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RACIAL PROFILING REDUX

DAVID A. HARRIS*

In March of 2002, the *St. Louis Post-Dispatch* ran an article at the top of its op-ed page entitled *Wake Up: Arabs Should Be Profiled*.¹ The piece, written by the African-American cultural critic and MacArthur Foundation “genius grant” recipient Stanley Crouch, employed blunt language to make the case that the government must target people on the basis of their ethnic appearance. Crouch, in the past a foe of racial profiling of American blacks on the nation’s highways, called unapologetically for treating all Arabs as suspects. “[I]f pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out,” Crouch wrote, “that is the unfortunate cost they must pay to reside in this nation.”² Crouch has hardly been alone among either pundits³ or the people who run the nation’s security apparatus. Even as U.S. Secretary of Transportation Norman Mineta says, repeatedly and publicly, that there will be no racial or ethnic profiling in airport security,⁴ those who run security operations have other ideas. Bruce Baumgartner, manager of aviation at Denver International Airport, told *Time* that what American airports need is more profiling, not less.⁵ A security screener at Denver told the magazine that “[f]or me, profiling is the only way to be conscientious in doing the job. I make decisions based on who I

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1. Stanley Crouch, *Wake Up: Arabs Should Be Profiled*, ST. LOUIS POST-DISPATCH, Mar. 19, 2002, at B7.

2. *Id.*

3. Kathleen Parker, *All’s Fair In This War Except Insensitivity*, CHI. TRIB., Sept. 26, 2002, at 19; Charles Krauthammer, *The Case for Profiling: Why Random Searches of Airline Travelers Are a Useless Charade*, TIME, Mar. 18, 2002, at 104; Jonah Goldberg, *Profiles In Profiling*, NAT’L REV., Nov. 14, 2001.

4. Norman Y. Mineta, U.S. Secretary of Transportation, Remarks at the Arab Community Center for Economic and Social Services Gala Dinner (Apr. 20, 2002) (transcript available at <http://www.dot.gov/affairs/042002sp.htm>) (“It is very tempting to take false comfort in the belief that we can spot the bad guy based on appearance alone. Some are yielding to that temptation in their arguments for racial profiling, but false comfort is a luxury we cannot afford.”).

5. Richard Zoglin & Sally B. Donnelly, *Welcome to America’s Best Run Airport, And Why It’s Still Not Good Enough*, TIME, July 15, 2002, at 23.

wouldn't like to be seated next to on an airplane." He went on to say that he would, "without question," investigate anyone "of Middle Eastern descent."⁶

None of this is terribly difficult to understand. After all, every one of the suicide hijackers of September 11, 2001, were young Arab Muslims from the Middle East; Al Qaeda, the terrorist group responsible, is based in the Middle East and uses the Koran as justification for its unspeakable acts. Therefore, it seems to many people that it "just makes sense" to focus on people from the Middle East—Arabs and Muslims. It appears that the threat we face originates with people of that background, so why do otherwise in the pursuit of safety? This thinking has shown itself quite clearly in the change in polling results on the issue of racial profiling. Before September 11, 2001, a surprising consensus had emerged in our country concerning profiling. At that time, almost sixty percent of the American public—not just African-Americans and Latinos, but all citizens—knew what racial profiling was, and emphatically wanted it stopped.⁷ But after the attacks on the World Trade Center and the Pentagon over fifty percent of Americans, including members of minority groups who had been most widely victimized by profiling in the past, said they supported the use of profiling, as long as it was targeted at Middle Easterners and Muslims in airports.⁸

Profiling may seem to be the obvious answer, but we have been down this path before, with disastrous results. In the 1980s, it was the War on Drugs—a metaphorical war, to be sure, not like the war against Al Qaeda—that led to profiling.⁹ Unfortunately, instead of making us safer, using racial and ethnic profiling will actually damage our antiterrorism efforts. What we should do now is not plunge back into racial profiling, but instead think coolly and clearly about what we learned about racial and ethnic profiling before September 11. This will be a more difficult task than it sounds given the climate of fear we now live in and with the Attorney General of the United States declaring that those who raise questions about civil liberties at this juncture do no less than aid the terrorists who want to kill us.¹⁰ Nevertheless,

6. *Id.* at 28.

7. *Racial Profiling Seen as Widespread, Particularly Among Young Black Men*, Gallup Poll Organization, Dec. 9, 1999, reprinted in GEORGE GALLUP JR., *THE GALLUP POLL: PUBLIC OPINION 1999*, at 238 (1999).

8. Jeffrey M. Jones, *Americans Felt Uneasy toward Arabs Even Before September 11*, *THE GALLUP POLL MONTHLY*, Sept. 2001, at 52; Jason L. Riley, *Racial Profiling and Terrorism*, *WALL ST. J.*, Oct. 24, 2001, at A22.

9. DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 21-23, 48-52 (2002) [hereinafter *PROFILES IN INJUSTICE*].

10. Neil A. Lewis, *Ashcroft Defends Antiterror Plan; Says Criticism May Aid U.S. Foes*, *N.Y. TIMES*, Dec. 7, 2001, at A1 (quoting the Attorney General's testimony before Congress, in which he said that those who challenge the government's policies "with phantoms of lost liberty. . .only aid terrorists.").

we must take an unblinking look at the realities we now face. When we do, we will see that there are genuine reasons to avoid using racial profiling now, lest we actually make it easier for our enemies to strike us.

I. THE COURTS AND THE LAW: ENABLERS OF RACIAL PROFILING, AND INEFFECTIVE TOOLS AGAINST IT

Most lawyers probably consider racial profiling one of those abhorrent creatures that the law prohibits, like racial discrimination in employment or housing, a practice that, if proven, will bring the legal equivalent of lightning bolts hurled by Zeus down on the perpetrators. The real picture has always been a good deal more complex, and remains so even in 2002, a full five years since the first legal cases and major media stories about racial profiling began to surface.¹¹ It is no exaggeration to say that the courts have been largely ineffective in the battle against profiling. In fact, the Supreme Court of the United States must actually shoulder much of the blame for racial profiling.

Many members of the public still believe the United States Supreme Court is a bastion of left-leaning liberalism, especially when it comes to the rights of criminal defendants. This is obviously untrue now; and it has been untrue for almost thirty years. In the early 1970s, with its membership clearly shifted toward conservative majorities, the Supreme Court began limiting the rights of criminal defendants, and, more importantly, increasing the discretion of police officers to do searches and seizures in garden-variety street crime cases. For example, in *United States v. Robinson* the Court increased the power of officers making an arrest to do a full search of anyone arrested, regardless of whether the arrestee presented any kind of a safety threat or could have hidden or destroyed evidence.¹² In *Schneckloth v. Bustamonte* the Court affirmed the power of police officers to search anyone—whether the police had probable cause, reasonable suspicion, or any evidence at all of criminal involvement—as long as officers obtained “voluntary” consent.¹³ The citizen need not give a *Miranda*-type waiver, the Court said; and the police need not tell him he has an absolute and unqualified right to refuse.¹⁴ As long as police did not coerce the citizen into agreeing to the request, the suspect’s ignorance of his rights was law enforcement’s bliss. After all, the Court said, it was important that police be able to do warrantless searches without probable cause or any evidence at all.¹⁵ This statement still seems remarkable today, given that anyone with even the most rudimentary knowledge of Fourth Amendment requirements would

11. See *infra* notes 36-40 and accompanying text.

12. 414 U.S. 218, 235 (1973).

