients interpreted this letter as an order versus an option. Others, due to their immigration status, feared being detained, deported, denied citizenship and dreaded the unknown consequences for not doing the interview.

In U.S. history, racial profiling has been consistently used to address national security and public safety issues. However, racial profiling has been an inappropriate and ineffective means to provide national security and public safety. The internment of Japanese-Americans was driven by racial prejudice and rumors. The War on Drugs was started to target Black people and “hippies.” It was unsuccessful in reducing the number of users and the amount of drugs entering the U.S. The War on Terror began after 9/11 to prevent terrorism. Likewise, the targeting of Middle Eastern people has limited the success of counterterrorism operations. Reviewing these three historical events, the use of racial profiling and its success in addressing national security and public safety concerns are notable. However, there are more effective ways that objectives could be met. The use of racial profiling as a method to protect the U.S. has preoccupied LEOs

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<sup>69</sup> Letter from Jeffrey Collins, U.S. Att’y, E.D. Mich. and Robert P. Cares, Asst. U.S. Att’y, E.D. Mich. (Nov. 26, 2001) [hereinafter Letter] (emphasis omitted) (on file with the COLUM. L. REV.); Lengel, *supra* note 14 (publishing text from letter used by U.S. Attorney's office).



and inhibited them from developing more reasonable and effective solutions, which is disadvantageous to the process of attaining national security and public safety.

## UNITED STATES LAWS AND SUPREME COURT CASES

Congress enacted the USA PATRIOT Act to combat terrorism after 9/11. In 2015, the act was replaced with the USA Freedom Act. The techniques used by LEOs are legally upheld through the sections and authorities created in these acts. In addition, United States federal and state Supreme Court cases have upheld race as a legal factor in certain situations, while others have not.

### USA PATRIOT Act and USA Freedom Act

A commonly known counterterrorism legislation is the USA PATRIOT Act and, most recently the USA Freedom Act, which amends parts of it. George W. Bush signed the USA PATRIOT Act on October 26, 2001, less than two months after 9/11. The USA PATRIOT Act addressed many topics, including domestic security, protecting the border, and investigating terrorism.<sup>70</sup>

Title I, domestic security, section 102 condemns discrimination against Arab and Muslim Americans.<sup>71</sup> Title IV, protecting the border, exercises the right to use the entry and exit data program enacted by section 110 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996.<sup>72</sup> It also authorizes the Attorney General to detain and certify any alien as a terrorist where there are reasonable grounds to believe he/she is affiliated with

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<sup>70</sup> USA PATRIOT Act, H.R. 3162, 100<sup>th</sup> Cong. 1 (2001).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

designated terrorist organizations or engaged in terrorist activities.<sup>73</sup> Title V, investigating terrorism, authorized LEOs to conduct surveillance and physical searches to investigate against terrorism.<sup>74</sup> Each title provided ample room for profiling since it is up to LEOs, such as the Attorney General, to decide if there are reasonable grounds to link someone to a terrorist organization or action through data and physical searches.

Since the USA PATRIOT Act was written in response to the September 11 attacks, in theory, it applies to all citizens, but it was written with Middle Eastern people in mind. In practice, it empowers law enforcement authorities to raid their homes, offices, and mosques in the name of the War on Terror.<sup>75</sup> LEO's authorities were given through the USA PATRIOT Act. 14 years later, some authorities were deemed unfit for current counterterrorism efforts and were revised in the Freedom Act.<sup>76</sup>

President Barack H. Obama signed The Freedom Act on June 2, 2015, a day after the USA PATRIOT Act expired. The act extended many parts of the USA PATRIOT Act of 2001 but revised what civil liberties are protected, improved transparency and better information sharing with the American people, and strengthened national security in the USA PATRIOT Act.<sup>77</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Geneive Abdo, *Islam in America: Separate but Unequal*, WASH. Q., 7, 12 (2005); Chrystie Flourney Swiney, *Racial Profiling of Arabs and Muslims in the US: Historical, Empirical, and Legal Analysis Applied to the War on Terrorism*, MUSLIM WORLD JOURNAL OF HUMAN RIGHTS article 3 (2006).

<sup>76</sup> USA FREEDOM Act, H.R. 2048, 114<sup>th</sup> Cong. 23 (2015).

<sup>77</sup> *Id.*

The revision included provisions to end bulk collection of private information, prevent government overreach, and allow challenges to national security gag orders. The end to bulk collection of private information was catalyzed by the ruling of the 2<sup>nd</sup> U.S. Circuit Court of Appeals on May 7, 2015. The court ruled that bulk collection of photo data is not authorized by federal law and is illegal.<sup>78</sup> The act improves transparency and better information sharing with the American people through expert guidance at the Foreign Intelligence Surveillance Act (FISA) court, declassification of FISA court opinions, and robust government and company reporting. FISA provides the government with the tools needed to strengthen national security. These tools include an increase of the statutory maximum prison sentence to 20 years, protection of the U.S.'s maritime activities from nuclear threats and other threats, enhancement of investigations of the international proliferation of weapons of mass destruction, and the provision of strictly limited emergency authorities.

#### United States Supreme Court Cases

U.S. federal and state Supreme Courts have allowed for interrogation and frisks without probable cause for an arrest providing that there is a reasonable basis for stop and frisks.<sup>79</sup> However, generally, the Supreme Courts have disallowed or limited the use of racial profiling. The reason is the lack of evidence of a reliable predictive value based on race when weighed

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<sup>78</sup> ACLU v. Clapper, 785 F.3d 787 (2015).

