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SO YOU THINK A WOMAN CAN'T CARRY OUT A SUICIDE BOMBING? TERRORISM, HOMELAND SECURITY, AND GENDER PROFILING: LEGAL DISCRIMINATION FOR NATIONAL SECURITY

INTRODUCTION

*I mean, maybe one day we will live in a more optimum world where terrorists come in every color of the rainbow. But the truth is, now they don't. I mean, the people who are trying to get us are young Muslim men, period.*¹

Racial and ethnic-based profiling has a history in the United States,² most notably occurring against the African-American community.³ In the Post-Reconstruction South, white groups kept watch over the newly “freed” blacks through Black Codes, Vagrancy Laws, and eventually Jim Crow statutes that “legitimized” their discriminatory actions.⁴ In the mid-nineteenth to early twentieth centuries, the police persecution of the Irish inspired the term “paddy wagon,” due to the number of raids and mass arrests of members of the group.⁵ In modern times the issue of racial profiling remains a pressing concern within minority groups, but today the focus has turned to police actions and inactions.⁶ It is a prevailing belief that most criminal acts, excluding the “intellectual” crimes of CEOs involved in the recent Enron and Martha Stewart fiascos, are typically committed by the poorest, darkest, and newest members of American society.⁷

By the mid-1990s society treated racial profiling by law enforcement as the great taboo.⁸ In 2000 eighty percent of Americans

1. Bill Maher, *Real Time with Bill Maher: Episode 56* (HBO television broadcast Aug. 19, 2005) (quotation available at http://www.hbo.com/billmaher/episode/2005_08_19_ep56.html).

2. Tanya E. Coke, *Racial Profiling Post-9/11: Old Story, New Debate*, in *LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM* 91, 91 (Cynthia Brown ed., 2003) (citing multiple instances of racial profiling of different minority groups).

3. David A. Harris, *Racial Profiling Reduces the Effectiveness of the Criminal Justice System*, in *THE LEGAL SYSTEM OPPOSING VIEWPOINTS* 103, 104-05 (Laura K. Egendorf ed., 2003) (explaining the widespread phenomena of “Driving While Black”).

4. See Coke, *supra* note 2, at 91.

5. *Id.*

6. *Id.*; see also New York Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights Implications of Post-September 11 Law Enforcement Practices in New York 1* (2004), available at <http://www.usccr.gov/pubs/sac/ny0304/ny0304.pdf>.

7. Coke, *supra* note 2, at 91.

8. New York Advisory Committee to the U.S. Commission on Civil Rights, *supra* note 6, at 1.

surveyed in a Gallup poll stated that they had not only heard of the act of profiling but believed the practice should be stopped.⁹ 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.¹⁰ Yet, in the wake of the September 11 terrorist attacks, the consensus of profiling in the nation changed.¹¹ All nineteen of the hijackers were Arabic men.¹² 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."¹³ Clearly, however, the profiling had to do with gender as well as race. Gender was the crux basis of the new terrorist profile because all of the hijackers were men;¹⁴ historically the gender of the members of such fundamentalist Islamic groups are male.¹⁵

This note will investigate the correlations, consequences, and effects of Department of Justice (DOJ) and Department of Homeland Security (DHS) programs, as well as the USA PATRIOT Act's allowances of race-based criminal profiling and its preponderant effect on minority men. Part I focuses on criminal law, the USA PATRIOT Act, and the elements of suicide terrorism, which have become the catalyst for requiring increased security in the United States. Part II examines profiling, providing explanations of criminal profiling, racial profiling and its underlying elements of gender, and the history of such law enforcement practices. That section further discusses the creation and conception of the Department of Homeland Security after September 11 and reviews the two major programs created by the DOJ and DHS, furthered by the USA PATRIOT Act, which had a profound and preponderant effect on minority men. Finally, Part III examines whether gender profiling, specifically the exclusion of women as terrorist suspects, is the best strategy for America to successfully combat terrorism. This note will demonstrate that through traditional profiling techniques, as well as non-traditional profiling, the DOJ and the DHS, as well as provisions in the USA PATRIOT Act, are targeting minority men. The gender bias, in addition to the assumptions concerning the racial profile of terrorists, will undoubtedly have a negative impact on the "War on Terror."¹⁶ Unless the

9. *Id.*

10. Coke, *supra* note 2, at 94.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Christopher Dickey, *Women of Al Qaeda*, NEWSWEEK, Dec. 12, 2005, at 27, 30.

16. The Bush Administration has referred to American defense policy in regards to acts of terrorism or potential terrorist threats as "the War on Terror." See, e.g., NATIONAL

government changes its position on the proper role of law investigation and enforcement, the terrorists may well continue to successfully complete their agendas.

I. CRIMINAL LAW AND TERRORISM: THE BASICS

To understand how the USA PATRIOT Act¹⁷ is such a unique and powerful piece of legislation, this note will first present a background of general federal criminal law to demonstrate how the USA PATRIOT Act trumps traditional criminal law¹⁸ and overrides precedents set by the Supreme Court for constitutional policing powers and conduct.¹⁹

A. Search and Seizure: Warrants and Warrantless Searches

The Fourth Amendment protects people and their possessions against “unreasonable searches and seizures.”²⁰ Further, the amendment protects against the issuing of warrants without the prerequisite of probable cause.²¹ The Warrant Clause is engrossed in the Fourth Amendment.²² It requires expressly that “no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”²³ In *U.S. v. Verdugo-Urquidez*, the Court stated that “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government.”²⁴

The Supreme Court typically has shown a preference for police officers to conduct searches with warrants.²⁵ The Court has repeatedly enforced its preference for searches that take place only after law enforcement has properly obtained warrants and has stressed that warrantless searches should be limited.²⁶ In *Ornelas v. United States*

STRATEGY FOR COMBATTING TERRORISM 7 (2006), available at <http://www.whitehouse.gov/nsc/nsct/2006/nsct2006.pdf> (noting that “[f]rom the beginning, the War on Terror has been both a battle of arms and a battle of ideas — a fight against the terrorists and their murderous ideology”).

17. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act].

18. See WALTER M. BRASCH, AMERICA'S UNPATRIOTIC ACTS: THE FEDERAL GOVERNMENT'S VIOLATION OF CONSTITUTIONAL AND CIVIL RIGHTS 14 (Peter Lang ed., 2005).

19. *Id.*

20. U.S. CONST. amend. IV.

21. *Id.*

22. RUSSELL L. WEAVER ET AL., PRINCIPLES OF CRIMINAL PROCEDURE 60 (2004).

23. U.S. CONST. amend. IV.

24. WEAVER ET AL., *supra* note 22, at 61 (citing *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990)).

25. *Id.*

26. *Id.*

the Court stated that the "Fourth Amendment demonstrates a 'strong preference for searches conducted pursuant to a warrant.'"²⁷ The Court has directly stated that the purpose of the warrant requirement is to protect privacy rights by assuring citizens that the intrusions of searches and seizures are not random or arbitrary acts by law enforcement but are authorized and approved by law, as well as being narrowly limited in scope.²⁸

B. Probable Cause

The Fourth Amendment expressly restricts the issuing of a warrant without "probable cause."²⁹ Black's Law Dictionary has defined probable cause as: "A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime."³⁰ The text goes on to specify that to establish probable cause specifically under the Fourth Amendment, suspicion must amount to more than a bare suspicion but does not have to be enough evidence to convict a suspect.³¹ Law enforcement must be able to show probable cause before a court will issue an arrest warrant or a search warrant.³² Furthermore,

the Supreme Court has concluded that probable cause requires a showing by the Government of "a fair probability" on each of the points that the prosecution must establish in order for a warrant to issue.

To demonstrate probable cause sufficient to obtain an arrest warrant, the Government must establish a fair probability that a crime has been committed *and* that the person to be arrested committed the crime.³³

By obtaining a search warrant, the Government demonstrates that it has cause to believe that the specified items sought are located in the space noted on the warrant and there is a fair probability that the specified items are evidence of a crime.³⁴

27. *Id.* (citing *Ornelas v. U.S.*, 517 U.S. 690, 699 (1996)).

28. *Id.* at 63 (citing *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 621-22 (1989)).

29. *WEAVER ET AL.*, *supra* note 22, at 63.

30. *BLACK'S LAW DICTIONARY* 1239 (8th ed. 2004).

31. *Id.*

32. *Id.*

33. *WEAVER ET AL.*, *supra* note 22, at 63; *see also Steagald v. U.S.*, 451 U.S. 204, 213 (1981) (explaining the difference between probable cause requirements for arrest and search warrants.)

34. *WEAVER ET AL.*, *supra* note 22, at 63; *see also Steagald v. U.S.*, 451 U.S. 204, 213 (1981).

A good faith belief in the existence of probable cause is not necessarily enough to pass constitutional muster.³⁵ In *Beck v. State of Ohio* the Court stated that “[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police.”³⁶ Search warrants and probable cause play a large factor in the War on Terror. As this note will examine in further detail below, the Government has utilized group detainment of Muslim and Arab men as a far-reaching net to “catch” potential terrorists, circumventing the requirements of probable cause.

C. Absence of Race and Gender in Supreme Court Holdings

There is a clear absence of racial and gender-based discussions in Supreme Court holdings.³⁷ Professor Charles Ogletree has noted that “even in situations where the United States Supreme Court has determined police practices towards racial minorities to be unconstitutional . . . little attention has been focused on the race of the suspect.”³⁸ Tracey Maclin points out that the Court simply might not be interested in a debate about the influence of race on the criminal justice system.³⁹

A clear example of the Court’s lack of concern about the effects of race and gender on criminal law would be the holding in *Coker v. Georgia*.⁴⁰ The Supreme Court granted Coker a writ of certiorari to decide if death penalty applications for rape crimes violated the Eighth Amendment.⁴¹ The Court determined that the application of death sentences to a rape perpetrator violates the Eighth Amendment’s ban against cruel and unusual punishment because the perpetrator did not take the victim’s life.⁴² Nowhere in the majority decision did the Court address race or gender.⁴³ The decision may indicate that “[t]he Court was either unconcerned or not impressed by the fact, that of 455 men executed [between 1930-1967] for rape, 405 (90%) were [black].”⁴⁴ This lack of acknowledgment occurred despite the fact that

35. *Beck v. State of Ohio*, 379 U.S. 91, 97 (1964) (citing *Henry v. United States*, 361 U.S. 98, 102 (1959)).

