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Race IPSA? Racial Profiling, Terrorism and the Future

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RACE IPSA? RACIAL PROFILING, TERRORISM AND THE FUTURE

RUTH SINGER*

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Although it has become a high-profile term, racial profiling is difficult to authoritatively define. The term often describes the use of race as the motivating factor for traffic stops, but this definition has been criticized as too limited in context.¹ The End Racial Profiling Act (ERPA), proposed several times in Congress, offers a much broader definition of racial profiling:

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¹ Reginald T. Shuford, *Civil Rights in the Next Millenium: Any Way You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 380 & 372 n.7 (1999).

the practice of a law enforcement agent relying, to any degree, on race, ethnicity, religion, or national origin in selecting which individuals to subject to routine or spontaneous investigatory activities, or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except where there is trustworthy information, relevant to the locality and time frame, that links persons of a particular race, ethnicity, religion, or national origin to an identified criminal incident or scheme.²

In American criminal law, probable cause must justify searches and seizures by government agents,³ and the standard of proof required to convict a person of a crime has long been “beyond a reasonable doubt.”⁴ In comparison, the ERPA definition suggests that race, ethnicity, religion or national origin acts as a substitute for probable cause.⁵ Definitions similar to but less thorough than that used by ERPA have been proposed by legal scholars⁶ and by bills introduced in state legislatures, such as Minnesota’s Bill.⁷ Other scholars suggest that racial profiling is simply the use of race as a “proxy” for criminality.⁸ Because the ERPA definition is more detailed and allows for the use of race when police receive trustworthy information, such as a descrip-

² End Racial Profiling Act of 2005 (ERPA), S. 2138 § 3(6), 109th Cong. (2005). This paper will rely on the ERPA definition when referring to racial profiling.

³ U.S. CONST. amend. IV.

⁴ *In re Winship*, 397 U.S. 358, 361 (1970).

⁵ William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 30 (2004).

⁶ Shuford, *supra* note 1, at 372 n.7 (citing Professor Randall Kennedy).

⁷ Kevin Voss, *Justice in a Changed World: Legislative Study: Eliminating Racial Profiling in Minnesota*, 29 WM. MITCHELL L. REV. 869, 870 (citing S.F. 386 82nd Leg., 1st Reg. Sess. (Minn. 2001) (as introduced)).

⁸ Carter, *supra* note 5, at 30. See also Jeremiah Wagner, *Racial (De)Profiling: Modeling a Remedy For Racial Profiling After the School Desegregation Cases*, 22 LAW & INEQ. 73, 78 (2004).

tion of a suspect by a witness that includes race, the term racial profiling in this paper refers to the ERPA definition.

THE HISTORY OF RACIAL PROFILING

The events of September 11, 2001, and the course of the war on terror sparked a renewed national debate on racial profiling, but the problem is not a new one.⁹ The idea that racial identity can be effectively substituted for criminal identity was applied to African Americans in the infancy of American slavery.¹⁰ The “image of blacks as possessing uncontrollable, innate urges for criminality and violence” continues to plague African Americans.¹¹ Since that time, the concept has been adapted to fit persons of Japanese and, more recently, Arab descent. During World War II, some considered Japanese citizens to be innately untrustworthy and disloyal to the United States.¹² Since 9/11, some individuals stereotype Arabic people as terrorists.¹³

Long before 9/11, the U.S. government forced thousands of Japanese citizens from their homes during World War II.¹⁴ The government used “military necessity” to justify Executive Order 9066, which allowed the Secretary of War and his designees to use their discretion to identify military sensitive areas and to exclude from those areas persons who posed a threat to national security.¹⁵ Without any direct evidence of such threats, the U.S.

⁹ See generally Sherry F. Colb, *The New Face of Racial Profiling: How Terrorism Affects the Debate*, FindLaw’s Writ, Oct. 10, 2001, <http://writ.news.findlaw.com/colb/20011010.html> (last visited Feb. 28, 2008).

¹⁰ Carter, *supra* note 5, at 17.

¹¹ *Id.* at 57.

¹² See Huong Vu, *Us Against Them: The Path to National Security is Paved by Racism*, 50 *DRAKE L. REV.* 661, 673 (2002); Colb, *supra* note 9.

¹³ See generally Leadership Conference on Civil Rights Education Fund, *Wrong Then, Wrong Now: Racial Profiling Before and After September 11, 2001*, (2007), http://www.civilrights.org/publications/reports/racial_profiling/ (last visited Feb. 28, 2008) [hereinafter *Wrong Then, Wrong Now*].

¹⁴ *Korematsu v. United States*, 323 U.S. 214, 218 & 226 (1944).

¹⁵ Exec. Order No. 9066, 7 *Fed. Reg.* 1407 (Feb. 19, 1942).

military treated all persons of Japanese descent as probable spies and saboteurs based on the bare assumption that there were disloyal persons hidden among them.¹⁶ To prevent suspected activity, officials subjected those of Japanese ancestry first to a curfew and later to exclusion from their homes and internment at various camps.¹⁷

One of the unfortunate victims of this sweeping generalization was Fred Korematsu, who was convicted of knowingly violating the exclusion order that forced him from his home.¹⁸ The Supreme Court upheld his conviction based “on the finding . . . that Fred Korematsu was not removed from his home ‘because of hostility to him or his race’ but because the United States was at war with Japan and the military ‘feared an invasion of our West Coast.’”¹⁹ Legal scholars, then and since, strongly criticize the *Korematsu* decision as being overly deferential to the government’s assertion of military necessity.²⁰

Executive Order 9066, as applied, was exceedingly overbroad. It applied to Japanese residents and citizens without qualification and essentially substituted race for facts or circumstances reasonably suggesting disloyalty.²¹ The act of internment goes

¹⁶ *Korematsu*, 323 U.S. at 218.

¹⁷ *Id.* at 217.

¹⁸ Exclusion Order 34 “directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from” San Leandro, California. This order was “substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407 . . . [which was] issued after we were at war with Japan [and which] declared that ‘the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.’” *Id.* at 216-17.

¹⁹ S. Res. 126, 109th Cong. (2005) (enacted).

²⁰ *Korematsu*, 323 U.S. at 233-48 (Murphy, Roberts and Jackson, J., dissenting). See also Liam Braber, Comment, *Korematsu’s Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 485 & 485 n.189 (2002).

