

# Profiling Terror

Sharon L. Davies\*

*In this article, Professor Davies critiques the post-September 11 arguments offered by a number of criminal justice scholars in favor of proposals that would subject Arabs and Muslims to some degree of ethnic-profiling. The article disputes the suggestion that such profiling proposals are in fact importantly different from the now-discredited racial profiling practices directed at African American and Latino males in drug-interdiction efforts along the nation's highways. Professor Davies argues that in a nation that claims upwards of 3.5 million persons of Arab descent, the amorphous ethnic characteristic of "Middle Eastern-ness" alone possesses no useful predictive power for separating innocents from potential terrorists.*

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\* John C. Elam/Vorys Sater Designated Professor of Law, Moritz College of Law at The Ohio State University; B.A., 1984, University of Massachusetts at Amherst; J.D., 1987, Columbia University School of Law. I would like to thank my Moritz colleagues, including Professors Ruth Colker, Joshua Dressler, John A. Powell, Alan C. Michaels, Peter Swire, and especially Marc Spindleman, for all they did to help me find the words and courage necessary to complete this article. Thanks are also due to Professors Norman Abrams, Sam Gross, Kevin Johnson, Peter Tillers and William Stuntz for generously sharing their time and thoughts during the development of this piece. Special thanks are due to Jeanne Zeller and Nile Hull for their outstanding research assistance, and to Michele Whetzel-Newton for her customarily excellent secretarial and administrative support. Finally, I am indebted to Professor Ruth Peterson and The Ohio State University's Criminal Justice Research Center for allowing me to present some of these ideas in their infancy at the CJRC's seminar series.

*“If I see someone come in and he’s got a diaper on his head and a fan belt around that diaper on his head, that guy needs to be pulled over and checked.”*  
—U.S. Representative John Cooksey<sup>1</sup>

*“Being threatened or otherwise harmed because of your ethnic origin is persecution. Being subjected to a little extra scrutiny because, as it happens, your ethnic origin is the same as that of terrorists who just killed more than 6,000 innocent civilians, is inconvenience.”*  
—Kathleen Parker, Orlando Sentinel<sup>2</sup>

*“Young Islamic males, like it or not, are the enemy. There is no getting around it, we have to profile them.”*  
—Neil Livingstone, CEO, GlobalOptions<sup>3</sup>

## I. INTRODUCTION

Following the attack on the World Trade Center on September 11, 2001, the nation’s debate over racial profiling turned an abrupt corner.<sup>4</sup> In the wake of the horrendous events of that day and the sudden loss of thousands of innocent lives, the public’s view of racial profiling lurched from dramatically against the practice<sup>5</sup> to decidedly in its favor.<sup>6</sup> As fear of additional terrorist attacks gripped the nation and

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<sup>1</sup> Statement of Rep. John Cooksey, in a radio interview on September 17, 2001 in the aftermath of the attacks on the World Trade Center and the Pentagon. Rep. Cooksey later apologized for the remark saying that he “never intended to disparage loyal Americans of Arab descent.” See Associated Press, *Louisiana: Apology from Congressman*, N.Y. TIMES, Sept. 21, 2001, at A16.

<sup>2</sup> Kathleen Parker, *All is Fair in War Except Insensitivity*, ORLANDO SENTINEL, Sept. 26, 2001, at A15.

<sup>3</sup> Wendy Ruderman, *Arab-Americans Upset by Profiling*, THE RECORD, Sept. 23, 2001, at A1.

<sup>4</sup> On September 11, 2001, two commercial airliners were hijacked from Logan Airport in Boston, Massachusetts, steered off course and deliberately flown into the sides of the 110-story twin towers of the World Trade Center in New York City. Shortly after, a plane hijacked from Dulles Airport was deliberately crashed into The Pentagon. A fourth hijacked airliner originating in Newark, New Jersey crashed in Shanksville, Pennsylvania after passengers of the plane wrestled control of the cockpit from hijackers who appeared headed for Washington, D.C. Within hours of the attacks, both of the twin towers and many surrounding buildings had collapsed, and over 6,000 lives were believed to have been lost. That number was later reduced to slightly below 3,000.

<sup>5</sup> Eighty-one percent (81%) of people responding to a national Gallup poll conducted in late 1999 stated that they disapproved of profiling practices. See *Racial Profiling Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE, Dec. 9, 1999. The results of the poll can be found at <http://www.gallup.com/poll/releases> (last visited Oct. 16, 2003).

<sup>6</sup> A CNN/USA Today/Gallup poll taken a few days after the attack on the World Trade Center revealed that many Americans supported law enforcement measures that targeted people of Middle Eastern descent, including subjecting them to more intensive security checks compared with other travelers even if they were American citizens (58%), issuing them special identification cards (49%) and authorizing their “special surveillance” (32%). See *id.* A Los Angeles Times poll conducted a few days after the attacks revealed that 68% of those polled approved of law enforcement “randomly stopping

public anger over the acts grew, worried citizens began to reconsider their prior opposition to racial profiling,<sup>7</sup> and proposals that actively urged law enforcement agents to take an especially hard look at persons of Middle Eastern descent abounded. These included calls for the initiation of national identification cards,<sup>8</sup> the enhanced surveillance of Arab-appearing persons in airports and flight schools,<sup>9</sup> the reduction or

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people who may fit the profile of suspected terrorists,” and that “a majority supported requiring people of Arab descent including U.S. citizens, to “undergo special, more intensive security checks before boarding airplanes in the U.S.” See Henry Weinstein et al., *After the Attack: Law Enforcement: Racial Profiling Gains Support as Search Tactic*, L.A. TIMES, Sept. 24, 2001, at A1; see also Jackie Calmes & Jim VandeHei, *White House, Congress Shift Agenda After Attack*, WALL ST. J., Sept. 26, 2001, at A22 (“[I]f some pre-Sept. 11 issues remain on the table, others are off tinkering with Social Security, for example, or curbing racial profiling by police.”); John Gibeaut, *Winds of Change*, 87 A.B.A.J. 32, 32 (Nov. 2001) (“What had been unthinkable before Sept. 11 suddenly became thinkable.”). An opinion poll conducted more than a month after 9/11 showed that the public’s heightened suspicion of Middle Easterners lingered. In a CNN-USA Today Gallup poll conducted between October 19 and 21, 49% of the respondents continued to think it appropriate to require Arabs present within the United States to carry special identification cards. See Candy Crowley, *Arab-Americans Concerned About Treatment*, <http://www.CNN.com/2001/US/10/24/rec.arab.americans/> (last visited Oct. 16, 2003).

<sup>7</sup> The nation witnessed a host of private self-help measures as commercial airline personnel of U.S. Airways, Delta Airlines and Northwest Airlines denied permission to fly to ticketed persons who either were or looked like they were of Middle Eastern descent. See Blaine Harden & Somini Sengupta, *Some Passengers Singled Out for Exclusion by Flight Crew*, N.Y. TIMES, Sept. 22, 2001, at B8; see also CNN Saturday, *Arab Americans Forced Off Commercial Flights*, (CNN television broadcast, Sept. 22, 2001), available at <http://www.cnn.com/TRANSCRIPTS/0109/22/cst.07.html>; Ken Ellingwood & Nicholas Riccardi, *After the Attack: Racial Profiling: Arab Americans Enduring Hard Stares of Other Fliers*, L.A. TIMES, Sept. 20, 2001, at A1 (quoting security guard at Baltimore-Washington International Airport who admitted “he was checking Arab-looking passengers more closely since the attacks, saying, ‘It’s hard and it’s harsh, but that’s the reality.’”); Adrian Walker, *Profiles Discouraged*, BOSTON GLOBE, Sept. 27, 2001, at B1 (quoting Massachusetts State Trooper justifying the profiling of Middle Easterners, “The hell with the ACLU. They’ve got to take a back seat. They’ve got to take an aspirin and get over it. . . . Worry about the other stuff later.”).

<sup>8</sup> See Ross Kerber, *ID, Please: Idea of National Identity Card System Gains Momentum in Wake of Attacks*, BOSTON GLOBE, Sept. 24, 2001, at C1 (“With government agencies looking for new ways to track suspects, and companies responding with new technology, the issue is now on the agenda of a congressional subcommittee.”); Alan Dershowitz, *Why Fear National ID Cards?*, N.Y. TIMES, Oct. 13, 2001, at A23 (although a civil libertarian, Dershowitz supports a national identity card because it “could be an effective tool for preventing terrorism, reducing the need for other law enforcement mechanisms—especially racial and ethnic profiling—that pose even greater dangers to civil liberties.”); Robert O’Harrow Jr., *States Devising Plan for High-Tech National Identification Cards*, WASH. POST, Nov. 3, 2001, at A10 (citing a survey that “found that 70 percent of those questioned favored requiring citizens to carry a national identification card of the sort used in other countries” following the September 11 terror attacks).

<sup>9</sup> See Sam Howe Verhovek, *Once Appalled by Race Profiling, Many Find Themselves Doing It*, N.Y. TIMES, Sept. 23, 2001, at A1 (in reference to heightened airport security, the article states, “While expressing regret at what they portrayed as the need for more detailed interrogations of people of Arab background, many people said the subjects of such extra attention said it should be understood and accept the reasons for it.”); Weinstein et al., *supra* note 6, at A1 (“A CNN/USA Today/Gallup poll also found that a majority of Americans supported requiring people of Arab descent, including U.S. citizens, to ‘undergo special, more intensive security checks before boarding airplanes in the U.S.’”).

discontinuation of student visas for nationals of Middle Eastern states,<sup>10</sup> the expansion of governmental authority to arrest immigrants with “links” to terrorist organizations and to accelerate their deportation,<sup>11</sup> the enhancement of governmental authority to intercept privileged attorney-client communications,<sup>12</sup> and the establishment of military tribunals to prosecute suspected terrorists free of the process burdens and defense rights that apply in federal court.<sup>13</sup>

A new label—“ethnic profiling”—quickly emerged and the practice it described was met with shrugs of resignation rather than shouts of protest, signaling a sea change in the nation’s thinking about profiling practices from its new, post-9/11 perspective.<sup>14</sup> Perhaps most tellingly, the sentiment favoring this ostensibly new breed of profiling seeped even across racial lines, appealing to those who had resented being the objects of the reviled practice only days before.<sup>15</sup>

In the face of this sudden shift in popular thinking, racial profiling opponents feared that the government would use the public’s new tolerance for race-conscious policing as a reason to renegotiate commitments it had only recently made to oppose racial profiling practices.<sup>16</sup> In the days immediately following the attacks, however,

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<sup>10</sup> See Neil Lewis & Christopher Marquis, *Longer Visa Waits for Arabs; Stir Over U.S. Eavesdropping*, N.Y. TIMES, NOV. 10, 2001, at A1 (“The State Department said today that it would slow the process for granting visas to young men from Arab and Muslim nations in an effort to prevent terrorist attacks. . . . State Department officials said that starting next week, visa applications from 26 nations from any men 16 to 45 years old would be checked against databases maintained by the F.B.I.”).

<sup>11</sup> See Tamar Lewin, *A Nation Challenged: The Domestic Roundup*, N.Y. TIMES, Feb. 3, 2002, at A14.

<sup>12</sup> See Jim Edwards, *Struggling to Keep Client Confidences*, NEW JERSEY L.J., Aug. 12, 2002.

<sup>13</sup> See Edward J. Klaris, *Justice Can’t Be Done in Secret: Why Public and Press have a Right to Witness Proceedings of Military Tribunals*, THE NATION, June 10, 2002, at 16.

<sup>14</sup> See *Morning Edition with Bob Edwards*, (Nat’l Pub. Radio, Sept. 25, 2001) (transcript on file with Professor Davies) (“Just two weeks ago, racial profiling was up there, at the top of the list of political No-Nos. . . . Today, however, two weeks after the attack allegedly carried out by Arab Muslims, what’s fair and what’s offensive in hunting down the bad guys has become less clear.”).

<sup>15</sup> See Verhovek, *supra* note 9, at A1 (reporting interviews with African Americans who admitted engaging in some private racial profiling practices of their own toward Arab Americans); Annie Nakao, *Arab Americans Caught in Profile Snare*, S.F. CHRON., Sept. 28, 2001, at A1 (reporting statements of African American male who feared flying with anyone of Arab ancestry). Leaders of the African American community, however, urged steadfast opposition to profiling practices. For example, U. S. Rep. John Conyers (D-Mich.), ranking member of the House Judiciary Committee, quickly issued a press release warning that the September 11 attacks threatened to set back the progress the nation had made on the racial profiling front, and urged a resolute stand against the practice. Press Release, Rep. John Conyers (Sept. 12, 2001) (on file with the author).

<sup>16</sup> In a monograph published less than a year before the attack on the World Trade Center, the U.S. Department of Justice had emphasized:

The guarantee to all persons of equal protection under the law is one of the most fundamental principles of our democratic society. Law enforcement officers should not endorse or act upon stereotypes, attitudes, or beliefs that a person’s race, ethnicity, or national origin increases that person’s general propensity to act unlawfully. There is no tradeoff between effective law enforcement and protection of the civil rights of all Americans; we can and must have both.

government officials struck a more cautionary chord, at least in public. Even as legal commentators could find no constitutional obstacle to ethnic profiling practices,<sup>17</sup> the United States Attorney General proclaimed the government's determination to abide by its commitment to oppose race or ethnic conscious policing practices.<sup>18</sup> And the Department of Transportation issued a directive to all airlines warning that targeting Arab Americans, Muslims or Sikhs would violate federal law.<sup>19</sup>

Despite the government's assurances, however, fear for the rights of Arab-Americans grew as the soothing words of these public officials began to collide with information that federal agents had in fact begun to round up persons of Middle-Eastern descent and place them under arrest. In a little over a month, the number of people taken into federal custody mushroomed from dozens,<sup>20</sup> to hundreds,<sup>21</sup> to over

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U.S. Department of Justice, *A Resource Guide on Racial Profiling Data Collection Systems, Promising Practices and Lessons Learned*, Monograph, Nov. 2000, at iii, available at <http://www.ojp.usdoj.gov/BJA/html/new1.htm> [hereinafter *Resource Guide*].

<sup>17</sup> See William Glaberson, *Racial Profiling May Get Wider Approval By Courts*, N.Y. TIMES, Sept. 21, 2001, at A16 (reporting that some lawyers believed "no reasonable interpretation of the Constitution would prevent officials from investigating Arabs after vast attacks that may have involved a terrorist network led by Arab Muslims").

<sup>18</sup> At a meeting with leaders of American Muslim groups, Attorney General John Ashcroft stated that the Justice Department would not tolerate ethnic profiling. See *Terror Probe Raises Concerns About Civil Rights*, CNN.com, at <http://www.cnn.com/2001/US/10/22/inv.civil.rights> (Oct. 22, 2001) [hereinafter *Terror Probe*].

<sup>19</sup> See Jessie Mangaliman, *Airlines Warned to Refrain from Racial Profiling*, MERCURY NEWS, Sept. 25, 2001, at 10A. Despite these warnings, reports of violence against Arab Americans and Muslims soared after 9/11. See *CNN Saturday, Arab-Americans Fear Backlash* (CNN television broadcast, Sept. 22, 2001), available at <http://www.cnn.com/TRANSCRIPTS/0109/22/cst.20.html> ("Expressions of hate directed against Arab-Americans: a mosque in Cleveland rammed by a car, an Iraqi-owned pizzeria in Massachusetts torched, a man wearing a turban shot and killed at a gas station in Arizona. One watchdog group has catalogued more than 250 incidents so far. The F.B.I. is looking into more [than] fifty specific complaints."); *CNN Saturday Morning News, The Unfortunate Backlash In Terrorism's Wake* (CNN television broadcast, Sept. 22, 2001), available at <http://www.cnn.com/TRANSCRIPTS/0109/22.smn.15.html> (Mr. Hussein Ibish of the American Arab Anti-Discrimination Committee stated that "we've had now over 300 confirmed cases of violent incidents against Arab-Americans and Muslims in the United States."); William Smith, *Villanova Law School Grad and Professor Lead City Hall Rally Against Terrorism*, LEGAL INTELLIGENCER, Sept. 26, 2001, No. 61, at 3 (according to Singh Dhanjal, a law clerk for the Superior Court in New Brunswick, N.J., "Sikhs across the country have suffered acts of violence and ethnic intimidation at the hands of fellow Americans.").

<sup>20</sup> See Weinstein et al., *supra* note 6, at A1 ("125 people of Arab extraction have been detained."); "America on Alert," *NBC News Special Report*, (NBC television broadcast, Sept. 17, 2001) (11:30 pm) (transcript on file with Professor Davies) (reporting that as of September 17, 2001, more than four dozen people had been arrested nationwide, most on the basis of immigration irregularities).

<sup>21</sup> See Wayne Washington, *350 Held, But None Charged in Attack*, BOSTON GLOBE, Sept. 28, 2001, at A13 (reporting 350 detentions); Dan Eggen, *Terror Probe Slows in United States*, WASH. POST, Oct. 19, 2001, at A07 (reporting "800 people detained since the Sept. 11 terror attacks"); "Racial Profiling in the United States after the September 11 Terrorist Attacks," *Talk of the Nation* (National Public Radio (NPR), Oct. 4, 2001) (reporting that as of that date the FBI had detained more than 400 people for questioning related to the terrorist attacks, and that "most of those people [were] of Arab or Middle Eastern descent.") [hereinafter *Talk of the Nation*].

one thousand.<sup>22</sup> And despite round-the-clock news coverage of every conceivable aspect of the September 11 story, remarkably little was known publicly about the identity of those prisoners, the grounds for their detention, the nature of the legal charges against them, or what had led federal agents to arrest them.<sup>23</sup>

If any doubts remained about the ethnic premises underlying the government's 9/11 investigation, those doubts were eliminated as information about the identity of those arrested after September 11 began to emerge,<sup>24</sup> and the Attorney General announced the government's plan to interview more than five thousand persons of Middle Eastern ancestry in search of information about al Qaeda and other terrorist organizations.<sup>25</sup> The Department of Justice expanded this group of interviewees four months later to include approximately 3,000 additional men who had entered the United States on non-immigrant visas from countries with an al Qaeda presence.<sup>26</sup> The interview campaign made clear that the government, too, had concluded that shared heritage with the suicide bombers made individuals fair targets of suspicion

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<sup>22</sup> See Neil Lewis, *Detentions After Attacks Pass 1,000 U.S. Says*, N.Y. TIMES, Oct. 30, 2001, at B1 ("Justice Department officials said today that the number of people who had been detained in connection with the Sept. 11 attacks had surpassed 1,000. . . ." A Justice Department spokeswoman said "the number of those arrested in connection with the investigation of the terrorist attacks was now 1,017."); Amy Goldstein, *A Deliberate Strategy of Disruption Massive, Secretive Detention Effort Aimed at Preventing More Terror*, WASH. POST, Nov. 4, 2001, at A1 (reporting the "government's official tally of 1,147 detainees"); Maureen O'Donnell, *Muslims Tell of Taunting, Harassment After Sept. 11*, CHICAGO SUN-TIMES, Dec. 17, 2001, at 17 (reporting that according to the Associated Press, "[a]s of December 9, about 1,200 people, mainly from Muslim countries, had been arrested or detained since the Sept. 11 attacks...").

<sup>23</sup> See *Terror Probe*, *supra* note 18 (reporting that civil libertarians were concerned for the civil rights of those arrested and detained after September 11 because the government would not say who was being held, what the charges were, how many were being held and whether they were being given access to family or counsel).

<sup>24</sup> Middle Eastern descent was the most common denominator among those arrested or subjected to questioning as our nation's police forces searched for others who might have known about the plot, helped them with it, or planned back-up acts of terrorism of their own. See "Arabs and Muslims Complaining of Racial Profiling and Harassment After September 11 Terrorist Attacks," Torvia Smith reporting (National Public Radio, September 29, 2001, 3:00 p.m.) (transcript on file with Professor Davies) (reporting "U.S. Attorney General John Ashcroft may be publicly denouncing racial profiling, but on the ground, [Massachusetts State Trooper Thomas] Gallagher says, it the only way to get the job done. In such a state of national emergency, he says, worrying about profiling is just naive. If Arabs or Muslims are being stopped, searched or inconvenienced more than others, Gallagher says, they and the civil rights groups, like the ACLU, will just have to understand."); Goldstein, *supra* note 22, at A1 (reporting that "the government has adopted a deliberate strategy of disruption—locking up large numbers of Middle Eastern men, using whatever legal tools they can...the largest group [of detainees] come from Saudi Arabia, Egypt and Pakistan. Virtually all are men in their twenties and thirties."); Lewis & Marquis, *supra* note 10, at A1 (reporting State Department officials said that starting next week, visa applications from 26 nations from any men 16 to 45 years old would be checked against databases maintained by the F.B.I).

