

# BEYOND “DRIVING WHILE BLACK” AND “FLYING WHILE BROWN”:<sup>1</sup> USING INTERSECTIONALITY TO UNCOVER THE GENDERED ASPECTS OF RACIAL PROFILING

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## INTRODUCTION

The day after the September 11th terrorist attacks in New York, two Muslim women in veils were pushing baby strollers in Brooklyn when they were surrounded by a group of angry youths who harassed them with racial epithets.<sup>2</sup> A week later, Sonia Sudan, a South Asian high school student in Boca Raton, Florida, was at a Kinko's copy shop when she was hauled out of the store by a deputy and held in a squad car until the FBI arrived and released her. Sonia was having cards printed for her boyfriend, who was about to enter the Air Force. She had illustrated them with a pentagram modeled after a piece of his jewelry, and a store employee had called the police, claiming Sonia was drawing satanic symbols.<sup>3</sup> In addition, during the last week of September 2001, a Muslim Harvard graduate student was verbally and physically assaulted as she exited a subway station in Cambridge, Massachusetts.<sup>4</sup> She was wearing the *hijab*.<sup>5</sup> Four white men cornered the woman and shouted, “What are you doing here? Go home to your own country!” and then tried to remove her *hijab*.<sup>6</sup>

Since the September 11th terrorist attacks, incidents like these are numerous.<sup>7</sup> Arab Americans, or anyone who resembles one, male or female, are being “profiled.” Yet the primary focus of racial profiling has been on

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<sup>1</sup> This phrase refers to the profiling of Arabs and South Asians in airports and on planes. It is a take on “Driving While Black,” the sarcastic phrase used to describe racial profiling on highways.

<sup>2</sup> South Asian Leaders of Tomorrow (SAALT), American Backlash: Terrorists Bring War Home in More Ways Than One (2001), at <http://www.saalt.org/biasreport.pdf> [hereinafter SAALT Report].

<sup>3</sup> Rekha Basu, Indian Woman Journalist Details New Bias Against Women Who Look Foreign, Women's eNews (Sept. 21, 2001), at <http://www.womensenews.org/article.cfm/dyn/aid/660/context/archive>.

<sup>4</sup> Juliet Chung, Grad Student Assaulted in Alleged Hate Crime, Harvard Crimson, (Oct. 1, 2001), at <http://www.thecrimson.com/article.aspx?ref=121413>.

<sup>5</sup> The *hijab* refers to the head covering or veil Muslim women are required to wear.

<sup>6</sup> Juliet Chung, *supra* note 4.

<sup>7</sup> See SAALT Report, *supra* note 2.

the male members of these communities.<sup>8</sup> This focus is not surprising given the popular and legal understanding of racial profiling as a state practice that targets men of color.

Racial profiling is generally understood as the practice of singling out people based on their race or ethnicity for police or other security stops in the belief that members of a certain race or ethnic group are more likely to commit a particular crime.<sup>9</sup> In recent years, racial profiling has been the subject of intense public debate in the United States. However, the debate has had a narrow focus.<sup>10</sup> In particular, traditional popular and legal discourse on racial profiling has focused on "Driving While Black," the sarcastic phrase used to describe the frequency with which police use traffic stops as a pretext to stop and search African Americans, specifically African American men.<sup>11</sup> Because "Driving While Black" has come to symbolize the problem of racial profiling, it not only reflects the way racial profiling has been constructed as a *state* act that primarily affects *men*, it furthers this construction. The focus on racial profiling as a male-state relationship is problematic because it simplifies the practice of profiling, the individuals whom it affects, and the ways in which it occurs.

Using an intersectional analysis, this paper seeks to create a more inclusive picture of who profiles and whom is profiled. The paper likens the practice of racial profiling in the African American community to that occurring in South Asian American and Arab American communities in the wake of the September 11th attacks in order to highlight the construction of racial profiling in both contexts as a state act that targets men, with the objective of showing that this construction is false and underinclusive. The paper argues that racial profiling occurs where race and gender identities intersect and, as a result, has an adverse impact on women of color. To

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<sup>8</sup> As will be discussed subsequently in Part IV, much of the media coverage concerning profiling of South Asian Americans and Arab Americans after September 11th concerned "Flying While Brown," or profiling on planes and in airports. For example, the L.A. Times reported an incident that occurred on September 19, 2001, almost a week after the twin towers fell. The article explained that Ashraf Khan, a San Antonio businessman, was on a flight to Karachi, Pakistan, to attend his brother's wedding but never made it. As he was sipping water in his first class seat, he heard an announcement from the cockpit that the flight would be delayed for a few minutes. Then he was approached by the pilot who told him to get off the plane. When Khan inquired as to why he was being asked to leave, the pilot simply responded, "I'm not going to take you. Myself and my crew are not safe flying with you. They don't feel safe." Ken Ellingwood & Nicholas Riccardi, After the Attack: Racial Profiling, L.A. Times, Sept. 20, 2001, at A1.

<sup>9</sup> Rebecca Porter, Skin Deep: Minorities Seek Relief From Racial Profiling, 35-NOV Trial 13 (1999).

<sup>10</sup> Henry Weinstein et al., Suddenly, A Reevaluation of Racial Profiling, The Record, Sept. 30, 2001, at 01.

<sup>11</sup> See, e.g., Gary Webb, DWB. (Police Stops Motorists to Check For Drugs), Esquire, Apr. 1, 1999, at 118.

uncover the gendered aspects of racial profiling, the paper challenges the common understanding that profiling is a state act, and complicates the boundaries drawn between racial profiling and hate crimes. In addition, the paper contends that racial profiling reinforces social hierarchies of race and gender identities, and results in the ranking of antipathies between and within marginalized groups, making it difficult for such groups to unite on this issue.

Part I provides a background on the practice of racial profiling in the United States and explores how it has been constructed as a relationship between law enforcement (or the state) and men of color (particularly African American men), with a particular focus on the phenomenon of "Driving While Black." Part II reveals the gendered aspects of racial profiling and explores how the practice also represents a particular relationship between the state and women of color, with a focus on instances of profiling against African American women by customs agents. Part III adopts a broader understanding of profiling and challenges the assumption that only the state can profile. It argues that private individuals also profile, thereby complicating the boundaries between hate crimes and racial profiling, and revealing the extent to which these practices overlap. Parts IV and V apply this broader understanding of profiling to uncover and analyze acts of profiling that have taken place since September 11th. Specifically, Part IV examines the way profiling has been constructed as a male issue in this context, with a particular emphasis on "Flying While Brown." Part V reveals how Arab and South Asian women have been targeted by post-September 11th profiling, but in different ways than their male counterparts. Finally, Part VI discusses the need for building coalitions across various racial, ethnic, and feminist organizations in order to redefine racial profiling and foster the development of an appropriate remedy, and also examines current obstacles to building these alliances.

## **I. RACIAL PROFILING: A BRIEF HISTORY AND BACKGROUND**

Profiling is not a new phenomenon. The first profile was reportedly developed in the early 1970s by a Detroit agent of the Drug Enforcement Agency (DEA) and was used at the Detroit airport and later in other airports.<sup>12</sup> The profile did not include race or any overt physical characteristic, but instead focused on certain behaviors. It included characteristics such as nervousness; whether a ticket was paid for in cash and in large bills; and whether a passenger was traveling to or from a place considered an origin of cocaine, heroin, or marijuana.<sup>13</sup>

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<sup>12</sup> David Harris, *Driving While Black: Racial Profiling On Our Nation's Highways*, An American Civil Liberties Union (ACLU) Special Report (June 1999), at <http://www.aclu.org/profiling/report/index.html>.

<sup>13</sup> *Id.*

In the 1980s, with the emergence of the crack market and President Reagan's declared "War on Drugs," skin color became a major profile component. Enforcement of drug laws began to take place at the "street level" rather than just in airports, and the focus was increasingly on poor communities of color.<sup>14</sup> By 1985, the DEA had trained thousands of police officers to employ the "pretextual traffic stop" as a tool for conducting drug investigations.<sup>15</sup> A "pretextual traffic stop" refers to the practice of stopping drivers, particularly those of color, for minor traffic violations for the purpose of searching their cars for drugs, guns, or cash.<sup>16</sup> In 1986, the DEA introduced a racialized drug courier profile through a highway drug interdiction program known as Operation Pipeline.<sup>17</sup> While a number of indicators were used, ranging from the presence of pine tree shaped air fresheners to fast food wrappers to tattoos of marijuana leaves,<sup>18</sup> ninety percent of the people arrested by the California Highway Patrol Pipeline units between 1997 and 1999, for example, were minorities.<sup>19</sup> Because more than 27,000 police officers in forty-eight participating states have been trained in the DEA's Pipeline program to use pretextual stops to locate drugs, the program has led to the significant increase in pretextual stops that is at the center of the racial profiling debate.<sup>20</sup>

Racial profiling was facilitated by the Supreme Court's decision to uphold pretextual stops as constitutional in Whren v. United States, 517 U.S. 806 (1996). Whren involved police officers patrolling an area of high drug-crime. While patrolling, the officers noticed a truck with a temporary license plate and saw the driver looking into the lap of the passenger, Whren.<sup>21</sup> The officers followed the truck until they saw it stop at a traffic light for an "unusually" long time, and then speed off when the officers turned to tail it.<sup>22</sup> They then pulled the car over, observed what appeared to be two bags of cocaine in Whren's hands, and arrested both the driver and the passenger.<sup>23</sup> In Whren, the Court found that the subjective motivations

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<sup>14</sup> *Id.*

<sup>15</sup> Jack Kearney, Racial Profiling: A Disgrace at the Intersection of Race and the Criminal Justice System, 36-Ark. Law. 20, 22 (2001).

<sup>16</sup> Maria V. Morris, Racial Profiling and International Human Rights Law: Illegal Discrimination in the United States, 15 Emory Int'l L. Rev. 207, 237 (2001).

<sup>17</sup> Harris, *supra* note 12.

<sup>18</sup> Webb, *supra* note 11, at 118.

<sup>19</sup> *Id.* at 119.

<sup>20</sup> Harris, *supra* note 12.

<sup>21</sup> Whren, 517 U.S. at 808.