36. *Id.*

37. Tracey Maclin, *Black and Blue Encounters — Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter*, 26 VAL. U. L. REV. 243, 262 (1991).

38. *Id.* at 262 n.78.

39. *Id.*

40. *Id.* at 263 n.82 (citing *Coker v. Georgia*, 433 U.S. 584, 584 (1977)).

41. 433 U.S. 584, 584 (1977).

42. Maclin, *supra* note 37, at 263.

43. *Coker*, 433 U.S. at 584.

44. Maclin, *supra* note 37, at 263 n.82 (citing JACK GREENBURG, JUDICIAL PROCESSES AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION 424 (1977)).

in *McCleskey v. Kemp* the Court clearly discussed that the historical roots of Georgia's death penalty law for rape grew from a "race conscious" criminal justice system.⁴⁵ The race and gender consciousness of Georgia's system was even codified during the Civil War.⁴⁶ The penal code

established that the rape of a free white female by a black [man] "shall be" punishable by death. However, rape by anyone else of a free white female was punishable by a prison term not less than 2 nor more than 20 years. The rape of *blacks* was punishable "by fine and imprisonment, at the discretion of the court."⁴⁷

The Court has attempted to be sympathetic towards concerns of mistrust that many minorities hold against law enforcement, however many of its rulings in the area of police investigative practices have inadequately addressed the issue of race.⁴⁸ For example, Maclin points out that "many of the confession cases decided before the landmark case of *Miranda v. Arizona* involved black defendants who claimed that their confessions were the result of brutal and coercive police tactics."⁴⁹

D. Reasonable Person Standard of Review

The Court established the so-called "reasonable person" standard in *Michigan v. Chesternut*.⁵⁰ The Court declared that a person was seized under the Fourth Amendment "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."⁵¹ The Court decided two key cases in 1991 that involved police-citizen encounters that have affected the "reasonable man" standard. In *California v. Hodari D.*⁵² and *Florida v. Bostick*⁵³ the Court examined whether the police had seized, through Fourth Amendment standards, a confronted individual.⁵⁴ The *Hodari* case concerned "a police chase and head-on confrontation of a person who ran at the sight of a police patrol car."⁵⁵ The Court held that a show of police authority directed at an individual did

45. 481 U.S. 279, 329-30 (1987).

46. Maclin, *supra* note 37, at 263.

47. *Id.* at 263 n.82 (citing *McCleskey v. Kemp*, 481 U.S. 279, 329-30 (1987)).

48. Maclin, *supra* note 37, at 264.

49. *Id.*

50. *Id.* at 249 (citing *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988)).

51. *Id.* (citing *Chesternut*, 486 U.S. at 573).

52. 499 U.S. 621 (1991) (as referenced in Maclin, *supra* note 37, at 245-46).

53. 501 U.S. 429 (1991) (as referenced in Maclin, *supra* note 37, at 245-46).

54. Maclin, *supra* note 37, at 245-46.

55. *Id.* at 246; *Hodari*, 499 U.S. at 623.

not constitute a seizure under the Fourth Amendment, barring that the individual obeys and/or is placed in physical custody.⁵⁶ *Hodari* affected the reasonable person standard because the Court held that the standard “stated only a partial declaration of what is required to trigger Fourth Amendment protection.”⁵⁷ The Court stated that the reasonable person test “states a necessary, but not a sufficient, condition for seizure.”⁵⁸

In *Bostick*, two officers boarded a bus traveling from Miami to Atlanta on a routine drug search.⁵⁹ The local police randomly searched individuals on bus trips, and asked to search their luggage as a way to continuously fight drug trafficking.⁶⁰ The officers randomly picked the appellant-defendant to search.⁶¹ They checked the defendant’s tickets and identification, then after finding nothing out of the ordinary they explained their purpose as narcotics officers and requested to search his luggage.⁶² There is a dispute on whether the defendant objected, but it is clear that the officers did notify the defendant that he had the right to refuse the search.⁶³ The Court held that the Fourth Amendment did not automatically bar random bus searches, and the Florida ruling that rendered all bus searches unconstitutional was incorrect.⁶⁴ So was *Bostick* seized under the Fourth Amendment if he felt unable to leave? Previously the law stated that a person was seized if he reasonably felt that he was not “free to leave” the encounter with law enforcement.⁶⁵ Yet in *Bostick*, the Court held that although the defendant did not feel free to leave, this fact was not a deciding factor, as he was already on the bus and had no desire to leave.⁶⁶ The Court reasoned that it was not the officer’s fault that *Bostick* was on the bus and not in a place where he would feel able to come and go as he pleased.⁶⁷ The dispositive issue was whether the police conduct had been deemed to be coercive.⁶⁸ The Court then stated that the proper test concerning the Fourth Amendment was “whether a reasonable person would feel free to decline the officer’s requests or otherwise terminate the encounter.”⁶⁹

56. *Hodari*, 499 U.S. at 626.

57. *Maclin*, *supra* note 37, at 246.

58. *Id.* at 637.

59. *Florida v. Bostick*, 501 U.S. 429, 431 (1991).

60. *Id.*

61. *Id.* at 431.

62. *Id.* at 431-32.

63. *Id.* at 432 (deciding the facts in light most favorable to the State).

64. *Maclin*, *supra* note 37, at 247.

65. *Id.*

66. *Id.*

67. *Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 435-36 (1991)).

68. *Id.*

69. *Id.*

There are, thus, clearly problems with the "reasonable person" standard. The Court is assuming that there is "an *average, hypothetical*, reasonable person out there to serve as a model for deciding Fourth Amendment cases. . . . The Court has said that a reasonable person will not feel coerced when federal drug agents accost her in an airport and ask to see her identification and airline ticket."⁷⁰ This determination is true even if that person approached does not realize that she can deny the request.⁷¹ The Court has held that there is no issue when agents come to question workers about their citizenship, even if other agents are posted at all exits so there is no way of leaving the area without being confronted.⁷² The Court assumes that any person in that situation would naturally feel free to leave.⁷³ Further, as with the case in *Michigan v. Chesternut*,⁷⁴ the Court has held that a person being chased down a street by a carload of law enforcement would not be seized.⁷⁵

Tracey Maclin rightfully argues that these assumptions by the Court are unrealistic.⁷⁶ Most people would not feel free to walk away from any police confrontation, let alone ones in airports or guarded factories.⁷⁷ Maclin cites the difference in dynamics of the relationship between law enforcement and black males as a relevant example of how the "reasonable person" standard is inadequate, and as a visual example of gender and racial-based profiling.⁷⁸ Maclin asserts that the Court's view of the "reasonable man" standard is wrong because the definition is "out of touch" with reality, the reality being that most black men do not trust law enforcement officers to respect their constitutional rights.⁷⁹ History has shown that law enforcement officers are not afraid to "teach a lesson to any black male who, even in the slightest way challenges [their] authority."⁸⁰ In Boston during the late 1980s, the city was faced with the issue of what happens when the police are encouraged to ignore the constitutional rights of black men.⁸¹ Boston was faced with a shooting of a white couple, and the police department created a mission to go after teenaged gangs.⁸² A search-on-sight policy was instituted, which was later ruled unconstitutional.⁸³

70. *Id.* at 248.

71. *Id.* at 248-49.

72. *Id.* at 249.

73. *Id.*

74. 486 U.S. 567 (1988).

75. Maclin, *supra* note 37, at 249.

76. *Id.*

77. *Id.*

78. *Id.* at 250.

79. *Id.* at 254.

80. *Id.* at 256.

81. *Id.* at 257.

82. *Id.*

83. *Id.* at 257 n.58.

The policy was continuously backed by high-ranking police officials, however, even after the ruling of unconstitutionality.⁸⁴ One judge stated the tactics that black males were subjected to at that time from the Boston Police department was "martial law."⁸⁵ Under these circumstances, it is clear that any black male in Boston at the time would not have felt safe to refuse any requests of a law enforcement officer.⁸⁶ The issues facing the reasonable person standard as applied to black men could easily be transferred to any minority men targeted by law enforcement. This note will critique the reasonable person standard in regards to law enforcement policies targeting Muslim and Arab men.

E. The USA PATRIOT Act and Other Companion Legislation

*The lesson of the Palmer Raids is that the history of American immigration policy is often written in times of national emergency. It is a history not written with "the favorable judgment of experience," but instead out of panic and fear. Al Qaeda is not the first international terrorist movement to threaten American institutions and strike fear in Americans; John Ashcroft is not the first Attorney General to make immigrants the focus of his war on terrorism.*⁸⁷

The allowances of the USA PATRIOT Act have been compared to the COINTELPRO program, or "Counterintelligence Program" of the 1950s, 60s, and 70s.⁸⁸ COINTELPRO unfairly targeted the rights of many citizens and groups, such as the Black Panther Party, which were engaged in legal political activity.⁸⁹ The FBI wished to silence so-called "radical" political opposition inside of the United States.⁹⁰ The public discovered the existence of COINTELPRO in March of 1971 when secret files were removed from the Bureau's offices and

84. *Id.* at 257 n.58.

85. *Id.* at 257.

86. *Id.* at 257 n.58.

87. Harlan Grant Cohen, *The (UN)Favorable Judgment of History: Deportation Hearings, The Palmer Raids, and The Meaning of History*, 78 N.Y.U. L. REV. 1431, 1436-37 (2003).

88. BRIAN GLICK, WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT 10 (1989).

89. AMERICAN CIVIL LIBERTIES UNION, *The USA PATRIOT ACT and Government Actions that Threaten our Civil Liberties*, available at <http://www.aclu.org/FilesPDFs/patriot%20act%20flyer.pdf> (last visited Oct. 14, 2006) [hereinafter ACLU].

