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## A MORE PERFECT NATION: ENDING RACIAL PROFILING

Russell L. Jones\*

*[O]ur country must abandon all the habits of racism, because we cannot carry the message of freedom and the baggage of bigotry at the same time.<sup>1</sup>*

### I. INTRODUCTION

The above quote from the second inaugural address of President George W. Bush is a reminder to Americans that all is not well on the “home front.” Semblances of the denial of liberty and freedom that President Bush’s address deplores in other countries still exist in America. Images from the natural disaster in Louisiana caused by Hurricane Katrina emphasize the disdain that America has shown for her poor, who are mostly black and brown.<sup>2</sup>

A recent Texas study indicates that in certain areas in the United States, blacks and Latinos are searched at higher rates than Anglos following a traffic stop.<sup>3</sup> The traffic stop, the basis for most investigations resulting in racial profiling, although legal, is usually a

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<sup>1</sup> President George W. Bush, Address at the 55th Inaugural Ceremony (Jan. 20, 2005), available at <http://www.whitehouse.gov/inaugural/index.html>.

<sup>2</sup> Yahoo!News Photo, *In the USA, Whites Find and Blacks Loot* (Jan. 23, 2006), <http://www.mindfully.org/Reform/2005/Whites-Find-Blacks-Loot30aug05.htm>. Two photos released on the same day, one of a white couple carrying food, and the other of a black man doing the same, were heavily circulated throughout the media and internet for their controversial captions. The first picture stated that the “[t]wo residents wade through chest-deep water after finding bread and soda from a local grocery store . . . ” *Id.* Yet the second picture, although synonymous to the first, stated that the young black man “walks through chest deep flood water after looting a grocery . . . ” *Id.* This serves as just one of many instances where the media alone negatively depicts people of color and continues to promote racial profiling. *Id.*

<sup>3</sup> “Blacks and Latinos in Texas were significantly more likely than Anglos to be searched following a traffic stop by Texas law enforcement agencies in 2002: approximately 6 of every 7 law enforcement agencies reported racial disparities between non-Anglo and Anglo search rates.” DWIGHT STEWARD, STEWARD RES. GROUP, TEX. CRIM. JUSTICE REFORM COAL., RACIAL PROFILING: TEXAS TRAFFIC STOPS AND SEARCHES—A FIRST LOOK AT THE NATION’S MOST COMPREHENSIVE RACIAL PROFILING DATASET 10 (Feb. 2004), [http://www.criminaljusticecoalition.org/files/userfiles/racial\\_profiling/2004\\_rp\\_report.pdf](http://www.criminaljusticecoalition.org/files/userfiles/racial_profiling/2004_rp_report.pdf) [hereinafter STEWARD, RACIAL PROFILING] (emphasis omitted); see also DAVID A. HARRIS, AM. CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS 2 (June 1999), available at <http://www.aclu.org/racialjustice/racialprofiling/15912pub19990607.html> [hereinafter HARRIS, DRIVING WHILE BLACK].

pretext used by police officers to search for drugs in situations where there is no other legitimate basis to conduct the search. Additionally, cases indicate that border patrol officers stop people of Mexican descent more often than other ethnic groups.<sup>4</sup> In fact a “Mexican appearance” is the most salient factor considered when deciding who to stop to investigate illegal border crossings.<sup>5</sup>

In cases involving racial profiling, government officials use the race or ethnicity of an individual to suggest criminal activity.<sup>6</sup> The practice singles out an individual not because of his criminal activity, but because of his race or ethnicity.<sup>7</sup> Racial profiling is founded on the premise that racial or ethnic minorities inherently commit certain crimes.<sup>8</sup> For several reasons, the use of race as the determining factor to identify criminal qualities is an ineffective tool in law enforcement investigations. It “perpetuate[s] negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair[s] our efforts to maintain a fair and just society.”<sup>9</sup> It not only undermines our constitutional rights, it undermines the trust on which law enforcement depends to effectively protect communities.<sup>10</sup>

Racial profiling by police officers has done more to divide Americans and perpetuate bigotry than any other form of racism. It diminishes any progress that has been made by America to achieve racial equality and fair treatment of all its citizens. Racial profiling perpetuates a caste system in the American criminal justice system and is a form of racism that America must abandon if she intends to set an

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<sup>4</sup> See generally *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Border officers on roving patrol stopped defendant’s car, saying later their only reason for doing so was the occupants’ apparent Mexican descent. *Id.* at 874-75.

<sup>5</sup> *Id.*

<sup>6</sup> Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 654 (2002). “[R]acial profiling’ occurs when a law enforcement officer questions, stops, arrest, searches, or otherwise investigates a person because the officer believes that members of that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating.” *Id.*

<sup>7</sup> Gene Callahan & William Anderson, *The Roots of Racial Profiling*, REASON MAG., Aug.-Sept. 2001, at 2 (explaining that when defining racial profiling that “the reason for the stop is a statistical profile of the detainee’s race or ethnicity”).

<sup>8</sup> See Gross & Barnes, *supra* note 6.

<sup>9</sup> U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), available at [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.htm](http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm) [hereinafter U.S. DEP’T OF JUSTICE, GUIDANCE ON RACE].

<sup>10</sup> *End Racial Profiling Act of 2004: Hearing on H.R. 3847 Before the Sub. Comm. on Crime, Terrorism, and Homeland Security*, 108th Cong. 249 (2004) (statement of Rep. John Conyers, Jr. of Michigan).

example of freedom for other nations. However, public and political attention to this phenomenon has waned. The discussion of racial profiling is only heard in the context of terrorism and passing conversations when some act of police brutality occurs. Efforts to eradicate racial profiling and the racist presumptions that give birth to it have become dormant. It is important to restart the conversations and studies of racial profiling to reach solutions to the problem.

A. *Failed Efforts To Address Racial Profiling*

Both former President William J. Clinton and current President George W. Bush have condemned the practice of racial profiling and recognized it as an anathema to effective law enforcement. Former President Clinton characterized it as “deeply corrosive” and “morally indefensible.”<sup>11</sup> President George W. Bush has said that it is “wrong and we will end it.”<sup>12</sup>

After President Bush’s statement in 2001 describing racial profiling as “wrong,” he signed a White House memorandum requesting that the Attorney General “review the use by Federal law enforcement authorities of race as a factor in conducting stops, searches, and other investigative procedures.”<sup>13</sup> In response, Attorney General John Ashcroft instructed the Civil Rights Division of the Department of Justice to develop guidance to address the problem of racial profiling. These efforts resulted in a policy guidance for federal law enforcement officers.<sup>14</sup>

However, the federal guidance enacted by the Attorney General’s office is a vain attempt to address the real problem of racial profiling.

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<sup>11</sup> Steven A. Holmes, *Clinton Orders Investigation on Possible Racial Profiling*, N.Y. TIMES, June 10, 1999, at A22 (quoting a statement made by President William J. Clinton in a conference with civil rights leaders and police leaders in his address at the Justice Department Conference) (internal quotations omitted). President Clinton stated, “While public confidence in the police has been growing steadily overall, people of color continue to have less confidence and less trust, and believe they are targeted for action . . .” *Law Enforcement Practice of Racial Profiling Under Fire* (June 9, 1999), <http://cnstudentnews.cnn.com/US/9906/09/race.police.02/>. He called racial profiling a morally indefensible, deeply corrosive practice and emphasized that “[r]acial profiling is in fact the opposite of good-police work where actions are based on hard facts, not stereotypes . . . . It is wrong, it is destructive, and it must stop.” Holmes, *supra*, at A22.

<sup>12</sup> President George W. Bush, Address to the Joint Session of Congress 4 (Feb. 17, 2001), reprinted in 147 Cong. Rec. H433 (2001), available at [www.whitehouse.gov/news/releases/2001/02/20010228.html](http://www.whitehouse.gov/news/releases/2001/02/20010228.html).

<sup>13</sup> President George W. Bush, Memorandum for the Attorney General (Feb. 27, 2001), available at [www.whitehouse.gov/news/releases/2001/02/20010228-1.html](http://www.whitehouse.gov/news/releases/2001/02/20010228-1.html).

<sup>14</sup> See U.S. DEP’T OF JUSTICE, GUIDANCE ON RACE, *supra* note 9.

First, it does not carry the force of law. Specifically, the policy guidance provides standards for federal law enforcement agencies in conducting investigations which may involve race or ethnicity,<sup>15</sup> but it does not impose any sanctions on an officer who may engage in the prohibited conduct, nor does it provide a remedy for a citizen who may be the target of racial profiling.<sup>16</sup> Also, the federal guidance policy is a federal standard and does not restrict states or local law enforcement agencies where the vast majority of criminal investigations are conducted.<sup>17</sup>

Further, the definition contained in the federal guidance loosely defines racial profiling.<sup>18</sup> It states that “‘Racial profiling’ . . . concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures.”<sup>19</sup> The policy guidance does not suggest criteria that will help determine when an officer has engaged in racial profiling of a suspect. It does not indicate what a complainant must show to prove a case of racial profiling.<sup>20</sup> Thus, the definition proposed by the policy guidance does not detail how racial profiling is determined; it only says that the practice is wrong.

Most importantly, the policy guidance does not address what has become the most pressing issues concerning profiling by ethnicity since 9/11.<sup>21</sup> It permits federal law enforcement officials to use ethnicity when investigating or preventing threats to national security.<sup>22</sup> The only limits placed on the use of ethnicity in these instances are that officials must meet the standards permitted by the Constitution and laws of the United States.<sup>23</sup> With the enactment of the Patriot Act, what is permitted by law

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See ROBERT M. BLOOM & MARK S. BRODIN, CRIMINAL PROCEDURE: EXAMPLES & EXPLANATIONS 2 (4th ed. 2004).

<sup>18</sup> U.S. DEP’T OF JUSTICE, GUIDANCE ON RACE, *supra* note 9.

<sup>19</sup> *Id.* at 1.

<sup>20</sup> Proving racial profiling has been an almost insurmountable obstacle for victims. There is no Fourth Amendment remedy for the practice, and under the Fourteenth Amendment Due Process Clause, the victim must show disparate treatment and an intent to discriminate. This burden has been arduous. See *Washington v. Davis*, 426 U.S. 229, 241-43 (1976) (requiring claimants to prove discriminatory intent in order to establish that a policy, discriminatory in its application, violates the Equal Protection Clause); see also Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1072-74 (1997).