²¹ Colb, *supra* note 9 (“Anyone of Japanese descent residing on the Pacific [sic] coast of the United States was presumed to be a traitor and accordingly placed in what were essentially prisoner-of-war camps.”).

far beyond “routine . . . spontaneous investigatory activities,”²² such as the stops and searches generally contemplated in racial profiling today, but it still serves as an example of the extremes that are possible when the underlying premise of racial profiling is accepted without question. Korematsu’s loyalty to the United States was never in question, but his race made him a criminal nevertheless.²³

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to review government actions following the issuance of Executive Order 9066.²⁴ Although the Commission concluded that “the decision in *Korematsu* lies overruled in the court of history,” the Supreme Court has yet to explicitly overturn the decision.²⁵ Justice Jackson eloquently and perceptively captured the problem in his *Korematsu* dissent, stating, “[t]he Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”²⁶

Since *Korematsu*, racial profiling claims in conventional crimes have met with little success in the lower courts.²⁷ Courts consider pretextual stops, which are objectively justifiable even

²² ERPA, *supra* note 2.

²³ *Korematsu*, 323 U.S. at 216.

²⁴ Commission on Wartime Relocation and Internment of Civilians Act, 94 Stat. 964 (1980).

²⁵ Braber, *supra* note 20, at 485 and n.189.

²⁶ *Korematsu*, 323 U.S. at 246.

²⁷ Wagner, *supra* note 8, at 99 n.192 (citing various cases). The author of this paper was unable to locate any cases with a final decision holding that racial profiling in fact took place. The closest rulings found were those denying motions to dismiss and holding that a colorable claim had been presented. One example is *Bennett v. City of Eastpointe*, wherein the 6th Circuit Court of Appeals ruled that the plaintiffs had produced sufficient evidence of racial profiling to proceed to a jury trial, but the case was settled following that decision. 410 F.3d 810 (6th Cir. 2005). *See also* *White v. Williams*, 179 F. Supp. 2d 405 (D.N.J. 2002).

though occasioned by an officer's ulterior motive, reasonable under the Fourth Amendment. As a result, racial profiling victims rarely receive the remedy of evidence suppression.²⁸ The Supreme Court held that racial profiling claims are covered by the Equal Protection Clause of the 14th Amendment, thereby requiring a showing that the government agency involved had a purposefully discriminatory policy in order for relief to be granted.²⁹ In such a case, meeting the burden of proof will be difficult for plaintiffs, if not impossible.³⁰

Despite little accomplishment in the private arena, the Department of Justice's pattern or practice investigations of discrimination did result in a number of consent decrees.³¹ Consent decrees typically require the subject police agency to engage in data collection and ongoing review to evaluate compliance with recommended procedures designed to eliminate racial prejudice as a factor in law enforcement decisions.³² Unfortunately, "consent decrees . . . have been slow to [put an end to] racial profiling."³³

²⁸ Whren v. United States, 517 U.S. 806, 813-14 (1996).

²⁹ Wagner, *supra* note 8, at 82.

³⁰ See R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 600 (2003) ("racial profiling is clearly unconstitutional only if irrational"). See generally Amnesty Int'l, *Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States* 32 (2004) (citing Brown v. Oneonta, 221 F.3d 329, 337 (2d Cir. 1999)), available at http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf [hereinafter *Threat and Humiliation*].

³¹ ERPA, *supra* note 2 at § 2(8) ("[A]s of November 15, 2000, the Department of Justice had 14 publicly noticed, ongoing, pattern or practice investigations involving allegations of racial profiling and had filed five pattern and practice lawsuits involving allegations of racial profiling, with four of those cases resolved through consent decrees.").

³² See Wagner, *supra* note 8, at 81 n.57 (citing White v. Williams, 179 F. Supp. 2d 405, 413-14 (D.N.J. 2002) (describing the provisions of a consent decree entered into between the Department of Justice and the State of New Jersey)).

³³ Wagner, *supra* note 8, at 104.

PUBLIC ATTITUDE TOWARD RACIAL PROFILING

In the years leading up to 9/11, prevailing public sentiment generally disfavored the use of racial profiling.³⁴ In 1999, polls indicated that 81% of the public disapproved of the use of racial profiling by police.³⁵ Perceptions of the frequency of its use in law enforcement vary widely by race, however.³⁶ Shortly before 9/11, in July 2001, a Gallup poll exposed a significant disparity between whites and blacks in terms of perception of the prevalence of racial profiling – 55% of whites believed it was widespread compared to 83% of blacks.³⁷ Further, although whites' perceptions did not change between 1999 and 2001, blacks' perceptions rose from 77% to 83%.³⁸

After 9/11, public attitude toward racial profiling shifted somewhat. The 9/11 terrorists were all Arabic men originating from Saudi Arabia, Egypt, the United Arab Emirates and Lebanon.³⁹ This led many to believe that racial profiling as a law enforcement tool, especially in the context of terrorism, is “just common sense.”⁴⁰ Nonetheless, more than half (53%) of those polled in 2002 were unwilling to go as far as requiring Arabs, including U.S. citizens, to carry a special ID.⁴¹ However, the

³⁴ Frank Newport, *Racial Profiling is Seen as Widespread, Particularly Among Young Black Men*, Gallup News Service, Dec. 9, 1999, available at <http://www.gallup.com/poll/3421/Racial-Profiling-Seen-Widespread-Particularly-Among-Young-Black-Men.aspx> (last visited Feb. 28, 2008).

³⁵ *Id.*

³⁶ Frank Newport, *Black-White Relations in the United States 2001 Update*, The Gallup Poll, July 10, 2001, at 19 available at <http://media.gallup.com/GPTB/specialReports/sr010711.PDF>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Dafna Linzer, *A Year Later, the 19 Hijackers are Still a Tangle of Mystery*, Associated Press, Aug. 19, 2002.

⁴⁰ See generally David A. Harris, *Racial Profiling Revisited: “Just Common Sense” in the Fight Against Terror?*, 17 CRIM. JUST. 36 (2002).

⁴¹ Darren K. Carlson, *Civil Rights: A Profile in Profiling*, The Gallup Poll, July 9, 2002, available at <http://www.gallup.com/poll/6361/Civil-Rights-Profile-Profiling.aspx> (last visited Feb. 28, 2008).

events of 9/11 gave some measure of social acceptability to the racial profiling of persons who are, or appear to be, of Arabic descent. This is revealed by the fact that 53% of respondents favored requiring all Arabs, including American citizens, to undergo special, more intensive security checks before boarding airplanes in the United States.⁴² Disparate beliefs about the prevalence of racial profiling persisted in the 2002 poll, with “blacks and Hispanics in the United States . . . more likely than whites to believe the practice of racial profiling is widespread”⁴³ However, minorities were not uniform in their opinions of whether such practices are ever justifiable, with Hispanics generally more likely than blacks to believe the practices were justified.⁴⁴ In addition, the 2002 poll indicated that reports of unfair treatment by police increased slightly since before 9/11:

One in five blacks (22%) say that they have been unfairly treated in dealings with police, such as traffic incidents within the last 30 days because they are black. Such reports of unfair treatment by police have [also] inched upward since this question was first asked in 1997 (from 15% to 22%).⁴⁵

Interestingly, post-9/11 polls revealed that, although the majority of Americans believe that police and the criminal justice system respect the rights of all people in general, the public believes some racial groups’ civil rights receive more respect than others:

More than eight in 10 Americans (82%) believe the civil rights of whites are respected, and 73% believe the same is true for Asians. Significantly fewer believe that the rights of blacks or Hispanics are respected: 62% for blacks and 63% for Hispanics. And just over half believe the criminal jus-

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

tice system respects the rights of Muslims (55%) and Arabs (53%).⁴⁶

EFFECTIVENESS OF RACIAL PROFILING OUTSIDE THE CONTEXT OF TERRORISM

Is racial profiling an effective law enforcement tool in catching everyday criminals? Aside from a witness's suspect description, which is excluded from the definition of racial profiling,⁴⁷ police use two general types of profiling involving race in the course of ordinary investigations. The first type is criminal profiling, which uses behavioral analysis to create a suspect description, such as a serial killer profile.⁴⁸ The ERPA definition provides an example of the second type of profiling.⁴⁹ Law enforcement uses criminal profiling to identify suspects of known crimes, whereas officers typically use racial profiling to search for unknown suspects of crimes that police merely believe have been or are being committed.⁵⁰ For example, the first type of profiling would involve a police officer seeing a white man who otherwise fits the profile developed from a known crime and who is engaged in behavior that reasonably causes suspicion.⁵¹ The police officer then decides to stop the man for questioning. An example of the second type would involve a police officer

⁴⁶ *Id.*

⁴⁷ ERPA, *supra* note 2 (making an exception from the definition of racial profiling for "trustworthy information" regarding an "identified criminal incident or scheme.").

⁴⁸ See Chet K.W. Payer, *Lies, Damned Lies, Statistics and Racial Profiling*, 13 KAN. J.L. & PUB. POL'Y 515, 542 (2004) (discussing the use of race as a factor in serial killer profiles).

⁴⁹ ERPA, *supra* note 2. See generally Gene Callahan & William Anderson, *The Roots of Racial Profiling*, Reason Magazine, Aug.-Sept. 2001 (describing a typical example of racial profiling in a traffic stop), available at <http://www.reason.com/0108/fe.gc.the.shtml> (last visited Feb. 28, 2008).

⁵⁰ Milton Heumann & Lance Cassak, *Profiles in Justice? Police Discretion, Symbolic Assailants, and Stereotyping*, 53 RUTGERS L. REV. 911, 917 (2001).

⁵¹ See Heumann & Cassak, *supra* note 50 (example based on the serial killer profile).

seeing an African American man simply driving a car on the highway. The police officer then decides to pull him over to search for evidence that he has committed some crime.⁵²

Problems in the effectiveness of criminal profiling can occur when the major focus of the profile is race or ethnicity.⁵³ ERPA's proposed language intended to eliminate racial profiling based on bias but did not specifically address behavioral or psychological profiles that include race.⁵⁴ However, it is interesting to note that even in the context of relatively reliable criminal profiles, overemphasis of race as a factor has been ineffective in at least two high-profile cases. The initial profile of the D.C. sniper was based on a white male serial killer profile.⁵⁵ This case provides an excellent example of the potential costs of relying too heavily on a race-based profile, even a statistically supported one.⁵⁶ Police may well have had the real culprits within their reach at roadblocks after each shooting before they finally realized that the killers they were searching for were black, not white.⁵⁷

More than 100 years before the D.C. sniper case, a Secret Service agent overlooked President McKinley's assassin because he admittedly focused his attention on an African American man

⁵² See *id.* (example based on the typical reported experience of driving while black or brown.) As indicated in the discussion of racial profiling definitions, this is not the only situation that would constitute racial profiling, but it does serve as a ready example.

⁵³ *Id.* at 925.

⁵⁴ ERPA, *supra* note 2 (making an exception from the definition of racial profiling for "trustworthy information" regarding an "identified criminal incident or scheme.").

⁵⁵ See *Threat and Humiliation*, *supra* note 30, at 24; Jeffrey Gettleman, *The Hunt for a Sniper: The Profiling: A Frenzy of Speculation Was Wide of the Mark*, N.Y. TIMES, Oct. 25, 2002.

⁵⁶ *Id.*

⁵⁷ *Id.*

of whom he was suspicious and who turned out to be a former law enforcement officer.⁵⁸

The use of racial profiling is based on an assumption that certain characteristics, such as race, go hand in hand with criminality.⁵⁹ Law enforcement officers who know certain characteristics of a suspect need not waste their time with people who do not have those characteristics and can instead focus on the “right” people.⁶⁰ It does not constitute racial profiling to focus on members of a particular race if law enforcement officers have a reliable description of a suspect that includes race.⁶¹ Absent such a description, whether such behavior is racial profiling depends on two key differences that exist between racial profiling and criminal profiling. The first difference is that in criminal profiling, if race is used at all, it is simply one factor among many others, such as psychological or behavioral traits.⁶² The second difference is timing – racial profiling takes place before a crime is known to have been committed,⁶³ as part of a crime-fighting strategy.⁶⁴

Traffic stop studies analyzed through the lens of racial demographics demonstrate that racial profiling does indeed take

⁵⁸ *Threat and Humiliation*, *supra* note 30, at 23-24 (citing Eric Rauchway, *Murdering McKinley: The Making of Theodore Roosevelt's America* 18 (Hill and Wang 2003)).

⁵⁹ United States Department of Justice, *Fact Sheet: Racial Profiling*, 1, June 17, 2003.

⁶⁰ *Id.* at 3.

⁶¹ *Id.*

⁶² See generally Callahan, *supra* note 49.

⁶³ *Id.* (discussing distinctions between case probability and class probability in profiling).

⁶⁴ Anthony E. Muchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 7 (2005). It should be noted that the cited paper uses the term “criminal profiling” to describe only those situations where a suspect description exists and does not consider the use of behavioral or psychological profiles involving race.

place.⁶⁵ Because hit rate studies – studies revealing how often police find contraband on a subject – show race is not an effective predictor of crime, using racial profiling does not make sense.⁶⁶ In the past, law enforcement relied upon drug usage data to support a heavier focus on minorities, citing the strong public interest in catching cocaine users and dealers. Older studies indicated drug users were disproportionately minorities and inferred the same for dealers,⁶⁷ but more recent data indicates that African Americans use cocaine at about the same rate as whites.⁶⁸ The results of these studies prompted some to suggest that this type of profiling might be more accurately termed “lazy law enforcement.”⁶⁹

In December 2003, R. Richard Banks, an associate professor at Stanford Law School, presented several criticisms of hit rate studies and their interpretation.⁷⁰ Banks asserted that the results of these studies have been misinterpreted as evidence of actual crime rates, rather than simply “the accuracy of the stop-search

⁶⁵ Peter Verniero & Paul H. Zoubek, N. J. Office of the Att’y Gen., *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling*, 4 (1999).