13. 412 U.S. 218, 248-49 (1973).

14. *Id.* at 247.

15. *Id.* at 243.

surely consider fact-based suspicion of criminal wrongdoing the very heart of constitutional protection against law enforcement intrusion, a sentiment dating all the way back to the revolutionary era.¹⁶

Nowhere was this increase in police discretion with regard to searches and seizures more noticeable than in the area of law enforcement power over drivers and vehicles. In *New York v. Belton*, the Justices ruled that any time anyone who has been riding in a vehicle was arrested—not just the driver or owner, but any occupant—the entire interior of the vehicle could be searched, including any *closed* compartments and containers, even if no one who had been in the vehicle could reach any of these areas any longer.¹⁷ And in *California v. Acevedo*, the Court solidified the power of officers to open closed containers without a warrant even when no arrest took place.¹⁸

The Justices took on the use of criminal profiles (not racial profiles) in *United States v. Sokolow*.¹⁹ In *Sokolow*, the defendants challenged the use of the so-called “drug courier profile” utilized by the Drug Enforcement Administration (DEA) to spot possible drug couriers in airports. According to the DEA, the profile was a group of otherwise innocent behavioral characteristics—how a ticket was purchased, whether identification information submitted matched up with other available information about the traveler, and the like—that, exhibited together, predicted a greater chance that the person under observation was a drug courier.²⁰ The Supreme Court was unimpressed with the defendants’ argument that probable cause or reasonable suspicion could not be generated from a constellation of otherwise innocent facts. On the contrary, the Court said, if the concurrent exhibition of certain characteristics or behaviors was positively correlated with criminal behavior, there is no reason that these behaviors should not be considered a legitimate source for police suspicion of wrongdoing. The fact that the factors that made up the profile were innocent in and of themselves made no difference at all.²¹

The Supreme Court’s efforts to grant police greater discretion over stops and searches involving automobiles reached its high water mark in *Whren v. United States*.²² *Whren* was a direct challenge to this accretion of police

16. See, e.g., Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 223 (1993) (arguing that some specific basis for suspicion must exist because “historical evidence” suggests that the “broad principle embodied in the Reasonableness Clause is that discretionary police power implicating Fourth Amendment interests cannot be trusted”).

17. 453 U.S. 454, 460-61 (1981).

18. 500 U.S. 565, 580 (1991).

19. 490 U.S. 1, 8-10 (1989).

20. *Id.* at 4.

21. *Id.* at 9. The Court reaffirmed this reasoning this past year in *United States v. Arvizu*, 534 U.S. 266 (2002).

22. 517 U.S. 806, 819 (1996).

powers; the defendants argued that the Justices should break with the eight United States Courts of Appeals that had ruled that police could use enforcement of traffic codes as a pretext, an excuse, to stop vehicles and drivers for investigation of other offenses (chiefly, the possible presence of drugs) for which there was absolutely no evidence.²³ The Court ruled that using traffic code enforcement as a pretext was acceptable, as long as *some* traffic violation had actually occurred.²⁴ The fact that the officer had no interest at all in traffic enforcement, but instead was using it to make an end-run around the Fourth Amendment's requirement that probable cause, or at least reasonable suspicion, of criminal behavior exist in order to make a forcible stop, did not trouble the Court in the least. The Fourth Amendment, Justice Scalia wrote for a unanimous Court, could no longer come into play to challenge pretext stops; the Amendment's prohibition against unreasonable searches and seizures was not offended, and could not be invoked, by those claiming that police had stopped them for criminal violations without any evidence except for traffic violations.²⁵

It is noteworthy that the defendants in *Whren* argued to the Court that the use of pretext stops would have a racially discriminatory impact. Citing then-new evidence of racial profiling from around the nation, the defendants argued that statistics showed that allowing police broad discretion to use traffic stops as an excuse to "fish" for other evidence might lead to racial profiling.²⁶ The Court brushed these concerns aside in a few terse sentences. If these pretext stops were being used in racially discriminatory patterns, Justice Scalia said, this had nothing to do with the Fourth Amendment; rather, it could only be addressed in lawsuits for violation of the Equal Protection Clause.²⁷

With these Supreme Court decisions as background, it is hardly surprising that the federal Drug Enforcement Agency (DEA) began a sustained effort in the 1980s and 1990s to train state and local police in the techniques of drug courier profiling for use on the highway. This program, called Operation Pipeline, was backed with millions of federal dollars.²⁸ Taking full advantage of the expanded discretion allowed to the police by the Court's decisions, the DEA trained literally tens of thousands of police officers from all over the country, who then trained others in their own and other departments, and set up state and local highway drug interdiction units.²⁹ Combined with federal government intelligence that was sent to local agencies that emphasized the

23. *Id.* at 810.

24. *Id.* at 811-13, 819.

25. *Id.*

26. *Id.* at 810.

27. *Id.* at 813.

28. PROFILES IN INJUSTICE, *supra* note 9, at 48-52.

29. *Id.*

race of drug traffickers in very general terms—“marijuana trafficking in New Jersey is controlled by blacks,” for example—Operation Pipeline makes the emergence of racial profiling entirely predictable.

Especially after *Whren*, the lack of litigation success in suits against racial profiling does not seem surprising. Indeed, the only thing that seems noteworthy is that so many lawyers and members of the public still believe that these lawsuits have, in fact, had a major role in addressing and taming racial profiling. To be sure, two of the first and most important cases of racial profiling, occurring in Maryland and New Jersey, garnered attention through successful litigation. The success and notoriety of these cases, however, is due at least in part to their unusual circumstances. In Maryland, the case styled *Wilkins v. Maryland State Police*,³⁰ featured plaintiff Robert Wilkins, a soft-spoken, African-American, criminal defense attorney and Harvard Law School graduate who repeatedly objected to his treatment by the State Police, even citing cases to them. When litigation began, attorneys discovered a “smoking gun” in State Police files, a written memorandum that clearly set out a racial profile.³¹ The result in this case was a quick settlement in which the State Police agreed to submit statistics on their stop and search practices to the federal court for a period of several years, and to modify their policies and practices.³² The case in New Jersey, styled *State v. Pedro Soto*,³³ was based not only on federal law but also on New Jersey’s Constitution and case law, which provide citizens of that state with more protection against racial discrimination than they have under federal law.³⁴ Far more common are cases in which courts slam the door on plaintiffs seeking to use the Equal Protection Clause (as suggested by Justice Scalia in *Whren*) or anti-discrimination statutes, usually by requiring that plaintiffs meet impossibly high standards to prove these claims.³⁵

In fact, only one type of litigation against profiling had consistent success in the 1990s: so-called “pattern-and-practice” suits brought by the U.S. Department of Justice under a specific federal statute, 42 U.S.C. § 14141.³⁶

30. See Settlement Agreement, *Wilkins v. Maryland State Police*, No. 93-468 (D. Md. approved Jan. 1, 1995).

31. *Armed Drug Traffickers in Allegany County, Maryland: Police Officer Safety*, CRIMINAL INTELLIGENCE REPORT (Maryland State Police), Apr. 27, 1992 (on file with author).