<sup>21</sup> U.S. DEP’T OF JUSTICE, GUIDANCE ON RACE, *supra* note 9, at 5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

is amorphous at best.<sup>24</sup> This is most clearly seen by the unilateral act of spying on Americans that President Bush recently condoned as legal in times when national security is threatened by terrorists—a decision that has seemingly increased the gap of mistrust many Americans have for the Executive Branch.<sup>25</sup>

In addition to President Bush's and Attorney General Ashcroft's efforts, two bills were introduced in Congress aimed at prohibiting racial profiling.<sup>26</sup> Although the attempts at federal legislation are starts, they are somewhat inconsistent in their efforts and are incomplete. The federal bills, introduced in Congress over a year ago, lay dormant without action by either the House or Senate. The bills were sent to committee where they remain at the time of this research.<sup>27</sup> Such inaction indicates that legislators do not consider racial profiling to be an important topic or a drastic enough problem for them to tackle.

If the evils of racial profiling are to be eliminated as a thorn in the American criminal justice system's side, the lackadaisical attitude taken by all three branches of the government must change. The Court must firmly state that racial profiling is an affront on the freedoms guaranteed by the Equal Protection Clause of the Fourteenth Amendment and the guarantees against unreasonable searches and seizures contained in the Fourth Amendment.<sup>28</sup> Additionally, the legislative branch must enact laws that will affect state policies on the topic and send a consistent

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<sup>24</sup> See U.S. Dep't of Justice, *The USA Patriot Act: Preserving Life and Liberty*, [www.lifeandliberty.gov/highlights.htm](http://www.lifeandliberty.gov/highlights.htm) (last visited Sept. 1, 2006).

<sup>25</sup> Bush: 'No Doubt' NSA Surveillance Is Legal (Jan. 26, 2006), <http://www.prisonplanet.com/articles/january2006/290106surveillance.htm> (President George W. Bush defended his program of warrantless surveillance saying, "There's no doubt in my mind it is legal.' . . . [The program] 'is designed to protect civil liberties,' and . . . 'it's necessary.'"); see also Dan Eggen, *Bush Authorized Domestic Spying*, (Dec. 16, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/16/AR2005121600021.html> ("It's clear that the administration has been very willing to sacrifice civil liberties in its effort to exercise its authority on terrorism, to the extent that it authorizes criminal activity . . .") (quoting Caroline Fredrickson, Director of Washington Legislative Office, American Civil Liberties Union).

<sup>26</sup> S. 2132, 108th Cong. (2004); S. 2112, 108th Cong. (2004).

<sup>27</sup> See *supra* note 26 and accompanying text.

<sup>28</sup> The Fourteenth Amendment provides in pertinent part "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

resounding message condemning racial profiling. However, to accomplish this feat, several questions must be honestly assessed. First, can race ever be a factor in criminal investigations? If race can be a factor, what role should it play in defining who to stop and investigate? Moreover, if race can be a factor, what can be done to ensure that it is not the “determining factor” in criminal investigations?

This research reopens the discussion on racial profiling and suggests remedies that may help eradicate a problem that cuts at the core of discrimination in America. Part II of this Article discusses the backlashes of racial profiling and why it is the anathema that will cause America to lose credibility in her efforts to democratize other societies. Further, Part II discusses the importance of taking affirmative action to eliminate racial profiling from certain police investigations. Part III addresses criminal investigations and profiling, and how race and ethnicity have become accepted factors for reasonable suspicion in certain crimes, while Part IV suggests a judicial remedy that may help eliminate the most insidious forms of racial profiling from police investigations.

## II. THE ILLS OF RACIAL PROFILING

Cases and studies indicate that racial profiling is most likely to occur in drug crime investigations, whether they are conducted by state and local police officers or federal Drug Enforcement Agents, or crimes that are related to enforcing laws against illegal immigration.<sup>29</sup> David Harris has stated that the “war on drugs” is significantly to blame for the abuse of police officers powers when making stops.<sup>30</sup> “Racial profiling is based on the premise that most drug offenses are committed by minorities.”<sup>31</sup> Thus, police officers looking for drugs will stop drivers based on the color of their skin.<sup>32</sup> A further analysis of racial profiling

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<sup>29</sup> See DEBORAH RAMIREZ, JACK McDEVITT & AMY FARRELL, U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 4 (Nov. 2000), available at <http://www.ncjrs.gov/pdffiles1/bja/184768.pdf> [hereinafter RACIAL PROFILING DATA COLLECTION SYSTEMS]; see also NEW JERSEY STATE ATTORNEY GENERAL’S OFFICE, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (Apr. 20, 1999), available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf).

<sup>30</sup> HARRIS, DRIVING WHILE BLACK, *supra* note 3, at 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

suggests that brown skin and Mexican ancestry will alert officers investigating illegal immigration.<sup>33</sup>

A. *Specific Problems of Racial Profiling*

As Randall Kennedy explains it, the practice of racial profiling requires blacks and Mexican-Americans to pay a type of racial tax for the war against drugs and illegal immigration that whites and other groups escape.<sup>34</sup> The racial tax penalizes innocent victims of color for the misconduct of others who also happen to be black or Mexican-American.<sup>35</sup> Police officers who use the practice of racial profiling to investigate drug trafficking or illegal immigration stop and search blacks and Hispanics at a far greater rate than their share of the population, and also at a far greater rate than their rate of offending.<sup>36</sup> The frequency of these selective stops compared to the number of stops of other racial or ethnic groups for these type of crimes suggests that the race of individuals investigated is a predominant consideration in determining who to stop. Thus, blacks and Hispanics are burdened or taxed unreasonably in the effort to curtail drug trading, other drug crimes, and illegal immigration.<sup>37</sup>

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<sup>33</sup> See Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 239-40 (2002). Alschuler references the opinions of *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), stating that the prevalence of illegal immigration across the Mexican border "had a brown face." *Id.*

<sup>34</sup> RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 161 (1997). One solution that Kennedy suggests to ending the racial tax is placing a tax across the board on all citizens for these ills. *Id.* He states

Instead of placing a racial tax on blacks, Mexican-Americans, and other colored people, governments should, if necessary, increase taxes across the board. More specifically, rather than authorizing police to count apparent Mexican ancestry or apparent blackness as negative proxies, states and the federal government should be forced either to hire more officers or to inconvenience everyone at checkpoints by subjecting all motorists and passengers to questioning (or to the same chance at random questioning). The reform I support, in other words, does not entail lessened policing. It only insists that the costs of policing be allocated on a nonracial basis.

*Id.*

<sup>35</sup> *Id.* at 160.

<sup>36</sup> See Jennifer A. Larrabee, "DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & POL'Y 291, 296-97 (1997); see also Wesley M. Oliver, *With an Evil Eye and Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1423-25 (2000).

<sup>37</sup> *Supra* note 34.

Additionally, racial profiling places a social stigma on the targeted groups, who are black and brown citizens.<sup>38</sup> When police officers indiscriminately stop people of color to investigate them for certain crimes, a subliminal message is sent to the entire society suggesting that people of color are more inclined to engage in unacceptable activity.

Consider Jerry Kang's statement that "[i]f it bleeds, it leads."<sup>39</sup> Sensationalistic crime stories are disproportionately shown with racial minorities repeatedly featured as violent criminals.<sup>40</sup> Consumption of these images intensifies our implicit biases against racial minorities, a form of cognition Kang refers to as "[r]acial schema[ ]."<sup>41</sup> Consequently, black and brown citizens are labeled by the unaffected portion of society as criminals and they are generally feared.<sup>42</sup> White citizens and even some well-to-do members of the targeted groups will avoid the harassed citizens and their communities at all costs. Civil rights leader Reverend Jesse Jackson acknowledged the existence of subconscious stereotyping against minorities when he publicly recalled his own statement that "'There is nothing more painful for me at this stage in my life than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody white and feel relieved. How humiliating.'"<sup>43</sup> This attitude of "avoid that community" stifles the positive traffic flow of business from the general society into communities where persons of the targeted groups may live or frequent. These areas suffer economically and eventually become strongholds of poverty and crime.

Furthermore, racial profiling can be a source of tension and distrust between the police and minorities.<sup>44</sup> If the criminal justice system is to meet its goal of crime detection and prevention, it must have the trust of the communities it serves.<sup>45</sup> When law enforcement practices used to

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<sup>38</sup> David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 455 (2003) [hereinafter Harris, *Using Race*]. "Racial profiling stigmatizes and penalizes, whether intentionally or not, on the basis of membership in a group." *Id.*

<sup>39</sup> Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1495 (2005) (internal quotations omitted).

<sup>40</sup> *Id.* at 1495.

<sup>41</sup> *Id.* at 1498. Kang defines a schema as a cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes. *Id.*

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

<sup>43</sup> Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 ALB. L. REV. 329, 333 (2003).

<sup>44</sup> See Harris, *Using Race*, *supra* note 38, at 3.

<sup>45</sup> *Id.*

stop and investigate minorities are perceived as biased and unfair, minority citizens will have less confidence in the criminal justice system, and thus, will report crimes infrequently, will not be witnesses at trials, or will not serve as jurors.<sup>46</sup>

Last, racial profiling creates a sense of disconnect from the general society for the targeted groups. A police policy that continuously targets a race or ethnic group for criminal activity indicates to members of the group that they are pariah.<sup>47</sup> They begin to feel that the protections that are given to other races or ethnic groups will not be extended to them.<sup>48</sup> Such a decline in trust leads to a lack of cooperation between police and the targeted groups, which ultimately results in the reduction of criminal deterrence.<sup>49</sup> The targeted groups begin to sense that they have been separated from the larger community.<sup>50</sup>

#### B. *Using Race To Determine Who To Stop*

Studies done in New Jersey, Maryland, Texas, and New York have shown that African-Americans and Latinos are stopped for traffic violations at a much higher rate than Anglo-Americans.<sup>51</sup> A recent Texas study indicates that not only are African-Americans and Latinos stopped at higher rates, but that blacks and Latinos are searched at a greater rate as well.<sup>52</sup> These statistics are antithetical to studies which indicate that African-American and Latinos do not engage in crime at a rate greater than their percentage of the population.<sup>53</sup> This data on stops and

<sup>46</sup> *Id.*

<sup>47</sup> Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 28 (2003). “[W]hen officers employ racial profiling to stop young African American males walking down the street, the officers insult and degrade the young men and their racial groups, making them feel less than full members of the American polity.” *Id.*

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

<sup>49</sup> R. Richard Banks, *Racial Profiling: Race, Policing and the Drug War*, 56 STAN. L. REV. 571, 573 (2003); see also RACIAL PROFILING DATA COLLECTION SYSTEMS, *supra* note 29.

