

THE PSYCHOLOGY AND SOCIOLOGY OF WRONGFUL CONVICTIONS

Forensic Science Reform

Edited by
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Racial Profiling and Miscarriages of Justice

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Racial profiling is the law enforcement practice of identifying individuals as criminals, or criminal suspects, based on perceptions regarding their race. This includes the use of factors such as race, skin color, nationality, ethnicity, and manner of dress as predictors (Reynolds, 2007; NIJ, 2013). Racial profiling treats these narrow ethnic indications quite improperly, as though they are predictive of criminal propensity (Ryberg, 2010). Also referred to as *discriminatory policing*, it effectively invalidates the presumption of innocence across broad groups, while at the same time serving to legitimatize stereotypes, bias and prejudice steeped in ignorance (Dunn, 2016).

The practice of racial profiling has a long and terrible history in the United States, going back to the *slave patrols* of the 1700s (Rushing, 2013).[5] As we will discuss in this chapter, the practice is poorly conceived, unsupportable, and corrosive to law enforcement's operational and cultural integrity. It is also a violation of civil rights (NIJ, 2013). Even recently, professional law enforcement agencies understood this,

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[5] As explained in Rushing (2013), "In 1704, South Carolina founded the first slave patrol in which white men policed black slaves on plantations and hunted for escaped slaves. Black people, the majority of which were slaves in South Carolina and other southern states, had to show passes to prove they had permission to be off the plantation, or, if they had been liberated, they had to carry freedom papers to prove they were free. Black people were subjected to interrogations and harassment and whippings and other physical punishment—even death—if they were determined to have run away. Like modern-day racial profiling, a black person's skin color, not their actions, made them subject to discriminatory treatment from law enforcement." One cannot help but see the parallels to Arizona Senate Bill 1070: "The Support Our Law Enforcement and Safe Neighborhoods Act," which enables law enforcement to demand proof of citizenship based on an undefined reasonable suspicion. This law essentially promotes racial profiling.

as did the general population. Racial profiling was actually on track to be dismantled as an accepted practice in the United States by the end of the 1990s. Then came the terrorist attacks of September 11, 2001 (aka, 9/11; Reynolds, 2007; p.667):

> *By the mid-1990s society treated racial profiling by law enforcement as the great taboo. In 2000 eighty percent of Americans surveyed in a Gallup poll stated that they had not only heard of the act of profiling but believed the practice should be stopped. Between January 1999 and September 2001, thirteen states had moved to pass legislation that banned racial profiling or required police departments to collect data on the act. Yet, in the wake of the September 11 terrorist attacks, the consensus of profiling in the nation changed. All nineteen of the hijackers were Arabic men. In no less than "a month [after] the attack, surveys showed that a majority of Americans favored more intensive security checks for Arab and Middle Eastern people." Clearly, however, the profiling had to do with gender as well as race. Gender was the basis of the new terrorist profile because all of the hijackers were men; historically the … members of such fundamentalist Islamic groups are male.*

Unfortunately, this devastating loss changed the complexion of the United States in a way that is still being felt with respect to public perception and related legislation. It also began the resurrection of racial profiling, which we will discuss shortly.

The purpose of this chapter is to explore the relationship between racial profiling and miscarriages of justices as a causal factor. This will involve the following discussion: racial profiling versus criminal profiling; racial profiling as racist, unconstitutional and illegal; the resurgence of racial profiling; racism and law enforcement; and the efficacy of racial profiling. We will conclude with a discussion regarding the relationship between racial profiling and miscarriages of justice.

CRIMINAL PROFILING VERSUS RACIAL PROFILING

Criminal Profiling and Racial Profiling are often conflated by those with a legal or political agenda. However, they are not the same thing. This is established with even the most cursory review of the literature.

Criminal profiling involves making inferences about the physical, habitual, emotional, psychological, and even vocational characteristics of criminals. However, there are many different methods of criminal profiling, and all vary with respect to the soundness of underlying theory, logic, and insight. Some methods are abstract, general, and trait predictive; others are concrete, specific, and state descriptive. Some rely on offender group statistics; some rely solely on experience; and some rely on examining case-specific behavioral evidence.[6]

[6] One of the authors (Turvey) has written a textbook on criminal profiling, which is now in its 4th edition (Turvey, 2011). It does not include a chapter on racial profiling because of the lack of empirical support for such practices, along with its unconstitutionality and illegality. It does, however, provide a chapter on profiling terrorists, written in cooperation with the Psychological and Behavioral Profiling Unit of the Singapore Police. In that Chapter, the dangers of profiling terrorists based on individual variables such as gender, religion or nationality are discussed. Because of the resurgence of racial profiling, and the issues identified in this chapter, future editions will address this illegal practice more extensively.