<sup>25</sup> See Memorandum from the Deputy Attorney General to All United States Attorneys and All Members of the Anti-Terrorism Task Forces (Nov. 9, 2001) (describing the manner in which interviews were to be conducted and topics covered).

<sup>26</sup> See *New Round of Interviews Planned with Foreigners*, WALL ST. J., Mar. 21, 2002, at A8.

after all.<sup>27</sup>

And there was broad-based support for the view that it should. Even as it became apparent that ethnicity figured more heavily into the government's post-9/11 investigation than it at first cared to admit, one popular reaction was: so what? After all, all nineteen of the 9/11 suicide hijackers were nationals of Middle Eastern states.<sup>28</sup> Didn't simple common sense mandate that government investigators of the events factor the shared ethnicity of additional suspects into their decisions of whom to question, detain, arrest or search?<sup>29</sup> Post-9/11 polls showed that many believed the answer was yes, and that continued loyalty to an anti-profiling position after the

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<sup>27</sup> More recently, as part of the government's ongoing anti-terrorism efforts, the Federal Bureau of Investigation ordered its field officers to count the mosques and Muslims in their localities, *see* Eric Lichtblau, *FBI Tells Offices to Count Local Muslim and Mosques*, N.Y. TIMES, Jan. 28, 2003, at A13, and tens of thousands of persons from countries considered to be state sponsors of terrorism, as well as a number of other mainly Muslim countries have been required to register their presence in the country with the Immigration and Naturalization Service. After determining that non-immigrant aliens from these countries required closer monitoring, the Attorney General instituted special registration requirements known as the National Security Entry-Exit Registration System (NSEERS) that require select individuals to be fingerprinted, photographed, and interviewed under oath at United States ports-of-entry. These registration requirements were subsequently extended to nationals of certain designated countries who had already been permitted to enter the United States. *See* Section 265 (b) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1305(b); Section 263 (a) of the Immigration and Nationality Act, 8 U.S.C. § 1303(a). This registration requirements affect non-immigrant aliens from four groups of countries: Iraq, Iran, Libya, Sudan and Syria; Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates and Yemen; Bangladesh, Egypt, Indonesia, Jordan and Kuwait; and Saudi Arabia and Pakistan.

On December 23, Senators Russell D. Feingold (D-Wis.), Edward M. Kennedy (D-Mass.), and Congressman John Conyers, Jr., (D-Mich.) sent a letter to Attorney General John Ashcroft demanding that he suspend the special registration requirements. The letter charged that the registration program authorized "a second wave of roundups and detentions of Arab and Muslim males disguised as a perfunctory registration requirement" based on widespread reports that hundreds of individuals who had voluntarily appeared to register had been arrested and detained "without reasonable justification." The text of the letter may be found accompanying a press release issued by the American-Arab Anti-Discrimination Committee at <http://www.adc.org/index.php?id=1570> (last visited Oct. 16, 2003).

<sup>28</sup> The Federal Bureau of Investigation (FBI) released the names and photographs of the 19 suspected hijackers in the weeks following the attacks. The names included Saeed Alghamdi, Ahmed Ibrahim A. al-Haznawi, Ahmed Alnami, Ziad Samir al-Jarrah, Satam M.A. al-Suqami, Waleed M. Alshehri, Wail M. Alshehri, Mohamed Atta, Abdulaziz Alomari, Marwan al-Shehhi, Fayez Rashid Ahmed Hassan al-Qadi Banihammad, Ahmed Alghamdi, Hamza Alghamdi, Mohand Alshehri, Khalid Almihdhar, Majed Moqed, Nawaf Alhazmi, Salem Alhazmi and Hani Hanjour. *See* <http://www.fbi.gov/pressrel/pressrel01/092701hjpjic.htm> (Sept. 27, 2001) (last visited Oct. 16, 2003).

<sup>29</sup> It is a common misconception that all Arabs are racially identifiable by their darker skin. In fact, Arabs may have white skin and blue eyes, olive or dark skin and brown eyes, and hair of a variety of textures. Indeed, the wide range of looks within the Arab and Middle Eastern communities has resulted in inconsistent official treatment of the classification of members of those communities over time. *See* "100 Questions and Answers About Arab Americans: A Journal's Guide," *available at* [www.freep.com/jobspage/arabs/arab4.html](http://www.freep.com/jobspage/arabs/arab4.html) (last visited Oct. 16, 2003) (stating "The United States has, at different times, classified Arab immigrants as African, Asian, White, European or as belonging to a separate group" while "[m]ost Arab Americans identify more closely with nationality than with ethnic group").

attacks would impose senseless costs on a nation suddenly at war with terrorism.

Before long, leading criminal justice scholars began to concur, if somewhat apologetically.<sup>30</sup> The gravity of the danger posed by future terrorist threats justified some degree of ethnic profiling,<sup>31</sup> these experts counseled, though for different reasons. The profiling of Arabs and Muslims is distinguishable from profiling of African Americans and Latinos, some argued.<sup>32</sup> An across-the-board opposition to profiling practices may be inadvisable, others wrote, particularly in times of grave national peril.<sup>33</sup> Attempts to prohibit profiling outright have always been futile, still another argued, thus the best we can hope to do is to trim the resentment caused by race-based practices by more closely monitoring how aggressively the police interact with those targeted.<sup>34</sup> All of these scholars acknowledged that ethnic profiling would impose costs on innocent targets, but each believed that nation's security demanded such costs, provided that safeguards were adopted to protect against police excesses.

This Article rejects the suggestion that Arab or Middle Eastern heritage provides an appropriate basis of suspicion of individuals in the aftermath of the September 11 attacks. In a nation that claims upwards of 3.5 million persons of Arab ancestry, the ethnic characteristic of Arab descent, standing alone, possesses no useful predictive power for separating the September 11 terrorists' accomplices and other terrorist wannabees from innocent Americans. It is a variable that is incapable of sufficiently narrowing what I call the "circle of suspicion" to warrant the kind of reliance pro-profiling arguments would place upon it.

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<sup>30</sup> See Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1437 (2002); William Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2161 (2002); Sherry Colb, *Profiling With Apologies*, 1 OHIO ST. J. CRIM. L. (forthcoming Spring 2004) (manuscript on file with the Ohio State Journal of Criminal Law) (page references are to the draft manuscript).

<sup>31</sup> See Colb, *supra* note 30, at 11 (arguing the interest in protecting American lives constitutes a compelling government interest which justifies the racial classification involved in the profiling of Arabs and Muslims); Gross & Livingston, *supra* note 30, at 1437 (citing the "extremity of the threat" as a justification for the government's focus on Middle Eastern men); Stuntz, *supra* note 30, at 2138–39 (characterizing the events of September 11 as a "crime wave" which could justify a reduction in legal protections). The Bush Administration lent its weight behind this belief when it announced its new guidelines against racial profiling practices, while specifically exempting prohibitions against the use of race or ethnicity in matters involving national security. See Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, U.S. Dept. of Justice, Civil Rights Division (June 2003).

<sup>32</sup> See Colb, *supra* note 30, at 5 ("I hope to articulate a vision of profiling and the Fourth Amendment that does not overly offend—even as it expresses some features of national profiling of terrorists that distinguish it, under some circumstances, from DWB [Driving While Black] profiling for drug couriers."); *id.* at 11 ("By contrast to the extremely high probability that an aspiring terrorist will turn out to be Arab and/or Muslim, the DWB profiling that has for several years drawn large-scale condemnation does not carry a similar likelihood of success.").

<sup>33</sup> See Gross & Livingston, *supra* note 30, at 1414 ("The problem may be that before September 11 there was too much agreement on the issue."). Simply assigning the label "racial profiling" to a law enforcement technique and thereby making it indefensible is not useful, the two argued.

<sup>34</sup> See, e.g., Stuntz, *supra* note 30, at 2179 ("Reasonable people can differ about the balance, but one could plausibly conclude that the efficiency gains from profiling outweigh the harm from the ethnic tax that post-September 11 policing is imposing on young men of Middle Eastern origin.").



To begin our examination of post-9/11 calls for a more tolerant attitude toward racial- or ethnic-conscious policing, Part I reviews the ways in which state and federal investigators made use of racial and ethnic information prior to September 11, the ways in which the courts, commentators and public officials responded to those uses, and why. This review shows that while the line between the proper and improper use of race or ethnicity in criminal investigations was sometimes fuzzy, the courts substantially agreed about two things: race could be considered if a crime victim provided racial or ethnic information about the perpetrator,<sup>35</sup> and race should not be considered as an act of simple “profiling,” i.e., a decision to interdict or detain an individual based solely on racial or ethnic assumptions about the individual’s propensity toward criminality.<sup>36</sup>

Part II imports principles central to the law of evidence to help assess the validity of the pre-9/11 resistance to racial profiling. The foundational concepts of “logical,” “legal” and “conditional” relevance offer support for the conclusion that although a suspect’s race or ethnicity can sometimes be a useful factor in effective law enforcement, in most criminal investigations it has extremely limited (or no) value. Moreover, even where it has some value, important policy reasons exist to severely restrict when racial or ethnic characteristics should be considered.

Part III uses this same framework of principles to examine the soundness of calls for ethnic profiling in the wake of 9/11 and to challenge the suggestion implicit in those calls that individual criminal propensities can be gauged by reference to racial or ethnic traits. Part III argues to the contrary that, even were we to assume that Middle Eastern origin had some value for distinguishing terrorists from non-terrorists, that ethnic fact would have no value for distinguishing between law-abiding and non-law-abiding persons of Middle Eastern descent. Put slightly differently, even if it had some minimal value for excluding certain people from the “circle of suspicion” (a point that this Article contests), it would have no value for moving individual Middle Easterners inside that circle.

Finally, Part IV responds to the arguments of three respected criminal justice scholars, William Stuntz, Samuel Gross and Debra Livingston, in support of at least some limited profiling after the attacks. A common thread running through these scholars’ arguments is the notion that we should be more concerned with *how* the police treat those they target for investigation than *why* they select those that they do. This Article contests that view and argues that the law should not neglect the important issues of equality that are raised when persons are targeted in criminal investigations on the basis of race or ethnicity.

## II. IDENTIFYING THE LIMITS ON THE USE OF RACE IN CRIMINAL INVESTIGATIONS

Before we can evaluate the spate of calls for Middle Eastern profiling, it is important to understand how the legal system reacted to the actions of federal and

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<sup>35</sup> See *infra* text accompanying notes 37–41.

<sup>36</sup> See *infra* text accompanying notes 52–58.

state investigators who factored the race or ethnicity of a suspect into their interdiction or detention decisions prior to September 11. Those willing to contemplate ethnic profiling in the wake of the attacks suggest that a revision of that view is both appropriate and necessary. To better evaluate those claims, it is critical that we understand where the pre-9/11 lines were drawn and why.

*A. Drawing Lines—The Pre-September 11 Position on Police Consideration of Race or Ethnicity.*

A review of pre-9/11 authorities reveals that the police have always been permitted to factor a suspect's racial or ethnic characteristics into investigations in which the race or ethnicity of the perpetrator of a particular crime is known. In other situations, however, courts and commentators have resisted suggestions that the use of race or ethnicity is appropriate.

*Situation #1—Victim Specifies Offender's Race.*

Even before September 11, any statement that race or ethnicity could never be a factor in the reasonable suspicion calculus would clearly have been overblown. It has never been accepted as law, even by those most adamantly opposed to racial profiling practices,<sup>37</sup> and for good reason. If it were true that the Fourth Amendment prohibits the police from considering race, ethnicity or gender when deciding whom to detain and question or arrest, the police would have to adopt a completely identity-blind approach even when a crime victim was able to identify the race, ethnicity or gender of her assailant, an idea which has no basis in law or reason.<sup>38</sup>

To see this point, let us pause to consider how such a race-blind investigative approach would play out in the context of an assault on a victim who was able to provide specific identifying information about her assailant to the police. Suppose Victim is robbed at gun-point in broad daylight by a Caucasian male in his early 20s wearing blue jeans and a white tee shirt. Victim willingly hands over her bag and her assailant flees on foot. The police arrive on the scene within one minute. Victim quickly describes the event and provides important identifying features of Assailant, including his race, gender, approximate age and clothing. What can the police do to apprehend the perpetrator of this robbery?

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<sup>37</sup> See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 151 (1997); DAVID COLE, NO EQUAL JUSTICE 50 (1999); see also *Resource Guide*, *supra* note 16, at 3.

<sup>38</sup> The decisions of the United States Court of Appeals are in accord. See, e.g., *United States v. Morrison*, 254 F.3d 679, 682 (7th Cir. 2001) (“When police are searching for a bank robber described as a black male, it is reasonable for them to be looking for a black man.”); *United States v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994) (“nationality or race may be relevant facts in some instances”); *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000) (holding that “Hispanic appearance, or any other racial or ethnic appearance, including Caucasian, may be considered when the suspected perpetrator of a specific offense has been identified as having such an appearance”).

It should be evident that any rule that required the police to take a completely race-blind investigative approach in this context would lead to absurd results. Under that approach the answer would have to be that the police could consider as a possible suspect any young man in the area wearing jeans and a white tee shirt. They might even worry about focusing their suspicions on young males, for fear that considerations of age or gender might also violate the rights of those stopped. The inefficiency of this approach alone should be enough to convince any reasonable thinker of its unworkability. The police would have to question indiscriminately every jean-and-tee-shirt-clad person, male or female, black or white, young or old, who was found in the immediate area. Beyond efficiency concerns, such an approach would have little assurance of apprehending the person actually responsible for robbing Victim. No legal thinker could claim that the law requires such an approach. It does not.<sup>39</sup>

As importantly, the use of race in the manner described above is *not* an act of racial profiling at all. As discussed more thoroughly below, the officer who uses race in a situation such as that posed above as a means of apprehending a culprit whose race has been specified by a victim (or through other means) is not engaged in the kind of thought process that makes racial profiling both offensive and unlawful.<sup>40</sup> That is, the police use of race or ethnicity in cases where a victim has identified the perpetrator by race or ethnicity disadvantages no particular racial or ethnic group,<sup>41</sup> and increases the chances of apprehending the person actually responsible for the crime.

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<sup>39</sup> The legality of the use of race or ethnicity in situations where the victim is able to identify the race or ethnicity of the perpetrator of the crime was the major exception carved out of the various definitions of racial profiling. See, e.g., *Resource Guide*, *supra* note 16, at 3 (defining racial profiling “as any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity”) (emphasis added). Case law is in accord. See, e.g., *United States v. Bautista*, 684 F.2d 1286 (9th Cir. 1982) (upholding stop based on victim’s description of the offenders’ race, location and dress); *In re Jose R.*, 625 N.Y.S.2d 494, 495 (N.Y. App. Div. 1995) (upholding stop where victim described suspect’s race, gender, clothing and location). *But see* R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001) (acknowledging but questioning the wisdom of the unanimous acceptance of the use of race or ethnicity in this type of situation).

<sup>40</sup> See *infra* text and accompanying notes 53–60.

<sup>41</sup> See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 242–43 (1983) (noting that “[b]ecause suspects in all racial groups will be identified in part by their race, reliance upon the witness’s description of the perpetrator’s race seems to impose equal burdens on all races”); KENNEDY, *supra* note 37, at 34 (noting this is not the type of generic criminal accusation that “hovers” over a group of persons on the basis of their race).

*Situation # 2—Victim's Specifies Offender's Race, Redux—Geographical and Temporal Considerations.*

The courts faced more difficult line-drawing questions in the situation where a crime victim supplied racially-identifying information to the police, but surrounding demographics or the response time that it took to apprehend a suspect limited the value of that information as a basis for individualized suspicion. To see the complexities involved in such a case, we can simply add a few facts to our first situation, where Victim provided the police helpful identifying information about her assailant to the police, including racial information (*He / was young / and white / and wore jeans / and a white / tee-shirt*).

Suppose that after receiving Victim's description, the police realized the area in which Victim was attacked was filled with young, white males with a penchant for wearing jeans and white tee-shirts. Could the police stop every young, jean-clad white male in the general vicinity to investigate further? Suppose they did, but the sweep yielded no suspect. Could the police continue their sweep the next day, as hundreds of college students fitting the general description of the culprit made their way toward their classes?

1. *Brown v. City of Oneonta*.

Those familiar with the facts of *Brown v. City of Oneonta*<sup>42</sup> know that the preceding hypothetical is no far-fetched scenario constructed merely to make a point. Complaints about such a sweep were filed by a class of African Americans residing in Oneonta, New York following a police investigation that reached every black male on a university campus and all other non-whites discovered within the city limits over a five-day period. The police conducted the sweep after receiving a breaking-and-entering report from a seventy-seven year old woman in the early morning hours of September 1992. The woman told the police that a man had entered her home, attacked her and then fled with a small wound on his hand. The woman was able to describe her assailant only as a young, black male, having seen only a part of his arm during their struggle. The police used a canine unit to track the perpetrator's scent toward a nearby university, but the dog lost the trail of the scent after only a few hundred yards.<sup>43</sup> Undaunted, the police requested a comprehensive list of all black male students from university administrators. With this list, the police then attempted to locate, question and examine the hands of every black male student. When those efforts failed to lead to an arrest, the police combed the city streets of Oneonta over the next several days, stopping and questioning and inspecting the hands of every person of color they saw.<sup>44</sup>

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<sup>42</sup> 221 F.3d 329 (2d Cir. 2000), *reh' en banc denied*, 235 F.3d 769 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).

<sup>43</sup> *Oneonta*, 221 F.3d at 334.

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

The United States Court of Appeals for the Second Circuit split on the question of whether to review the case *en banc*, and disagreed vehemently about the equal protection claims advanced by the plaintiff class,<sup>45</sup> but the court agreed on the validity of the Fourth Amendment claims of those among the class who could show that they were subject to seizures by the officers who confronted them.<sup>46</sup> The court noted the defendants' failure to dispute the merits of the plaintiffs' Fourth Amendment claims, writing that defendants would have faced such "difficulty demonstrating reasonable suspicion" on the facts of the case that they declined even to "attempt to do so."<sup>47</sup> Rather than dispute the merits of those claims, the police argued that their encounters with the black class members were "consensual" and therefore failed to trigger Fourth Amendment protections.<sup>48</sup> Because sufficient evidence was produced by certain members of the class to show that their encounters were not consensual,<sup>49</sup> however, the court vacated the district court's summary judgment order in favor of the defendants and remanded the case for action on those claims.<sup>50</sup>

To the extent that *Oneonta* attracted scholarly attention before September 11, commentators embraced the decision as plainly correct at least with respect to the Fourth Amendment challenges.<sup>51</sup> All that the police knew about the hundreds of black males they interrogated in connection with the Oneonta attack was that they were black and male and lived in the same city as the elderly victim. So unable was this combination of facts to amount to reasonable suspicion that it convinced the defendants themselves of the futility of even advancing such a defense. More important for present purposes, *Oneonta* shows that police action based on racially-specific information provided by a victim cannot always be constitutionally defended.

*Situation # 3—No Victim Specification of Offender's Race—"Racial Profiling."*

A third way in which officers used race or ethnicity in detention decisions prior to September 11 was disfavored by the courts and is what critics refer to when they

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<sup>45</sup> *Id.* at 341. A panel of the court affirmed the district court's dismissal of the plaintiff class's equal protection claims (see *Brown v. City of Oneonta*, 911 F. Supp. 580, 587–89 (N.D.N.Y. 1996)) on the ground that the police's action employed no racial classification. The panel reasoned that because the police action emanated from a victim's description of the offender (which included racially-specific information) rather than from a racial stereotype, it violated no equal protection principles. For an excellent refutation of the equal protection aspects of the *Oneonta* decision, see *Banks*, *supra* note 39, at 1078–88.

