

Racial Profiling

Are minorities unfairly targeted by police?

Civil liberties and minority groups are pressuring police departments to eliminate racial and ethnic profiling in pedestrian and traffic stops, while police groups and some experts insist the complaints about the practice are exaggerated. African-Americans have long complained of traffic stops seemingly for “driving while black,” and many — including President Obama and Oprah Winfrey — said recently they have felt profiled by store clerks for “shopping while black.” Hispanics and Muslims also feel singled out as suspected immigration violators or terrorists. Two big law enforcement agencies — the New York City Police Department and the Maricopa County Sheriff’s Office, which covers Phoenix — are under court order to eliminate the practice. In New York, Mayor-elect Bill de Blasio is expected to change the NYPD’s aggressive stop-and-frisk policies after he takes office on Jan. 1.



Jovan Washington, Louis Estrada and Cecil Boyce say racial profiling by police makes innocent activities such as hanging out and playing basketball in New Haven, Conn., difficult for blacks and Hispanics. Washington, at left, says police have targeted the group for no apparent reason. “They just assume that we are up to no good,” he said.

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Racial Profiling

BY KENNETH JOST

THE ISSUES

Twice within less than a year, David Floyd was stopped and frisked by New York City police officers while on his way home — once while walking on the street and once while fumbling with keys at the front door to his building. Officers found no weapons or contraband and filed no charges in either incident, the first in April 2007 and the second in February 2008.

Five years after the second incident, however, Floyd, an African-American now 33 years old, was still seething. “The whole experience, it’s humiliating, it’s embarrassing,” Floyd told a reporter for *Colorlines*, a New York City-based online magazine on race issues. “It doesn’t matter what kind of person you are, how tough you are. It’s a scary thing because you don’t know what’s going to happen with your life, you don’t know what’s going to happen with your freedom.”¹

Floyd, now a medical student in Havana, Cuba, made the comments in late March after testifying as the lead plaintiff in a major class action against the New York City Police Department (NYPD). The suit, *Floyd v. City of New York*, charges the NYPD, the nation’s largest police force, with using racial profiling as part of an aggressive stop-and-frisk policy maintained for 10 years under Mayor Michael Bloomberg and Police Commissioner Raymond W. Kelly.*

* The widely used term “racial profiling” in this report encompasses the targeting of an individual based on either race or ethnicity.



Demonstrators in Los Angeles on July 16, 2013, protest the acquittal of white neighborhood watch volunteer George Zimmerman in the shooting death of Trayvon Martin, an unarmed black Florida 17-year-old. The verdict touched off a nationwide debate on racial profiling, which minority groups say is widespread. Two major court cases target the New York Police Department’s stop-and-frisk policy and Arizona Sheriff Joe Arpaio’s controversial immigration-related profiling.

Bloomberg and Kelly credit the city’s declining crime rate under their watch to a sevenfold increase in the number of police stops of pedestrians during Bloomberg’s tenure, especially in high-crime, predominantly African-American and Hispanic neighborhoods. In a blockbuster decision, however, U.S. District Judge Shira Scheindlin ruled on Aug. 12 that such stop-and-frisk tactics violated the constitutional rights of minorities in New York City.

Scheindlin called the disproportionate number of blacks and Hispanics stopped by police “indirect racial profiling” that violates the Constitution’s Equal Protection Clause and faulted

police for violating Supreme Court guidelines under the Fourth Amendment on when such stops are allowed. Scheindlin emphasized that nearly 90 percent of the persons stopped were neither arrested nor given summonses. The veteran, Democratic-appointed judge named Peter Zimroth, a prominent New York lawyer and a former top counsel to the city, to serve as an “independent monitor” to oversee, with community input, reform of the use of the tactic.²

Two-and-a-half months later, however, a federal appeals court panel put a hold on Scheindlin’s order at the city’s request and — in an extraordinary action — removed her from the case. On Oct. 31, a panel of the Second U.S. Circuit Court of Appeals in New York City said Scheindlin had violated judicial ethics by steering the *Floyd* case to her court and by giving interviews to journalists while the case was before her. The appeals court’s stay was to remain in effect

until after the appeal is heard, sometime after mid-March.³

Scheindlin’s ruling represents the most dramatic court decision on an issue that has simmered and occasionally boiled over since the 1990s.⁴ African-Americans have long complained of what they regard as unwarranted traffic and pedestrian stops by police, seemingly prompted by nothing other than their race. More recently, Hispanics and people of Arab or South Asian backgrounds have registered similar complaints about being targeted by police because of their ethnicity as suspected immigration violators or as terrorists.

Getty Images/Kevoork Djanssezian

San Marcos who was a Texas state trooper from 1981 to 1993.

"I don't think anybody knows the answer to that particular question," says Bueermann with the Police Foundation. "Some people believe it's prevalent," he says. "Others will tell you that it's not."

"It's a very difficult question to answer," says David Harris, a professor at the University of Pittsburgh Law School and a leading critic of racial profiling since the late 1990s. "It certainly exists. In some departments it may have a large role; in some, less so; in some, not at all." (See "At Issue," p. 1021.)

Public concern about the issue is also hard to measure. In a recent report, the Department of Justice found that most people subjected to traffic or pedestrian stops in 2011 believed the stops were legitimate and police acted properly. But African-Americans and Hispanics were somewhat more likely to disagree and were somewhat more likely to be ticketed after traffic stops than white drivers.⁹ (See graphs, right.)

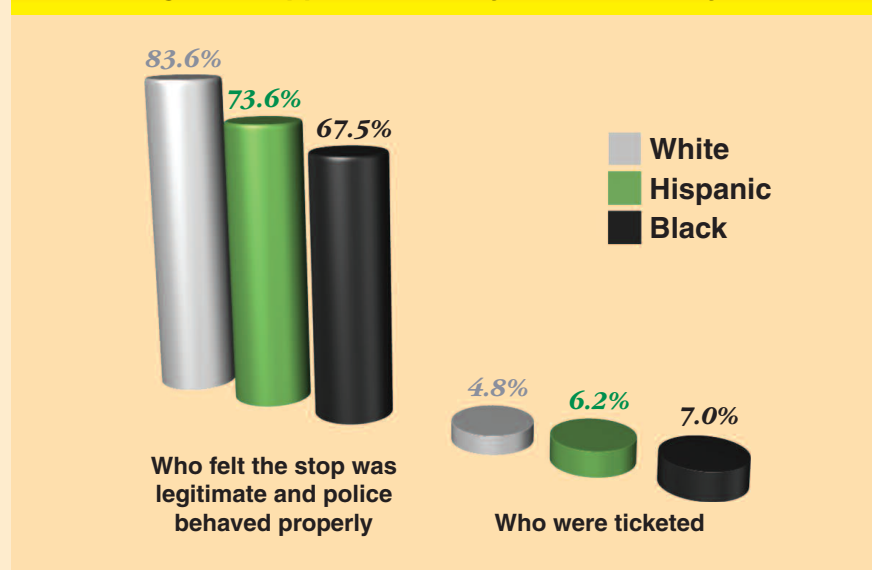
Lawyers from the Center for Constitutional Rights, a New York-based public interest law firm that represents the plaintiffs in the New York City case, hailed Scheindlin's ruling. "The NYPD is finally being held to account for its longstanding illegal and discriminatory policing practices," Darius Charney, a senior staff attorney with the center, said. "The city must now stop denying the problem and partner with the community to create a police department that protects the safety and respects the rights of all New Yorkers."

Appearing together on the day of the ruling, Bloomberg and Kelly defended the department's practices as lawful and effective. "Our crime strategies and tools — including Stop-Question-Frisk — have made New York City the safest big city in America," Bloomberg declared. Kelly labeled the racial-profiling finding "recklessly untrue. We do not engage in racial profiling," Kelly continued. "It is prohibited by law. It is prohibited by our own regulations."¹⁰

Most Police Stops Viewed as Legitimate

Police stopped about 31 million drivers or pedestrians in the U.S. in 2011, according to a triennial Justice Department survey. Most of those stopped said police had legitimate grounds and behaved properly during the encounter. Black and Hispanic drivers, however, were less likely than white drivers to view the stop as legitimate and more likely to be ticketed. The survey found no statistical difference in the race or ethnicity of pedestrians in street stops.

Percentage of Stopped Drivers by Race, Ethnicity, 2011 . . .



Source: Lynn Langton and Matthew Durose, "Police Behavior During Traffic and Street Stops, 2011," Bureau of Justice Statistics, Department of Justice, September 2013, www.bjs.gov/content/pub/pdf/pbtss11.pdf

Scheindlin stressed that she was not prohibiting use of stop-and-frisk altogether. Beyond ordering the appointment of a monitor, she instructed the department only to institute a pilot project equipping officers in one precinct in each of the city's five boroughs with body-worn video cameras to record stops and arrests.

Bloomberg nevertheless warned that the judge's order threatens public safety in New York, promised to appeal and instructed the city's lawyers to seek to delay the order pending an appeal. Scheindlin on Sept. 17 rejected the city's motion for a stay. The city's lawyers then sought a stay in

the Second Circuit, where an appeals panel heard arguments on Oct. 29 and issued the stay two days later.¹¹

Meanwhile, the impact of stop-and-frisk on crime in New York emerged as an issue in the race to succeed Bloomberg, an Independent who was barred by term limits from seeking reelection. His policies were criticized by several candidates in the Democratic primary on Sept. 11, including the eventual winner, Bill de Blasio, the city's public advocate. De Blasio was elected mayor by a landslide on Nov. 5.

As de Blasio prepares to take office and police and law enforcement experts around the country watch

developments in New York and Arizona, here are some of the major questions being debated:

Are racial and ethnic profiling prevalent in U.S. law enforcement today?