⁶⁶ Shuford, *supra* note 1, at 378. See also American Civil Liberties Union, *Sanctioned Bias: Racial Profiling Since 9/11*, 2 (Feb. 2004). But see Banks, *supra* note 30, at 582.

⁶⁷ Banks, *supra* note 30, at 581 & 581 n.52 (“The survey evidence, however, does appear to indicate that black and Latino adults are more likely than whites to frequently use cocaine, which poses a much greater risk of a fatal overdose than marijuana (the most commonly used drug) The survey findings indicate that blacks are nearly twice as likely as whites to have used cocaine during the month prior to the survey.”).

⁶⁸ Dep’t of Health & Human Servs., Office of Applied Studies, Results from the 2004 National Survey on Drug Use and Health: Illicit Drug Use Tables, Table 1.43b (2004), available at <http://www.oas.samhsa.gov/NSDUH/2k4nsduh/2k4tabs/Sect1peTabs1to66.htm> (last visited Apr. 6, 2008).

⁶⁹ Paul Butler, Associate Professor, George Washington University Law School, Speech at the National Commission on the Future of DNA Evidence Proceedings: Racial Profiling (July 10, 2000), available at <http://www.ojp.usdoj.gov/nij/topics/forensics/events/dnamtgrans10/trans-11.html> (last visited Apr. 6, 2008).

⁷⁰ Banks, *supra* note 30, at 582.

process.”⁷¹ Banks argued that because reported hit rates typically exceed the range of plausible crime rates, “officers [must be] select[ing] individuals for investigation at least partly on the basis of criteria actually related to criminality.”⁷² However, Banks did not offer examples of either the crime rates that might be considered “plausible” or the specific “criteria related to criminality” that might have been used. In addition, the State Police Review Team Report, which Banks cited, specifically warned that the sample size used was too small to generalize any conclusions based on the calculated hit rate.⁷³

The primary support offered for Banks’ assertions of implausibly high hit rates comes from a study by the U.S. Customs Service,⁷⁴ which raises the question of the applicability of this argument to hit rate studies involving highway traffic stops. Logically, the customs environment allows more opportunities for law enforcement officers to observe suspicious behavior than highway traffic. It is difficult to imagine that readily observable behavior that might justify a stop, such as speeding, would be a reliable predictor of a driver engaging in drug trafficking. The intended implication appears to be that race, in and of itself, is a criterion related to criminality,⁷⁵ but Banks did not offer any direct support for the implied relationship. Banks also raised the issue of possible underestimation of minority drug use as a limitation of the survey data and studies conducted between 1998 and 2002, but recent versions of these studies may have addressed these issues by increasing sample size and response rate.⁷⁶

⁷¹ *Id.*

⁷² *Id.* The exact criteria related to criminality are not specified.

⁷³ Verniero, *supra* note 65, at 28.

⁷⁴ Banks, *supra* note 30, at 583.

⁷⁵ *Id.* at 584 (“This difficulty is compounded *if race is related to criminality.*”) (emphasis added).

⁷⁶ *Id.* at n.50. See also Dep’t of Health & Human Servs., Office of Applied Studies, Results from the 2004 National Survey on Drug Use and Health: Nat’l Findings Appendix A, 107 & 145 (2004).

Perhaps the most damning assessment of racial profiling as a law enforcement tool for conventional crimes comes from law enforcement officers themselves:

Racial profiling . . . is one of the most ineffective strategies, and I call it nothing less than lazy, sloppy police work. It's basically saying you don't want to learn about your community, you don't want to learn about people's behavior, you don't want to do your job, and don't want to investigate, you just want to stop a lot of people and see if you can come up with some statistical number at the end of the evening⁷⁷

EFFECTIVENESS OF RACIAL PROFILING IN THE CONTEXT OF TERRORISM

In the everyday criminal world, the cost of failure to catch or imprison a criminal might, at worst, be “measured in individual deaths.”⁷⁸ The stakes may be significantly higher for failure to catch or imprison a terrorist.⁷⁹ If racial profiling is effective in preventing terrorism, it can be argued that the large number of lives at risk from any one attack justifies its use and that the practice should be considered acceptable in such extreme situations.

COULD RACIAL PROFILING HAVE PREVENTED 9/11?

The uniformity of ethnicity among the 9/11 hijackers led some people to believe not only that racial profiling is an acceptable law enforcement tool in the context of investigating terrorism,

⁷⁷ *Threat and Humiliation*, *supra* note 30, at 21 (quoting the testimony of Captain Ron Davis, Oakland Police Department, Nat'l Organization of Black Law Enforcement Executives (NOBLE), Oakland, CA, Sept. 9, 2003).

⁷⁸ ALAN DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 23 (W.W. Norton & Co., Inc. 2006).

⁷⁹ *Id.*

but also that it might have made a difference on 9/11.⁸⁰ Of course, any conclusion about the effect racial profiling might have had on 9/11 would be speculative at best, but a close examination of the events of that day does not seem to support the theory that racial profiling would have changed the course of history. Not all of the 9/11 conspirators passed through airport security without incident.⁸¹ Security subjected two of the hijackers to additional scrutiny based on the recommendation of an airline employee.⁸² After two of the hijackers set off alarms at the security checkpoints, security checked them with hand wands and allowed them to pass.⁸³

Some reports inaccurately stated that the box cutters and pepper spray said to have been used by the 9/11 conspirators were items allowed on airplanes at that time.⁸⁴ However, even if air-

⁸⁰ No official statement to this effect has been made, but speculation exists. An example is this comment posted by Toby Petzold (<http://tobypetzold.com/>) to http://www.theleftcoaster.com/cgi-bin/mt-comments.cgi?entry_id=2207: (July 22, 2004, 04:00 PM) (last visited Feb. 28, 2008): "We know who the enemy is. And his greatest aids and abettors are those who are so logic-impaired (i.e., hypocritical) and partisan that they can't admit that racial profiling would have saved lives that terrible morning. You can't blame Bush and the bureaucracy for following the stupid rules against racial "discrimination" that the politically correct imposed upon our society."

⁸¹ NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT, 20 (2004) [hereinafter *9/11 Commission Report*].

⁸² *Id.*

⁸³ *Id.* at 3. The 9/11 Commission Report did indicate that a review of the videotape of one of the hand screenings revealed sub-standard procedures by airport security, since the passenger was passed without conclusive identification of the object that triggered the alarm.