The method used by the authors, for example, is referred to as Behavioral Evidence Analysis (BEA). As explained in Turvey (2011):

> *BEA is an ideo-deductive method of crime scene analysis and criminal profiling. It involves the examination and interpretation of physical evidence, forensic victimology, and crime scene characteristics. For the purposes of criminal profiling, the results of these individual examinations can be analyzed for behavioral patterns and clusters that suggest offender characteristics of investigative or forensic relevance. BEA is ideographic in that it is concerned with studying the aspects of individual cases and offenders through the lens of forensic analysis—not groups of similar cases and presumably similar offenders. It is deductive in that inferences and conclusions are not inductive theories or nomothetic predictions in disguise. They are based on critical thinking, the scientific method, and analytical logic. BEA conclusions are meant to be the result of the most complete understanding of the events surrounding the commission of the crime. A BEA-style crime scene analysis or criminal profile will not render a conclusion unless the evidence exists to support it. Instead of relying on averaged (nonexistent/abstract) offender statistics, BEA profilers conduct a detailed examination of a scene and related behaviors to determine which characteristics are evidenced.*

For examples of BEA related forensic examinations, readers may reference Turvey and Esparza (2016).

Racial profiling, as already discussed, involves an inference or prediction regarding criminal propensity and suspect guilt based on a visible traits (e.g., race, skin color, nationality, ethnicity, and manner of dress as predictors). It does not look for patterns based on multiple factors; it reinforces racism, prejudice, and related stereotypes based on uninformed observation.

The difference between criminal profiling and racial profiling is ultimately one of context. Criminal profiling is interested in examining patterns of behavior within a framework of relationships, histories, and conditions. Racial profiling looks at one thing, out of context, and discriminates. Ultimately, one is an attempt to get beneath surface details and understand an individual's patterns and motives; the other is an attempt to reinforce a prejudice in order to avoid learning about the individual, beyond how they appear on the surface.

RACIAL PROFILING: EFFICACY

Racial profiling does not work. In other words, there is zero empirical evidence to suggest that it predicts or prevents crime, or that it accurately identifies criminals. The only thing that it reliably accomplishes, as we have demonstrated, is the erosion of public trust and the creation of liability related to civil rights violations and excessive use of force (e.g., 1983 civil rights lawsuits; Blanks, 2016; Natarajan, 2014).

Racial profiling persists because of a fallacy of logic referred to as the *availability heuristic*: answering a question of probability by asking whether examples come

readily to mind. What we recall most readily becomes what we believe is likely. The suspicion heuristic is related, as discussed in Richardson and Goff (2012, pp. 310–311):

> *This substitution of representativeness and availability in the context of judgments of criminality (we use the phrase "judgments of criminality" to refer to the assessment that another is engaged in criminal activity or poses a threat) is what we term the "suspicion heuristic."*
>
> *Use of the suspicion heuristic cannot help but disadvantage Blacks. This is because Blacks serve as our mental prototype (i.e., stereotype) for the violent street criminal. Furthermore, the tendency for black suspects to be over-represented in media portrayals of violent street crime makes the Black-as-criminal stereotype readily available.*
>
> *However, heuristic errors in determinations of suspicion can also burden other groups stereotyped as criminal in certain situations because what triggers the suspicion heuristic is the existence of the stereotype. For instance, Latinos (or those appearing to be) are stereotyped as drug dealers, gang members, and undocumented immigrants; people believed to be Muslim are stereotyped as terrorists; and Whites are stereotyped as drug buyers when they are in nonwhite neighborhoods.*
>
> *Although it is easy and familiar to resort to conscious racial bias to explain racial errors in judgments of criminality, the suspicion heuristic can explain how these mistakes occur even in the absence of a consciously biased actor. Imagine egalitarian-minded individuals walking down a dark street at night. It would not be surprising for them to think about the possibility of being mugged or attacked. Although they are not aware of it, simply thinking about crime may automatically trigger the link between non-Whites and criminality below the level of conscious awareness. As a result, their attention is more likely to be drawn to non-Whites present in the environment—a type of unconscious racial profiling. Notice, then, that even before individuals make a judgment of criminality, they may subject non-Whites to greater scrutiny. This can occur regardless of whether individuals intend it.*
>
> *Once their attention is captured, they will make a judgment about the likelihood that the stranger is engaged in criminal activity. However, they may substitute a judgment of how closely this person resembles a criminal stereotype instead. Hence, if the person being judged is non-White, individuals are more likely to make a mistaken judgment of criminality.*
>
> *The suspicion heuristic can bias individuals' judgments even if they consciously reject the stereotype. The decisions of the best-intentioned individuals may be affected by the mere existence of the stereotype because of the associative networks our minds use to process information. That is, merely being aware of the stereotype is sufficient to be influenced by it in ways that disadvantage those stereotyped as criminal, regardless of the perceiver's intentions or character. Even worse, people's heuristic criminality judgment will feel easy, familiar, and true because they cannot evaluate information processes that proceed beneath awareness.*

The authors have found that a great many law enforcement officers rely upon "information" gleaned from film, television, and other fictional references in the absence of proper education and training (see also Turvey, 2011). This makes the inexperienced particularly susceptible; and these media stereo-types become hardened self-fulfilling beliefs that can last an entire career.

RACIAL PROFILING AS RACIST, UNCONSTITUTIONAL, AND ILLEGAL

There are a few related issues that must be understood about racial profiling before we continue. First, it is racist. Second, it is unconstitutional. And third, it is illegal. This means racial profiling only serves as a mechanism for legitimizing or cloaking individual and/or institutional prejudice. The inevitable result is civil liability in federal court.