32. Settlement Agreement, *supra* note 30, at 4-5.

33. 734 A.2d 350, 359-60 (N.J. Super. Ct. Law Div. 1996).

34. *Id.* at 360.

35. *E.g.*, *Washington v. Vogel*, 106 F.3d 415 (11th Cir. 1997) (unpublished decision affirming *Washington v. Vogel*, 880 F. Supp. 1542 (M.D.Fla. 1995)); *Chavez v. Illinois State Police*, 251 F.3d 612, 647-48 (7th Cir. 2001); Daryl Kelly, *Federal Racial Profiling Suit is Dismissed*, L.A. TIMES, Mar. 19, 2002, at B1.

36. 42 U.S.C. § 14141 (2000).

This statute allows the federal government to bring an action in federal court when the facts show not just a single or even a few violations of law, but a demonstrable pattern of civil rights deprivations by police over a sustained period. A handful of such cases, in Pittsburgh, Los Angeles, Steubenville, Ohio, and New Jersey, have resulted in consent decrees in which the police departments have agreed to make changes in their policies, procedures, training, internal structures, and administration.³⁷ In several other cases, including those in Washington, D.C. and Montgomery County, Maryland, local governments have invited federal pattern and practice investigations and agreed to be bound by federal recommendations.³⁸ While these suits and investigations unquestionably have made for better policing in the cities affected, there have been relatively few of these cases since the statute's enactment in 1994.³⁹ Perhaps more importantly, only the federal government can bring these cases; the law makes no provision for any private right of action.⁴⁰

Thus, it has been institutions and methods other than courts and litigation—legislatures, public discussion and debate, and interaction with police departments themselves—that have become the major locus of activity on the issue of racial profiling. Courts have not only provided little relief; they have encouraged the activity and even enabled it to continue unaddressed.

II. WHAT WE KNEW ABOUT RACIAL PROFILING BEFORE SEPTEMBER 11

When public discussion of profiling first began in the middle 1990s, police and public officials reacted uniformly; they denied that any such practice existed, and said that any stories from people of color concerning the repeated stops they experienced at the hands of the police were not evidence of any

37. Consent Decree, *United States v. Pittsburgh* (W.D. Penn. approved Apr. 16, 1997), available at <http://www.usdoj.gov/crt/split/documents/pittssa.htm>; Consent Decree, *United States v. Los Angeles*, No. 00-11769 (C.D. Cal. approved June 15, 2001), available at <http://www.usdoj.gov/crt/split/documents/laconsent.htm>; Consent Decree, *United States v. Steubenville Police Dept.* (S.D. Ohio approved Sept. 3, 1997), available at <http://www.usdoj.gov/crt/split/documents/steubensa.htm>; Joint Application for Entry of Consent Decree, *United States v. New Jersey*, No. 99-5970 (D. N.J. approved Dec. 30, 1999), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm>.

38. MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE AND THE DISTRICT OF COLUMBIA AND THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT (June 13, 2001), available at <http://www.usdoj.gov/crt/split/documents/dcmoa.htm>; 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), available at <http://www.usdoj.gov/crt/cor/Pubs/mcagrmt.htm>.

39. 42 U.S.C. § 14141 (2000).

40. 42 U.S.C. § 14141(b) (2000).

problem. Rather, these stories were simply the excuses of those caught breaking the law. (Never mind the fact that the stories came largely from law-abiding, tax-paying citizens who had never been charged with any crime.) But with the release of data from Maryland, New Jersey, and other jurisdictions in the mid to late 1990s, the denial argument became untenable. All of these data, from different places in the country and from different law enforcement agencies with different missions, pointed in the same direction: police officers in these departments were definitely using race and ethnic appearance to target minorities for searches and seizures at levels widely disproportionate to the presence of these same people among the driving population.⁴¹ These disparities were so statistically striking that the leading expert in the field, Dr. John Lamberth of Temple University, described them this way: “While no one can know the motivation of each individual trooper in conducting a traffic stop, the statistics . . . , representing a broad and detailed sample of highly appropriate data, show without question a racially discriminatory impact on blacks. . . . The disparities are sufficiently great that, taken as a whole, they are consistent and strongly support the assertion that [police] targeted the community of black motorists for stop, detention, and investigation. . . .”⁴² Thus, it began to become obvious to most observers that the countless stories of African-Americans and Latinos were not *just stories*, but rather illustrations of a real, measurable phenomenon.

This new information caused a shift in the public debate. To be sure, some still contend that there is no such thing as racial profiling.⁴³ But, by and large, the discussion has changed. Defenders of profiling now contend that the practice is simply a common sense, rational response to high levels of criminality among minorities. Look at arrest rates and imprisonment rates, they say; minorities are vastly over-represented in relation to their presence in the population. Therefore, the argument goes, it just makes sense to target

41. For a review of racial profiling data, the circumstances of the cases surrounding their release, and the stories of individuals subjected to race-based traffic stops, see PROFILES IN INJUSTICE, *supra* note 9; David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999); DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS (June 1999), <http://archive.aclu.org/profiling/report/index.html>.

42. John Lamberth, Report of John Lamberth, Ph.D. (Nov. 8, 1996) (an expert report prepared in connection to *Wilkins v. Maryland State Police*, No. 93-483 (D. Md. 1993)), available at <http://archive.aclu.org/court/lamberth.html>.

43. Most vocal among these critics is Heather Mac Donald of the Manhattan Institute of New York. See Heather Mac Donald, *The Myth of Racial Profiling*, CITY JOURNAL, Spring 2001, available at http://www.city-journal.org/html/11_2_the_myth.html; Heather Mac Donald, *The Myth of Racial Profiling Debunked*, CITY JOURNAL, Spring 2002, available at http://www.city-journal.org/html/eon_3_27_02hm.html.

these populations with our law enforcement resources.⁴⁴ By encouraging police to pull over, stop, frisk, and search more people of color, racial profiling gives police a leg up in the fight against crime and drugs. By focusing on blacks and Latinos, police increase the odds that those they stop and search will be criminals. It is simple, and will help officers catch more bad guys, find more drugs, and confiscate more guns than would otherwise be the case. In other words, racial profiling is just smart crime fighting. As one police spokesman explained, the fact that racial profiling results in larger numbers of arrests of blacks and Latinos is just an unfortunate by-product of sound policing.⁴⁵

There are at least two problems with this thinking. First, when proponents of profiling point to disproportionate incarceration and arrest levels among minority populations, they are not wrong about those facts. Blacks, Latinos, and others *are*, in fact, disproportionately arrested and incarcerated.⁴⁶ Those may be difficult facts for some to admit, but that does not make them less true. The real question is what those facts actually *mean*.