<sup>50</sup> This sensation of contemporary segregation and its detrimental effects are synonymous to those of the petitioners in *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1952). In *Brown*, the Supreme Court held that segregation “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

<sup>51</sup> See Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1 (2005); see also STEWARD, RACIAL PROFILING, *supra* note 3; Gross & Barnes, *supra* note 6, at 660; Larrabee, *supra* note 36; Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 746 (2004).

<sup>52</sup> See STEWARD, RACIAL PROFILING, *supra* note 3.

<sup>53</sup> See Bernard E. Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century*, 70 U. CHI. L. REV. 105, 123 (2003). The growing data on racial profiling demonstrates that “the hit rate for drugs and weapons in police searches

investigations of blacks and Latinos suggests that police officers are not color blind and that race or ethnicity is a factor used in determining who to stop and search.

The above being said, society expects law enforcement officers to take proactive steps to ensure that citizens are safe from crimes against person and property. The ideal state of law enforcement would be “one in which most crimes are deterred, and those which are not are intercepted before an innocent person has been harmed by a criminal.”<sup>54</sup> In an ordinary criminal investigation, absent a crime being committed in the presence of the officer or an identification of a known suspect, an officer’s belief that something is criminally awry is generally based on a profile.<sup>55</sup> To this end, police officers will use variables such as “sex, manner of dress, age group, criminal history, marital status, level of education, location, and time of day” to assess criminal activity.<sup>56</sup> In these instances, police departments collect data about criminal activity to help them predict who is most likely to engage in certain crimes and where future criminal activity may occur.<sup>57</sup> Profiling in this context “can be defined as a broad method of targeting police resources based on where they are most likely to encounter crime.”<sup>58</sup> The collected data is designed to increase the effectiveness and efficiency of police work by directing department resources into areas where the goals of crime prevention and detection can be better achieved.<sup>59</sup>

For example, a certain neighborhood has experienced a series of daytime burglaries on Sunday mornings or a particular area of town is known to be frequented by suspected drug dealers. The police department may increase officers’ presence in these areas at certain hours to combat the prevailing trend of crime. This method of profiling, known as geographical “crime-mapping,” speculates about the future based on past facts and it places officers in areas where it is perceived

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of African Americans is the same as or lower than the rate for whites.” *Id.* (emphasis omitted); see also William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004).

<sup>54</sup> Brandon del Pozo, *Guided by Race: An Ethical and Policy Analysis of Racial Profiling in Law Enforcement Decisionmaking*, 1 QUEENSLAND U. TECH. L. & JUST. J. 266, 272 (2001).

<sup>55</sup> Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 986-87 (1999).

<sup>56</sup> del Pozo, *supra* note 54, at 276.

<sup>57</sup> *Id.* at 272.

<sup>58</sup> *Id.* at 275.

<sup>59</sup> *Id.* at 272.

that certain crimes will occur.<sup>60</sup> The purpose is to deter crime before it happens or detect the crime before damage is done in the community.

Considering the above methods of profiling, can race be a factor in the equation used to determine who to stop and investigate or does the use of race violate constitutional protections? Should race be considered in developing police policy to determine who will be targeted for certain criminal violations? If race is a permissible factor, what amount of weight should it be given? Will it become the predominant factor? Will the use of race distort criminal investigations? These questions will guide the discussion in the remainder of this research.

### III. CRIMINAL INVESTIGATION, POLICE POLICY, AND RACIAL PROFILING

A primary goal of American criminal law is to define what behavior is morally unacceptable and to punish those who engage in such behavior.<sup>61</sup> Criminal statutes are enacted to help accomplish these purposes.<sup>62</sup> Law enforcement agencies, in their efforts to protect citizens from crimes and arrest those who commit crimes, develop policies designed to detect, prevent, and reduce criminal activity.<sup>63</sup> Effective and constitutional police policies will not infringe on the fundamental rights and freedoms of the people, but they must be developed and applied in a manner that will accomplish their stated goals.<sup>64</sup> For example, a policy that allowed for searches of citizens' homes on a policeman's hunch that criminal activity is afoot would result in a loss of confidence in the criminal justice system that would outweigh any benefit of crime prevention, detection, or reduction.<sup>65</sup>

Brandon del Pozo suggests three facets of a test to determine whether police policies are effective. "The first task would be to ensure that the policy is a moral end, and if it is not, that it does not interfere with what are ostensibly moral ends."<sup>66</sup> This indicates that police departments should carefully consider and prioritize the moral ends that their policies are constructed to achieve. For example, crimes against persons would be given more attention than crimes against property.<sup>67</sup>

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<sup>60</sup> *Id.* at 276.

<sup>61</sup> PAUL H. ROBINSON, *CRIMINAL LAW* 50 (1997); *see also* WAYNE R. LAFAVE, *CRIMINAL LAW* 9-11 (4th ed. 2003).

<sup>62</sup> LAFAVE, *supra* note 61, at 11.

<sup>63</sup> del Pozo, *supra* note 54, at 272.

<sup>64</sup> *Id.* at 274.

<sup>65</sup> *Id.* at 272.

<sup>66</sup> *Id.* at 273.

<sup>67</sup> *Id.*

The second facet of the test is that “[t]he policy must try to meet its stated goal without violating the moral rights and freedoms of citizens in its practice.”<sup>68</sup> This requirement involves determining when it is acceptable to curtail moral rights or freedoms to achieve a policy end. The third requirement is that “[t]he policy must not in and of itself take on an added negative moral significance by neglecting certain other moral duties.”<sup>69</sup> For example, a community might be experiencing a high number of shoplifting thefts. However, a police policy directing all of the department’s resources to this problem and neglecting more serious crimes of robbery and murder is both negligent and illogical.

Considering del Pozo’s factors in light of racial profiling, a police policy that singles out an individual for criminal investigation solely because he is of a particular race or ethnic group would be immoral within itself, and it cannot be the means to any legitimate moral end.<sup>70</sup> Such a policy blatantly offends the moral rights and freedoms of equal protection of the law, and the negative effect of alienating the targeted group thwarts the primary purpose of pre-arrest criminal investigation.<sup>71</sup> However, a police policy that completely prohibits the use of race as a factor in certain limited criminal investigations may ignore sound law enforcement techniques that can help reduce crime.<sup>72</sup> As a result, in limited situations, race has been accepted as a legitimate factor that officers may use when conducting certain criminal investigations.<sup>73</sup>

A. *Is Race a Factor that Police Officers Use When Deciding Who To Stop?*

It is an accepted axiom that race alone cannot initiate a police officer’s decision to stop and investigate an individual. However, when

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<sup>68</sup> *Id.* at 274.

<sup>69</sup> *Id.*

<sup>70</sup> U.S. CONST. amend. XIV § 1, provides for equal protection of the law for all citizens.

<sup>71</sup> YALE KAMISAR, WAYNE R. LAFAYE & JEROLD H. ISRAEL, BASIC CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS 4 (11th ed. 2005). The commentators explain that in pre-arrest investigations notes that there are three basic groups of pre-arrest investigative procedures: “(1) police procedures that are aimed at solving specific past crimes known to the police . . . ; (2) police procedures that are aimed at unknown but anticipated ongoing and future criminal activity . . . ; and (3) prosecutorial and other non-police investigations conducted primarily through the use of subpoena authority.” *Id.*

<sup>72</sup> Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 361 (2000). Trende states that “it seems that racial profiling is, to a certain extent, a rational reaction to the current realities of society, and that eliminating it would exact a toll upon society by removing a somewhat-effective crime-fighting technique.” *Id.*

<sup>73</sup> See *United States v. Fouche*, 776 F.2d 1398, 1402-03 (9th Cir. 1985). Race may be considered as one of the factors contributing to a founded suspicion of criminal conduct, although race alone cannot justify an investigatory stop. *Id.*

looking for criminal traits, police officers look for traits which they believe correlate with criminal behavior.<sup>74</sup> More often than not, the officer associates criminal or deviant behavior with conduct—a mannerism, language, or an appearance—that differs from his.<sup>75</sup> The race or ethnicity of the suspect is the first factor that a police officer notices. It becomes a relevant factor in suggesting criminal behavior when the officer considers what is different about the suspect.<sup>76</sup> However, officers suggest that factors other than race or ethnicity actually alert their attention to an alleged suspect.<sup>77</sup>

In *United States v. Taylor*,<sup>78</sup> the arresting officers suggested that they noticed the suspect because of the suspect's "obviously agitated conduct and appearance."<sup>79</sup> In *United States v. Avery*, officers noticed a young African-American walking hurriedly, and subsequently stated that they suspected the defendant because of his demeanor. In both cases, the suspect was an African-American.<sup>80</sup>

These cases suggest that after racially identifying an individual, an officer begins to look for other characteristics that may give him reasonable suspicion to stop the person for an investigation.<sup>81</sup> If asked, the officer justifies his initial stop of the suspect by referring to other acceptable factors, such as agitated conduct, hurried demeanor, or unusual appearance, and leaving race out of the equation.<sup>82</sup>

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<sup>74</sup> Thompson, *supra* note 55, at 986.

<sup>75</sup> *Id.* at 987. Thompson suggests that police officers bring to their trade preconceived ideas about people and what are criminal traits. *Id.* These perceptions are often reduced to culturally embedded stories about groups. *Id.* One misnomer that officers apply is that people of color are more likely to engage in criminal conduct than whites. *Id.* As a result, discriminatory treatment is often a product of unconscious racism. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992). The court found that the initial encounter and search of the suspect was consensual. *Id.* The arresting officers stated that the suspect was poorly attired, but carried a new bag; he ran rapidly along the corridor, furtively scanning the course of his travel, and proceeded directly to the curb without claiming any baggage. *Id.* Even though the suspect was the only African-American on the plane, the officers deny that he was singled out because of his race. *Id.* In *United States v. Avery*, officers noticed a young African-American walking hurriedly, and suggested that reasonable suspicion was based on the suspect's demeanor and not his race. 128 F.3d 974, 976-77 (6th Cir. 1997).

<sup>78</sup> 956 F.2d 572 (6th Cir. 1992).