RACIST

Racial profiling is racist, by definition. *Racism* is "the subordination of any person or group because of skin color or other distinctive physical characteristics. Racism, like sexism, is reflected in both individual and institutional acts, decisions, habits, procedures, and policies that neglect, overlook, exploit, subjugate, or maintain the subordination of the individual or the group" (Appleby, Colon, & Hamilton, 2011, p. 66). Racial profiling involves inferring suspect criminality or guilt based on race and/or perceived racial factors. The natural consequences of such discriminatory inferences can include deportation, or the loss of property, liberty, and even life. Apart from internment or concentration camps, there is no greater potential for subordination or marginalization.

Institutional racism is defined as a set of cultural values, policies and/or procedures within any organization that consistently provides for the unfair treatment of a specific class of individuals. This is discussed in the context of research compiled in Chaney (2015, pp. 313–314):

> *In essence, institutionalized racism is structured into political and social institutions and occurs when institutions, including corporations, governments and universities, discriminate either deliberately or indirectly, against certain groups of people to limit their rights (Better, 2002; Staples, 2011; Troyna & Williams, 2012; Williams, 1985). Race-based discrimination in housing, education, employment, health and public safety are forms of institutional racism. Furthermore, this form of discrimination reflects the cultural assumptions of the dominant group, so that the practices of that group are seen as the norm to which other cultural practices should conform (Andersen & Taylor, 2006; Armour, 1997; Bonilla-Silva, 2009; Feagin & Elias, 2013; Phillips, 2011; Reilly, 2015).*

To be clear, racial profiling can be the result of individual racist attitudes and beliefs; or it can be emulated and learned as a function of institutionally racist values

and policies. Often, however, it is both—as individual racist attitudes and beliefs cannot survive where leadership and institutional culture forbid them (see generally Crowder & Turvey, 2013).

UNCONSTITUTIONAL

Racial profiling is unconstitutional because it violates constitutionally protected civil rights. This includes *4th Amendment* protections against unreasonable search and seizure. As explained in Feder (2012):

> *The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." In its 1968 Fourth Amendment ruling,* Terry v. Ohio*, the Supreme Court found that reasonable, articulable suspicion was sufficient grounds for a police officer to briefly stop and question a citizen. Such suspicion must not be based on the officer's "inchoate and unparticularized suspicion or 'hunch,' but on the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Terry employed a "totality of circumstances" test to determine the reasonableness of police investigatory stops.*

Prevailing caselaw is further explained for the explicit benefit of federal officers and agents in the Department of Justice Guidelines on racial profiling (DOJ, 2014; p. 2):

> *The [United States] Constitution protects individuals against the invidious use of irrelevant individual characteristics.* See Whren v. United States*, 517 U.S. 806, 813 (1996). Such characteristics should never be the sole basis for a law enforcement action. This Guidance sets out requirements beyond the Constitutional minimum that shall apply to the use of race, ethnicity, gender, national origin, religion, sexual orientation, and gender identity by Federal law enforcement officers. This Guidance applies to such officers at all times….*

Racial profiling also violates the *14th Amendment* protections regarding due process and equal treatment under the law (Dunn, 2016). Section 1 of the 14th Amendment reads:

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.*

This Amendment states that all citizens are equal and may not be treated differently; and that they are entitled to the same constitutional protections. In other words, Christians are not to be afforded special consideration or status above Muslims; and those with white skin are not to be given more deference than those who are brown

or black. Effecting policy, or writing legislation, as though there are some Americans who are more worthy of constitutional protections than others is a violation of civil rights. Therefore, while some leaders will speak and act as though racist beliefs have community support, related policies and actions will not be protected by the courts.

ILLEGAL

Racial profiling is generally illegal. In other words, it violates the law (state and federal). This is true for at least three reasons.

First of all, most states have passed antiracial profiling legislation; or they have state constitutions affording rights that mirror federal antidiscrimination, due process, and equal treatment provisions (see generally: Coble, 2015). Related laws and provisos can make racial profiling illegal at the state level, and are a powerful tool for holding local and state level law enforcement accountable.

Second, *Title VI of the 1964 Civil Rights Act* forbids discrimination based on race or ethnicity in any federally assisted program or activity. Given that most states, municipalities, and law enforcement agencies accept federal funds, this subordinates them to Title IV. As explained in Feder (2012, p. 12):

> *…courts have held that Title VI permits a private right of action for individuals to seek injunctions against recipients of federal funding, including police, for a policy or practice that discriminates on account of race. Moreover, local police departments that receive DOJ assistance are subject to agency regulations providing that recipients may not "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination ... or have the effect of defeating or substantially impairing" program objectives because of race.*

Third, all 50 states are subordinate to the *United States Constitution*, it's *Bill of Rights*, and the *Civil Rights Act of 1964* which "outlawed discrimination in public places and facilities and banned discrimination based on race, gender, religion or national origin by employers and government agencies" (Stewart & Escobedo, 2014). So even if local or state law enforcement is not prohibited from engaging racial profiling, they are still part of the United States. Moreover, it is often the case that when local law enforcement is sworn in, their oath includes upholding the Constitution of the United States.