90. GLICK, *supra* note 88, at 9-10.

released to the media.⁹¹ Multiple groups were victims or beneficiaries of the covert operation.⁹² The FBI revealed six counterintelligence programs: Communist Party-USA (1956-71); "Groups Seeking Independence for Puerto Rico" (1960-71); Socialist Workers Party (1961-71); "White Hate Groups" (1964-71); "Black Nationalist Hate Groups" (1967-71); and "New Left" (1968-71).⁹³

The entirety of the USA PATRIOT Act is not controversial.⁹⁴ In fact many of its clauses and provisions are purely administrative.⁹⁵ Nevertheless, many of the changes made by the act were rejected previously by Congress.⁹⁶ Attorney General John Ashcroft drafted the act under its first name, the Anti-Terrorism Act of 2001, in secret.⁹⁷ The USA PATRIOT Act acronym stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act."⁹⁸ The Act was passed under great duress by both the House and the Senate,⁹⁹ and President George W. Bush signed the bill into law on October 26, 2001.¹⁰⁰

Through section 201 and 901 of the Act, the FBI and CIA are given authority to share information and evidence.¹⁰¹ Section 201, *Authority to Intercept Wire, Oral and Electronic Communications Relating to Terrorism* amends section 2516(1) of Title 18 of the United States Code by:

(1) . . . redesignating paragraph (p), as so redesignated by section 434(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132; 110 Stat. 1274), as paragraph (r); and (2) by inserting after paragraph (p), as so redesignated by section 201(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208; 110 Stat. 3009-565), the following new paragraph:

91. *Id.* at 7 (noting that further information was discovered through freedom of information requests, lawsuits, and former agents publicly confessing).

92. *Id.* at 11 (citing examples of actions against several racial groups).

93. *Id.* at 11-13 (noting that the "White Hate Groups" program was actually a program that aided groups such as the KKK to confine attacks to COINTELPRO targets).

94. WALTER M. BRASCH, *AMERICA'S UNPATRIOTIC ACTS: THE FEDERAL GOVERNMENT'S VIOLATION OF CONSTITUTIONAL AND CIVIL RIGHTS* 4 (Peter Lang ed., 2005).

95. *Id.*

96. *Id.* at 5.

97. *Id.* at 4. (citing *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Acts Upon the United States*, 328).

98. USA PATRIOT Act, *supra* note 17.

99. See BRASCH, *supra* note 94, at 5-7 (noting the problematic nature of the introductions of amendments to the bill, Congress members' inability to even fully read the document before its passing, and chides from then-Attorney General John Ashcroft about opposition aiding terrorists).

100. *Id.* (explaining in detail the lengthy and issue-riddled process of approval through the House and Senate).

101. *Id.* at 8.

'(q) any criminal violation of section 229 (relating to chemical weapons); or sections 2332, 2332a, 2332b, 2332d, 2339A, or 2339B of this title (relating to terrorism)'¹⁰²

The administration felt that this alteration of 18 U.S.C. §2516(1) was necessary to remove the "wall" between the FBI and the CIA that was initiated in the 1970s.¹⁰³ The "wall" was initiated to restrain civil liberties violations that arose from domestic spying.¹⁰⁴

Section 218 of the Act lowers the standard of proof required for a search warrant.¹⁰⁵ The section changes the requirements from "probable cause" to "reasonable cause."¹⁰⁶ The Act gives FBI agents the ability to investigate any American citizen for criminal matters without the requirement of probable cause so long as it is for "intelligence purposes."¹⁰⁷ Sections 806 and 213 of the Act allow even more liberal searches and seizures.¹⁰⁸ Section 806 allows searches to seize an individual's property without notification, going against the Fourth Amendment "knock and announce" precedent.¹⁰⁹ Section 213, *Authority For Delaying Notice of the Execution of a Warrant*, amends 18 U.S.C. §3103(a) by:

(1) . . . inserting '(a) IN GENERAL.—' before 'In addition'; and
(2) by adding at the end the following:

'(b) DELAY.—With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if—

'(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705);

'(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and

102. USA PATRIOT Act, *supra* note 17, at 14.

103. BRASCH, *supra* note 94, at 8 (noting that some commentators have stated that without the amending of 18 U.S.C. §2516(1) the wall was, and continues to be, imaginary).

104. *Id.*

105. *Id.* at 12.

106. *Id.*

107. ACLU, *supra* note 89.

108. BRASCH, *supra* note 94, at 13.

109. *Id.*

'(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.'¹¹⁰

The USA PATRIOT Act provides that a non-citizen may be detained without charges for seven days initially, so long as the Attorney General certifies that he is a national security threat.¹¹¹ After that initial week, the State must formally charge the detainee to continue holding him.¹¹² If the State does not have a valid crime with which to charge the detainee, the State must drop any proposed charges.¹¹³ The Act, however, enables the attorney general to declare the non-citizen who has a right to remain within the United States a "threat to national security" and jail him or her indefinitely with re-certification every six months.¹¹⁴ In October of 2002, Representative Adam Schiff (D-Calif.) introduced the "Detention of Enemy Combatant Act" (H.R. 5684) requiring that the executive branch establish more black-letter standards for detention of United States Citizens and residents.¹¹⁵ The Act went on to require "timely access to judicial review" and limited "who may be called an 'enemy combatant.'"¹¹⁶ The bill stalled in the Subcommittee on Military Personnel.¹¹⁷

F. Suicide Bombing and Gender

*Understand this, the terrorists don't care if you're black, white, green, blue or purple. Their sole purpose in life is to kill us, and so therefore, what people like Mr. Connelly need to do is distance themselves from the constant reminder that profiling only pertains to blacks [sic] people. We're not looking to do that, that's not what this means. What this means is that a black police officer is looking for a terrorist and if he believes that that man of Middle Eastern descent under 30 happens to look like a possible terrorist, or even if not, he needs to be pulled over!*¹¹⁸

110. USA PATRIOT Act, *supra* note 17, at 33-34.

111. KATE MARTIN, *Secret Arrests and Preventative Detention*, in *LOST LIBERTIES: ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM* 75, 76 (Cynthia Brown ed., 2003).

112. *Id.*

113. *Id.*

114. *Id.*

115. BRASCH, *supra* note 94, at 175.

116. *Id.*

117. *Id.*

118. *Dayside* Interview by Juliet Huddy with Wayne Simmons, former CIA analyst, and Wade Connelly (Jul. 26, 2005), available at <http://www.newshounds.us/2005/07/27/>

According to Tel-Aviv University Law Professor Emanuel Gross, “[s]uicide attacks . . . are a communitarian phenomenon within the context of which the individual gives up his life in order to benefit the collective he represents.”¹¹⁹ This act moves directly against human intuition to remain alive, in such circumstances, to see the destructive outcome of a successful action.¹²⁰ Instead, the desire to perform the ultimate sacrifice to assist in the achievement of the collective goal takes over.¹²¹

Gender roles are an important consideration in traditional Muslim societies.¹²² Much of the Muslim world has been compared to the days of old, “when knights were bold — and fair maidens were kept behind veils, their virtue protected, their lives entirely controlled by men.”¹²³ Jihadist propaganda even ties the invasion and violation of Muslim land to the violation of women.¹²⁴ Hamas, a Palestinian Islamist organization, stated in a 1998 covenant that “the Muslim woman [is] the maker of men” and the person charged with the education and preparation of future fighters.¹²⁵ Even the act of foreign occupation can be considered by many Muslim men to be a form of emasculation.¹²⁶

Professor Gross notes that “[b]etween 1993, when the fundamentalist Palestinian organizations began carrying out suicide attacks and the outbreak of the al-Aqsa intifada in September 2000, all suicide bombers were males, most were married, and they possessed a high school and even higher education.”¹²⁷ To fulfill their goals, Islamic terrorist groups must recruit men and boys, the process of which “exploits not only their anxieties and fears but their basic sexual needs and desires.”¹²⁸ For example, the Muslim Brotherhood in Egypt capitalized upon the “frustrations and confusion of people whose patriarchal societies were being challenged by urbanization and the inroads of Western ideas.”¹²⁹ A middle-class man in Cairo traditionally provides his wife with an “owned and furnished apartment before

racial_profiling_lets_do_it.php.

119. Emanuel Gross, *The Struggle of a Democracy Against the Terror of Suicide Bombers: Ideological and Legal Aspects*, 22 WIS. INT'L L.J. 597, 626 (2004).

120. *Id.*

121. *Id.*

122. Dickey, *supra* note 15, at 29.

123. *Id.*

124. *Id.* at 30.

125. *Id.*

126. *Id.*

127. Gross, *supra* note 119, at 631.

128. Dickey, *supra* note 15, at 30.

129. *Id.*

a marriage can be performed, or consummated."¹³⁰ As a result of this tradition, many men were forced to wait until their thirties to marry.¹³¹ The Brotherhood took advantage of this frustrating tradition by preaching that couples could wed earlier, minus the new Kitchen-Aid mixer, if they followed the proper spiritual course.¹³² A combination of "sexual frustration in this life and the lure of sexual as well as spiritual rewards in the next" are part of the propaganda of a jihadist looking to recruit men and boys.¹³³ Many of the radical Islamic groups, including Al Qaeda, all speak on the Muslim teachings that promise seventy-two "virginal beings . . . to attend to the martyr's desires in paradise."¹³⁴ At the apex of the al-Aqsa intifada, however, Palestinian women entered the world of suicide bombing.¹³⁵ People both in and outside of Palestinian society consider the phenomenon of female suicide bombers as being primarily aimed at internal interests of women against the conservative leadership of society.¹³⁶ For women, participation is less about the external military issues.¹³⁷ Operationally, adding women into the equation opens the roster of potential bombers and adds a new issue to security.¹³⁸ Security must now find creative ways to screen women for potential suicide bombers yet preserve the dignity and modesty of the many Middle Eastern women who are not involved in such missions.¹³⁹ Groups such as Al Qaeda, however, had hoped for a moment to freeze the gender roles of old.¹⁴⁰ Some members of the group still view "females as chattel in some cases, as revered mothers in others and almost always icons to be protected from outside influences."¹⁴¹

II. PROFILING AND ITS HISTORY

Oh, it absolutely matters, and as I've been on the record of saying in the past, it's long overdue. Profiling works. . . . I can tell you unequivocally . . . that it works from past experiences when I was working with the cartels, I knew exactly who to

130. *Id.* at 30-31.