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

<sup>23</sup> *Id.* at 809.

of an officer were not relevant in evaluating the constitutionality of a stop and search, stating that their prior cases “foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved .... Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis.”<sup>24</sup> According to the ACLU, the *Whren* decision was detrimental because it gave the police almost unlimited license to stop and search any vehicle, as long as they could find any minor traffic violation to serve as a pretext for the stop.<sup>25</sup>

### A. The Focus on “Driving While Black”

Although law enforcement agencies use racial profiling in a variety of ways including the identification of drug couriers, terrorists, and gang members, the most notorious incidents of racial profiling have been pretextual traffic stops.<sup>26</sup> As such, racial profiling has essentially become synonymous with “Driving While Black,” the sarcastic term given to the practice of racial profiling on our nation’s highways. In fact, the ACLU’s extensive report on racial profiling is titled “Driving While Black,” and the entire report is focused on the use of the pretextual traffic stop.<sup>27</sup> Further, mainstream media coverage of racial profiling centers on racial profiling on the highways<sup>28</sup> and the legislative response to racial profiling is directed at traffic stops. The legislative action against profiling began with the Traffic Stops Statistics Act, H.R. 1443, which requires police to collect basic data—including the race of the driver, the reason for the stop, and whether a search was performed—on all of their routine traffic stops.<sup>29</sup> The federal act was introduced in 1997 and since then various state legislators have proposed similar bills, some of which have become state law.<sup>30</sup>

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<sup>24</sup> *Id.* at 813.

<sup>25</sup> Harris, *supra* note 12.

<sup>26</sup> Amanda G. Main, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 Brandeis L.J. 289, 289 (2000).

<sup>27</sup> See Harris, *supra* note 12.

<sup>28</sup> See, e.g., Webb, *supra* note 11, at 118. See also Tammerlin Drummond, *It’s Not Just in New Jersey: Cops Across the U.S. Often Search People Just Because of Their Race*, a Study Says, Time, June 14, 1999, at 61; Anna Quindlen, *The Problem of the Color Line: Here’s the Riddle: Why Is Our Most Important Issue the One No One Really Wants to Talk About?* Newsweek, Mar. 13, 2000, at 76.

<sup>29</sup> David Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 Mich. J. Race & L. 237, 238-39 (2001).

<sup>30</sup> Such bills have become law in Connecticut, North Carolina, Massachusetts, Missouri, Rhode Island, Tennessee, Washington, and Kansas. *Id.* at 239-40.

That "Driving While Black" has become the focus of the racial profiling debate is significant for two reasons. First, the emphasis on "Driving While Black" illustrates how profiling is conceived of as being entirely about race. The phrase itself implies that one's blackness is the primary offense leading to a pretextual stop. Where "Driving While Black" is constructed as the main form of profiling, other aspects of one's identity (gender, class, or religion, for example) that may contribute to the likelihood that an individual will be profiled are overlooked. Second, the focus on highway profiling is significant because of the way it is constructed as a practice that targets men. Much popular and academic discourse on the topic reflects the notion that, "If you are a young, African-American or Latino male ... [a]t some point during your lifetime, you will be harassed by the police."<sup>31</sup> The view that racial profiling primarily affects black men has been maintained by both feminist and black liberation organizations. The National Organization of Women (NOW) has not spoken up about racial profiling, probably because this is not considered a gender issue, but a race issue. Black liberation groups, such as the proponents of the Million Man March, have presented profiling as a male problem. As a consequence, black women who are victims of profiling have no one to speak on their behalf. In short, equating racial profiling with "Driving While Black" implies that racial profiling mainly affects African American (and Latino) men and conceals or ignores the ways that women of color are racially profiled on the highways and elsewhere. The next section identifies some of the ways in which women of color are profiled and how their experiences of profiling are distinct from those of men similarly situated.<sup>32</sup>

## II. "GENDERING" RACIAL PROFILING: HOW WOMEN OF COLOR ARE PROFILED

In order to debunk the myth that racial profiling is faced exclusively by black men, we need to recognize that racial profiling occurs in various ways. Although "Driving While Black" is the most well-known and highly publicized form of profiling, black men and women are singled

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<sup>31</sup> Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling Is Wrong*, 18 St. Louis U. Pub. L. Rev. 371, 371. See also Kathryn K. Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment and Other Microaggressions* (1988).

<sup>32</sup> This paper does not wish to trivialize the experience of "Driving While Black" or to imply that the racial profiling of African American and Latino men is not pervasive and problematic; clearly it is. Rather, the purpose of this paper is to expose the deficiencies in employing a single-axis framework to understand racial profiling and, specifically, to examine the ways racial profiling targets both men and women of color, but in distinct ways.

out and suspected of criminal behavior in diverse contexts.<sup>33</sup> As one scholar notes, "the net which criminalizes blackness has been cast far and wide."<sup>34</sup>

Before explaining how racial profiling occurs outside the context of "Driving While Black," it is worth noting that while highway profiling may have a greater effect on black men, black women are not immune from this practice. In fact, according to a survey conducted by the Washington Post, the Henry J. Kaiser Family Foundation, and Harvard University, twenty-five percent of black women felt that they had been unfairly stopped by police.<sup>35</sup> Since there is little statistical data on racial profiling in general,<sup>36</sup> it is difficult to ascertain how many women of color are subject to highway profiling. However, individual anecdotes like those that follow can be powerful in the aggregate and, at the very least, illustrate that women are victims of "Driving While Black" as well.

In April 2000, Linda Johnson was stopped by a Nebraska police officer while she was driving her family's Lexus from Omaha to Fort Riley.<sup>37</sup> The officer tailed her for eleven and one half miles before pulling her over.<sup>38</sup> Johnson said she told the officer that the only reason he stopped her was "because of the color of my skin and the type of car I am driving."<sup>39</sup> The officer issued her a warning for driving left of the center line and the next day he called Johnson's husband at work to complain about her behavior during the traffic stop.<sup>40</sup> He did not face criminal charges such as official misconduct or oppression under color of office.<sup>41</sup>

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<sup>33</sup> See Katheryn K. Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, 40 B.C. L. Rev. 717, 721-25 (1999). Russell argues that blackness has become a standard indicator of criminality and provides examples of what she terms "walking while black," "idling while black," and "shopping while black" in which black individuals were stopped by police while engaging in these respective activities.

<sup>34</sup> *Id.* at 730.

<sup>35</sup> See Richard Morin & Michael H. Cottman, Discrimination's Lingering Sting: Minorities Tell of Profiling, Other Bias, Wash. Post, June 22, 2001, at A1.

<sup>36</sup> David A. Harris, The Stories, The Statistics, and The Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 276 (1999). Harris explains that much of the data thus far on racial profiling has been obtained from lawsuits or independent academic research because police records concerning police conduct are either irregular or nonexistent.

<sup>37</sup> Tara Deering, Deputy Won't Face Charges: Don Stenberg Says Racial Profiling Can't Be Proved in the Traffic Stop of a Black Woman, Omaha World-Herald, Aug. 15, 2000, at 9.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.* Nebraska Attorney General Don Stenberg ruled that the officer did not engage in official misconduct or oppression under color of office when he stopped Johnson and stated that, while he found the officer's decision to contact Johnson's husband to be "inexplicable and inexcusable," he could not conclude that any proof of the officer's

Jhenita Whitfield, an African American woman, was stopped while driving through Eagle County to San Diego with her sister and four small children.<sup>42</sup> The officer told her that she had failed to signal properly before she changed lanes and then he asked to search her car, to which she consented.<sup>43</sup> She said, "I didn't feel I had a choice. The kids were hungry and one had to go to the bathroom. I figured, let's do it and get the hell out of here."<sup>44</sup> Whitfield is one of the plaintiffs in a class action lawsuit brought by motorists against officials in Eagle County, Colorado. The plaintiffs, who are men and women, argued the unconstitutionality of investigatory stops performed pursuant to a drug interdiction program.<sup>45</sup>

In October 2001, Marlene Adams filed a federal lawsuit against the city of Erie, Pennsylvania, and nine of its police officers claiming that officers pulled her over on June 16, 2001, because she is black. At the time, officers were looking for a shooting suspect. In her lawsuit, Adams maintains that the officers said they stopped her, ordered her out of her car, and searched her because she "completely met the description of an individual who shot someone" at a dance club earlier that morning. Adams says that the police could not have truly believed that she was the shooting suspect because they were looking for a black man who was bald or had a crew cut and she is a woman with "long, flowing black hair."<sup>46</sup>

Even if black women are less subject to "Driving While Black" than their male counterparts, which they likely are, the examples above reveal that they are still targets of highway profiling. More importantly, if they are less visibly targeted on the highways this does not mean they are not profiled because profiling is not confined to "Driving While Black."

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criminal activity was present. Stenberg did remark, however, that the officer's actions may constitute a civil rights violation, which Johnson could pursue as a civil lawsuit in federal or state court. *Id.*

<sup>42</sup> Robert Jackson, Eagle County Must Pay for Stopping Motorists: ACLU wins \$800,000 settlement for Drivers Stopped Because They Fit Drug Courier Profile, Rocky Mtn. News (Denver), Nov. 10, 1995, at 4A.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> To assist them in intercepting drug traffickers on the interstate, "these officers were provided a list of indicators, or characteristics common to drug couriers. The indicators included: rental vehicles, vehicles owned by persons not in the vehicle, vehicles with out-of-state license plates, darkened windows or curtains, temporary CB antennas, radar detectors, structural modifications, welding burns, absence of luggage, air fresheners, fast food wrappers on the floor and loose screws in the trim or lying on the floor. Although the parties disagree on the extent to which the race or ethnicity of the automobile occupants was to be relied upon, there is no dispute that race was a consideration." Whitfield v. Bd. of County Comm'rs of Eagle County, Colo., 837 F. Supp. 338, 340 (D. Colo. 1993).

<sup>46</sup> Associated Press, Erie Motorist Alleges Profiling, Pittsburgh Post-Gazette, Oct. 12, 2001, at B3.



### A. Racial Profiling Off the Highways: In Airports and Bus Stations

Perhaps the most prominent display of racial profiling of women of color has taken place in various United States airports. African American women are disproportionately singled out for strip-searches by U.S. Customs Service agents in such airports.<sup>47</sup> Many of these searches have occurred at Chicago O'Hare Airport, leading to a class action lawsuit brought on behalf of ninety-two African American women strip-searched at O'Hare Airport by customs agents.<sup>48</sup> Similar incidents of the profiling of African American women in airports are evident around the country. For example, the ACLU is currently bringing two separate cases against the U.S. Customs Service for the invasive bodily searches of two African American women at Newark Airport.<sup>49</sup>

Regardless of whether these cases are ultimately successful in the courts, the filing of lawsuits against the U.S. Customs Service has prompted review by the United States General Accounting Office (GAO) of the Customs Service's policies and procedures for conducting personal searches. Specifically, the GAO report provides data and analysis on characteristics of passengers, such as race and gender, which affect the likelihood that a passenger will be selected for an intrusive search such as a strip-search or an X-ray.<sup>50</sup> The GAO report has confirmed what many already suspected—that black women are disproportionately strip-searched by U.S. Customs officials. For example, according to a study of Customs statistics by Sheri Johnson, a Cornell Law professor, black and Hispanic travelers were subjected to forty-three percent of the body searches conducted in 1998.<sup>51</sup> Black female travelers were eight times more likely than white males to face a strip-search by Customs agents.<sup>52</sup> The GAO Report found that of the 102,000 international passengers subjected to some form of personal search in 1997 and 1998, four percent were strip-searched and one percent were subjected to an X-ray exam.<sup>53</sup> Moreover, among

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<sup>47</sup> Black Women Targets of Unfair Racial Profiling, San Antonio Express-News, Apr. 13, 2000, at 4B.