<sup>79</sup> *Id.* at 574.

<sup>80</sup> *Avery*, 128 F.3d at 976-77.

<sup>81</sup> *Id.*

<sup>82</sup> See *id.*; *Taylor*, 956 F.2d 572. But see *United States v. Harvey*, 16 F.3d 109, 113-14 (6th Cir. 1994). In *Harvey*, an officer in court stated that "if the occupants had not been African-Americans, he would not have stopped the car." *Id.*

If the race of the individual had never caught the officer's attention, the purported suspect may very well have gone unnoticed.<sup>83</sup> Randall Kennedy suggests that whenever race is a factor in determining who to stop and investigate, police officers cannot divest their perceptions about the crime and the race of the individual, and thus race becomes the primary factor in making the stop.<sup>84</sup> Hence, in the police officer's initial observation of criminal conduct, the suspect's race may be more than just a factor; it may become the decisive factor in determining whether to make the stop and investigate the individual.<sup>85</sup>

This can be seen in a case where an individual may be "out of place," that is, in an area where the officer does not expect to encounter people of the suspect's race,<sup>86</sup> or the individual may be in an area where people of the suspect's race are believed by the officer to engage in certain criminal activity.<sup>87</sup> Assume that three young Mexican-American males are riding in an older model Oldsmobile in a mostly white upscale community or that a "preppie" young white male is in an all black neighborhood where several drug arrests have been made. These seemingly innocuous observations will peak the officer's interest in the individual and incite him to investigate.<sup>88</sup> Supposedly, the race of the suspect is not the primary consideration. However, the individual's race is the pivotal factor that alerts the officer. Subconsciously, the officer equates the race of the individual together with his peculiar location to mean that criminal wrongdoing is afoot.<sup>89</sup> Based on inaccurate

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<sup>83</sup> See *United States v. Vasquez*, 612 F.2d 1338, 1352-53 (2d Cir. 1979) (Oakes, J., dissenting). In his dissenting opinion, Judge Oakes stated, "One has the uncomfortable impression here that, but for the Hispanic appearance of Flores and Vasquez, they might not have been stopped." *Id.*

<sup>84</sup> See KENNEDY, *supra* note 34, at 148-49; see also Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAG., June 20, 1999, available at <http://www.mapinc.org/drugnews/v99.n656.a02.html> (noting that "in crime fighting, race matters"). "When asked, most cops will declare themselves color blind. But watch them on the job for several months, and get them talking about the way policing is really done, and the truth will emerge, the truth being that cops, white and black, profile." *Id.*

<sup>85</sup> KENNEDY, *supra* note 34, at 148-49.

<sup>86</sup> See *State v. Barber*, 823 P.2d 1068, 1075 (Wash. 1992) ("racial incongruity, *i.e.*, a person of any race being allegedly 'out of place' in a particular geographic area" could not be considered in the reasonable suspicion inquiry).

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

<sup>88</sup> See, *e.g.*, *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992).

<sup>89</sup> See Thompson, *supra* note 55, at 987.

Given the nature of law enforcement, stereotyping would appear integral to the police officer's world. Not only are police officers trained to enforce the laws and norms of our society, they are encouraged to investigate behavior that appears to them to be out of

perceptions of individuals of the suspect's race group, the officer pursues a racially motivated hunch in an attempt to develop reasonable suspicion or probable cause to seize the individual.<sup>90</sup>

In the above hypothetical case, race became a predominant factor in the criminal investigation. It distorted the officer's view of possible suspects, and he equated criminality to a race of people, rather than to an identified, accepted criminal profile. The race of the suspect was misused by the officer to suggest that people of the suspect's racial group are inclined to commit crimes. In other words, the use of race or ethnicity in most cases

permits a state actor to inject racist attitudes into the carrying out of what should be color-blind law enforcement. . . . The use of an immutable characteristic as the basis of suspicion for criminal activity is patently unconstitutional, and the notion that DEA agents and like state personnel can consider race in carrying out its duties is nothing short of outrageous and cannot be permitted.<sup>91</sup>

*B. If Race Can Be a Factor, How Should It Be Used?*

Because race is oftentimes misused by police officers, it is important to develop a solution that will ensure that when the use of a suspect's race or ethnicity is permissible, an officer will not use an individual's race or ethnicity to suggest criminal activity. It is unconscionable to suggest that innocent persons of a racial or ethnic group must suffer constitutional infringements because of unfounded perceptions that an officer may have about the group. However, a proper solution for racial profiling cannot totally remove race as a permissible factor in all criminal investigations. Outlawing the use of race in every instance would not necessarily change police behavior on the street.<sup>92</sup>

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the ordinary. . . . The resulting mindset makes it more likely that officers will associate difference with deviance.

*Id.*

<sup>90</sup> *Id.* In the case concerning the preppie white youth, it is the neighborhood and its occupants that are suspect. *Id.* The officer stereotypes the neighborhood based on the race of its occupants and surmises that the white youth is associated with the neighborhood only because of the criminal nature of the residents. *Id.*

<sup>91</sup> *United States v. Taylor*, 956 F.2d 572, 582 (6th Cir. 1992).

<sup>92</sup> *See generally* Thompson, *supra* note 55.

Further, a wholesale removal of race from all criminal investigations may prevent police departments from effectively meeting appropriate objectives and carrying out proper departmental policies.<sup>93</sup> Thus, any solution to eradicate racial profiling must ensure that there is a proper balance between the constitutional safeguard of equal protection and police policies that use race appropriately. If race is permitted to be a factor, there should be clear guidelines concerning its use. Accordingly, it is necessary to first define those situations where race may be used in ordinary criminal investigations.

C. *Permissible Uses of Race in Criminal Investigations*

Race has been accepted as a factor in ordinary criminal investigations in at least three obvious situations: when a description of the suspect includes his race, when there is information about a certain crime spree that involves persons of a particular race or ethnic group, and when an investigation of criminal activity focuses on a one-race community.<sup>94</sup> The United States Supreme Court has also validated the use of race or ethnicity in cases involving illegal drug trafficking and the entrance of illegal aliens.<sup>95</sup>

1. Race as a Part of the Suspect's Description

One legitimate use of race in ordinary pre-arrest criminal investigations involves an officer's response to a complaint that provides information about the suspect's physical characteristics, including his race. In *United States v. Travis*,<sup>96</sup> the Sixth Circuit concluded that "race or ethnic background may become a legitimate consideration when investigators have information on this subject about a particular suspect. If, for example, officers know that a bank robber was white, the officers may limit their investigation to whites."<sup>97</sup> The officer's investigation in this instance consists of no more than stopping a group of people who match the given description to see if any person in that group can be identified as the person in question. However, the use of race as a factor in this situation should be narrowly tailored to meet the government's interest in apprehending criminals.<sup>98</sup> This suggests that officers should

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<sup>93</sup> See KENNEDY, *supra* note 34 (suggesting that race should be barred totally in determining suspicion in criminal investigations). Kennedy believes the use of race should be illegal.

<sup>94</sup> These situations are explained more fully in *infra* Parts III.C.1-III.C.3.

<sup>95</sup> See *infra* Parts III.C.4-III.C.6 for details.

<sup>96</sup> 62 F.3d 170 (6th Cir. 1995).

<sup>97</sup> *Id.* at 174.

<sup>98</sup> See Alschuler, *supra* note 33, at 184-85.

conduct their search for a person that matches the physical description in the general vicinity of the crime or in areas where evidence obtained from the crime may lead them.<sup>99</sup> A search that is too broad—that is, a search that questions every person of the racial group, even those who are removed from the crime scene—abridges the Equal Protection Clause.<sup>100</sup>

An example of a questionable use of race to identify a suspect is seen in *Brown v. City of Oneonta*.<sup>101</sup> In *Oneonta*, a 77-year-old woman was attacked near Oneonta, New York.<sup>102</sup> The victim reported to the New York State Police that her assailant was a young black male and that he had cut his hand with his knife during the attack.<sup>103</sup> A police canine unit tracked the assailant's scent from the scene of the crime toward the nearby campus of the State University of New York College at Oneonta ("SUCO").<sup>104</sup> Only two percent of SUCO's students were black. Based on this information, the police contacted SUCO and obtained a list of all black male students enrolled at the school.<sup>105</sup> When this effort produced no suspects, the police conducted a sweep of Oneonta. They questioned nonwhite persons on the streets and inspected their hands for cuts.<sup>106</sup>

In a civil suit brought by several people who were questioned, the court found that police action did not deprive the plaintiffs of their right to equal protection under the law.<sup>107</sup> It stated that the plaintiffs had not been questioned solely on the basis of their race.<sup>108</sup> They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime, and the police department's policy was race neutral.<sup>109</sup> The court found that the plaintiffs failed to sufficiently allege that the police policies had a discriminatory intent.<sup>110</sup>

But in *Oneonta*, the search conducted by the New York State Police was not narrowly tailored to meet the government's crime-fighting goal.<sup>111</sup> Remember, a police policy must try to meet its stated goal

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<sup>99</sup> *Id.* at 199.

<sup>100</sup> *Id.*

<sup>101</sup> 221 F.3d 329 (2d Cir. 1999).

<sup>102</sup> *Id.* at 334.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

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

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 336-37.

<sup>108</sup> *Id.* at 337.

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

<sup>110</sup> *See id.* at 337-38.

<sup>111</sup> *See Alschuler, supra* note 33, at 184.

without violating the moral rights and freedoms of citizens in its practice.<sup>112</sup> The broad sweep of the city which was based on a description that consisted of race, approximate age, and gender alone singled black males out of the population for investigation. A police policy that permits officers to question all persons of a particular race on a broad spectrum with such a minute description fosters a practice that offends the privacy freedoms of the targeted race.

The *Oneonta* court's suggestion that the impact of the investigation was reasonable, in light of the government's interest because the number of black males in the city was negligible, is incredible.<sup>113</sup> Let us assume that the suspect was a white male and the city's racial composition was overwhelmingly black. It is unthinkable that the police would conduct an investigation that would result in questioning practically every white male in the city for a crime that involved nominal injury to person or property. This method of investigating the crime would be less likely to produce a suspect than it would to raise the ire of the public, especially those in the targeted group.<sup>114</sup>

The theory of incompetently targeting one race of people was poignantly displayed in the case of serial killer Derrick Todd Lee in Baton Rouge, Louisiana.<sup>115</sup> For months a criminal profile pointed to a white man. However, once the profile was broadened, Lee, a black man, was arrested within the same week. The one fact that ultimately dumbfounded people was that the final suspect was black, and serial killers "aren't supposed to be black."<sup>116</sup> Inserting race clouds our judgment about who conducts certain crimes and lulls us into a false sense of security.<sup>117</sup>

The identity of a suspect may be the most important variable that will assist officers in apprehending a criminal offender. However, this

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<sup>112</sup> See *Oneonta*, 392 F.3d at 338-39.