131. *Id.* at 31.

132. *Id.*

133. *Id.*

134. *Id.* at 31.

135. Gross, *supra* note 119, at 634.

136. *Id.*

137. *Id.*

138. *Id.* at 634-35.

139. *Id.* at 635.

140. Dickey, *supra* note 15, at 29.

141. *Id.* at 29-30.

*look for, what to look for, and we were very successful. Today we just happen to know that certain ethnic groups, may, may be involved in terrorism, and certainly they should be afforded a little more attention, it doesn't mean that we neglect any other nationality, but it certainly means that we've [sic] to continue to make our airports and our railways safer, and profiling does that.*¹⁴²

To conduct effective criminal investigations, police officers often use profiling, which can be a "legitimate and necessary" law enforcement strategy.¹⁴³ The inclusion of race or other factors, such as gender, does not immediately create a discriminatory practice.¹⁴⁴ For example, the profiling of street gangs may include certain criteria and profiles to alert law enforcement that someone could be a member of the gang being targeted in an investigation.¹⁴⁵

Although commentators describe criminal profiling in many different manners, "all definitions suggest a process whereby law enforcement personnel make judgments about another based on a number of overt and subtle factors."¹⁴⁶ A possible list of these factors could be: "race, national origin, manner of dress and grooming, behavioral characteristics, when and where the observation is made, the circumstances under which the observation is made, and relative to information the officer/investigator may already possess."¹⁴⁷ Proper criminal profiling works because many criminals will take on a *modus operandi*.¹⁴⁸ *Modus operandi*, "M.O." or manner of operating, has been defined as "the distinctive features of the manner in which a criminal perpetrates his or her offenses, and it is the distinctive features that represent a pattern of criminal behavior resulting in what is referred to [as] an M.O."¹⁴⁹ As some authors express, "[p]rofilng does *not* provide the specific identity of the offender. Rather, it indicates the *kind* of individual most likely to have committed a crime."¹⁵⁰

142. Simmons, *supra* note 118.

143. DARIN D. FREDERICKSON & RAYMOND P. SILJANDER, RACIAL PROFILING: ELIMINATING THE CONFUSION BETWEEN RACIAL AND CRIMINAL PROFILING AND CLARIFYING WHAT CONSTITUTES UNFAIR DISCRIMINATION AND PERSECUTION 16 (2002).

144. *Id.*

145. *Id.* at 17.

146. *Id.* at 15.

147. *Id.*

148. *Id.* at 18.

149. *Id.* at 18.

150. HAROLD SCHECHTER, THE SERIAL KILLER FLIES: THE WHO, WHAT, WHERE, HOW, AND WHY OF THE WORLD'S MOST TERRIFYING MURDERERS 339 (2004) (quoting John Douglas & Robert Ressler, *Criminal Profiling from Crime Scene Analysis*, 1986) (Douglas

For example, serial killers are heavily profiled because of the consistency between their crimes and the people who commit them.¹⁵¹ In September of 1984, several criminology experts presented a seminal paper on serial murder at the tenth triennial meeting of the International Association of Forensic Sciences.¹⁵² The report examined thirty-six jailed offenders, and offered a list of the top ten traits of serial killers.¹⁵³ The ten traits discovered included the fact that most serial killers are single white males;¹⁵⁴ most are fairly intelligent with a mean IQ of "bright normal;"¹⁵⁵ most come from troubled families and broken homes;¹⁵⁶ as children, they experienced abuse (physical, psychological, and/or sexual);¹⁵⁷ they have interests in deviant sexuality;¹⁵⁸ and they tend to have trouble with male authority figures.¹⁵⁹ Researchers have also identified three major warning signs from the personal histories of serial killers that lend to their criminal profile.¹⁶⁰ This "psychopathological *triad*" includes: "*enuresis* (bed-wetting), *pyromania* (fire-starting), and *precocious sadism* (generally in the form of animal torture)."¹⁶¹

Although it may have legitimate uses, criminal profiling is not a perfect aid for law enforcement.¹⁶² From September 2001 to May 2003, five white women were raped and killed in and around Baton Rouge, Louisiana.¹⁶³ Statistics show that most serial killers choose victims of their own race, committing intraracial crimes as opposed to interracial, so profilers instantly described the perpetrator as being a white male.¹⁶⁴ Through DNA evidence, however, the murderer was identified as African-American Derrick Todd Lee.¹⁶⁵ Another example

and Ressler are two of the founding members of the Federal Bureau of Investigation's Behavioral Science Unit).

151. *Id.* at 22.

152. *Id.* at 22-23. Robert Ressler and John Douglas of the Federal Bureau of Investigation's Behavioral Science Unit, along with Professors Ann W. Burgess and Ralph D'Agnostio, authored the paper.

153. *Id.*

154. *Id.*

155. Psychological Assessment and Testing: IQ Classifications, <http://www.assessmentpsychology.com/iqclassifications.htm> (last visited Feb. 20, 2007) (noting that in the 1995 Wechsler Adult Intelligence Scale Manual the term "Bright Normal" was replaced with and corresponds with the current term "High Average").

156. SCHECHTER, *supra* note 150, at 22.

157. *Id.*

158. *Id.*

159. *Id.* at 25.

160. *Id.*

161. *Id.*

162. *Id.* at 339.

163. *Id.*

164. *Id.*

165. *Id.*

of a profile gone wrong occurred during the D.C. sniper attacks.¹⁶⁶ In the fall of 2002, for twenty-two days, motorists in and around D.C. feared being faced with random and deadly gunfire.¹⁶⁷ Traffic stops slowed travel well into southwestern Virginia, where the police frantically looked for the suspect in the largest manhunt that the Washington area had ever seen.¹⁶⁸ The police were looking for a white man acting alone, the standard profile for a serial killer.¹⁶⁹ In the end, John Allen Muhammad and John Lee Malvo were arrested¹⁷⁰ and tried for the crimes.¹⁷¹ Muhammad is an African-American male, and Malvo is a male Jamaican citizen.¹⁷² Muhammad and Malvo were able to pass through numerous traffic stops with the murder weapon because they did not fit the profile on either account.¹⁷³ Clearly, this is another example of when profiles fail the law enforcement system. Had race not played a factor in the manhunt, police may have found the perpetrators well before they claimed the lives of more victims.

A. Racial Profiling

*There is a difference between profiling and racial profiling. Profiling in terms of behavior, in terms of dress, in terms of whether or not you check in your suitcase, acting nervously, buying a one way ticket — these are all acceptable profiles of potential terrorists. If ethnicity is one of many elements of a profile, then it makes some sense. But if ethnicity or race is the only criteria for differential treatment, that is not acceptable and more importantly it is not useful and in fact, counter-productive.*¹⁷⁴

166. Coke, *supra* note 2, at 102.

167. Simon Duffy, *Closing the Net: How They Cracked the Case*, CNN WEB NEWS, Oct. 24, 2002, <http://archives.cnn.com/2002/US/South/10/24/sniper.case.cracked/index.html>.

168. *Id.*

169. Coke, *supra* note 2, at 102.

170. Duffy, *supra* note 167.

171. James Dao, *Muhammed May Face Additional Trials*, N.Y. TIMES, Nov. 26, 2003, at A21; Adam Liptak, *Sniper Suspect Is Described As Eager, Not Brainwashed*, N.Y. TIMES, Dec. 16, 2003, at A32.

172. Paul Bradley, *Sniper Suspect a Racist? Prosecutors List Acts as Evidence*, RICHMOND TIMES DISPATCH, Aug. 19, 2003, at B1.

173. Coke, *supra* note 2, at 102-03.

174. Raul Yzaguirre, *America Attacked: Racial Profiling With Raul Yzaguirre*, WASHINGTONPOST.COM LIVE ONLINE, Sept. 25, 2001, http://discuss.washingtonpost.com/zforum/01/attack_yzaguirre0925.htm. Mr. Yzaguirre is the President of the National Council La Raza. *Id.*

Racial profiling is nothing new and has been a well-used tactic of law enforcement.¹⁷⁵ Black's Law Dictionary defines racial profiling as: "[t]he law-enforcement practice of using race, national origin, or ethnicity as a salient basis for suspicion of criminal activity."¹⁷⁶ For whatever the criminal plight of the time, our society often has assumed that the "poorest, darkest, or more recently arrived among us are at the center of vice."¹⁷⁷ In 1901, for example, President McKinley was assassinated, and the immediate suspect was a "dark complexioned man."¹⁷⁸ Jim Parker, an African-American man and a former constable, saved the President from a third bullet and then apprehended the actual assassin, Leon Czolgosz.¹⁷⁹ Czolgosz was convicted of the crime and executed on October 29, 1901.¹⁸⁰ One of McKinley's Secret Service agents, George Foster, admitted to overlooking Czolgosz because he was not black.¹⁸¹

Historically race, not gender, has played a more controversial role in criminal profiling.¹⁸² Many "police chiefs acknowledged that race played a sometimes significant role in deciding whom to stop and search."¹⁸³ American law enforcement's policy in fighting drugs throughout history provides a clear illustration.¹⁸⁴ The Chinese were persecuted in the nineteenth century for opium dens, yet opium was the drug of choice for middle-class white women who suffered from anxiety and malaise before the arrival of the minority group on the West Coast.¹⁸⁵ Marijuana was banned in the 1930s only after authorities feared that Chicanos would be violent if they smoked it.¹⁸⁶ Cocaine is known in pop culture as a popular white party drug.¹⁸⁷ The acceptance of the drug for white America brings to mind the giant "Man-in-the-Moon" animated figure that snorted the substance from a silver spoon in the Studio 54 nightclub.¹⁸⁸ As Tanya Coke states,

175. Coke, *supra* note 2, at 91.

176. BLACK'S LAW DICTIONARY 1286 (8th ed. 2004).

177. Coke, *supra* note 2, at 91; see also PBS, *The American Experience: America 1900. People and Events: Leon Czolgosz*, <http://www.pbs.org/wgbh/amex/1900/peopleevents/pande16.html> (last visited Feb. 20, 2007).