Supporters of racial profiling use these numbers as a kind of substitute crime rate, arguing that the elevated arrest and incarceration rates are indicative of a higher rate of criminal perpetration among blacks and other minorities, and that is where they err. Arrest rates are not, as many seem to believe, measurements of crime. Arrest rates are measurements of a *particular type of law enforcement behavior—arresting*. The same goes for statistics on incarceration. These numbers do not measure crime; rather, they measure what one might call *incarceration behavior* by relevant actors: judges who pronounce sentences, legislators who pass laws governing sentences, members of sentencing commissions, and the like. Arrest rates and imprisonment rates may have some relationship to actual rates of offending, but how close a relationship, whether it varies by type of crime, and how great a variation we might see, are all questions that, at best, remain unanswered by simply citing arrest and imprisonment statistics. This very point was made four decades ago by two social scientists, John Kitsuse and Aaron Cicourel.⁴⁷ Kitsuse and Cicourel showed that while records of arrest and court activity give us useful information regarding the activity of institutions like police departments and courts, they present real problems when used to depict patterns of criminal

44. See, e.g., Marshall Frank, *Racial Profiling: Better Safe Than Sorry*, MIAMI HERALD, Oct. 19, 1999, at B7 (arguing that disproportionately high rates of imprisonment among blacks justify more intense scrutiny of blacks by law enforcement).

45. Michael Fletcher, *Driven to Extremes; Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1.

46. PROFILES IN INJUSTICE, *supra* note 9, at 75-76.

47. John Kitsuse & Aaron Cicourel, *A Note on the Use of Official Statistics*, 11 SOCIAL PROBLEMS 131 (1963).

behavior or characteristics of offenders.⁴⁸ In his 1995 Southerland Prize lecture to the American Society of Criminology, the esteemed criminologist Delbert Elliot of the Center for the Study and Prevention of Violence at the University of Colorado asserted that we had failed to heed Kitsuse and Cicourel, and “had fallen into bad habits” by continuing to use arrest data to support conclusions about the characteristic behaviors of offenders. Using statistics this way, Elliot said, will “lead to incorrect conclusions, ineffective policies and practices, and ultimately undermine our efforts to understand, prevent, and control criminal behavior.”⁴⁹ There is nothing wrong with using arrest and imprisonment numbers, but they can only help us if we understand them for what they are.

The second problem with the racial-profiling-is-common-sense-crime-fighting idea—stop and search more minorities and you will catch more criminals—is that it is an assumption. It is a strongly held, confidently expressed assumption to be sure, but an assumption nonetheless, and it has never been tested until recently. But now, new data about police stops and searches, available in just the last couple of years, enables us to test this central assumption. These new data, gathered from different enforcement agencies in various parts of the country, allow us to make direct comparisons between the success rates of stops and searches when police use racial profiling on minorities, to their success rates when they use nonracial policing techniques on whites. In other words, these new data allow us to compare the rate at which officers “hit”—find drugs, guns, or other contraband—using nonracialized policing based on observation of suspicious behavior (i.e., the stops and searches of whites) with the hit rate for racially targeted policing (the highly disproportionate stops and searches of blacks and Latinos). These hit rates can help us answer the question that has previously gone unasked: does profiling using race and ethnic appearance, in fact, help catch more bad guys?

The hit rate data come from at least half a dozen studies.⁵⁰ They cover a range of geographic areas, law enforcement missions, and agency sizes. All data were collected by the law enforcement agencies themselves. It is surely fair to say that the result in all of these studies would come as something of a surprise to supporters of racial profiling as a common-sense tool in crime fighting. All the data showed that concentrating on minorities did not, in fact, yield *more* arrests than using traditional tactics of behavioral observation against whites. *Race-based stops and searches of minorities actually yielded*

48. *Id.*

49. Delbert Elliot, *Lies, Damn Lies, and Arrest Statistics*, address at the Southerland Award Presentation to the American Society of Criminology (Nov.1995).

50. The details of hit rate studies quoted here appear in more detail in PROFILES IN INJUSTICE, *supra* note 9, at 79-81.

fewer hits on a percentage basis in all of these studies than traditional, behavior-based stops of whites did. The upshot of this remarkable consistency across a number of different studies is hard to miss: law enforcement using racial and ethnic profiles is *not*, in fact, a sensible crime fighting tool. It actually works *less well* than traditional policing, which relies on observation of behavior. Racial and ethnic profiling do not increase law enforcement's efficiency or its yield; in fact, using this tactic drags policing down—the equivalent of having police officers chase crooks with lead weights around their ankles.

Though these results, solid as they are, seem counterintuitive, they are not difficult to understand on reflection. Using race or ethnic appearance to decide who is suspicious turns officers away from what we might call the first principle of good policing: the observation of suspicious behavior. Using racial profiling, officers pay attention instead to racial or ethnic appearance—a characteristic that may *describe* someone well, but that has little power to *predict* criminal behavior in any sizeable population. By contrast, proactive police work is all about looking at what people do. Behavior is the best clue an officer can have about what someone is up to and what the person may do next.

All of this discussion about the effectiveness of racial profiling, of course, simply adds to the very real and important moral and social concern the issue generates. Americans have long recognized the moral bankruptcy of the idea of group guilt. Just because someone belongs to a group that has some small number of members who may do harm, we cannot treat all members of that group as presumptively guilty of the offense. When we have deviated from that principle—the internment of the Japanese during World War II springs readily to mind⁵¹—we have, at least belatedly, acknowledged these actions as terrible mistakes.⁵² Group guilt, or, perhaps better said, group suspicion, is exactly what racial and ethnic profiling is. As far as social costs, we have long since passed the point at which the damage done by racial and ethnic profiling—the anger, distrust and cynicism that it causes—could be said to damage only individual citizens, or even just particular ethnic or racial groups. These costs have leached out of the targeted groups and into society as a whole, causing widespread suspicion, not just of policing; but also of courts,

51. *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (refusing to strike down internment orders).

52. *Korematsu v. United States*, 584 F.Supp. 1406, 1420 (N.D. Cal. 1984) (vacating convictions because government information supporting internment-related orders was false); *Restitution for World War II Internment of Japanese-Americans and Aleuts*, 50 U.S.C. § 1989 (1988); see generally Frank Wu, *Profiling In the Wake of September 11: The Precedent of Japanese Internment*, 17 CRIM. JUSTICE 52, 56 (Summer 2002).

the entire legal system, and even the rule of law itself.⁵³ When one segment of society is seen as unfairly targeted or persecuted by the system, the system itself loses legitimacy—not just in the eyes of those on the receiving end of the abusive treatment, but also in the eyes of all citizens. And that is a cost to all of society.