<sup>46</sup> *Oneonta*, 221 F.3d at 336, 340–41. The court believed that a number of the class members were not subject to seizures by the police, but were merely involved in consensual encounters.

<sup>47</sup> *Id.* at 340.

<sup>48</sup> See *id.*; see also *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>49</sup> *Oneonta*, 221 F.3d at 340 (giving examples of what made the encounters not consensual).

<sup>50</sup> See *id.*

<sup>51</sup> For a critical discussion of the court's equal protection analysis, however, see *Banks*, *supra* note 39, at 1108–15.

used the term “racial profiling.”<sup>52</sup> Generally speaking, racial profiling occurs when an officer’s decision of whom to stop and question for suspected criminal activity proceeds from the individual’s race or ethnicity itself. In such a case, it is the individual’s race or ethnicity that attracts the officer’s interest or suspicion. From that point of suspicion the officer may then be motivated to engage in pretextual behavior to justify the individual’s stop or arrest.<sup>53</sup>

To see the difference between this type of use of race or ethnicity and that in the previous scenario, let us hypothesize a criminal investigation of an entirely different sort, namely, the investigative work of a Special Agent of the Drug Enforcement Administration (DEA) in connection with the so-called “war on drugs.” Suppose our DEA Agent is aware that the vast majority of drug arrests made by members of his unit have involved African American and Latino males between the ages of 17 and 25, despite the fact that they represent only a minority of the resident population. He also knows that many of his department’s recent drug arrests have involved males driving flashy, late-model luxury vehicles. Based on the collective experiences of his department, the DEA Agent is more suspicious of, and therefore more likely to stop, a minority male driving a luxury vehicle than a non-minority male driving the same kind of car. Put slightly differently, he factors the race or ethnicity of those with whom he comes into contact into his assessment of whether to detain them for questioning about suspected drug trafficking activities.<sup>54</sup> Is this a valid use of race?

The argument that minorities were more likely than non-minorities to be found in possession of drugs was the most common justification offered in support of this type of use of race or ethnicity. As put by Professor David Harris, it was an argument ostensibly grounded on “rationality, not racism.”<sup>55</sup> Empirical evidence did much to discredit the law enforcement justification that minorities were disproportionate possessors of controlled substances, however, and suggested instead that minority drug arrests rates might have more to do with flawed police assumptions than disproportionate minority criminality.<sup>56</sup> On the basis of this and other evidence, prior

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<sup>52</sup> See David A. Harris, *The Stories, the Statistics, and the Law: Why ‘Driving While Black’ Matters*, 84 MINN. L. REV. 265 (1999); see also *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

<sup>53</sup> See *Whren v. United States*, 517 U.S. 806, 813 (1996) (upholding pretextual stops on the ground that an officer’s “subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”).

<sup>54</sup> Even more troublesome is the propriety of factoring race/ethnicity into a decision to engage in a “consensual encounter” for which the Supreme Court has repeatedly held reasonable suspicion need not be shown. For a helpful discussion of the line between consensual encounters and *Terry*-stops or other Fourth Amendment seizures, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 8.03, at 131–40 (3d ed. 2002).

<sup>55</sup> See Harris, *supra* note 52, at 294.

<sup>56</sup> For example, in a ground-breaking study of searches carried out by officers on cars stopped along Interstate 95 in the state of Maryland, Dr. John Lamberth found that while black drivers were subject to far more traffic stops and vehicle searches than whites, they were no more likely than whites to be found in possession of contraband. Based on the Lamberth study, the percentage of black and white drivers and passengers in possession of contraband was virtually identical (28.4 percent of blacks and 28.8 percent of

to September 11, most observers concluded that the racial profiling of Blacks and Hispanics in drug interdiction efforts was constitutionally indefensible.<sup>57</sup> As summed up by Professors Gross and Livingston, “[f]ishing for drug couriers in the immense stream of cars on interstate highways” was widely recognized to be “a hopeless strategy for eliminating drug trafficking” and as a consequence was “almost uniformly condemned.”<sup>58</sup> In short, prior to September 11, courts and commentators agreed that while it was generally proper for an officer to consider race when a victim had identified the perpetrator of the crime by his race or ethnicity, there were limits on how much weight the officer would be permitted to give the racial or ethnic information. In addition, suspicion of criminality based on race or ethnicity alone, as reflected in the practice of racial profiling, constituted an improper use of racial or ethnic information. Neither was it a sufficient defense that recorded arrest rates

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whites were found to possess drugs). See Report of Dr. John Lamberth, Plaintiff’s Expert, *Wilkins v. Maryland State Police*, Civil Action No. CCB-93-483 (D. Md. 1993); John Lamberth, *Driving While Black: A Statistician Proves that Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1999, at C1; see also Harris, *supra* note 52, at 295. Other studies of searches conducted by police officers in New Jersey and by agents of the United States Customs Service reached the same conclusion and suggested that race was not a statistically significant factor that could be used to differentiate between those found to be in possession of drugs. See PETER VERNIERO & PAUL ZOUBEK, N.J. ATT’Y GEN. INTERIM REPORT OF THE STATE (Apr. 20, 1999) [hereinafter N. J. INTERIM REPORT] (finding that white and black “hit rates” for drug possession by those searched was not significantly different). The Customs search study was particularly compelling as it was based on nationwide data outside of the context of searches conducted on cars traveling the public highways. The study examined the patterns of stops and searches conducted in airports and showed that while Black and Hispanic air travelers were disproportionately stopped and searched in airports (43% of all of those searched were either Black or Hispanic), their “hit rates” for possession of contraband were actually lower than the hit rates for White air travelers. See U.S. Customs Service, *Personal Searches of Air Passengers Results: Positive and Negative*, at 1 (Washington, D.C. 1998); Harris, *supra* note 52, 295–96. For an astute new look at the data concerning the Maryland State Police, see Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002).

<sup>57</sup> President Clinton spoke bluntly about the practice of racial profiling at a conference concerning police-community relations in June 1999 calling it “deeply corrosive” and “morally indefensible.” Remarks by President William J. Clinton (June 9, 1999), in U.S. DEPT. OF JUSTICE, REPORT ON THE PROCEEDINGS, ATTORNEY GENERAL’S CONFERENCE ON STRENGTHENING POLICE-COMMUNITY RELATIONSHIPS, at 22–23. He criticized racial profiling as “the opposite of good police work, where actions are based on hard facts, not stereotypes,” and demanded its end. See *id.* (“It is wrong, it is destructive, and it must stop.”). When the leading presidential candidates, Albert Gore and George W. Bush, weighed in on the debate, they too added their voices in opposition to the practice. Former United States Attorney General Janet Reno was equally adamant that racial profiling violated important equal protection principles and would not be tolerated. The Attorney General stressed:

The guarantee to all persons of equal protection under the law is one of the most fundamental principles of our democratic society. *Law enforcement officers should not endorse or act upon stereotypes, attitudes, or beliefs that a person’s race, ethnicity, or national origin increases that person’s general propensity to act unlawfully.* There is no tradeoff between effective law enforcement and protection of the civil rights of all Americans; we can and must have both.

*Resource Guide*, *supra* note 16, at iii (emphasis added).

<sup>58</sup> See Gross & Livingston, *supra* note 30, at 1431.

reflected greater minority involvement in drug trafficking activity, given serious and mounting empirical evidence that questioned the reliability of those statistics.

*Situation # 4—No Victim Identification, Redux—Written Profiles with Racially- or Ethnically-Explicit Terms.*

An additional use of race and ethnicity, sometimes supported by the courts prior to September 11 while generating considerable scholarly criticism, involved police reliance on formal, written profiles that listed a particular race or ethnicity as one among many factors that might give rise to reasonable suspicion in certain circumstances.<sup>59</sup> A well-known example was drug courier profiles that sometimes included a particular race or ethnicity as one factor alongside a number of others. Law enforcement officers used these written profiles to guide their decisions about whom to approach and/or detain for suspected drug trafficking activities. Those factors, the police argued, when viewed in combination, could justify suspicion of a person who matched a number of the listed elements.<sup>60</sup>

Despite scholarly criticism,<sup>61</sup> courts tended to uphold reliance on drug courier profiles prior to September 11 provided law enforcement agents who relied on those profiles did not consider an individual's race or ethnicity in isolation in calculating

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<sup>59</sup> See *United States v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir. 1994) (upholding profile that included among other factors that the suspect was Hispanic, traveling from a "source state," drove a 2-door vehicle, in the company of another man, and checked into a motel without a reservation). A conceptually related category of cases reflecting police reliance on a suspect's racial or ethnic considerations is sometimes referred to as "racial congruence." Unlike other scholars, I group these two uses of race and ethnicity together on the theory that both emanate from the same fundamental belief—the belief that in some circumstances an individual's race or ethnicity can provide a logical, independent source of suspicion of criminal activity provided that that individual is observed in circumstances considered suspicious for other reasons. See *Johnson*, *supra* note 41, at 226–30, 233–36 (discussing drug courier profiles and racial incongruence); *Banks*, *supra* note 39, at 1082 (discussing drug courier profiles); *Gross & Livingston*, *supra* note 30, at 1432–33 (discussing racial incongruence). This type of case generally involves a police officer who becomes suspicious of an individual in part due to the perception that the individual appears racially or ethnically "out of place" in the area in which he is observed. Although there appears to be some disagreement among the courts about the validity of this type of racial consideration, at minimum, the racial or ethnic factor must be accompanied by other factors that make the individual's presence in the locality suspicious. In other words, as with written profiles, to justify a temporary seizure of a "racially-incongruent" a combination of racial and non-racial factors must be present; law enforcement officers are not permitted to reason exclusively from race.

<sup>60</sup> An officer's observance that a suspect's conduct or appearance conformed to the facts set out on a written profile did not automatically satisfy the reasonable suspicion standard, see *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (*per curiam*), but neither did it detract from it. See *United States v. Sokolow*, 490 U.S. 1, 10 (1989); see also *DRESSLER*, *supra* note 54, at § 18.03, at 305 (3d ed. 2002).

<sup>61</sup> See *JESSE CHOPER ET AL., TRENDS AND DEVELOPMENTS 1979-1980*, at 132–43; Charles L. Becton, *The Drug Courier Profile: "All Seems Infected that th' Infected Spy, as All Looks Yellow to the Jaundic'd Eye,"* 65 N.C. L. REV. 417, 423–98 (1987). See generally Kathleen Mahoney, Comment, *Drug Trafficking at Airports—The Judicial Response*, 36 U. MIAMI L. REV. 91 (1981); Francis Karl Toto, Note, *Drug Courier Profile Stops and the Fourth Amendment: Is the Supreme Court's Case of Confusion in its Terminal Stage?*, 15 SUFFOLK U. L. REV. 217 (1981).



reasonable suspicion.<sup>62</sup> In other words, to be relied upon, the racial or ethnic element listed in the profile had to be observed in combination with other sufficiently weighty elements. Where race or ethnicity provided the sole or primary basis for an agent's decision to stop an individual, however, detentions were invalidated.<sup>63</sup>

In theory at least, reliance on race or ethnicity as a part of a profile can be defended *if* the criminal activity which is the subject of the profile is sufficiently narrow in scope and *if* the police apply the factors included in the profile in a proper manner. A simple example should suffice to demonstrate why this is true, and highlight the importance of these *caveats*. Say a major urban center has been plagued by severe acts of violence between two local gangs, made up of young, Chinese American males. Suppose further that each of those gangs wears distinctive colors to identify themselves and their respective allegiances. Would a profile compiled to help police officers identify gang members be valid if it included the most common race or ethnicity of those members amidst a number of other factors (such as, the colors worn by the gang members, the geographical territories claimed by the gangs, the most common range of ages of gang members, etc.)? I believe the answer is yes,<sup>64</sup> but qualification is necessary.

There are two principal dangers with this answer: the possibility that law enforcement officers will misapply the factors included in such a profile by overestimating the value of the racial or ethnic factors,<sup>65</sup> and the possibility that racial or ethnic factors will be included in profiles that cannot justify it, such as where race or ethnicity is not confined to a sufficiently narrow group (like a discrete, geographically-cabined gang) to enable officers or agents to use those factors properly.

The first problem—misapplication of formal racial or ethnic factors—is fairly straightforward. This occurs when an officer uses an individual's race or ethnicity as the sole or primary basis for his suspicion. For example, if the evidence surrounding an officer's stop of a Chinese male under the gang profile described above reflected few facts beyond the suspect's ethnicity to justify the stop, the detention would be invalid, not because the profile included an ethnic factor, but because of the absence of other facts making the individual's behavior worthy of suspicion. This is in fact the

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<sup>62</sup> See *United States v. Cortez*, 449 U.S. 411, 418 (1981) (upholding "consideration of the modes or patterns of operation of certain kinds of lawbreakers"); *United States v. Place*, 660 F.2d 44, 48 (2d Cir. 1981) (upholding consideration of Hispanic background viewed in combination with other facts to justify reasonable suspicion of criminal activity).

<sup>63</sup> See, e.g., *Whitfield v. Bd. of Cty. Comm'rs*, 837 F. Supp. 338, 343–44 (D. Colo. 1993) ("While race is an appropriate characteristic for identifying a particular suspect, it is wholly inappropriate to define a class of suspects. Without particularization...the naked inference would be that race correlates to criminal behavior."); *United States v. Laymon*, 730 F. Supp. 332, 339 (D. Colo. 1990) (holding that profiling stops may not be predicated on discrimination based on race or ethnicity).

<sup>64</sup> Professors Sam Gross and Debra Livingston reached a similar conclusion about the validity of considering apparent Italian American characteristics in an investigation of the activities of the Gambino crime family. See Gross & Livingston, *supra* note 30, at 1433.

<sup>65</sup> See discussion of "logical relevance" at Part III, A.1, *infra*.

same problem as that presented by the police conduct in *Oneonta*, with the exception that rather than a victim identification making race or ethnicity relevant to the investigation, here the written profile purports to make Chinese ethnicity relevant to the investigation of suspected gang activity.<sup>66</sup>

The second problem—the inclusion of racial or ethnic factors in written profiles in which the inclusion of those factors is unjustified—is less transparent and as a result may be under-appreciated by the courts. While it may be appropriate in the gang profile described above to include (among other factors) reference to Chinese ancestry, the inclusion of the same ethnic factor in a different type of profile (such as the typical drug courier profile) should be considered inappropriate.<sup>67</sup> That is, the inclusion of race or ethnicity in profiles of criminal conduct not sufficiently circumscribed by other specific geographical (e.g., known territorial boundaries respected by the gangs) behavioral (e.g., known membership signals used by gang members) or other circumstantial (e.g., specific colors worn by the gangs) factors, enables precisely the same conduct as officers engaged in classic “racial profiling” along the nation’s highways. It seduces law enforcement officers into engaging in racial stereotyping and pretextual behavior. It transforms every Hispanic or African American arriving from a “source city” into a potential drug dealer. It burdens those travelers with a “racial tax” not imposed upon other travelers coming from the same places.<sup>68</sup> By its inclusion in a formal profile, it may also imbue race-conscious policing that flows from it with an appearance of propriety.

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<sup>66</sup> Another misapplication problem could emanate from racial and ethnic confusion. Racial and ethnic characteristics are not always easily identified. Thus, an officer who believes she is observing the conduct of a Chinese male, might actually be observing the conduct of a Korean or Japanese male. The possibility that officers will mistake a suspect’s racial or ethnic identity makes the courts’ insistence on the presence of a combination of suspicious factors all the more critical.

<sup>67</sup> For an example of such a controversial profile, see *United States v. Elmore*, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979) (describing DEA drug courier profiles) and *United States v. Rico*, 594 F.2d 320, 325 (2d Cir. 1979) (noting differences between DEA courier profiles introduced before the Second and Sixth Circuits).

<sup>68</sup> See KENNEDY, *supra* note 37, at 138–63. A similar problem is presented by Supreme Court doctrine respecting border searches. The Supreme Court has held in a series of decisions that although police may not consider ethnic appearance alone to justify a stop, see *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975), consideration of such an ethnic factor is permissible if it is considered simultaneously with other factors that in combination amount to reasonable suspicion. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976); see also *United States v. Arvizu*, 534 U.S. 266, 273–74 (2002). As argued in Part III, see *infra* text accompanying notes 71–73, although it may be in such cases that Hispanic appearance is “logically relevant,” there are good reasons to question its “legal relevance.” That is, even if the Hispanic appearance of a car passenger near the border between the United States and Mexico makes it minimally more likely that the car contains aliens illegally in the country than it would be without that piece of evidence, in a state boasting a sizeable Mexican-American population, the probative value of that ethnic information quickly diminishes to nearly zero. See *United States v. Montero-Camargo*, 208 F.3d 1122, 1132–33 (9th Cir. 2000) (holding defendants’ Hispanic appearance was not a proper factor in light of large number of Hispanics living lawfully in the area). When officers are permitted to consider it nonetheless, they may tend to exaggerate its value, just as they have done in other settings.

It can also foster poor policing. Like informal profiling practices along the nation's roadways, written profiles have been shown to be ineffective. For example, the United States Customs Department developed a regrettable reputation for stopping and strip-searching African-American women—twice as often as it strip-searched white men and women, and three times as often as it strip-searched African-American men—based on a formal, written profile that instructed Customs agents of what type of person was likely to be carrying drugs.<sup>69</sup> As the controversy surrounding the Customs profiling policy grew, the agency hired Raymond Kelly, the former police chief of the New York City Police Department, to help improve the agency's record and reputation. Kelly did this by reducing the formal profile that had formerly been used by Customs agents from forty-three criteria to six, and by requiring supervisory approval for any strip search conducted pursuant to that revised policy. After these changes, the number of strip searches conducted by Customs agents dropped by 68 percent, but the number of "hits" (i.e., the number of searches that resulted in the seizure of drugs) went up by ten percent.<sup>70</sup> Quite simply, the original Customs' profile suffered from both of the dangers discussed above. When race or ethnicity is included as one of many factors on a drug courier profile, law enforcement officers may tend to over-estimate its value. More fundamentally, the inclusion of the factor in such a wide-ranging profile should itself have been recognized as constitutionally indefensible for equal protection reasons.

In summary, the courts have sometimes permitted law enforcement officers to rely upon racial or ethnic factors included in formal (thus reviewable) written profiles, and sometimes not. Even before September 11 the court's scrutiny of formal profiles for the two dangers discussed above may have been insufficient. After September 11 the courts may feel additional pressures to endorse profiles that formally contemplate the consideration of race and ethnicity in the reasonable suspicion equation. If the profile in question presents the danger that officers will use the listed racial or ethnic factor as an excuse to reason from racial assumptions and stereotypes and is not sufficiently narrowed in scope, the decision to include it should be considered constitutionally suspect. By contrast, racially or ethnically-explicit profiles which are sufficiently circumscribed in scope and which provide officers the means by which to distinguish between innocent and non-innocent members of the named racial or ethnic group, may be constitutionally defensible, assuming proper application.

### III. EXAMINING THE PROBATIVE VALUE OF RACE AND ETHNICITY TO CRIMINALITY

Even when racially specific information is provided by a victim or eyewitness or through other credible means, the usefulness of that information to an officer's

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<sup>69</sup> GEN. ACCOUNTING OFFICE, U.S. CUSTOMS SERVICE: BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS, REPORT TO THE HONORABLE RICHARD J. DURBIN, UNITED STATES SENATE, MAR. 17, 2000, at 12, 14.

<sup>70</sup> See *Talk of the Nation*, *supra* note 21.

decision to detain or arrest a particular individual is far more limited than many seem to recognize. As explored more fully below, in our increasingly multi-cultural country, race can never provide sufficient information to justify a Fourth Amendment seizure by itself, and even when it is “logically relevant” to a criminal investigation, its usefulness is limited to providing a means to *exclude* persons from, rather than *include* particular persons within, what I call the “circle of suspicion.”

The analytic structure provided by the concepts of “logical” and “legal” relevance can help us to appreciate pre-9/11 limits on the police use of racial and ethnic information in detention decisions.<sup>71</sup> This Part will show that although a suspect’s race may at times be logically relevant to a criminal investigation, its probative value may be so insufficient as a basis for evaluating a particular person’s suspiciousness, that its relevance will be substantially outweighed by the social costs associated with reliance upon it as a basis for reasonable suspicion.