178. Amnesty International, Questions and Answers about Racial Profiling, http://www.Amnestyusa.org/racial_profiling/pdf/qanda.pdf (last visited Feb. 20, 2007).

179. *Id.*

180. *Id.*

181. *Id.*

182. See Coke, *supra* note 2, at 91-92.

183. *Id.* at 93.

184. *Id.* at 92.

185. *Id.*

186. *Id.*

187. *Id.*

188. Bob Colacello, *In the Heat of the Night — Interview with Studio 54 Club Owners Steve Rubell, Andy Warhol, Truman Capote and Bianca Jagger*, INTERVIEW, Aug. 1998,

Cocaine use, although illegal, had been almost normalized as the drug of choice among the white upper and middle classes in the late 1970s and 1980s. It took the drug's adoption by inner-city blacks in the form of crack a decade later to launch a "war on drugs" worthy of a new cabinet post, billions of dollars in law enforcement, and penalties 100 times more severe than for powder cocaine.¹⁸⁹

B. Gender Profiling: A Minority Race Phenomenon

*Rounding up and detaining black males is an old (unconstitutional) police habit.*¹⁹⁰

The Black's Law Dictionary definition of the term "racial profiling" makes evident the link between racial profiling and gender:

Originally, the term referred to the practice of stopping a disproportionate number of *male* African-American drivers on the assumption that they had a heightened likelihood of being involved in criminal activity. After the terrorist attacks of September 11, 2001, the term was frequently used in reference to searching and interrogating Middle Eastern *men* at airports.¹⁹¹

Due to law enforcement actions, black men specifically are particularly hostile and distrustful of police.¹⁹² In a Department of Justice report, African Americans are 50 percent more likely than whites to be stopped for any reason (traffic violation or random stop) more than once.¹⁹³ The African-American community has adopted the phrase "driving while black" ("DWB") in response to the harassment by police on the road that has persisted for years.¹⁹⁴ Nationwide, "black males have been treated with open disrespect and contempt by the police."¹⁹⁵ Don Wycliff states: "Even black men who share no other problem with the black underclass share this one. The most successful, respectable black man can find himself in a one-sided confrontation

available at http://www.findarticles.com/p/articles/mi_m1285/is_n8_v28/ai_21007968.

189. Coke, *supra* note 2, at 92.

190. Maclin, *supra* note 37, at 255.

191. BLACK'S LAW DICTIONARY, *supra* note 173 (emphasis added).

192. Maclin, *supra* note 37, at 245.

193. CENTER FOR POLICY ALTERNATIVES, *Racial Profiling*, <http://www.stateaction.org/issues/issue.cfm/issue/RacialProfiling.xml> (last visited Feb 20, 2007) (citing polls that demonstrate dissatisfaction with police behavior is twice as high among blacks as among whites, which could be a result of the negative treatment from the police that African Americans receive).

194. Coke, *supra* note 2, at 92.

195. Maclin, *supra* note 37, at 245.

with a cop who thinks his first name is 'Nigger' and his last name is 'Boy.'"¹⁹⁶

Black men know that a different law exists on the street, and that they face random, unwarranted stops and searches at any time.¹⁹⁷ Black men are taught not to question the authority of the police, because responses by the officers are quick and brutal.¹⁹⁸ These issues between black men and police supersede all other factors, including: economic status, employment, and education.¹⁹⁹ Clearly, black men constitute a specific race *and* gender profile for law enforcement.²⁰⁰ They are considered "suspicious and targeted for questioning not because of any objective or empirical evidence that they are involved in criminality, but because of police bias and societal indifference to the plight of black males who are on the receiving-end of aggressive police tactics."²⁰¹ This form of gender-based profiling is akin to the gender-based profiling of Muslim and Arab men. The profiling seemingly is based in race; however, it is also deeply rooted in gender.

C. Pre September 11: Trend Towards Anti-Profiling

In 1995, profiling became a point of public debate.²⁰² A Drug Enforcement Agency (DEA) description of drug couriers was the first source of controversy.²⁰³ The description used in the Operation Pipeline initiative to crack down on interstate trafficking urged law enforcement agents "to look out for black and Latino males traveling together, or in rented cars, especially those driving carefully within the speed limit."²⁰⁴ Should individuals match this profile, the policy urged troopers to find *some reason* to stop and search the drivers who met the description for illegal drugs.²⁰⁵

In 1999, former President Bill Clinton spoke out about the act of profiling, calling it "morally indefensible and ordered federal law enforcement agencies to begin collecting racial data on all stops and searches."²⁰⁶ President George W. Bush stated that profiling was "wrong in America, and we've got to get rid of it."²⁰⁷ By the year 2000, data showed that more than 59 percent of Americans believed that

196. *Id.*

197. *Id.* at 253.

198. *Id.*

199. *Id.*

200. *Id.* at 260.

201. *Id.*

202. Coke, *supra* note 2, at 92-93.

203. *Id.* at 93.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 94.

racially-based profiling was widespread.²⁰⁸ In fact, “between January 1999 and September 2001, some thirteen states had passed legislation either requiring police departments to collect data on racial profiling or simply banning the practice.”²⁰⁹

D. Post-911: Forget the Past, Let’s Get ‘Em in the Future.

*More significantly, 47 months have come and gone since 9/11 without a major terrorist attack on U.S. soil. The closest thing we had to a major bombing was the new Pauly Shore show on TBS. Even if the next attack comes tomorrow, it is worth pondering that we’ve gone 47 months without the savages being able to mount another terrorist attack in a country virtually designed for terrorist attacks, a country where we search the purses of little old ladies so that recent immigrants from Saudi Arabia named “Mohammed” wearing massive backpacks don’t feel singled out.*²¹⁰

One of the major repercussions of September 11 is the increase of racial profiling of Arabs and South Asians.²¹¹ Since the attacks, there has been an increase in complaints that the government has singled out Islamic, Arabic, or Middle Eastern people for increased inspection.²¹² Arab-Americans are now three times more likely than whites to experience racial profiling.²¹³ A Gallup Poll reported that the majority²¹⁴ of Americans favored the profiling of Arabs at airports in 2001.²¹⁵ Oddly enough, seventy-one percent of black respondents favored the profiling despite their own struggles with racial profiling.²¹⁶ Application of profiling in airports has resulted in airport security asking many male Arabs and South Asians to leave airplanes

208. *Id.*

209. *Id.*

210. Ann Coulter, *It’s ‘Let’s Roll’, Not ‘Let’s Roll Over’* (Universal Press Syndicate, Aug. 10, 2005), <http://www.anncoulter.org/cgi-local/article.cgi?article=69>. Ms. Coulter is a political pundit, and she wrote this article in the aftermath of the London subway and bus bombings. *Id.*

211. CENTER FOR POLICY ALTERNATIVES, *supra* note 193.

212. *Bush Orders Racial Profiling Ban*, CBS NEWS, June 18, 2003, <http://www.cbsnews.com/stories/2003/06/26/politics/main560558.shtml>.

213. CENTER FOR POLICY ALTERNATIVES, *supra* note 193.

214. Coke, *supra* note 2, at 94 (noting that fifty-seven percent of whites and sixty-three percent of non-black non-whites favored the profiling).

215. *Id.*

216. *Id.*

simply on account of their appearance.²¹⁷ Cultural callousness often accompanies profiling, and an example of this insensitivity has occurred when “many Sikh Americans have been asked to remove their turbans in airports — a violation of their religious freedom.”²¹⁸ During the build-up prior to the Iraq war, the FBI compiled a list of ten thousand Iraqi nationals and former citizens in the United States who were targeted for “voluntary interviews” based only on their nationality.²¹⁹ In 2001 and 2002, there were about three hundred complaints filed against government agencies about the discriminatory practices, many dealing with Customs and Immigration officials.²²⁰ The Justice Department, however, only found one incident of misconduct in 2000, and they referred one 2001 case for disciplinary action.²²¹ In addition, twenty-five civil suits were filed for racial profiling against multiple federal agencies between 2000 and 2001.²²² Of the seven suits that remained in the court system, three were settled, and four were dismissed.²²³

Hundreds of mostly Arab and South Asian men have been held in secret federal custody for weeks or months.²²⁴ Their basic rights under the criminal justice system have been denied, such as the process of being formally charged.²²⁵ The United States government has blatantly refused to publish either their names or their whereabouts, even under court order.²²⁶

In September of 2002, “three [male] Muslim medical students traveling by car from Chicago to Florida to begin their residency training were stopped and detained.”²²⁷ Law enforcement officials encountered and detained the students after a woman called in a tip, claiming to have overheard a suspicious conversation between the students in a restaurant.²²⁸ The police stopped and searched the students’ car, and in the process closed off a twenty-mile stretch of I-75 in Georgia.²²⁹ The police then “detained and interrogated the students for seventeen hours before they concluded the men posed no threat and released

217. CENTER FOR POLICY ALTERNATIVES, *supra* note 193.

218. *Id.*

219. *FBI: Iraqi Interview Provided Helpful Info For War*, CNN.COM, Apr. 17, 2003, <http://www.cnn.com/2003/LAW/04/17/sprj.iq.ashcroft.mueller/index.html>.

220. *Bush Orders Racial Profiling Ban*, *supra* note 212.

221. *Id.*

222. *Id.*

223. *Id.*

224. MARTIN, *supra* note 111, at 76.

225. *Id.* at 77.

226. *Id.* at 80.

