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ANY WAY YOU SLICE IT: WHY RACIAL PROFILING IS WRONG

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INTRODUCTION

It has been said that in life but two things are certain: death and taxes.¹ If you are a young African-American or Latino male, however, there is an additional certainty: At some point during your lifetime, you will be harassed by the police.² Racially motivated police harassment, vis-a-vis racial profiling, is as American as baseball and apple pie. And it has been around, in some form or fashion, for most of America's history.³ Racial profiling happens to consumers and pedestrians, on planes, trains, and automobiles. There is driving while black (or brown), flying while black, walking while black, shopping while black, hailing (as in a cab) while black, swimming while black (six African-American youths accused of stealing a cell phone and beeper at a public pool in Michigan) and dining while black (think Miami, where a tip was automatically added to the bill of a black patron, on the assumption that blacks are poor tippers), to name a few. The most accurate term to describe the pervasiveness of the phenomenon is breathing while black, a reality underscored by the shooting deaths over a thirteen-month period - by the New

* Staff Attorney, Legal Department, American Civil Liberties Union Foundation National Headquarters, New York. I thank my ACLU colleagues around the country for their trailblazing and inspiring work challenging racial profiling. I also want to thank my colleagues in my office in New York for their enthusiastic support of my own work seeking an end to racial profiling.

1. Benjamin Franklin, JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE (Justin Kaplan ed., 16th ed. 1992).

2. See KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARRASSMENT, AND OTHER MACROAGGRESSIONS 34 (1998) "The frequency of contact between Black men and the police has led a generation of Black men to teach their sons 'The Lesson' - instructions on how to handle a police stop." *Id.*

3. For example, during the time of the Black Codes following the Civil War, among other things, Blacks were stopped during their travels, forced to identify themselves and reveal where they were coming from and where they were going. See generally RANDALL KENNEDY, RACE, CRIME, AND THE LAW 84-85. See also F.M. Baker, "Some Reflections on Racial Profiling," 27 J. AM. ACAD. PSYCHIATRY L. 627 (1999) "Racial profiling is . . . a component of our national fabric." *Id.*

York Police Department alone - of four unarmed black men, Amadou Diallo, Patrick Dorismond, Malcolm Ferguson and Richard Watson.⁴

ARGUMENT

Any way you slice it, racial profiling is wrong.⁵ First, it is morally indefensible, steeped as it is in racial stereotypes and erroneous assumptions about the propensity of black and Latino men to commit particular types of crimes.⁶ Second, racial profiling - equating race with criminality and using it in the absence of and in lieu of probable cause - is legally impermissible.⁷ It violates various constitutional and statutory rights, including the Equal Protection Clause of the Fourteenth Amendment, the Fourth Amendment, and Title VI of the Civil Rights Act of 1964. Finally, racial profiling is just bad, ineffective policing. By targeting black and Latino men, practitioners of racial

4. See, e.g., Bob Herbert, *Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29; see also Rocco Parascandola, Jamie Schram, Maria Malave & Tracy Connor, *Unarmed Man Slain in Police Struggle: Giuliani Asks Calm as Cops Start Probe*, N.Y. TIMES, Mar. 17, 2000, at A11; Tina Kelley, *Police Shooting Victim Is Remembered and Mourned in Tears and Songs*, N.Y. TIMES, Mar. 25, 2000, at B4.

5. See *Martinez v. Village of Mount Prospect*, 92 F. Supp.2d 780, 782 (N.D. Ill. 2000) (“Racial profiling of any kind is anathema to our criminal justice system because it eviscerates the core integrity that is necessary to operate that system effectively in our diverse democracy.” *Id.*)

6. Racial profiling has flourished in the era of the War on Drugs. See generally *Driving While Black: Racial Profiling on our Nation's Highways*, AMERICAN CIVIL LIBERTIES UNION SPECIAL REPORT, May 1999, available at <http://www.aclu.org/profiling/rport/index.html>. Where abusive and excessive police practices were once conducted on the sly, the War on Drugs has virtually sanctioned the public, systematic, and unapologetic violation of civil liberties. Add to this a society still struggling with stereotypes involving race and crime, and the inevitable result is that people of color are those bearing the brunt of these abusive practices. *But see* ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 107 (1993) (asserting that history teaches that racism and stereotypes preceded a black underclass who commit a disproportionate amount of crime, thereby undermining the argument that race-based law enforcement is merely a reaction to that reality).