⁸⁴ Associated Press, *Pre-9/11 Rules Barred Box Cutters*, USA TODAY, Nov. 11, 2002, available at <http://www.usatoday.com/travel/news/2002/2002-11-11-box-cutters.htm> ("ATA spokesman Michael Wascom said only: 'Box cutters were not prohibited by the FAA on 9-11-01,' and refused to comment further.") (last visited Feb. 28, 2008). In fact, box cutters were prohibited items by airline industry guidelines, but not by FAA regulations, which referred only to the length of the blade. *Hearing Before the National Commission on Terrorist Attacks Upon the United States*, 108th Cong. (2003) (statement of Norman Mineta, Secretary of Transportation), available at <http://www.9-11>

port security stopped and searched all 19 conspirators based only on their race and found the prohibited box cutters and pepper spray, airport security presumes that most passengers carry prohibited items inadvertently.⁸⁵ Even today, the Transportation Security Agency (TSA) does not fine passengers who inadvertently carry prohibited items and instead confiscates such items.⁸⁶ In the absence of some sort of resistance or other incident, it is unlikely that criminal penalties, fines or denial of boarding would have resulted.⁸⁷

The Computer Assisted Passenger Prescreening System (CAPPS),⁸⁸ based on airline reservation systems and designed to combat the threat of explosive devices in checked luggage, selected seven of the 9/11 hijackers.⁸⁹ Because its focus was on explosive devices in luggage, CAPPS protocol required that checked baggage be held back until security confirmed that the passenger had boarded the plane.⁹⁰ CAPPS was not designed to handle the particular threat posed by suicide hijackers.⁹¹ Furthermore, many of the 9/11 hijackers did not travel with checked baggage.⁹²

Assuming the 9/11 hijackers were racially profiled, searched and relieved of any prohibited items, would that have stopped

[commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-23.pdf](http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-23.pdf) at 7.

⁸⁵ Transportation Security Administration, *Civil Enforcement Policies*, available at http://tsagov.edgesuite.net/research/laws/editorial_1504.shtm (last visited Apr. 8, 2008).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *9/11 Commission Report*, *supra* note 81, at 2-3 (listing Atta, Suqami, Wail al Shehri, Waleed al Shehri, Hanjour, al Mihdhar, and Moqed).

⁸⁹ *Hearing Of the National Commission on Terrorist Attacks Upon the United States*, 108th Cong., (2003) (statement of Jane Garvey, *former Administrator, Federal Aviation Administration*), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.pdf. [hereinafter Garvey].

⁹⁰ *9/11 Commission Report*, *supra* note 81, at 3.

⁹¹ Garvey, *supra* note 89 (explaining that the CAPPS system did not require scrutiny of passengers “beyond examination of their checked baggage.”).

⁹² Garvey, *supra* note 89.

them? During the hearings before the 9/11 Commission, Commissioner John F. Lehman expressed his opinion that “an effective well-trained terrorist doesn’t need a knife [and] doesn’t need a box cutter.”⁹³ Given the level of determination required for a suicide mission like 9/11, it seems unlikely that things would have been much different had security confiscated the box cutters.

“RESPONSIVE TO THE ASSESSED THREAT”

Jane Garvey, the former Administrator of the Federal Aviation Administration, testified before the 9/11 Commission that the day before the attacks, “aviation security was *responsive to the assessed threat* based on information from intelligence and law enforcement agencies.”⁹⁴ As part of the response to that threat, the CAPPs system was developed with a focus on explosives contained in luggage,⁹⁵ but that system has been severely criticized for the lack of foresight in its implementation.⁹⁶ Stephen McHale, the Deputy Administrator of the TSA dismissed the CAPPs system as old technology,⁹⁷ and the 9/11 Commis-

⁹³ *Hearing Of the National Commission on Terrorist Attacks Upon the United States*, 108th Cong., (2003) (comment of John F. Lehman, 9/11 Commissioner), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-23.pdf.

⁹⁴ Garvey, *supra* note 89 (emphasis added).

⁹⁵ National Commission on Terrorist Attacks Upon the United States, Final Report of the National Commission on Terrorist Attacks Upon the United States Executive Summary, available at http://www.9-11commission.gov/report/911Report_Exec.htm (last visited Apr. 6, 2008) [hereinafter *9/11 Executive Summary*].

⁹⁶ *Hearing Of the National Commission on Terrorist Attacks Upon the United States*, 108th Cong., (2003) (statement of Stephen McHale, Deputy Administrator of the Transportation Security Agency), available at http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-23.pdf; *9/11 Executive Summary*, *supra* note 95.

⁹⁷ McHale, *supra* note 96.

sion identified the failure to search CAPPS selectees as one of the operational failures of 9/11.⁹⁸

Prior to 9/11, airport security focused on preventing attacks involving explosives and the mindset for dealing with a hijacking was to negotiate and secure the safety of the passengers.⁹⁹ These policies, based on past events, did not address vulnerabilities that have since been exposed. Nevertheless, even with the known pitfalls of racial profiling, some officials believe we should still emphasize race as the determinative factor in our investigations¹⁰⁰ – in other words, we should continue to look backward rather than forward. September 11th should have taught us the fallacy of this reactionary approach.

TSA Deputy Administrator McHale cautioned against the use of racial profiling in his testimony, instead emphasizing that terrorists have a proven history of using dupes such as women and children. Thus, racial profiling of an *Arab* terrorist would have been ineffective against both Richard Reid and Jose Padilla.¹⁰¹ But even McHale felt that “we pull over too many grandmothers and too many kids” in airport security checks.¹⁰²

While we should learn from past experience, it does not follow that the next terrorist attack will be identical to 9/11, any more than 9/11 was identical to Pan Am Flight 103.¹⁰³ Racial profiling in a national security context was ineffective and ineffi-

⁹⁸ *9/11 Executive Summary*, *supra* note 95.

⁹⁹ Garvey, *supra* note 89.

¹⁰⁰ *Hearing Of the National Commission on Terrorist Attacks Upon the United States*, 108th Cong., (2003) (comments of John F. Lehman, 9/11 Commissioner), 115, http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-23.pdf (“[I]f there is an Arab, a young Arab male or female, and a little old lady from Pasadena, you pick the Arab to pull aside.”).

¹⁰¹ *Id.* at 104.

¹⁰² *Id.* at 114.