<sup>79</sup> Terry v. Ohio, 392 U.S. 1 (1968).

against the substantial intrusion upon civil liberties embodied by these types of policing measures.<sup>80</sup>

In *Terry v. Ohio*, John W. Terry and Richard Chilton were frisked by a 39-year police officer because their activity in front of a jewelry store was suspicious.<sup>81</sup> The officer found a gun in Terry's and Chilton's pockets.<sup>82</sup> They were found guilty because of the suspicious nature of their behavior and the officer's concern for his safety. Thereby, making the stop and frisk permissible.<sup>83</sup> They appealed, but the Appellate court affirmed.<sup>84</sup> Then, Terry appealed to the U.S. Supreme Court and they affirmed the ruling of the lower court.<sup>85</sup> *Terry v. Ohio* expands the authority of officers to investigate crimes, including the use of racial profiling, where there is a reasonable basis for suspicion.

In *United States v. Martinez-Fuerte*, the plaintiff and others were stopped on a major highway near the Mexican border at a routine, fixed, checkpoint for brief questioning about the occupants in the vehicle.<sup>86</sup> The issue, in this case, was whether national security stops violate the Fourth Amendment's proscription against unreasonable searches and seizures?<sup>87</sup> The majority

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<sup>80</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 124.

<sup>81</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

<sup>87</sup> *Id.*

concluded no. As long as there is reasonable suspicion an individual can be searched in the interest of public safety. In the majority opinion, Justice Lewis F. Powell, Jr. writes: “The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure... But the Fourth Amendment imposes no irreducible requirement of such suspicion.”<sup>88</sup> The race of Martinez-Fuerte and the other individuals in the car, along with the location they came from, provided the reasonable suspicion required to be searched since it served the interest of keeping public safety. This Supreme Court case suggests, under the Fourth Amendment, it is constitutional to use race as one factor among several for a decision to stop a person, but not as the sole basis for such a decision.

In *Mustafa v. City of Chicago*, Anna Mustafa sued police officers for false arrest and violation of her civil rights following an incident at Chicago’s O’Hare Airport.<sup>89</sup> Mustafa was a 56-year-old woman and an American citizen of Palestinian descent and Muslim faith.<sup>90</sup> Three months following 9/11, Mustafa along with 19 of her immediate family members purchased tickets to fly to Europe to attend her father’s funeral.<sup>91</sup> They also ordered “Muslim” meals.<sup>92</sup> Following, Mustafa was escorted to a bomb-detection machine to check her two pieces of

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<sup>88</sup> *Id.*

<sup>89</sup> *Mustafa v. City of Chicago*, 442 F.3d 544 (7th Cir. 2006).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

luggage, but officers failed to check her purse.<sup>93</sup> When she realized it she said, “You already checked my luggage. Maybe I have a bomb in my purse. Nobody checked that.”<sup>94</sup> Minutes later officers came to arrest Mustafa and she missed her father’s funeral.<sup>95</sup> She was charged and later acquitted of a Felony - Disorderly Conduct-Bomb Threat pursuant to 720 Ill. Comp. Stat., 5/26-1(a)(3).<sup>96</sup> However, her claim of false arrest and violations of civil rights was denied because there was probable cause to arrest her.<sup>97</sup> The two facts that led a reasonable person to believe a crime had been committed are (1) commotion and agitation with Mustafa at its center in an international airport and (2) Mustafa saying, “Maybe I have a bomb.”<sup>98</sup> Regardless of the ruling, Mustafa was found not a risk. Therefore, racial profiling did not predict or prevent a terrorist attack.

Two Supreme Court cases that stand out from the previous cases are *United States v. Montero-Camargo* and *United States v. Avery*. In *United States v. Montero-Camargo*, the court held that race may not be included in a profile used as a basis for individualized suspicion under the Fourth Amendment.<sup>99</sup> In *United States v. Avery*, the court stated that the Equal Protection

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000).

Clause of the Fourteenth Amendment applies to all government actions.<sup>100</sup> These actions include early stages of police investigations, such as non-coercive questioning, surveillance in public areas, and requesting consent to conduct searches that are not governed by the Fourth Amendment because they do not involve actual searches and seizures. Therefore, racial profiling may be challenged under the Fourth Amendment of the United States Constitution.<sup>101</sup> Under general Equal Protection principles of the Fourteenth Amendment in the United States Constitution, it may be that racial profiling is generally prohibited in the absence of finding that its implication is narrowly tailored to serve a compelling state interest.<sup>102</sup> An acceptable use of racial profiling can also be defined in how many innocent people are affected and treated. When stops and searches are truly narrowly tailored, then it makes sense to stop someone who is in the vicinity at the time a particular crime is committed or if evidence can place the person within a time frame.

Much of the federal legislation immigrants, non-immigrant aliens, and travelers are subjected to, are designed to proactively prevent terrorism and provides evidence on a federal level that racial profiling is not encouraged. However, there are circumstances when the Supreme Court will allow it. The responsibility falls on each law enforcement agency who interpret policies and laws based upon their inherent bias, which will be discussed in the solutions section of this thesis.

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<sup>100</sup> United States v. Avery, 80 U.S. 251 (1871).

<sup>101</sup> State v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

<sup>102</sup> City of Richmond v. J. A. Croson Co., 488 U.S. 469, 486 (1989).



## EFFECTIVENESS

The trend of racial profiling has continued from WWII into the War on Terror. The counterterrorism actions executed have acted as deterrents, not preventions, of some terrorist attacks. While deterrents and disruptions are helpful, the ultimate goal is to prevent terrorism. However, current counterterrorism operations are not as effective as they set out to be. As a result, terrorists continue to recruit, and acts of terrorism continue to occur worldwide.