7. For the first time, in 1999, the term “racial profiling” made its way into the dictionary. The OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE defines “racial profiling” as the “[a]lleged police policy of stopping and searching vehicles driven by people from particular racial groups.” With appropriate respect, this author disagrees with this definition, because, as discussed above, racial profiling occurs in non-vehicular contexts as well. The OXFORD AMERICAN DICTIONARY’s definition of “racial profiling” is a more appropriate definition for “driving while black” or “d.w.b.,” which also made the dictionary for the first time in 1999. RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY defines “d.w.b.” as: “Driving While Black (used ironically to refer to the stoppage of a black motorist by police because of the motorist’s race rather than for any real offense).”

Other commentators also have offered a definition of “racial profiling.” For example, Harvard Law School Professor Randall Kennedy urges a broad definition of racial profiling, consistent with present-day police practices: “using race as a factor [not the sole factor] in deciding whom to place under suspicion and/or surveillance.” Randall Kennedy, *Suspect*, THE NEW REPUBLIC, Sept. 13 & 20, 1999, at 35 (emphasis added).

profiling ignore the reality that others are committing crimes (especially those involving the transport of drugs on the nation's highways) and are largely being allowed to get away with it. Additionally, the societal costs exacted by racial profiling, including jury nullification and the lack of faith in the justice system, are immeasurable.

DISCUSSION

The Immorality of Racial Profiling

Racial profiling is morally indefensible. Under the guise of good policing, racial profilers stereotype and penalize African-Americans and Latinos solely on the basis of their skin color.⁸ Even conceding that, as with all races, some small percentage of African-Americans and Latinos are committing crimes, racially motivated policing punishes everyone for the sins of a few.⁹ So widespread is racial profiling that Harvard Law School Professor Randall Kennedy, in his book *Race, Crime, and the Law*, likens it to a tax levied against black men: “[A] young black man selected for questioning by police as he alights from an airplane or drives a car is being made to pay a type of racial tax for the war against drugs that whites and other groups escape.”¹⁰

In attempting to justify racial profiling, its proponents frequently demonize people of color, often employing hateful and vitriolic rhetoric. Last year, for example, New Jersey State Police Superintendent Carl Williams said to a newspaper that “mostly minorities” traffic in marijuana and cocaine and that “[t]he president of the United States went to Mexico to talk to the president of Mexico about drugs. He didn’t go to Ireland. He didn’t go to England.”¹¹ Fortunately for motorists of color traveling the roads of New Jersey, he was fired soon thereafter.¹²

In another example, white separatist Jared Taylor told an annual meeting of the National Association of Police Organizations that law-enforcement officers were justified in using racial profiling during police traffic stops.¹³

8. Many consider the case of Wen Ho Lee, the Chinese scientist accused and incarcerated for spying, as an example of racial profiling indicating that Asian-Americans are victims of the practice as well.

9. See COSE, *THE RAGE OF A PRIVILEGED CLASS*, *supra* note 6, at 94-95 (pointing out that, in the context of violent crimes, blacks who are arrested made up less than 1 percent of the black population in 1991, and just under 1.7% of the black male population).

10. KENNEDY, *supra* note 3, at 159.

11. Joe Donohoe, *Trooper Boss: Race Plays Role in Drug Crimes*, NEWARK STAR-LEDGER, Feb. 28, 1999.

12. Corky Siemaszko, *N.J. Top Cop Axed for Race Remarks*, N.Y. DAILY NEWS, Mar. 1, 1999.

13. See ACLU Newswire: *White Separatist Defends Racial Profiling At Police Meeting*, Aug. 20, 1999, available at <http://www.aclu.org/news/1999/w082099a.html>.