<sup>48</sup> Anderson v. Comejo, 2001 WL 826878 (N.D. Ill. 2001).

<sup>49</sup> See, e.g., Hum v. United States, 221 F. Supp. 2d 493 (D. N.J. 2002); Bradley v. United States, 164 F. Supp. 2d 437 (D. N.J. 2001).

<sup>50</sup> United States General Accounting Report, U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results (March 2000), available at <http://www.gao.gov> [hereinafter GAO Report].

<sup>51</sup> Stephen Barr, Two Allege Racial Bias by Customs, Wash. Post, May 21, 1999, at A29.

<sup>52</sup> *Id.*

<sup>53</sup> GAO Report, *supra* note 50, at 2.

United States citizens, black women were most often subject to strip-searches in 1998.<sup>54</sup> In fact, black women were nine times more likely than white women to be X-rayed after being frisked or patted down, but half as likely as white women to be carrying illegal substances.<sup>55</sup> The report also found that black, Asian, and Hispanic women were strip-searched three times more than men of the same race, while white men and women were strip-searched at about the same rate.<sup>56</sup> The following individual examples provide insight into the invasive nature of these searches and their detrimental effects.

Janneral Denson, an African American woman who was seven months pregnant, was returning to Fort Lauderdale from Jamaica when she was pulled out of a passenger arrival line by U.S. Customs agents who suspected her of swallowing packets of illegal drugs.<sup>57</sup> She was detained and taken to a local hospital where she was handcuffed to a bed and forced to drink four cups of a laxative.<sup>58</sup> Twenty-four hours later, when her bowels showed no signs of drugs, she was released.<sup>59</sup> She underwent an emergency cesarean and gave birth to a severely underweight son.<sup>60</sup>

Similarly, Amanda Buritica, a Latina woman traveling from Hong Kong to San Francisco, was detained for twenty-five hours, during which time she was subjected to a humiliating strip-search.<sup>61</sup> She testified that a female agent kept kicking her legs and telling her to bend down more.<sup>62</sup> Buritica said the agent ordered her to "lift up my breasts. She looked. She told me to lift up my hair. She inspected me everywhere."<sup>63</sup> Buritica was forced to take laxatives, watched by agents during her bowel movements, ordered to be X-rayed, and forbidden from making phone calls.<sup>64</sup> She called the detention the most humiliating experience of her life.<sup>65</sup>

African American women are also profiled in other public arenas. For example, Annette Evans, a nineteen-year-old African American woman

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Lynn Sweet, O'Hare Searches Biased, Report Finds Black Women Singled Out for Searches at O'Hare, *The Chi. Sun-Times*, Apr. 10, 2000, at 3.

<sup>57</sup> Barr, *supra* note 51, at A29.

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

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

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

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

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

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

with no prior record, was stopped by two policemen as she was about to board a bus in the Port Authority terminal of New York City.<sup>66</sup> After a brief conversation, the sergeant told her he thought she was carrying drugs.<sup>67</sup> A search of her hand luggage revealed several ounces of cocaine in a brown paper bag.<sup>68</sup> The court granted a motion to suppress the evidence because there was insufficient support for reasonable suspicion and insufficient evidence that she consented to the search.<sup>69</sup> The court criticized the officers' conduct and said, "[T]he picture that emerges is one of discriminatory law enforcement which does incalculable damage to our civil liberties but produces at best questionable results for the war on drugs."<sup>70</sup>

### B. Why Are These Women Singled Out?

The O'Hare incidents and others like them have prompted policy changes by the U.S. Customs Service, including the installation of a body scan imaging machine at O'Hare in 1999.<sup>71</sup> In addition, the GAO Report has reportedly led to a significant reduction in the number of people subjected to the most intrusive searches and a higher success rate (likelihood of finding contraband) in those subjected to searches.<sup>72</sup> But these improvements do not answer the lingering question of why women of color, particularly black women, were so much more likely to be subjected to the most degrading searches by Customs agents around the United States. Part of the problem is indeed the far-reaching power of the U.S. Customs Service to conduct pat-downs of travelers in holding rooms.<sup>73</sup> But this is not the root of the problem. Even if the Customs Service reduces the total number of invasive searches, as it reportedly has, black women may still be disproportionately searched—without data aggregated by race and gender we will not know for sure. Rather, the root of the problem lies in the

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<sup>66</sup> *People v. Evans*, 556 N.Y.S.2d 794, 795 (Sup. Ct. 1990).

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

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

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

<sup>70</sup> *Id.*

<sup>71</sup> Sweet, *supra* note 56, at 3.

<sup>72</sup> According to Customs Statistics released for the first half of fiscal 2000, there were 649 of the most invasive personal searches (including X-rays, strip-searches, monitored bowel movements, and body cavity exams) as compared to 1,342 for the same period of fiscal 1999. Customs also reported a 54.8% success rate compared with 25.6% for the previous year. *Id.*

<sup>73</sup> ACLU Press Release, *Black Women Targeted in Intrusive Airport Searches* (April 10, 2000), at <http://www.aclu.org/news/2000/w041000a.html>.

intersectional oppressions that black women experience.<sup>74</sup> Neither race nor sex discrimination can fully explain why these women were so disproportionately targeted for searches by Customs agents. The problem is not solely racial discrimination because, as noted previously, the GAO report found that women of color were strip-searched three times more often than men of the same race. Similarly, sex discrimination cannot account for the discrepancy, since black women were nine times more likely than white women to be X-rayed after being patted down.<sup>75</sup> It is a unique combination of the two, their intersectional identities, which creates this multiple jeopardy<sup>76</sup> for black women.

Two intersectional stereotypes, that is, stereotypes that have both racist and sexist dimensions, may elucidate why black women are singled out for intrusive Customs searches. First, black women are often stereotyped as drug addicts.<sup>77</sup> Second, black women have historically been sexualized and projected as impure women.<sup>78</sup>

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<sup>74</sup> Kimberlé Crenshaw explains that while black women sometimes experience discrimination that is similar to that experienced by white women or black men, often they experience "double discrimination," and are the victims of practices that discriminate on the basis of both race and sex. Crenshaw also stresses that the intersectional experiences of black women cannot always be explained in an additive manner. She writes "[S]ometimes they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women." Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 149.

<sup>75</sup> GAO Report, *supra* note 50, at 2.

<sup>76</sup> Deborah King uses this term to describe both the multiple oppressions from which black women suffer and the multiplicative (as opposed to additive) relationships among these oppressions. Deborah King, Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology, 14 Signs: J. of Women in Culture and Soc'y 220, 222-23 (1988).

<sup>77</sup> The medical community is one place where this stereotype exists. Charles Ogletree, Jr., explains that African American women are much more likely to be reported to government authorities than wealthy white patients and argues that the disproportionate number of prosecutions of black women for fetal endangerment should be challenged because they are based on stereotypes that black women are drug addicts and irresponsible and unfit mothers. Charles Ogletree, Jr., The Burdens and Benefits of Race in America, 25 Hastings Const. L.Q. 219, 244 (1998).

<sup>78</sup> See, e.g., Catherine Albiston, The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class and Gender, 9 Berkeley Women's L.J. 9, 16-17 (1994); Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1271 (1991); Tanya Ketari Hernandez, Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race, 4 J. Gender Race & Just. 183, 195 (2001); Marilyn Yarbrough & Crystal Bennett, Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars, 3 J. Gender Race & Just. 625, 633 (2000).

### C. The Stereotype of Black Women as Drug Addicts

The stereotype of the black woman as "drug addict" is not surprising given the racist undertones of the War on Drugs, which emerged in response to the explosion of the crack market in the 1980s. Modern sentencing laws for drug offenses have had a disproportionate impact on communities of color and have vastly increased the incarceration rates for those communities.<sup>79</sup> Michael Tonry asserts that "the impact of the War on Drugs on young inner-city minority males was foreseeable."<sup>80</sup> Thus, such laws could be viewed as inherently racist<sup>81</sup> or as the codification of the stereotype, deeply embedded in our collective cultural consciousness, of the black or Hispanic drug dealer from the inner city.

But the War on Drugs has had a disproportionate effect on women as well, and has led to a steep rise in the number of women incarcerated.<sup>82</sup> Nonetheless, the efforts to find and prosecute offenders of drug laws have not affected all women equally. *Black* women are disproportionately impacted by this war.<sup>83</sup> Black women have come to embody the typical addict or drug courier.<sup>84</sup> They are the archetypal "druggie."<sup>85</sup> The injustice in the incarceration of these women and the long sentences they serve is that many are not drug addicts, but are merely the "mules" forced or tricked into carrying drugs for dealers.<sup>86</sup> "Often the dealers are boyfriends, spouses, or other relatives that use the threat of retaliation if the women do not agree to carry large amounts of drugs, frequently across state or national borders."<sup>87</sup>

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<sup>79</sup> Paula C. Johnson, At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing, 4 Am. U. J. Gender Soc. Pol'y & L. 2, 41 (1995).

<sup>80</sup> *Id.* at 42.

<sup>81</sup> *Id.* (citing Michael Tonry, Malign Neglect: Race, Crime and Punishment in America (1995)).

<sup>82</sup> Between 1990 and 1997, the number of women serving time in prison for drug offenses almost doubled while there was a forty-eight percent increase in the number of men in prison for drug offenses. Human Rights Watch Report, Punishment and Prejudice: Racial Disparities in the War on Drugs, 12.2 (May 2000), at 12.

<sup>83</sup> In 1996, 42.2% of all black women and 36.1% of all white women admitted to prison in 1996 were convicted of drug offenses. *Id.*

<sup>84</sup> Ogletree, *supra* note 77.

<sup>85</sup> While I recognize that Latina women are similarly stereotyped as drug addicts and mules, and are also disproportionately targeted for searches by Customs agents, for the purpose of this analysis I choose to focus on black women.

<sup>86</sup> Johnson, *supra* note 79, at 45.