The process to determine the effectiveness of counterterrorism efforts is complex but not impossible. Goals of each agency, as well as goals within a mission, are different, which means the degrees of effectiveness are constantly changing. As a result, different uses of profiling are not easily transferable from one agency to another. The definition and standard of effectiveness should be uniform so that all LEOs can use it in their daily operations. Effectiveness can be defined in many ways. Arguably, effectiveness in the terms of counterterrorism can be the degree of success in the prevention of harm through deterrence or incapacitation.<sup>103</sup>

Using race to find a criminal can be effective in two ways:

(1) If reliable witnesses report that they saw a white man running from the scene of a murder and going into a bar in which there are only three white men, the police have enough information to detain all three-“reasonable suspicion”-and they might have probable cause to arrest them as well. If there is only one white man in the bar, there might just be enough to convict by proof beyond a reasonable doubt.<sup>104</sup>

(2) While a suspect's race alone is never proof of guilt, a suspect's race is frequently powerful evidence of innocence. If the eyewitnesses to a murder are right and the killer was a white man

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<sup>103</sup> Margareth Etienne, *Making Sense of the Ethnic Profiling Debate*, 80 *MISS. L.J.* 1523 (2011).

<sup>104</sup> Gross, S.R., and Livingston, D., *Racial Profiling under Attack*, *COLUM. L. REV.*, Vol.102, No.5, 1428, (Jun. 2002).

that is conclusive evidence of the innocence of any person who is black, or a woman. (The witnesses could in theory be mistaken, but even so the police are justified in treating their description as very strong evidence of innocence of any person of the wrong race or sex.)<sup>105</sup> This may be the real reason why courts uniformly agree that police officers may rely on racially specific descriptions of criminal suspects, despite the prohibition against the use of racial classification.<sup>106</sup>

While this explanation provides effective uses of racial profiling, the effectiveness of racial profiling is further complicated. The complication arises because the civil rights of individuals are being compromised when entire classes of people are broadly and vaguely defined as Middle Eastern in appearance. This definition encompasses not only those of Middle Eastern descent, but also South Asians, Mediterranean peoples, Hispanic-Americans, African-Americans, and generally “brown” people.<sup>107</sup> The threat against the U.S. is broad and not from a narrow racial group, but an extreme subset of one of the major religions in the world.<sup>108</sup> The current criteria fails to separate Muslim extremists from other identifiers by including non-Middle Eastern, non-Arab, non-extremist people and a vast majority of peaceful and law-abiding Middle Eastern Muslims.<sup>109</sup> Decisions on whether profiling is appropriate or not are clearly

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<sup>105</sup> *Id.*

<sup>106</sup> Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 *UCLA L. REV.* 1075, 1083-88, (2001); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 *YALE L.J.* 214, 237-43 (1983).

<sup>107</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, *KENNEDY SCHOOL REVIEW*, 124.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

arbitrary, which undermines citizens who are Middle Eastern in appearance and their ability to be secure in the protections provided by the U.S. justice system.<sup>110</sup>

### Terrorist Diversity

A key sign of the ineffectiveness of current counterterrorism operations is the expansion of terrorist recruitment to include many different races, ethnicities, and religions. Society has also become aware of the terrorists' motives, actions, and variety. Recently, a group of protestors took over a building in a federal wildlife refuge in Oregon.<sup>111</sup> There has not been an official consensus of labeling those actions as terrorist activity; however, it is arguable that if the group, was made up of Muslims and/or of people who look Middle Eastern, the event would have been labeled a terrorist attack and ended swiftly by guns and/or raid of the building.<sup>112</sup>

The group who occupied the Oregon federal wildlife refuge building were armed, anti-government extremists. They announced that they were willing to kill or be killed.<sup>113</sup> LEOs did not have a massive reaction. Also, the media did not provide a minute by minute coverage detailing the political, religious, and overall personal backgrounds of the terrorists. The LEOs' response was that it was a protest by "militia members" not terrorists and that they were looking for a peaceful end. However, the FBI defines domestic terrorism as activities that:

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<sup>110</sup> *Id.* at 125.

<sup>111</sup> Ibrahim Hooper, *Let's Call the Oregon 'Protestors' What They are: Terrorists*, TIME, (Jan. 5, 2016), <http://time.com/4166975/oregon-protesters-terrorists/>.

<sup>112</sup> *Id.*

<sup>113</sup> Dana Liebelson, Ryan J. Reilly, and Nick Baumann, *Oregon Militants Vow to 'Kill and be Killed if Necessary,' but FBI Isn't Biting*, THE HUFFINGTON POST, (Jan. 04, 2016), [http://www.huffingtonpost.com/entry/oregon-militia-fbi\\_us\\_568a831ae4b0b958f65c1bfa](http://www.huffingtonpost.com/entry/oregon-militia-fbi_us_568a831ae4b0b958f65c1bfa).

...involve acts dangerous to human life that violate federal or state law; appear intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the U.S.<sup>114</sup>

The actions by the “militia members” fall under section (ii) of this definition of domestic terrorism. Yet, since they did not fit the Middle Eastern racial profile, they were not treated as though they participated in any of the actions stated in the definition of domestic terrorism.