LIABILITY

Racial profiling results in individual and institutional liability in federal court by virtue of *42 U.S.C.* Section 1983. As explained in Feder (2012, p. 10):

> *Judicial decisions reflect the crucial role that racial record-keeping and statistics may play in mounting a successful legal challenge to racial profiling. This is because the plaintiff must prove both racial motivation and "discriminatory effect" of law enforcement practices in federal lawsuits under 42 U.S.C. Section 1983. Section 1983 provides a monetary damages remedy for harm caused by deprivation of federal constitutional rights—including equal protection of the laws—by*

> *state or local governmental officials or those acting in concert with them, that is, under "color of law." Claims against federal defendants—usually in the context of border, customs, or airport searches—may be maintained directly under the Constitution as a* Bivens *action, or under the Federal Tort Claims Act.*

In other words, law enforcement officers, and their respective agencies, may be held liable in civil court at the federal level for engaging in racial profiling.

For example, consider the ongoing litigation involving Sheriff Joe Arpaio of Maricopa County, Arizona. He continues to engage in discriminatory practices and racial profiling despite federal court orders to cease and desist, at great cost to the community and the reputation of local law enforcement. Details were reported in Sanders (2016):

> *The Maricopa County Board of Supervisors voted Wednesday to pay $4.5 million in legal fees to attorneys representing a group of plaintiffs who sued Sheriff Joe Arpaio in a racial-profiling case. Originally, lawyers from groups including the American Civil Liberties Union and Mexican American Legal Defense and Educational Fund sought $5.9 million.*
> *Plaintiff attorneys say most of the costs were generated in the past three years and stem from Arpaio's violation of court orders and plaintiffs' efforts to hold him in contempt of court. The federal judge ruled Arpaio was in civil contempt for ignoring an order to stop his immigration patrols. The judge has since asked federal prosecutors to bring criminal contempt charges. Taxpayers already have spent $10.4 million on attorney fees in the case.*

Prior to this, a federal judge found Sheriff Arpaio "in civil contempt of court. Judge G. Murray Snow says Arpaio has repeatedly and knowingly disobeyed his orders to cease policing tactics against Latinos that he says amount to systemic racial profiling" (Kennedy, 2016).[7] Sheriff Arpaio is widely considered among the most openly racist law enforcement officers in the nation, and lawsuits against his agency and county for related civil rights violations are continuous.

Other cases include:

- Institutional Racism: Former Rutland City Police Officer Andrew Todd, an African-American, brought a civil action against Rutland City alleging racism and other misconduct; he settled for $975,000 (Keck, 2015).
- Institutional Racism: "Honolulu City Council members agreed to pay $4.7 million to settle a lawsuit that says the Honolulu Police Department engaged in racial and sexual discrimination. The federal lawsuit was filed in 2010, saying that the Honolulu Police Department put officers' lives in danger when they were refused backup during nighttime traffic stops. The plaintiffs say they faced retaliation after speaking out about racial discrimination, and police and city officials hid evidence that would have bolstered their case" (Riker, 2016).

[7] Joe Arpaio was ultimately found guilty of contempt owing to his continued unconstitutional immigration arrests in violation of court orders. However, in August of 2017 he was pardoned by President Donald J. Trump.

- Racial Profiling: "A Charleston jury awarded $1.3 million to a black couple who said they were arrested because they accused a white state trooper of racial profiling during a 2012 traffic stop. The civil rights lawsuit by Catherine and Jerome Newkirk, who were pulled over for speeding by Trooper James Enzor in Florence County lasted three days" (Lowe, 2017).
- Racial Profiling: "UCLA has agreed to pay $500,000, including $350,000 in scholarships, to settle a claim by a prominent African American judge over alleged mistreatment and racial profiling by campus police during a traffic stop last year, officials announced Friday. Los Angeles County Superior Court Judge David S. Cunningham, who is a former president of the Los Angeles Police Commission, and his attorney will receive $150,000. An additional $350,000 will establish a scholarship fund named after Cunningham and administered by the UCLA Black Alumni Assn. for undergraduate or law students, according to a statement from both sides in the dispute" (Gordon, 2017).

RACIAL PROFILING: A RESURGENCE

Since 9/11, racial profiling has experienced a resurgent popularity. Outlier sentiments began as uninformed post-attack punditry, made in support of the few openly racist elements remaining in law enforcement (see generally Benson, 2001; Turvey, 2012).[8] First the language was anti-Muslim; then it expanded to include illegal Mexican immigrants. Then these became law, with the ratification of *The Patriot Act,* which made Muslims and others vulnerable to racial profiling (Akram, 2002; Kleiner, 2010; Pitt, 2011).

Eventually, *The Patriot Act,* and the subsequent *Freedom Act,* emboldened both law enforcement and political leaders to go public with longstanding, but privately held, racist opinions.[9] This meant the open endorsement of policies and legislation that allowed or encouraged racial profiling against these two groups. This set the stage for what was to come in the 2016 presidential election (Zaman, 2016).