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

Tracy Huling studied drug couriers arrested at New York's John F. Kennedy Airport for smuggling drugs into the United States. She reported many stories of women who were severely penalized for drug possession even though they were forced to carry drugs.<sup>88</sup> One such story involved Marie, a forty-year-old black woman, who carried a small wooden statue filled with cocaine on the plane with her from Haiti.<sup>89</sup> She said she did it because a village police chief told her that he would blow up her mother's house with a grenade if she did not carry the statue.<sup>90</sup> She was acquitted after serving a year on Riker's Island.<sup>91</sup> Similarly, Delia, a divorced mother of four with a seventh-grade education, traveled outside of Greensboro, North Carolina, for the first time to meet her future husband in Nigeria, the brother of a businessman she knew.<sup>92</sup> Delia's fiancé sent her home from Nigeria with a gift: a quilted suede coat, the lining of which she was told upon her arrest contained fifteen ounces of heroin.<sup>93</sup>

Clearly, it is not only black women who function as mules for their dealer boyfriends,<sup>94</sup> yet they are disproportionately targeted by Customs officials on the basis of stereotypes that black women do drugs. The racist elements of the war on drugs and the stereotypes of black women as drug addicts that are perpetuated in the medical community,<sup>95</sup> in modern welfare policy,<sup>96</sup> and in the media<sup>97</sup> increase the likelihood that even the most

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<sup>88</sup> Tracy Huling, Women Drug Couriers: Sentencing Reform Needed for Prisoners of War, 9-WTR Crim. Just., 14 (1995).

<sup>89</sup> *Id.* at 16.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> For example, Sally Smith, a white woman, was sentenced to life without parole in 1993 in Michigan after being convicted of "conspiracy with intent to deliver over 650 grams of cocaine." She was convicted based on two phone calls made to collect money for her boyfriend and two receipts she signed for a cash exchange. There was sufficient evidence that she was physically and verbally abused by her boyfriend but the court refused to admit evidence of the abuse. See Amnesty International USA, "Not Part of My Sentence:" Violations of the Human Rights of Women in Custody (Mar. 1999), available at <http://www.amnestyusa.org/rightsforall/women/report/index.html>.

<sup>95</sup> See Ogletree, *supra* note 77.

<sup>96</sup> Parvin R. Huda explains that eligibility standards and requirements pertaining to reproduction that are part of modern welfare policy are based, in part, on the stereotype of black women as drug addicts and the fear that they will produce baby addicts. Parvin R. Huda, Singled Out: A Critique of the Representation of Single Motherhood in Welfare Discourse, 7 Wm. & Mary J. Women & L. 341, 368 (2001).

<sup>97</sup> Sandi Toll explains how during the crack epidemic in the 1980s the media began to publicize findings of newborns addicted to crack and portrayed the mothers as

innocent black women will be stopped and searched for drugs when traveling through the United States.

#### D. The Stereotype of Black Women as Super-Sexual

Black women are not only more likely to be patted-down when stopped by U.S. Customs officials, but, as the GAO report indicates, black women were also nine times more likely than white women to be X-rayed after being patted down.<sup>98</sup> Moreover, the O'Hare incidents reinforce the claim that black women are in fact the primary victims of the most invasive personal searches, including the monitored use of laxatives, strip-searches, and X-rays. In the process, their bodies are treated as nothing more than potential crime scenes. These searches represent a devaluation of black women's bodies that is deeply rooted in American history. Black women's bodies have historically been sexualized and thereby cheapened, and the myths about their sexuality that emerged during the days of slavery continue to influence the law's treatment of these women today.

One of the common stereotypes ascribed to African American women is that of the Jezebel, the "bad black girl," who is depicted as lustful, seductive, impure, and sinful.<sup>99</sup> Catherine Albiston explains, "Historically, black women have been viewed as 'sexual savages,' the embodiment of female evil and sexual lust, jezebels and sexual temptresses."<sup>100</sup> During slavery, a time in history when women were expected to be modest and to cover every inch of their bodies, slave women's naked bodies were often exposed publicly for brutal beatings or for inspection prior to being sold in order to determine their sexual worth for purposes of breeding.<sup>101</sup> According to Albiston, "The popular myth is that 'all black women are eager for sexual exploits, voluntarily "loose" in their morals and, therefore, deserve none of the consideration and respect granted to white women.' Black women have been singled out and judged as more immoral than other groups of women. Media images of black women as whores, sluts, and prostitutes continue today."<sup>102</sup> Kimberlé

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irresponsible and selfish, the majority of whom were African American. Sandi J. Toll, For My Doctor Eyes Only: Ferguson v. City of Charleston, 33 Loy. U. Chi. L.J. 267, 291 (2001).

<sup>98</sup> GAO Report, *supra* note 50, at 2.

<sup>99</sup> Lori A. Tribbett-Williams, Saying Nothing, Talking Loud: Lil' Lim and Foxy Brown, Caricatures of African-American Womanhood, 10 S. Cal. Rev. L. & Women's Studies 167, 173 (Fall 2000); Yarborough & Bennett, *supra* note 78, at 636.

<sup>100</sup> Albiston, *supra* note 78 (citing bell hooks, Ain't I a Woman 33-34 (South End Press, 1981)); Gerda Lerner, The Myth of the "Bad" Black Woman, in Black Women in White America: A Documentary History 163, 163 (Gerda Lerner ed., 1972).

<sup>101</sup> Tribbett-Williams, *supra* note 99, at 174.

<sup>102</sup> Albiston, *supra* note 78, at 16.

Crenshaw highlights the intersectionality in the stereotype of black women as highly sexual and impure.<sup>103</sup> Crenshaw argues that the black race has historically been portrayed as “more sexual, more earthy, more gratification-oriented,”<sup>104</sup> and that these sexualized images of race have a particularly negative effect on black women because they intersect with norms of women’s sexuality that are used to distinguish the good women from the bad, the pure from the impure.<sup>105</sup> The construction of black women as highly sexual and, in our culture therefore “bad,” results in their less than adequate protection under the law.

That the stereotype of African American women as impure, bad women has modern legal consequences is evident in the context of sexual assault and rape.<sup>106</sup> The law and society at large have not rushed to protect the sexual victimization of black women with the fervor that has been present where white victims were raped or otherwise sexually assaulted.<sup>107</sup> Kimberlé Crenshaw argues that “[B]lack women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot.”<sup>108</sup> The well-known case of the Central Park Jogger is a perfect example of this tendency. While the rape of this wealthy, white woman by several Latino and black males was widely denounced and even prompted Donald Trump to take out full page ads in *The New York Times*, *The Daily News*, *The New York Post*, and *New York Newsday* to condemn the men who had committed the assault,<sup>109</sup> twenty-eight other rapes or attempted rapes that took place in New York City that same week went virtually unnoticed.<sup>110</sup> Most of the rape victims

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<sup>103</sup> Crenshaw, *supra* note 78, at 1271.

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

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

<sup>106</sup> Kimberlé Crenshaw explains that studies of rape have indicated that men convicted of raping black women tend to receive, on average, a sentence of two years, while they receive ten years for the rape of a white woman. Moreover, black women who are victims of rape are less likely to be believed by jurors. See Crenshaw, *supra* note 78, at 1269.

<sup>107</sup> Linda L. Ammons, Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome, 1995 Wis. L. Rev. 1003, 1026-27 (1995).

<sup>108</sup> Crenshaw, *supra* note 78, at 1271.

<sup>109</sup> Thirteen years later the State Supreme Court in Manhattan vacated the convictions for the rape of the Central Park Jogger of all five men. The judge threw out the convictions after Matias Reyes, a convicted murder-rapist, confessed to the crime. Both DNA and other evidence link Reyes to the crime. The five men have each completed between seven and thirteen years for the attack. Susan Saulny, Convictions and Charges Voided In '89 Central Park Jogger Attack, N.Y. Times, Dec. 20, 2002, at A1.

<sup>110</sup> Ammons, *supra* note 107, at 1029. See also Crenshaw, *supra* note 78, at 1267.



were black or Hispanic.<sup>111</sup> Particularly disturbing is the fact that the brutal rape of a thirty-eight-year-old black woman who was forced off a Brooklyn street at knife-point by two men, taken to a rooftop, raped, beaten, and thrown fifty feet to the ground, that occurred two weeks after the Central Park Jogger rape, received little attention as well.<sup>112</sup>

The differential response to rapes involving white and black victims is also evident when one compares the police investigations of the cases of Kimberly Rae Harbour and Carol Stuart in Boston. Kimberly Harbour was a young black woman who was a drug user, an unwed mother, and an occasional prostitute. She was gang-raped, beaten with a tree limb, and stabbed 132 times on October 31, 1990.<sup>113</sup> However, the police treated this case as a routine killing and called no special attention to it even though it was a brutal and far from ordinary killing.<sup>114</sup> Further, they made no arrests until more than a month after the rape.<sup>115</sup> In contrast, when Carol DiMaiti Stuart, a married, white woman from Boston, was murdered in 1989, police publicly accepted and quickly acted on the tip from her husband, Charles Stuart, that his wife had been shot to death by a black man in a jogging suit.<sup>116</sup> In the end, Charles Stuart was named the police's prime suspect and committed suicide soon after.<sup>117</sup> The distinct reactions to these crimes reinforce the notion that certain women's bodies are considered more valuable than others.<sup>118</sup>

The history of the devaluation of black women's bodies facilitates an understanding of why black women are disproportionately selected for humiliating searches. It may also explain what appears to be greater outrage when white women are the subjects of such invasive searches. For example, while there are a number of African American women who have accused the U.S. Customs Service of conducting illegal searches, only a white woman's case, that of Kathryn Kaniff, has reached the trial level.<sup>119</sup> After

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<sup>111</sup> Seventeen of the victims were black, seven Hispanic, three white, and two Asian. Don Terry, In Week of an Infamous Rape, 28 Other Victims Suffer, N.Y. Times, May 29, 1989, at B25.

<sup>112</sup> Ammons, *supra* note 107, at 1029.

<sup>113</sup> Brutal Murder in Boston Draws Outrage. Investigation Complaints, Daily News of L.A., Nov. 22, 1990, at N2 [hereinafter Brutal Murder].

<sup>114</sup> *Id.*

<sup>115</sup> Double Standard?, Time, Dec. 3, 1990, at 57.

<sup>116</sup> Brutal Murder, *supra* note 113.

<sup>117</sup> *Id.*

<sup>118</sup> Valerie Smith, Split Affinities: The Case of Interracial Rape, in Conflicts in Feminism 271, 278 (Keller & Hirsch eds., 1990).