For these and other reasons, most importantly the existence of broad public support and political pressure for action, states and cities around the country have begun to take the first steps to address profiling. This movement (if that is not too bold a word) began with the 105th Congress, when Representative John Conyers, Jr. of Michigan seized on a proposal made in a law review article: police should collect basic data on each and every police stop.⁵⁴ Conyers introduced a piece of legislation embodying all of the proposal's central elements: data would be collected on each traffic stop, including the reason for the stop, the race of the driver, whether a search was conducted and on what basis, and whether the search uncovered any contraband. The proposed legislation, called the Traffic Stops Statistics Act,⁵⁵ attracted virtually no notice at first, and, therefore, no opposition. But, when an amended version of the bill emerged with a unanimous recommendation from the Republican-controlled U.S. House Judiciary Committee and then passed the House of Representatives without any opposition in March of 1998,⁵⁶ the public suddenly became aware of it. The passage of the bill was widely reported in the press, and police groups quickly mobilized in opposition to it. A fairly typical reaction came from the National Association of Police Organizations (NAPO), an umbrella group that represents approximately four thousand police interest groups. There was “no pressing need or justification” for any action on the problem, a NAPO spokesman said, since there was no real problem.⁵⁷ Furthermore, officers would “resent” having to take any steps to address this nonexistent problem, even just the step of collecting data.⁵⁸ This opposition, combined with the presidential impeachment proceedings that seized the attention of Congress and the nation in the fall of 1998, was enough to kill the bill's chances of passage by the Senate during what remained of the 105th Congress. A new version of the bill was introduced unsuccessfully in the 106th

53. PROFILES IN INJUSTICE, *supra* note 9, at 117-21.

54. David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 579-80 (1997).

55. Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997).

56. 144 CONG. REC. H1387 (daily ed. Mar. 24, 1998), available at 1998 WL 129711.

57. Robert L. Jackson, *Fight Against Discriminatory Traffic Stops Appears to Have Hit a Police Roadblock*, L.A. TIMES, June 1, 1998, at A5.

58. *Id.*

Congress;⁵⁹ and a much more comprehensive piece of legislation—The End Racial Profiling Act of 2001⁶⁰—was still pending at the end of 2002.

Even if the federal legislation never passes, however, there is now real government action in many places that is designed to address the issue in some basic ways. More than fifteen states have passed legislation mandating some kind of data collection on traffic stops, as well as requiring other actions and changes including written policies against profiling and new training programs.⁶¹ Missouri's legislation⁶² represents the best of these efforts. It

59. Traffic Stops Statistics Study Act of 1999, H.R. 1443, 106th Cong. (1999).

60. S. 989, 107th Cong. (2001).

61. *E.g.*, COLORADO (COLO. REV. STAT. § 24-31-309 (2001) (defines “profiling” and bans peace officers from doing it); COLO. REV. STAT. § 42-4-115 (2001) (data collection on traffic stops to include race among other characteristics); CONNECTICUT (CONN. GEN. STAT. § 54-11 (2001) (prohibition against racial profiling by police departments; data collection required); KANSAS (KAN. STAT. ANN. § 22-4604 (2002)); MARYLAND (MD. CODE ANN., TRANSP. § 25-113 (2001) (race data must be collected by officers at traffic stops, but profiling shall not be used by officers making traffic stops); MISSOURI (MO. REV. STAT. § 590.050 (2001) (annual education for police officers opposing use of racial profiling and encouraging respect for all races); MO. REV. STAT. § 590.650 (2001) (prohibits the practice of routinely stopping members of minority groups for violations of vehicle laws as a pretext for investigating other violations of criminal law); NEBRASKA (NEB. REV. STAT. § 20-501 (2002) (defines “racial profiling” and refers to motorists being stopped based solely upon their race as a discriminatory practice); NEB. REV. STAT. § 20-502 (2002) (prohibits the use of racial profiling by all police officers in the state); NEB. REV. STAT. § 20-503 (2002) (racial profiling defined as “detaining an individual or conducting a motor vehicle stop based upon disparate treatment of an individual); NEB. REV. STAT. § 20-504 (2002) (police must collect data on race from their traffic stops); NORTH CAROLINA (N.C. GEN. STAT. § 114-10 (2002) (data collection on race by police officers making stop); RHODE ISLAND (R.I. GEN. LAWS § 31-21.1-2 (2001) (prohibits use of racial profiling in traffic stops); R.I. GEN. LAWS § 31-21.1-4 (2001) (traffic stop studies to be conducted by R.I. Att’y Gen.); R.I. GEN. LAWS § 31-21.1-5 (2001) (prohibits the use of racial profiling as the sole reason for stopping or searching motorists for routine traffic stops); TENNESSEE (TENN. CODE ANN. § 38-1-402 (2001) (police must record info on traffic stops including race); TEXAS (TEX. EDUC. CODE ANN. § 96.641 (Vernon 2002) (chiefs of police are to have initial and continuing training on racial profiling); TEX. OCC. CODE ANN. § 1701.253 (Vernon 2002) (as part of the minimum curriculum requirements, the commission shall establish a statewide comprehensive education and training program on racial profiling for officers licensed under this chapter); TEX. OCC. CODE ANN. § 1701.402 (Vernon 2002) (racial profiling certificates for law enforcement officers that participate in the program); TEX. CODE CRIM. PROC. ANN. art. 2.131 (Vernon 2002) (a peace officer may not engage in racial profiling); TEX. CODE CRIM. PROC. ANN. art. 2.135 (Vernon 2002); (Certain law enforcement agencies shall retain the video and audio documentation of each traffic and pedestrian stop for at least 90 days after the date of the stop. If a complaint is filed with the law enforcement agency alleging that a peace officer employed by the agency has engaged in racial profiling with respect to a traffic or pedestrian stop, the agency shall retain the video and audio record of the stop until final disposition of the complaint); TEX. CODE CRIM. PROC. ANN. art. 2.132 (Vernon 2002) (prohibits use of racial profiling and requires data collection from traffic stops including race); UTAH (UTAH CODE ANN. § 53-1-106 (2002) (public safety code department administration must maintain a database

mandates an end to racial profiling, the collection of data on all traffic stops by every law enforcement agency in the state, new written policies against racial profiling, and anti-profiling training for officers.⁶³ For departments that do not comply with these requirements, the law empowers the state's attorney general to recommend to the governor that these departments lose their state funding.⁶⁴ Missouri Attorney General Jay Nixon, whose office has supervised implementation of the new law, says the statute represents a comprehensive and strong effort to deal with the problem.⁶⁵

Perhaps more significant than these legislative efforts, hundreds of police agencies around the country that are not under any legislative obligation to do

of information including the race of the person stopped and checked and the race of the law enforcement officer who made the stop); *see also Components of Racial Profiling Legislation*, Memorandum from the Institute on Race & Poverty, to Senators Linda Berglin, Jane Ranum, and Representative Greg Gray (March 5, 2001), <http://www.instituteonraceandpoverty.org/publications/racialprofiling.html>.