#### A. *Determining the Legal and Logical Relevance of Race to Criminal Investigations.*

As every student of evidence knows, proof need not be compelling to be relevant, nor even close. As defined in the Federal Rules of Evidence, any evidence is “relevant” if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>72</sup> This rule embodies the concept of logical relevance, and provides a helpful starting point for the assessment of the value of any information offered for a trial jury’s consideration. It can provide an appropriate starting point for our analysis as well.

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<sup>71</sup> Trial courts generally take two steps when evaluating the value of particular information before admitting it and thereby allowing finders of fact to factor it into their deliberations. The first step involves an evaluation of what is sometimes called the “logical relevance” of the information to the case, that is, the courts decide whether the information “has any tendency in logic to establish a proposition” of importance to the case. The second step involves a balancing process that weighs the probative value of the information (an assessment of *how much* of a tendency the information has to establish the proposition for which it is offered) against other important policy objectives to determine its “legal relevance.” See ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT’S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 125 (1998). Although the Federal Rules of Evidence do not expressly employ the terms legal and logical relevance, the concepts are embodied in Rules 401 (which calls for the evaluation of the logical relevance of an item of evidence) and 403 (which calls for an evaluation of the legal relevance of an item of evidence). For a helpful explanation of the difference between the two concepts and how they are reflected in the Federal Rules of Evidence, see *id.* at 125–32. This two-tier analysis means that a normally admissible, logically relevant fact might nonetheless be excluded from evidence (*i.e.*, found legally irrelevant) if a court finds that the finder of fact’s consideration of it would be unfairly prejudicial, too misleading or consume too much time. See *Old Chief v. United States*, 519 U.S. 172, 179, 181–82 (1997) (reviewing this two-step process in the context of Rules 401 and 403); FED. R. EVID. 403 (codifying common law power of judges to exclude logically relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence”).

<sup>72</sup> FED. R. EVID. 401.

1. The Logical Relevance of a Victim's Description of a Perpetrator's Race or Ethnicity (Situations ## 1 and 2).

When the critical issue in a criminal prosecution is the identity of the perpetrator, and the accused sitting at the defense table is white, it will naturally be relevant evidence that immediately after the crime the victim identified the perpetrator as white. Why? Because the fact that the perpetrator of the offense and the person accused of the offense share the same race makes the prosecutor's claim that the accused was the perpetrator "more probable" than it would be without the racially-specific information provided by the victim, though admittedly only minimally.<sup>73</sup> This means that racial information provided by a victim of a crime will always be (at least minimally) logically relevant to a fact "that is of consequence to the determination of [an] action," that is, to the identity of the perpetrator.

Of course, if the person arrested and charged with the crime were black, even though the victim had identified the perpetrator as white, the same statement would also be true—the racial information provided by the victim about the perpetrator's race would be logically relevant. In that event, however, the racial information provided by the victim would be relevant because it failed to match the accused's race and consequently would make the prosecutor's identity claim (that the accused committed the crime) far "less probable" than it would be without the evidence. In other words, the fact of the race of the accused in the latter example would be relevant evidence for the defense, and highly probative evidence at that.

This hypothetical demonstrates at once two important facts. First, as suggested in Part I, at times race *can* play a proper role in (i.e., be relevant to) the resolution of questions of criminality. Second, and more important, the probative value of racially-identifying information provided by a crime victim is always greater when it is used as a means for *excluding* a person (or really, a group of persons) from the circle of suspicion, than when it is used as a means to *include* a person within the circle of suspicion.

Let us consider these two propositions more carefully. In our first example above, where Victim identifies her attacker as white and the accused is also white (i.e., where the racial information is being used to *include* a particular person, the accused, within the circle of suspicion) the racial evidence provided by Victim is "relevant," but only minimally so. In the second example, where Victim identifies her attacker as white, and the accused is black (i.e., where the racial information is being used to *exclude* a particular person, the accused, from the circle of suspicion) the probative value of the racial evidence provided by Victim is extremely high as it raises serious doubt that the accused is the perpetrator. In addition, the probative value of the racial information in the second example is the same for all non-white individuals fitting Victim's other identifying information (jeans, tee-shirt, maleness, etc.) as it provides the finder of fact the means to exclude them as well from the circle

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<sup>73</sup> As famously put by Professor McCormick, "[a] brick is not a wall." MCCORMICK ON EVIDENCE 278 (John W. Strong ed., 5th ed. 1999).

of suspects. Assuming Victim has correctly and honestly identified the race of her attacker, the chances of a non-white, jean-clad male or female being her attacker are virtually nil. This shows that the value of the racial information provided by Victim (“my attacker was white”) as a basis for *excluding* the group of individuals not possessing that racial characteristic from the circle of suspicion approaches 100% utility.

The same cannot be said of the value of the racially-specific information for *including* a particular individual within the circle of suspicion, a point which many fail fully to appreciate. It is perhaps easiest to illustrate this point by expressing the assumptions that run through each of these scenarios as an evidence theorist would do, in deductive or syllogistic form. The syllogism that can show that racially-specific information can provide a powerful means for excluding a person (or group of persons) from the circle of suspicion, would loosely go something like this:

- 1) The person who committed this robbery was a white male;
- 2) Defendant is a non-white male;
- 3) Therefore, Defendant did not commit this robbery.

The deductive power of this syllogism makes it easier to see how race may logically be used in certain investigative circumstances, but more as a means for excluding persons from the circle of suspicion than as a means for including a particular person within the same circle.

This point is made even more evident if we consider a contrasting syllogism that attempts to include a particular individual within the circle of suspicion on similar reasoning. It would go something like this:

- 1) The person who committed this robbery was a white male;
- 2) Defendant is a white male;
- 3) Therefore, Defendant committed this robbery.

The error of the deductive reasoning in this syllogism is immediately apparent. If white males number greater than one, the fact that Defendant is also a white male simply cannot lead to the conclusion that Defendant committed the robbery. Indeed, the addition of a just one other white male to the cohort would reduce the chances of Defendant’s responsibility for the crime by a full half. The addition of two white males to the group would lower the odds to one-third, and so on. This should make it clear how the possession of a characteristic shared by a group very quickly loses its usefulness as a means of including a particular individual within a circle of suspicion. The significance of group characteristics, such as race or ethnicity, drops precipitously as more and more persons are known to share that same characteristic. In a diverse population which espouses a commitment to the principle of unfettered freedom of movement, its utility quickly approaches (even if it never quite reaches) zero.

To fix the problem of logic presented by this syllogism, non-racial information must be added. To see how the addition of more information can help, let us consider

the logical value of a victim's identification of the perpetrator's race in connection with a crime of theft. Suppose a small lecture room is filled to beyond capacity with fifty persons, plus the Victim of a crime. Twenty-five of the lecture-goers are white, twenty-five are black, and one of them has stolen Victim's wallet. The crime is reported and the police respond immediately before any one of the lecture-goers is able to leave. Because of the crowded conditions in the room and the quickness of the crime, however, Victim is unable to do any more than identify the race of the person who lifted her wallet (she saw the hand of the perpetrator reach into her pocket and nothing more). According to Victim the person who stole her wallet is white. Based on these facts, the crime scene can fairly be depicted as follows:

- 1) The pickpocket is a white lecture-goer;
- 2) None of the non-white lecture-goers is the pickpocket;
- 3) Any of the white lecture-goers might be the pickpocket.

Based on what we know about the composition of those attending the lecture, the following conclusions can easily be drawn. All of the twenty-five black lecture-goers are innocent of the pickpocketing offense. Any of the remaining twenty-five white lecture-goers might be guilty of this offense. And, without more information, it is impossible to assess the statistical chances of any one of them being the culprit as any greater than 1/25. Are those odds sufficient to permit the police to detain each of the white lecture-goers on the basis of their race for questioning?

To justify a brief detention, the police would have to satisfy the reasonable suspicion standard.<sup>74</sup> Although the Supreme Court has instructed that reasonable suspicion is a non-technical concept requiring less than a showing of probable cause,<sup>75</sup> it has also made clear that to satisfy it the officer must be able to point to "specific, articulable facts" that would lead a reasonably prudent officer to conclude not only that a pickpocketing crime has occurred, but that the person being stopped was in some way connected to that criminal activity.<sup>76</sup> What specific, articulable facts are available to justify a suspicion as to each of the twenty-five white lecture-goers?

There are actually several facts capable of articulation here beyond race. True, each of the white lecture-goers share with the culprit a common race. And this will no doubt be the factor primarily relied upon by the police *to make the initial cut* between those who are suspects and those who are not. After that point, however, the value of that racially-identifying information (that the perpetrator is white) is reduced virtually

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<sup>74</sup> Reid v. Georgia, 448 U.S. 438, 440 (1980) (*per curiam*) (holding that "any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity"); Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

<sup>75</sup> United States v. Sokolow, 490 U.S. 1, 7 (1989) (finding reasonable suspicion standard is "obviously less demanding than that for probable cause" and "considerably less" than proof of wrongdoing by a preponderance of the evidence).

<sup>76</sup> Terry, 392 U.S. at 27 (holding officers may not act on the basis of an "inchoate and unparticularized suspicion or hunch" to justify a seizure); see also INS v. Delgado, 466 U.S. 210, 217 (1984) (police must provide "some minimal level of objective justification" for the stop).

to zero. That is, it has no additional remaining value for distinguishing among any of the remaining twenty-five white suspects. Therefore, to avoid conflating the value of the racial information (useful only as a means of eliminating the black lecture-goers from the circle of suspicion) with the value of other articulable facts, after making that cut the police should begin again at square one and analyze what else they know about the twenty-five remaining suspects that might give the police cause temporarily to detain them. A mistake commonly made by police and others when considering the value of racially-specific information, is that they fail to recognize that its value in these circumstances is limited to making this initial cut.<sup>77</sup> After that, there is nothing about the information that enables the police to distinguish one racially-congruent suspect (i.e., having a race congruent to the race of the perpetrator) from another. Failure to recognize this fact presents the danger that the value of racial evidence will be over-estimated.

But let us assume that our hypothetical officers recognize the limits of the value of the racial information provided by Victim. What if anything is left to justify their detention of the twenty-five white lecture-goers? Perhaps more than one initially might think. Each of the remaining suspects was present in the space in which the crime occurred. That space was confined. The fact that it was confined limited the total number of possible suspects overall to fifty, reduced further by race to twenty-five. Given the size of the room, each of the twenty-five had been in close enough proximity to Victim to have committed the theft. In addition, due to the special characteristics of the locality in which the crime occurred, it is also true that the culprit was still present among the group of twenty-five remaining suspects when the police arrived. That is, all of the potential suspects were still present at the time of the desired police action. No one had been able to leave. Finally, given the quick response of the police, and the difficulty of unloading the stolen wallet without notice, it was reasonable for the police to believe that the offender still had the proceeds of the crime on his/her person at the time the police arrived. Although extremely close, when considered in combination, these facts might amount to reasonable suspicion and justify the brief detention of each of the twenty-five white lecture-goers to enable the police to confirm or dispel their suspicions.<sup>78</sup>

But as the foregoing analysis suggests, the timeliness of the police response is central to this conclusion, and therefore warrants special emphasis. Had the police arrived later, after some of the lecture-goers had departed, there would have been far less reason to believe that the culprit was still among those remaining at the scene. Indeed, it is reasonable to expect that, if given the chance, the perpetrator of the crime would have been among the first to leave. This means that temporal considerations must play a key role in any determination of reasonable suspicion.

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<sup>77</sup> See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329, 334 (2d Cir. 2000).

<sup>78</sup> The critical word here is brief. The Supreme Court has emphasized that a *Terry* stop must be brief, and last no longer than necessary to effectuate its purpose. See 392 U.S. at 26. If a stop is longer than necessary, though justified in its inception, it may convert into the equivalent of an arrest and require the higher showing of probable cause. See *Florida v. Royer*, 460 U.S. 491 (1983).



The peculiar spatial characteristics of the locality in which a crime occurs are also critical. In the example given, the ability of the police to narrow their investigative efforts to fifty was owing not only to the known race of the offender but to the confined quarters in which the crime occurred. Had the crime occurred in a more open, racially-diverse space, where entry and exit were unlimited, the group of possible suspects would both quickly expand to include greater numbers of people not present at the time the crime occurred, and disperse among that larger, amorphous group. This expansion and dispersal of persons fitting the description of the offender provided by Victim would greatly reduce the reasons to suspect any one of those individuals.

The relatively modest number of people subject to detention in this hypothesized case is also important to the conclusion that reasonable suspicion existed to believe that any one of the individuals left among the suspect group might be the culprit and hence justify a brief interference with the twenty-five white suspects. This is a difficult point as it naturally raises the question, how many are too many? Unfortunately, it is neither possible nor wise to cite a precise number given the infinitely diverse sets of facts that could either justify or fail to justify such detentions.<sup>79</sup>

These important caveats reveal the critical differences between scenarios like our pickpocket crime (or any other case falling within the Situation #1 category<sup>80</sup>) and the *Oneonta* case,<sup>81</sup> and help us to pinpoint the source of the error made by the police in that case. Unlike the limited confines of the hypothesized lecture room in which Victim was robbed, the *Oneonta* police faced a city without walls, with a resident population of 10,000, and a student population of 7,500.<sup>82</sup> In addition, in our hypothetical case, due to the configuration and confinement of the suspect group (limited to a known number in an enclosed space), it can be presumed the police would be able to complete an investigation of the theft quite quickly. By contrast, the *Oneonta* investigation spanned the course of five days, involved more than two hundred people, and resulted in no arrests.<sup>83</sup> Finally, unlike our hypothesized officers who could be certain that the thief was still among those subject to detention, the same simply could not be said in the *Oneonta* investigation.<sup>84</sup>

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<sup>79</sup> These might include, among other things, the gravity of the crime involved, whether the suspect fled on foot, the time it took the police to respond to the scene, whether the suspect was armed and considered dangerous, etc.

<sup>80</sup> See *supra* text accompanying notes 37–41.

<sup>81</sup> See *supra* text accompanying notes 42–51.

<sup>82</sup> See *Oneonta*, 221 F.3d at 334.

<sup>83</sup> See *id.*

<sup>84</sup> In addition, our hypothesized Victim correctly and honestly identified the thief's race. As we know, this is not always the case. In Union, South Carolina, Susan Smith claimed that a Black man had stolen her car and abducted her children, when in fact she had intentionally drowned them by strapping them into her car and steering it into a lake. In Boston, Massachusetts, Charles Stuart claimed that a Black man had violently assaulted him and killed his wife, when in fact he had inflicted his own wounds and committed the murder himself. Both false reports induced massive manhunts for the supposed Black

Indeed, as one ponders the implicit reasoning of the Oneonta officers it becomes apparent that race was not only *a reason* for targeting the people they did, it was the *primary* reason for targeting those individuals. This is evidenced most clearly by the officers' decision to sweep the streets of the city after their canvas of the African-American male student population failed to produce the assailant. That sweep involved not only every black person spotted on the street, but every non-white person as well.<sup>85</sup> In the vast majority of cases where courts have upheld detentions based in part on a victim's description of the race of the suspect, the victim has provided additional, specific identifying information simultaneously factored into the decision to detain particular individuals.<sup>86</sup> By contrast, where officers have failed to gather or consider additional details beyond race, detentions have been invalidated.<sup>87</sup> The foregoing analysis shows that this is a critical restriction in light of the limited ability of (admittedly "logically relevant") racial information, standing alone, to justify moving any particular individual of the specified race into the circle of suspicion.<sup>88</sup>

Had the Oneonta police recognized that the surrounding circumstances greatly depleted the utility of the racial description provided by the victim, they might have avoided constitutional error. That is, they would have realized that the flight of the assailant into an open area, with a modest, but racially diverse population, severely limited the probative value of the victim's description of the offender's race to being able to exclude non-blacks from the circle of suspicion. It could help them make an initial cut, but it could not help them differentiate between the hundreds of city residents who were left as potential suspects (i.e., put in Fourth Amendment terms, it could not give the police individualized suspicion), and certainly it could not provide the basis for thinking of every non-white as a possible suspect. The constitutionally defective police conduct in *Oneonta* demonstrates why it would be helpful to train the police to see that the probative value of racial or ethnic information is often minimal, even where that information is provided by a crime victim.

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criminals. For discussions of these and other racial hoaxes, see KATHERYN K. RUSSELL, *THE COLOR OF CRIME* 69-93 (1998); Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith- Spectacles of Our Times*, 35 WASHBURN L.J. 225 (1996); Kathryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L. J. 593, 596-99 (1996).

<sup>85</sup> *Oneonta*, 221 F.3d at 334. The implication of the officers' decision to stop all non-Whites was clear: the police believed that there was a chance the seventy-seven year old woman had made a mistake about the race of her assailant when she identified him as Black, but there was a limit to how far they were willing to operate on that belief. By targeting not only Blacks, but all non-Whites in the city sweep, the police demonstrated that they could not conceive of the possibility that the offender might have been White.

<sup>86</sup> See *supra* note 39.

<sup>87</sup> See, e.g., Taylor v. State, 695 So. 2d 503, 505 (Fla. Dist. Ct. App. 1997) (finding a stop invalid where police radio broadcast included only the suspect's race and gender and the fact that he was traveling by bicycle); Bellamy v. State, 696 So. 2d 1218 (Fla. Dist. Ct. App. 1997) (finding stop invalid where victim described only the race and general clothing worn by suspect).

<sup>88</sup> Indeed, when the Oneonta police failed to confine their search within these boundaries, they discriminated against hundreds of persons of color with no positive result.

## 2. The Logical Relevance of Racial Profiling and Racially Explicit Written Profiles (Situations ## 3 and 4).

It is also possible to evaluate the logical relevance of a suspect's racial or ethnic characteristics in cases involving no victim specification of the race of the perpetrator. As shown in Part II, prior to September 11 the legal system was considerably less tolerant of police consideration of a suspect's racial or ethnic characteristics in the absence of such a specification.<sup>89</sup> Looked at in evidentiary terms, this reluctance could have signaled one of two things: either that the courts viewed an individual's race or ethnicity in such cases to be "logically irrelevant" (i.e., to have no tendency to make a fact of consequence to the action more or less probable than it would be without the evidence), or that any relevance race or ethnicity had to such a case was substantially outweighed by the costs that would be imposed by allowing the police to considering it (i.e., it was legally irrelevant).

The drug interdiction operations initiated by some state police officers along the nation's highways prior to September 11 provide a helpful example of this type of use of race or ethnicity and enable us to assess the "logical relevance" of that information to the apprehension of drug traffickers. During these surveillance operations, the police could be certain that some motorists were transporting drugs, but they had no specific information separating out any particular motorist from the larger group. Thus, unlike a victim identification case (Scenario ## 1 and 2), the police had no specific information pointing to the race or ethnicity of a particular motorist to provide a possible basis for focusing their interdiction efforts on motorists within a particular racial or ethnic group. Therefore, in order to refute charges that their apparent consideration of the race or ethnicity of minority motorists was improper (or, for the purposes of our analysis here, logically irrelevant), defenders of officers' consideration of motorists' race or ethnicity had to show that motorists falling within certain racial or ethnic groups were in fact more likely to be drug traffickers than motorists outside those groups. In evidentiary terms, only by making such a showing could it be said that evidence of motorists' racial or ethnic characteristics had some tendency to make a fact of consequence to the investigation (specifically, *X* was involved in the drug trade) more likely than it would be without the evidence.

This is in fact what police forces initially argued when faced with criticism that race-conscious policing in this type of situation violated the constitutional rights of minority motorists stopped.<sup>90</sup> As shown in Part I, however, painstaking empirical research eventually convinced the courts and public officials that the racial assumptions being made by the police could not hold up to scrutiny. Put in evidentiary terms, minority status alone could have no logical relevance to drug trafficking activity.

Moreover, by now it should be apparent that even were it possible for the police to show that racial status made some motorists more likely drug possessors than other

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<sup>89</sup> See *supra* text and accompanying notes 37–41, 52–58.