<sup>119</sup> Matt O'Connor, Jury Hears Details of Strip-Search; X-rays Also Taken of Woman by Customs Agents, Chi. Trib., Aug. 14, 2001, at 1.

returning from a trip to Jamaica, Kaniff was strip-searched and X-rayed by Customs agents at Chicago O'Hare airport.<sup>120</sup> As Kaniff exited the plane, a trained dog was "alerted" to the presence of a narcotic odor on Kaniff, but she alleged that she was carrying food.<sup>121</sup> She was considered suspicious because she bought her airline ticket on short notice and paid in cash. Moreover, she did not stay at a hotel in Jamaica and made several trips to Jamaica in the past few years despite her low income.<sup>122</sup> A supervisor authorized a pat down of Kaniff's clothing and an inspector reported feeling a bulge in Kaniff's crotch area.<sup>123</sup> Suspecting that Kaniff might be hiding narcotics in a bodily cavity, the inspector obtained authorization to conduct a partial strip-search and then X-rays, but never found anything.<sup>124</sup> A federal jury recommended \$129,750 in damages for the pain, suffering, and psychiatric costs that Kaniff had to bear as a result of the search.<sup>125</sup>

Yvette Bradley's case, on the other hand, was dismissed on a motion for summary judgment.<sup>126</sup> Bradley was subjected to an invasive search at Newark International Airport after she returned from a trip to Jamaica and on May 12, 2000, the ACLU filed a lawsuit against the U.S. Customs Service on her behalf.<sup>127</sup> According to the lawsuit, Bradley was led to a room in the airport where she was told to stand against the wall with her legs spread apart and her palms to the wall.<sup>128</sup> A Customs officer then ran her fingers over every area of Bradley's body, including her breasts and the inner and outer labia of her vulva, but the search did not reveal any drugs.<sup>129</sup> The District Court of New Jersey granted summary judgment to the Customs Service, finding that there was no prima facie case for race and gender discrimination and that the Customs agents had conducted nothing more than a routine search.<sup>130</sup> The court found it irrelevant that Bradley was wearing a dress with no underwear on underneath, which meant there was

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> This opinion is advisory only. The final decision will be made by the District Judge, Rebecca Pallmeyer, but the judge reportedly told jurors that she would take their verdict "very seriously." *Id.*

<sup>126</sup> Bradley v. United States, 164 F. Supp. 2d 437, 443 (D.N.J. 2001).

<sup>127</sup> ACLU Press Release, ACLU Sues U.S. Customs Service Over Degrading Search in Case of "Flying While Black" (May 12, 2000), at <http://www.aclu.org/news/2000/n051200a.html>.

<sup>128</sup> Bradley, 164 F. Supp. 2d at 443.

<sup>129</sup> ACLU Press Release, *supra* note 127.

<sup>130</sup> Bradley, 164 F. Supp. 2d at 455.

one less “barrier,”<sup>131</sup> and stressed that a pat down search does not become intrusive or non-routine solely because it involves patting down a woman’s crotch area or breasts, and that “patting down a woman’s crotch area to feel for bulges, would necessarily press upon the external genitalia, including the inner and outer labia ....”<sup>132</sup> Moreover, the court found that even if the search had been non-routine, the officers had reasonable suspicion to conduct it<sup>133</sup> based on the fact that Bradley had come from Jamaica, a known source for narcotics, and that she was wearing an “unusual” hat under which drugs could be hidden and clothing that seemed too warm considering the climate from which she had just arrived.<sup>134</sup> Why were these facts a better basis for reasonable suspicion than those in Kaniff’s case? Bradley, too, was coming from Jamaica, had paid for her ticket in cash, and she had made frequent trips to Jamaica even on a low salary. Why were all the white male passengers in baseball hats on Bradley’s flight not stopped and searched?<sup>135</sup> The different results reached in these two cases are likely a product of the longstanding views that black women and their bodies need less protection and deserve less respect than their white counterparts.

Thus, the profiling of African American women in airports can be understood as a product of their intersectional identities and the unique discrimination they face as a result of being both black and female. The racist undertones of the War on Drugs have made them the likely suspects for carrying drugs by Customs agents while the historical devaluation and sexualization of their bodies makes it acceptable to strip-search them and deprive these women of their most basic dignities.

Although the practice of airport profiling described above disrupts the conventional understanding of racial profiling as male, it also reinforces the conception of profiling as a state act, because the perpetrators continue to be state officials. The next section challenges the conception of profiling as a state practice that takes place in the public sphere by examining the extent to which racial profiling and hate crimes overlap, particularly in the wake of September 11th.

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<sup>131</sup> “The fact that Plaintiff chose not to wear underwear does not transform this patdown search into an intrusive one.” *Bradley*, 164 F. Supp. 2d at 449.

<sup>132</sup> *Id.* at 449.

<sup>133</sup> *Id.* at 451.

<sup>134</sup> *Id.* at 446.

<sup>135</sup> *Id.* at 443.

### III. RACIAL PROFILING AND HATE CRIMES: A BLURRY BOUNDARY

#### A. The (Perceived) Differences Between Hate Crimes and Racial Profiling

Hate crimes are crimes in which the victim was selected based on race or on some other indicator of group status.<sup>136</sup> Racial profiling is also a practice in which individuals are targeted because of their salient group identity. Yet hate crimes are seen in popular society and under the law as being two entirely different phenomena. Racial profiling is constructed as a routine practice. It occurs in the context of police officers performing a public service, and it is viewed as minimally intrusive on the individual, as merely an inconvenient traffic stop. It is rarely deemed illegal. Hate crimes, on the other hand, are illegal even without the “hate” component. They are perceived as aberrant and as more severe, burdensome, and traumatic for the victim, at least where the crime is extremely violent in nature.<sup>137</sup>

#### B. The Similarities Between the Practices

Even though racial profiling and hate crimes are conventionally categorized completely independently of one another, scholars have recognized the similarities between the practices. One scholar, Lu-in Wang, who has conducted a particularly in-depth comparison of the practices, argues that in the broadest sense, the practices are similar because they involve groups who are seen as “suitable targets.”<sup>138</sup> Hate crimes and racial profiling develop in response to myths that certain groups are prone to deviancy and tend to commit certain crimes, and both, in turn, perpetuate this myth.<sup>139</sup> Thus, both are very much a product of the social and historical contexts in which they exist; yet both are rationalized as isolated from that context.<sup>140</sup> Often, the racist elements of these practices are overlooked, and the tendency is to focus solely on the crime without acknowledging the unconscious racism that might be a factor in the conduct in question. An officer’s decision to stop someone in a “high crime area” is rationalized as “good police practice,” as the efficient and cost-effective thing to do. The same failure to acknowledge the pervasiveness of social meanings of race is

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<sup>136</sup> Lu-in Wang, “Suitable Targets”? Parallels and Connections Between “Hate” Crimes and “Driving While Black”, 6 Mich. J. Race & L. 209, 210 (2001).

<sup>137</sup> *Id.* at 212.

<sup>138</sup> *Id.* at 213.

<sup>139</sup> *Id.* at 213.

<sup>140</sup> *Id.* at 212-13.

present where a robber or a rapist uses racial slurs against his victim, and it is rationalized as "understandable" or unsurprising, given his motive. As a consequence, only the most extreme examples, the Amadou Diallos<sup>141</sup> and Matthew Shepards<sup>142</sup> of the world, are those that are widely publicized and condemned.

Wang also challenges the assumption that racial profiling is a mere inconvenience and is not especially burdensome for the victim, arguing that even a "minor" traffic stop can lead an individual to depression and isolation. Wang parallels the burdens that racial profiling and hate crimes place on people other than the victims themselves, specifically other members of the victim's social group. She explains that both hate crimes and racial profiling influence the ways many members of the social group conduct themselves (avoiding driving flashy cars or walking through a predominantly white neighborhood, for example).<sup>143</sup>

### C. Hate Crimes and Racial Profiling in Light of September 11th

If racial profiling and hate crime were already fluid categories, September 11th has only further blurred the line between these practices. In this new context, Arab Americans and those who resemble them have become "the suitable targets."<sup>144</sup> They are being targeted by law enforcement as well as by private citizens. In fact, September 11th has become a catalyst for what can be termed private vigilantism. Ordinary citizens are participating in the effort to locate suspicious individuals, acting out of a perceived duty. The incidents taking place range from what might traditionally be categorized as a hate crime (a Pakistani man killed days after the attacks is an example)<sup>145</sup> to incidents that are consistent with our conventional understanding of racial profiling, such as the New York City

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<sup>141</sup> On February 4, 1999, Amadou Diallo, a black African immigrant with no police record, was shot forty-one times by police in the Bronx. Police claimed they thought he was reaching for a gun and had been looking for a rape-murder suspect at the time they encountered Diallo. See Donna de La Cruz, Police Shooting of Unarmed Man Stuns New York City, Associated Press Newswires, Feb. 9, 1999.

<sup>142</sup> In October 1998, two young men severely beat Matthew Shepard, a gay college student, tied him to a wooden fence in an isolated area, and then left him in near-freezing temperatures. Mr. Shepard was in a coma for almost a week before he died, his skull "too crushed for surgery." See Elaine Herscher, News Analysis: Wyoming Death Echoes Rising Anti-Gay Attacks, S.F. Chronicle, Oct. 13, 1998, at A7; Associated Press, Gay Victim of Beating Is Dead: Wyoming College Student Never Came Out of Coma, Chi. Trib., Oct. 12, 1998, at 1.

<sup>143</sup> Lu-in Wang, *supra* note 136, at 228-30.

<sup>144</sup> *Id.* Lu-in Wang employs this term in her article, arguing that hate crimes and racial profiling both reflect the view that certain groups are "suitable victims" or "suitable targets." *Id.*

<sup>145</sup> SAALT Report, *supra* note 2, at 9.

cab driver of Trinidadian descent who was stopped by police five times in the hours after the twin towers fell.<sup>146</sup> There are also incidents that fit less neatly into these categories, such as the airline passenger who notifies an attendant that a fellow passenger looks suspicious or the pedestrian who refuses to ride in the taxi of a Sikh man. In these instances, what label do we impart? The difficulty in categorizing arises because in this wartime context, these categories are especially fluid. We have allowed the government to increase surveillance, and the presence of police officers on every corner is embraced. As a result, the once protected private sphere has become de-privileged.

The blurring of these practices is significant because it calls for a broader conception of profiling that recognizes that profiling is not wholly public but extends into the private sphere. This deconstruction of the public/private dichotomy in the context of racial profiling allows additional victims of profiling to be uncovered, particularly women of color. The blurring is also significant because it raises the question of whether the state is in fact licensing certain racist acts. When private vigilantism is left unchallenged or when it is rationalized, as hate crimes often are, as an isolated and aberrant act of individual expression that the state cannot regulate, the state seems to be implicitly endorsing such vigilantism. Previously, the state and the legal system have mostly intervened to protect male victims of racial profiling (particularly in the context of pretextual traffic stops). As new categories emerge, when and where the state chooses to intervene to protect victims of profiling will be indicative of who counts and who does not. If the months following September 11, 2001, are any indication, it seems that the victims of post-September 11th profiling who are least likely to receive state protection are women of color. The next sections will elaborate.