The Oregon terrorists were not the only ones who did not fit the stereotypical mold of terrorists. Richard Reid, the “shoe bomber,” who attempted to board a plane with explosives in his shoes, had a British mother and a Jamaican father.<sup>115</sup> Timothy McVeigh was a white, American militia terrorist who bombed the Oklahoma City Federal building. John Walker Lindh, the American-born Taliban soldier raised in Marin County, California, was convicted based on his activities with Al Qaeda.<sup>116</sup> Aafia Siddiqui, a mother of three with a degree from MIT, was on the FBI's most wanted terrorist list until her capture in 2008.<sup>117</sup> In 2009, a black Nigerian man named Umar Farouk Abdulmutallab was arrested for attempting to blow up a Detroit-bound transatlantic airliner.<sup>118</sup> Colleen LaRose, a white, blonde American woman nicknamed Jihad

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<sup>114</sup> *Definitions*, 18 U.S.C. § 2331 (Oct. 26, 2001).

<sup>115</sup> Alan Cowell, *The Shadowy Trail and Shift to Islam of a Bomb Suspect*, N.Y. TIMES, (Dec. 29, 2001), at A1.

<sup>116</sup> Adam Liptak, *A Case of Buyer's Remorse That Could Linger for Years*, N.Y. TIMES, (Apr. 23, 2007), at A12.

<sup>117</sup> CBN NEWS, *U.S. Captures Top Female Terrorist Suspect*, (Aug. 13, 2008), <http://www.CBN.com/cbnnews/427466.aspx>.

<sup>118</sup> Dan Eggen et al., *Plane Suspect was Listed in Terror Database*, WASH. POST, (Dec. 27, 2009), at A1.

Jane, was arrested for her involvement in a terrorist assassination plan.<sup>119</sup> Also, many local domestic terrorists were white males whose combined terroristic acts resulted in hundreds of deaths. They include the Atlanta Centennial Olympic bomber and the Unabomber.<sup>120</sup> The stereotyping and profiling of those who are or appear to be Middle Eastern as a terrorist can no longer be the main indicator of a terrorist.

Some terrorist organizations have become diverse and recruit members from all over the world in multiple demographic groups, which does not align completely with the law enforcement strategy profile. Even though there is a history of terrorists in the U.S. not being Middle Eastern, many LEOs still racial profile those who are Middle Eastern as terrorists. Many terrorists were not caught before their attacks because they did not match the “terrorist profile” even though their actions leading up to the attacks were reflective of typical terrorist activities.<sup>121</sup>

### Consistency

Consistency in counterterrorism operations can help accomplish counterterrorism goals more effectively and efficiently without using racial profiling. In WWII, the War on Drugs, and the War on Terror, LEOs have been criticized for not being consistent about who they stop, search, and detain. The Oregon terrorist attack that occurred in January of 2016 is an example of this premise. In this situation, the typical counterterrorism response used when an individual is suspected of domestic terrorism was not employed. Consistency also encompasses how close

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<sup>119</sup> Carrie Johnson, *With 'JihadJane', a New Kind of Threat*, WASH. POST, (Mar. 10, 2010), at A1.

<sup>120</sup> CNN LIBRARY, *Olympic Park Bombing Fast Facts*, (Jul. 3, 2015), <http://www.cnn.com/2013/09/18/us/olympic-park-bombing-fast-facts/>.

<sup>121</sup> *Id.*

local law enforcement agencies are following national counterterrorism laws. Unfortunately, organizations that use racial profiling as a primary reason to stop, search, seize, and detain do not keep records on how consistently useful racial profiling has been over the years.

However, recently TSA has shown they have developed consistent security measures, regardless of the demographic of the individual being searched. For example, a 10-year-old girl was patted down extensively for having a juice box larger than the three ounces allowed on an aircraft.<sup>122</sup> She and her father made a public statement on the news about how invading and humiliating the process was, and there was a public outrage over the incident. Society must come to understand that what happened to the 10-year-old girl happens to countless people who are profiled daily.

Even though TSA has become more thorough in their secondary searches, there is a gap in their counterterrorism operations. The TSA Pre-check is a gap. It assumes a particular person is a low-risk threat to national security and public safety. The program only considers those who may qualify as low-risk to receive expedited screening. On their website, they clearly list the advantages of participating in this program: you do not need to remove your shoes, laptops, 3-1-1 liquids, belts, or light jackets.<sup>123</sup> The 3-1-1 rule applies to aerosols, gels, and liquids to be in containers no larger than three ounces. All three-ounce containers must be in one clear plastic re-sealable bag and each passenger is allowed one. These advantages are ideal for those who fit the

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<sup>122</sup> Elahe Izadi, *Father Outraged by TSA Pat Down of His 10-Year-Old Daughter*, THE WASHINGTON POST, (Jan. 6, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/01/06/father-outraged-by-tsa-pat-down-of-his-10-year-old-daughter/>.

<sup>123</sup> TRANSPORTATION SECURITY ADMINISTRATION, *TSA Precheck*, <https://www.tsa.gov/tsa-precheck>.

low-risk profile, but are a disadvantage for all other airport travelers because these types of people could very well perform acts of terrorism. Yet, because they do not fit the Middle Eastern profile or are frequent business traveler they are overlooked.

Through the TSA Pre-check, children 12 and under are allowed to travel with an eligible parent or guardian. This provides the opportunity for the eligible person to use children as a terrorist weapon or place terrorist weapons in the travel bags of children. The assumptions made by these types of programs do not allow for fully effective counterterrorism efforts.<sup>124</sup>

Many Americans were frightened because the terrorists on 9/11 were Middle Easterners, which in the U.S. is a minority group.<sup>125</sup> Therefore, racial profiling as part of investigating terrorism has been largely tolerated. Typically, racially motivated security measures are accepted along with aggressive measures when they target small and disempowered groups such as racial minorities and foreigners.<sup>126</sup> Consistency in counterterrorism operations is not accepted as much as racial profiling. If consistent measures were applied to all people regardless of races, ethnicities, etc. then, terrorism can be prevented, and there would be more public engagement in counterterrorism measures.