<sup>90</sup> See Harris, *supra* note 52 at 294.

motorists—an assumption that, I believe, has no basis—the value of that information would be limited to providing a ground for excluding some motorists from the circle of suspicion.<sup>91</sup> It would have no value for moving any particular minority motorist into that circle. Again, only the addition of non-racial information would remedy this problem of proof.

This conclusion is supported by a third evidentiary concept: the concept of “conditional relevance.”<sup>92</sup> As shown above, with respect to the question of who is and who is not an appropriate suspect of a particular crime, race becomes logically relevant to a criminal detention as soon as a victim or eyewitness asserts<sup>93</sup> or other credible evidence demonstrates<sup>94</sup> that a particular crime was committed by a person of a particular race, *but not before*. Its relevance is conditioned on sufficient evidence that the victim (or another) in fact observed the perpetrator and noted his race. If the victim was unable to identify her assailant by race, the race of the person sitting at the defense table would be entirely irrelevant. It would add nothing to the identity question, one way or the other.<sup>95</sup> Put in evidentiary terms, the accused’s race would have no tendency to make a consequential fact (the identity of the assailant) more or less likely than it would be without the evidence.<sup>96</sup>

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<sup>91</sup> As the discussion in Part I shows, this would lead to serious police error in light of empirical evidence that shows white possession of narcotics to be on par with non-white possession of narcotics. See *supra* text accompanying notes 52–58.

<sup>92</sup> See FED. R. EVID. 104.

<sup>93</sup> See MCCORMICK ON EVIDENCE, *supra* note 73, at 641 (noting that “direct evidence from a qualified witness offered to help establish a provable fact can never be irrelevant”).

<sup>94</sup> For example, even in the absence of a live witness, the race of a suspect would become relevant when the police obtain a still photograph produced by an ATM machine, or video recording produced by an unmanned security camera that captures the race of the perpetrator of a crime.

<sup>95</sup> Professor Sheri Lynn Johnson made the same point almost 20 years ago in a non-racial hypothetical in her article *Race and the Decision to Detain a Suspect*. See Johnson, *supra* note 41, at 217. Emphasizing the probabilistic nature of the justification for detention decisions, Professor Johnson observed:

[A] bulge in a waistband may be significantly related to the carrying of contraband, but it is observed in conjunction with other signs of obesity, it has no *probative value*. On the other hand, although riding a bicycle is not statistically related to the commission of any crime, riding one late at night in a warehouse district may correlate highly with participation in a burglary. Essentially, a reasonable police officer ignores those facts that, controlling for other observed facts, do not increase the likelihood of criminal activity.

See *id.* (emphasis added).

<sup>96</sup> I am using the term evidence loosely here, as in this last scenario the race of the defendant is not technically offered and received into evidence.

### 3. The Legal Relevance of Racial and Ethnic Information to Criminal Investigations.

On the same reasoning, it can be argued that even at the pre-trial investigative stage, in most cases the race of a suspect will be relevant only when there is evidence that points to the race of the perpetrator first. Although (as shown in Part I<sup>97</sup>) there may be limited circumstances in which race becomes relevant even in the absence of a victim identification, those situations are extremely limited and, given the human tendency to over-value racial and ethnic information, it is appropriate that the courts view such arguments with skepticism. Thus, the absence of racial information provided by a crime victim should make the race of a possible suspect presumptively irrelevant.

Once one acknowledges the extremely limited value of racial or ethnic information in a diverse society for moving particular persons inside the circle of suspicion, serious questions are raised about the continued reliance on racial and ethnic information in criminal investigations, namely, whether such information is sufficiently weighty to justify its use, particularly in the absence of a victim identification of a perpetrator by race.

The evidentiary concept of "legal relevance" could provide a model for our analysis of racial and ethnic information. As stated above, even weak evidence may constitute logically relevant evidence, and if it does, the Federal Rules of Evidence normally permit its admission and its consideration by the finders of fact.<sup>98</sup> However, a finding of "relevance does not ensure admissibility" for "there remains the question of whether its value is worth what it costs."<sup>99</sup> Thus, at the level of the trial at least, evidence with extremely limited probative value might be excluded from consideration if its value for establishing a provable fact is substantially outweighed by countervailing considerations, such as unfair prejudice or confusion.<sup>100</sup> Put slightly differently, to be admissible, evidence must not only be logically relevant, but legally relevant as well. This means that its probative value must be high enough to justify the costs of considering it.<sup>101</sup>

In many cases, the extremely low probative value of racial and ethnic information to distinguish between persons of color will be substantially outweighed by the costs imposed by police reliance on it. The costs are well known. An extensive body of literature pre-dating September 11 exists to document the serious, wide-ranging costs that are imposed when police employ race-conscious policing techniques in the absence of a victim specification, i.e., when police racially profile. The thoughtful critiques provided by these scholars have shown that explicit racial targeting has both individual and collective effects. It takes a profound emotional toll

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<sup>97</sup> See *supra* text accompanying notes 59–70.

<sup>98</sup> See FED. R. EVID. 402.

<sup>99</sup> MCCORMICK ON EVIDENCE, *supra* note 73, at 279.

<sup>100</sup> See FED. R. EVID. 403.

<sup>101</sup> See PARK ET AL., *supra* note 71, at 125.

on those subject to it.<sup>102</sup> It is degrading and intimidating. It also has serious group effects. It treats innocent, law-abiding people like criminals purely on the basis of race or ethnicity.<sup>103</sup> It encourages African Americans and Latinos to be mistrustful of and to avoid contact with the police, and heightens racial tensions when those contacts occur.<sup>104</sup> It solidifies racial divides and racial prejudices, as Whites equate greater Black arrests with greater Black criminality.<sup>105</sup> And it is fundamentally inconsistent with equality principles supposedly at the center of our political and social system.<sup>106</sup>

The same costs are not imposed where an officer *properly* uses race or ethnicity in a criminal investigation, as where a victim has identified the perpetrator by race or ethnicity. In such a “Situation #1” case,<sup>107</sup> the costs of investigation are borne equally by all races and there is no blanket accusation of criminal propensity left “hovering” over a particular racial or ethnic group.<sup>108</sup> Where, however, the police use such victim identification information improperly, *i.e.*, where a “Situation #1” investigation changes into a “Situation #2” investigation,<sup>109</sup> substantial costs are imposed. An example of those costs is supplied by the facts of *Oneonta*. Hundreds of persons of color were subject to targeted police questioning and (in some cases) detention based primarily on their race. The costs of that kind of operation therefore can closely approximate the costs imposed by classic racial profiling tactics. As shown above, had the police weighed the minimal logical relevance of the victim’s identification against those costs, they might have avoided constitutional error. This shows that the lines drawn by the courts before September 11 permitting (Situation ## 1 and 4) and restricting (Situation ## 2 and 3) racial or ethnic considerations by the police, parallel the conclusions we reach when we evaluate the probative value of such racial or ethnic information (its “logical relevance”) against its costs (“legal relevance”).

#### 4. Prescriptive Summary—A Presumption Against Racial and Ethnic Considerations.

The foregoing analysis shows that while the race of a person may sometimes be logically relevant to criminal investigations it will certainly not always be sufficiently weighty to justify interference with his or her personal expectations of privacy. Even if race or ethnicity is helpful as a means to exclude groups of persons from the circle

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<sup>102</sup> As put by Professor David Harris, “These stops are not the minor inconveniences they might seem to those who are not subjected to them. Rather, they are experiences that wound the soul and cause psychological scar tissue to form.” Harris, *supra* note 52, at 288–89; *see also id.* at 269–87 (relaying stories of persons subject to profiling practices).

<sup>103</sup> *See id.* at 288–310 (discussing the costs of profiling practices).

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See supra* text accompanying notes 37–41.

<sup>108</sup> *See* KENNEDY, *supra* note 37.

<sup>109</sup> *See supra* text accompanying notes 42–51.

of suspicion in a particular case, it has minimal relevance for doing anything more. Concerns about the costs imposed by its consideration, therefore, could (and should) support a rule that presumptively disallows it.<sup>110</sup>

The creation of a presumption might not be necessary if the historical evidence of police investigative behavior reflected a clear appreciation of the limited value of racial and ethnic information to criminal investigations. But, the police action in *Oneonta*<sup>111</sup> and other incidents like it,<sup>112</sup> the statements made by police representatives in defense of racial profiling,<sup>113</sup> and more recently, similar statements made by proponents of ethnic profiling in the wake of the September 11 attacks, suggest a widespread misconception about the value of such information. In light of the human tendency to overestimate the value of racial and ethnic proof, a presumption against its consideration is appropriate. This would mean that police reliance on racial and ethnic factors in interdiction and detention decisions would be considered presumptively invalid. Although the presumption could be rebutted in certain cases (such as in some, but not all, victim identification cases) the burden would be on the state to show that, in light of the facts of the particular case, the police both properly considered race or ethnicity and that they properly weighed the value of the racial or ethnic information against the costs of considering it.

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<sup>110</sup> Some may disagree with the wisdom of excluding logically relevant evidence. When writing in support of the adoption of then-proposed Rule 403, Professor James answered this criticism as follows:

Why should there be a standard of "legal relevancy" more strict than, or in any respect different from, the standards of logic? Why exclude any data which if admitted would change the apparent probabilities and hence serve, even to a slight degree, to aid the search for truth? Justice Holmes suggested one answer, it is "a concession to the shortness of life."

George F. James, *Relevancy, Probability and the Law*, 29 CAL. L. REV. 689, 697, 700-01 (1941).

<sup>111</sup> See *supra* text accompanying notes 42-51.

<sup>112</sup> See, e.g., *Davis v. Mississippi*, 394 U.S. 721 (1969) (describing the detention, interrogation and fingerprinting of nearly one hundred blacks on a rape victim's description of her attacker as a "Negro youth"); see also Tracey Maclin, *Black and Blue Encounters - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 251-52 (1991) (describing similar sweeps). In addition, according to Professor David Cole, a computer search of all reported federal bus and train sweep cases from January 1993 to August 1995 found that nearly ninety percent of those stopped were minorities. See David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1076 (1999).

<sup>113</sup> The head of the New Jersey State Police, Carl Williams, defended the racial profiling practices of officers in his department by pointing out that it was after all "mostly minorities" who trafficked in marijuana and cocaine and that when public officials went overseas to discuss the drug problem they went to Mexico, not Ireland. See Kathy Barrett Carter & Ron Marsico, *Whitman Fires Chief of State Police*, NEWARK STAR-LEDGER, Mar. 1, 1999, at 1. Governor Christine Todd Whitman fired Williams after he made these and other remarks about the profiling practices.

## 5. Defending the Application of Trial Principles to Pre-Trial Investigative Conduct.

Some may wonder whether the principles of logical and legal relevance, though fundamental to the law of evidence, are out of place when discussing detention decisions on the level of the street. Even if not controlling, these principles can help to illuminate the validity of the pre-September 11 lines regarding the proper and improper use of race in criminal investigations. An officer is entitled to detain an individual temporarily (via a so-called *Terry* stop) or more indefinitely (via a formal arrest) only if the information known to the officer gives her reasonable suspicion or probable cause to believe that criminality is afoot or a crime has been or is about to be committed, and that the individual stopped or arrested is linked in some way to the suspicious or criminal activity. Reasonable suspicion and probable cause will exist, or not, depending on the unique aggregate of facts known to the detaining officer which point to suspicious conduct or a known criminal act *and* the suspect's connection to it. When an officer on the street is called upon to make a detention decision, therefore, she is necessarily operating in the realm of probabilities.<sup>114</sup>

Just as a trial judge who is asked to decide the relevance or conditional relevance of an item of evidence must consider the existence and provability of other facts before she can resolve an objection to the introduction of that evidence, a police officer must consider the interlocking nature of each fact known to her, giving varying and appropriate weight to each, when calculating the presence of reasonable suspicion or probable cause. The mental processes of these two actors are actually quite similar. While the Supreme Court has instructed that reasonable suspicion and probable cause calculations "are not technical"<sup>115</sup> ones akin to the "library analysis" of scholars,<sup>116</sup> neither are they child's play. The officer must give careful consideration to how and what each fact adds to the likelihood of an individual's involvement in criminal activity.

## IV. THE USE OF ETHNICITY IN TERROR INVESTIGATIONS—PROFILING TERROR

We are now in a position to examine the merit of claims made after September 11 that persons of Middle Eastern descent or origins can and should be made to submit to greater law enforcement intrusions than others in order to provide for the nation's security and bring those responsible for the attacks to justice.<sup>117</sup> As in Part II,

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<sup>114</sup> See *United States v. Cortez*, 449 U.S. 411, 417 (1981) (observing that reasonable suspicion "does not deal with hard certainties, but with probabilities"); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) ("In dealing with probable cause . . . as the very name implies, we deal with probabilities.").

<sup>115</sup> *Brinegar*, 338 U.S. at 175 (noting the probable cause calculation involves "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.").

<sup>116</sup> *Cortez*, 449 U.S. at 418.

<sup>117</sup> The comments of a columnist writing for *The Orlando Sentinel* provide a useful example of such a claim. In the column, Kathleen Parker described herself as a "5-foot-6-inch, 115-pound, middle-aged



it is possible to express the implicit suggestion of ethnic suspicion that lies at the center of such claims in deductive or syllogistic form. It would go loosely something like this:

- 1) Persons of Middle Eastern origins are more likely to commit (or know of the threat of) an act of terrorism against the United States than persons of non-Middle Eastern origins;
- 2) X is a person of Middle Eastern origins;
- 3) Therefore, X is more likely to commit (or know of the threat of) an act of terrorism against the United States than a non-Middle Easterner.

The suggestion embodied within the syllogism (X is a more likely terrorist) is deductively sound only if its principal premise is correct (Middle Easterners are more likely to commit an act of terrorism against the United States). If there is reason to question the legitimacy of that premise, the deductive power of the syllogism is greatly reduced, if not entirely eliminated. Thus, unless it is true that Middle Easterners are more likely to commit terrorist acts against the United States than non-Middle Easterners, the principal premise is fallacious, and the syllogism topples like a

woman of Northern European extraction with shoulder-length, tastefully highlighted hair and dark-brown eyes who speaks English with a slight Southern accent,” and she wrote unapologetically:

No one blames those of Middle Eastern extraction for being outraged when they're singled out for persecution. We're all in this together. But there's a difference between persecution and inconvenience. Being threatened or otherwise harmed because of your ethnic origin is persecution. Being subjected to a little extra scrutiny because, as it happens, your ethnic origin is the same as that of terrorists who just killed more than 6,000 innocent civilians, is inconvenience.

Parker, *supra* note 2. Parker added breezily that had a person fitting her description hijacked a plane and killed thousands of innocents, not only would she “gladly subject” herself “to extra scrutiny” but she would do so with the “zeal and enthusiasm” of a “patriot, if not a crusader.” *Id.* It is interesting that Parker chose to use the terms “zeal” and “crusader.” If the events of September 11 demonstrate anything it is that zealots and crusaders are the problem, not the answer. Moreover, her assurances that she would have no problem accepting profiling practices aimed at her is likely to instill little confidence in those who will actually have to bear the burden of those practices in real life. With this statement Parker sets herself up as the standard against which all patriotically-minded Americans should measure themselves, while neglecting to acknowledge that these other patriots (and not she) will be the ones actually burdened by that scrutiny and all of its attendant effects (e.g., the humiliation of being made to feel an “outsider” in one’s own country, the implicit suggestion of criminality, the delays associated with having to respond to such suspicion, etc.). As a white female, Parker is privileged to fall within a racial and gender group that historically has been subject to little to no profiling by the police. As a result, her claims of tolerance for targeting practices are sure to ring hollow to less privileged ears. More fundamentally, Parker’s comments reflect the basic flaw that underlies any act of pure racial or ethnic suspicion in a diverse society. She suggests that an act of terrorism by a person sharing her gender, height, weight, age, ethnicity, hair length, hair and eye color and language would rightly subject her, and presumably every other woman with her features, to the “inconvenience” of enhanced governmental scrutiny and interference. While part of me is loathe to defend Parker against the hypothesized burden she wants us to believe she would bear so graciously, principle demands a defense, just as it demanded a defense on behalf of African American males subject to discriminatory stops prior to September 11, and just as it demands a defense against the ethnically-conscious targeting of Middle Easterners after it.

house of cards.<sup>118</sup> Accordingly, to evaluate the validity of this deductive syllogism we would want to know two things. First, what evidence is there to support the premise that persons of Middle Eastern origins are more likely terrorists than persons of other origins? Second, even if the premise is true, can the fact that a particular individual shares that group characteristic fairly lead to the conclusion that he is a more likely terrorist than someone outside that group?

As to the first, the evidence to support the initial premise apparently lies in the events of September 11 themselves. When one examines the comments of those advocating the ethnic profiling of persons of Arab descent post-September 11, the advocates use the horrible acts committed by the 19 hijackers to support their claims that it was fair thereafter to be more suspicious of others ethnically like them.<sup>119</sup> As put by Floyd Abrams, the fact that “all the hijackers [were] from abroad, all were from the [Middle East] and all [were] Arabic speaking,” could make it appropriate “to look harder” at others with the same characteristics.<sup>120</sup> Because the logic of those subscribing to this view would dump a very weighty burden on the members of the targeted group, it is deserving of close examination.

The collection of terrorist acts that have occurred on American soil should make any careful thinker hesitate before concluding that persons of Middle Eastern origins are in fact more likely to be terrorists than others. Several “home-grown” terrorists belie this claim. Timothy McVeigh, a white male from upstate New York, committed an act of terrorism responsible for the loss of 168 innocent lives, and over 500 injuries. Had he had his way, the death toll would have been much higher. It was purely and simply a fortuity not in any way creditable to him that more people were not killed when he detonated the bomb outside the Murrah Federal Building. When asked if he had any regrets, McVeigh replied that his only regret was that the building had not collapsed completely.<sup>121</sup> Before the events of September 11, McVeigh’s malicious and premeditated crime was frequently referred to as “the deadliest act of

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<sup>118</sup> Evidence theorist, Professor George F. James described the dangers of this kind of syllogistic reasoning fifty years ago:

Suppose that it is argued: “Most *As* are *X*, *B* is an *A*, therefore *B* is probably *X*”; or, “Nine-tenths of all *As* are *X*, *B* is an *A*, therefore the chance are nine to one that *B* is *X*.” Neither of these arguments is logically valid except upon the assumption that *As* may be treated as a uniform class with respect to the probability of their being *X*.

James, *supra* note 110, at 697. Professor James warned his readers about the hidden dangers of such deductive assumptions: “Once one attempts to deal, in a quasi-syllogistic form, not with certainties but with probabilities, additional opportunities for fallacy are presented.” *Id.* at 697. The source of error is that, although an individual’s position within a particular class or group may have some extremely limited “logical relevance” it “falls short of the minimum requirement of legal relevancy.” *See id.* at 700.

<sup>119</sup> The comments of columnist Kathleen Parker, *see supra* note 117, provide an example. Parker suggests that Arabs should be willing to tolerate extra scrutiny because they share an ethnic background with the murderers of 3,000 innocents. *See Parker, supra* note 2.

<sup>120</sup> *See Weinstein et al., supra* note 6.

<sup>121</sup> *See Declaration Of Harley G. Lappin at \*3, Entertainment Network v. Lappin*, (No. TH 01-0076-C T/H), 2001 WL 400093 (S.D. Ind., Apr. 11, 2001) (Over five hundred persons escaped the building with their lives.).

terrorism ever committed on American soil.”<sup>122</sup> Nevertheless, no one suggested after the bombing of the Alfred P. Murrah Federal Building in Oklahoma City that the effort to bring to justice those responsible for that bombing and the deaths of 168 innocents could properly involve acts of police profiling that would subject to extra scrutiny young, closely-cropped, white males simply because they shared those physical characteristics with McVeigh. And why not? I suspect that it is because, when we are faced with the criminality of a white suspect who may have accomplices, we do not fall prey to the same tortured reasoning to which we seem so easily to fall prey when we are faced with a minority suspect.<sup>123</sup> In such a setting, we seem instinctively to know that the odds of capturing additional culprits by treating all young, white males with suspicion are so astronomically small, and the burdens we place on innocent white males in the process are so astronomically large, that it is a course of investigative conduct that makes no logical sense.<sup>124</sup>

Additional examples provide further reason to doubt the first premise of the syllogism posed above. Like Tim McVeigh, Ted Kaczynski also fails to fit the currently popular stereotype of the Arab or Muslim terrorist.<sup>125</sup> Kaczynski, another native of upstate New York and a White American, was responsible for a string of bombings occurring over the course of seventeen years which resulted in the deaths of three people and injuries of twenty-three others.<sup>126</sup> Unlike the post-9/11 reaction, however, one would search in vain for calls for increased surveillance of scrubby, white male recluses after Kaczynski’s reign of terror. And rightly so.<sup>127</sup>

This collection of home-grown terrorist acts should reveal the vacuousness of the initial premise underlying the syllogism stated above (Middle Easterners are more

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

<sup>123</sup> The nation may do well to keep in mind who it initially assumed had to have been responsible for the Oklahoma City bombing. Immediately after the event was reported, all eyes turned to foreign extremists as the only logical culprits.