<sup>113</sup> *Id.* at 334, 338. The city of Oneonta has a population of just over 17,500 residents with an African-American student population of approximately 2%. *Id.* at 338.

<sup>114</sup> *State v. Lee*, 879 So. 2d 173, 173 (La. Ct. App. 2004)

<sup>115</sup> *Id.*

<sup>116</sup> Issac Bailey, *Race Can Hinder an Investigation*, THE SUN NEWS (Myrtle Beach, S.C.), June 9, 2003.

<sup>117</sup> *Id.* Bailey states that racial profiling is

like a proverbial woman who walks down the sidewalk late at night and spots an approaching black male and promptly darts across the street for safety. She'd better be sure her fear is based on something other than race because she could be leaving the side of the street with Martin Luther King, Jr. and running into the arms of Tedd Bundy.

*Id.*

goal is better served by structuring the search in a manner that is more likely to target the officer's resources on potential suspects rather than an entire community. The government's goal in *Oneonta* would have been served by questioning black men who may have been seen in the area at the time of the crime, questioning black male students at SUCO on the evening of the crime, as the police dogs led the officers to the campus, or questioning black males in the city who may have recently committed a similar crime.<sup>118</sup> An investigation based on the identification of a suspect by race conducted in this manner would have been more productive and less volatile.

The methods that the government uses to apprehend a criminal should also consider the gravity of the offense committed. This variable is important when weighing the government's interest—criminal apprehension—against the infringement on the targeted citizen's privacy interests. The impact or severity of the crime will help determine the significance of the governmental interest and how the methods used to accomplish this interest should be tailored.<sup>119</sup> In *Oneonta*, there was no death, violent injury, threat to a community of people, or significant loss of property. Instead, the crime of interest in *Oneonta* was a burglary which ended in a brief struggle with the homeowner. There was no report of a series of such crimes. Thus, the sweep of the entire city was unreasonable considering the gravity of the offense committed. The governmental interest in apprehending a burglar did not outweigh the enormous burden placed on the African-American men who were subjected to the government's intrusion.<sup>120</sup> A properly structured police

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<sup>118</sup> See U.S. DEP'T OF JUSTICE, GUIDANCE ON RACE, *supra* note 9. In explaining methods that should be used by law enforcement officers conducting specific criminal investigations the guidance policy states:

[The] [r]eliance upon generalized stereotypes is absolutely forbidden. Rather, use of race or ethnicity is permitted only when the officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an *identified* criminal activity. The rationale underlying this concept carefully limits its reach. In order to qualify as a legitimate investigative lead, the following must be true: [(1)] The information must be relevant to the locality or time frame of the criminal activity; [(2)] The information must be trustworthy; [and (3)] *The information concerning identifying characteristics must be tied to a particular criminal incident, a particular criminal scheme, or a particular criminal organization.*

*Id.* (emphasis added).

<sup>119</sup> See *Tennessee v. Garner*, 471 U.S. 1, 2 (1985).

<sup>120</sup> See *id.* "Apprehension . . . is a seizure subject to the Fourth Amendment's reasonable requirement. To determine whether such a seizure is reasonable, the extent of the intrusion on the suspect's rights under that Amendment must be balanced against the governmental interests in effective law enforcement." *Id.*

policy cannot take on an added negative moral significance.<sup>121</sup> Focusing a large amount of resources on this crime may force the police department to remove officers from areas where there is a greater need.

## 2. Race as a Factor When There Is Information About a Crime Spree

Race is also an important factor in criminal investigations when police officers have credible information that persons from a certain racial group have been involved in a particular crime spree.<sup>122</sup> For instance, assume police are aware that members of a street gang are bringing large quantities of drugs into their city from a certain source city. If the members of the street gang are of a particular race, police officers will stop young men of the identified race who demonstrate characteristics of the gang and other criminal behavior related to the suspected crime.<sup>123</sup> Such a stop is based on a police policy designed to prevent drug traffic in the city and may include surveying or watching young men who have characteristics that are unique to an identified suspected group. That is, the police may look for young men who wear a certain color bandana, who are of a certain race, and who are arriving from a known source city.<sup>124</sup> The above factors are considered in the totality of the circumstances. Additionally, other factors that suggest criminal behavior should be considered before stopping a person of the targeted group.<sup>125</sup>

The suspect's race in this situation is a primary factor in deciding who to stop. Is this racial profiling? The practice does not suggest that a group of people is more inclined to commit certain crimes because of the race of its members. The stops are focused and based on variables that are meant to prevent drug trafficking. Race is not the sole factor used to make the stops. Rather, the characteristics of members of the gang, the arrival point into the city, and the suspects' reactions and mannerisms are all considered before engaging the person. Further, the credible

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<sup>121</sup> *Id.* The Tennessee statute authorized use of deadly force against unarmed, non-dangerous fleeing suspect. The Court said, "There is no indication that holding a police practice such as that authorized by the statute unreasonable will severely hamper effective law enforcement." *Id.*; see also del Pozo, *supra* note 54, at 273.

<sup>122</sup> Sharon Davies, *Reflections on the Criminal Justice System After September 11, 2001*, 1 OHIO ST. J. CRIM. L. 45, 72-73 (2003); see also Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1433-34 (2002).

<sup>123</sup> Characteristics of the gang may include dress, identifiable tattoos, etc. Characteristics of the crime may be part of a criminal profile.

<sup>124</sup> See *United States v. Travis*, 62 F.3d 170, 172-73 (6th Cir. 1995); see also *United States v. Avery*, 137 F.3d 343, 350 (6th Cir. 1997). A suspect's race, in combination with additional circumstances and evidence, could constitute reasonable suspicion. *Id.*

<sup>125</sup> See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

information received by the department together with the current drug problem necessitates an investigation that is narrowly tailored to meet the governmental end.<sup>126</sup>

### 3. Race as a Factor When Investigating Crime in a One-race Community

Assume that a police department decides to place more officers in a predominantly black neighborhood because the residents of the community have complained about an increase in drug activity. Officers assigned to patrol the neighborhood aggressively pursue young black males who they believe are involved in drug activity. All of the stops for drug investigations in the neighborhood are of young black males. Police officers making the stops suggest that the stops are based on the officers' experiences when dealing with drugs in a black neighborhood.<sup>127</sup> The officers indicate that they consider factors such as age, appearance, vehicle driven, actions of the suspects, time of day, and where the persons of interest are located.<sup>128</sup> But the citizens in the neighborhood suggest that the officers are engaging in profiling young black men. Are the stops based on the race of the suspects or a police policy to reduce drug activity?

"As long as a department's goals are moral and properly ordered, and barring . . . negligence, policies may be enacted, repealed or changed to meet the sensibilities and expectations of the citizens they serve."<sup>129</sup> However, citizen dismay or disapproval of a police policy should not result in the changing of a policy to one that will not meet governmental goals and that will neglect other moral ends.<sup>130</sup> A moral end of the

<sup>126</sup> See Alschuler, *supra* note 33, at 184.

<sup>127</sup> See DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK, 24-26 (2002) (explaining *Terry v. Ohio*, 392 U.S. 1 (1968), by stating that the case permitted officers to take preemptive steps to investigate crime where they had reasonable suspicion founded upon the officers observations and reasonable inferences a well-trained and experienced officer could make from those inferences).

<sup>128</sup> See *Brown v. Texas*, 443 U.S. 47, 52 (1979).

In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. . . . When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

*Id.*; see also *City of St. Paul v. Uber*, 450 N.W.2d 623 (Minn. Ct. App. 1990) (holding that officers could not stop an individual solely on the basis that he was a stranger in an area known for crime; the stop must be based on grounds sufficient to establish reasonable suspicion).

<sup>129</sup> See del Pozo, *supra* note 54, at 273.

<sup>130</sup> *Id.*

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policy in the above hypothetical situation is to reduce drug crimes in a neighborhood where such crimes have caused concern. To achieve this end, the police department increased its presence in the affected neighborhood. As long as the police policy of increasing their presence in the black neighborhood and aggressively pursuing suspects who match the characteristics and demeanor of those who may engage in drug crimes is aligned with the goal of crime reduction, the policy does not offend constitutional rights or privileges.

However, the tactics that police officers use to address the drug problem must be properly designed to meet the stated goal of crime reduction.<sup>131</sup> The tactics used may be based on police officers' experiences in dealing with drugs in the targeted neighborhood and reasonable suspicion gained during their surveillance of possible drug suspects.<sup>132</sup> They cannot be unreasonable or overly aggressive in their pursuits.<sup>133</sup>

Race in the above instance is a factor because of a compelling governmental goal in reducing crime by reducing drug traffic in a targeted neighborhood. When conducting their investigations, officers will use their experience to determine the tactics to be used when responding to crimes.<sup>134</sup> Their experiences in a particular neighborhood will also help officers draw their own conclusions about the use of race and other variables as factors of potential criminality.<sup>135</sup> The individuals stopped in the hypothetical situation were not stopped solely because of their race, but rather because of a combination of characteristics which led the officers to believe that they were involved in drug trafficking. Though race was a factor in the stops, it was not used in a manner that suggests officers were targeting a particular racial group because of a belief that they are more inclined to engage in criminal activity; it is only a factor because of the report of increased drug activity in a one-race neighborhood. As a result, unless it can be shown that the manner of carrying out the policy contained a discriminatory intent, the use of race

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<sup>131</sup> See *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.*

<sup>132</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>133</sup> See *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>134</sup> See *Terry*, 392 U.S. 1.

<sup>135</sup> See *Goldberg*, *supra* note 84. An interview with an officer reveals that he uses his intuition and experiences gained from his tenure as a highway patrol when determining who may be a criminal suspect. *Id.*

is not racial profiling.<sup>136</sup> Thus, there is no violation of the Equal Protection Clause.