227. Coke, *supra* note 2, at 97.

228. *Id.*

229. *Id.*

them.”²³⁰ Even after the discovery of the mistake, however, the students paid for their gender and race.²³¹ The hospital withdrew their residency offers after being bombarded with hate mail.²³² Furthermore, “Governor Jeb Bush and Senator Bob Graham effusively praised law enforcement officials and the tipster in Georgia as good patriots.”²³³

E. Racial Profiling Ban

*In 2001, with great fanfare, President [George W.] Bush pledged to end racial profiling. “It’s wrong,” he said, “and we will end it in America.” Sadly, he has failed to fulfill this promise or to enforce virtually any aspect of his directive to the Justice Department to end profiling practices. Last July, the president boasted that he was the first president to ban racial profiling in federal law enforcement. That claim simply does not hold up: the federal policy does not cover profiling based on national origin or religion, does not include any enforcement mechanisms, and contains a blanket exception for “national security” and “border integrity”—a loophole big enough to drive that truck through.*²³⁴

The Bush Administration ordered a sweeping ban on racial and ethnic profiling in all governmental agencies in June of 2003.²³⁵ The ban did not include gender and was two years in the making.²³⁶ In 2000, President Bush made a campaign trail commitment to end racial profiling.²³⁷ In a 2001 address the President furthered his commitment to a ban on the practice.²³⁸ The guidelines directly affected about 120,000 United States law enforcement officers in the FBI, DEA, and the DHS, among others.²³⁹ As a whole, “the policy makes a clear distinction between routine law enforcement work and that involving

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. Curt Goering, Statement to Amnesty International, Sept. 13, 2004, <http://www.Amnestyusa.org/news/document.do?id=31BDEDADCDF0198A85256F0F0047D8E7>. Mr. Goering is the Senior Deputy Executive Director of Amnesty International USA. *Id.*

235. *Bush Orders Racial Profiling Ban*, *supra* note 212.

236. *Id.*

237. Eric Lichtblau, *Bush Issues Federal Ban But Exempts Security Inquiries*, N.Y. TIMES, June 17, 2003, at A1.

238. *Id.*

239. *Bush Orders Racial Profiling Ban*, *supra* note 212.

national security or border security."²⁴⁰ It forbids the reliance on racial or ethnic stereotypes, yet the policy allows certain racial or ethnic groups to undergo more rigorous scrutiny if information exists linking these groups to terrorist activities that could result in an attack.²⁴¹ The policy also allows consideration of race, should there be credible information that the people of those identified groups are involved in specific crimes or are part of a criminal organization.²⁴² Opponents have stated that the President created these loopholes to legally allow racial profiling, rather than really working to ban the practice.²⁴³ As Miriam Gohara of the NAACP Legal Defense Fund stated, "It looks to me that [the policy] is more interested in carving out exceptions to racial profiling than it is in enforcing a ban."²⁴⁴ The exceptions equate to the legal gender and ethnic profiling of Muslim men in airports, should information about an Al Qaeda plan to bomb United States airliners be discovered.²⁴⁵

F. Internationally

Internationally, two key documents prohibit racial discrimination: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)²⁴⁶ and the International Covenant on Civil and Political Rights (ICCPR).²⁴⁷ CERD was adopted by the United Nations General Assembly in December of 1965 and ratified by the United States in 1994 as a non-self-executing treaty to prevent the filing of domestic lawsuits by individuals.²⁴⁸ The CERD has a clear definition of racial profiling and asserts that "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races. . . ."²⁴⁹ The United Nations General Assembly adopted the ICCPR in December of 1966; it entered into force in 1976 and was ratified by the United States in 1992.²⁵⁰ The ICCPR provides exceptions

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 20th Sess., U.N. Doc. A/2106(XX) (Dec. 21, 1965).

247. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21st Sess., U.N. Doc. A/2200(XXI) (Dec. 16, 1966) [hereinafter ICCPR].

248. Amnesty International, *supra* note 178.

249. International Convention on the Elimination of All Forms of Racial Discrimination (CERD), *supra* note 246, at Part I, Art. 2.

250. Amnesty International, *supra* note 178.

to adherences of the Covenant during times of public emergency.²⁵¹ Even these exceptions, however, do not cover the sweeping negation of rights that the USA PATRIOT Act has legitimized. The ICCPR Part II, Article 4 states,

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, *provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.*²⁵² [Emphasis added]

G. The Department of Homeland Security

President George W. Bush proposed creating the Department of Homeland Security (DHS) in June of 2002 in the aftermath of September 11, when the administration and the public questioned the state of national security.²⁵³ The President concluded that the nation needed a more unified national security structure, whose primary mission was to protect the American homeland.²⁵⁴ The DHS's mission is to "[p]revent terrorist attacks within the United States; [r]educe America's vulnerability to terrorism; and [m]inimize the damage and recover from attacks that do occur."²⁵⁵ The DHS created a clear and efficient structure that housed four divisions: Border and Transportation Security; Emergency Preparedness and Response; Chemical, Biological, Radiological and Nuclear Countermeasures; and Information Analysis and Infrastructure Protection.²⁵⁶ The Department unified authority over federal security operations that related to border patrol, territorial waters, and transportation.²⁵⁷ Further, it assumed responsibility for the operational assets of the Coast Guard, Customs Service, Immigration and Naturalization Service and Border Patrol ("INS"), and the Transportation Security Administration.²⁵⁸ By combining those entities under one roof, the President made the DHS the sole governmental body tasked with managing entry into the

251. ICCPR, *supra* note 247, at Part II, Art. 4.

252. *Id.*

253. PRESIDENT GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY 1 (2002), available at <http://www.dhs.gov/xlibrary/assets/book.pdf>.

254. *Id.*

255. *Id.* at 8.

256. *Id.* at 2.

257. *Id.*

258. *Id.*

United States.²⁵⁹ The DHS oversees federal assistance during domestic disasters and is most noted for sliding the Federal Emergency Management Agency (FEMA) under its umbrella.²⁶⁰ In addition, the Department sets national policy and establishes guidelines for state and local governments on preparing for and responding to the full range of terrorist threats involving weapons of mass destruction (WMD).²⁶¹ The DHS merged under one roof the identification and assessment of current and future threats to security, mapped those threats, and issued warnings on the threats as well as decisions on how to proceed with the appropriate preventative and protective actions in response to the threats.²⁶² In the event of a threat against national security, the DHS would partner with the FBI Office of Intelligence, the CIA, the Department of Justice (DOJ), and other governmental organizations to achieve those tasks.²⁶³

H. Security or Gender Discrimination? Detainment and Special Registration

In the early post-September 11 period, the United States endorsed policies that only continued to encourage profiling. Reportedly 1,200 people, mostly Arabic or Muslim men,²⁶⁴ were rounded up in a sweep for suspects immediately after the World Trade Center attacks.²⁶⁵ To facilitate quick interrogations, "[m]any [of the men] were detained and in June 2003, a report by the Office of the Inspector General found significant problems in the way the detainees were treated."²⁶⁶ They were not permitted adequate access to telephones, legal services, or their family members.²⁶⁷ The suspects were held for a prolonged period "based on unclear and underfunded FBI clearance policy,"²⁶⁸ and, furthermore, there existed evidence of "physical and verbal abuse by prison officials."²⁶⁹ Out of the 1,200 arrested and jailed, only one was charged as a terrorist, yet more than six hundred were charged with immigration violations.²⁷⁰ Those suspects charged with immigration violations most likely did not have an attorney, although they "were subjected to secret hearings where the government

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 3.

263. *Id.*

264. MARTIN, *supra* note 111, at 75.

265. Amnesty International, *supra* note 178.

266. *Id.*

267. *Id.*; see also MARTIN, *supra* note 111, at 82.

268. Amnesty International, *supra* note 178; see also MARTIN, *supra* note 111, at 81.

269. Amnesty International, *supra* note 178.

270. MARTIN, *supra* note 111, at 75.

excluded family and friends.”²⁷¹ The secrecy of the arrests led critics to suspect the silence was a cover for government misconduct as opposed to silence to protect national security.²⁷²

An analogous situation in American history is the Japanese Internment during World War II. During the war, “the federal government interned over 100,000 Japanese men, women, and children without regard to citizenship or length of residence in the U.S.”²⁷³ The Japanese were placed in remote camps with their homes, businesses, and property confiscated.²⁷⁴ The case of *Korematsu v. United States*²⁷⁵ challenged this government-authorized action, which bore striking similarities to World War II’s massive arrest of Jews under Hitler. The Court stated that the “exclusion of those of Japanese origin was deemed necessary because of . . . the disloyal members of the group, most of whom we have no doubt were loyal to this country.”²⁷⁶ When confronted with the comparison of the internment camps as concentration camps, the Supreme Court rebuked the comparison “with all the ugly connotations that term implies.”²⁷⁷ The Court felt that this security measure was “nothing but an exclusion order,”²⁷⁸ and to bring up any racial issues “without reference to the real military dangers which were presented, merely confus[ed] the issue.”²⁷⁹ The Court held that the exclusion order was not unjustified²⁸⁰ and, furthermore, that the exclusion was not issued due to hostility towards the Japanese but because the United States was at war with Japan and required this security measure.²⁸¹

The Palmer raids following World War I provide yet another historical link to the United States’ reaction after September 11.²⁸² Concern augmented regarding the growth of the Socialist party and the creation of the Communist Labor Party.²⁸³ At specific issue was the May 1919 “nationwide bomb conspiracy”²⁸⁴ where thirty-six bombs were mailed to prominent Americans,²⁸⁵ including one to then

271. *Id.*

272. *Id.* at 78.

273. Coke, *supra* note 2, at 92.

274. *Id.*

275. 323 U.S. 214 (1944).

276. *Id.* at 218-19.

277. *Id.* at 223.

278. *Id.*

279. *Id.*

280. *Id.* at 224.

281. *Id.* at 223.

282. Coke, *supra* note 2, at 91-92.

283. Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 245 (2005) (discussing the Palmer Raids).