<sup>124</sup> *Cf. Gross & Livingston, supra* note 30 at 1435–36 (observing that had the elderly victim in the *Oneonta* case identified her assailant as White there is little reason to believe that the police would have conducted a sweep of the city stopping all young White males even though Whites constituted a significantly smaller percent of the city’s population).

<sup>125</sup> See ALSTON CHASE, *HARVARD AND THE UNABOMBER—THE EDUCATION OF AN AMERICAN TERRORIST* (2003).

<sup>126</sup> See Declaration and Appendices in Support of Defendant’s Motion for Special Jury Selection Procedures at \*20, *United States v. Kaczynski*, (No. CR-5-96-259GEB GGH), 1997 WL 536035 (E.D. Cal., Aug. 22, 1997).

<sup>127</sup> The person or persons responsible for one of the most recent waves of terror in the United States—the Anthrax scare—provide a final example. The perpetrator(s) of these acts of terror may or may not turn out to have Middle Eastern origins, but the government has conceded its utter uncertainty about that. Public officials have admitted that the persons responsible for those bio-terrorist acts are as likely to be Americans as foreigners, and recent reports have focused once again on an American as the government’s current prime suspect for the Anthrax mailings. *Cf. Susan M. Akram & Kevin R. Johnson, Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2003) (discussing other acts of violence meeting the FBI’s classification as terrorism).

likely to commit acts of terror than non-Middle Easterners). Moreover, even were we to assume the validity of that premise *arguendo*, we would still have to answer a second question, to wit, is it just to target an individual having Middle Eastern origins purely on the basis of that shared ethnic characteristic? The answer suggested by the discussion in Part II is no. In that Part we learned that while race or ethnicity can sometimes play a valid role in a criminal investigation, its value (when used) is extremely limited. The question then becomes: does the post-September 11 ethnic profiling of Arabs and Muslims fit within the categories discussed in Part II which justify the consideration of race or ethnicity? And even if it does, are law enforcement agents utilizing the ethnic marker in an appropriate way?

It should be plain that the bulk of the investigative action following the attacks was not pursuant to a report of a crime by a victim who provided an ethnic description of the perpetrator. With the possible exception of Zacarias Moussoui, whom prosecutors allege was the intended “twentieth” hijacker, the persons most directly involved in the September 11 attacks died while committing them. While it would be folly to assume that all those responsible for the attacks are now either dead (the 19 hijackers) or being detained (Moussoui), neither does the search for additional co-conspirators fit the “Situation #1” mold.<sup>128</sup>

Even if it did, there are reasons to question the legitimacy of an investigative effort that would consider and treat the national community of Arabs and Muslims as suspicious purely on the basis of ethnicity. The lessons of *Oneonta*, where officers targeted an entire African American community (and other persons of color) based on a victim’s claim that her attacker was black, should make us hesitate before throwing our support behind a law enforcement operation that would rely on similar discriminatory reasoning on a much broader scale. Even were federal investigators focused on additional co-conspirators in the September 11 attacks themselves, there is in fact no important difference between the reasoning of the Oneonta police (a black man committed this crime, so it is appropriate to target all black men within the city confines in our investigation) and the reasoning of those who support the post-9/11 profiling of Arabs and Muslims (a group of Middle Easterners committed this crime, so it is appropriate to target all Middle Easterners within the country in the government’s investigation).

These considerations push toward the conclusion that the ethnic focus of the government’s post-9/11 investigation involves exactly the same type of thought process as that condemned in Situation #2—classic racial profiling—where suspicion emanates from race or ethnicity rather than individualized, suspicious conduct.<sup>129</sup> The action involved is one focused on an entire ethnic group of people, based purely and simply on ethnic suspicion. It imposes burdens not shared equally across all racial and ethnic groups. The fact that it may be included in a formal written profile cannot

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<sup>128</sup> See *supra* text accompanying notes 37–41.

<sup>129</sup> See *supra* text accompanying notes 52–58.

save it, as flawed reasoning provides the justification for its inclusion and insufficient limitations are present to cabin its application.<sup>130</sup>

Another fundamental error made by these profiling proponents is the suggestion that the shared ethnicity of the September 11 hijackers so greatly increases the statistical probability that future terrorists will also be persons of Middle Eastern descent that harsher treatment toward anyone falling within that ethnic group is warranted. This point relates to the fallacy explored in Part II that race or ethnicity can provide not only the basis for excluding certain people or groups of people from the circle of suspicion, but it can provide the basis for moving particular individuals that are in the group that is left into the circle of suspicion. Let us revisit our syllogism—Middle Easterners are more likely terrorists than non-Middle Easterners; *X* is a Middle Easterner; therefore, *X* is more likely a terrorist—to see where the problem with this reasoning rests. Not only is the premise of the syllogism questionable for the reasons explored above, so too is the final conclusion, for, as demonstrated above, even if one believed the initial premise to be accurate, the absence of non-ethnic information providing some individualized basis for suspecting a particular member of that ethnic group of terrorist activity makes it impossible to support the final conclusion.<sup>131</sup>

#### V. A TALE OF TWO PROPOSALS

This Part considers the arguments advanced in two scholarly proposals which contemplate the need for more intensive governmental scrutiny of certain persons after 9/11. The first proposal, advanced by Professor William Stuntz in his essay *Local Policing After the Terror*,<sup>132</sup> advocates expanding police authority to allow suspicionless “group searches” as one means for addressing the heightened security risks posed by terrorism. If that authority is exercised in a racially-conscious way, according to Stuntz, steps can be taken to mitigate the harms that flow therefrom. In a second essay, *Racial Profiling Under Attack*,<sup>133</sup> Professors Samuel Gross and Debra Livingston argue that race-based policing need not always be deemed prohibited, particularly if it is carried out from a distance, or if the police strive to apply it in a manner that does not divide society into camps of “us” and “them.” As will be seen below, all three of these deservedly respected scholars seem to agree that some form of profiling is inevitable in the aftermath of the attacks, though they differ on how far the government should be permitted to go to ensure the nation’s security. A critique of their principal arguments is set forth below, beginning with those of Professor Stuntz.

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<sup>130</sup> See *supra* text accompanying notes 59–70.

<sup>131</sup> See *supra* text accompanying notes 42–51 (discussing the *Oneonta* flaw).

<sup>132</sup> See Stuntz, *supra* note 30.

<sup>133</sup> See Gross & Livingston, *supra* note 30.

### A. William Stuntz

In the post-9/11 world of police power that Professor Stuntz envisions, our goal should be to minimize the harms that flow from racial profiling rather than to prohibit the practice outright. According to Stuntz, it is simply unrealistic (if not “inadvisable”<sup>134</sup>) to expect that racial profiling practices can be eradicated. Thus, the law should strive for the second best thing: to ensure that those subjected to profiling practices feel better about the way their contacts with the police unfold. Put simply, racial profiling opponents should focus on “mitigating” the harms that radiate from the practice of profiling, rather than preventing its occurrence altogether.<sup>135</sup> Stuntz recommends the adoption of a new Fourth Amendment strategy to achieve that mitigation, tempered by a new restraint on the exercise of the additional police authority it would confer. Specifically, he suggests allowing the police to conduct “group searches” without individualized suspicion and permitting the police to stop and question individuals on “slight suspicion,” provided reviewing courts pay more attention than is currently paid to the manner in which the police conduct those encounters.

Whatever our resistance to this idea, Stuntz warns, compromise cannot be avoided. For, like it or not, the post-9/11 calls for greater law enforcement authority are precisely the type of public and official demand made every time the nation experiences a new “crime wave.”<sup>136</sup> Surges in the crime rate are always followed by increased demands by the public for security, enhanced investigative powers for law

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<sup>134</sup> Stuntz, *supra* note 30, at 2142. Although Professor Stuntz stops short of asserting that racial profiling should be sanctioned after 9/11, he is plainly ambivalent about the wisdom of an absolute ban against it. He is not entirely persuaded that “an optimal regime would ban race-conscious policing,” writing that the efficiency gains from profiling might sometimes outweigh the “racial tax” that is unequally borne by racial and ethnic profiling targets. *Id.* at 2177 (citing Randall Kennedy). While “it is usually a very bad thing,” it is “occasionally tolerable,” Stuntz writes, provided the benefits outweigh the harm. *Id.* at 2179. Though acknowledging the danger that because the police internalize only the *benefits* of race-conscious policing they are likely to underestimate the harm imposed on those so targeted, he concludes that this is a situation that is “incapable of legal resolution.” *Id.*

<sup>135</sup> *Id.* at 2163 (“[I]f solving the profiling problem is impossible, mitigating it is well within the law’s capability.”). Stuntz believes that the police will always be able to utilize race-conscious tactics in deciding whom to investigate because there is little the courts can do to discover when they are so engaged; he proposes that we resign ourselves to an alternative approach. Under that approach we might at least curb some of the police practices currently employed *after* subjects are racially profiled (such as overly intrusive searches and lengthy detentions), practices which magnify the harms profiling inflicts.

<sup>136</sup> Stuntz provides an interesting review of the way in which the country has responded publicly and officially to increased and decreased crime rates in the past. *See id.* at 2142–60. “Higher crime rates led to cutbacks in legal protections in the 1970s and 1980s,” Professor Stuntz writes, “just as lower crime rates have led to some expansion” of those protections.” *Id.* at 2138. These fluctuations are “sensible,” Stuntz thinks, if Fourth and Fifth Amendment jurisprudence is to strike the right “balance between the social need for order and individuals’ desire for privacy and liberty.” *Id.* Professor Stuntz’s prediction that after 9/11 the courts will be more willing to sanction broader group surveillance authority may already be coming true. *See, e.g.,* Susan Saulny, *New York Seeks Looser Police Surveillance Rules*, N.Y. TIMES, Feb. 22, 2003, at A10 (reporting court order that eased former limits on police surveillance of political groups).

enforcement and reductions in civil liberties; the one-day crime wave of 9/11 should be expected to be no different.<sup>137</sup> Courts and legislatures *will* accede to the pressure for expanded police authority, he predicts, particularly in three main areas: police profiling,<sup>138</sup> secret information-gathering techniques<sup>139</sup> and interrogation tactics.<sup>140</sup> Given this reality, Stuntz counsels civil libertarians to consider how willing concessions of some authority in those areas could help to cabin the “loss of individual liberty and privacy” the 9/11 attacks have made inevitable. He thinks civil libertarians might be willing.

### 1. The Trade

If civil liberties must be scaled back, it might at least be possible to negotiate a “trade” for them, Stuntz proposes, according to which the public could swap greater investigative authority to the police in exchange for greater scrutiny into how the police conduct themselves during non-consensual police-citizen encounters. This trade would be a “Pareto move,” he says, for though it would confer more power upon the police to stop and question individuals without individualized suspicion, it could also be fashioned to dispense “more liberty and privacy” to those subjected to the newly expanded police powers.<sup>141</sup>

If one accepts Stuntz’s initial premises—that racial profiling is intractable and that post-9/11 expansion of the police power is inevitable—the promise of an exchange of police powers for individual rights may seem seductive. Cutting one’s losses can be an important strategy in times of retrenchment, and if cutbacks in civil liberties are in fact inevitable, it is tempting to seek some guarantee that the recipients of those greater investigative powers will meaningfully be restricted in the ways in which they wield them. Before we embark upon that road, however, it behooves us to reflect upon the validity of the premises that seem to call for the making of such concessions, beginning with the first: that racial and ethnic profiling is so stubborn a problem, so resistant to change, that mitigation rather than opposition is the best course of action.

This is a gloomy view, and one, moreover, that is hard to square with the historical record of battles waged, and waged successfully, against racial profiling practices in recent years. As discussed in Part I, racial profiling opponents had

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<sup>137</sup> Stuntz, *supra* note 30, at 2138 (“What happened on September 11, 2001 was, among other things, a crime wave—because of that one day, the number of homicides in America in 2001 will be twenty percent higher than the year before.”).

<sup>138</sup> *See id.* at 2161 (“young men of Middle Eastern origin are clearly going to receive more police attention than the rest of the population”); *see also id.* at 2162–80.

<sup>139</sup> *See id.* at 2161, 2180–85. Stuntz’s discussion supporting increased police authority to conduct secret searches and to continue to interrogate suspects who have invoked their right to remain silent is beyond the scope of this article.

<sup>140</sup> *See id.* at 2161, 2186–90.

<sup>141</sup> *Id.* at 2141.

secured significant victories in the fight against racial profiling practices in the days before 9/11. Several states had passed laws prohibiting the practice and demanding data collection relevant to it.<sup>142</sup> A number of police forces had entered into consent decrees with the Department of Justice agreeing to forgo all racial profiling practices and promising to collect data by which their compliance with those agreements could continue to be monitored.<sup>143</sup> Numerous other police forces had agreed to collect such data voluntarily.<sup>144</sup> Opinion polls reflected the public's opposition to the practice.<sup>145</sup> The American Bar Association's 530-member House of Delegates voted unanimously to urge state and local authorities to record the race of persons subjected to traffic stops in order to help determine the existence and dimensions of racial profiling practices,<sup>146</sup> and bills pending before Congress sought to study and restrict it on the federal level.<sup>147</sup> Thus, contrary to Stuntz's account that even before 9/11 resistance to the practice was futile, it seems just as reasonable to conclude that a consensus was

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<sup>142</sup> State legislatures in Connecticut, Kansas, Missouri, Washington, Massachusetts, and Tennessee passed such data-collection legislation over strong opposition. See S.B. 1282, 1999 Gen. Assem., Reg. Sess. (Conn. 1999). Other states enacted slightly narrower data collection provisions or statutes that defined and outlawed racial profiling. See, e.g., S.B. 1102, 1999 St. Assem., Reg. Sess. (Cal. 1999) (prohibiting racial profiling and requiring law enforcement officers to participate in racial profiling training); S.B. 1444, 1999 Leg., Reg. Sess. (Okla. 1999) (prohibiting racial profiling and requiring law enforcement agencies to develop policies to prevent its occurrence); see also Report of the Columbus Bar Association Racial Profiling Task Force, Columbus, Ohio, at 27-33 (Jan. 2001) [hereinafter CBA Report] (summarizing bills introduced in a number of states to require police to collect racial and ethnic traffic stop data).

<sup>143</sup> See *United States v. New Jersey*, Consent Decree (December 30, 1999); *Wilkins v. Maryland State Police*, Civil Action No. CCB-93-483 (D. Md. 1993); Memorandum of Agreement Between the United States Department of Justice, Montgomery County, Maryland, the Montgomery County Department of Police, and the Fraternal Order of Police, Montgomery County Lodge 35, Inc. (Jan. 14, 2000); *United States v. City of Pittsburgh*, Consent Decree, ¶ 16 (Apr. 16, 1997); *United States v. City of Steubenville, Ohio*, Consent Decree, ¶ 24 (Sept. 3, 1997).

<sup>144</sup> See *Resource Guide*, *supra* note 16, at 2; see also CBA Report, *supra* note 142, at 18-22 (describing a sample of the voluntary data collection efforts underway across the country). The combination of state legislation mandating the collection of such information, with data-collection programs voluntarily undertaken by over 100 police departments and agencies nationwide, was considered a major victory in the fight against the practice.

<sup>145</sup> A national Gallup poll conducted in late 1999 confirmed that a majority of Americans believed that law enforcement officers routinely engaged in the practice. See *Racial Profiling Is Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERV., Dec. 9, 1999, available at <http://www.gallup.com/poll/releases> (last visited Oct. 14, 2003). Fifty-nine percent (59%) of all adults polled were convinced that police officers stopped motorists of particular racial and ethnic groups because the police believed that minorities were more likely than others to commit crimes, and seventy-seven percent (77%) of the African-Americans polled believed the practice was widespread. See *id.* An overwhelming eighty-one percent (81%) of those polled stated that they disapproved of such profiling practices. See *id.*

<sup>146</sup> In turn, local bar associations across the country created Task Forces to study racial profiling in their communities and to urge their local police forces to collect data. See, e.g., CBA Report, *supra* note 142, at 18.

<sup>147</sup> Traffic Stops Statistics Act of 1999, H.R. 1443, 106th Cong. (1999).



emerging in opposition to racial and ethnic profiling practices, and that the country's resolve to abolish those practices was real not fanciful.<sup>148</sup>

But even if Stuntz is right—even if the host of anti-profiling measures underway prior to the attacks could never *completely* eradicate racial profiling practices (even if they could always hope only to help incrementally)—it is hard to see how that fact should cause us to abandon the ban against the practice. A ban can be good in a utilitarian way even if it is not completely successful (making theft a crime reduces theft, even if it does not eliminate it, and that reduction has utility). Moreover, the denunciation of racial profiling has important symbolic value. The aggressive steps taken before the attacks against the practice clearly communicated the public's stance against race-based policing. Even if the legal system could not hope entirely to stamp out the practice, it could hope to shine upon it a light of disapprobation. It could denounce racial profiling for what it was—misguided bigotry, poor police work, and shoddy investigative analysis unworthy of respect or tolerance.

The real question then is whether the events of 9/11 demand a rethinking of this anti-profiling position. Professor Stuntz makes little effort to explain why they should; he simply says that they *will*, based on his review of the way in which the American public has demanded greater police powers in response to crime waves in the past. I am unpersuaded by this argument for two reasons. First, it is not at all clear that the events of September 11 can fairly be characterized as a crime wave, and hence equated with the crime rates and concomitant security concerns that peaked over decades of time.<sup>149</sup> But even if they can, as a normative matter it is not self-evident that those historical reactions are something to be proud of, never mind to reproduce. It is at least as likely that these vacillations reflect the decisions of a legal system that is insufficiently reflective of the errors made when police power is calibrated to the level of a nation's fears and prejudices. At a minimum, the burden should be on those who suggest that just because we have gone there before, we should go there again. It may be, as suggested by Stuntz's review of historic reactions to crime waves, that the country's new-found tolerance of profiling practices is not particularly surprising after 9/11. A public convinced of its vulnerability might well be willing to endure greater police intrusions in exchange for greater security, even in the absence of hard evidence that the privacy-impairing measures it contemplates will actually deliver that security. But surely public acceptance cannot by itself supply the justification for a law enforcement policy that subscribes to racially-biased policing. The public "consented" to the forced relocation of over 100,000 persons of Japanese ancestry during World War II, but no thoughtful scholar today would defend the government's internment decisions on the basis of that consensus.

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<sup>148</sup> Moreover, if Stuntz is right about this, what are we to think about the gains of the civil rights era? Were these chimerical too?

<sup>149</sup> Stuntz, *supra* note 30, at 2138 (observing that high crime rates in the 1970s and 1980s led to an expansion of police authority).

Moreover, even if we believe that no amount of official or public effort will ever completely eradicate racial profiling practices, is the exchange of police powers for rights that Professor Stuntz imagines for us really the best bargain we can think of to minimize the harms inflicted on those racially targeted? As conceived by Professor Stuntz, the bargain would include both an expansion of police investigative authority and the development of mechanisms to oversee and constrain the exercise of those new (and existing) powers. On the police-enhancing side of the bargain, Stuntz would permit the police, first, “to seize or search groups, with or without any grounds for suspecting individual members of those groups,” and, second, “to stop and question individual suspects based on slight suspicion.”<sup>150</sup> On the liberty-enhancing side, he would institute measures to have the courts monitor those interactions more closely. Let us consider each of these proposals *seriatim*.

a. The Power to Conduct Group Searches and Seizures.