There are additional states that have passed legislation, the provisions of which do not require data collection. These laws usually just prohibit racial profiling but carry no consequences: *e.g.*, CALIFORNIA (CAL. PENAL CODE § 13519.4 (Dearing 2002) (Police officers are to be trained not to use racial profiling as a tool. Data collection regarding race is voluntary.); KENTUCKY (KY. REV. STATE ANN. § 15A.195 (Michie 2001)); LOUISIANA (LA. REV. STAT. ANN. § 32:398.10 (West 2002) (officers must view learning video about racial profiling, inapplicable to any law enforcement agency or department that has adopted a written policy against racial profiling); MINNESOTA (MINN. STAT. § 626.8471 (2001) (racial profiling defined and officers trained); MINN. STAT. § 626.951 (2002); MINN. STAT. § 626.9513 (2001) (study to be carried out by the state commissioner of safety and those law enforcement agencies whom volunteer to be part of the study); MINN. STAT. § 626.9514 (2001) (Att'y Gen. must have a toll free phone number for complaints about incidents of racial profiling); MINN. STAT. § 626.9517 (2001) (grants to agencies participating in racial profiling study for the purchase of video cameras for police vehicles); OKLAHOMA (OKLA. STAT. tit. 22, § 34.3 (2002) (racial profiling is prohibited and criminalized; racial profiling it is a misdemeanor); OKLA. STAT. tit. 22, § 34.4 (2002) (victim of racial profiling may file a complaint with the Oklahoma Human Rights Commission and may also file a complaint with the district attorney for the county in which the stop or arrest occurred); OKLA. STAT. tit 22, § 34.5 (2002)); WASHINGTON (WASH. REV. CODE ANN. § 43.43.490 (West 2002) (training police officers on racial profiling); WASH. REV. CODE ANN. § 43.43.480(1) (West 2002) (data collection, including race, is encouraged for all traffic stops); WEST VIRGINIA (W. VA. CODE § 30-29-10 (2001) (racial profiling by law enforcement agencies is prohibited).

62. *See* MO. REV. STAT. § 590.650, et seq. (2000 & Supp. 2001).

63. MO. REV. STAT. § 590.650.6 (2000 & Supp. 2001).

64. *Id.*

65. Jeremiah W. ("Jay") Nixon, *Remarks on Racial Profiling in Missouri*, 22 ST. LOUIS U. PUB. L. REV. 53, 53 (2003). For a discussion of the origin of the Missouri statute see Leland Ware, *Prohibiting Racial Profiling: The ACLU's Orchestration of the Missouri Legislation*, 22 ST. LOUIS U. PUB. L. REV. 59, 60 (2003).

so have taken similar action on their own.⁶⁶ In fact, this has become common enough that an announcement that a city will begin collecting data no longer makes national headlines the way that it did just a short time ago. It is easy to forget that the first sizeable agencies to begin collecting data on their own – San Diego and San Jose, California – began their efforts only in 1999.⁶⁷ While data collection is hardly the norm everywhere, it no longer stands out as something that all police agencies resist.

III. PROFILING IN THE FIGHT AGAINST TERRORISM

In the aftermath of the catastrophic terrorist attacks on September 11, we learned that all of those who had hijacked the planes that day were Arabs and Muslims from Middle Eastern countries.⁶⁸ Our enemy was Al Qaeda, an

66. *E.g.*, in CALIFORNIA: San Diego (Jean Alliance Colston, *Ignorance Will Not Bring Equality*, SAN DIEGO UNION-TRIBUTE, April 28, 2002, at G3), San Jose (Lisa O'Neill Hill, *Delving Into Disparities: Issue Under Study, Scrutiny Locally and Nationwide*, PRESS-ENTERPRISE, February 24, 2002, at A1), Los Angeles (Solomon Moore, *The State Rights Groups Sue Davis Over Racial Profiling Data*, LOS ANGELES TIMES, November 2, 2001, at B8); in FLORIDA: Jacksonville and Florida Highway Patrol (Manoucheka Celeste, *Profiling No Longer Practiced, Police Say Officials Support Law Banning Racial Stops*, FLORIDA TIMES-UNION, June 22, 2001, at B1); in MICHIGAN: Grand Rapids (Mike Connell, *Search After Traffic Stop Raises Question of Equal Treatment*, TIMES HERALD (Port Huron, Mich.) May 19, 2002, at 7B), Highway Patrol (*Survey Doesn't Reveal Profiling*, CHICAGO TRIB., January 25, 2001, at 3); in OHIO: Cincinnati (Derrick DePledge, *Promise to End Racial Profiling on Back Burner After Sept. 11*, GANNETT NEWS SERVICE, April 19, 2002, available at 2002 WL 5257537), Ohio State Highway Patrol (Jennine Zeleznik, *State Sen. Roberts' Bill Would Require Demographic Data From Traffic Stops; Legislation Would Show if Agencies Using Racial Profiling*, DAYTON DAILY NEWS, April 18, 2002, at 3B), Cleveland (T.C. Brown, *O'Connor Says Racial Profiling Not A Problem*, PLAIN DEALER, December 8, 2000 at 8B); in OREGON: Highway Patrol and Portland Police (Maxine Bernstein, *State Police Post Findings On Stops By Driver's Race*, OREGONIAN, May 9, 2002, at A1); in PENNSYLVANIA: Highway Patrol (Keith Herbert, *Forms Arrive Late for Penn State Study of Racial Patterns in Police Traffic Stops; State Troopers Will Take Information to Look for Evidence of Profiling*, MORNING CALL (Allentown), April 2, 2002, at B4), Pittsburgh and Philadelphia Police (John M.R. Bull, *State Panel Hears Testimony on Racial Profiling by Police*, PITTSBURGH POST-GAZETTE, October 23, 2001 at pg B7); in SOUTH CAROLINA: State Highway Patrol (Greg Rickabaugh, *Study Hints Police Ticket More Blacks; Survey Suggests South Carolina Troopers are Pulling Over, Citing High Percentage of Minorities*, AUGUSTA CHRONICLE, July 1, 2001, at C1); in WISCONSIN: Madison (Pat Schneider, *Latinos Tell of Fear in Sauk; Want Traffic Cops to Keep Racial Data, Stop Harassment*, CAPITAL TIMES, July 11, 2002, at 1B).

67. See Paul Van Slambrouck, *Two cities tackle racial profiling*, CHRISTIAN SCIENCE MONITOR, Mar. 29, 1999, available at <http://www.csmonitor.com/durable/1999/03/29/fp2s1-csm.shtml>.