Taylor, who has called diversity “unnatural” and said on his Web site that whites face “the prospect of oblivion,” said that profiling was “common sense” because blacks commit violent crimes more than whites.¹⁴ Likewise, Marshall Frank, a retired police officer defended racial profiling by resorting to racist and inaccurate assumptions about the make of cars people drove, the type of clothes they wore, and the neighborhoods they visited.¹⁵ In the editorial, Frank, referring to people as “dirt-bags,” said, “Label me a racist if you wish.”¹⁶ He displayed no concern whatever about condemnation for his racist beliefs. One can only imagine the lessons he passed on to the officers in his charge during his thirty years as an officer. Even more frightening is the untold number of motorists who likely fell victim to his shameless beliefs. Those sentiments, thankfully, are at great odds with what most Americans believe today.¹⁷

Another factor illustrating the morally shallow ground upon which racial profiling rests is the all-too-common failure of its proponents seriously to appreciate or care about the deleterious effects racial profiling has on its victims. Motorists penalized for driving while black or brown will, at the very least, be inconvenienced. Frequently, the experience will be frightening, humiliating or even traumatic. Sometimes, the episode will be deadly.¹⁸ The shooting of three African-American and Latino youths on the New Jersey Turnpike by New Jersey State Troopers in 1998 demonstrates that the lives of young black and Latino men mean little or nothing to officers who have sworn an oath to protect everyone.¹⁹ Yet, the Marshall Franks of the world justify racial profiling on the ground that it is “better to be safe than sorry.” Such

14. *Id.*

15. Marshall Frank, *Otherviews*, MIAMI HERALD, Oct. 19, 1999 (op/ed.).

16. *Id.*

17. In a Gallup poll, the general public indicated its overwhelming disapproval of the practice of racial profiling. According to the poll, 59 percent of all Americans, 56 percent of white Americans, and 77 percent of African-Americans said that racial profiling is widespread. Moreover, 81 percent of all Americans disapprove of racial profiling. Over 40 percent of African-Americans say they have been the victims of racial profiling, including 72 percent of African-American men aged 18-34. Unsurprisingly, African-Americans are more likely to have a negative view of police than their white counterparts. See Frank Newport, *Racial Profiling is Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE, Dec. 9, 1999, available at <http://www.gallup.com/poll/releases/pr991209.asp>. Demonstrating the extent to which racial profiling has become a part of daily discourse, even “Dear Abby” repudiated the practice. See Abigail Van Buren, *Dear Abby*, NEWSDAY, Apr. 10, 2000, at B14, available at <http://www.newsday.com/coverage/current/fanfare/Monday/nd1067.htm>.

18. Amadou Diallo and Patrick Dorismond in New York, Jonny Gammage in Pennsylvania, and Tyisha Miller in California, presumed dangerous before being gunned down, all died from racial profiling.

19. See Peter Noel, *Fear and Loathing on the New Jersey Turnpike*, THE VILLAGE VOICE, June 4, 1998.

callous disregard for the safety and well-being of profiling victims begs an obvious question: safer for whom?

The Illegality of Racial Profiling

Beyond being immoral, racial profiling is also illegal.²⁰ The Equal Protection Clause of the Fourteenth Amendment forbids unequal treatment on the basis of race.²¹ “The central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.”²² The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.”²³ Racial profiling, which targets people of color on the basis of nothing more than their race and subjects them to differential treatment, stands in direct contravention of the Fourteenth Amendment’s mandates.