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<sup>124</sup> TRANSPORTATION SECURITY ADMINISTRATION, *TSA Precheck FAQ*, <https://www.tsa.gov/tsa-precheck/faq>.

<sup>125</sup> Gross, S.R., and Livingston, D., *Racial Profiling under Attack*, COLUM. L. REV., Vol.102, No.5, 1413-1438, (Jun. 2002).

<sup>126</sup> *Id.*

## SOLUTIONS

Racial profiling in counterterrorism efforts has been ineffective in preventing terrorism. Terrorists have made it difficult to quantify the value of a life compared to the varying degrees of harm associated with the improper use of race in counterterrorism efforts.<sup>127</sup> This is especially true when the perpetrators devalue their lives and the lives of others.<sup>128</sup> There is a need for reformation of training and policies that govern the actions of LEOs. LEOs should be trained to use facts instead of implicit biases to help counterterrorism efforts. Along with training, policies should be enacted to reinforce objectivity instead of subjectivity. It is inevitable that any type of screening process might be viewed as profiling. However, if we allow race to be a lesser of many criteria or requirements, it will mitigate its effect on people.

The tools we already have can prevent terrorist attacks on American soil. The laws, regulations, body scanners, x-rays, and LEOs have been effective so far in deterring terrorist activity.<sup>129</sup> However, the current system is not perfect and a failure of it can cost many lives. Therefore, exploring options to make it better is worth it.

### Training

When dealing with people, it is important to recognize that although people are a nation's greatest asset, there must be an effort to decrease human error. The best possible way to improve

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<sup>127</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 125.

<sup>128</sup> *Id.* at 126.

<sup>129</sup> TRANSPORTATION SECURITY ADMINISTRATION, *Prohibited Items*, <https://www.tsa.gov/travel/security-screening/prohibited-items>.



the human aspect of counterterrorism efforts is by removing inherent biases people have and implementing policies that do not support the use of inherent biases.<sup>130</sup>

There is not a single or fool-proof way to solving this issue. However, a step in the right direction requires, at minimum, a full day of training given to all LEOs to help them objectively perform their jobs/careers.<sup>131</sup> The day should consist of helping participants recognize their biases through tests and conducting procedures in small groups. Finally, each participant should have the opportunity to create a presentation reflecting on their biases and where the logic for their biases originated.

Biases develop at a young age, are reinforced as we grow up, and are perpetuated through experiences, conformity, and the media.<sup>132</sup> When biases are learned, people are resistant to change even when the evidence does not support them; they embrace and isolate evidence that supports their biases.<sup>133</sup> Media and television consistently use biases to convey moods, scenes, and characters.<sup>134</sup> There is mental residue, hidden negative biases, even if someone is working to behave without them.<sup>135</sup> Since biases are an innate human trait used for survival to determine

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<sup>130</sup> Tracey G. Gove, *Implicit Bias and Law Enforcement*, THE POLICE CHIEF, 78, 45-56, (October 2011).

<sup>131</sup> SOUTHERN POVERTY LAW CENTER, *Teaching Tolerance*, (2016), <http://www.tolerance.org/supplement/test-yourself-hidden-bias>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

friend or foe, it is reasonable to see why the categorization of people happens so easily.<sup>136</sup> The schema is a stereotype, which turns into prejudice and then into discrimination.<sup>137</sup>

Requiring individuals who will be LEOs to take tests such as Harvard University's, the University of Virginia's, and University of Washington's Implicit Association Tests (IAT) will help individuals to first recognize they have an implicit or hidden bias.<sup>138</sup> The tests consist of categories to choose from including Race (black-white), Arab/Muslims, Gender, and many more to measure unconscious biases. It allows the test taker to experience their hidden biases as the test is conducted. One's reaction time to a set of people and characteristics will bring unconscious biases into one's consciousness.

To demonstrate the way the IAT works, we will use the Arab-Muslim IAT category. The task of the participant is to associate good words (peace, happy, glorious, etc.) and bad words (nasty, evil, hurt, etc.) with both Arab-Muslims and Other People of nationalities or religion. The association the participant responds more quickly with, such as Arab-Muslim with bad words and Other People with good words, shows bias. The reaction is measured in milliseconds, and when the participant completes the task they receive a rating of "strong", "moderate", or "slight". There are critics of the IAT test, such as Texas A&M University psychologist Hart Blanton, Ph.D. Blanton highlights a weakness, the way the test is scored.<sup>139</sup> The IAT provides feedback

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Brian Nosek, Mahzarin Banaji, and Tony Greenwald, *Project Implicit*, (2011), <https://implicit.harvard.edu/implicit/selectatest.html>.