¹⁰³ *Hearing Of the National Commission on Terrorist Attacks Upon the United States*, 108th Cong., (2003) (statement of Jane Garvey, former Administrator, Federal Aviation Administration), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.pdf.

cient during World War II, when the only people found guilty of espionage against the United States were not of Japanese descent.¹⁰⁴ In the aftermath of the Oklahoma City bombing, the inclusion of Arabic interpreters on the federal investigation indicates that investigators sought Arabic terrorists, not the two Caucasian men who actually set off the bomb.¹⁰⁵ Richard Reid, Jose Padilla and John Walker Lindh all had connections to terrorism or terrorist groups and were of non-Arabic descent and appearance.¹⁰⁶ These examples demonstrate the problems with assuming that the next terrorist or group of terrorists to board a plane or enter a building will look exactly like the perpetrators of 9/11. Although not officially substantiated, there are reports of an organization such as Al-Qaeda recruiting white Muslims from the United Kingdom, Bosnia and Albania. As an organization that is known to be particularly adaptive, these actions should come as no surprise.¹⁰⁷ If anything, the higher risks involved in terrorism make it imperative to avoid lazy law enforcement techniques, which are easily adapted to, and promote, the very behavior they attempt to prevent.

¹⁰⁴ *Threat and Humiliation*, *supra* note 30, at 24 (citing The Hon. Robert Matsui of California, "Redress for Japanese Internment," remarks to the 99th Congress, Jan. 3, 1985. 131 Cong. Rec. E 54).

¹⁰⁵ Mathieu Deflem, *The Globalization of Heartland Terror: International Dimensions of the Oklahoma City Bombing*, paragraph 33, <http://www.cas.sc.edu/socy/faculty/deflem/zokla.htm> (last visited Feb. 28, 2008). See also *Threat and Humiliation*, *supra* note 30, at 24 n.40 (citing Mary Abowd, *Arab-Americans Suffer Hatred After Bombing*, CHICAGO SUN TIMES, May 13, 1995, and Dr. James J. Zogby, President, Arab American Institute, Remarks to the Open Forum, Washington, D.C., "Arab American Perspectives on the International War Against Terrorism," Dec. 5, 2001, available at <http://www.state.gov/s/p/of/proc/tr/6901.htm>) (last visited Feb. 28, 2008).

¹⁰⁶ See *Threat and Humiliation*, *supra* note 30, at 25. See also *Wrong Then, Wrong Now*, *supra* note 13, at 29.

¹⁰⁷ See Sean Rayment, *Whites Being Lured into Islamic Terror*, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/07/02/nterr102.xml&sSheet=/news/2006/07/02/ixuknews.html> (last visited Feb. 28, 2008). See also *Wrong Then, Wrong Now*, *supra* note 13, at 31.

CULTURAL ALIENATION

Racial profiling has other drawbacks besides terrorist adaptation. Racial profiling has the potential to alienate otherwise neutral or loyal Muslims and generate sympathy for the terrorist cause.¹⁰⁸ One must consider whether this could tip the balance toward creating terrorists similar to the July 7, 2005 London bombers.¹⁰⁹ One of the bombing conspirators, Mohammad Sidique Khan, did not fit the general profile of a young Muslim fundamentalist.¹¹⁰ Those who knew him considered him to be well integrated into English culture, and he did not seem to suffer from “cultural isolation, racial segregation or adolescent religious indoctrination.”¹¹¹ But the young man, described as a “Beeston lad, born and bred” by a former classmate, accused the British government of committing atrocities against his people all over the world and called Osama bin Laden and Abu Musab al-Zarqawi heroes in his suicide video.¹¹² Khan did not clarify the specific events in the Middle East to which he referred, but he did discuss “the bombing, gassing, imprisonment and torture of [his] people.”¹¹³

While racial profiling pales in comparison to bombing, gassing, imprisonment and torture, it is evident that extreme anger over the abuse of fellow Muslims lay at the heart of Khan’s personality shift. His suicide video showed that loyalty to English culture in no way interfered with his decision to become a suicide bomber.¹¹⁴ The lingering question surrounding Khan and the London bombings is this: if he was truly as well integrated

¹⁰⁸ *Id.*

¹⁰⁹ Nasreen Suleaman, *The Mystery of ‘Sid’*, BBC News, Oct. 19, 2005. See also Paul Reynolds, *Bomber Video ‘Points to Al-Qaeda’*, BBC News, Sept. 2, 2005, available at <http://news.bbc.co.uk/1/hi/uk/4208250.stm> (last visited Feb. 28, 2008).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* (“The language he uses is that of a dedicated Al-Qaeda fighter.”).

into English culture as was thought, how could he kill his fellow countrymen? There may never be a definitive answer to this question, but it does suggest some level of cultural alienation, despite the evaluations of his character by friends and colleagues.

After the bombings, the London press spread reports of “radicalisation [sic] taking place in local gyms, youth centres, and Islamic bookshops,” and the Muslim community where Khan lived reportedly became angry and eventually wary.¹¹⁵ Though no direct connection can ever be definitively made between one man’s suicide bombing and a shift to radical fundamentalism by others, it would be foolish to ignore the ripple effect created in such a close-knit community.

RACIAL PROFILING POLITICS AND LEGISLATION

President George W. Bush, in his first address to a joint session of Congress in February 2001, soundly condemned the practice of racial profiling: “It’s wrong, and we will end it in America. In so doing, we will not hinder the work of our nation’s brave police officers. They protect us every day. . . . But by stopping the abuses of a few, we will add to the public confidence our police officers earn and deserve.”¹¹⁶ Barely a month later, Rep. Eleanor Holmes Norton (D.C.) introduced the Racial Profiling Prohibition Act of 2001 in the House. The bill was sent to the House Committee on Transportation and Infrastructure, then to the Subcommittee on Highways and Transit.¹¹⁷ Two months later, Representative Norton introduced the Act again, and sent it to committees again, with no further action.¹¹⁸

¹¹⁵ *Id.*

¹¹⁶ George W. Bush, President of the United States, Address of the President to the Joint Session of Congress 147 Cong. Rec. H431 (Feb. 27, 2001).

¹¹⁷ Racial Profiling Prohibition Act of 2001, H.R. 965, 107th Cong. (2001) 147 Cong. Rec. H827 (Mar. 8, 2001).

¹¹⁸ Racial Profiling Prohibition Act of 2001, H.R. 1907, 107th Cong. (2001).

Four months after President Bush's speech, ERPA was first introduced in the Senate.¹¹⁹ To date, versions of ERPA have been introduced in the U.S. Senate three times, with bipartisan support, and three times it has died in committee.¹²⁰ In total, between the House and the Senate, eight bills directly dealing with racial profiling have been introduced between 2001 and 2005, and none have made it out of committee.¹²¹ In February 2004, a resolution calling for Congress and the states to end ra-

¹¹⁹ End Racial Profiling Act of 2001, S. 989, 107th Cong. (2001).

¹²⁰ *Id.* See also End Racial Profiling Act of 2004, S. 2132, 108th Cong. (2004).