There are several ways for a plaintiff to plead intentional race discrimination in violation of the Equal Protection Clause: a plaintiff could point to a law or policy that expressly classifies persons on the basis of race;²⁴

20. Race as the sole factor in law enforcement activity is impermissible. *See, e.g.* *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (prohibiting use of Mexican ancestry as basis for *Terry* stop); *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997) (Equal Protection clause is violated when a police officer initially targets someone solely on basis of race, without additional factors, and then, because of the person’s race, investigates that person for drug trafficking.); *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 991 F.Supp. 895, 901-02 (N.D. Ohio 1997) (“There can be no question that a seizure based solely on race or ethnicity can never be reasonable.”); *Murillo v. Musegades*, 809 F.Supp. 487, 499 (W.D. Tex. 1992) (“[A] search or seizure will *never* be considered reasonable if the officer stops the vehicle *solely because of the mexican ancestry of the occupant.*”) (emphases in original); *United States v. Ramos*, 753 F.Supp. 75, 78-80 (W.D.N.Y. 1990) (Hispanic appearance insufficient to establish reasonable suspicion to justify a stop.); *Ramirez v. Webb*, 599 F.Supp. 1278, 1283 (W.D. Mich. 1984) (A seizure can never be reasonable if the stop was based solely on person’s Mexican ancestry.). However, the use of race as one of several factors is not proscribed. *See e.g., Brignoni-Ponce*, 422 U.S. 873; *Avery*, 137 F.3d 343. *But see* *United States v. Montero-Camargo*, 2000 U.S. App. LEXIS 6494 (9th Cir. 2000) (holding that Border Patrol may not rely on Hispanic ancestry as a factor in making stops and overruling prior cases in which Hispanic appearance was permitted to serve as a basis for stops, absent particularized or individualized suspicion).

21. The Fourteenth Amendment provides, in relevant part, that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

22. *See* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1953); *Korematsu v. United States*, 323 U.S. 214, 216 (1944)). *Accord* *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Lowery v. Commonwealth of Virginia* 388 S.E.2d 265, 267 (Va. App. 1990). *See also* *Samaad v. City of Dallas*, 940 F.2d 925, 932 (5th Cir. 1991). “The heart of the equal protection clause is its prohibition of discriminatory treatment. If a governmental actor has imposed unequal burdens based upon race, it has violated the clause.” *Id.*

23. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

24. *See, e.g., Adarand Constructors*, 515 U.S. at 227-229.

a plaintiff could identify a facially neutral policy that has been applied in an intentionally discriminatory manner;²⁵ or a plaintiff could allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus.²⁶ Racial profiling cases are likely to contain allegations of an express racial classification.²⁷

Racial profiling also violates the Fourth Amendment, which is designed to protect individuals from unreasonable searches and seizures.²⁸ In the context of vehicular stops, an investigative stop of an automobile “must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.”²⁹ In other words, some level of reasonable suspicion is required. The law enforcement officer conducting the stop must be able to “point to specific and articulable facts which, taken together with rational inferences from these facts, reasonably warrant” stopping a person to conduct further investigation.³⁰ For automobile searches, while a warrant is not required, probable cause to believe that the car contains contraband is still a prerequisite.³¹ “Probable cause means ‘a fair probability that contraband or evidence of a crime will be found.’”³² In the absence of probable cause, a search warrant, or exigent circumstances, a search will be deemed legal only if it is conducted with the consent of the party searched.³³

25. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

26. See, e.g., *Arlington Heights*, 429 U.S. at 264-65; see generally *Brown v. Oneonta*, 195 F.3d 111, 118-119 (2d Cir. 1999).

27. See, e.g., *Maryland State Conference of NAACP Branches, et al. v. Maryland Dep’t of State Police, et al.*, 72 F.Supp.2d 560, 568-69 (D.Md. 1999); *Chavez v. Illinois*, 27 F.Supp.2d 1053, 1070 (N.D.Ill. 1998); *Gerald v. Oklahoma Dep’t of Public Serv.*, CIV-99-676-R (W.D. Okla. Dec. 21, 1999) (slip op. at 21) (on file with the author); *National Congress for Puerto Rican Rights v. City of New York, et al.*, 191 F.R.D. 52, 54 (S.D.N.Y. 1999).