68. Dan Eggen & Cheryl W. Thompson, *U.S. Seeks Thousands of Fugitive Deportees; Middle Eastern Men are Focus of Search*, WASH. POST, Jan. 8, 2002, at A1, available at 2002 WL 2519501.

organization based on a radical (some even say perverted) interpretation of the Islamic faith.⁶⁹ In a heartbeat, everything we had learned about racial profiling—its costs and the illusory nature of its crime-fighting benefits—disappeared. Since the perpetrators were all young Muslim men from the Middle East, the solution seemed obvious: we needed to use a profile at airports that would focus law enforcement attention on young Middle Eastern men. An ethnic profile targeting *them* was not discrimination; it was a sensible anti-terrorist measure. Syndicated columnist Kathleen Parker gave voice to this feeling when she called racial profiling of Middle Eastern men “a temporary necessity that no patriotic American should protest.”⁷⁰

A. *Is It Happening?*

The first question that should be asked is whether or not ethnic profiling of Arabs and Muslims is in fact happening. There seems to be a widespread belief that the government is bending over backwards to avoid ethnic profiling. While certain segments of the government may in fact be doing so, it is also obvious that ethnic targeting is definitely in use. For example, in an eerie echo of the DEA’s Operation Pipeline, the 1980s effort to spread racial profiling to traffic enforcement all across the nation,⁷¹ federal law enforcement officials now travel the nation offering anti-terrorism training to state and local police. The federal officials tell local officers to use traffic stops as a pretext to spot potential terrorists.⁷² “Among the items police are taught to look for besides phony passports and fake or stolen drivers’ licenses: prayer rugs and copies of the Koran, Islam’s holy book.”⁷³

Even more disturbing, however, are some of the actions of the U.S. Department of Justice. In the fall of 2001, Attorney General John Ashcroft decreed that the Department would conduct “voluntary” interviews with 5,000 young men from the Middle East.⁷⁴ In the spring of 2002, the Attorney General added another 3,000 names to the list.⁷⁵ The Department has also detained hundreds of Middle Easterners on petty immigration violations and

69. Aaron Zitner & Richard A. Serrano, *Response to Terror the Anthrax Threat Answers in Anthrax Probe Only Yield More*, L.A. TIMES, Oct. 20, 2001, at A5, available at 2001 WL 28922057.

70. Parker, *supra* note 3, at 19.

71. PROFILES IN INJUSTICE, *supra* note 9, at 21-23.

72. Kevin Johnson, *In the Heartland, A Call to Mobilize*, USA TODAY, Mar. 25, 2002, at 1A.

73. *Id.*

74. Allan Lengel, *Arab Men in Detroit to Be Asked to See U.S. Attorney*, WASH. POST, Nov. 27, 2001, at A5, available at 2001 WL 30328341.

75. *Special Report with Brit Hume*, Fox News television broadcast (Mar. 20, 2002), available at 2002 WL 5584774.

minor criminal violations.⁷⁶ The exact number still detained as of this writing is not known because the Department has refused to answer any questions about the detainees.⁷⁷ The Attorney General has also used the material witness statute⁷⁸ to detain those he suspects of involvement, but against whom he has no evidence.⁷⁹ All of this is racial and ethnic targeting by any other name. Concededly, the violators of immigration law detained by the Department of Justice have broken the law. Yet, while hundreds of thousands of other people in this country have also broken immigration laws, the government has only detained members of one narrow group for these offenses, Muslims and Middle Easterners, who have been selected for this treatment by virtue of ethnicity.

B. Will It Work?

If officials are, in fact, using ethnic profiling now, a second question looms even larger: will it work? Will ethnic profiling actually help to make the U.S. safe from terrorists? Many people today seem to regard the use of ethnic profiles against Middle Easterners as “just common sense” in the fight against terrorism. But, as in the War on Drugs, this “common sense” profiling of Middle Easterners has little to do with good, solid law enforcement. And in the end, it will almost certainly blunt efforts to protect the country against terrorists, particularly Al Qaeda.

First, consider the centerpiece of all good police work: observation of suspicious behavior. It is a truism among veteran police officers that it is not what people look like that tells them who to regard as suspicious; it is what people *do* that matters.⁸⁰ If police officers want to know what someone is up to, they watch the subject’s behavior; what the person has done and what the person is doing now are the best indicators of what that person will do in the future. Using a racial or ethnic profile to decide whom to stop and search cuts directly against this experience-based rule. When law enforcement uses skin color or ethnic appearance as a proxy for actual dangerousness, law enforcement agents shift their attention. They begin to turn away from what counts—how people behave—and instead attend to what people look like.

76. Dan Eggen, *Tough Anti-Terror Campaign Pledged; Ashcroft Tells Mayors He Will Use New Law to Fullest Extent*, WASH. POST, Oct. 26, 2001, at A1, available at 2001 WL 29164803.

77. Siobhan Gorman, *Power to the Government*, NAT’L J., Jul 27, 2002, available at 2002 WL 7095407.

78. 18 U.S.C. § 3144 (2000).

79. Steve Fainaru & Dan Eggen, *Judge Rules U.S. Must Release Detainees’ Names*, WASH. POST, Aug. 3, 2002, at A1, available at 2002 WL 24825355.

80. Indeed, this was a sentiment expressed to the author by experienced officers so frequently in the course of research interviews that few ever question it. All behavioral profiling depends on this assumption.

They pay less attention to what is important—behavior—and more to what is literally only skin deep. It is crucial that those on the front line in the fight against Al Qaeda not miss anything that might tell them whether any particular person they observe is a potential terrorist; injecting race or ethnic appearance into the mix of characteristics that we want police to look for when they search for possible terrorists can only distract officers from what actually counts.

The distraction of law enforcement agents from all-important behavioral clues leads directly to a second point. Even a “good” profile, one that is based on rigorously analyzed statistics culled from plentiful, systematically collected data, will cast suspicion over more innocent people than guilty ones. When we construct a profile using the wrong kind of characteristic—racial ones as opposed to markers of behavior—we effectively enlarge our suspect pool. When the police regard as suspects not just those who *act like* potential terrorists but also those who *look like* potential terrorists, they end up with many more people to investigate, the overwhelming majority of whom will have exhibited no behavior in which the police might be interested. This will inevitably mean that law enforcement resources and efforts will be spread more thinly than is wise. Even the FBI does not have unlimited manpower; every person who they must investigate because he “looks like a terrorist” takes away enforcement resources from investigations of suspects who actually behave suspiciously. And that is a trade off that makes little sense.

Third, if the keenest possible observation of behavior is one of the pillars of solid police work, then the collection, analysis, and dissemination of intelligence is surely another. Intelligence in police work is simply information, information that tells law enforcement about things in a community that are suspicious. There is nothing new in this as far as police work goes. Ask any veteran police detective what it takes to solve a major crime, a murder, say, or a robbery. Since police almost never observe such crimes when they occur, they have to figure out who did it after the fact. From watching television and movies, one might think that Sherlock Holmes-style deduction or high-tech forensic work in the crime lab do the trick. While this is certainly true in some cases, what counts much more often is what people who live and work in the area will tell police.⁸¹ It is a truism among police officers that in most murders perpetrated by persons unknown to the police,

81. The best example of this as of this writing is the arrest and indictment of six men of Yemeni descent in Lackawanna, N.Y., in the fall of 2002, for various terrorism-related crimes. The information leading to the apprehension of the men came not from spy satellites or infiltrators but from members of the Yemeni community in Lackawanna. Philip Shenon, *Threats and Responses: Indictment; U.S. Says Suspects Awaited An Order For Terror Strike*, N.Y. TIMES, Sept. 15, 2002, at A1 (investigation was begun after federal law enforcement received “information from within the area’s Muslim community months ago [prior to indictment] that people loyal to Al Qaeda might be living among them”).

people in the neighborhood usually know who did the crime; it is only the police who do not. Solving these crimes depends on getting the public to give that information to the police.