After 2001, there was also a documented uptick in racially motivated crime across the nation (Ansari, 2016; Brown, 2016).[10] Most of the victims of hate crimes

[8] Former NYPD Police Officer Richard "Bo" Dietl often refers to himself as criminal profiler during media appearances. During a January 17, 2007 interview on Fox News' *The Real World with Nick Cavuto, he stated*: "Don't you watch 24? They're out there. Terrorist cells are out there." Mr. Dietl was citing the fictional television program 24 as evidence that terrorist cells from the Middle East were, at the time, working inside the United States. And that, therefore, the racial profiling of all Muslims as potential terrorists (i.e., anyone who wears a turban) is reasonable, useful, and necessary in the wake of 9/11. It should not be necessary to explain how absurd this reasoning is.

[9] For a review regarding the differences between these two pieces of legislation, see Dilanian (2015).

[10] The most recent available FBI hate crime data comes from 2015, and it only addresses reported crime. The data breaks down as follows: "There were 5,818 single-bias incidents involving 7,121 victims. Of those victims, 59.2 percent were targeted because of a race/ethnicity/ancestry bias; 19.7 percent because of a religious bias; 17.7 percent because of a sexual orientation bias; 1.7 percent because of a gender identity bias; 1.2 percent because of a disability bias; and 0.4 percent because of a gender bias" (FBI, 2016).

have been targeted because they are black; but victims targeted due to Mexican or Muslim heritage have been on the increase (FBI, 2016). This has occurred along with the increased visibility of, reporting of, and attention to police shootings involving unarmed black men. There can be no question that this was the product of awareness made possible through both traditional journalism and "viral" social media. As explained in Katz (2016, p. 923): "Street relations between the police and African-American communities have seemingly reached new levels of conflict, or else body cams and cell phones are finally disclosing the extent and truth about such interactions."

National concern over the issue of racial profiling was all but forced with the shooting of 18-year-old Michael Brown, an unarmed black man. He was killed by Officer Darren Wilson of the Ferguson Police Department in Missouri, on August 9, 2014. As explained in Calabresi (2015):

> *The violent protests in Ferguson last August were driven by the indelible image of an unarmed black teenager, Michael Brown, lying in the street after a white police officer, Darren Wilson, shot him dead. But the outrage in Ferguson, and the national debate that accompanied it, were also about something harder to see: racism, and the allegation that Ferguson's largely white cops were deeply, systematically and violently prejudiced against black residents. Now, as one of his last acts as U.S. Attorney General, Eric Holder has painted a picture of Ferguson's entrenched racism that is clear and unmistakable.*

Despite overwhelming evidence against Officer Wilson, the prosecutor in the case was able to use the Grand Jury as a tool to prevent an indictment for murder.[11] This is a practice common when police officer shootings result in an arrest that is dictated by public outcry as opposed to a prosecutor's political ambition (Davey & Bosman, 2014; McKinley & Baker, 2014). As explained in Mirzoeff (2016), subsequent to a scholarly review of grand jury proceedings once they were finally made public: "the grand jury prosecutors turned the event into a high-definition visual space in which only physical evidence and police testimony could be trusted, discounting all eyewitness accounts. This reading shows that the event lasted less than a minute. Discrepancies, contradictions, and oversight abound in the prosecution case that was never cross-examined" (p.49). Even before the details of the Grand Jury manipulations were made public, the outcome was contested. The immediate result was nationwide riots and protests, as already mentioned.

National unrest over the decision by the Grand Jury in Ferguson led to a civil rights investigation into the local Police Department by the United States Department of Justice. Their inquiry was divided into two separate issues. With respect to Officer

[11] The authors have had many occasions to review Grand Jury proceedings in relation to criminal trials, in their capacity as forensic experts. The Grand Jury is secret, and involves only the case put on by the prosecutor. The routine use of inconsistent, false, and exaggerated testimony from state witnesses goes unchallenged, and consequently this tool is ripe for abuse. In short, it allows prosecutors to craft the outcome that they want despite the evidence. This has long been a criticism of the Grand Jury system (see the arguments made in Johnston, 1974; they remain relevant to this day).

Wilson, the first investigation determined that: "this matter lacks prosecutive merit and should be closed" (DOJ, 2015a). This put Officer Wilson in the clear with respect to criminal charges. However, the second investigation examined the broader issues of local law enforcement culture and leadership. The DOJ was blunt and specific about the institutional racism that their investigation revealed (DOJ, 2015b):