28. The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . .” U.S. CONST. amend. IV.

29. *United States v. Cortez*, 449 U.S. 411, 417 (1981); accord *Price v. Kramer*, 200 F.3d 1237 (9th Cir. 2000).

30. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

31. *United States v. Ross*, 456 U.S. 798 (1982); accord *Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (Detention of a motorist is reasonable where probable cause exists to believe that a traffic violation has occurred). Unfortunately, protections accorded motorists are not always extensive. See, e.g., *New York v. Belton*, 453 U.S. 454 (1981) (granting police broad authority to search driver and passengers, vehicle, compartments and containers, incident to lawful custodial arrest); *Ohio v. Robinette*, 519 U.S. 33 (1996) (holding that the Fourth Amendment does not require that a lawfully seized defendant be advised that he is “free to go” before his consent to search will be recognized as voluntary).

32. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

33. See *Florida v. Royer*, 460 U.S. 491, 497 (1983). The government has the “burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a

Depending upon the nature and severity of the encounter, allegations generally will be that defendants violated the Fourth Amendment by stopping a motorist of color without reasonable suspicion, searching him and his vehicle without probable cause, detaining him for unreasonably long periods of time, coercing consent to search or searching without consent, and deploying a drug-sniffing dog for an intrusive and unjustified search.³⁴

Claims also may exist under Title VI of the Civil Rights Act of 1964 and its implementing regulations, which prohibit discrimination by agencies receiving federal funding.³⁵ Significantly, while Title VI itself bars only intentional discrimination, its implementing regulations also prohibit practices that have an unjustified disparate impact.³⁶

Although claims based upon the constitutional right to travel have yet to meet with much success in racial profiling cases,³⁷ under the right circumstances, a racial profiling litigant may prevail.³⁸ Moreover, depending upon the factual circumstances surrounding the profiling incident, various torts, including false imprisonment, assault and battery, and intentional or negligent infliction of emotional distress, also may be alleged, as well as conspiracy and state statutory claims.³⁹

burden that is not satisfied by showing a mere submission to a claim of lawful authority.” *Id.* See also *Schneekloth v. Bustamonte*, 412 U.S. 218, 233-34 (1973).

34. See, e.g., *Maryland State Conference*, 72 F.Supp.2d at 560.

35. Title VI provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d. Department of Justice implementing regulations provide that no funding recipient shall:

utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

28 C.F.R. § 42.104(b)(2).

36. See *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardian Ass’n v. Civil Service Comm’n of New York City*, 463 U.S. 582, 607-08, 612, 634 (1983); *Rodriguez v. California Highway Patrol*, 89 F. Supp.2d 1131 (N.D. Cal. 2000).

37. E.g., *Maryland State Conference*, 72 F.Supp.2d at 568-69; *Chavez*, 27 F.Supp.2d at 1070 (N.D.Ill. 1998); *Gerald*, CIV-99-676-R, slip op. at 21.

38. See generally *Maryland State Conference*, 72 F.Supp.2d at 568-69. Concluding that the plaintiffs’ assertion that they continued to use Maryland’s highways indicated the absence of an “actual barrier,” the court held that “more” of an impediment than the stops alleged by plaintiffs was required to establish a constitutional violation. *Id.* In some circumstances, therefore, it is conceivable that “more” can be shown and a right to travel violation accordingly established.

39. See, e.g., Complaint, *Rodriguez*, 89 F. Supp.2d 1131, No. C-99-20895-JF/EAI (Nov. 30, 1999) (on file with author). See generally 42 U.S.C. §§ 1981, 1985 and 1986.