<sup>139</sup> Beth Azar, *IAT: Fad or fabulous?*, AMERICAN PSYCHOLOGICAL ASSOCIATION, (July/August 2008), Vol 39, No. 7, 44, <http://www.apa.org/monitor/2008/07-08/psychometric.aspx>.

with a failing psychometric, which Blanton believes is an arbitrary metric.<sup>140</sup> However, the IAT test has been validated by research.<sup>141</sup> From the years of research, general findings indicate (1) implicit biases are persuasive, (2) most people are often unaware of them, (3) implicit biases predict behavior, and (4) people differ in levels of implicit bias.<sup>142</sup>

The next step would be to break the training participants into small groups to discuss and perform scenarios. The scenarios could consist of one individual who is required to stop, search, and detain three to five life-size cutouts of people. The cutouts vary in sex, race, and outward religious attire. Each scenario is filmed and feedback is provided. Feedback questions would include: How well did you think you conducted the search? Were you aware of the changes in your facial expressions, the search techniques you used, and how closely you searched the person? How did performing this search make you feel? Where did your biases come from? How did they influence your action? What can we do about them? The first person to give feedback will be the individual who performed the procedures. The next would be from their peers. The last would be from their small group supervisor. Afterwards, participants would re-watch the scenario through film to discuss and determine the extent to which feedback corresponded appropriately with actions taken.

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<sup>140</sup> *Id.*

<sup>141</sup> John Tierney, *In Bias Test, Shades of Gray*, NEW YORK TIMES, (Nov. 18, 2008); Hal R. Arkes and Philip E. Tetlock, *Attributions of Implicit Prejudice, or 'Would Jesse Jackson "Fail" the Implicit Association Test?*, PSYCHOLOGICAL INQUIRY, 15, no. 4, 257–278, (2008) <http://faculty.washington.edu/agg/IATmaterials/PDFs/AT.psychinquiry.2004.pdf>; Anthony G. Greenwald, et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 97, no. 1, 17-41, (2009), <http://faculty.washington.edu/agg/pdf/GPU&B.meta-analysis.JPSP.2009.pdf>; Kristin A. Lane, Jerry Kang, and Mahzarin R. Banaji, *Implicit Social Cognition and Law*, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 3 (Dec. 2007).

<sup>142</sup> *Id.*

Once participants have completed these steps, they would create a final presentation to present to their classmates. It will be a reflection on what they learned about their types of biases, the history of where they may have begun and been reinforced, the results of the small group scenarios, and the steps they can take to mitigate or eliminate their implicit bias.

The goal of these activities is to help participants become more aware of what their implicit biases are and how they can fix it to be better LEOs and overall better people. When people become aware of their hidden biases, if they desire, they can monitor their behavior and play close attention to verbal language, body language, and stigmatizations of target groups.<sup>143</sup> A conscious decision to change can lead someone to reduce their unconscious biases.<sup>144</sup>

### Policy

To mitigate the improper use of race in counterterrorism operations, policies should be created, enacted, and enforced to be a reference for authorities to use and help to clarify how to appropriately adhere to policies. Policies should explain what LEOs are doing, why they are doing it, and how it helps to achieve the agency's overall mission. In Dr. Fridell's book, *Racially Biased Policing: The Law Enforcement Response to Implicit Black-Crime Association*, she present ideal policies to be created to ensure certain criteria are met in order to stop, search, seize, interdict, or detain based upon race.<sup>145</sup> She presents three policy models:

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<sup>143</sup> SOUTHERN POVERTY LAW CENTER, *Teaching Tolerance*, (2016), <http://www.tolerance.org/supplement/test-yourself-hidden-bias>.

<sup>144</sup> Kristin A. Lane, Jerry Kang, and Mahzarin R. Banaji, *Implicit Social Cognition and Law*, ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 3 (Dec. 2007); Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, PERSONALITY AND SOCIAL PSYCHOLOGY REVIEW 6, no. 3, 242–261 (2002).

<sup>145</sup> Lorie A. Fridell, *Racially Biased Policing: The Law Enforcement Response to Implicit Black-Crime Association*, Racial Divide: Racial and Ethnic Bias in the Criminal Justice System, ed. Michael J. Lynch, Britt Patterson, and

(1) The race or ethnicity of an individual shall not be the sole factor in determining the existence of probable cause to place in custody or arrest an individual or in constituting a reasonable and articulable suspicion that an offense has been or is being committed so as to justify the detention of an individual or the investigatory stop of a motor vehicle.<sup>146</sup>

(2) Officers may not consider the race or ethnicity of a person in the course of any law enforcement action unless the officer is seeking to detain, apprehend, or otherwise be on the lookout for a specific suspect sought in connection with a specific crime who has been identified or described in part by race or ethnicity.<sup>147</sup>

(3) Officers shall not consider race/ethnicity to establish reasonable suspicion or probable cause except that officers may take into account the reported race/ethnicity of a potential suspect(s) based on trustworthy, locally relevant information that links a person or persons of a specific race/ethnicity to a particular unlawful incident(s).<sup>148</sup>

The first policy is a Connecticut statute on racial profiling and it reflects the “solely model”. This policy provides a loophole because if a LEO were to stop a Middle Eastern man for having a liquid over the allowed amount at an airport, but leaves a white man alone for the same issue, it is not violating a “solely model” policy. The decision was based on race and another factor (race and violation of airport liquid policy). The second and third policies mandate a LEO to show the link between identifiers, such as race, and the certain suspect who was stopped, searched, detained, and arrested. For example, if an eyewitness describes the terrorist suspect by

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Kristina K. Childs, Monsey, N.Y.: CRIMINAL JUSTICE PRESS, (2008); Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, PERSONALITY AND SOCIAL PSYCHOLOGY REVIEW 6, no. 3, 242–261 (2002).

<sup>146</sup> Racial Profiling Prohibition Act, C.G.S. 54-11.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

race, physical description, and clothing then, race, along with the other identifiers, can be used as a means to stop, search, detain, and arrest.