> *The Justice Department found that the Ferguson Police Department (FPD) engaged in a pattern or practice of conduct that violates the First, Fourth, and 14th Amendments of the Constitution…*
> *"As detailed in our report, this investigation found a community that was deeply polarized, and where deep distrust and hostility often characterized interactions between police and area residents," said Attorney General Eric Holder. "Our investigation showed that Ferguson police officers routinely violate the Fourth Amendment in stopping people without reasonable suspicion, arresting them without probable cause, and using unreasonable force against them…*
> *The department found that the FPD has a pattern or practice of:*
>
> - *Conducting stops without reasonable suspicion and arrests without probable cause in violation of the Fourth Amendment;*
> - *Interfering with the right to free expression in violation of the First Amendment; and*
> - *Using unreasonable force in violation of the Fourth Amendment.*
>
> *The department found that Ferguson Municipal Court has a pattern or practice of:*
>
> - *Focusing on revenue over public safety, leading to court practices that violate the 14th Amendment's due process and equal protection requirements.*
> - *Court practices exacerbating the harm of Ferguson's unconstitutional police practices and imposing particular hardship upon Ferguson's most vulnerable residents, especially upon those living in or near poverty. Minor offenses can generate crippling debts, result in jail time because of an inability to pay and result in the loss of a driver's license, employment, or housing.*
>
> *The department found a pattern or practice of racial bias in both the FPD and municipal court:*
>
> - *The harms of Ferguson's police and court practices are borne disproportionately by African Americans and that this disproportionate impact is avoidable.*
> - *Ferguson's harmful court and police practices are due, at least in part, to intentional discrimination, as demonstrated by direct evidence of racial bias and stereotyping about African Americans by certain Ferguson police and municipal court officials.*

The inevitable result of this and similar incidents was the formation of what is now the *Black Lives Matter (BLM)* movement. They are an international crusade, originating from the African-American community in the United States. BLM

campaigns against systemic violence and institutional racism perpetrated against members of the black community (Miller, 2016).[12] As one might expect, this has resulted in its own racial backlash from the law enforcement community, and from politicians looking to solidify their base (so-called Blue Lives Matter and related legislative initiatives; see DeBerry, 2017).[13]

Pro-racial profiling sentiment in the public culminated with the 2016 election of Donald J. Trump. He is openly supportive of racial profiling against Muslims and Mexicans, regardless of their legal status. To be clear, Mr. Trump ran for President of the United States, and won, on a platform that can only be described as openly racist.[14]

First, President Trump promised to strengthen US Border security by building a wall along the entire Mexican border, to keep illegal immigrants from entering (Diaz, 2017). Former Mexican President Vincent Fox has called this proposed wall "a monument to racism," as have others (Bierman & Bennett, 2017).[15] As of this writing, President Trump is drafting budget legislation to make this wall a reality.[16]

Then President Trump proposed to ban Muslims from entering the country, until such time as "extreme vetting" could be put in to effect through subsequent executive order (Dennis & Markon, 2017). He has further attempted to make good on this campaign rhetoric with two separate failed executive orders imposing travel bans against predominately Muslim countries. These executive orders have been referred to as both "racist" and "anti-Muslim" (Carney, 2017). This is a view that is shared by multiple federal courts, as thoughtfully explained in Toobin (2017): "Two federal judges just invalidated President Donald Trump's executive order on immigration, and both for the same reasons. In highly similar opinions… federal district judges

[12] See http://blacklivesmatter.com/about/.

[13] There can also be no question that the election of the first black President, Barack Obama, for two consecutive terms, also played a significant role in percolating what became the anti-BLM backlash. President Obama's skin color, and the accusations of the so-called birther movement were constant lightning rods during the election campaign of President Trump (Barbaro, 2016).

[14] As explained in Kristof (2016), Mr. Trump's negative views towards minorities were not at all veiled during the presidential campaign: "Trump's suggestions that President Obama was born in Kenya; his insinuations that Obama was admitted to Ivy League schools only because of affirmative action; his denunciations of Mexican immigrants as, 'in many cases, criminals, drug dealers, rapists;' his calls for a temporary ban on Muslims entering the United States; his dismissal of an American-born judge of Mexican ancestry as a Mexican who cannot fairly hear his case; his reluctance to distance himself from the Ku Klux Klan in a television interview; his retweet of a graphic suggesting that 81 percent of white murder victims are killed by blacks (the actual figure is about 15 percent); and so on. Trump has also retweeted messages from white supremacists or Nazi sympathizers, including two from an account called @WhiteGenocideTM with a photo of the American Nazi Party's founder."

[15] As explained by the Editorial Board (2017) of *The Chicago Tribune*: "When Trump declared his candidacy in June 2015, he stated that one of the biggest dangers facing America was migrants from Mexico. ("They're bringing drugs. They're bringing crime. They're rapists.") That claim is demonstrably false: All evidence suggests that undocumented immigrants are less likely to commit crimes than the population at large. It also was a racist insult."

[16] President Trump has also repeatedly disparaged judges presiding over lawsuits against him as impartial, due solely to their Mexican heritage. In the recent past, Republican House Speaker Paul Ryan labeled Trump's statements as "textbook racism" (Walsh and Raju, 2016).

in Hawaii and Maryland used statements Donald Trump made as a candidate for President to conclude that his revised travel ban on people from six majority-Muslim nations represented unconstitutional religious discrimination."