Relying on a fluid conception of profiling as not wholly public, the next sections bring an intersectional perspective to the racial profiling that has been occurring since the terrorist attacks on September 11th and argue that, similar to the way that airport profiling of African American women was overlooked in the focus on "Driving While Black," profiling of Arab and South Asian women has been overshadowed amidst all the controversy surrounding "Flying While Brown."

#### **IV. PROFILING IN THE WAKE OF SEPTEMBER 11TH**

The week after the terrorist attacks on September 11th, I was riding in the taxi of an Indian cab driver when across the back of the driver's seat, scrawled in thick black marker I saw the words "Sand nigger go home." Undoubtedly, this bigotry is one of the disturbing repercussions of the attacks. The tragedies of September 11, 2001, may have instilled

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<sup>146</sup> *Id.* at 21.

widespread fear among Americans and forever altered our sense of security, but for Americans of Middle Eastern or South Asian descent, this fear is multiplied by the nagging terror that they will be singled out by law enforcement officials or private citizens as suspects for crimes they did not commit or even plan to commit. These fears have proven to be well-founded. In the first week after the attacks, at least 645 bias incidents directed towards Americans perceived to be of Arab descent were reported by various members of the United States media.<sup>147</sup>

Profiling in the aftermath of September 11th has been perceived primarily as being about race or ethnicity and the gendered aspects of the new terrorist profile have been largely overlooked. Thus, "Flying While Brown" parallels "Driving While Black" in the way it has come to dominate the profiling debate. Much of the reason for the racial focus is that media coverage of post-September 11th profiling has focused on airport profiling of Arab and Arab-resembling Americans.

In the fall of 2001, The Boston Globe reported that:

Under Federal Aviation Regulation 91.3, an airline pilot is "directly responsible for, and is the final authority as to, the operation of that aircraft." Known as a "captain's authority," this discretion permits pilots to overrule air traffic controllers and airlines. "They can divert flights because of drunken passengers, refuse to fly because of mechanical problems, and delay a takeoff because of hunger pangs."<sup>148</sup>

This broad discretion has allowed pilots of various airlines to order Arab and South Asian men off their planes even if they have no reasonable basis for suspicion.

In the weeks and months after the attacks, numerous stories of passengers being pulled off flights circulated. For example, CNN reported various incidents of airport profiling of Arab-looking men. One story involved Vahid Zohrehvandi, a software developer of Iranian descent, who was traveling from Seattle to his home in Dallas aboard an American Airlines flight when an airline employee approached him and told him to collect his belongings and get off the plane.<sup>149</sup> According to Zohrehvandi, the attendant told him, "The pilot does not feel comfortable flying."<sup>150</sup>

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<sup>147</sup> *Id.* at 2.

<sup>148</sup> Stephanie Stoughton, Fliers See Bias as Pilots Move to Bump Them, Boston Globe, Nov. 11, 2001, at A1.

<sup>149</sup> CNN, Airlines, Passengers Confront Racial Profiling (Oct. 3, 2001), at <http://www.cnn.com/2001/TRAVEL/NEWS/10/03/rec.airlines.profiling/index.html>.

<sup>150</sup> *Id.*

When Zohrehvandi inquired as to what aroused suspicion, the attendant responded, "The pilot does not like how you look."<sup>151</sup>

Similarly, a few days after Ashraf Khan's removal from a jet,<sup>152</sup> two Northwest Airlines pilots escaped the cockpit on ropes while their plane sat at Dulles International Airport outside Washington. An Arab man was removed from the plane. According to a Northwest spokesman, the pilots left the plane because the flight crew "perceived" a threat.<sup>153</sup> And in another typical incident, an Egyptian American, Maged Eisherbiny, was removed from a United Airlines flight from Chicago to Los Angeles. His wife reported that Eisherbiny was removed from the flight because the crew was uncomfortable having him on board.<sup>154</sup>

The Boston Globe highlighted Bashar Halabi's experience on an October 5 US Airways flight from Dulles International Airport.

The forty-four-year-old FAA engineer, who is Syrian-American, said an airline official asked [him] and his friend to leave the plane.... After being detained, they were told that the pilot did not want them to reboard. ... [Halabi] was told that a flight attendant believed that the two men had acted suspiciously. In addition, both men had used the plane's lavatory, though the attendant did not hear Halabi flush the toilet.... In a letter to Halabi, an airline representative explained that the pilot decided to remove the men after hearing a report that the lavatory was not used.<sup>155</sup>

The numerous reports of post-September 11th profiling essentially tell the same story: brown men are being pulled off planes because their presence on board allegedly frightens pilots, crew members, and passengers. Because all nineteen of the hijackers were young, Arab males, it is not surprising that there have been so many reports of Arab men or Arab-looking men being singled out as "threats" in airports around the country.<sup>156</sup> These reports are problematic in the aggregate, however, because they both reflect and foster the belief that only Arab men are being singled out. The reality, as the next section will document, is that the singling out is not only

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<sup>151</sup> *Id.*

<sup>152</sup> See Ellingwood & Riccardi, *supra* note 8.

<sup>153</sup> CNN, Arabs Removed From Flights; Airlines Investigate (Sept. 21, 2001), at <http://www.cnn.com/2001/US/09/21/gen.airlines.arabs.removed/index.html>.

<sup>154</sup> *Id.*

<sup>155</sup> Stoughton, *supra* note 148.

<sup>156</sup> ABC News reports, "Almost all the suspects in the Sept. 11th attack are Arab men, so at airports now, many travelers nervously look for Arabs." John Stossel, Rethinking Racial Profiling: How the Attacks Have Changed Views (Oct. 4, 2001), at [http://abcnews.go.com/sections/2020/2020/2020\\_011002\\_racialprofiling\\_stossel.html](http://abcnews.go.com/sections/2020/2020/2020_011002_racialprofiling_stossel.html).



happening in airports or on planes, and men certainly are not the only ones feeling the effects of profiling. Thus, focus on post-September 11th airport profiling is incomplete and ignores the various ways in which individuals are being profiled as a result of September 11th.

## V. GENDERING THE TERRORIST PROFILE: HOW WOMEN ARE BEING TARGETED POST-SEPTEMBER 11TH

Focusing on post-September 11th profiling in the context of "Flying While Brown" leads to the same misconceptions as that found in "Driving While Black." First, it assumes that Arab women have not been the victims of profiling. Second, it establishes the Arab (or South Asian) man as the representative victim of profiling, so that even when women are recognized as victims of profiling, their experiences are not considered distinct from their male counterparts. Either way, the female victims of profiling are rendered invisible, and their experiences remain unaccounted for, unexplained, and unchallenged.

Since the attacks, Muslim women throughout the country—"from immigrants to American-born-and bred college students—have experienced harassment and physical abuse."<sup>157</sup> Muslim women have had their veils ripped off,<sup>158</sup> have received death threats,<sup>159</sup> and have been told that they look like terrorists.<sup>160</sup> Muslim and South Asian women have been spat on.<sup>161</sup> Some women have been victims of severe physical assault. For example, a Sikh woman driving to her family's video store in San Diego was stabbed. Swaran Kaur Bhullar's car was stopped at a red light when two men on a motorcycle pulled up beside her, yanked open her door, and shouted, "This is what you get for what you've done to us!" They then yelled, "I'm going to slash your throat!" Bhullar raised her elbows to protect her neck and hunched over. She was stabbed in the head at least twice before the men, hearing a car approach, sped off.<sup>162</sup>

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<sup>157</sup> L.A. Chung, Muslim Women's Hijab is Proud Expression of their Faith, San Jose Mercury News, Sept. 25, 2001.

<sup>158</sup> See SAALT report, *supra* note 2, at 41.

<sup>159</sup> According to a student at Troy High School in Michigan, Muslim girls wearing the *hijab* at school were harassed by fellow students who said, "We're going to kill you and your family." *Id.* at 30.

<sup>160</sup> See *id.* at 26, 41.

<sup>161</sup> Two women riding the subway wearing headscarves were spat on according to Oakland police. *Id.* at 41. A woman wearing a headscarf was spat on by a fellow student at the University of Alabama-Birmingham. *Id.* at 27. See also Asian American Legal Defense & Education Fund report on bias incidents, at [www.aaldef.org](http://www.aaldef.org) [hereinafter AALDEF report].

<sup>162</sup> Jenifer Hanrahan, Sikh Woman Stabbed in Suspected Hate Crime Linked to Terror Attacks: Incident Latest of 36 in Area Involving Violence, Threats or Harassment, San Diego Union Trib., Oct. 5, 2001, at B2.

The bias incidents involving Arab and South Asian women have not been limited to so-called hate crimes; similar to their male counterparts, some women have been singled out as potential "threats."<sup>163</sup> For example, Jamilah Ali, a thirty-eight-year-old Muslim woman traveling with her husband and son was ordered out of her car at gunpoint when she was driving through Ohio hours after the attacks on September 11th.<sup>164</sup> In a classic case of the private vigilantism described earlier, several patrons at a crowded service station who saw Ali and her family, made frantic 911 calls to report that people in "Arabian garb" had been spotted.<sup>165</sup> Ali and her husband were ultimately arrested for being "disorderly" and held in jail for eight days.<sup>166</sup> Ali was convicted on a charge of threatening sheriff's deputies.<sup>167</sup>

Thus, Arab and South Asian women have been sought out by Americans acting out of misplaced anger and fear. The incidents against these women have not been recognized as profiling because many of them have occurred in private settings and between private citizens and thus do not easily fit into the conception of profiling as a public problem. Because of the focus on "Driving While Black" or "Flying While Brown" and the idea that profiling is something done by a government official or similarly authoritative position (such as a pilot), profiling between ordinary citizens is overlooked. However, profiling is not limited to the highways or the airports. As ACLU staff attorney Reginald Schuford explains, "There is driving while black (or brown), flying while black, walking while black, shopping while black, hailing (as in a cab) while black, swimming while black ... and dining while black (think Miami, where a tip was automatically added to the bill of a black patron, on the assumption that blacks are poor tippers), to name a few."<sup>168</sup> Racial profiling is an example of our society's tendency to focus on the public sphere and marginalize the private. There are private dimensions of profiling that must be recognized in order to create a more accurate picture of who is targeted by profiling and to recognize the role that gender plays in this practice.

The need for a more inclusive vision of profiling is necessary in order to address its severe effects. In the aftermath of September 11th,

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<sup>163</sup> The incident involving the young South Asian woman, Sonia Sudan, who was deemed suspicious by a Kinko's employee and temporarily detained, is another example. See Basu, *supra* note 3, and accompanying text.

<sup>164</sup> Civil Rights Group Launches Drive to Overturn Conviction of Muslim Woman, Agence France-Presse, Aug. 29, 2002.