Another suggested policy would be that LEOs may wear body cameras with vocal recordings at all times during their shift. This would not only monitor inherent biases, but it would also show questionable force used absent of imminent danger. In airports across the country, TSA officers screen passengers through X-rays and bag checks. One person is in a room only looking at the screen and tells the front line people when they need to check a person or bag. Unfortunately, the thoroughness of the search is not 100% certain because the front line person is performing a secondary search on different categories of people. Training on how all secondary searches should be conducted can help ensure each officer is performing the same secondary search on every “flagged” individual regardless of race, gender, age, etc. Camera recordings can provide evidence that searches are happening the way they should.

With monitoring, there must be a level of autonomy with LEOs. Camera or video footage should only be used when the person monitoring believes there is a consistent use of biases by the LEO conducting stops and searches and/or when someone complains about being racially profiled while a stop and/or search was conducted on them. Accountability within each LEO must be established through the organizational culture. The culture may be, to be honest, truthful, and loyal to the position, the organization, and its mission.

In addition, if a LEO has profiled and there is a correlation between the profiling and the implicit bias test results then, they enter a graduated consequence system. The system would be tailored to each organization’s capabilities. However, here is an example of what it may look

like. The first instance, the LEO is given a verbal warning and must go through immediate retraining. The second instance, they are given a written warning and probation from that particular job in the company. They will receive a night shift job that does not require them to work on the front lines, so they may still earn their pay. The third instance, they are suspended without pay for three days. The consequences are worsened by how many times the offense is made. In contrast to the graduated consequence system, LEOs, who consistently perform their job objectively with little to no implicit biases, will enter a graduated reward system. This system would be tailored to each organization's capabilities as well. Each month the LEO performs well he/she will receive recognition on the organization's monthly award board. When he/she has consistently performed for three months, in addition to the board recognition, he/she will receive a \$50 restaurant gift card. At six months, he/she will receive a \$100 Visa gift card. The incentive will start over each year, but as long as he/she is performing consistently the incentives will be provided. Even if the organizations cannot offer financial incentives, they should still offer something that motivates their members. This may motivate people to adhere to policies since it can affect their livelihood.

Policy making requires research and time. However, there are important questions to answer when writing and enacting policy that can help prevent racial profiling in U.S. Counterterrorism. Thereby, making it more effective. Was race or other discriminatory factors the motive to stop, search, and detain someone? Was that suspect treated with respect throughout the entire process? Is the manner designed to discover relevant information that is freely given?

## LIMITATIONS

Limitations of this thesis include: racial profiling provides deterrence, the attackers of 9/11 were Middle Easterners, and a survey with analyzed data could have been conducted specifically for this thesis. Although racial profiling is inadequate in preventing terrorism, it provides deterrence.<sup>149</sup> However, if the ultimate goal is to prevent terrorism and terrorist are only deterred, research must be done to find more effective and progressive ways to combat and prevent terrorism.

Also, the attackers of 9/11 were Middle Easterners and following the attacks racial profiling was justified. On July 31<sup>st</sup>, 2012, the National Counterterrorism Center's (NCTC) Country Reports on Terrorism 2011, stated Sunni Extremists were responsible for the greatest amount of worldwide terrorist attacks and fatalities for the third consecutive year in a row.<sup>150</sup> Sunni Extremists committed about 56% of all attacks and about 70% of all fatalities, globally.<sup>151</sup> Sunni is a branch of the Muslim religion and 85%-90% of the world's Muslim population is Sunnis.<sup>152</sup> Most Sunnis live in the Middle East and makeup of 90% or more of Egypt's, Jordan's, and Saudi Arabia's populations.<sup>153</sup> In the NCTC's most recent report in 2014, they list five organizations as the top perpetrators of worldwide terrorist attacks who have ties to Middle

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<sup>149</sup> Margareth Etienne, *Making Sense of the Ethnic Profiling Debate*, 80 Miss. L.J. 1523 (2011).

<sup>150</sup> National Counterterrorism Center, *Country Reports on Terrorism 2012*, DEPARTMENT OF THE STATE, (2013), <http://www.state.gov/documents/organization/210204.pdf>.

<sup>151</sup> *Id.*

<sup>152</sup> *Sunnis and Shia: Islam's Ancient Schism*, BBC NEWS, (Jan. 4, 2016), <http://www.bbc.com/news/world-middle-east-16047709>.

<sup>153</sup> *Id.*



Eastern nations: the Islamic State of Iraq and the Levant (ISIL), Taliban, Al-Shabaab, Boko Haram, and Maoists/Communist Party of India-Maoist.<sup>154</sup> However, there is a lack of available, current, and reliable statistical information to determine if in the last few years racial profiling is adequate in preventing terrorism in the U.S.

In addition, a survey and analyzing of data specifically for the purpose of this thesis was not conducted. Ideally, a survey would be sent out to organizations such as the TSA and DHS asking if they racial profile in their counterterrorism operations. The follow-up question would be: how effective it has been along with statistical data on the race of terrorist they deterred or captured? The survey would provide evidence that racial profiling is either adequate or not based upon quantifiable and qualifiable evidence.

Many people profile, it is apparent. Even children profile unfamiliar adults as dangerous strangers and are taught to know the difference. These limitations make racial profiling compelling but it is ineffective and the law does not support it. It is not accepted unless there is probable cause or another justified reasoning.<sup>155</sup>

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<sup>154</sup> National Counterterrorism Center, *Annex of Statistical Information: Country Reports on Terrorism 2014*, DEPARTMENT OF THE STATE, (2014), <http://www.state.gov/documents/organization/239628.pdf>.