As executive director of a community organization in the predominantly black Northside neighborhood of Kalamazoo, Mich., Mattie Jordan-Woods helps people fill out complaints against the city's police force about racial profiling. She herself feels she has been stopped because of her race several times in the past. Now, Kalamazoo officials and the city's African-American community have evidence on the issue.

A statistical study, released in September, shows that black motorists were twice as likely as white drivers to be stopped by Kalamazoo officers at 11 intersections studied over a 12-month period ending in February 2013. The study, conducted by John Lamberth, a pioneer of racial profiling research, also shows that black motorists were more likely to be searched after having been stopped, but that white drivers were more likely to be found with contraband.¹²

In submitting the report, Lamberth praised city leaders for requesting the study and promising to act on its findings. "The leadership of KPDS [Kalamazoo Department of Public Safety] and the City of Kalamazoo has made it clear to us that targeting of Black motorists is unacceptable and must change," Lamberth wrote. Jordan-Woods said she had "high hopes" but stressed that "systematic" changes were needed. "It's going to take long term," she told the *Kalamazoo Gazette*.

Lamberth, a social psychologist and former professor and chairman of the Department of Psychology at Temple University in Philadelphia, conducted path-breaking studies on racial profiling in two court cases in the 1990s. In New Jersey, a judge relied on Lam-

berth's finding of apparent racial profiling by state troopers on the New Jersey Turnpike in throwing out evidence in drug cases against a group of 17 African-American defendants. Three years later, the New Jersey attorney general's office acknowledged that the state police had maintained a practice of targeting black motorists as suspected drug violators.

Lamberth had produced a similar study in Maryland that a black lawyer, Robert Wilkins, relied on in a civil suit against the state police after he was stopped without any charges being brought.* In settling the suit, the state paid Wilkins and his family \$50,000 in damages and, more important, agreed to compile racial data on traffic stops and to change training and policies in order to prevent racial profiling.¹³

In the New York City case, Judge Scheindlin relied on a comparable statistical study by Jeffrey Fagan, a professor of criminal justice at Columbia Law School, which found police stops are "significantly more frequent" for blacks and Hispanics than for whites. In addition, Fagan found that police were more likely to use force against blacks and Hispanics than against whites. Experts retained by the city disputed Fagan's findings, but Scheindlin said Fagan's evidence was "more reliable."¹⁴

Lamberth and Fagan both took pains to make the studies statistically valid, but Mac Donald, the racial profiling skeptic at the Manhattan Institute, finds the studies generally worthless. "The cost of these studies is completely a total waste of money," she says.

Mac Donald — who had not seen the Kalamazoo study — faults traffic studies in general on the ground that

they use as a benchmark all drivers instead of drivers committing traffic offenses. "It's absurd to look at who's being stopped without looking at who's speeding," she says. In a like vein, she says Fagan's study fails to account for the fact that blacks and Hispanics commit a larger percentage of crimes in New York than whites. In fact, she says, "Whites commit just 1 percent of the shootings but they're 9 percent of the stops."

Researchers agree that census data — commonly used for comparisons in news coverage — should not be used as a benchmark to compare police stops by race. "It's free, easy and it's the lowest common denominator," says Geoffrey Alpert, a professor of criminal justice at the University of South Carolina in Columbia. "And it's not worth its weight in anything in major cities and complex environments."

Creating the right baseline — for example, for traffic studies — can be "very difficult," Alpert explains. "We know who they pull over, we know to whom they give tickets, we know how long they keep them, but the problem is we don't know who the average driver is," he says. Alpert oversaw a study in Florida's Miami-Dade County that found what he termed "adverse results" at two of the eight intersections covered.

"Benchmarks are notoriously inaccurate and unreliable," says Withrow, the Texas State University professor. As another methodological problem, he notes that it is unclear how often police know the race of a driver before making a stop.

In their studies, both Lamberth and Fagan dealt with the benchmark issue. Lamberth reasoned that virtually all drivers are so likely to be committing some traffic violation as to give police broad discretion in determining what cars to stop. In his report, Fagan said he found a racial disparity after controlling for crime, the concentration of police and local social conditions.

* Wilkins is currently a federal district court judge in Washington, D.C.; President Obama nominated him for the U.S. Court of Appeals for the District of Columbia Circuit, but the Senate on Nov. 18 blocked his confirmation by failing — on a 53-38 vote, short of the 60 votes required — to close debate on the nomination.

Alejandro del Carmen, chair of the Department of Criminology and Criminal Justice at the University of Texas at Arlington and a frequent instructor at police academies in Texas, says aggregate studies are useful but fail to identify individual officers who engage in racial profiling. Overall, he believes racial profiling exists but is exaggerated.

“Racial profiling as a whole doesn’t have the prevalence that the media would lead the public to believe, but it happens more often than the folks on the other spectrum say,” del Carmen says. “Racism continues to be a problem in the law enforcement community.”

Do aggressive stop-and-frisk tactics help reduce crime?

New York City police officers logged 97,296 stops in 2002, Bloomberg’s first year as mayor and Kelly’s first year as police commissioner. A decade later, in 2011, the number of stops peaked at 685,724 — a sevenfold increase. And all the while the city’s overall crime rate and individual rates for murder and other crimes were falling. The murder rate, for example, fell from 4.8 to 3.9 per 100,000 inhabitants — a decline in absolute numbers from 909 in 2002 to 769 in 2011, even as the city’s population rose.¹⁵

To Bloomberg and Kelly, the statistics prove the success of a law enforcement strategy that included increased police stops as a significant component. “There is just no question that Stop-Question-Frisk has saved countless lives,” Bloomberg said on the day of Scheindlin’s decision in the stop-and-frisk case. “And we know that most of the lives saved, based on the statistics, have been black and Hispanic young men.”¹⁶

Mac Donald, the Manhattan Institute fellow, agrees. She says stepped-up on-the-street enforcement has had “a remarkable effect,” contributing to a steep decline in the state’s total prison population. “Felony crime is so far down in New York City,” Mac Donald says, “because they are able to intervene in

suspicious behavior before it rises to the level of a felony crime.”

Overlooked in the claims is the fact that New York City’s crime rate began declining in the early 1990s — a decade before Bloomberg and Kelly took office. The number of murders per year, for example, peaked at 2,605 in 1990 and had declined by nearly two-thirds before Bloomberg took office. Moreover, the crime rate nationwide has been falling sharply since the 1990s. The FBI’s “Uniform Crime Reports” show that the murder rate has fallen by half

merous perspectives, most of which have nothing to do with police practices — for instance, the economy.”

“New York City is not the only city that has had a healthy drop in crime,” says Harris, the racial-profiling critic. “Other cities have done pretty well, and they have not made stop-and-frisk such an aggressive part of what they’re doing.”

Critics of the NYPD tactics also emphasize that the vast majority of stops resulted in no arrests or summonses. In its compilation, the New York Civil Liberties Union said the percentage of



Getty Images/Andrew Burton

New York City Mayor Michael Bloomberg, left, and Police Commissioner Raymond W. Kelly defend the city’s aggressive stop-and-frisk policy, which they say has helped keep the city’s crime rate down. They were responding to a blockbuster ruling on Aug. 12 by U.S. District Judge Shira Scheindlin that the policy violated the constitutional rights of minorities. An appeals court later removed Scheindlin from the case and put a temporary hold on her ruling, pending an appeal.

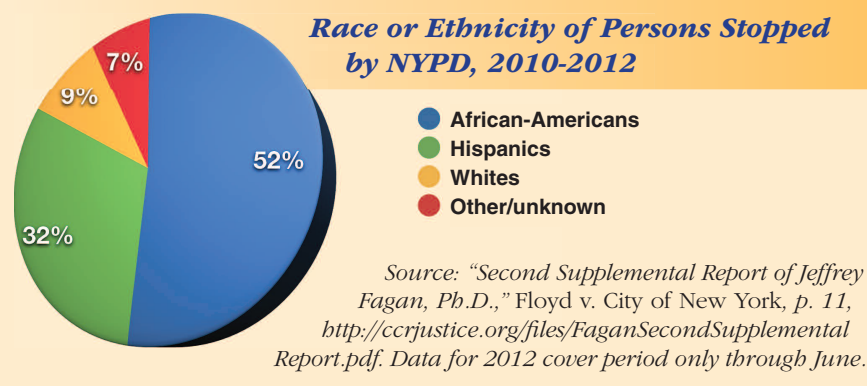
since 1993 — from 9.5 to 4.7 per 100,000 inhabitants.¹⁷

Criminologists generally play down the potential impact of specific police tactics on the overall crime rate. “I’m not certain that a specific program has that much of a benefit to the overall reduction of crime in New York City,” says del Carmen, the University of Texas professor. “Crime is affected by nu-

“completely innocent” persons who were stopped — meaning no arrest or summons ensued — had risen from 82 percent in 2002 to as high as 90 percent in 2006. An analysis of 150,000 stop-and-frisk arrests between 2009 and 2012 by the New York attorney general’s office shows that only half resulted in convictions and only one-fourth of the total resulted in any prison time.¹⁸

Blacks, Hispanics More Likely to Be Stopped

Of the approximately 1.6 million pedestrians stopped and questioned by New York City police officers during the period 2010-2012, more than half were African-American and nearly one in three were Hispanic. The statistics were compiled on behalf of the plaintiffs in the federal lawsuit *Floyd v. City of New York*.



The Supreme Court established guidelines for police stops in a 1968 decision, *Terry v. Ohio*.¹⁹ Under *Terry*, police can stop an individual if an officer has a "reasonable suspicion" the individual is committing or is about to commit a crime. Police can conduct a limited pat-down for weapons based on a "reasonable belief" that the individual may be armed and dangerous. In both cases, the officer's belief must be based on "specific and articulable facts," not an officer's hunch. "A focus on a person's race or ethnicity does not satisfy that standard," says Tracey Maclin, a law professor at Boston University who has written briefs on Fourth Amendment issues for the American Civil Liberties Union (ACLU).