¹²¹ Details of action taken on bills and resolution dealing with racial profiling introduced into Congress between 2001 and 2005: Racial Profiling Prohibition Act of 2001, H.R. 965, 107th Cong. (2001) - 3/8/2001: Referred to the House Committee on Transportation and Infrastructure; 3/9/2001: Referred to the Subcommittee on Highways and Transit. Racial Profiling Prohibition Act of 2001, H.R. 1907, 107th Cong. (2001).- 5/17/2001: Referred to the House Committee on Transportation and Infrastructure; 5/18/2001: Referred to the Subcommittee on Highways and Transit. End Racial Profiling Act of 2001, S. 989, 107th Cong. (2001).- 6/6/2001: Introductory remarks on measure. (CR S5891-5893); 6/6/2001: Read twice and referred to the Committee on the Judiciary. (text of measure as introduced: (CR S5893-5895); 8/1/2001: Committee on the Judiciary Subcommittee on Constitution. Hearings held. With printed Hearing: S.Hrg. 107-537. End Racial Profiling Act of 2001, H.R. 2074, 107th Cong. (2005).) - 6/6/2001: Introductory remarks on measure. (CR E1037-1038); 6/6/2001: Referred to the House Committee on the Judiciary; 7/16/2001: Referred to the Subcommittee on Crime. Racial Profiling Education and Awareness Act of 2002, S. 2114, 107th Cong. (2002). - 4/11/2002: Introductory remarks on measure. (CR S2584); 4/11/2002: Read twice and referred to the Committee on the Judiciary (text of measure as introduced: CR S2584-2585). Uniting Neighborhoods and Individuals To Eliminate Racial Profiling (UNITE) Act, S. 2112, 108th Cong. (2004) - 2/25/2004: Introductory remarks on measure. (CR S1588-1589); 2/25/2004: Read twice and referred to the Committee on the Judiciary. End Racial Profiling Act of 2004, S. 2132, 108th Cong. (2004) - 2/26/2004: Introductory remarks on measure. (CR S1688); 2/26/2004: Read twice and referred to the Committee on the Judiciary. (text of measure as introduced: CR S1688-1690). ERPA, *supra* note 2 - 12/16/2005: Introductory remarks on measure. (CR S13804-13805); 12/16/2005: Read twice and referred to the Committee on the Judiciary. (text of measure as introduced: CR S13805-13808). The 2005 version of the ERPA died in committee and has not yet been reintroduced in the 110th Congress. See also U.S. Senator Russ Feingold, http://www.senate.gov/~feingold/issues_profiling.html.

cial profiling was introduced in the House, but even this relatively simple resolution never made it past the Subcommittee on Crime, Terrorism, and Homeland Security.¹²²

Following Congress' failure to act in any significant way on the four racial profiling bills submitted before February 2002, former U.S. Attorney General John Ashcroft stated that:

“[t]his administration . . . has done more to indicate its opposition [to racial profiling] than ever in history. The President said it's wrong and we'll end it in America, and I subscribe to that. Using race . . . as a proxy for potential criminal behavior is unconstitutional, and it undermines law enforcement by undermining the confidence that people can have in law enforcement.”¹²³

For all of the rhetoric about the evils of racial profiling, little to nothing has been accomplished at the federal level besides “indicating opposition” to the practice. In contrast, as of March 2001, 11 states had enacted racial profiling legislation, and 13 others had introduced legislation addressing the problem.¹²⁴ Since that time, the number of states with legislation dealing with the issue of racial profiling has nearly tripled.¹²⁵ However, as of September 2004, only two states criminalized the practice

¹²² Expressing the sense of the House of Representatives that Congress and the States should act to end racial profiling, H. Res. 515, 108th Cong. (2004) - 2/4/2004: Referred to the House Committee on the Judiciary; 3/1/2004: Referred to the Subcommittee on Crime, Terrorism, and Homeland Security.

¹²³ United States Department of Justice, *Fact Sheet: Racial Profiling*, 1, June 17, 2003 (quoting John Ashcroft, United States Attorney General, Feb. 28, 2002).

¹²⁴ Memorandum from the Institute on Race and Poverty to Senator Linda Berglin, Senator Jane Ranum and Representative Greg Gray (March 5, 2001) (discussing the components of racial profiling legislation), available at <http://www1.umn.edu/irp/publications/racialprofiling.html> (last visited Feb. 28, 2008).

¹²⁵ Racial Profiling Data Collection Resource Center at Northeastern University, Legislation and Litigation, <http://www.racialprofilinganalysis.neu.edu/legislation/> (last visited Feb. 28, 2008).

of racial profiling, and only one created a private cause of action in civil courts.¹²⁶

In 2003, the Department of Justice released a set of guidelines for law enforcement on the subject of racial profiling, but the guidelines remain woefully inadequate to remedy the problem at the federal level.¹²⁷ These guidelines fall short in several key areas: they do not apply at the state and local level, they do not require data collection or provide a means of enforcement, and the exceptions for immigration and national security remain overbroad.¹²⁸ As discussed above, the use of racial profiling to prevent terrorism may create more problems than it solves. There is little, if any, justification for differentiating the use of racial profiling in the context of national security from the context of everyday criminal investigation.

The significant numbers of people who are racially profiled but not prosecuted are left with only the meager recourse provided by equal protection jurisprudence.¹²⁹ Because of the difficulties in meeting the required burden for potential plaintiffs, equal protection claims will not likely serve as a deterrent to racial profiling.¹³⁰ The lack of discernable consequences means that the practice goes unchecked.¹³¹ Individuals affected by racial profiling “experience fear, anxiety, humiliation, anger, resentment, and cynicism” toward the criminal justice system, and “public confidence and trust” in the system decreases as a result.¹³²

Professor William Carter of Harvard Law School argues that racial profiling of African Americans constitutes one of the remaining badges of slavery. He also suggests that the Thirteenth

¹²⁶ *Threat and Humiliation*, *supra* note 30, at 41-43.

¹²⁷ *Threat and Humiliation*, *supra* note 30, at 30-31.

¹²⁸ ERPA, *supra* note 2.

¹²⁹ Carter, *supra* note 5.

¹³⁰ *Id.* at 33.

¹³¹ *Id.*

¹³² ERPA, *supra* note 2.

Amendment provides a better means than the Fourteenth Amendment for putting an end to the practice.¹³³ However, this type of Thirteenth Amendment analysis would not extend protection to members of races who were not subject to slavery. While adoption of this reasoning by the courts would certainly be a step forward for African Americans, it is an incomplete solution to a problem that has grown beyond the Driving While Black phenomenon.