The Inefficiency of Racial Profiling

In addition to being immoral and illegal, racial profiling is bad policing, failing to reduce crime - some say even breeding it - and exacting immeasurable costs upon society. Time and again, studies have shown that racial profiling, to combat crime generally and in service of the War on Drugs, in particular, is simply ineffective. For example, federal statistics show that African-Americans are 13 percent of the country's drug users (equivalent to their composition in the American population), yet African-Americans constitute 37 percent of those arrested on drug charges, 55 percent of those convicted on drug charges, and 74 percent of all drug offenders sentenced to prison.⁴⁰ The former Attorney General of New Jersey has called this phenomenon the "perverse illogic" of racial profiling: when people of color are targeted and searched at a grossly disproportionate rate, it is only logical that they will be arrested and incarcerated at a commensurately high rate.⁴¹ Meanwhile, the 87 percent of drug users who are NOT African-American are for the most part left alone.

In Maryland, statistics by the Maryland State Police show that black and white motorists were found to have drugs at an equal rate of 28 percent,⁴² and that blacks were 73 percent of those stopped and searched, despite being only 17.5 percent of those committing traffic violations.⁴³

40. See Troy Duster, *Pattern, Purpose, and Race in the Army War*, in CRACK IN AMERICA 262-68 (Craig Reinerman & Harry G. Levine eds., 1997). Accord 1997 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (U.S. Department of Justice and State University of New York at Albany); RUSSELL, *supra* note 2, at 31 (Despite being 38 percent of all crack users, blacks account for more than 85 percent of federal crack convictions.) See also Jennifer Loven, *Black Women Stopped Disproportionately By Customs*, THE ASSOCIATED PRESS, Apr. 10, 2000, available at <http://abcnews.go.com/sections/travel/DailyNews/blackwomen000410.html> (indicating that while black women passing through U.S. Customs as they return home from overseas trips are more likely to be subjected to strip searches and X-rays, they are the least likely to be carrying drugs).

41. Final Report of the State Police Review Team, July 2, 1999, available at http://www.state.nj.us/lps/Rpt_ii.pdf. Accord *Martinez*, 92 F. Supp.2d at 783. "[T]argeting Blacks for police surveillance results in higher rates of arrest, reinforcing the presumption of Black criminality. If police stopped and frisked whites as frequently as they do Blacks, white arrest rates would increase." *Id.* (quoting Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 81 J. CRIM. L. & CRIMINOLOGY 775 (1999)). "Put simply, there is a connection between where police look for contraband and where they find it." *Id.* (quoting David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 301 (1999)).

42. This number seems extremely high and is probably being overstated by the Maryland State Police in an attempt to show the effectiveness of its tactics. Its significance, however, is obvious: it is the same across races.

43. *Driving While Black*, AMERICAN CIVIL LIBERTIES UNION SPECIAL REPORT, *supra* note 6, at 32.

Not only does racial profiling fail miserably in an arguably well-intentioned but poorly executed effort to rid America of drugs, its societal costs are extraordinary.⁴⁴ For one thing, people of color “individually and as a community are psychologically harmed.”⁴⁵ The costs to society also include the perpetuation of inaccurate stereotypes, which in turn produces “exaggerated levels of fear and more pronounced levels of scapegoating.”⁴⁶ Fundamentally,

[r]ace-based policies pit law enforcement against minorities and create an unbreakable cycle: racial stereotypes may motivate police to arrest Blacks more frequently. This in turn generates statistically disparate arrest patterns, which in turn form the basis for further police selectivity by race.⁴⁷

Racial profiling also results in the refusal by some people of color to cooperate with police investigations, to disbelieve police officers who are testifying against a criminal defendant and to employ jury nullification when serving on juries.⁴⁸ According to Professor David Cole, racially discriminatory law enforcement practices

undermine law enforcement itself, because they breed resentment and alienation among minorities People who see the criminal justice system as fundamentally unfair will be less likely to cooperate with police, to testify as witnesses, to serve on juries, and to convict guilty defendants when they do

44. *See generally id.* at 36-7.