In his report, Fagan estimated that 6 percent of the stops were unjustified under the *Terry* standard. The most frequent basis for stops listed in the officers' reports was "furtive movements." In her decision, Scheindlin said Fagan underestimated the number of unjustified stops.

Both South Carolina professor Alpert and former Texas state trooper Withrow say New York City officers ap-

pear to have gone too far. "They pushed the envelope too far as to what a *Terry* stop is supposed to do," Withrow says. Alpert sees evidence of unwarranted racial profiling. "It sure seems overwhelming that they stop people of color, and they don't get hits," he says.

Maclin and others also warn that over-enforcement alienates people in the community and reduces their willingness to cooperate with police. "You're going to scoop a lot of innocent people that you may need down the road to get information," Maclin says.

Shelton, with the NAACP, agrees. "They are misusing resources when they use them so blanketly," Shelton says. "You end up losing a lot of your effectiveness."

Mac Donald dismisses that concern. People in high-crime neighborhoods want more, not less, police presence, she says. "Police should be fighting crime," she says. "The most important thing is to bring safety to law-abiding residents of poor neighborhoods."

Should courts take a leading role in combating police racial and ethnic profiling?

When lawyer Robert Wilkins com-

plained of racial profiling after being stopped while driving with his family in western Maryland, he filed a civil suit against the state police, the first case in which evidence was presented that showed police were targeting African-Americans. In settling the suit in 1995, the state agreed to prohibit racial profiling, institute training to combat the practice and file racial data on stops with a federal magistrate to help monitor compliance.²⁰

Four years later, the New Jersey attorney general's office sought to deflect a U.S. Justice Department investigation of racial profiling by the state police with a package of similar reforms. Besides data collection, the new procedures also required a trooper to inform a dispatcher of the reason for a stop before interrogating any driver or passengers. The changes, still in place, were not enough, however, to forestall a Justice Department suit and eventual federal court settlement that included ongoing monitoring of the state police.²¹

In contrast to those cases, New York City officials have been fighting tooth-and-nail against the racial profiling allegations that are part of the broad attack on the NYPD's stop-and-frisk tactics. On the day of Scheindlin's decision, Mayor Bloomberg complained that the judge "wants to put the NYPD into receivership based on the flimsiest of evidence in a handful of cases. . . . No federal judge has ever imposed a monitor over a city's police department following a civil trial," Bloomberg said. Moreover, he noted, the Justice Department — under Presidents Clinton, George W. Bush and Obama — had "never, not once, found reason to investigate the NYPD."²²

Bloomberg's criticism understates the role played by the courts in combating racial profiling. The Justice Department suit against New Jersey was one of several brought during the Clinton administration and served as the template for more than half a

dozen suits or investigations initiated under President Obama.²³

Racial profiling critics say the courts' role in combating the practice is useful and necessary. "That's what courts are set out to do, to determine whether police are acting within constitutional bounds," says Dennis Parker, director of the ACLU's Racial Justice Program. Withrow and del Carmen — law professors who have studied and work with police on race-related issues — both agree. "Courts have the obligation and the moral and legal duty to intervene and to dissect, analyze and respond to concerns that the community may have with respect to racial profiling," says del Carmen, the University of Texas professor.

"In some cases it's necessary," says Withrow, the Texas State professor and former state trooper. "In New Jersey, they had had a massive consent decree for 10 years — quite onerous — but that department had gotten into the position where practices were ingrained to the very bowels of the department."

Mac Donald — who criticized the New Jersey settlement in her book *Are Cops Racist?* — also criticizes Scheindlin's decision in the New York City case. "A monitor is unnecessary," she says. "If the monitor adopts Scheindlin's methodology for racial profiling, it's going to signal the end of New York's record-breaking crime drop."

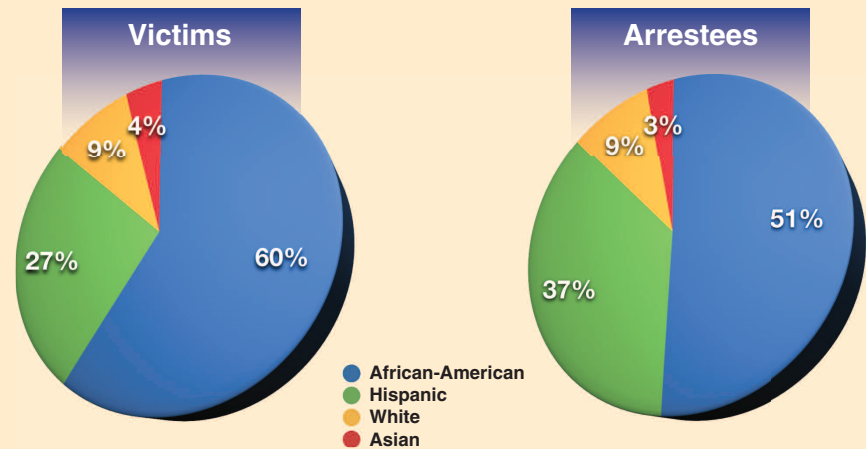
She also calls the appointment of a monitor a "tragic waste of resources" and sees body-worn video cameras as a waste. "I'm just not certain they would resolve the issues that are allegedly at stake here," she says of the cameras.

Even while supporting the courts' role on the issues, some racial profiling critics say remedies may be more effective if crafted by law enforcement agencies themselves. "Courts have an important role to play, but they cannot be the sole enforcer of constitutional obligations to avoid racial dis-

Most Victims, Arrestees Are Minorities

African-Americans and Hispanics were victims in nearly 90 percent of the murders or non-negligent manslaughters in New York City in 2012, according to the NYPD.

Murder Victims and Arrestees in New York City, by Race, Ethnicity, 2012



Source: "Crime and Enforcement Activity in New York, Jan. 1-Dec. 31, 2012," New York Police Department, www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2012_year_end_enforcement_report.pdf

crimination," says MALDEF president Saenz. "It's important to have administrative processes short of going to court," he says, including an adequate opportunity to file complaints.

Harris, the University of Pittsburgh professor, says police react negatively to court supervision. "It's perceived as a judge who knows nothing, who's never done anything on the street, telling a police department what to do," he says.

"What I would like to see is the change coming primarily from law enforcement itself, from mayors and city governments, from state legislatures," Harris continues. "They are best positioned to know what's going on on the ground around them. They are in the best position to make changes that are likely to be accepted in the departments affected. That's where reform would be best hatched. And many police departments do things like that." ■

BACKGROUND

A 'Difficult' History

The term "racial profiling" is of recent coinage, but bias-based policing in the United States dates as far back as the revolutionary era with the religious profiling of Quakers seen as disloyal to the cause of independence. African-Americans have been subject to racial profiling from the days of slavery through the so-called Jim Crow era and up to modern times. Mexicans and other Latinos have been singled out for rough treatment by law enforcement since the time of Texas' independence. And immigration laws dating from the late 19th century amounted to racial or ethnic profiling against, among others, Asians and southern

and eastern Europeans. “It’s a very difficult history,” says del Carmen, the University of Texas professor.²⁴

The Continental Congress ordered the arrest and imprisonment of dozens of Pennsylvania Quakers suspected of disloyalty to the revolutionary cause in August 1777, according to an account by Emory University law professor Morgan Cloud.²⁵ No evidence was offered, no hearings were held and some of those arrested were exiled to imprisonment in Virginia. The captives were released by April 1778, in part, Cloud says, because of objections to the procedures not only from their families but also from some political leaders.

African-Americans comprised around one-sixth of the country’s population in the pre-Civil War era, the vast majority of them held in slavery, mainly but not exclusively in the South. Those who escaped — “runaway” slaves, as they were called — could be captured by private slave hunters under the Fugitive Slave Act, a 1793 law (strengthened in 1850) that offered few procedural protections. Free blacks had no immunity from capture, as dramatized in the new movie “12 Years a Slave”; courts generally recognized a presumption that a black person was a slave.

The end of slavery merely transformed the legally and socially enforced profiling of African-Americans. The racial segregation laws of the Jim Crow era reflected the prevailing assumption that blacks were different from — and inferior to — whites. African-Americans suspected or accused of committing crimes could be subjected to abusive treatment by police or sheriffs’ officers and to patently unjust proceedings in court. Worse was the threat of racially profiled vigilante justice: More than 3,400 African-Americans were lynched from the 1880s to 1950, according to a compilation by the Tuskegee Institute, the historically black college in Tuskegee, Ala (renamed Tuskegee University in 1983).²⁶

Mexicans and Mexican-Americans

were also the victims of ethnic profiling from the time of Texas’ independence from Mexico and its subsequent annexation by the United States. The Texas Rangers, founded in 1845 and the nation’s first statewide police organization, was known, according to the University of Texas’ del Carmen, for “brutal acts against Comanche tribes and thousands of Mexicans.”²⁷ Mexican-Americans in Texas and the Southwest were subjected to the same kind of residential and educational segregation as African-Americans elsewhere. And in the 1930s as many as 2 million people of Mexican descent were forced or pressured to leave the United States.

Federal immigration laws dating from the late 19th century reflected ethnic profiling at the national level. The first of the laws, passed in 1875, barred entry to “undesirables,” who included Asians brought to the United States for forced labor or prostitution. Seven years later, the Chinese Exclusion Act prohibited all immigration of Chinese laborers. In the ensuing decades immigration officers enforced admission requirements, such as literacy tests, in ways that favored northern and western Europeans, del Carmen explains. The quota system enacted in the 1920s wrote those preferences into law.