To “simultaneously increas[e] both police authority and public welfare,” Stuntz writes, the law’s current reluctance to permit searches and seizures of groups should be eliminated. Group searches and seizures should be allowed far more readily, for groups possess superior abilities to defend themselves against police abuses than do lone individuals. This new search and seizure authority would not be unlimited in scope; it would include only the power to stop and search “classes of people defined by place and time,” *not* “classes of people defined by characteristics such as race, sex, alienage, or occupation.”<sup>151</sup> Thus, an officer could be empowered to stop a group of people “who happen[] to be driving past a particular point on a particular road at a particular time” without expecting the officer to offer reasons for suspecting each of the members of the group of wrongdoing. So too might a group of people “who occup[y] a given building or public space at a given time”<sup>152</sup> be stopped and searched without individualized suspicion. But, an officer would not be able to defend her decision to stop a group of African Americans, or Latinos, or Muslims solely on the basis of their racial and ethnic characteristics, unless they were connected in some temporal and spatial way.

It is plain, of course, that contemporary Fourth Amendment jurisprudence would reject this group search idea. The police are normally required to have an individualized basis for suspecting persons detained of involvement in criminal activity. Stuntz tells us, however, that the current norm is “perverse.” At least if our goal is to minimize the harms inflicted by police detentions. He explains this conclusion as follows:

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<sup>150</sup> *Id.* at 2141. It is unclear whether by “slight suspicion” Professor Stuntz means something less than “reasonable suspicion,” the current standard for temporary detentions. Because he does not expand on the term, or attempt to defend a lessening of the standard for individual detentions, I will take him to prescribe no reduction in the quantum of proof currently required for individual *Terry* stops and frisks.

<sup>151</sup> *Id.* at 2163.

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

Group searches and seizures, unlike individual ones, are largely self-regulating. If Fourth Amendment law gave police free rein to stop large groups of motorists or pedestrians for brief questioning, the result would not be an orgy of roadblocks and street sweeps, for police have reasons other than the law to use such tactics with care. Then too, retail searches and seizures are likely to cause more harm than the wholesale kind. This would be true even in a monoracial society, but it is all the more true in a racially divided one, for discriminatory policing is much harder to combat when the police deal with individuals than when they deal with groups.<sup>153</sup>

Under this view, the power to conduct suspicionless searches and seizures of groups would constitute a “healthy” “bribe” to the police,<sup>154</sup> even without a demand for an explicit concession in return, for the police would be forced either to self-regulate their execution of that expanded authority or topple under the sheer weight of it. Though the proposal would expand the search and seizure power of the police in the short run, in the long run it would decrease the harms suffered by individuals stopped on the basis of race, Professor Stuntz argues, for if the police failed to self-regulate, those affected would be in a vastly superior position to protest than are individuals currently subject to harmful profiling practices. In addition, those subject to group searches would suffer less harm from suspicionless searches than those who are currently racially targeted on an individual basis, Stuntz writes,<sup>155</sup> for if everyone in a group is treated equally (even equally badly), there are at least fewer reasons for any one of them to conclude that he or she is being singled out for improper reasons.<sup>156</sup>

All of this would be true, of course, only if one assumes that the police would treat this new group search authority as a substitute for, rather than as a supplement to, the powers they already possess.<sup>157</sup> But what reason is there to believe that this would

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<sup>153</sup> *Id.* at 2164.

<sup>154</sup> *Id.* at 2141.

<sup>155</sup> *See id.* at 2166 (“When a single driver is pulled over, the experience is different and worse than if the same driver were stopped for the same period of time along with every other driver passing through a checkpoint.”).

<sup>156</sup> On this point there is an interesting symmetry between Stuntz’s group search proposal and Gross and Livingston’s insistence that those targeted be treated as “us” and not “them.” At the core of Stuntz’s proposal is the notion that individuals will feel less resentful about being detained and questioned if other members of their group are being similarly inconvenienced. At the heart of Gross and Livingston’s is the idea that individuals will feel less resentful if they think their detention is simply routine, and does not actually lodge a criminal allegation against them. *See infra* text accompanying notes 200–03. The difference between the two proposals seems to be that Stuntz thinks inconvenienced folks will be happier even if the basis for the stop is blanket criminal suspicion (i.e., somebody in this group has to be up to no good, and by golly we’re going to find him/her) so long as everyone else in the group is equally suspected.

<sup>157</sup> *See id.* at 2166 (“searching and seizing groups is always better than the *alternatives*”) (emphasis

be true? Under current law, reasonable suspicion gives the police the power to stop individuals independent of the “group search” proposal. That basic grant of authority conferred would not magically disappear simply because we chose to give the police even greater power to conduct suspicionless searches of groups. The police would be authorized to do both, and the question is whether that reality would (as he claims) “mitigate” racial profiling concerns and minimize the reduction in liberty and autonomy that (he says) the 9/11 attacks make necessary.

Even more doubtful is the suggestion that, if permitted, group searches would somehow turn out to be less discriminatory than have been searches of individuals. Although Professor Stuntz acknowledges that “[t]here is always reason to worry about the potential for discrimination in police work,” he offers two reasons to overcome this concern: he defines “group search” in non-racial and non-ethnic terms, and he argues that improper discrimination against groups is more easily combated than discrimination against individuals. Again, I am unpersuaded.

Although ostensibly Stuntz’s group search proposal would authorize the search of only those “classes of people defined by place and time” and not “classes of people defined by characteristics such as race, sex [or] alienage,”<sup>158</sup> in a country that continues to be plagued by severe problems of residential and other segregation,<sup>159</sup> this definitional device lacks significance. Until the country has better success integrating its citizenry, those discovered by the police to be in a particular place at a particular time will very often simultaneously be definable by their race or ethnicity.<sup>160</sup> Thus, there seems little to prevent the police from simply asserting a non-racial or –ethnic basis as their justification for stopping a group of persons (such as that they “happened” to be in the same place at the same time) to satisfy Stuntz’s definition of an “acceptable” group.<sup>161</sup>

In short, group stops and searches are just as likely to be pretextual as individual stops and searches have been. When airport security agents select and search a number of non-Muslim travelers at the airport, then “randomly” select and search

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added); *id.* at 2167 (“Different police tactics are, from the point of view of the police, substitutes for one another. Make one tactic cheaper relative to the other, and the police will shift at the margin from the more expensive tactic to the cheaper one.”).

<sup>158</sup> See *id.* at 2163.

<sup>159</sup> See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); David Rusk, *The “Segregation Tax”: The Cost of Racial Segregation to Black Homeowners* (Oct. 2001), available at [www.brook.edu/dybdocroot/es/urban/publications/rusk.pdf](http://www.brook.edu/dybdocroot/es/urban/publications/rusk.pdf) (last visited Oct. 14, 2003) (paper for the Center on Urban & Metropolitan Policy of the Brookings Institution). For example, under his definition, the police would seem authorized to stop and search a group attending services at a Muslim mosque.

<sup>160</sup> Professor Stuntz claims, without empirical support, that vehicular traffic is less segregated than pedestrian traffic. See Stuntz, *supra* note 30, at 2166–67. Even if this were true, his group search and seizure proposal is not limited to the search and seizure of groups of drivers only, it would authorize such measures against motorists and pedestrians alike.

<sup>161</sup> For example, his definition would seem to permit the seizure and search of the members of a mosque who attended a particular service, or a gathering of a group of scholars of color at an annual LatCrit conference.

every Muslim male attempting to board a flight, it is reasonable to consider the detention and searches of the non-Muslims as a new form of pretextualism, one that is not lost on the Muslim community. True, it is pretext of a different kind, but its goal—to cover up what authorities are *really* attempting to investigate—is the same. In the classic pretextual vehicle stop, the pretext (“I stopped you for failing to signal”) is used as means to cover up the officer’s real interest in X, who, for whatever reasons, matches the officer’s perception of who is likely to be a drug dealer. In the Stuntz group search scenario, the pretext (“I stopped all these other folks who don’t look like Arabs or Muslims”) is used as a means to cover up the security agents’ real interest in X, whose Arab or Muslim appearance matches the agents’ conception of who is likely to be a terrorist.

Perhaps it is for this reason that Professor Stuntz goes on to argue that, even “when groups are not integrated,” group seizures without individualized suspicion are still preferable to individual seizures with it, because a group is in a much stronger position to complain about excesses than is an individual.<sup>162</sup> At first glance this seems right, but on closer inspection there is reason to question it for two reasons. The first is that Stuntz overstates the power of the groups that are most likely to feel the impact of the new search power he is proposing. Indeed, the new governmental entitlement that he conceives is only imaginable because of the already subordinated status of the groups of persons we are talking about. Were his point about group power valid, the nation would not be embroiled in a debate over racial profiling, the topic would be a non-starter. It is precisely because of the relative powerlessness of subordinated groups that Arabs and Muslim Americans have to date been unable to stave off such proposals.<sup>163</sup>

Second, if a group search proposal were adopted it would confer new authority on the police. Thus, far from being in a stronger position to complain, groups subjected to targeting practices would have no cognizable basis for complaint. Police would be *entitled* to conduct group searches and seizures with no articulation of individualized suspicion, and with that authority much of the leverage profiling complainants formerly had would be stripped away. Though Stuntz is surely right that individual complaints against being subject to a vehicle stop have been easily thwarted by an officer who is prepared to swear to observing the individual engaged in some traffic infraction, even a minor infraction, at least the state is still required to show that the officer had some objective reason to justify the action. Under Professor Stuntz’s proposal that burden would disappear entirely. Once the officer asserted that the individual was a member of a group, all of whom were in some way inconvenienced, no further justification would be needed, and the loss of their liberty and privacy would simply be the price they paid for being a part of some amorphous identifiable group.

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<sup>162</sup> Stuntz, *supra* note 30, at 2167.

<sup>163</sup> Checks on government power provided by the Constitution are needed most by those who cannot rely on democratic political process to protect them.

Professor Stuntz would almost certainly respond that the current burden borne by the state in the individual stop context is a burden in name only. And for vehicular stops he would be right. The Court made it clear in *Whren* that an officer may detain a person for a traffic infraction, even if the officer's real suspicions center on drugs rather than traffic.<sup>164</sup> In such a case the state need only offer evidence of the infraction to defeat a complaint that no legally sufficient basis existed to suspect the individual of involvement with drugs. Nevertheless, while I have no desire to defend the Court's treatment of pretextual claims in *Whren*, it does bear noting that the "out" created for the police by the decision is presently confined to vehicular stops. It is only by virtue of the fact that our cars are subject to volumes of traffic regulations that an officer is able so easily to identify a traffic violation so as to provide, after *Whren*, a sufficiently "objective" justification for making such a stop. But as we know, searches and seizures occur in a wide variety of contexts, and quite often some distance from a vehicle. In those non-vehicular contexts, the ready availability of a pretextual basis for the detention of an individual is significantly reduced. The same cannot be said of Stuntz's proposed "group search" authority, which is not limited to automobile stops, and thus would confer upon the police a far more generalized authority to conduct stops than does the *Whren* doctrine. So far, the bargain Professor Stuntz proposes is looking decidedly lopsided.

b. Regulate the Manner in Which Police Interactions Unfold.

The liberty-enhancing side of the Stuntz deal, however, seeks to provide a counterbalance to the new group search power by devising greater restraints on the way in which officers carry out these encounters. If we grant the police greater leeway to seize groups, we should simultaneously regulate what steps may be taken during those encounters, he writes, because it is the "the manner of the stop—the degree of disrespect and force the officers display—that largely determines how the suspect will react."<sup>165</sup> Accordingly, the courts' current "sharp" focus on the line that separates seizures from non-seizures, and searches from non-searches, should be erased. In its stead we should set a "hazier" limit of legitimate police power practices that separates "decent" from "indecent" police behavior.<sup>166</sup> This hazier focus could include inquiry into whether the officer completed the encounter swiftly, acted proportionately to the circumstances that generated the stop, explained the reason for the action to the detainee and otherwise treated him or her with respect.<sup>167</sup> In short, the law should "place legal limits on the coercion—and rudeness—police inflict on

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<sup>164</sup> See *Whren v. United States*, 517 U.S. 806, 811–13 (1996).

<sup>165</sup> See *id.* at 2173.

<sup>166</sup> See *id.* at 2179 ("if the system cannot eliminate race-based selection of suspects (as it plainly cannot), it may still be able to reduce the injury those suspects feel once they are selected").

<sup>167</sup> See *id.* at 2174 ("Worrying about *how* street stops happen makes more sense than worry about *how many* of them happen.") (emphasis added).

suspects”<sup>168</sup> during such stops. While Stuntz admits that this would not “greatly affect” the way in which the police select their targets—“meaning that race and ethnicity would probably be overused”—it would at least reduce “the costs of [that] overuse.”<sup>169</sup>

This pinched conception of the bases of resentment felt by persons of color who come into contact with the police is highly questionable. To support it, Professor Stuntz relies primarily on the findings of a study conducted by social psychologists Yuen Huo and Tom Tyler. The study probed the reactions of three California ethnic groups (African Americans, Latinos and Whites) to a range of legal authority, with a particular emphasis on face-to-face interactions.<sup>170</sup> Huo and Tyler’s data confirmed that African American and Latinos hold less positive ideas about their encounters with legal authority than do Whites,<sup>171</sup> and the researchers attempted to determine whether gaps in the way in which these different ethnic groups viewed legal authorities were “due to different outcomes, different perceptions of their treatment, or different expectations of fair treatment generally.”<sup>172</sup> They found that perceptions of fair treatment by authorities were more important to those surveyed than favorable outcomes (such as whether or not a citation was issued when stopped by the police),<sup>173</sup> i.e., “the primary complaint minorities have with the legal system has to do with the quality of their treatment rather than the outcomes they receive.”<sup>174</sup>

Stuntz relies on these findings to reach three tentative conclusions of his own: 1) “the manner, and the manners, of street stops probably have a *larger* effect on suspects’ views of the police than does their selection as suspects;” 2) “discrimination in street policing may have more to do with the way police *treat* different categories of suspects than with how many people in each category are stopped;” and 3) “even if the law successfully regulated police selection of targets, the level of racial distrust in policing would remain high.”<sup>175</sup> These conclusions imply that minorities are bothered more by the unfair treatment that may follow a stop, than by the unfairness that may have contributed to their selection as targets to begin with; thus, if we make these

<sup>168</sup> *Id.* at 2180.

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

<sup>170</sup> See YUEN J. HUO & TOM R. TYLER, HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY (2000). The researchers’ methodology included a telephonic survey of over 1,656 Los Angeles and Oakland residents who reported they had had a personal encounter with a legal authority in the year or so preceding the interview. See *id.* at 12. The survey takers were asked about their perception of their treatment by legal authority in a wide range of contexts spanning the receipt of parking tickets to requests for emergency assistance.

<sup>171</sup> See *id.* at 23.

<sup>172</sup> See *id.* at 5.

<sup>173</sup> See *id.* at 7 (concluding people “are not necessarily satisfied and willing to support decisions only when they benefit from those decisions”); *id.* at 39 (“African Americans and Latinos are less positive about their experiences with legal authorities not so much because the outcomes they receive are unfavorable, but because the procedures authorities use do not meet their expectations of fairness.”).

<sup>174</sup> *Id.* at 31.

<sup>175</sup> Stuntz, *supra* note 30 at 2173–74 (emphasis added).

encounters more pleasant, or at least less unpleasant, we will mitigate the harms that flow from profiling practices.

Huo and Tyler's findings, however, do not support Stuntz's conclusions. To the contrary, Huo and Tyler found no significant difference in the way in which African Americans, Latinos and Whites defined "fair treatment." All three groups placed similar weight on what the researchers concluded were the three constituent parts of the procedural fairness equation: neutrality (whether the survey taker believed the authority had acted "without bias" and had "made decisions based on facts"), benevolence (whether the survey taker believed "the authority's motives were honorable and [could] be trusted") and status recognition (whether the survey taker believed the authority showed "regard" for her "as a full member of the community").<sup>176</sup> This led Huo and Tyler to the perhaps unremarkable conclusion that legal authorities need not adopt "different approaches when dealing with members of different ethnic groups" when devising ways in which to improve citizen satisfaction with legal authority.<sup>177</sup> To the contrary, the study "reinforce[d] the overriding importance of *evenhanded* treatment, attending to personal concerns, and respecting the dignity of individuals," Huo and Tyler stressed.<sup>178</sup>

In the face of these findings one can argue that minorities mind less about being unfairly selected for investigation by the police than about being unfairly treated during stops by the police only by completely divorcing the question of the fairness of selection procedures from the concept of "fair treatment." Huo and Tyler did not do that,<sup>179</sup> nor should they have. It is far more likely that a person who feels she has been racially targeted will conclude, rightly, that the police were acting neither "neutrally" nor "benevolently" toward her, and were specifically denying her the "status recognition" afforded other members of the community. In other words, while the Huo and Tyler study may support the conclusion that the injury inflicted by a race-based targeting practice can be *further aggravated* by disrespectful police behavior, it provides no reason to believe that respectful behavior will erase the injury already caused by an unfair selection practice. To the contrary, the qualitative and quantitative evidence gathered prior to 9/11 concerning minority resentment of racial profiling practices suggests race-based targeting was a great source of animosity toward the police totally apart from the action that followed it.

This does not mean that the regulation of police behavior during non-consensual encounters is unimportant. Of course it is. The way police conduct themselves in these encounters matters, and courteous behavior can help to ameliorate some of the resentment felt by those delayed or otherwise inconvenienced by such stops. The police should be taught that quick and respectful dispatch of such encounters serves

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<sup>176</sup> HUO & TYLER, *supra* note 170, at 57–58.

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

<sup>178</sup> *Id.* at 58 (emphasis added).

<sup>179</sup> To the contrary, though Huo and Tyler's survey did not include questions specifically related to racial profiling, their data showed that minorities reported being stopped by the police in greater numbers than whites. *See id.* at 60.



both their and the public's best interests. But it is a mistake to think that the injury that is inflicted when a person has been targeted on the basis of race can be extinguished by mannerly post-detention behavior. If we have learned anything from the literature about racial profiling it is that the harms that result from this practice are not confined to the duration of a single stop and are not limited to the particular individual profiled. Racial profiling practices injure far more broadly than that. They stigmatize entire populations. They promote a siege mentality that may be difficult for persons not subjected to them to fully understand. They breed fear of and resentment toward the police, which ultimately undermines authority. Thus, while there are many reasons to promote courteous police behavior (not the least of which are the dividends that redound to the police themselves), post-stop courtesy does not get at what makes profiling practices a harm.

Moreover, even if we assumed that more respectful police behavior could reduce some amount of the hurt that results from profiling, only the strictest restrictions on police behavior are likely significantly to impact the high levels of resentment reflected by pre-9/11 anti-profiling statistics. It is clear, however, that Professor Stuntz would oppose such strict regulation. "Bright line rules" restraining certain types of police behavior during police/citizen encounters are inadvisable, Stuntz warns, given the infinite permutations of those encounters. This view leads him once again to reach for the next best thing: a more flexible standard that lets the police "know roughly" what behavior is in and out of bounds.<sup>180</sup> But, besides that, he writes, "there is little the law can do beyond telling police officers to behave reasonably."<sup>181</sup>

If that is in fact the best that the law can do, then those subject to group stops would receive very little payoff from Professor Stuntz's proposed trade. The Fourth Amendment already demands that searches and seizures be "reasonable." Thus, the real power the public is being asked to surrender to the police (the power to conduct suspicionless group searches and seizures) contrasts sharply with the "hazy" promises of decent behavior the police are being asked to make—restrictions that are neither new, nor particularly restrictive.

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<sup>180</sup> Professor Stuntz explains more fully:

No one knows how to craft a legal formula that will tell officers how to behave in advance. That problem, however, need not be solved; vagueness in legal definitions is a more tolerable vice than law professors tend to think. The problem that needs addressing is not definition but application—the question is not whether we can come up with the right legal terminology, but whether police officers can know roughly where the boundaries are in practice.

Stuntz, *supra* note 30, at 2175.

<sup>181</sup> Such a rule would not be fatally vague, Stuntz writes, for similar totality of the circumstances standards have worked "tolerably well" elsewhere "in spite of their linguistic muddiness." *Id.* at 2174–75.