President Trump has also proposed to bring back racial profiling, directed at Muslims and Mexicans. However, the practice has much broader implications. In September 2016, then candidate Trump proclaimed his support for racial profiling by police, as reported in Schleifer (2016):

> *Our local police—they know who a lot of these people are. They are afraid to do anything about it because they don't want to be accused of profiling," Trump said on Fox News on Monday. Trump pointed to how Israel used profiling and "done an unbelievable job.*

Only days after taking office, President Trump signed an executive order that can only be viewed as the beginning of efforts directed towards legitimatizing the practice of racial profiling nationwide (Zapotosky, 2017):

> *President Trump on Wednesday directed his homeland security secretary to deputize local law enforcement officials to enforce immigration laws, a move that civil rights advocates fear could embolden police to racially profile those they encounter. The directive came as part of a sweeping executive order that cracks down on people in the country without documentation and the cities that don't readily hand them over for deportation.*

All of this context, which includes racist and discriminatory directives from then highest office in The United States, has combined to encourage and even legitimize racial profiling against black, muslim, and Mexican Americans, which continues at an alarming rate.

RACISM AND LAW ENFORCEMENT CULTURE

The authors have experienced that law enforcement are trained to manage all encounters in terms of force and control; and to view interactions with citizens through the lens of criminality. In other words, they are trained to control every situation using some level of force; and to identify those that must be arrested. This is their paradigm: force and criminality.

It is an indisputable fact that institutional racism, and racial profiling, is part of this paradigm within many law enforcement agencies. This is explained in Chan (2011):

> *There is certainly a vast literature that supports the finding that street-level police officers often form stereotypical opinions about the criminality of certain ethnic groups and use such visual cues in routine, proactive policing work (see, e.g., Ericson 1982; Bayley and Mendelsohn 1969). These ways of seeing and acting are regarded as features of police (sub)culture that appear to be common across*

space and time. Satzewich and Shaffir (2009) provide evidence that police officers in their study (even officers from ethnic minorities) saw profiling as integral to police work and admitted that the racial appearance of the citizen was one factor among others that they took into account when deciding whether to intervene. The authors suggest that "the occupational culture enables the police to draw upon a vocabulary of explanations" that "permit[s] them to deny responsibility when faced with the allegation that their profiling is racially motivated" (Satzewich and Shaffir, 2009: 211).

This is also consistent with the results of multiple independent investigations into law enforcement agencies that have carried out over the past decade—in a variety of legal contexts.

1. **Ferguson Police Department, Missouri:** A DOJ investigation found evidence of widespread institutional racism—that "Ferguson's largely white cops were deeply, systematically and violently prejudiced against black residents" (Calabresi, 2015).
2. **Baltimore Police Department (BPD):** In 2016, a DOJ investigation determined that "BPD engages in a pattern or practice of conduct that violates the Constitution or federal law. BPD engages in a pattern or practice of (1) making unconstitutional stops, searches, and arrests; (2) using enforcement strategies that produce severe and unjustified disparities in the rates of stops, searches and arrests of African-Americans; (3) using excessive force; and (4) retaliating against people engaging in constitutionally protected expression. This pattern or practice is driven by systemic deficiencies in BPD's policies, training, supervision, and accountability structures that fail to equip officers with the tools they need to police effectively and within the bounds of the federal law" (DOJ, 2016).
3. **Boston, Massachusetts:** The Massachusetts Supreme Judicial Court overturned the conviction of man for having a weapon without a permit, based on the following: "A black man who runs from police shouldn't necessarily be considered suspicious—and merely might be trying to avoid "the recurring indignity of being racially profiled." In its ruling, the court cited Boston Police Department crime data "and a 2014 report by the ACLU of Massachusetts that found blacks were disproportionately stopped by the city's police…." The court also cited "a factual irony" in how flight from police is viewed and said that in this instance, a Boston police officer decided to approach Warren and a companion despite important factors: The officer was looking for three, not two, suspects, and he had been given only vague descriptions that the suspects were wearing dark clothing and a hoodie" (Chappell, 2016).
4. **Los Angeles Police Department (LAPD)**: "African Americans have significantly less trust in LAPD officers than other residents do. A new survey, commissioned by the department, found that less than half of black residents consider the police honest and trustworthy. Only a third believe officers treat

people of all races or ethnicities fairly… Accusations of racial profiling—what the LAPD calls biased policing—are difficult to prove, as they hinge on what an officer is thinking when he or she stops someone. Los Angeles police usually receive a few hundred complaints of biased policing each year, largely from African Americans. None have been upheld, a number that has become more glaring in recent years as residents and police commissioners continue to voice their concerns" (Mather & Chang, 2016). To be clear, the failure to validate a single complaint, and to conclude that 100% were false reports, is not viable. This suggests that the LAPD is either falsifying the results of some investigations, or not investigating these complaints at all.

5. **Chicago Police Department (CPD):** In 2016, a task force appointed by the mayor found that "[r]acism has contributed to a long pattern of institutional failures by the Chicago Police Department in which officers have mistreated people, operated without sufficient oversight, and lost the trust of residents" (Davey & Smith, 2016). In 2017, a US DOJ investigation found that the CPD engages in a pattern of unconstitutional use of force; that a lack of accountability contributes to an overall pattern of unconstitutional conduct; and specifically, that "CPD has tolerated racially discriminatory conduct that not only undermines police legitimacy, but also contributes to the pattern of unreasonable force. The pattern or practice of unreasonable force, coupled with the recurrence of unaddressed racially discriminatory conduct by officers further erodes community trust and police effectiveness. Our review of complaints of racially discriminatory language found repeated instances where credible complaints were not adequately addressed. Moreover, we found that some Chicago police officers expressed discriminatory views and intolerance with regard to race, religion, gender, and national origin in public social media forums, and that CPD takes insufficient steps to prevent or appropriately respond to this animus…. We have serious concerns about the prevalence of racially discriminatory conduct by some CPD officers and the degree to which that conduct is tolerated and in some respects caused by deficiencies in CPD's systems of training, supervision and accountability" (DOJ, 2017, p. 15).