<sup>165</sup> *Id.*

<sup>166</sup> Muslim Woman Arrested Sept. 11 to Get Help With Appeal, Associated Press Newswires., Aug. 30, 2002.

<sup>167</sup> *Id.*

<sup>168</sup> Schuford, *supra* note 31, at 371.

profiling has affected Arab and South Asian women in profound ways. Many women have been fearful of leaving their houses and have been told by their family members not to wear clothing marking their ethnic identities. One Muslim woman from New Jersey, Tanvir Farooqui, was warned by family members not to wear her *hijab* in public. She continued to wear her veil but decided to go out as little as possible in the weeks after the attack. On those occasions when she did have to leave home, she removed the pin that holds the white-lace-edged scarf tight around her head. When stopped in traffic, she dropped the veil to her shoulders. “I would slip off my scarf, so no one behind me could say, ‘There’s a woman in a veil,’” she said.<sup>169</sup> Other women were warned by employers or co-workers to remove their veils.<sup>170</sup> Muslim organizations such as the Anti-Arab Discrimination Committee also called for Muslim women to not wear their scarves after the attacks. Some scholars of the Koran even issued a *fatwa*<sup>171</sup> allowing women to “alter the *hijab* if they feel their lives might be in danger.”<sup>172</sup>

While some women chose not to wear the *hijab* at all, others tied their scarves in such a way that they would appear less conspicuous. One Muslim woman, who was nine months pregnant, tied her *hijab* so that it resembled a hat; she said that she was trying to protect the life within her and that if she were not pregnant, she would wear a traditional *hijab*.<sup>173</sup> Similarly, Sumiya Khan, a young Muslim woman, experimented with different ways of tying her *hijab* (to make it look more like a hat) before she left for a flight from Seattle to the Bay Area.<sup>174</sup>

### A. Why Are Arab and South Asian Women Being Profiled?

Arab and South Asian Women have been the victims of profiling and numerous bias incidents after September 11th because they, too, are the “mules” in their communities. Arab and South Asian women are targeted both for what they literally bear, whether it is a *hijab*, *salwar kameezes*, or *bindi*, and for what these external markers represent. Both within their communities and outside of them they are perceived as the bearers of their culture and traditions. Because many women of Arab and South Asian descent continue to wear ethnic clothing and other identifiers while their

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<sup>169</sup> *Id.* at 371.

<sup>170</sup> A Providence day care worker was strongly advised by a co-worker not to wear her scarf. SAALT report, *supra* note 2, at 20.

<sup>171</sup> A *fatwa* is a legal statement in Islam issued by a religious lawyer on a specific issue. See *Encyclopedia Of the Orient*, at <http://i-cias.com/cgi-bin/eo-direct.pl?fatwa.htm> (last visited Apr. 20, 2003).

<sup>172</sup> L. A. Chung, *supra* note 157.

<sup>173</sup> *Id.*

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

male counterparts do not, they are more easily recognized as members of their communities and, consequently, more easily profiled.<sup>175</sup> For example, in 1987, in an area of New Jersey where large numbers of Indians had moved, a group of youths who called themselves the “dot-busters” engaged in a series of attacks against Indian women.<sup>176</sup> The dot-busters verbally and physically harassed Indian housewives who walked down the street wearing *saris* and *bindis* (the “dot” worn by Hindu women on their foreheads).<sup>177</sup> These women were attacked not only because they were easily recognized as Indian, but also because their *bindis* and Indian clothing rendered them symbols of the immigrant culture these youths apparently despised.<sup>178</sup>

Similarly, Muslim women wearing veils have been targeted in the aftermath of September 11th not only because they are easily located and identified but because of what their veils are taken to symbolize. In one sense their veils become a means of guilt by association whereby the veil is interpreted as an endorsement of Muslim fundamentalism and terrorism. But the veil is also interpreted as a sign of oppression, creating the (mis)perception that the woman behind the veil is already a victim of domination and thus an easy target. One Muslim woman explains her predicament:

I often wonder whether people see me as a radical, fundamentalist Muslim terrorist packing an AK-47 assault rifle inside my jean jacket. Or maybe they see me as the poster girl for

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<sup>175</sup> It should be noted that some men, particularly Sikhs, also don external markers, in particular the turban. Thus, it is not surprising that many Sikh men have been the targets of profiling in both public and private realms. The Sikh Coalition has documented numerous bias incidents against Sikh men. They have had their turbans searched by airport security personnel, they have been asked to remove their turbans for the duration of flights to make passengers more comfortable, and they have even had their turbans spat on and their beards grabbed and involuntarily shaved. See <http://www.sikhcoalition.org>. Some Sikh men have chosen to shave their beards, cut their hair, and abandon the turbans. For example, New York City cab driver and college student, Parwinder Singh, cut his hair after being assaulted by a group of Brooklyn kids after the attacks (they threw beer bottles at him). Others feel very strongly that the turbans should be kept because of their strong religious beliefs. In fact, there was a lot of anger and discontent in Parwinder Singh's family after he cut his hair. Leela Jacinto, *Bias Fallout: How One Sikh American Learned a Hard Lesson in Identity Politics* (Oct. 30, 2001), at [http://abcnews.go.com/sections/us/DailyNews/sikh011030\\_hair.html](http://abcnews.go.com/sections/us/DailyNews/sikh011030_hair.html).

<sup>176</sup> Johanna Lessinger, *From the Ganges to the Hudson: Indian Immigrants in New York City* 139 (1995).

<sup>177</sup> *Id.* at 140.

<sup>178</sup> What is interesting is the fluidity of ethnic identifiers and the ways they can be both assets and burdens. For example, the same *bindi* that created the vulnerability for these Indian women became a kind of protection after September 11th, a means of helping an ignorant American public tell the difference between Muslim and South Asian women. In fact, the Indian Consul General in New York advised Indian women to wear *bindis* as identifying marks on their foreheads. Sumaya Raychauduri, *Scapegoats*, *The Nation* (Sept. 27, 2001), at <http://www.thenation.com/doc.mhtml?i=20011008&s=raychaudhuri20010927>.

oppressed womanhood everywhere. I’m not sure which it is. I get the whole gamut of strange looks, stares, and covert glances. You see, I wear the hijab, a scarf that covers my head, neck, and throat. I do this because I am a Muslim woman who believes her body is her own private concern.<sup>179</sup>

This quotation, taken from an article written in the early 1990s, illustrates that stereotypes about Muslim women are deeply embedded in the American psyche and were not born on September 11th. The recent terrorist attacks have brought these stereotypes to the surface, where they become the catalysts and justifications for the profiling of Muslim women.

### **B. Similarities in the Profiling of Black Women and Arab Women**

Although Arab women are often targeted because of stereotypes about what their clothing symbolizes while black women are targeted, in part, for stereotypes about their bodies, a gendered analysis of racial profiling in both African American and Arab communities reveals various similarities in the roots of this profiling. Both groups of women are sought out because what they “carry” or what others perceive them to carry makes them especially vulnerable to surveillance. Like the African American women strip-searched at O’Hare, Arab and South Asian women are profiled as a result of the intersectional spaces they occupy. They are spat at, harassed, and assaulted both because they are Muslim (or at least perceived to be) *and* because they are women. Profiling is a kind of double jeopardy for Muslim and South Asian women because their lives not only are compromised by people outside of their communities, but are also restricted from within their own communities. If a Muslim woman wears her *hijab* as a sign of strength, freedom, and her dismissal of Western conceptions of what beauty is,<sup>180</sup> then is that very strength and freedom not compromised whether her veil is being pulled off by a stranger or whether she is warned by family members either not to wear the *hijab* or not to leave the house? Either way, her “choice” is really no choice at all since it is an act demanded by external forces.

An intersectional analysis reveals more similarities in the profiling of African American women at O’Hare and other airports and the profiling of Arab women in recent months: both practices objectify these women’s bodies and both practices literally strip them of their dignity. A Muslim woman who has never shed her veil in public may feel just as humiliated as an African American woman who is subjected to an intrusive pat down or strip-search. In fact, in response to an incident in which a Muslim teenager

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<sup>179</sup> Naheed Mustafa, *My Body is My Own Business*, The Globe and Mail (Toronto), June 29, 1993, at A26.

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

was ordered to remove her headscarf at an airport security checkpoint, the Council on American-Islamic Relations commented that, "For a Muslim woman, being forced to remove her headscarf in this manner, is equivalent to a public strip search."<sup>181</sup> An understanding of why African American women are so much more likely to be strip-searched than white women similarly situated elucidates the perverse fascination with the Muslim woman's veil. Once we realize that the historical sexualization and commodification of black women's bodies facilitates the profiling of these women and allows Customs officials to take liberties with their bodies, we begin to see how deeply embedded stereotypes about Muslim women as oppressed, modest, and chaste may explain the ways they have been profiled and the ways their perceived vulnerabilities have been exploited. The sexualization of black women and the labeling of Muslim women as chaste appears to replicate the bad woman/good woman dichotomy. But a deeper analysis reveals that both stereotypes place these women outside of the "norm" of how women's bodies are to be used and, as a consequence, they both become the "bad" women. The stereotypes function to position these women as something less than women, thereby justifying the disrespectful treatment and devaluing of their bodies.

#### **VI. COALITION BUILDING AFTER SEPTEMBER 11TH: A HOPELESS DREAM OR A REAL POSSIBILITY?**

September 11th has shown that racial and ethnic prejudices are constantly lingering beneath the surface of American society. One group may be more targeted than another at a given time, but targets they all remain. In order to address this issue, racial profiling and hate crime legislation will need to be rethought and rewritten to include all of the victims of these practices and to acknowledge the extent to which these practices overlap and exist in both the public and private spheres. While I recognize the need for long-term legal remedies, I choose to focus on the immediate question of where to begin addressing the problem. The answer, I believe, lies in coalition building. September 11th provides the perfect opportunity for multiple political and community groups to rally around the issue of racial profiling. After all, African Americans have long been the victims of profiling by law enforcement, and the National Association for the Advancement of Colored People (NAACP) and the ACLU have

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<sup>181</sup> BWI Guard Forces Muslim Teen to Remove Religious Headscarf: Islamic Advocacy Group Says Action at Airport Amounts to "Public Strip Search," (Jan. 9, 2002) at [http://www.beliefnet.com/boards/message\\_list.asp?discussionID=111460](http://www.beliefnet.com/boards/message_list.asp?discussionID=111460). The seventeen-year-old Muslim high school student said, "No guys are supposed to see my hair until my husband sees it when I get married.... It was very humiliating with all those people staring at me like I did something wrong.... It was against my religion." Katherine Shaver, Hair Seen: Apology Sought: BWI Screening Prompts Complaint From Muslim Teenager, Wash. Post, Jan. 9, 2002, at B01.

challenged these illegal practices. With the recent terrorist attacks has come the prominence of a new terrorist profile, which has led to the profiling of Indians, Sikhs, and Arabs and has profoundly affected both the men and the women in these communities. Given that racial profiling has become so pervasive and now affects many different communities of color, perhaps a unified response to the problem by various women's organizations, religious groups, and racial/ethnic communities will facilitate the construction and enforcement of the most appropriate remedy, from which all victims can gain some benefit. However, the critical inquiry is whether such a coalition can be built.