B. Samuel Gross and Debra Livingston—Ranking Racial and Ethnic Grievances

In their essay, *Racial Profiling Under Attack*,<sup>182</sup> Samuel Gross and Debra Livingston stake out a more moderate position on the racial profiling question and the question of what powers the police should be given in the wake of the attacks. Professors Gross and Livingston start by noting that we can think of police decisions that take race or ethnicity into account as falling along a spectrum which includes acts ranging from “the worst expressions of racism” to acts which are “perfectly justified.”<sup>183</sup> They argue that we “[can] locate a [particular] police practice along this range” by focusing not just on “who the authorities target,” but on “what they do” to them and “why.”<sup>184</sup> In some ways this observation parallels Part I’s review of the pre-9/11 approach to the use of race and ethnicity. That review showed that sometimes race can be considered in police investigations, and sometimes not. But Gross and Livingston’s spectrum is different than mine for two reasons: they ultimately omit from their spectrum the most innocent usage of race or ethnicity in official investigations—the victim identification scenario—and they advocate a repositioning of the line that before 9/11 separated “prohibited” from “permitted” police uses of race or ethnicity.<sup>185</sup>

This first difference is likely explained more by the nature of spectrums themselves than by any disbelief on Gross and Livingston’s part that victim identification cases provide the clearest example of a case where the use of racial or ethnic information is appropriate. In their article Professors Gross and Livingston identify the forced relocation of Japanese Americans during World War II to relocation centers as the highwater mark of American ethnic profiling practices, which leads them to place “mass imprisonment” or perhaps “torture or execution” on the basis of race or ethnicity at the “high end” of their spectrum. At “the low end” the two scholars place the police decision to “pay close attention” to members of a

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<sup>182</sup> See Gross & Livingston, *supra* note 30.

<sup>183</sup> *Id.* at 1415.

<sup>184</sup> *Id.*

<sup>185</sup> As Gross and Livingston correctly point out, there was no single definition for racial profiling before the 9/11 attacks, a fact that creates obstacles for any scholar interested in contrasting the state of the law concerning racial profiling practices before and after the attacks. To get around this hurdle and “shed some light” on the situations in which race or ethnicity should and should not properly be considered by the police, the two scholars offer their own definition for the practice, a definition that roughly approximates that used by most jurisdictions before the attacks. According to their definition, “[r]acial profiling occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime the office is investigating.” See *id.* For present purposes I am prepared to adopt that definition, though for reasons that will become apparent below, I differ with the way in which Gross and Livingston would have the courts apply it. Using this definition, the two legal commentators proceed to survey the landscape of ways in which the police factored the race or ethnicity of certain suspects into their criminal investigations prior to 9/11. This survey is similar to that set out in Part I of this article.

particular racial or ethnic group.<sup>186</sup> By describing the range of race-based police actions in this way, the two fail to acknowledge the victim identification scenario as the clearest form of proper race-based police action. As such, it is the form that rightly should occupy the spectrum's "low end."

Gross and Livingston would defend their decision to omit this type of police practice on the ground that they intended their spectrum to consider only instances of racial and ethnic profiling and not other non-profiling uses of racial or ethnic information. Even so, in my view this is a mistake, for the elimination of the most innocent usage of race or ethnicity in police investigations leaves on the table only those racial usages formerly viewed as wrongful. Without being able to see acts of racial profiling juxtaposed beside victim identification cases, it is easy to lose sight of what made racial profiling so objectionable to begin with. While I have no serious objection to utilizing a spectral analysis to think through the issues raised by racial profiling,<sup>187</sup> it is important when we do so that we ensure, first, that all relevant data are included within the spectral field, and second, that we are not overly seduced by the relative appearance of that data. By its very nature a spectrum can seduce its observer into considering points along it (here, each example representing a different type of police use of race) *in relation to* each other, rather than considering them as usages that fall on one or the other side of a prohibited/permitted line.<sup>188</sup> Put slightly differently, one is tempted to begin to *rank* the racial usages and the harms that they cause against each other, treating some as intolerable, but others not. This is particularly true if the racial usage formerly thought of as the least offensive form of race-based policing is omitted from the spectrum entirely.

Putting the length of the spectrum to one side, however, this Article also reaches a different conclusion about how to separate acceptable profiling practices from non-acceptable ones. Professors Gross and Livingston suggest that prior to 9/11 there may have been "too much agreement" that racial profiling always inflicts a constitutional injury.<sup>189</sup> Labeling a police practice as racial profiling was never "very informative"<sup>190</sup> in this view, because as important as whom the police have targeted

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<sup>186</sup> See *id.* at 1425.

<sup>187</sup> One positive feature of this type of spectral analysis is that it emphasizes (as do I in Part I) that, at times, police use of race or ethnicity poses no constitutional problem (such as in my Situation #1 Victim identification scenario). See *supra* discussion accompanying notes 73–88.

<sup>188</sup> That is, when viewed along a spectrum it is impossible not to note that some racial usages appear worse than others. And if some usages are worse than others, then it seems reasonable to assume that the some of the harms or burdens imposed by those usages will also be worse than other harms or burdens. Further, if some of the racial usages/harms are worse than others, shouldn't we think of them as less acceptable than others as well? And conversely, if some are not as bad as others, shouldn't we think of them as more acceptable, particularly in times posing severe national security concerns?

<sup>189</sup> Before the events of 9/11, racial profiling disputes were largely "factual," the two remind us. Complainants would allege that the police had engaged in racial profiling, and to have any chance to win, the police had to deny it. "If a practice was successfully tagged as racial profiling, the cops lost; if not, they won," even in the absence of a uniform consensus about what racial profiling was. See Gross & Livingston, *supra* note 30, at 1414.

<sup>190</sup> See *id.* at 1416. The fact that "some cases cannot be easily classified" leads Gross and Livingston

and why, is how badly the police have treated those targets in the process.<sup>191</sup> The implication of this is that some acts of racial targeting might be acceptable even if the racial suspicions of the police are not “justified,”<sup>192</sup> provided that the police take care in how they go about conducting their investigations of those targeted.<sup>193</sup>

Thus, Professors Gross and Livingston suggest that rather than constituting a single, offensive form of police behavior, profiling represents a range of police behaviors, some of which are acceptable, while others are not. The line between unacceptable and acceptable police behavior, they contend, is not between profiling and non-profiling practices, but between excessive and sufficiently restrained governmental action.<sup>194</sup> To illustrate the point they speculate about whether some less intrusive acts of official discrimination against Japanese Americans during World War II might have been acceptable. “What if Japanese Americans had simply been asked to submit to FBI interviews, or required “to report their whereabouts to the police periodically?” the two ask.<sup>195</sup> Without asserting that such heightened reporting obligations would necessarily withstand constitutional scrutiny, Professors Gross and Livingston do assert that they would “have been far preferable to the relocation and imprisonment that were in fact ordered.”<sup>196</sup> This is true enough, but it does little to answer whether either of the contemplated racial harms should be countenanced. Even if it is true that one racial wound cuts deeper than the other, that does not alter the fact that both originate from a single source of racial suspicion. If that source of suspicion is flawed, all that emanates from it will be flawed as well.

While Gross and Livingston’s opposition to “classic” examples of racial profiling is apparent throughout their article, and they take pains to offer a test that will position the line between tolerable and intolerable official racial usages in such a way as to

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to conclude that “it is a mistake to focus excessively on labels.” *Id.* I might agree with them if they offered a reasonable alternative for distinguishing between racial grievances. In my view, however, they fail to do that.

<sup>191</sup> *See id.* at 1415 (“To locate a police practice along this range, we need to know in concrete detail not just who the authorities target, and why, but what they do to these people and why they do it.”).

<sup>192</sup> *Id.* at 1425.

<sup>193</sup> Accordingly, if an investigation is covert, conducted “at a distance,” and information is gathered “from public sources,” the consequences to those targeted “will be minimal,” Gross and Livingston write, and might therefore be acceptable. *Id.* The two reached this conclusion despite their awareness of a study that revealed the racially-biased, covert investigative efforts of one police force assigned to a predominantly white suburban area. The study showed that members of the police force were “more likely to run license-plate checks on cars with black drivers than on cars with white drivers” and that the gap increased the farther black drivers traveled away from the “black-dominated metropolis.” *Id.* Making no effort to defend the police profiling practice the study illuminated, Gross and Livingston state simply, “The only good thing we can say about the profiling in that case is that few of its victims ever realized their status.” *Id.*

<sup>194</sup> *See id.* at 1425 (observing that there will be “infinite gradations” between the high and low ends of the spectrum “as the government’s conduct becomes increasingly intrusive, disruptive, frightening, and humiliating”).

<sup>195</sup> Gross & Livingston, *supra* note 30, at 1425.

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

continue to disallow it, the test they create would permit other instances of race-based profiling. The two scholars propose that the courts draw this line by asking “two important questions”: the first—geared toward “separat[ing] out a class of cases near the bottom” of their spectrum—would examine how far the police went in their efforts to gather evidence (i.e., was their investigation overt or covert, did they confront the subject, or did she fail even to realize that she was being investigated?); the second, would apply to cases involving more overt police action and would ask whether the police treated the person as “one of us” (i.e., “a law abiding person to be checked”) or as “one of them” (i.e., “a criminal to be caught and punished”)?<sup>197</sup>

Both of these questions focus on the manner in which the police handle their interactions with those targeted rather than on their reason for targeting whom they do, and if applied, would permit the more liberal use of race or ethnicity in police investigations. For example, the first question—how far did the police go—appears designed to shelter from constitutional challenge evidence gathered by furtive racial targeting. The idea seems to be that no significant harm results when a group of individuals is profiled on the basis of race if the particular individuals profiled are unaware of the government’s activity. I cannot agree. Contrary to the old adage, sometimes what we don’t know *can* hurt us, and that harm is suffered not only by those burdened by the profiling practices, but by all of us who fancy ourselves members of a nation that is concerned as much about foundational privacy principles as by the need to provide for national security. Indeed, if taken to its logical extreme, the covert bugging of private communications (the ultimate investigative technique conducted in secret and at a distance) purely on the basis of racial or ethnic suspicion would be permissible, provided the government actors in charge of that surveillance were savvy enough to keep their activities under wraps.<sup>198</sup> Personal awareness of governmental surveillance simply cannot be the correct test for identifying permissible from impermissible government action. If it were, we would be encouraging the government to skulk. And the more successful it became at hiding its conduct, the more challenge-proof its conduct would become.

More fundamentally, the fact that a particular individual unconstitutionally targeted may not know that he has been so targeted simply cannot convert conduct that is constitutionally prohibited from wrong into right. It is hard to conceive of such a blatantly race-conscious policing policy as anything other than the creation of a racial classification, one which would make it subject to equal protection concerns. While Professors Gross and Livingston may very well be correct that a policy to conduct such an investigation from a distance will sometimes foil a Fourth Amendment challenge (because it does not satisfy the Court’s conception of a Fourth

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<sup>197</sup> *Id.* at 1425 (emphasis in original).

<sup>198</sup> If this seems a bit far fetched, one need only consider reports that Attorney General Ashcroft has asked his lawyers to draft a law that would enable the government to wiretap citizens for up to two weeks without court authorization. See William Safire, *Privacy Invasion Curtailed*, N.Y. TIMES, Feb. 19, 2003, at A41.

Amendment “search”<sup>199</sup>) the policy would still have to survive equal protection analysis. This additional constitutional check would force government officials to explain what “compelling interest” exists to justify targeting their investigative efforts on members of particular racial or ethnic groups, and to show that no more “narrowly” tailored approach exists to serve that interest. The fact that a policing practice is carried out in secret, shielded from the light of public knowledge and examination, may well undermine any argument that the interest being served by that practice is compelling.

Professors Gross and Livingston consider the second of their two proposed line-drawing inquiries—“Is the subject treated as one of *us* or as one of *them*, as a law abiding person to be checked out or as a criminal to be caught and punished?”—the more important one of the two inquiries because “it affects the experience of people who *do* know what is being done to them.”<sup>200</sup> They offer two examples to illustrate the difference between “us” and “them” treatment. A subject stopped at a typical airport checkpoint is treated as an “us,” because such checks are conducted democratically; everyone is subject to security checks, and “[t]he operating assumption” for all, whether “Muslim or Presbyterian, is that she will clear security and rejoin the crowd.”<sup>201</sup> By contrast, Blacks and Latinos disproportionately stopped along the nation’s highways on suspicion of being drug traffickers are treated as “them.” They explain:

The trooper is not going through a routine so he can let [them] go on [their] way and move on to his next task. He believes [they] are drug dealer[s]; he *wants* to find drugs on [them]. He wants to prove that [they] are criminal[s], preferably big criminal[s], and will be disappointed if he finds no drugs; he might get mad.<sup>202</sup>

It is difficult to know whether Professors Gross and Livingston mean this inquiry to be determined from the perspective of the officer or the person stopped. If it is the latter, the fact that an officer has “democratically” interfered with a group of non-Arab air travelers may mean very little to Arab air travelers who are also stopped, if the latter group perceives that the treatment of the former is simply a cover for the officer’s real objective.<sup>203</sup> Thus, from the start, the question Gross and Livingston

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<sup>199</sup> See *Katz v. United States*, 389 U.S. 347 (1967) (establishing that a Fourth Amendment search occurs only when the government intrudes upon an area in which an individual has a reasonable expectation of privacy).

<sup>200</sup> Gross & Livingston, *supra* note 30, at 1425.

<sup>201</sup> *Id.* at 1426.

<sup>202</sup> *Id.*

<sup>203</sup> Since September 11, I have taken several flights and have heard many non-Arabs grumble about the extra security measures they must endure. A frequent retort from members of this group is essentially: “Like I look like a terrorist.” The implicit message of such statements is that, even if it is not publicly acknowledged, there *is* a terrorist profile, and they don’t fit it. It is a mistake to think that Arabs and Muslims do not recognize this as well.

pose is likely to give little comfort to members of this routinely profiled community.

Even accepting their methodology, its application to specific proposals that contemplate differential treatment of Arabs and Muslims after 9/11 shows those proposals to be no good. Gross and Livingston's description of the flaw in the classic racial profiling scenario (Black and Latino drivers disproportionately stopped on suspicion of drug trafficking) which leads to the conclusion that this is "them"-like treatment is helpful to see why. According to this description, the officer's error in the DWB example is that he *believes* Blacks and Latinos are more likely to be drug dealers, that he *wants* to find drugs that will help him prove those suspicions, that he will be *disappointed* if he is unsuccessful, and perhaps even so *disbelieving* enough of their innocence that he will get mad. This is wrongful racial profiling, the two scholars say, because the officer treats these subjects as criminals, "a basic insult to a person's self image and to his position in society."<sup>204</sup> By extension, the Department of Justice's campaign to interview thousands of Middle Eastern men after 9/11, would also seem to constitute "them"-like treatment. After all, the government targeted only persons of Middle Eastern descent in the interview campaign, displaying a belief that persons who shared the hijackers' ethnicity were more likely to be involved in or know of terrorist activities than those who did not. Indeed, Professors Gross and Livingston concede that the interview campaign *was* "ethnic profiling to the extent that the FBI [was] operating on a general assumption that Middle Eastern men are more likely than others to commit acts of terror."<sup>205</sup> They nevertheless conclude that the interview campaign was *not* profiling "to the extent that the agents [were] pursuing case-specific information about the September 11 attacks, albeit in a dragnet fashion."<sup>206</sup> This suggests that whenever an investigative effort derives in some (even remote) sense from an actual crime in which specific information about the racial or ethnic identity of the perpetrator (or perpetrators) is available, it will not technically be profiling, even if the police "dragnet" entire communities of persons with the same racial or ethnic characteristic in an effort to nab those responsible.<sup>207</sup>

Yet this argument surely excuses too much. The discussion of the *Oneonta* and other cases in Parts I and II demonstrates that this type of over-reliance on racial and ethnic information is extremely unlikely in a diverse society to yield those responsible for crimes.<sup>208</sup> Even where such racial information is logically relevant to a criminal

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<sup>204</sup> *Id.* at 1427.

<sup>205</sup> *Id.* at 1436.

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

<sup>207</sup> It is sheer fiction that the bulk of the ethnic focus of the government's post-9/11 investigation has been designed to bring to justice the perpetrators of the horrendous events of that single day. The plain focus of the government's ongoing law enforcement efforts is to investigate and prevent *future*, not past, terrorist conduct, and the question for legal thinkers is how far can it go in doing that, and down what sorts of paths?

<sup>208</sup> So does Professor Gross's cogent empirical analysis of data gathered about the highway patrol practices of the Maryland State Police. See Gross & Barnes, *supra* note 56, at 751 (concluding "[s]topping and searching cars on interstate highways without prior intelligence is a hopeless strategy for eradicating drug trafficking.").

investigations, its value is largely limited to excluding groups of individuals from the circle of suspicion, rather than moving any particular individual possessing that racial or ethnic characteristic inside that circle. Once we lose sight of this point, the door to using racial and ethnic information is opened far too wide: the police officer who has arrested a Latino male for involvement in a drug conspiracy can use this as a reason to stop other Latinos anywhere and everywhere. Moreover, because of the extremely marginal probative value of ethnic information regarding any individual, this standard would inflict the very “insult” with which Professors Gross and Livingston are so rightly concerned when they consider and condemn the classic racial profiling scenario.

Gross and Livingston’s uncertainties about the implications of their own proposed test seem revealed by their reluctance to conclude that the interview campaign *is* ethnic profiling, as they are reluctant to conclude that it *is not*.<sup>209</sup> They dodge having to provide a clearer answer about that by concluding that it really does not matter what we call it, what really matters is how polite the government is when it conducts such a campaign.<sup>210</sup> “In the end,” they write, “what the Department of Justice *does* to those it seeks to interview, for what reasons and on what basis, are more important than the fact that they may have been initially selected for interviews in part because of their ethnicity or national origin.”<sup>211</sup> This means that even if we were satisfied that a particular police/citizen interaction would not have taken place but for the citizen’s race or ethnicity, our main concern should be (*ala* Stuntz) about how that citizen was treated during the interaction.<sup>212</sup>

It is true that it matters what law officials do when carrying out criminal investigations. But it also matters when racial or ethnic assumptions provide the basis for whom the government chooses to criminally investigate, just as it matters when the government uses race or ethnicity as a handy proxy for criminality. The fundamental principles of reasonableness and equal protection embedded in the Fourth, Fifth and Fourteenth Amendments exist to ensure that government authorities can be reminded that all of these things matter when fear for the nation’s security may cause them to forget.

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<sup>209</sup> *See id.* (“The answer turns out to be a draw.”).

<sup>210</sup> *See id.* (“The Justice Department’s program may or may not fall within our definitional line. Its wisdom and morality, however, do not depend on the pigeonhole in which it is placed but on what the Justice Department in fact does.”).

<sup>211</sup> *Id.* at 1437 (emphasis added).

<sup>212</sup> Professors Gross and Livingston compliment Professor Stuntz’s “thoughtful discussion” of the idea that “much of the harm [racial profiling] inflicts could be ameliorated by better, more respectful treatment of those the police target.” *See id.* at 1427 n.56.



## VI. CONCLUSION

We live in a time of expanded possibilities and expanded fears. This is a time in which the malignant intentions of a narrow band of individual actors can transform commercial airliners into weapons of mass destruction, and fear-based efforts to defend against similar future threats can transform the ethnicity of that narrow band of individuals into a seemingly legitimate basis for group suspicion. In such times legal thinkers have a special duty to counsel the nation and its leaders about the lessons of the nation's past mistakes, and the error that is made when ethnicity is permitted to serve as a proxy for criminal suspicion.

However well intentioned, the body of legal scholarship that attempts to justify the investigative targeting of Arabs and Muslims after 9/11 is, in my view, wrongheaded. It is also dangerous, for our government leaders are quite naturally emboldened by the acquiescence of that elite crop of respected scholars. Although I do not pretend to hope to change their minds, it is my hope that this article will encourage other legal thinkers to enter the conversation about the proper and improper role of race and ethnicity in criminal investigations. Much stands to be lost if the voices of opponents to racial and ethnic profiling go unheard.