The most notorious episode of ethnic profiling occurred during World War II with the internment of more than an estimated 110,000 persons of Japanese descent, most of them U.S. citizens. President Franklin D. Roosevelt authorized the internment in an executive order issued on Feb. 19, 1942, two-and-a-half months after Japan attacked Pearl Harbor, based on warnings from the military that the Japanese represented a national security threat. Today, those warnings are widely viewed as unfounded, the internment in ramshackle concentration camps in remote areas as shameful and the Supreme Court decision, *Korematsu v.*

United States (1944), upholding the action as disgraceful.

Still, the court’s decision in *Korematsu* established the principle that race-based restrictions in the law are “immediately suspect.” Courts “must subject [such restrictions] to the most rigid scrutiny,” Justice Hugo L. Black wrote for the 6-3 majority. “Pressing necessity may sometimes justify the existence of such restrictions,” he continued. “Racial antagonism never can.”²⁸ That principle laid the basis for courts, legislatures and law enforcement agencies later in the 20th century to give greater scrutiny to racial and ethnic profiling.

An ‘Indefensible’ Practice

Racial and ethnic profiling emerged as an important issue late in the 20th century because of a confluence of factors. The civil rights revolution embodied the demand of African-Americans for equal treatment under the law, including by police. The rapid increase in the Latino population, especially from the 1980s, prompted analogous demands from Latino advocacy groups to eliminate discriminatory treatment. And the criminal law revolution wrought by the Supreme Court under Chief Justice Earl Warren subjected local and state law enforcement to greater scrutiny to comply with constitutional norms. Meanwhile, public concern about crime and, in particular, about illegal drugs led police and law enforcement agencies to adopt tactics often disproportionately aimed at African-Americans and Latinos — sometimes consciously.²⁹

The Warren Court’s major criminal law decisions — such as the *Miranda* ruling on police interrogation guidelines — benefited white and minority suspects and defendants alike. Despite criticism for supposedly “handcuffing” police, the Warren Court also gave police an important tool in its 1968 *Terry* decision upholding — with only one

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Chronology

1960s-1970s

Civil rights movement targets racial inequality; Supreme Court forces changes in criminal justice systems.

1968

The National Advisory Commission on Civil Disorders (Kerner Commission), charged with examining the causes of urban riots, urges more sensitive, diverse police forces (Feb. 29). . . . Supreme Court approves limited “stop-and-frisk” authority (*Terry v. Ohio*, June 10).

1970s

FBI develops “profiles” of airplane hijackers, serial killers.

1975, 1976

Supreme Court limits use of race or ethnicity in roving Border Patrol stops but allows it at border checkpoints.

1980s-1990s

Racial profiling emerges as issue.

1989

Supreme Court approves use of drug courier profiles (April 3).

1995

Maryland State Police agree to prohibit stops based on racial drug courier profiles (Jan. 4).

1996

Supreme Court allows traffic stops even if real purpose is drug enforcement (June 10).

1999

N.Y. police officers kill Amadou Diallo, Guinean immigrant, (Feb. 4), triggering widespread protests, racial profiling suit; officers prosecuted,

acquitted. . . . N.J. attorney general finds racial profiling by state troopers despite official policies prohibiting it (April 20); Justice Department appoints monitor. . . . President Bill Clinton orders law enforcement agencies to compile race, ethnicity data to guard against profiling (June 10). . . . New York attorney general finds New York City police guilty of racial profiling (Dec. 1).

2000-Present

Racial profiling litigation increases; states pass laws addressing issue.

2001

President George W. Bush promises to help end racial profiling (Feb. 27). . . . Al Qaeda hijackers attack United States (Sept. 11); Muslims, Arabs rounded up in immigration sweeps, singled out in airport security checks, face widespread public suspicion.

2003

Bush administration bans racial, ethnic profiling in all federal law enforcement agencies, but allows exception for national security-related investigations (June 17). . . . New York City settles racial profiling suit (*Daniels v. City of New York*) (Sept. 18); settlement approved by District Judge Shira Scheindlin (Dec. 12).

2008

Center for Constitutional Rights files new stop-and-frisk suit against New York Police Department (NYPD) (*Floyd v. City of New York*), claiming violations of 2003 settlement in the *Daniels* case (Jan. 31); new suit is assigned to Scheindlin as “related” case.

2009

Obama becomes first African-American president (Jan. 20); Eric Holder becomes first black attorney general. . . . African-American studies scholar Henry Louis Gates Jr. arrested at his home in Cambridge, Mass., by white police officer (July 16); Obama later hosts “beer summit” between Gates and the arresting officer to soothe feelings.

2012

White community-watch volunteer George Zimmerman kills unarmed black teenager Trayvon Martin in Sanford, Fla., touching off a nationwide debate on racial profiling (Feb. 26); Zimmerman, charged with second-degree murder, is later acquitted. . . . Muslim plaintiffs file federal suit to halt NYPD surveillance of mosques, Muslim neighborhoods (June 6); case, with two others, still pending. . . . Federal judge dismisses FBI suit over informant’s surveillance of mosques in Southern California (Aug. 14).

2013

Federal judge finds Maricopa County Sheriff Joe Arpaio guilty of ethnic profiling of Latinos (May 24); orders appointment of monitor, other steps. . . . Scheindlin finds NYPD guilty of racial profiling, Fourth Amendment violations in stop-and-frisk policies; orders appointment of monitor, test of body-worn cameras (Aug. 12). . . . Federal appeals panel stays Scheindlin’s order; removes her from case (Oct. 31). . . . Bill de Blasio, who opposes stop-and-frisk policies, elected New York City mayor (Nov. 5).

2014

De Blasio to become New York City mayor (Jan. 1); new police commissioner expected; changes in stop-and-frisk policies expected.

Profiling Seen in ‘Shopping While Black’ Incidents

“It’s disappointing that it still happens today.”

Trayon Christian was excited after getting a paycheck from his work-study job on April 29, because he could finally afford the expensive designer belt he had his eye on at Barneys, the upscale Manhattan department store.

Christian, 19, a student at New York City College of Technology, paid for the \$349 Ferragamo belt with a debit card and left the store headed down Madison Avenue. Less than a block later, however, two undercover New York City police detectives stopped Christian and, according to a later lawsuit, questioned the purchase, handcuffed him and took him to the nearby station house.

Christian, who is African-American, was released without charges. But six months later he filed a civil rights suit against Barneys and the city, claiming he was in effect stopped for “shopping while black.” News of the suit, first reported by the *Daily News* on Oct. 23, apparently struck a chord. Within a week, three more black New Yorkers emerged with allegations of having been racially profiled as possible credit-card scammers while shopping at New York City stores.¹

“You still have undercover officers out there judging people on the basis of what they look like,” says Kenneth Meeks, a producer at Black Enterprise Broadcast Media and author of the book *Driving While Black*, published in 2000. “It’s disappointing that it still happens today, but I can’t say I’m surprised.”²

Barneys, confronted with a similar accusation from a 21-year-old black nursing student over her purchase of a \$2,500 handbag in February, is denying any wrongdoing and blaming the undercover police officers for selecting shoppers to investigate. After the news of Christian’s lawsuit, Barneys declared in a statement on Facebook that no employee was involved in pursuing any action against the teenager. In the second incident, a Barneys executive called the student’s mother with a similar disclaimer of responsibility.³

“Barneys New York has zero tolerance for any form of discrimination, and we stand by our long history in support of all human rights,” the company said in the Facebook statement.

Kayla Phillips, the woman in the second incident at Barneys,

is planning to sue the company, according to her attorney. The actor Rob Brown, one of those who accused Macy’s of racial profiling in a mistaken arrest at the store in June, filed a class action suit against the company in federal district court in Manhattan on Nov. 13. Macy’s declined to comment directly on the suit, but said in a statement: “We do not tolerate discrimination of any kind, including racial profiling.”⁴

Brown filed a separate class action against the NYPD for its part in the arrest even though police apologized for the mistake afterward.

Despite the denials, the New York attorney general’s office initiated an investigation of the two incidents with a letter sent to Barneys on Oct. 28. The office sent a similar letter to Macy’s, the huge New York City department store, after two black shoppers had emerged with similar accounts of alleged profiling. “The alleged repeated behavior of your employees raises troubling questions,” wrote Kristen Clarke, head of the attorney general’s Civil Rights Bureau.⁵

New York police sources confirmed to the *Daily News* that the NYPD stations undercover officers at Barneys and other stores to try to nab credit card fraud perpetrators. Police have gotten 53 grand larceny complaints this year for credit card fraud at Barneys’ Madison Avenue store and have made more than 47 arrests, the department said. It did not provide a racial breakdown of those arrested.

In a subsequent story, *The New York Times* reported that Barneys’ security management team had responded “several months ago” to an increase in shoplifting and credit card fraud by instructing store personnel to “take chances” in spotting suspicious customers even at the risk of intercepting innocent people.⁶

The New York City episodes surfaced only two months after Oprah Winfrey, the television mogul and one of the world’s richest women, encountered a kind of racial profiling herself while trying to purchase a \$38,000 handbag in a high-end women’s store in Zurich, Switzerland. The store clerk declined to show Winfrey the handbag she wanted and suggested a less expensive one instead.⁷

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dissenting vote — the stop-and-frisk procedure. The court noted complaints of “harassment” by African-Americans, however, in stressing the need to limit the procedure to “the legitimate investigative sphere.” Meanwhile, the so-called Kerner Commission, appointed by President Lyndon B. Johnson in response to urban riots of the mid-’60s, had issued a comprehensive report in

1968 recommending, among other steps, the hiring of more diverse and more sensitive police forces.³⁰

The Supreme Court’s initial encounter with the profiling issue came in a pair of immigration-related cases in the mid-1970s. In the first, the court in 1975 ruled that a roving Border Patrol car could not stop a vehicle solely because the driver or passengers appeared to be of Mexican ancestry. Appearance

was a “relevant factor,” Justice Lewis F. Powell Jr. wrote, but not enough to “justify stopping all Mexican-Americans to ask if they are aliens.” A year later, however, the court ruled that agents at a border checkpoint could select motorists for secondary inspection based solely on apparent Mexican ancestry.³¹

The formal art of “profiling” began in the 1970s, as police and the FBI tried to identify characteristics to spot

Racial profiling is a fact of life for African-Americans in any number of public settings, according to Meeks, notably when trying to hail a cab. "I've seen it dozens of times in the past year," Meeks says. "The driver will pass the black person and take the white person instead."