284. Cohen, *supra* note 87, at 1436 (discussing the Palmer Raids).

285. *Id.*

Attorney General A. Mitchell Palmer.²⁸⁶ The United States government immediately suspected Russian and Eastern European immigrants.²⁸⁷ In November of 1919 the Palmer raids commenced with the arrest of six hundred fifty people.²⁸⁸ Then in January of 1920, Palmer arrested another four thousand people.²⁸⁹ Law enforcement officials found the suspects at so-called "radical hangouts" and proceeded to detain them.²⁹⁰ The United States government deported more than three thousand aliens were deported during the Palmer raids,²⁹¹ and it charged "more than 1400 Americans with violations of the newly coined criminal syndicalism statutes, which made it illegal to attempt to overthrow the government of the United States."²⁹²

I. Special Registration

On November 6, 2002, the Department of Justice announced that it would require men from five Muslim countries who were temporarily visiting the United States to be fingerprinted, photographed, and registered as a step in the "war on terror."²⁹³ National Security Entry/Exit Registration System (NSEERS) requires men age sixteen and up "from 24 Muslim and Middle-Eastern countries and [North] Korea to report for registration and interrogation at their local INS."²⁹⁴ The program was originally launched in airports two months earlier when citizens from Iran, Iraq, Libya, Sudan, and Syria were subjected to information gathering when they arrived in the United States.²⁹⁵ The program was extended to include male citizens of those countries who arrived in the United States before September 11.²⁹⁶ The *Washington Post* quoted Hussein Ibish, spokesman for the American-Arab Anti-Discrimination Committee, as emphasizing that none of the hijackers of the September 11 incidents came from the countries that were being targeted.²⁹⁷ The government stated that it would only affect "a tiny percentage of the tens of millions of tourists, students, business people and temporary workers who come to the United States

286. Donohue, *supra* note 283, at 245.

287. Cohen, *supra* note 87, at 1436.

288. Donohue, *supra* note 283, at 245.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. Mary Beth Sheridan, *U.S. Wants Prints of Muslim Visitors; Arab Groups Denounce Plan*, WASHINGTON POST, Nov. 7 2002 at A3, available at <http://www.washingtonpost.com/ac2/wp-dyn/A19891-2002Nov6>.

294. Amnesty International, *supra* note 178.

295. Sheridan, *supra* note 293.

296. *Id.*

297. *Id.*

each year," yet it also affected people who have passports from two countries — one of which was not from one of the five selected nations.²⁹⁸ This form of non-traditional profiling has resulted in "over 13,000 men [being] placed in deportation proceedings, mostly on account of minor immigration violations or due to their immigration case being caught in INS backlogs."²⁹⁹ Furthermore, when NSEERS began the government promised that this policy would be expanded to all visitors to the United States.³⁰⁰ This promise was quickly reversed, and NSEERS will not expand to visitors from other countries.³⁰¹

III. EFFECTS ON TERRORISM: IS GENDER PROFILE HELPING OR HINDERING AMERICA?

*We need a common sense approach for this very difficult question. Let me give you an analogy — if you witness a crime committed by an Anglo blue-eyed blonde male driving a white car, it would make sense for the police to focus on everybody who is a Anglo blue-eyed blonde male driving a white car, but it would not make any sense to stop every male who is blonde and blue-eyed just because they are white males and blue-eyed. Secondly the other common sense approach is to try to make us feel safe and not just make us feel better. So the point being that if we were to target all Arabs or all Arab looking people, that would not make us any safer as a society. What it would do would be to alienate an entire group of people against the rest of us. Thirdly, I can assure you that having been a victim of racial profiling, we see this issue from a very different perspective.*³⁰²

298. *Id.*

299. Amnesty International, *supra* note 178.

300. *Id.*

301. *Id.*

302. Yzaguirre, *supra* note 174. Mr. Yzaguirre was answering the following question from a Washington, D.C. reader of the *Washington Post*:

Why are we having this debate? Racial and ethnic profiling works the way it's intended to — over the extent of broad groups, not with respect to every individual member of the statistical group. So why doesn't it make perfect sense to intelligently use racial and ethnic profiling as an appropriate analytic screen? If it was statistically unreliable, cops wouldn't use profiling, because it wouldn't make them any overtime and increase their pensions. I suspect that the real reasons many groups out there (including yours) oppose racial and ethnic profiling is that it identifies the most socialized members of the group directly with the least socialized members of the group. An example

During the government's continued "war on terror" in a post-September 11 United States, three arrests clearly show the ineffective nature of profiling. The arrests of John Walker Lindh, Jose Padilla, and Richard Reid illustrate that visual profiling is not the answer.³⁰³ John Walker Lindh, a middle-class white man,³⁰⁴ "agreed to plead guilty to aiding the Taliban and carrying explosives while doing so."³⁰⁵ A general point of strong critique with the Lindh case is the fact that he was granted general privileges and options that other suspected terrorists are typically not provided, such as full access to an attorney and the ability to plea bargain.³⁰⁶ Jose Padilla, a United States citizen of Puerto Rican ancestry and alleged Chicano gang member,³⁰⁷ was arrested in May of 2002 after flying into Chicago's O'Hare airport on suspicion of being on a reconnaissance mission to create and plant a dirty bomb.³⁰⁸ Richard Reid, a citizen of the United Kingdom of West Indian and European ancestry,³⁰⁹ pled guilty to all eight charges against him in the infamous American Airlines "shoe-bombing" incident on December 22, 2001.³¹⁰ Reid also declared himself a follower of Osama Bin Laden.³¹¹ None of these three high profile cases involved men of Arabic descent.

A. Women as Terrorists

*... the murderer will still pay the price, and we will not remain the only ones to cry. If our people cannot realize the dream and the goals of the victims, and live in freedom and dignity, then let the whole world be wiped out.*³¹²

of this result: this emotionally forces the Hispanic Calif. Court of Appeals Judge to either prove that he's not a posse man, or to defend those who are. The truth is, that's just race-shame. And you know it. Racial and ethnic profiling — as a screen and not a proxy for actual guilt or innocence — works, and works well. Please stop hindering the public safety by opposing it.

Id.

303. See generally Coke, *supra* note 2, at 104.

304. Amnesty International, *supra* note 178.

305. Dahila Lithwick, *The Pushover*, SLATE, July 16, 2002, <http://www.slate.com/Id/068128/>.

306. *Id.*

307. Amnesty International, *supra* note 178.

308. *Profile: Jose Padilla*, BBC NEWS, June 11, 2002, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/americas/2037444.stm>.

309. Amnesty International, *supra* note 178.

310. *'Shoe Bomber' Pleads Guilty*, BBC NEWS, Oct. 4, 2002, <http://news.bbc.co.uk/1/hi/world/americas/2298031.stm>.

311. *Id.*

312. Gross, *supra* note 119, at 634 (citing the statement of Hanadi Jeradati, a female bomber, to the Jordanian newspaper *Ha'aretz* on October 17, 2003).

An easy and clear consequence of a non-gender-neutral profile is the negation of women as potential terrorists. Female suicide bombers first appeared in Lebanon twenty years ago.³¹³ Around 2000, the phenomenon of female suicide bombers began to be prevalent in Palestinian territories during the al-Aqsa intifada.³¹⁴ In regards to Palestinian female suicide bombers, this phenomenon may be less about being militant and may instead be primarily aimed at the female internal interest against the conservative leadership of the state.³¹⁵ The women have come mainly from secular Arab nationalist groups, Kurdish rebels in Turkey, and non-Muslim Liberation Tigers of Tamil Eelam to fight the government of Sri Lanka.³¹⁶ The past few years, however, have given birth to female attackers coming from other groups and geographic locations.³¹⁷

Thauriya Hamamreh, a Palestinian woman and orthodox Muslim, "was caught by the security forces just prior to departing on a mission to commit a suicide attack on behalf of the al-Aqsa Martyrs Brigades, an armed militia group affiliated to Fatah and financially supported by the Palestinian Authority."³¹⁸ In October of 2003, Hanadi Jeradati blew herself up in a crowded restaurant in Haifa killing twenty-one civilians on behalf of the Palestinian Islamic Jihad.³¹⁹ In July of 2003, three female bombers were involved in two

313. Dickey, *supra* note 15, at 27.

314. *Id.* The Al-Aqsa Intifada, according to the American Friends Service Committee, is the Palestinian uprising that was sparked in September 2000 after Ariel Sharon visited the Harmal-Sharif area in East Jerusalem, where the Al-Asqua Mosque is located, with one thousand armed escorts. American Friends Service Committee, *Middle East Glossary*, available at <http://www.afsc.org/israel-palestine/learn/glossary.htm> (last visited Feb 25, 2007). Intifada means "shaking off" in Arabic. It is sometimes referred to as the Second Intifada.

While the beginning of the Second Intifada consisted of tactics of civil disobedience similar to those in the First Intifada, the Second Intifada eventually involved much more violent resistance. This violence included direct armed conflict between Palestinian militias and the Israeli military inside the Occupied Palestinian Territories, as well as attacks against Israeli civilians inside Israel. According to the Israeli human rights organization B'Tselem, from September 29, 2000 until January 31, 2007 1,020 Israelis and 4,325 Palestinians have been killed in fighting.