45. RUSSELL, *supra* note 2, at 44. “The impact of police harassment is cumulative. Each negative experience creates another building block in the Black folklore about police.” *Id. Accord* Harris, *supra* note 40, at 268. “Pretextual traffic stops aggravate years of accumulated feelings of injustice, resulting in deepening distrust and cynicism by African-Americans about police and the entire criminal justice system.” *Id.*

46. RUSSELL, *supra* note 2, at 45. *See also* COSE, *supra* note 6, at 110. “[A]s long as the dominant message sent to impressionable black boys is that they are expected to turn into savage criminals, nothing will stop substantial numbers of them from doing just that.” *Id.*

47. RUSSELL, *supra* note 2, at 45. The costs to society also can be measured in monetary terms:

U.S. taxpayers have paid tens of millions of dollars in police brutality suits. Between 1992 and 1993, Los Angeles County alone paid more than \$30 million to citizens victimized by police brutality. In 1996, an all-white Indianapolis jury held the city liable for the police killing of an unarmed 16-year-old Black boy. The jury awarded \$4.3 million.

Id. In New York, there is a similar pattern of payouts. *See* Kevin Flynn, *Record Payout In Settlements Against Police*, N.Y. TIMES, Oct. 1, 1999, at B1; Michael Cooper, *Stricter Oversight of Police Would Save Money, Report Says*, N.Y. TIMES, at B3. The cases of Abner Louima and Amadou Diallo are likely to produce substantial settlement payouts, as well.

48. *See id.* at 46. For a discussion of jury nullification and its various manifestations, see Jack Weinstein, *The Many Dimensions of Jury Nullification*, 81 JUDICATURE 168; see also Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J. L. REF. 285 (1999).

serve. In addition, people who have lost respect for the law's legitimacy are more likely to break the law themselves. . . . Finally, the perception and reality of a fundamentally unfair criminal justice system contribute to broader racial divisions in society.⁴⁹

Even judges, finding racial profiling at play, have suppressed evidence, reduced sentences or refused to convict in criminal cases.⁵⁰

CONCLUSION

Racial profiling "operate[s] like a deadly cancer on our justice system."⁵¹ It eats away at the very liberties which have made America the greatest country in the world: "the freedom to go about our business without unwarranted police interference and the right to be treated equally before the law, without regard to race or ethnicity."⁵² Law enforcement agencies expend limited resources unsuccessfully targeting black and Latino citizens in their failed efforts carrying out the War on Drugs. In so doing, racial profilers trample upon the civil, constitutional and human rights of people of color, most often without apology and increasingly with tragic consequences. Those who are targeted, part of the largest growing segments of the American population, in turn regard police officers and the justice system, generally, with suspicion and skepticism. Some go so far as to resist helping a police investigation; some will even nullify verdicts. To most Americans, the Civil Rights Movement, led by Martin Luther King, Jr., signified a sea of change in the fight for racial equality. Dr. King's philosophy exalted nonviolence and brotherhood over hate and brute force and called for the equal treatment of all Americans. Dr. King's plea was simple: that all individuals be judged by the content of their character rather than the color of their skin.⁵³ Racial profiling is incontrovertible evidence that we are not yet there.

49. *Martinez*, 92 F. Supp.2d at 782 (quoting David Cole, *Race, Policing, and the Future of Criminal Law*, 26 HUM. RTS. 3 (Summer 1999)).

50. *See, e.g.*, *U.S. v. Laymon*, 730 F.Supp. 332 (D.Colo. 1990); *United States v. Leviner*, 31 F.Supp.2d 23, 33 (D. Mass. 1998); *State v. Soto* # 88-07-492 Superior Court of New Jersey (L.Div. March 4, 1996, Judge Francis) (on file with author); *United States v. Williams*, No. CR-93-214-A, slip op. (W.D. Okla. January 11, 1994) (on file with author).

51. *Martinez*, 92 F. Supp.2d at 783.

52. *Driving While Black*, AMERICAN CIVIL LIBERTIES UNION SPECIAL REPORT, *supra* note 6, at 7.

53. *See* STEPHEN B. OATES, LET THE TRUMPET SOUND: THE LIFE OF MARTIN LUTHER KING, JR. 254 (1982) ("I Have A Dream" speech).