President Obama himself has spoken about his own experiences of being followed while in department stores, hearing car doors lock as he passed by parked vehicles on the street or having women clutch their purses tightly when sharing an elevator. "That happens to me, at least before I was a senator," Obama said in unscheduled remarks on July 19 following the acquittal of white community volunteer George Zimmerman in the February 2012 shooting death of black teenager Trayvon Martin.⁸

The apparent profiling of black shoppers affects who gets arrested for retail theft, according to one expert, but the underlying assumption that blacks account for most store thefts is unsubstantiated. Jerome Williams, a business professor at Rutgers University who has studied marketplace discrimination, told The Associated Press that white women in their 40s engage in more shoplifting than other demographic groups. "The reason they don't show up in crime statistics is because people aren't watching them," Williams was quoted as saying.⁹

Meeks, who has three teenage children, says he wrote his book to show how to fight back against racial profiling. "You have to make a stand, so the person who profiles you thinks twice before doing it to the next person," he says. But he also warns his children to expect it to happen to them.

"They are very much aware of the ways that society looks on them," Meeks says. "They are black, and they will be profiled at some point in their lives."

— **Kenneth Jost**

¹ Kerry Burke, Mark Morales, Barbara Ross and Ginger Adams Otis, "How could YOU afford a belt like THIS?" *Daily News* (New York), Oct. 23, 2013, p. 5. For an overview, see Jesse Washington, "Barneys case stirs talk of 'Shopping While Black,'" The Associated Press, Oct. 29, 2013.



Getty Images/NY Daily News/Pearl Gabel

New York City college student Trayon Christian, 19, filed a civil rights suit against Barneys after he was stopped, handcuffed and taken to a police station after buying a \$349 belt at the upscale department store. He was released without charges.

² Kenneth Meeks, *Driving While Black: Highways, Shopping Malls, Taxicabs, Sidewalks. What to Do if You Are a Victim of Racial Profiling* (2000).

³ Tina Moore and Ginger Adams Otis, "Bagged by 'Racism,'" *Daily News*, Oct. 24, 2013, p. 5.

⁴ "Macy's slapped with federal class action lawsuit over racial-profiling shopping case," WPIX-11, Nov. 14, 2013, <http://pix11.com/2013/11/13/macys-slapped-with-federal-class-action-lawsuit-over-racial-profiling-shopping-case/#axzz2116fMjzE>.

⁵ See Kenneth Lovett, "New York attorney general targeting Barneys, Macy's over racial profiling claims," *Daily News* (New York), Oct. 29, 2013.

⁶ J. David Goodman, "Profiling Complaints by Black Shoppers Followed Changes to Stores' Security Policies," *The New York Times*, Oct. 30, 2013, p. A24.

⁷ See Christine Hauser, "Oprah Winfrey and the Purse She Couldn't Have," *The Lede* (New York Times blog), Aug. 9, 2013, <http://thelede.blogs.nytimes.com/2013/08/09/oprah-winfrey-and-the-handbag-she-couldnt-have/>; Tim Newcomb, "A Lot of People 'Sorry' About Oprah Winfrey Purse Incident," *Time*, Aug. 13, 2013, <http://entertainment.time.com/2013/08/13/a-lot-of-people-sorry-about-oprah-winfrey-purse-incident/>.

⁸ For transcript, see "Obama Recalls Getting Followed, People Locking Doors On Him — In other Words, Being A Black Man In America," *The Huffington Post*, July 19, 2013, www.huffingtonpost.com/2013/07/19/obama-racial-profiling_n_3624881.html.

⁹ Washington, *op. cit.*

in potential serial killers or airline hijackers. From those rare offenses, the practice expanded to the so-called war on drugs with the federal Drug Enforcement Administration's (DEA) development of a drug courier profile in the 1980s. The DEA never published the profile, but evidence in some cases showed that profiles sometimes specifically referred to African-Americans or Hispanics. In any event, the open-

ended characteristics gave agents broad discretion in selecting individuals to stop. The Supreme Court green-lighted the use of such profiles in a 1989 decision stemming from the search of a deplaning passenger at the Honolulu airport. By a 7-2 vote, the court found the combination of six listed factors justified the stop and search; the dissenters countered that none of the factors specifically pointed to criminal activity.³²

Through the 1990s, evidence mounted that African-Americans were far and away the majority of motorists stopped in drug-related enforcement. Wilkins' suit in Maryland was the first to uncover hard evidence of targeting of African-Americans, as recounted by Harris, the University of Pittsburgh professor. A state police "Criminal Intelligence Report," disclosed during the suit and dated only days before Wilkins was

Muslims Challenge ‘Religious Profiling’

“We should not be singled out simply because of religion.”

Sarah Abdurrahman was in a festive mood as she returned to the United States with friends and family earlier this year after attending a friend’s wedding in Canada.

But the good feelings died at the border as she and her traveling party, all U.S. citizens and all Muslims, suffered what the radio journalist later described as a painful and humiliating six-hour ordeal at the hands of U.S. Customs and Border Patrol (CPB) agents.

Abdurrahman, an assistant producer with the NPR program “On the Media,” said the agents detained the traveling party without explanation, refused to identify themselves and questioned at least one of the travelers, Abdurrahman’s husband, about his religious practices. She described the experience — and her fruitless efforts to get an explanation afterward — in a 20-minute report on the program on Sept. 20.¹

The episode typifies the seeming religious profiling that advocates for the United States’ 6 million Muslims say has been common since al Qaeda’s September 2001 attacks on the United States. Because of terrorism-inspired scrutiny at the federal, state and local levels, many Muslims today worry that they may be monitored, interrogated, detained or even arrested for no reason other than religion, according to officials with the San Francisco group Muslim Advocates.

“We’re not saying mosques or Muslims should be off limits,” explains Glenn Katon, the group’s legal director. “It’s that mosques should not be singled out, Muslims should not be singled out simply because of religion.”

The complaints extend beyond individual anecdotes such as Abdurrahman’s. Muslims are currently challenging in court broad surveillance programs maintained by the New York Police Department (NYPD) and by the FBI in Southern California. Both law enforcement agencies are accused of infringing religious liberties by infiltrating mosques without adequate justification. But so far none of the law enforcement practices has been ruled improper.

In California, Craig Monteilh posed as a Muslim convert under an assumed name for more than a year as a paid FBI informant, using audio and video recording devices to gather information. The American Civil Liberties Union (ACLU) of Southern California and the Council on American-Islamic Relations (CAIR) filed a civil rights suit against the FBI on behalf of Muslim community members in Orange County in regard to Monteilh’s acknowledged infiltration of approximately 10 Southern California mosques. The government claimed the “state secrets” privilege in refusing to disclose details of Monteilh’s surveillance in so-called Operation Flex. In August 2012, U.S. District Judge Cormac Carney dismissed the government as a defendant but allowed the suits against individual FBI agents and officials to proceed. ACLU lawyers appealed the decision.²

In New York, the NYPD is facing three separate suits challenging its surveillance of mosques and Muslims as Fourth Amendment violations both in New York and across the state line in New Jersey. Lawyers for the New York-based Center for Constitutional Rights and the Muslim Advocates filed the first of the suits in federal district court in New Jersey in June 2012;

stopped, included an explicit profile targeting African-Americans.

The data gathering that resulted from the settlement of Wilkins’ suit showed that 72 percent of those stopped in Maryland were African-Americans. The litigation and newspaper investigations in New Jersey produced similar evidence that the vast majority of motorists stopped on the state’s turnpikes were African-Americans.

Despite such evidence, the Supreme Court declined in 1996 to question the use of traffic stops as a pretext for drug enforcement. The decisions stemmed from the convictions of two African-Americans who had been found with drugs after police officers patrolling a “high-drug” area in Washington, D.C., stopped them ostensibly because of a

taillight violation. Unanimously, the court said the officers’ “ulterior motives” did not matter as long as they had probable cause for the stop.³³

President Bill Clinton cited the evidence of racial profiling in traffic stops, however, when he ordered federal law enforcement agencies in June 1999 to begin collecting data on the race or ethnicity of individuals they question, search or arrest.³⁴ The Justice Department was to use the data to determine whether federal officers were engaging in racial profiling and, if so, what should be done to stop the practice. Clinton said he hoped state and local law enforcement agencies would adopt similar steps to try to eliminate what he called a “morally indefensible” practice. Racial

profiling, he said, “is wrong, it is destructive and it must stop.”

‘Deliberate Indifference?’

The issue of racial and ethnic profiling gained new importance after the Sept. 11 terrorist attacks on the United States in 2001 as Muslims and people of Arab or South Asian background came under heightened attention — and suspicion — from law enforcement and the general public. Meanwhile, critics of racial profiling of African-Americans and Latinos continued efforts in court and legislative bodies to combat the practice and drew important support from the Obama administration’s stepped-up

the ACLU, along with the New York Civil Liberties Union (NYCLU) and a police accountability project at the City University of New York Law School, filed a comparable suit in federal district court in Brooklyn in June.³

In a third case, lawyers from the NYCLU are charging the police with violating their own court-approved guidelines for initiating surveillance of political or religious organizations. The guidelines date back to a court-approved settlement of anti-spying litigation in the 1970s, but the NYPD got the rules eased in 2003 after claiming they hampered counterterrorism work.⁴

Separately, the ACLU has sued the FBI under the Freedom of Information Act to try to obtain the agency's guidelines for counterterrorism investigations. In a ruling on Oct. 23, the federal appeals court in Philadelphia upheld the FBI's decision to limit disclosure of the requested documents because it would reveal investigative techniques.⁵

Abdurrahman was also stymied in her efforts to determine why her traveling party was detained when they re-entered the United States earlier this year. On the radio program, Abdurrahman said she filed a complaint about the incident with the Department of Homeland Security's Office of Civil Rights and Civil Liberties. The office rejected the complaint, she said, but the reasons for upholding the agents' actions were redacted in the notice of the decision.