<sup>155</sup> *United States v. Avery*, 80 U.S. 251 (1871); *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000); *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

## CONCLUSION

There is not a clear-cut answer to the improper use of race within U.S. counterterrorism efforts. A clear, quantifiable answer may not be feasible when there is ample room for the subjective weighing of many outcomes to racial profiling.<sup>156</sup> Critics of racial profiling argue that profiling violates fundamental civil rights.<sup>157</sup> While advocates of racial profiling contend that those rights must bend concerning public safety and the prevention of a catastrophic loss of lives.<sup>158</sup> The costs and benefits need to be balanced. Informed decisions can be made when provided with the proper training. While U.S. counterterrorism can be modified to be less intrusive, they provide deterrents, and it would be foolish to eliminate those provisions completely.

Steps have been made in the right direction where screening processes, such as TSA's Screening of Passengers by Observation Technique (SPOT), have been expanded by incorporating more nonracial factors, so race is only one measure and not the main factor.<sup>159</sup> Race, together with other information about the suspect, can form a pattern that is persuasive to any degree.<sup>160</sup> Race should be one of many investigative factors, not a determinative one, to aid in counterterrorism efforts. Other informative measures that have been added are travel patterns,

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<sup>156</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 122.

<sup>157</sup> Margareth Etienne, *Making Sense of the Ethnic Profiling Debate*, 80 MISS. L.J. 1523 (2011).

<sup>158</sup> *Id.*

<sup>159</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 126.

<sup>160</sup> Gross, S.R., and Livingston, D., *Racial Profiling under Attack*, COLUM. L. REV., Vol.102, No.5, 1413-1438, (Jun. 2002).

professional or familial connections, criminal records, financial history, and affiliations with other groups and individuals.<sup>161</sup> This allows LEOs to make the most informed decisions through holistic information about an individual.

It is achievable to determine if LEOs are using racial profiling to operate on a general assumption that Middle Eastern people, especially men, commit acts of terror, or if they are pursuing specific information about the 9/11 attacks to prevent terrorist attacks. Also, when LEOs are combating terrorism they may not know how to separate or distinguish the two conditions. Redefining the group of people who are deemed more likely to be a terrorist, through actions, not race, and creating the balance between security and civil rights will ensure the overall integrity of the system for all parties involved. Inevitably, there will be individual cases where racial profiling issues will come into play. However, the system must work in favor of the group so individual cases are less likely.<sup>162</sup>

Society and law enforcement, including the DHS, respond to each other in a variety of ways. The reoccurring trend is if society requests stronger national security measures then, law enforcement responds with strengthened security measures. However, many times, this means racial profiling is used in order to aid in combating crimes. The effectiveness of profiling has yet to be scientifically proven, although surveys and hypothetical equations to calculate the

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<sup>161</sup> K. Sheik Pal, *Racial Profiling as a Preemptive Security Measure after September 11: A Suggested Framework for Analysis*, KENNEDY SCHOOL REVIEW, 119, 126.

<sup>162</sup> *Id.*

effectiveness have been conducted.<sup>163</sup> The results did not validate or invalidate racial profiling as effective.<sup>164</sup>

Attitudes regarding racial profiling in the name of preventing terrorism are contingent on one's mission, training, and work environment. LEOs have a duty to maintain security, prevent crime, enforce the law, and conduct counterterrorism operations. They are responsible if they fail to do any of these. General society does not have these responsibilities. Consequently, LEOs would more likely see some value in being able to recognize suspicious terrorist behavior coupled with a more probable physical description in a security-sensitive situation.

Training individuals to recognize and eliminate personal biases will be a key aspect of solving racial profiling in counterterrorism efforts. Testing, active participation in scenarios, and retention of policies that prohibit racial profiling in counterterrorism efforts will aid in the solution. The issue of racial profiling is generational and contingent upon the tragedies that catalyze LEOs to perform the duties they swore to do.

Since 9/11, the fear of future terrorist attacks heightened investigation because of the seriousness of the threat. With that and the identity of the terrorists, the government was justified in its initial investigations focused on Middle Eastern men; although it provided anxiety and pain to those who fit the profile. However, 15 years later, it is no longer justified with the changes to who the terrorists recruit, what they believe, and their capabilities. The individuals impacted by 9/11 or raised with the stigmatizing of Middle Eastern people have been subjected to the biases

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<sup>163</sup> Brown, N.D. and Newman, D.W., *Historical Overview and Perceptions of Racial Profiling in an Era of Homeland Security*, CRIMINAL JUSTICE POLICY REVIEW, Volume 20 Number 3, 366-372 (2009).

<sup>164</sup> *Id.*

of who commit terrorist attacks. Unfortunately, this is a harder change to make, but it is achievable through retroactive training.

The government must now operate with appropriate reasoning and adequate information. Racial profiling is no less complicated or troubling. Therefore, we must have a deep suspicion of it. The consequences of negative stereotypes are discrimination, stigmatization, and the overlooking of other groups. This can cause investigators to more likely suspect criminal behavior in targeted groups. It is dangerous for LEOs to investigate in this way because it deprives the rights of and degrades the targeted group. It also affects split-second, life or death decisions. The starting point to prevent the improper use of race is the presumption that no one racial group should be considered more suspicious or dangerous than another. More research should be conducted to provide a new alternative to the issue of racial profiling in national security efforts. Profiling can be based upon other information, such as behavior and childhood experiences instead of race because they provide more evidence of who is likely to commit a crime.<sup>165</sup>

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<sup>165</sup> McCorkle, R.C. and Miethe, T.D., *The Anatomy of Dangerous Persons, Places, and Situations*, CRIME PROFILES SECOND EDITION, 2 (2001).

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