The use of race as a factor in cases where an identity is given of the suspect which involves his race, where there is a crime spree which involves individuals of a certain race or ethnicity, or where crimes are investigated in one-race neighborhoods seems to meet an appropriate police policy that does not offend constitutional protections. Race in these instances is not used to single-out or insidiously label particular groups of individuals as criminals because of their race. In each of the situations a complaint is made or facts are known that give details about the race of the suspect. When race is used in this perspective in conjunction with other variables, it can assist police departments with detecting and preventing criminal activities. In particular, race permits the investigating officers to narrow their search to individuals who are more likely involved in the suspected criminal activity.<sup>137</sup> This focused search can hasten the investigation and possibly prevent other criminal acts by the suspect. Here, the inclusion of race as one factor used to conduct the criminal investigation is the most sensible and logical means to pursue the complained of criminal. The profile information used in these examples is the same that would be used by officers in other criminal investigations regardless of the race of the suspect.<sup>138</sup>

As suggested by Randall Kennedy, "The law should authorize police to engage in racially discriminatory investigative conduct only on atypical, indeed extraordinary, occasions in which the social need is absolutely compelling: weighty, immediate, and incapable of being addressed sensibly by any other means."<sup>139</sup> Race should be used in ordinary criminal investigations only when it is imperative to meet a non-discriminatory goal of the crime prevention or detection. In the above situations, the race of the individuals was used only to help police meet a proper policy goal and it was not as a proxy for criminal activity.

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<sup>136</sup> See *United States v. Armstrong*, 517 U.S. 456, 461 (1996).

<sup>137</sup> See U.S. DEP'T OF JUSTICE, GUIDANCE ON RACE, *supra* note 9 (explaining police investigation of a suspected individual).

<sup>138</sup> See RICHARD G. SCHOTT, FBI LAW ENFORCEMENT BULLETIN, THE ROLE OF RACE IN LAW ENFORCEMENT: RACIAL PROFILING OR LEGITIMATE USE? (Nov. 2001), *available at* <http://www.fbi.gov/publications/leb/2001/november2001/nov01p24.htm>.

<sup>139</sup> See KENNEDY, *supra* note 34, at 161.

4. Profiling in Drug Enforcement Agency Drug Investigations Has Been Permitted

Besides permitting the use of race in instances where it is important to ordinary criminal investigations, courts have recognized that the race or ethnicity of a suspect may provide valuable information in drug interdiction cases when combined with other known or observed characteristics of individuals who may commit such crimes.<sup>140</sup> Police officers are entitled to assess the totality of the circumstances surrounding the subject of their attention in light of their experience and training.<sup>141</sup> In doing so, the officer will look for variables that will suggest to him that criminal activity is afoot.<sup>142</sup> These variables may include the dress of the suspect, where he is located, how he responds to the officer's initial inquiries, excessive nervousness, or attempts to avoid the officer.<sup>143</sup> The list goes on and on.

Generally, when investigating drug crimes at international checkpoints, police officers use drug profiles to identify possible suspects.<sup>144</sup> In *United States v. Berry*,<sup>145</sup> the court listed several basic characteristics that make up a drug courier profile.

The seven primary characteristics [listed by the court in *Berry*] are:

- (1) arrival from or departure to an identified source city;
- (2) carrying little or no luggage, or large quantities of empty suitcases;
- (3) unusual itinerary, such as rapid turnaround time for a very lengthy airplane trip;

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<sup>140</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

<sup>141</sup> See SCHOTT, *supra* note 138.

<sup>142</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>143</sup> See Brian Wilson, *The War on Drugs: Evening the Odds Through Use of the Airport Drug Courier Profile*, 6 B.U. PUB. INT. L.J. 203, 207 (1996).

<sup>144</sup> See *Florida v. Royer*, 460 U.S. 491, 491 (1983). Royer was observed at Miami International Airport by two plain-clothes detectives of the Dade County, Florida, Public Safety Department. *Id.* The detectives believed that Royer's appearance, mannerisms, luggage, and actions fit the so-called "drug courier profile." *Id.* The officers placed Royer in a small room, took his identification and ticket, and retrieved his luggage from the baggage area. *Id.* The Court found that Royer had essentially been arrested by the officers and that his appearance and conduct in general were not adequate grounds for probable cause. *Id.* But, the Court surmised that the facts in the case were enough for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention. *Id.*

<sup>145</sup> 670 F.2d 583, 599 (5th Cir. 1982).

- (4) use of an alias;
- (5) carrying unusually large amounts of currency in the many thousand of dollars, usually on their person, in briefcases or bags;
- (6) purchasing airline tickets with a large amount of small denomination currency; and
- (7) unusual nervousness beyond that ordinarily exhibited by passengers.

The secondary characteristics are[:]

- (1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport;
- (2) immediately making a telephone call after deplaning;
- (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and
- (4) excessively frequent travel to source or distribution cities.<sup>146</sup>

The court noted that using a profile is nothing more than an administrative tool of the police and that the presence or absence of a particular characteristic on a profile is of no legal significance in the determination of reasonable suspicion.<sup>147</sup> It is the totality of the circumstances that will dictate whether the officer can stop the suspect and investigate further.

In *United States v. Sokolow*,<sup>148</sup> the Supreme Court approved the Drug Enforcement Agency's use of profiles in drug courier cases. The Court stated, "A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."<sup>149</sup> It is the profile together with the articulable factors that prompts a stop of the suspect and not the profile alone.

Although race or ethnicity is not listed as a part of the drug courier profile, it has become a part of the totality of the circumstances used by officers to help them identify who to stop for questioning about possible

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 600.

<sup>148</sup> 490 U.S. 1 (1989).

<sup>149</sup> *Id.* at 11.

drug activity.<sup>150</sup> Considering a suspect's race in drug investigations is permitted if the officer can articulate factors that, when cumulated, would give him reasonable suspicion to believe that the suspect is engaged in the prohibited activity.<sup>151</sup> However, race or ethnicity alone will not establish reasonable suspicion for a stop.<sup>152</sup> In sum, courts have not found that the use of race as a variable in drug interdiction cases offends recognized constitutional protections as long as the officer's encounter with an individual is not based solely on the suspect's race.<sup>153</sup>

#### 5. Using Race in Border Patrol Cases

Similarly, the use of race or ethnicity in a profile is seen in border patrol cases. In *Nicacio v. INS*,<sup>154</sup> a Chief Patrol Agent for the Immigration and Nationalization Service testified that, in making roving-patrol stops, his subordinates considered, in addition to Latino ethnicity, a "dirty, unkempt appearance," a "lean and hungry look," and "wearing work clothes."<sup>155</sup> Profiles were used by the officers in a similar manner as those used in drug interdiction cases. The factors stated in the profile seemingly apply as much to innocent travelers as they do to an individual smuggling people illegally into the United States; but in fact, the factors suggest ethnic profiling. Nonetheless, the Court in *United States v. Martinez-Fuerte* found that the factors sufficed as alternatives for the stop and neither race nor ethnicity was considered alone.<sup>156</sup>

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<sup>150</sup> Sheri Lyn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214, 234 (1983). Most officers would state that race is not a factor in determining who to stop. *Id.*

<sup>151</sup> See *United States v. Avery*, 821 F.2d 1377 (9th Cir. 1987).

<sup>152</sup> *Id.*

<sup>153</sup> See *United States v. Travis*, 62 F.3d 170, 173-74 (6th Cir. 1995). Travis complained that she was targeted by the officers because of her race. *Id.* The court held that officers may stop an individual for several reasons, one of which may be race. *Id.* There is no Fourteenth Amendment violation as long as some of these reasons are legitimate and can equal to reasonable suspicion. *Id.* In *United States v. Weaver*, the court concluded that

Hicks [the investigating officer] had knowledge, based upon his own experience and upon the intelligence reports he had received from the Los Angeles authorities, that young male members of black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors Hicks relied upon, was a factor in the decision to approach and ultimately detain Weaver.

966 F.2d 391, 394 (8th Cir. 1992). The court found that the suspect's race along with the other factors were enough to give Officer Hicks reasonable suspicion to stop Weaver. *Id.*

<sup>154</sup> 768 F.2d 1133 (9th Cir. 1985).

<sup>155</sup> *Id.* at 1137.

<sup>156</sup> 428 U.S. 543, 563 (1976).

Specifically, the Court emphasized that ethnicity is an important consideration in border patrol cases. Writing for the majority, Justice Powell asserted that “even if it be assumed that such referrals [for stops] are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.”<sup>157</sup> That the Border Patrol relies on apparent Mexican ancestry at the checkpoint is clearly relevant to the needs of law enforcement.<sup>158</sup> Although Latino ethnicity could not itself create the reasonable suspicion required for a roving-patrol stop, the likelihood that any given person of Mexican ancestry is an alien is high enough in an area near the Mexican-United States border to make Mexican appearance a relevant factor.<sup>159</sup>

#### 6. The Problems Race and Ethnicity Present in Drug Interdiction and Border Patrol Cases

In drug interdiction and border patrol cases, the use of race or ethnicity to help officers identify who to investigate presents special concerns. On its face, in drug trafficking or interdiction cases, the data that makes up the drug profile is race neutral.<sup>160</sup> Purchasing airline tickets with large amounts of cash, a rapid turnaround time for a very lengthy airplane trip, or carrying large amounts of currency in briefcases or bags are activities that are not unique to any race or ethnic group.<sup>161</sup> However, statistics indicate that most individuals stopped for drugs at airports or other points of entry are racial or ethnic minorities.<sup>162</sup> This

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<sup>157</sup> *Id.*

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

<sup>159</sup> See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).

Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. . . . The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

*Id.*

<sup>160</sup> See *supra* text accompanying note 144 (characteristics that make up a drug profile).

<sup>161</sup> See *supra* text accompanying note 144 (characteristics that make up a drug profile).

<sup>162</sup> See *United States v. Taylor*, 956 F.2d 572, 581 (6th Cir. 1992) (Keith, J., dissenting). In his dissent, Judge Damon J. Keith writes,

The disproportionate number of African-Americans who are stopped indicates that a racial imbalance against African-Americans does exist and is implicitly sanctioned by the law enforcement agency. The assumption that seventy-five percent of those persons transporting drugs and other contraband through public modes of transportation are African-American is impermissible.