The program quoted Munia Jabbar, an attorney with CAIR, that Muslims are often asked "really invasive" questions about religious practices when re-entering the United States. She says the ques-

tioning, as Abdurrahman's husband described, is improper. "You're singling people out because of their religion and then subjecting them to longer detentions and to humiliating questioning about stuff that they're allowed to do legally," she says.

Abdurrahman says the episode left her shaken. "I came out of the experience wondering what our rights are," she said.

— Kenneth Jost

¹ See "My Detainment Story: Or How I learned to Stop Feeling Safe in My Own Country and Hate the Border Agents," NPR, Sept. 20, 2013, www.wnyc.org/radio/#/ondemand/319368. For print coverage, see Harrison Jacobs, "American Muslim Reporter Describes 'Dehumanizing' Treatment at US Border," *Business Insider*, www.businessinsider.com/sarah-aburrahman-detained-at-us-border-2013-9.

² The case is *Fazaga v. FBI*. For background and materials, see the ACLU of Southern California's website: www.aclusocal.org/fazaga/. For news coverage, see Victoria Kim, "Spying suit against FBI is rejected," *Los Angeles Times*, Aug. 15, 2012, p. A1.

³ The cases are *Hassan v. City of New York*, www.ccrjustice.org/hassan, and *Raza v. City of New York*, www.aclu.org/national-security/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program filed in June 2013. For coverage, see Chuck McCutcheon, "U.S. Muslims Seek to End Surveillance," in "Government Surveillance," *CQ Researcher*, Aug. 30, 2013, pp. 730-731. See also Matt Apuzzo and Adam Goldman, *Enemies Within: Inside the NYPD's Secret Spying Unit and Bin Laden's Final Plot Against America* (2013).

⁴ The case is *Handschu v. Special Services Division*, www.nyclu.org/case/handschu-v-special-services-division-challenging-nypd-surveillance-practices-targeting-politica.

⁵ *ACLU v. FBI*, 12-4345 (3d Cir., Oct. 23, 2013), www2.ca3.uscourts.gov/opinarch/124345p.pdf; for coverage, see Jason Grant, "ACLU denied access to FBI files on profiling," *The Star-Ledger* (Newark, N.J.), Oct. 24, 2013, p. 11.

scrutiny of local police forces. And two incidents made racial profiling issues front-page news: the arrest of the prominent African-American scholar Henry Louis Gates Jr. at the door of his Cambridge, Mass., home in 2009 and the killing of Trayvon Martin, an unarmed black teenager, by a white community-watch volunteer in a gated community in Florida in 2012.

Just one month after taking office, President George W. Bush followed Clinton's example by promising in his State of the Union address on Feb. 27, 2001, that his administration would work to end racial profiling. Attorney General John Ashcroft echoed Bush's promise, describing the practice as "unconstitutional."³⁵ After 9/11, however, the government evidently focused at-

tention on Muslims, Arab nationals and Arab-Americans in investigating possible links to al Qaeda — the group responsible for the Sept. 11 attacks — within the United States. Immigration authorities rounded up hundreds of Middle Easterners.

Despite official denials, airport screeners appeared to be giving special attention to Muslims and Arabs; and some prominent commentators — including the Manhattan Institute's Mac Donald — forthrightly defended profiling as common-sense law enforcement.³⁶ When the Bush administration issued racial profiling guidelines in June 2003, it included an exception for national security-related investigations.³⁷ A decade later, Arab-American and Muslim groups continue to com-

plain of heightened and unwarranted scrutiny from law enforcement — including a controversial special counterterrorism unit within the NYPD.

The New York City force had come under intense scrutiny for alleged racial profiling beginning in February 1999 with the shooting death of a Guinean immigrant, Amadou Diallo, at his front door in an ethnically diverse Bronx neighborhood. Plainclothes officers in the department's Street Crime Unit thought Diallo matched the description of a suspected rapist; when Diallo reached for his wallet as identification, the officers mistook it as a weapon and fired 41 rounds, killing him. The incident sparked raucous demonstrations and an unsuccessful prosecution of the four officers in a

trial moved to Albany, N.Y., because of pretrial publicity.

The episode also led to a lawsuit by the Center for Constitutional Rights, accusing the NYPD of racial profiling and unlawful stop-and-frisk practices. The suit cited, among other evidence, a report by the New York attorney general's office that showed Street Crime Unit officers stopped 16 African-Americans for every arrest made. After lengthy discovery, the city disbanded the Street Crime Unit and, in September 2003, agreed to settle the suit — called *Daniels v. City of New York* — by promising to institute policies aimed at eliminating racial profiling. District Judge Scheindlin approved the settlement in December.³⁸

Obama's election as the nation's first African-American president five years later was seen by some as marking a new era in race relations, but the Gates episode only six months after Obama's inauguration underlined the continuing points of contention between law enforcement and black Americans. Gates was charged with disorderly conduct on July 16, 2009, after a white Cambridge, Mass., police officer mistook him for a possible burglar. The charges were later dropped, and Obama hosted Gates and the officer for a so-called beer summit at the White House on July 30 to smooth things over.³⁹

The killing of Martin by the white community-watch volunteer, George Zimmerman, on Feb. 26, 2012, touched off a more protracted nationwide debate over possible racial profiling. Zimmerman, concerned about a rash of home burglaries in the largely white gated community in Sanford, Fla., tailed Martin as the unarmed teenager was returning to his father's home and fatally wounded him during a scuffle.

Zimmerman was charged with second-degree murder and acquitted on July 13, 2013, under Florida's controversial so-called Stand Your Ground law, which eases rules for self-defense in criminal trials. The verdict prompt-

ed widespread protests by African-Americans.⁴⁰

Meanwhile, NYPD's stop-and-frisk litigation had resumed in 2008, after the Center for Constitutional Rights accused the city of failing to comply with the 2003 settlement. Judge Scheindlin assumed jurisdiction over the new case, *Floyd*, since it was related to the *Daniels* case that she had previously tried. The assignment would underlie later complaints of bias by the city and others, including the Manhattan Institute's Mac Donald, and the appeals court's subsequent decision to order the case reassigned. The trial in the new case began on March 18 and closed two months later on May 20 after sharp arguments over the implications of opposing statistical studies and testimony from police officials.

Scheindlin issued her ruling on Aug. 12. Out of the 4.4 million stops logged by police, Scheindlin found that at least 200,000 — about 5 percent — were unconstitutional, and that the actual figure was probably higher. She went on to find that blacks and Hispanics were more likely to be stopped than whites after controlling for other variables, that blacks were more likely to be arrested and that blacks and Hispanics were more likely to be subjected to use of force. In all, Scheindlin concluded the data showed “deliberate indifference” on the city's part toward constitutional rights — a necessary finding to establish liability under federal civil rights law. Bloomberg vowed to appeal. ■

CURRENT SITUATION

Patterns and Practices

Police and sheriffs' departments around the country are dealing with questions of racial profiling under pres-

sure from civil liberties and minority rights groups, community organizations, the Justice Department and federal courts.

Apart from New York City, the biggest pending controversy appears to be in Maricopa County, Ariz., where Arpaio — who styles himself as the nation's toughest sheriff — is planning to appeal a federal judge's order to place the department under a court-appointed monitor for at least four years. In other cities, including Philadelphia, New Orleans and Seattle, police departments have agreed to changes aimed at eliminating racial profiling but continue to face questions about compliance.

Despite the controversies, police organizations insist that the accusations of widespread racial profiling are unsubstantiated. “Most police departments base their stops on reasonable suspicion or probable cause, not on the basis of their race,” says Darrel Stephens, executive director of the Major Cities Chiefs Association and former police chief in several metropolitan areas, including most recently Charlotte-Mecklenburg County, N.C.

Civil liberties and minority rights groups disagree. Racial profiling is “happening in states all across the country,” says the ACLU's Parker. “The indications are that it's prevalent.”

The sweeping order in Maricopa County comes in a case, *Ortega Melendres v. Arpaio*, that accuses Arpaio of a pattern and practice of targeting Latino drivers and passengers for traffic stops, investigations and arrests. The suit was filed in 2007 on behalf of Manuel Ortega Melendres, a Mexican national residing legally in the United States, who was questioned and held for several hours after the car in which he was riding was stopped supposedly for speeding. The white driver was not ticketed, but Melendres was held until U.S. authorities verified his immigration status.

The suit was later broadened into a class action and litigated by private attorneys and lawyers from the ACLU of Arizona, the ACLU's national Immigrants

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At Issue:

Is racial profiling by police a serious problem in the United States?



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WRITTEN FOR *CQ RESEARCHER*, NOVEMBER 2013

in their 2009 report, “The Persistence of Racial and Ethnic Profiling: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination,” the American Civil Liberties Union and the Rights Working Group concluded that despite “overwhelming evidence of its existence, often supported by official data, racial profiling continues to be a prevalent and egregious form of discrimination in the United States.”

Time has not altered that conclusion. Numerous studies, data collection and individual anecdotes confirm that law enforcement agents continue to rely on race, color or national or ethnic origin as a basis for subjecting people to criminal investigations.