There are some signs of hope. After September 11th, many groups denounced the backlash against Arab and South Asian Americans. The AALDEF compiled a comprehensive incident report of hate crimes and profiling against South Asians.<sup>182</sup> SAALT, an activist group, created a comprehensive report detailing 645 bias incidents that occurred in the week after the attacks.<sup>183</sup> The report was not limited to cases involving South Asians but included those where Arab, Muslim, Hindu, and Sikh people were the victims. In addition, the National Organization for Women (NOW) recognized the attacks against Arabs, specifically mentioning an incident in which two Muslim girls were beaten at an Illinois college, and has renewed its call to Congress to pass the Local Law Enforcement Act (formerly Hate Crimes Prevention Act).<sup>184</sup> An article in *Black Women Today* also denounced the racial profiling of South Asians and Arabs and calls for a cohesive response.<sup>185</sup> There were also efforts at the grass roots level. For example, one white non-Muslim student in Washington, D.C., proposed the "Scarves for Solidarity Campaign" which called for women across the United States, regardless of their faith, to wear a scarf or hat covering their hair on October 8, 2001, to show their solidarity with Muslim women targeted after September 11th.<sup>186</sup>

While many groups responded positively and indicated a desire to work across racial and ethnic lines to combat racial profiling, other groups have been less willing to do so, making it clear that tensions that have long existed between ethnic groups do not vanish even when these groups face a common challenge. The NAACP has not rejected invitations to join

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<sup>182</sup> See AALDEF Report, *supra* note 161.

<sup>183</sup> See SAALT Report, *supra* note 2.

<sup>184</sup> Siobhan Benet, Muslim, Asian Women Targets of Insults, Harassment, Women's eNews, (Sept. 26, 2001), at <http://www.now.org/eNews/sept2001/092601threats.html>.

<sup>185</sup> Akilah Monifa, "Those" People are Us, *Black Women Today* (Sept. 24, 2001), (on file with author).

<sup>186</sup> Sandy Banks, Donning Scarves in Solidarity, *L.A. Times* (Sept. 25, 2001), available at <http://www.commondreams.org/views01/0925-12.htm>.

coalition efforts, but their response to post-September 11th profiling reveals some of these inter-group tensions. For example, Heaster Wheeler, the Executive Director of the Detroit branch of the NAACP, noted that the local NAACP signed a coalition statement sent on September 21 to Northwest Airlines expressing deep concern regarding the apparent racial profiling of four Northwest passengers of Middle Eastern descent. However, after being asked for a third time to sign yet another coalition statement on behalf of the Arab American community, Wheeler felt compelled to remind Michael Steinberg (an attorney with Michigan ACLU) of the still very serious unresolved issues between blacks and Arabs in metro Detroit, "There is no question as to where we (the NAACP) stand on the issues of racial profiling; period!" Wheeler wrote, "The question is where do so many of the others stand? ... Where was this coalition in response to African-American frustration?" Rev. Wendell Anthony, President of the Detroit NAACP, defended Wheeler's memo, saying "We cannot spend all of our energy concerned with our Arab-American brothers when at the same time they do not express the same concerns about us."<sup>187</sup>

#### **A. Imagining a Coalition Between Black Women and Arab Women**

The Detroit debate raises questions as to whether black women and Arab women will be able to work together to address the profiling that both groups experience. Perhaps because of the intersectional identities they share, they will be more likely to transcend the tensions between their larger communities than their male counterparts. The fact that their experiences of racial profiling have gone largely unrecognized and that the public and the media have focused on the racial profiling of the men in their communities may be a source of unity. The "newness" of gendered profiling—that is, the fact that the profiling of women has been recognized relatively recently—may also facilitate coalition building between Arab and black women because neither group can accuse the other of not supporting its cause. These groups may also find commonality in the ways they are racially profiled, specifically in the ways their physical beings are targeted and their bodies stripped, depriving them of bodily integrity and personal dignity.

Potential barriers to this kind of coalition include the fact that Arab and black women may view their concerns as too different and may not feel they have a common enemy. If, for example, African American women are challenging the conduct of U.S. Customs officials, their concerns are more rooted in the public sphere than Arab women, who are dealing with profiling by private individuals. Moreover, although stereotypes play a role in the profiling of both black and Arab women, they battle distinct stereotypes with differing connotations. The perception that black women

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<sup>187</sup> Trevor Coleman, Why Arab Community Can't Take Black Support For Granted, *The Detroit Free Press*, Nov. 8, 2001.



are drug couriers is arguably more negative than the vision of Muslim or South Asian women as the preservers of tradition. Additionally, the stereotype of black women as "sexually uninhibited and willing participants in most sexual acts"<sup>188</sup> sharply contrasts with the conception of Muslim women as modest, chaste, and sexually repressed. Also, African American women may resent the fluidity of identity that Muslim women have—that they can take off their *hijabs* or alter them to avoid harassment when no such remedy is available to black women. They may perceive their own ethnic markers, like the color of their skin or the texture of their hair, as more permanent and less easily disguised even though Muslim women themselves may not consider their ethnic identifiers so easily detachable. And Muslim women, in turn, may resent the continual focus and importance imparted to their clothing. One scholar comments that, "The issue of how and why Muslim women dress as they do is obviously of great interest to Americans. I've had Muslim women tell me that they refuse to participate in Christian-Muslim dialogue anymore because the Christian women can't get past focusing on their headgear."<sup>189</sup>

Another potential barrier is that white Americans are not the only Americans that stereotype ethnic groups in the United States. Members of these ethnic groups are also affected by the dominant perceptions and often stereotype each other. This may explain why after September 11th many people of color who previously denounced racial profiling have become more accepting of it—even black Americans. One man said, "I'm black American and I've been racially profiled all my life ... And it's wrong." Then almost in the next breath, the man admitted that if he saw a group of Middle Eastern men boarding a plane he was on, he would be nervous.<sup>190</sup> The recent terrorist attacks have made blacks and whites alike fearful of Arab Americans, and coalition building will not be possible unless black women can overcome this distrust of Arabs. But even before September 11th, Americans stereotyped Arabs and ascribed specific images to Arab women. One Muslim scholar, Susan Darraj, contends that "Americans continue to purchase wholesale the neatly packaged image of the veiled, meek Arab woman. This pitiful creature follows her husband like a dark shadow, is forced to remain silent at all times, is granted a body only to deliver more children, perhaps even in competition with her husband's

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<sup>188</sup> Aaronette White, I Am Because We Are: Combined Race and Gender Political Consciousness Among African American Women and Men Anti-Rape Activists, 24 *Women's Stud. Int'l F.* 13, 13 (2001).

<sup>189</sup> Jane I. Smith, Clothes and Convictions: Even Progressive Muslim Women Separate Themselves From the Western Feminist Agenda, 1/30/02 *Chrstncty* 26.

<sup>190</sup> Sam Howe Verhovek, A Nation Challenged: Civil Liberties; Americans Give in to Racial Profiling, *N.Y. Times*, Sept. 23, 2001, at A1.

other wives.”<sup>191</sup> According to Darraj, such stereotypes and images result in the creation of a sharp contrast between modern American women and modern Arab women. Black American women will have to reject such cultural constructions in order to successfully align with Arab women.

Lastly, Arab and black women will likely face the pressure to stand behind their larger communities. If, for example, black women in Detroit rallied with Arab women while the NAACP rejected coalition building efforts, the women might be deemed traitors or inauthentic representations of their larger cultures. The fear of being ostracized from the black community and appearing disloyal to the black community has led black women to be silent about other abusive experiences they suffer, in particular, sexual abuse or rape.<sup>192</sup> Black women may stay silent about profiling also to avoid being perceived as racially disloyal. Muslim women, on the other hand, may be deemed cheap imitations of Western feminism and the pawns of such feminists since prominent feminists like Uma Narayan find that the perspectives of many Third World feminists “are suspiciously tainted and problematic products of our ‘Westernization.’”<sup>193</sup> Not only does assuming black women and Arab women can engage in coalition building mean that they will to some extent choose their identity as women over their race identity, it also means that they will choose their identity as women or women of color over their specific intersectional identities. But the intersectional identities of black women and Arab women may in fact hinder efforts at coalition building. Arab women may, for example, find that the practices they experience are so unique to their identities as Arabs and as women that they cannot meaningfully ally with black women. The intersectional spaces they occupy may create such specific identities as to make the finding of commonality unlikely.

## CONCLUSION

Since September 11th, racial profiling is no longer the dirty phrase that it once was. Americans who previously held disdain for the practice are now more willing to allow law enforcement to use race in making stops of people who may fit the terrorist profile.<sup>194</sup> This greater acceptance of racial

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<sup>191</sup> Susan Muaddi Darraj, Understanding the Other Sister: The Case of Arab Feminism, Monthly Rev. (Mar. 2002), at <http://www.monthlyreview.org/0302darraj.htm>.

<sup>192</sup> See White, *supra* note 188, at 13.

<sup>193</sup> Uma Narayan, Contesting Cultures: Westernization, Respect for Cultures, and Third World Feminists 3.

<sup>194</sup> In a Los Angeles Times Poll taken a few days after the attacks, sixty-eight percent said they would approve of law enforcement randomly stopping people who fit the terrorist profile. Similarly, a CNN/USA Today/Gallup poll found that a majority of Americans supported requiring people of Arab descent to undergo more intensive security checks at airports. See Weinstein et al., *supra* note 10.

profiling calls for a deeper understanding of how the practice occurs, whom it targets, and what its effects are. Racial profiling is not only about race. As this paper has shown, it is about race and gender and the intersection of these two identities. We need to refocus the debate on racial profiling and broaden the lens so that women of color come into view. One way to do this is to employ an intersectional analysis of racial profiling. Intersectionality brings to light what is overshadowed in the racial profiling debate. An intersectional analysis is also useful because it reveals the private dimensions of racial profiling—in the context of the September 11th backlash, for example, how many Arab women are being affected by the new terrorist profile. Intersectionality complicates our current understanding of racial profiling by exposing how a particular mode of profiling is shaped by the person being profiled. As such, intersectionality detects those aspects of profiling that go unnoticed where a single-axis framework is employed, rendering the invisible visible and the silenced heard.