ERPA, if passed, would lessen the burden on racially-profiled plaintiffs by shifting the focus from the subjective intent of the perpetrator¹³⁴ to the disparate impact of law enforcement activities on racial and other minorities.¹³⁵ The American people should demand legislative action on the issue of racial profiling in order to make ourselves, our communities and our nation safer.

THE FUTURE OF RACIAL PROFILING

Nearly 40 years after he was convicted, Fred Korematsu petitioned for a writ of coram nobis.¹³⁶ Korematsu introduced into evidence documents proving that the government knowingly

¹³³ Carter, *supra* note 5, at 87.

¹³⁴ *Id.* at 33 n.86 (citing Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978)).

¹³⁵ ERPA, *supra* note 2. As noted above, the ERPA has not yet been reintroduced in the 110th Congress, but history suggests that it will be. The focal argument of this paper is that it is time Congress gave this matter serious attention. It is clear that the underlying prejudice and intellectual shortcuts that often result in racial profiling are not likely to disappear on their own, but the injurious behavior of racial profiling merits official action. See Press Release, American Civil Liberties Union, ACLU Sues TSA Official, JetBlue for Discriminating Against Passenger Wearing Arabic T-Shirt (Aug. 9, 2007), <http://www.aclu.org/freespeech/gen/31266prs20070809.html> (last visited Feb. 28, 2008).

¹³⁶ *Korematsu v. United States (Korematsu II)*, 584 F. Supp. 1406 (N.D. Cal. 1984).

concealed contradictory evidence from the court.¹³⁷ The U.S. District Court determined that senior government officials withheld information regarding their claim of military necessity when they presented their case.¹³⁸ Thus, the court concluded that equity required the granting of Korematsu's petition.¹³⁹

The district court relied heavily on the conclusions of The Commission on Wartime Relocation and Internment of Citizens in its decision:

The Commission concluded that at the time of the issuance of Executive Order 9066 and implementing military orders, there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry without regard to individual identification of those who may have been potentially disloyal. The Commission found that military necessity did not warrant the exclusion and detention of ethnic Japanese. It concluded that 'broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership.' As a result, 'a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.'¹⁴⁰

The court concluded that although it was impossible to say what effect the concealed evidence might have had on the Su-

¹³⁷ *Id.*

¹³⁸ *Id.* at 1417.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1416.

preme Court's decision, Korematsu's petition must be granted.¹⁴¹ The court recognized that the *Korematsu* decision demonstrates how the government cannot be allowed to hide behind the shield of national security.¹⁴² "[I]n times of international hostility and antagonisms, our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused."¹⁴³

In spite of, or more likely because of, the injustice he suffered, Korematsu became an advocate for civil liberties.¹⁴⁴ After 9/11, he spoke out against racial discrimination and violence targeting Arab, Muslim, South Asian, and Sikh Americans.¹⁴⁵ He also cautioned the federal government against making the same mistakes by singling out individuals based on race, ethnicity or religion.¹⁴⁶ Shortly after Korematsu's death, the U.S. Senate passed a resolution honoring his life and advocacy,¹⁴⁷ but Congress' failure to produce substantive legislation dealing with the problems of racial profiling made the resolution ring hollow.

The logical corollary to the idea that some racial groups' civil rights are respected more than others is that some racial groups' civil rights are *less* respected than others. The public's willingness to subject African Americans, Arabs and other minorities to law enforcement scrutiny on the basis of race alone confirms this proposition and conjures the ghost of *Plessy v. Ferguson*.¹⁴⁸ In the days of *Plessy*, pseudoscience supported racial prejudice

¹⁴¹ *Id.* at 1419.

¹⁴² *Id.* at 1420.

¹⁴³ *Id.*

¹⁴⁴ S. Res 126, 109th Cong. (2005).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896) ("Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one

by playing on fears that “Anglo-Saxon heritage” would be diluted if distinctions between the races were not respected.¹⁴⁹ When considering the legal propriety of racial profiling, we should heed the words of Justice Harlan’s dissent in *Plessy*:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.¹⁵⁰

Thankfully, as to segregation, *Plessy* is no longer controlling law.¹⁵¹ Nevertheless, because the American government has misused race for more than three centuries, any new governmental use of race should be suspect.¹⁵²

The government and the people of the United States have shown a disturbing propensity toward allowing the sacrifice of fundamental human rights. This sends “the troubling message that the destruction of four planes and three buildings is cause enough to sacrifice the spirit of the laws that is fundamental to this country’s self-conception as the Land of the Free.”¹⁵³ An Israeli court once stated that:

race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”).

¹⁴⁹ *Ho ex rel. Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 863 (9th Cir. 1998).

¹⁵⁰ *Plessy*, 163 U.S. at 559 (J. Harlan, dissenting).

¹⁵¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁵² *Ho ex rel. Ho*, 147 F.3d at 863.

¹⁵³ Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23 (2002).

This is the destiny of a democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components of its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.¹⁵⁴

Although the Israeli court was commenting on the use of torture, these words apply to a discussion of racial profiling in America as well. Racial profiling and the resulting loss of constitutionally protected rights violate the spirit of American law.¹⁵⁵ As President John F. Kennedy once said, “[t]his Nation was founded by men of many nations and backgrounds. It was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened.”¹⁵⁶

Korematsu should have taught us that when the government and the people are under the terrible stress created by an attack on our nation, we are too willing to sacrifice principles, like equal protection, in the name of greater safety.¹⁵⁷ In other words, we prefer to violate rights now and beg forgiveness later.¹⁵⁸ Equal protection jurisprudence has fallen short of what is required to remedy the problem of racial profiling.¹⁵⁹ We need

¹⁵⁴ HCJ No. 5100/94 Public Committee Against Torture v. General Security Service (Israel Supreme Court 1999).

¹⁵⁵ Braber, *supra* note 20, at 487.

¹⁵⁶ Office of the Federal Register, National Archives and Records Administration, *Public Papers of the Presidents of the United States: John F. Kennedy, 1963*, 468, available at <http://www.bartleby.com/73/219.html> (last visited Apr. 6, 2008).

¹⁵⁷ Braber, *supra* note 20, at 473.

¹⁵⁸ *Id.*

¹⁵⁹ See Wagner, *supra* note 8, at 82. See also Banks, *supra* note 30, at 600 (“racial profiling is clearly unconstitutional only if irrational”). See also

legislation to clearly outline prohibited behaviors and to specify remedies available to victims of racial profiling in order to hold us to our ideals in these times of great stress and temptation. The time has come for the citizens of this country to truly honor the memory of Fred Korematsu, and many others like him, by demanding that racial profiling be outlawed.

Threat and Humiliation, *supra* note 30, at 32 (citing *Brown v. Oneonta*, 221 F.3d 329, 337 (2d Cir. 1999)).