The cost of this reliance on race or ethnicity as a supposed indicator of likely criminal activity is high for individuals and society. Examples of the practice abound. After analyzing hundreds of thousands of police stops, a federal judge concluded that African-Americans and Latinos in New York City were far more likely than whites to be stopped by police when there was no reasonable suspicion of criminal activity and were less likely than whites to be found in possession of illegal items. Meanwhile, a federal court in Arizona found the Maricopa County Sheriff’s Office relied on ethnicity in enforcing immigration laws in a way that was clearly unconstitutional. In both cases, the courts were so concerned about future violations that they ordered the use of impartial monitors to track compliance with remedies intended to stop the illegal practices.

Reliance on racial profiling is not limited to local law enforcement. Six states have adopted immigration enforcement laws that invite the profiling of Latinos. The federal government routinely relies on programs and practices that delegate immigration enforcement authority to state and local agencies, resulting in the unfair targeting of Latino, Arab, South Asian and Muslim people in the name of immigration control and national security.

Despite overwhelming evidence that racial profiling persists, the End Racial Profiling Act continues to languish in Congress. Until appropriate action is taken to address discriminatory profiling, people will continue to be subjected to the humiliation of repeated, unwarranted and intrusive stops and investigations, depriving them of their individual rights and undermining support for our criminal justice system.

The idea of basing law enforcement on actions rather than on race, ethnicity or religion is long overdue.



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WRITTEN FOR *CQ RESEARCHER*, NOVEMBER 2013

there is no credible evidence that racial profiling is a serious problem among police forces. Studies that purport to show the contrary inevitably assume that police activity should match population ratios, rather than crime ratios. But urban policing today is driven by crime data: Officers are deployed to where city residents are most victimized by violence. Given the racial disparities in crime commission, the police cannot provide protection to neighborhoods that most need it without generating racially disproportionate enforcement numbers.

In New York City, for example, the per capita shooting rate in predominantly black Brownsville, Brooklyn, is 81 times higher than in Bay Ridge, Brooklyn, which is largely white and Asian. That disparity reflects Brownsville’s gang saturation, which affects policing in myriad ways. Police presence will be much higher in gang-infested neighborhoods, and officers deployed there will try to disrupt gang activity with all available lawful tools, including the stopping and questioning of individuals suspected of criminal activity. Each shooting will trigger an intense police response, as officers seek to avert a retaliatory gang hit. Given the difference in shooting rates, it is no surprise that Brownsville’s per capita police stop rate is 15 times higher than Bay Ridge’s. If it were not, the police would not be targeting their resources equitably, according to need. Yet some advocates cite such stop disparities as prima facie proof of profiling.

Community requests for protection are the other determinant of police tactics. Last fall, I spoke with an elderly cancer amputee in the South Bronx. She was terrified to go down to her lobby to get her mail because of the youths hanging out there, smoking marijuana. Only when the police had been by to conduct trespass stops would she venture out: “When you see the police, everything’s A-OK,” she said. Police cannot respond to such requests for public order without producing racially disparate enforcement data that can be used against them in the next racial profiling lawsuit.

Young, black males are murdered at 10 times the rate of whites and Hispanics combined, usually killed by other minority males. The New York Police Department has brought the homicide victimization rate among the city’s minorities down nearly 80 percent, yet young, black men are still 36 times more likely to be murdered than young, white males. Proactive policing is the best protection poor, minority neighborhoods have against violence and fear.

Continued from p. 1020

Rights Projects and MALDEF. After presiding over a four-week trial in July 2012, District Judge Snow, a Republican appointee, issued a 142-page decision on liability on May 24, finding the sheriff's office guilty of Fourth Amendment violations for making suspicionless stops and of equal protection violations for targeting Latinos on the basis of their ancestry.⁴¹ Snow followed with an Oct. 2 order requiring installation of cameras in all deputies' cars, increased data collection and reporting and creation of a community advisory board. To ensure compliance with the order, Snow is to appoint a monitor. The order is to stay in effect for at least three years after full compliance is shown.

In other cities, the Philadelphia Police Department remains under a 2011 consent decree negotiated with ACLU lawyers that requires data collection on stop-and-frisk incidents and analysis of the data by an independent court-appointed monitor. The most recent report, issued in March, found that the number of stops had decreased, but that 45 percent of the stops were unjustified; African-Americans and Hispanics were the subjects of 76 percent of the stops and 85 percent of the frisks.⁴²

Court-supervised consent decrees in New Orleans and Seattle stem from reports issued by the Justice Department's Civil Rights Division in 2011, which criticized both departments on use-of-force policies and "bias-based" policing — including, in the case of New Orleans, directed at lesbian, gay, bisexual or transgender persons. In Seattle, a survey released in September and commissioned by the court-appointed monitor, attorney Merrick Bobb, found that nearly two-thirds of Seattle residents believe police routinely discriminate against people of color.⁴³ In New Orleans, the police department has hired a new deputy superintendent to oversee implementation of the federal court decree, but the court has yet to appoint the independent monitor to check on compliance.⁴⁴

Meanwhile, Congress is being urged to strengthen federal efforts to combat racial profiling by passing legislation introduced in the wake of Zimmerman's acquittal in the Trayvon Martin killing. The End Racial Profiling Act, introduced by Democrats Sen. Ben Cardin of Maryland and Rep. John Conyers of Michigan, would prohibit racial profiling by federal or federally funded state law enforcement agencies. It would also authorize civil suits by the United States or any individual injured by racial profiling for a declaratory judgment or injunction, but not damages.⁴⁵

No hearings are scheduled on the racial profiling bills. But the Senate Judiciary Committee did hear from Trayvon Martin's mother, Sybrina Fulton, in an Oct. 29 hearing on Stand Your Ground laws. Florida is one of 22 states with such laws, which generally eliminate the duty to retreat from an attacker threatening serious bodily harm or death. Fulton told the panel that the law "did not work" in her son's case, but other witnesses said there was no reason for Congress to act.

"This is about the right of everyone to protect themselves and protect their families," said Sen. Ted Cruz, R-Texas.⁴⁶

NYPD Changes?

The fate of New York City's stop-and-frisk case is up in the air after the landslide election on Nov. 5 of a new mayor who opposed the NYPD policies while campaigning and promised, if elected, to drop the appeal in the case.

As the city's public advocate, mayor-elect de Blasio had sided with the plaintiffs in the *Floyd* case, criticized the Bloomberg-Kelly stop-and-frisk policies and promised if elected to withdraw the city's appeal of Judge Scheindlin's order.

De Blasio, who will take office on Jan. 1, did not repeat that promise in the immediate aftermath of his election. Instead, he stressed on election night that public safety and respect for civil

liberties are both important for the city. In a press conference the next day, de Blasio said only that he plans to decide on a new police commissioner soon.

Among several possibilities mentioned as new commissioner, William Bratton, a former chief in New York City and Los Angeles, is drawing the most attention. Bratton headed the LAPD from 2002 to 2009 after having served as head of the New York City Transit Police for four years and as New York City police commissioner from 1994 to 1996. Currently working as a security consultant, Bratton is known to want his old job back.

De Blasio's campaign website praised Bratton for having reduced crime in Los Angeles without the "unconstitutional" use of stop-and-frisk. De Blasio was reported to have met with Bratton several times during the campaign. Others mentioned as possible appointees include Philip Banks III, an African-American who is the NYPD's top department chief, and Joseph Dunne, leader of the Port Authority Police Department.⁴⁷

Despite de Blasio's vow to drop the city's appeal in the *Floyd* case once in office, the future of the case is dividing interest groups. City Councilman Jumaane Wilson, a Democrat from Brooklyn, led a rally at City Hall the day after the election, urging the Bloomberg administration to drop the appeal. The next day, however, unions representing 29,000 of New York's 35,000 officers filed papers with the Second U.S. Circuit Court of Appeals asking to keep the appeal alive even if the city drops it. The union argues that Scheindlin's order unfairly taints the integrity of the force and changes operational rules for officers.

Meanwhile, Scheindlin remains removed from the case after the three-judge appellate panel reaffirmed its Oct. 31 order that it be reassigned randomly to another district court judge. The unexpected decision, issued just two days after hearing the city's request for a stay, said Scheindlin "ran afoul" of the Code of Judicial Conduct by guiding plaintiffs' lawyers to file the *Floyd* case in

her court and by giving media interviews while the case was pending.

Scheidlin denied any wrongdoing and stressed that she had made no direct comment about the *Floyd* case in the interviews. A few days later, lawyers representing her asked that either the three-judge panel or the full Second Circuit reverse the action. The legal team, headed by New York University law professor Burt Neuborne, argued the action was substantively unwarranted and procedurally flawed because Scheindlin had no opportunity to respond. In a separate letter, Neuborne said the “unseemly dispute” was a distraction from the merits of the case.

The next day the city filed a motion urging the panel to vacate Scheindlin’s order altogether. New York City corporation counsel Michael Cardozo said the ruling would undermine the police department’s “ability to carry out its mission effectively.” The city also urged the court to speed up the appeal so that it could be ruled on before Bloomberg leaves office.

Lawyers from the Center for Constitutional Rights countered on Nov. 11 with a filing that argued reassigning the case to a new judge would result in an “undue waste of judicial resources and potential prejudice” to the plaintiffs.

On Nov. 13 the panel reaffirmed its decision in an expanded 17-page opinion.⁴⁸ In granting the stay, the judges said that “in the interest of judicial efficiency” it would also hear the appeal on the merits next spring.

By then, however, de Blasio will have had time to decide whether to drop the appeal. ■

U.S. city. But life can be hard, too, for young black men walking those streets if they run into a cop like Philip Nace of the Philadelphia Police Department.

Nace, who is white, is under disciplinary investigation after a damning video of his racially abusive, obscenity-laced encounter on Sept. 27 with two young black men went viral on YouTube. The 16-minute video, shot on a cell phone by one of the men, shows Nace and an unidentified partner stopping the men solely because they had greeted someone as they were walking in predominantly African-American North Philadelphia.