We have all heard numerous times since September 11, 2001, how the events of that day represent a massive failure of the intelligence agencies to compile the necessary information due to an egregious failure to “connect the dots.”⁸² These failures, and the real possibility that we may very well have Al Qaeda “sleeper” cells of Middle Easterners on our soil, obviously make intelligence gathering more crucial than it has ever been. Intelligence agencies and law enforcement simply must have open lines of free-flowing communication with those who might have important information on potential terrorists. That information will almost certainly have to come from those most likely to encounter the individuals in these “sleeper” cells: *members of Middle Eastern, Muslim, and Arab communities*. Thus, what law enforcement needs most right now are solid relationships with the Arab and Muslim communities in the U.S., relationships based on trust and mutual interest, fostered over time while working as partners in fighting crime. However, using a profile focusing on Arab and Muslim heritage—whether by questioning 8,000 young male Arabs, or by detaining an unknown number of Middle Easterners (but no members of any other group) on petty immigration charges—will not foster trust; it will not help build the solid relationships necessary for effective communication and real partnership. Rather, profiling will do quite the opposite: it will communicate to these communities that law enforcement regards them not as partners in terror prevention, but as potential terrorists—in short, as suspects. When we take away their freedom on relatively trivial grounds on the chance that they *might be* terrorists, since we’d rather be safe than sorry, we sow not trust, but fear. This fear naturally cuts off the possibilities for open communication, destroying our ability to gather crucial intelligence.

All of this explains why many high-placed law enforcement professionals quickly rejected the “common sense” approach of profiling Middle Easterners. Attorney General Ashcroft’s “voluntary” questioning of Middle Eastern men met with instant skepticism in many major police departments. Police command staff quickly recognized the damage that this questioning would do to their long-term efforts to build crime-fighting partnerships and intelligence links with their Middle Eastern communities.⁸³ Eight former FBI officials, including former FBI and CIA chief William H. Webster, went on record in the

82. Al Kamen, *Stand by Your Man, Sort of*, WASH. POST, Oct. 3, 2001, at A29, available at 2001 WL 28361577.

83. *E.g.*, Fox Butterfield, *Police Are Split On Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1.

Washington Post to voice doubts about the law enforcement value of these tactics.⁸⁴ “It’s the Perry Mason School of Law Enforcement . . .,” according to Kenneth Walton, a former assistant FBI director.⁸⁵ The interviews, he said, would likely produce nothing more valuable than “the recipe to Mom’s chicken soup.”⁸⁶ Little wonder, then, that senior intelligence officials circulated a memorandum just weeks after the events of September 11 that warned law enforcement and intelligence agents about the dangers of racial and ethnic profiling.⁸⁷ Profiling with racial or ethnic characteristics should be avoided at all costs, the intelligence professionals said, but not because it was politically incorrect, would generate bad publicity, or might lead to lawsuits. The reasons were much more straightforward: profiling with these skin-deep characteristics would fail. The only way to succeed was careful observation of suspicious behavior and intelligence gathering. “[F]undamentally, believing that you can achieve safety by looking at characteristics instead of behavior is silly,” one of the officials told the *Boston Globe*.⁸⁸ “If your goal is preventing attacks. . .you want your eyes and ears looking for pre-attack behaviors, not characteristics.”⁸⁹

The fourth point may be the most important of all as we consider using racial profiling against Al Qaeda. The profiling of Middle Easterners shows a fundamental misunderstanding of the nature of what we are up against in Al Qaeda. The Al Qaeda organization is a viciously murderous terrorist organization based in the Middle East that is bent on killing Americans and Westerners.⁹⁰ No one disagrees with these facts. But Al Qaeda is something else as well: an organization that has consistently shown itself to be highly intelligent, patient, and thoroughly adaptable. Woe be unto us if we forget this. The attack on the World Trade Towers on September 11 was *not the first assault* on this landmark, *but the second*. When the first attack, in 1993,⁹¹ failed to accomplish their goal, these terrorists took *eight years* to install a new set of agents on American soil, devise an entirely new method of attack, plan it down to the smallest detail, and then practice it so that it could be carried out

84. Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism*, WASH. POST, Nov. 28, 2001, at A1.

85. *Id.*

86. *Id.*

87. Bill Dedman, *Memo Warns Against Use of Profiling As Defense*, BOSTON GLOBE, Oct. 12, 2001, at A27.

88. *Id.*

89. *Id.*

90. Richard A. Serrano, *Judge Says No Need to Prove Lindh Killed*, L.A. TIMES, Apr. 2, 2002, at A10, available at 2002 WL 2465531.

91. Dan Eggen, *FBI Launches Massive Manhunt: Hijackers Trained as Pilots in U.S.*, WASH. POST, Sept. 13, 2001, at A1, available at 2001 WL 27732028.

almost perfectly.⁹² These people are not stupid; just because they are killers does not mean that we can count on them to act like fools. Since Al Qaeda knows we are now looking for young, Middle Eastern suicide hijackers, they will almost certainly try something different—for example, attacking us with non-Arabs from countries outside the Middle East, like British citizen Richard Reid⁹³ or American Jose Padilla,⁹⁴ or attempting to get explosives on airliners in luggage of unsuspecting passengers or the tons of unscreened cargo that are shipped on commercial jets everyday.⁹⁵

Those who insist on the “common sense” of focusing on Middle Eastern men ignore all of this. They suggest that the U.S. can be safe if we focus on and inconvenience only suspicious “others,” not ourselves. These people face backwards, toward the past—when the only way to safety is to look forward, toward what our enemy may do next.

92. Walter Pinkus, *Mueller Outlines Origin, Funding of Sept. 11 Plot*, WASH. POST, June 6, 2002, at A1, available at 2002 WL 21749706.

93. David Johnston, *A Nation Challenged: The Bombing Suspect; Al Qaeda Trained Bombing Suspect, Indictment Says*, N.Y. TIMES, Jan. 17, 2002, at A1, available at <http://query.nytimes.com/search/article-page.html?res=9c04E6D71138F934A25752C0A9649C8B63>.

94. Associated Press, *Padilla Lawyers to Give Arguments on Secret Report: Government Challenges Disclosure*, WASH. POST, Oct. 25, 2002, at A15, available at <http://www.washingtonpost.com/wp-dyn/articles/A13903-2002Oct24.html>.

95. See Blake Morrison, *Failures In Cargo Security Reported*, USA TODAY, May 22, 2002, at 1A.