*Id.*

phenomenon suggests that race or ethnicity is an extremely important factor in determining who to stop and investigate. In border patrol cases, the Court has not sought to mask the permissive use of ethnicity as a factor to suggest reasonable suspicion.<sup>163</sup> It has only tongue-in-cheek suggested that the ethnicity of the suspect cannot be the only factor that initiates the stop.<sup>164</sup>

It appears that courts have permitted the use of race in drug interdiction cases on the hypothesis that experienced officers can distinguish a drug courier, and the essential need to curtail drug trafficking should yield to that experience. Hence, if the race of the suspect is a variable that the officer uses in making his assessment, then we must suffer it to be. The same rationale applies to preventing the entry of illegal immigrants into the United States. The Court has justified the use of ethnicity in border patrol cases by finding that the class of violators is composed of persons who are likely to appear to be of Mexican descent, and thus, ethnicity is a relevant factor.<sup>165</sup> The result is that the Court is willing to give officers wide discretion in protecting the borders from illegal immigration.

By giving officers such broad latitude of discretion in drug interdiction and border patrol cases, courts have given officers *de jure* authority to offend the principles of equal protection and those principles contained in the Fourth Amendment prohibition against unreasonable searches and seizures.<sup>166</sup> Racial and ethnic minorities are

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<sup>163</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Brignoni-Ponce*, 422 U.S. 873.

<sup>164</sup> *Martinez-Fuerte*, 428 U.S. 543; *Brignoni-Ponce*, 422 U.S. 873.

<sup>165</sup> *Martinez-Fuerte*, 428 U.S. 543; *Brignoni-Ponce*, 422 U.S. 873.

<sup>166</sup> See *supra* note 28 (providing the text of the Fourth Amendment); see also Ann Mulligan, *City of Indianapolis v. Edmond: The Constitutionality of Drug Interdiction Checkpoints*, 93 J. CRIM. L. & CRIMINOLOGY 227, 227-28 (2002) (discussing the Court's efforts to protect individual liberties in roadblock cases). Mulligan states

Had the Court followed the principles it set forth in earlier roadblock cases, it would have been forced to uphold the drug interdiction checkpoints as constitutional. Instead, the majority of the Court created an arbitrary distinction that has no basis in prior case law or in the wording of the Fourth Amendment. As a result, current roadblock case law has become confusing and illogical—the Court solved nothing and despite its attempt to preserve individual liberties under the Fourth Amendment, the Court failed. States can easily circumvent the Court's decision and establish roadblocks identical to the roadblocks struck down in *Edmond* simply by taking care to articulate a primary purpose that the Court has deemed acceptable. As a result, the Court's promise to protect Fourth Amendment rights is hollow and illusory. Increased litigation and uncertainty about the types of roadblocks that are constitutional will likely result.

asked to pay a high cost in the effort to eliminate these crimes.<sup>167</sup> They are singled-out not because of criminal activity, but because of their race or ethnicity. However, some suggest that race is only a small part of the equation used to support reasonable suspicion for the stops.<sup>168</sup> Other factors exist that may very well have been enough for the officer to conduct the investigation and stop the individual.<sup>169</sup>

It is obvious that race has permeated criminal investigations. Some uses of race as described above appear to be legitimate; however, others are insidious. It is these insidious uses of race that have caused the ills perpetuated by racial profiling discussed earlier in this Article. In order to repair a society that is often fractured by race, it is important that real solutions to racial profiling are discovered.

#### IV. COURT EFFORTS THAT MAY ASSIST WITH THE PROBLEM

##### A. *Batson v. Kentucky*

Assume that an African-American family is traveling on Interstate 10 from Lake Charles, Louisiana, to Houston, Texas, at approximately 3:00 a.m. This stretch of highway is known to law enforcement officers to be a popular corridor for drug traffickers. A Texas Highway Patrol officer notices the car with several people inside. The officer is unable to distinguish the gender of the passengers or their ages, but he does identify them as black. The officer follows the car for about two minutes and stops it. He tells the driver that he was pulled over for traveling 68 miles per hour in a 65 mile per hour speed zone. He then asks the driver where he is going at that time of the morning and why he chose to travel so late. The driver explains that he is taking his family to Astro World and to a baseball game in Houston. The officer asks the driver if he can search his vehicle, but the driver denies the request. The officer issues the driver a traffic citation for speeding, which is later dismissed by a local prosecutor.

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*Id.*

<sup>167</sup> See KENNEDY, *supra* note 34.

<sup>168</sup> Several informal interviews were conducted with Baton Rouge and New Orleans City police persons and Louisiana State police persons who stated that race was not the only factor used to help them determine whether a person is involved in criminal activity. The person's demeanor, such as if he ran when he saw police and his reaction to the police encounter are more important than the person's race. The interviewees suggested that race was never the sole factor. It is a combination of several factors that will lead them to investigate a particular person.

<sup>169</sup> These other factors are based on the reasonable suspicion standard developed in *Terry v. Ohio*, which is discussed in the text accompanying *supra* notes 127, 132, 134.

It is highly unlikely that the officer stopped the vehicle because it was speeding. This pretext was used to initiate contact so that the officer could investigate his unilluminated hunch of drug activity. In this instance, he has used the race of the individuals in the car to suggest criminal involvement. No other plausible explanation exists for the stop, and thus, it violates the Fourteenth Amendment's Equal Protection Clause.<sup>170</sup> The case of *Batson v. Kentucky*<sup>171</sup> and the recent interpretation of *Batson* in *Miller-El v. Dretke*,<sup>172</sup> may provide insight on how to address this and other impermissible uses of race or ethnicity in criminal investigations.

In *Batson*, the Supreme Court found that an individual could not be excluded from a jury solely on the basis of his race. The Court stated that the defendant is guaranteed that individuals of his race will not be excluded from the jury venire "on the false assumption that members of his race as a group are not qualified to serve as jurors."<sup>173</sup> By denying a person the right to participate in the jury process because of his race, the state has unconstitutionally discriminated against the excluded juror.<sup>174</sup> Hence, the race of a potential juror cannot be used to suggest that he is not qualified for jury service.

In *Batson*, the Court allowed statistical proof to show discriminatory intent on the part of Kentucky prosecutors in their use of peremptory strikes to remove African-American jurors from cases where the defendants were African-Americans.<sup>175</sup> The Court held:

To establish such a case, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor

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<sup>170</sup> U.S. CONST. amend. XIV.

<sup>171</sup> 476 U.S. 79 (1986).

<sup>172</sup> 125 S. Ct. 2317 (2005).

<sup>173</sup> *Batson*, 476 U.S. at 86.

<sup>174</sup> *Id.* at 87.

<sup>175</sup> *Id.* at 95.

used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.<sup>176</sup>

“Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.”<sup>177</sup> The court then determines whether the defendant has proven purposeful discrimination.<sup>178</sup> The prosecutor must articulate a neutral explanation related to the particular case to be tried, and his explanation cannot be based on his intuition about potential jurors of a particular race.<sup>179</sup> That is, belief that the potential black juror is more inclined to be biased in a case where the defendant is black is prohibited.

Applying the *Batson* analysis to an allegation of racial profiling would require the defendant to show that the officer has purposefully discriminated against others of his race when investigating criminal activity. To do this, the defendant would not need to show an extended pattern of discrimination by the officer.<sup>180</sup> The defendant could make out a case of purposeful discrimination by a totality of the relevant facts surrounding the stop.<sup>181</sup> Once the defendant has shown discriminatory intent, the burden would shift to the state to articulate a racially neutral reason for the police officer’s stop and investigation of the individual.<sup>182</sup>

*Batson* required that the State give a plausible explanation for the actions taken by the prosecutor.<sup>183</sup> Federal courts interpreted this plausible explanation to mean any reason that the prosecutor asserted for excluding a juror other than race or ethnicity.<sup>184</sup> The prosecutor’s explanation needed only to be facially neutral.

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<sup>176</sup> *Id.* at 96 (internal citations omitted).

<sup>177</sup> *Id.* at 97.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 80.

<sup>180</sup> *Id.* at 95.

<sup>181</sup> *Id.*

<sup>182</sup> This statistical requirement cannot be the same as that mentioned in most cases analyzing the Equal Protection Clause and racial profiling. The Supreme Court’s recent decision in *Miller-El v. Dretke* gives us guidance on the type of statistical information that may prove purposeful discrimination. 125 S. Ct. 2317 (2005).

<sup>183</sup> See *Batson*, 476 U.S. at 80.

<sup>184</sup> See *id.* at 97-98; *People v. Hernandez*, 75 N.Y.2d 350, 355 (N.Y. 1990); *People v. Peart*, 197 N.Y.S.2d 599, 600 (N.Y. App. Div. 1993); *People v. Duncan*, 177 N.Y.S.2d 187, 193 (N.Y. App. Div. 1992).

However, in *Miller-El v. Dretke*,<sup>185</sup> the Court explained that the explanation given by the prosecutor for excluding racial minorities from the jury had to be more than just facially neutral.<sup>186</sup> Specifically, the Court concluded that some reasons given by the prosecutor may be false even though they appear to be facially neutral.<sup>187</sup> As a result, the trial court judge may be required to look beyond the reason given to determine whether there is an intent to discriminate on the basis of race.<sup>188</sup> Even if the trial judge or appeals court can imagine a reason for excluding black jurors that might not have been false or can think of some rational basis for excluding blacks, if the reason given does not hold up when the totality of the facts are considered, it must not be accepted.<sup>189</sup> “A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.”<sup>190</sup>

Applying this to a pre-arrest criminal investigation, the officer’s explanation for making a stop must indicate an appropriate basis other than race. This explanation must be more than just race neutral, it must include factors that when considered in totality suggest to a well-trained officer that the suspect was involved in criminal activity.<sup>191</sup> The trial court should weigh the factors articulated by the officer and the defendant’s allegation of a discriminatory racial intent. If the reasons given by the officer are weak and suggest a pretext, the trial judge should find that racial profiling has occurred.<sup>192</sup> The trial judge must be willing to discredit an officer’s reason when strong evidence suggests that his only motivation for making a stop was the race of the suspect.<sup>193</sup> This will prevent an officer from camouflaging his true intent by providing some illogical, yet race neutral, explanation for his actions.

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<sup>185</sup> *Miller-El*, 125 S. Ct. 2317.

<sup>186</sup> *Id.* at 2325.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 2325-31 (finding that the numbers alone suggested a racial motivation for striking blacks from the jury). Out of twenty black members of the 108-person venire panel, only one served. *Id.* at 2325. Although nine were excused for cause or by agreement, ten were peremptorily struck by the prosecution. *Id.* The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members. *Id.* The Court also looked at the side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. *Id.* at 2325-26. It found that the proffered reason for striking some black panelists applied just as well to white panelists. *Id.*

<sup>189</sup> *Id.* at 2332.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See Thompson, *supra* note 55, at 1001.