After one of the men asks the reason for the stop, Nace scoffs at the request, tells the men to go back to New Jersey, describes them as “free-loaders” and accuses one of them of dealing in marijuana before letting them both go. “We can assure the public that he [Nace] is off the street,” Lt. John Stanford told the *Philadelphia Daily News* after a second video showed Nace destroying a neighborhood basketball hoop. “What you see in those two videos is certainly not what we teach.”⁴⁹

Nace’s conduct shows the underbelly of stop-and-frisk racial profiling. “There’s no place for that kind of attitude and behavior in a professional law enforcement agency in this country,” the NAACP’s Shelton remarked after viewing the video. But the investigations and lawsuits challenging racial profiling go after the practice more broadly with statistical evidence, not just anecdotes, and aim at broad policy changes, not simply discipline of individual officers.

On the surface, the statistics seem to support accusations of racial profiling, but skeptics such as the Manhattan Institute’s Mac Donald are unconvinced by what she calls “circumstantial” evidence. “It’s a very complicated issue,” says Alpert, the University of South Carolina professor, “and we don’t know

very much because it tests the boundaries of social science research.”

The New York City case could influence further developments on the issue, but the appeals court’s decision to stay Judge Scheindlin’s order makes speculation perilous. Before the stay, Harris, the University of Pittsburgh professor and racial profiling critic, was predicting the case could encourage police departments around the country to rethink stop-and-frisk. After news of the stay, he saw a possible impact in an opposite direction. “If the case is not upheld on appeal, many people will take from that that the NYPD style of aggressively using stop-and-frisk is the right thing to do after all,” Harris said.

Other experts, however, say police chiefs are already working to combat racial profiling. “Virtually all healthy, competent, well-functioning departments have policies against it,” says Bueermann, the Police Foundation president. Del Carmen, the University of Texas professor, agrees that police chiefs are addressing the issue, but says policies are not always followed in the field. “There are always officers in some departments who believe that racism is part of the job,” he says.

Advocacy groups that have raised the profiling issue are optimistic that police departments are moving in their direction. “Many police departments are taking the issues very seriously,” says Parker with the ACLU. Saenz, the MALDEF president, foresees “a broader understanding of how inappropriate profiling is” and “a broader array of protections against the practice nationwide.” Shelton agrees. “We’re going to continue to move forward,” he says.

From an opposite perspective, however, Mac Donald sees the racial profiling debate as interfering with good policing. “The police cannot go after crime if they’re held to a population benchmark,” she says. “Unless black crime goes down,” she adds, “the story is not going to go away.” ■

OUTLOOK

Mean Streets

Life can be hard for a police officer patrolling the streets of a major

Notes

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About the Author

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FOR MORE INFORMATION

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International Association of Chiefs of Police, 515 North Washington St., Alexandria, VA 22314; 703-836-6767; www.theiacp.org. Represents operating chief executives of international, federal, state and local law enforcement agencies of all sizes.

Major Cities Chiefs Police Association, <https://majorcitieschiefs.com/about.php>. Represents chiefs from 63 large American city or county police organizations.

Mexican American Legal Defense and Educational Fund, 634 S. Spring St., Los Angeles, CA; 213-629-2512; www.maldef.org. A leading civil rights organization for Latinos.

Muslim Advocates, 315 Montgomery St., 8th floor, San Francisco, CA 94104; 415-692-1484; www.muslimadvocates.org. Civil rights organization for Muslims, Arab and South Asian Americans.

NAACP, 4805 Mt. Hope Dr., Baltimore MD 21215; 410-580-5777; www.naacp.org. Century-old civil rights organization for African-Americans.

National Sheriffs’ Association, 1450 Duke St., Alexandria, VA 22314; 1-800-424-7827; www.sheriffs.org. Represents and assists sheriffs’ offices nationwide through education, training and information resources.

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A University of Pittsburgh law professor proposes making video and audio recording of search-and-seizure incidents, as is done already in several cities, a routine police practice.

Meyer, Deborah L., "The SPOT Program: Hello Racial Profiling Goodbye Fourth Amendment," *University of Maryland Law Journal of Race, Religion, Gender, and Class*, Vol. 10, No. 2 (2010), pp. 289-339, <http://digital-commons.law.umaryland.edu/rrgc/vol10/iss2/5/>.

The author critically examines the Transportation Security Administration's so-called SPOT program ("Screening of Passengers by Observation Technique") to identify potential terrorists.

Withrow, Brian L., and Jeffrey D. Dailey, "Racial Profiling and the Law," in Craig Hemmens (ed.), *Current Legal Issues in Criminal Justice* (Oxford University Press, forthcoming 2014).

The 11,000-word chapter gives a comprehensive, up-to-date account of law and litigation over racial profiling from the 1960s to the present. Withrow, a former Texas state trooper, is a professor of criminal justice at Texas State University in San Marcos; Dailey is an assistant professor of homeland and border security at Angelo State University, in San Angelo.

Reports and Studies

"Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy," Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, U.S. House of Representatives, June 17, 2010, serial no. 111-131, http://judiciary.house.gov/hearings/hear_100617_1.html.

The hearing included testimony and statements from six witnesses, including representatives of the American Civil Liberties Union, Sikh Coalition and Muslim Advocates. The committee website includes video and print transcript.

On the Web

"If Police Encounters Were Filmed," Room for Debate (*New York Times* blog), Oct. 22, 2013, www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras.

A former police officer endorses body cameras for police, but two civil liberties-minded advocates warn against the practice because of privacy concerns.

The Next Step:

Additional Articles from Current Periodicals

Arizona Case

“Arpaio to appeal order appointing monitor,” *The Associated Press*, Nov. 1, 2013, <http://ktar.com/22/1673867/Sheriff-Arpaio-to-appeal-order-appointing-monitor>.

Lawyers for Maricopa County Sheriff Joe Arpaio say they will appeal a judge’s October order that a court-appointed independent monitor oversee the sheriff’s office due to allegations of past racial profiling.

Hensley, JJ, “Documents: MCSO, ACLU differ on how to resolve racial profiling case,” *The Arizona Republic*, Aug. 24, 2013, p. B4, www.azcentral.com/news/politics/articles/20130823mcsoclucld-racial-profiling-case.html.

Maricopa County Sheriff’s Office lawyers filed documents in the county’s 2007 racial profiling case arguing against a court-ordered monitor and suggesting that a proposed community advisory board will become “a political tool.”

Skoloff, Brian, “Judge orders monitor in Ariz. sheriff profile case,” *The Associated Press*, Oct. 3, 2013, <http://bigstory.ap.org/article/judge-orders-monitor-ariz-sheriff-profile-case>.

After finding that Arizona’s Maricopa County Sheriff Joe Arpaio’s office engages in racial profiling, a federal judge orders that an independent monitor and a community advisory board be appointed to ensure departmental compliance with constitutional requirements.

Religious Profiling

Abdelkader, Engy, “We can be secure without profiling,” *The Star-Ledger* (Newark, N.J.), April 25, 2012, http://blog.nj.com/njv_guest_blog/2012/04/profiling_as_in_nypd_muslim_pr.html.

A legal fellow with the Institute for Social Policy and Understanding, a Washington think tank, writes that in light of revelations that the New York Police Department (NYPD) has systematically spied on Muslim-Americans, Congress should pass the End Racial Profiling Act, which would prohibit racial profiling by law enforcement officials.

Adely, Hannan, “Muslims Seek U.S. Probe of NYPD Spying,” *Herald News* (Passaic County, NJ), Oct. 25, 2013, p. A3.

Religious, civil-rights and community-based organizations from across the country have asked the Department of Justice to open a civil rights investigation into the NYPD’s surveillance of Muslim-Americans.

Mian, Rashed, “Pol: NYPD Muslim Surveillance is ‘Un-American,’” *Long Island Press* (N.Y.), Oct. 23, 2013, www.longislandpress.com/2013/10/23/pol-nypd-muslim-surveillance-is-un-american/.

New York State Sen. Kevin Parker, D-Brooklyn, chided the

NYPD for “treating one of the world’s great religions as if it’s a criminal enterprise,” adding, “all Muslims are not terrorist and all terrorists are not Muslims.”

Retail Stores

The Reliable Source, “Jay Z at center of Barneys controversy,” *The Washington Post*, Oct. 30, 2013, p. C2, www.washingtonpost.com/blogs/reliable-source/wp/2013/10/29/barneys-racial-profiling-case-gets-more-complicated-for-jay-z-new-york-attorney-general-investigating/.

Fans of Jay Z, who has a holiday promotion deal with Barneys, are pressuring the African-American superstar to sever his ties with the luxury retailer over a recent incident of alleged racial profiling of a black shopper.

Gale, Daryl, “The high price of racial profiling,” *The Philadelphia Tribune*, Nov. 1, 2013, www.phillytrib.com/localopinion/item/11498-the-high-price-of-racial-profiling.html.

Since recent alleged incidents of racial profiling of black shoppers at Macy’s and Barneys in New York, the Internet has been ablaze with stories from African-Americans describing being followed, harassed or handcuffed while shopping.

Washington, Jesse, “Barneys case stirs talk of bias at stores,” *Courier-Post* (Cherry Hill, N.J.), Nov. 3, 2013, p. A19, www.courierpostonline.com/viewart/20131103/BUSINESS03/311030025/.

A Rutgers University business professor who studies marketplace discrimination says middle-aged white women are the most likely to shoplift. Any perception that black customers steal more is “a reflection of who’s getting watched. It becomes a self-fulfilling prophecy.”

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Jost, Kenneth. “Remembering 9/11.” *CQ Researcher* 2 Sept. 2011: 701-732.

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Jost, Kenneth. “Remembering 9/11.” *CQ Researcher*, September 2, 2011, 701-732.

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