Id. The Al-Aqsa Mosque is the third holiest shrine in the Muslim world. In contrast, the First Intifada took place from 1987-1993 and was on the whole a peaceful resistance "against the Israeli Occupation of Palestinian Territory. The Palestinians organized boycotts of Israeli products, tax strikes, neighborhood watches, and emergency medical relief. The Israeli reported economic loss to Israel through the Palestinian boycotting efforts amounted to about \$650 million in export goods and about \$280 million in tourism." *Id.*

315. Gross, *supra* note 119, at 635.

316. Dickey, *supra* note 15, at 27.

317. *Id.*

318. Gross, *supra* note 119, at 633.

319. *Id.*

incidents in Moscow that killed fifteen people.³²⁰ The bombers were linked to the Chechen rebels.³²¹ Known as “black widows,” the women are dressed in black and wear the “martyr’s belt” filled with explosives.³²² In October of 2002, they took hostages in a Moscow theater,³²³ and in June of 2003, a woman killed seventeen members of Russia’s military forces by throwing herself under their bus and detonating explosives.³²⁴ On November 23, 2006, Hamas³²⁵ claimed responsibility for a sixty-four-year-old grandmother who attacked Israeli troops in northern Gaza. Fatima Omar An-Najar was a Palestinian grandmother who detonated her explosives after Israeli soldiers, who thought she was acting suspicious, threw a stun grenade towards her.³²⁶ An-Najar’s relatives cite that she was “the oldest of the more than 100 Palestinian suicide bombers who have attacked Israelis over the past six years.”³²⁷ An-Najar’s oldest daughter shed light on her reasoning to commit the attack stating: “They [Israelis] destroyed her house, they killed her grandson — my son. Another grandson is in a wheelchair with an amputated leg.”³²⁸

For example, on February 25, 2007, a suicide attack occurred at the business school annex to Mustanshiryah University in Baghdad, Iraq.³²⁹ The attack killed at least forty-one people, mostly students at the University annex, and injured at least forty-six.³³⁰ Witnesses to the attack stated to authorities that a woman carried out the bombing,

320. *Chechnya’s ‘Black Widow’ Bombers*, CNN, July 11, 2003, <http://www.cnn.com/2003/WORLD/europe/07/11/russia.black.widows/>.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. “Hamas is the largest and most influential Palestinian militant movement.” Counsel on Foreign Relations, *Background: Hamas*, <http://www.cfr.org/publication/8968/#1> (last visited Feb. 25, 2007). The name Hamas not only means “zeal” in Arabic but is additionally an acronym for “Harakat al-Muqawama al-Islamiya” or Islamic Resistance Movement.” *Id.* The group is infamous for “[operating] a terrorist wing carrying out suicide bombings and attacks using mortars and short-range rockets.” *Id.* The group won the Palestinian Authority’s general elections in January of 2006. *Id.* Hamas refuses to recognize the nation state of Israel, and its charter plainly states its commitment to the destruction of Israel. *Id.* In June of 2006 the group ended a year long cease-fire “truce after reports that errant Israeli shell killed several civilians on a Gaza beach.” *Id.* The Israeli Defense Forces denied responsibility. *Id.*

326. Sarah El Deeb, *Suicide Bomber Was Grandmother Aged 64*, THE SCOTSMAN, available at <http://news.scotsman.com/international.cfm?id=1742512006> (last visited Feb. 27, 2007).

327. *Id.*

328. *Id.*

329. Shafika Mattar & Yaha Bazanji, *Attack Kills Dozens at Baghdad College*, N.Y. TIMES, Feb. 25, 2007, <http://www.nytimes.com/aponline/world/AP-Iraq.html?ex=1173070800&en=ddfa29ab797c7431&ei=5070>.

330. *Id.*

although the Interior Ministry of Iraq has yet to verify those statements.³³¹ Neither Al Qaeda nor any other organization has claimed responsibility for the attack.³³² As Associated Press writers Shafika Mattar and Yaha Bazanji stated, “[s]uicide bombings by women are unusual but not unprecedented in Iraq’s chaos.”³³³

Until recently, Al Qaeda held back from allowing women to become bombers.³³⁴ Ayman al-Zarqawi broke the taboo, enabling women to become Al Qaeda’s newest weapons of choice.³³⁵ The first woman to become a suicide bomber for Al Qaeda remains anonymous to this day.³³⁶ In September of 2005, she blew herself apart in the town of Tal Afar, killing five men and wounding thirty more.³³⁷ In October of 2005, Al Qaeda in Iraq claimed a second female bomber who was accompanied by her husband on their mission in Mosul, attacking an American patrol.³³⁸ Muriel Degauque, a fair-skinned woman of Belgian descent was the third Iraq-based Al Qaeda female bomber in November of 2005.³³⁹ She blew herself up attacking Iraqi police near the town of Baqubah, and her husband was killed by American troops shortly after her death.³⁴⁰ A fourth woman was claimed by Al Qaeda in Iraq the same night of Degauque’s mission in a bombing of three hotels in Amman, Jordan.³⁴¹ Sajida Mubarak al-Rishawi, the fourth bomber,³⁴² failed to detonate her bomb at the Jordan Radisson hotel.³⁴³ Al-Rishawi’s husband, Hussein Ali al-Shamari, also held bombs, which upon exploding killed thirty-eight civilians.³⁴⁴

Clearly, the new influx of women attackers is a prevalent concern with United States officials and the state of national security.³⁴⁵ The threat of women suicide bombers was more of a theoretical problem until recently.³⁴⁶ It was assumed that Osama bin Laden and Ayman al-Zawahiri would resist using women as bombers.³⁴⁷ Yet in a matter

331. *Id.*

332. *Id.*

333. *Id.*

334. Dickey, *supra* note 15, at 27.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.* at 28.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. ‘Bomber Confession’ Shocks Jordan, CNN, Nov. 14, 2005, <http://edition.cnn.com/2005/WORLD/meast/11/14/jordan.blasts/>.

344. *Id.*

345. Dickey, *supra* note 15, at 28.

346. *Id.*

347. *Id.*

of four months in 2005, the threat became more serious and very real to United States officials.³⁴⁸ These officials worry that the female suicide bombers will begin to carry out attacks in Western Europe and the United States, and their concern over "married couples" whose joining would either be legitimate or for the sole purpose of a mission is also growing.³⁴⁹

One legitimate concern in regards to national security is that women could gain easy access to soft targets in Western countries.³⁵⁰ Degauque, the third Iraq Al Qaeda female bomber, was of Belgian descent, so her profile would not have been one to cause an alarm in Western countries.³⁵¹ She retained a European Union passport that would have further enabled her to gain access to many soft targets, yet she blew herself up in Iraq.³⁵² This action clearly shows that the terrorists are aware of their profiles and are working to throw officials off balance.³⁵³ Further, the general profile of a female bomber may sometimes be different than that of a male or other females. For example, although the motives could be identical, a woman bomber in Palestine typically has a higher level of education than the average Palestinian woman.³⁵⁴

The mere threat of women suicide bombers will cause increased strain between peacekeepers and fundamentalist Islamic societies.³⁵⁵ Women suicide bombers have become, in addition to dangerous weapons of destruction, provocation tactics by terrorists.³⁵⁶ The involvement of women in such attacks broadens not only the number of available bodies for such missions but poses a new and complex threat to security keepers.³⁵⁷ Security will be charged with finding new and innovative methods to identify female suicide bombers without violating the dignity or modesty of innocent civilian women.³⁵⁸ It is important to note, however, that there are fewer women who have committed or have been caught attempting to commit suicide attacks than males in some states, such as Palestine.³⁵⁹ The Tamil Tigers in Sri Lanka,³⁶⁰

348. *Id.* at 29.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* (citing Professor Mia Bloom, author of DYING TO KILL: THE ALLURE OF SUICIDE TERROR).

354. Gross, *supra* note 119, at 635.

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. The Liberation Tigers of Tamil Eelam (LTTE), founded in 1976, is the most powerful Tamil group in Sri Lanka. Global Security.org, *Military: Liberation Tigers of Tamil*

however, have had about thirty percent of their attacks carried out by women,³⁶¹ and the Chechen "black widows" are all female.³⁶²

CONCLUSION

Clearly, the prototype for profiling a "terrorist" is a male of Arabic descent, or a Muslim male who has brown or black skin. This profile has been utilized by law enforcement officials and resulted in seemingly unlawful detentions and the special registration set in place by the Government. This author concludes that the primary problem with such profiling tactics is that while the government detains and registers this prototype, terrorism continues with an altered face. Muriel Degauque is a startling example of the different shades and genders of a terrorist: a fair-skinned Belgian who blew herself up attacking Iraqi police in November of 2005.³⁶³ She defies the prototype, as does Jose Padilla, John Walker Lindh, and Richard Reid. So how is this statutorily allowed discrimination really helping the war on terror? Although the USA PATRIOT Act and the guidelines stated above do not exclude an open profile, law enforcement has *chosen* a narrow one: Muslim, Arabic Male. Should the United States continue with its narrow-minded focus on terror, one can only hope that another major tragedy does not strike as a result of exploiting the self-accepted gender bias that our legislature has permitted. With Al Qaeda now allowing and possibly soon encouraging female operatives,

Eelam (LTTE), <http://www.globalsecurity.org/military/world/para/ltte.htm> (last visited Feb. 25, 2007). The Tamil people of Sri Lanka are their own social entity, with history, culture, and language. *Id.* They call their nation "Tamil Eelam." *Id.*

The LTTE began its armed conflict with the Sri Lankan Government in 1983 and relies on a guerrilla strategy that includes the use of terrorist tactics. The group's elite Black Tiger squad conducts suicide bombings against important targets, and all rank-and-file members carry a cyanide capsule to kill themselves rather than allow themselves to be caught. The LTTE is very insular and highly organized with its own intelligence service, naval element (the Sea Tigers), and women's political and military wings.

Id. In 1983, the Tamil rebels began an armed uprising, complaining of discrimination against their community. *Id.* A cease fire was signed in 2002 and is still in force, but peace talks are on hold indefinitely. *Id.* In July of 2004, the

Tamil Tigers threatened to resume a civil war halted by a peace process that began [over two years ago]. [They] accuse the Sri Lankan military of trying to weaken the rebel movement by using the rival rebel faction against them. The army and the government deny the charges, saying they are abiding by a ceasefire agreement signed in 2002.

Id.

361. Gross, *supra* note 119, at 635.

362. Chechnya's 'Black Widow' Bombers, *supra* note 320.

363. Dickey, *supra* note 15, at 28.

the previous and current terrorist bombings by the Chechan “black widows,” Jordanian, and Palestinian female suicide bombers, as well as the addition of non-Arab and potentially non-Muslim’s working against the ideals and well-being of the United States, one can only hope that our government will open its eyes and see the reality that a woman can indeed commit an act of jihad.

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