<sup>193</sup> *Id.*

In the foregoing hypothetical situation, the officer's explanation for stopping the vehicle—that the car was speeding—is facially neutral. However, it is very uncommon for an officer to stop a vehicle and give its driver a traffic citation for exceeding the speed limit by only three miles per hour.<sup>194</sup> The most logical explanation for the stop is the race of the individuals in the car and the officer's intuition that people of the occupants' race, traveling that stretch of highway at that time of night, must be involved in drug trafficking.

The *Batson* reasoning may also be applied to the five situations identified earlier in this Article as accepted uses of race in criminal investigations.<sup>195</sup> In cases where race is a part of the suspect's description, the investigating police officers may not stop every individual of the suspect's race on the basis of race only. To stop every individual of the reported race of the suspect suggests that there is a pattern of intentionally investigating people of the identified racial group without evidence that the stopped individuals were involved in the crime.<sup>196</sup> Such a pattern of indiscriminate stops of racially identifiable persons shows a discriminatory intent on the part of the investigating police department.

When making stops to investigate crimes in this situation, the department must consider factors other than the suspect's race. These factors may include the time and location of the reported crime, the nature of the crime, evidence of *modus operandi* that may suggest certain known individuals, or other legitimate investigative leads.<sup>197</sup> A legitimate investigative lead must meet at least three requirements. First, the information must be relevant to the locality or time frame of the criminal activity.<sup>198</sup> Second, the information must be trustworthy.<sup>199</sup> Last, the information concerning identifying characteristics must be tied to a particular criminal incident, a particular criminal scheme, or a particular criminal organization.<sup>200</sup> The race of the reported suspect may be considered, but it cannot be used to suggest that persons of the suspect's race are guilty because they happen to be the right skin color.

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<sup>194</sup> I presented this scenario to three traffic officers. None indicated that he would have given the driver a ticket. As a matter of fact, they all indicated that unless there were more variables—such as the driver weaving, driving reckless, or bringing attention to himself—they would not have even stopped the vehicle.

<sup>195</sup> *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

<sup>196</sup> *Id.*

<sup>197</sup> See U.S. DEP'T OF JUSTICE, GUIDANCE ON RACE, *supra* note 9.

<sup>198</sup> See *id.*

<sup>199</sup> See *id.*

<sup>200</sup> See *id.*

The same analysis may apply when there is information about a crime spree or where officers investigate crimes in a one-race community. The officer cannot use race as an indicator that individuals of certain groups are inclined to be involved in criminal activity.<sup>201</sup> He must be able to articulate racially neutral explanations for his stop and investigation of individuals under these conditions.

In drug courier and border patrol cases, *Batson* and *Miller-El* may be especially relevant. If *Batson* and *Miller-El* are properly applied, the government will no longer be able to use race or ethnicity as the most salient factor in identifying possible suspects. The suspect's race or ethnicity could not be a factor that supports some other facially neutral, but illogical explanation for the stop. The government must show that the officer's stop of a person at an airport for drugs or the border for illegal immigration was motivated by factors which suggest that the person is involved in the suspected crime.<sup>202</sup> Then the trial judge must examine the government's explanation for its veracity and its tendency to show that the officer had reasonable suspicion to believe that the suspect was involved in criminal activity.<sup>203</sup>

B. *Bollinger v. Grutter*

Another approach that may help ensure race is used properly in criminal investigations can be found in *Bollinger v. Grutter*.<sup>204</sup> In *Grutter*, the Court held that race could be used in a flexible, nonmechanical way to determine admission to the University of Michigan School of Law.<sup>205</sup> The *Grutter* decision permitted the Law School to consider race as one factor among many, in an effort to assemble a diverse student body.<sup>206</sup> Race could be considered as a "plus factor" in an applicant's file; however, it could not be the sole determining factor.<sup>207</sup> The Court recognized racial diversity in higher education as a compelling governmental interest, which may meet the strict scrutiny standard of a

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<sup>201</sup> See SCHOTT, *supra* note 138.

<sup>202</sup> See *Miller El v. Dretke*, 125 S. Ct. 2317, 2317 (2005).

<sup>203</sup> *Id.*

<sup>204</sup> 123 S. Ct. 2325 (2003).

<sup>205</sup> *Id.* at 2342.

<sup>206</sup> *Id.* at 2345.

<sup>207</sup> *Id.* "The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race."  
*Id.*

reviewing court.<sup>208</sup> However, to do so the program must be narrowly tailored.<sup>209</sup>

In any context, an individual's race or ethnicity is a suspect classification under the Equal Protection Clause of the Fourteenth Amendment and racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny.<sup>210</sup> However, to attain the important governmental goals of crime prevention and detection, it may become necessary to consider the race or ethnicity of an individual in qualified instances.<sup>211</sup> But, a departmental policy that encourages police officers to use race as the determining factor in criminal investigations would offend the tenets of the Equal Protection Clause of the Fourteenth Amendment. "Textbook equal protection analysis therefore suggests that when the police employ a racial classification in investigating crime, the critical question is simply whether this classification is 'narrowly tailored' to advancing the government's crime-fighting goal."<sup>212</sup> As stated in *Bollinger v. Grutter*, when race is essential to meeting a compelling governmental interest, it may be one factor among many, a "plus factor," but not the determining factor.<sup>213</sup>

For example, in the case of a criminal investigation where an identification of the suspect includes his race, a police officer may consider the race of the individuals he stops. However, he cannot indiscriminately stop all persons of the suspect's race. Other factors must be considered and the use of race must be narrowly tailored to meet the governmental goal of crime prevention or detection. Race can be one factor among many, but not the factor that prompts the officer to initiate contact with a particular person. The officer must consider the location and time of the crime, possible escape routes for the suspect, the gravity of the offense, etc. Race is only important because the officer knows that he is looking for a person from an identified race. The race of the individual should not motivate officers to stop a supposed suspect for investigation.

When race initiates the stop, it is not used as a "plus" factor in the totality of the circumstances, but rather, it becomes the defining factor in

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<sup>208</sup> *Id.* at 2339-42.

<sup>209</sup> *Id.*

<sup>210</sup> See U.S. CONST. amend. XIV, § 2; see also *Grutter*, 123 S. Ct. at 2337.

<sup>211</sup> See SCHOTT, *supra* note 138.

<sup>212</sup> Alschuler, *supra* note 33, at 184.

<sup>213</sup> See *Miller El v. Dretke*, 125 S. Ct. 2317, 2345 (2005).

determining who to stop and investigate.<sup>214</sup> Race becomes the “super plus” factor that alone in the officer’s view warrants the stop. If race is appropriately used as a “plus” factor among many factors, serious consideration will be given to important evidence that suggests that the supposed suspect is somehow related to the crime and is not being singled-out solely on the basis of his race.

Even though I suggest the approach advanced by the *Bollinger v. Grutter* analysis as a tool to help eliminate inappropriate racial profiling, I do not believe that it is a cure-all. In border patrol cases and drug interdiction cases where race has become an essential variable in determining who to stop, it is important that governmental officers are not given *carte blanche* to use the race or ethnicity of an individual in such a manner that it becomes a “super plus” factor. In these cases, it is almost impossible to prevent officers from giving great deference to the supposed suspect’s race when investigating purported violations.<sup>215</sup> The officer’s experiences and attitudes when investigating illegal immigration and drug interdiction crimes indicate to him that he should stop individuals with particular physical traits.<sup>216</sup> It is impractical to believe that we can change the officer’s innate opinions or what he has learned from his experiences while investigating these crimes.<sup>217</sup> Because of his innate opinions and experiences, invariably, with or without conscious intent, the individual’s race becomes the most important factor that prompts the officer to make a stop.<sup>218</sup>

Accordingly, in cases concerning illegal immigration or drug interdiction, a combination of *Batson* and *Grutter* may present a better approach for eradicating racial profiling. This combined analysis would allow race to be a “plus” factor among other relevant factors to give an officer reasonable suspicion for a stop. However, because race is a factor and it is given enormous weight by officers in these investigations, the government must be able to articulate a racially neutral explanation that would have given reasonable suspicion for the stop.

Assume that an officer notices a tractor trailer at the border with two men that have a “Mexican appearance” in the cab. Because the men are

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<sup>214</sup> See *Grutter*, 123 S. Ct. at 2343. “When using race as a ‘plus’ factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.” *Id.*

<sup>215</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 543 (1976).

<sup>216</sup> See, e.g., *Goldberg*, *supra* note 84.

<sup>217</sup> See *Thompson*, *supra* note 55.

<sup>218</sup> See *id.*

crossing the border at a point where illegal entrance has been a problem and they are using a vehicle that can transport several people, the officer's attention is peaked. The officer watches the tractor trailer as it makes a turn from the main highway to a less traveled road. Unaware that he is being observed by the officer, the driver of the truck pulls to the side of the road. He and his passenger enter the trailer and appear to yell at someone or something in the trailer. They get back into the cab. When the driver notices the police officer, he becomes visibly nervous and slows the truck to a snail's pace. The officer pulls the truck over and inquires about the itinerary of the two. Their stories are conflicting and both are evasive. The officer asks what they are transporting; they answer livestock. When he does not notice any ventilation for livestock, or the smell that livestock generally emanates, the officer asks if he can look inside the trailer. His request is denied. At this point, the officer detains the two until he can get a telephone warrant from a local judge.

In the above situation, the first factor that became visible to the officer was the Mexican appearance of the two men. However, a combination of the other factors suggests that "Mexican appearance" was not the defining factor for the officer stopping the vehicle. The government in this hypothetical could articulate other factors justifying the stop that are racially neutral, even though the ethnicities of the driver and his passenger were factors.

#### V. CONCLUSION

Racial profiling is not a novel phenomenon. Because we have neglected its effect on race and society, however, it has become a crippling problem. Pre-arrest criminal investigations suggest that officers are more concerned about a suspect's race than whether he is involved in criminal activity. As a result, it is oftentimes the race of the suspect that dictates the officer's actions.

It is important that efforts are reinitiated to end racial profiling. These efforts must include more than mere discussions. They must prompt affirmative action from the courts and legislators. The suggestions included in this Article are meant to reignite a waning discussion.