Other DOJ investigations and published research have also found racial bias and discrimination by law enforcement agencies in San Francisco (Peralta, 2016) and Oakland (Parker, 2016). It does not end here, however. As of this writing, dozens of major police agencies are currently under investigation for similar practices nationwide—either by the DOJ, the ACLU, locally formed task forces, or various government commissions.

The results of these and many other related investigations tend to disprove assertions that institutional racism is not a feature of modern law enforcement. In addition, they provide a contextual explanation as to why racial profiling persists, despite a lack of demonstrable efficacy. This is not to say that all police officers are racist;

rather that racism features prominently as part of the misconduct experienced within many police agencies.

RACIAL PROFILING AND MISCARRIAGES OF JUSTICE

The criminal justice system in the United States rests on the principle that all suspects and defendants are innocent until proven guilty.[17] This is referred to as the presumption of innocence, which requires the state to prove a defendant's guilt beyond a reasonable doubt. As explained in Coffin v. United States (1895): "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." The right to a presumption of innocence was upheld in Taylor v. Kentucky (1968), which states "the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment."

The presumption of innocence is premised on the belief that it is worse to convict the innocent than to let the guilty go free (e.g., In re Winship, 1970). In other words, convicting the innocent is viewed by the law, and by society, as an unacceptable price to pay for justice. As explained in Schlup v. Delo (1995): "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."

In their contact with the criminal justice system and its various agents, criminal suspects and defendants can become victims of bias, corruption, ignorance, error, and even indifference. When this happens, due process falls apart, the presumption of innocence may be violated, and civil rights violations may be incurred. Such circumstances are referred to as *miscarriages of justice*.

Miscarriages of justice come in a variety of forms. All of them relate to legal consequences, but they need not result in harm done by the court (which is only one branch of the criminal justice system). The most common miscarriages include:

1. Wrongful detention
2. False arrest
3. Failure to investigate and arrest
4. Failure to prosecute
5. Wrongful or malicious prosecution
6. Ineffective assistance of counsel
7. Wrongful acquittal
8. Wrongful conviction
9. Wrongful sentencing

Racial profiling violates due process, the presumption of innocence, and the Constitutional Amendments that provide for them. It is consequently both unconstitu-

[17] This section is adapted from Cooley and Turvey (2014).

tional and illegal, as already discussed. Moreover, because it does not work, the only outcome of racial profiling can be a miscarriage of justice.

Direct evidence of racial profiling and other forms of discrimination (especially if combined with an established pattern of discrimination by an individual officer, their supervisors, or their institution) are sufficient basis for a 1983 Civil Rights lawsuit. As explained in Feder (2012, p. 5):

> *Direct evidence of discriminatory intent was sufficient to avoid summary judgment on a Section 1983 claim of selective enforcement in the Tenth Circuit decision,* Marshall v. Columbia Lea Regional Hospital. *There the claimant was able to present evidence of the officer's behavior during the events in question as well as his alleged record of racially selective stops and arrests in drug cases under similar circumstances. Further evidence was offered that the claimant did not commit the alleged traffic violation and that the officer made eye contact with him prior to activating his emergency lights. As soon as the officer approached the claimant, he accused him of being on crack, an accusation the officer repeated several times during the encounter. When the officer filled out the citation form, he noted the claimant's race, although the form called for no such designation. Most compellingly, it was shown that the officer had an extensive recorded history—or "modus operandi"—of similar misconduct during his prior employment as a police officer in another jurisdiction.*

Again, given that racial profiling is evidence of both racism and racial discrimination, proof of its application or occurrence is a miscarriage of justice. There is no wiggle room here. Those in law enforcement who would use such tactics are in violation of *The Constitution* that they have sworn to uphold. Those who suffer because of them are entitled to have their cases dismissed, as well as to demand civil penalties against responsible individuals and government agencies in federal court per 42 U.S.C. Section 1983.

CONCLUSION

Racial profiling, as already discussed, involves an inference or prediction regarding criminal propensity and suspect guilt based on visible traits (e.g., race, skin color, nationality, ethnicity, and manner of dress as predictors). It does not look for patterns based on multiple factors. It reinforces racism, prejudice, and related stereotypes based on cultural illiteracy.

Racial profiling is inherently racist; unconstitutional; and illegal. This means racial profiling only serves as a mechanism for legitimizing or cloaking individual and/or institutional prejudice. The inevitable result is a miscarriage of justice, culminating in civil liability in federal court.

Evidence from multiple DOJ investigations into law enforcement agencies across the United States suggests that racial profiling features prominently in law enforcement practices. Furthermore, that these practices are often driven by widespread institutional racism, tolerated by the leadership. This provides an explanation for the persistence of racial profiling, despite the fact that it does not work.

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