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# WRONG THEN, WRONG NOW

Racial Profiling Before & After September 11, 2001



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## **Executive Summary**

This Report compares the practice of "traditional" street-level racial profiling with the post-September 11 profiling of Arabs, Muslims, and South Asians. It concludes that profiling is just as wrong now as it was before the war on terrorism began. The same arguments that led President Bush and Attorney General Ashcroft to condemn racial profiling before September 11 should lead them to abandon it now.

In the months preceding September 11, a national consensus had emerged on the need to combat racial profiling. In the fearful aftermath of the terrorist attacks, some reevaluated their views. It is now time to dispel those doubts, reawaken the national consensus, and ban racial profiling in America.

Racial profiling occurs when law enforcement agents impermissibly use race, religion, ethnicity or national origin in deciding who to investigate. Compelling anecdotal and statistical evidence demonstrates that minorities are disproportionately targeted by law enforcement. Pretextual traffic stops of Blacks and Hispanics are common across the United States - the police frequently use race as a basis to suspect that minorities violate the drug and immigration laws.

Before September 11, polls showed that Americans of all races and ethnicities believed racial profiling to be both widespread and unacceptable. On February 27, 2001, President Bush told a joint session of Congress that racial profiling "is wrong and we will end it in America." With the introduction of the bipartisan End Racial Profiling Act by Senator Russell Feingold (D-Wis.) and Representative John Conyers (D-Mich.) on June 6, 2001, the enactment of comprehensive Federal anti-profiling legislation seemed imminent.

On September 11, this consensus evaporated. The 19 men who hijacked airplanes to carry out the horrific attacks on the World Trade Center and the Pentagon were Arabs from Muslim countries. The federal government immediately focused massive investigative resources and law enforcement attention on Arabs, Arab Americans, Muslims, Sikhs, and South Asians. Many of the practices employed in the name of fighting terrorism - from the singling out of young Arab or Muslim men in the United States for questioning and detention to the selective application of the immigration laws to nationals of Arab or Muslim countries - amount to racial profiling. But despite public hostility to street-level racial profiling, anti-terror profiling has flourished.

At the same time, there is new evidence that "traditional" racial profiling remains prevalent after September 11. The persistence of both forms of racial profiling makes clear the need to revive the pre-September 11 consensus that the practice of profiling is always wrong and should be prohibited.

**Chapter I** of the Report defines racial profiling and provides illustrations of the practice. Blacks, Hispanics, Asians, and Arabs have all been victimized by unjustified racial and ethnic assumptions and generalizations.

The next two Chapters of the Report have parallel structures.

**Chapter II** addresses "*traditional*" racial profiling - the reliance on race to investigate street-level criminal activity (especially drug crimes) and immigration violations. There are different forms of such profiling: disproportionate traffic and pedestrian stops of minorities; unwarranted searches of Black females by the U.S. Customs Service; and the targeting of Hispanics by the Immigration and Naturalization Service. The evidence is clear: minorities have been unfairly singled out for law enforcement attention. For example:

- A Department of Justice Report on police contacts with the public concluded that in 1999, African Americans were 20 percent more likely than Whites to be stopped and 50 percent more likely to have experienced more than one stop. Police were more than twice as likely to search an African American or Hispanic driver than a White driver.
- Data from the Los Angeles Police Department covering the period July to November 2002 showed that 22 percent of Black drivers stopped by LAPD were asked to step out their cars, compared to only seven percent of White drivers stopped. Once out of their cars, 67 percent of Blacks were patted down and 85 percent subjected to a body search. Fifty-five percent of Hispanics removed from their cars were patted down and 84 percent searched. By contrast, only 50 percent of Whites stopped were patted down and 71 percent searched.

Traditional profiling is fueled by the assumption that minorities commit more of the types of crimes that profiling is used to detect, e.g., drug crimes. In fact, statistical data from many jurisdictions shows the opposite: "hit rates" for minorities subjected to pedestrian and traffic stops, and to searches by the Customs Service, are generally *lower than* hit rates for Whites. For example:

- According to the New York Attorney General's Report on NYPD's "stop and frisk" tactics, stops of minorities were less likely to yield arrests than stops of Whites.
- According to a General Accounting Office report on U.S. Customs Service practices, while Black female U.S. citizens were nine times more likely than White females to be x-rayed following a frisk or patdown, they were less than half as likely to be found carrying contraband.

"Traditional" racial profiling is not only humiliating and contrary to core American values, it is also ineffective as a law enforcement tactic. And the consequences of racial profiling are severe: profiling harms innocent people, skews the U.S. prison population, alienates minority communities, and contributes to a crisis of confidence in the criminal justice system.

**Chapter III** explores new forms of profiling in the anti-terrorism context: the emergence of a "driving while Arab" version of "driving while Black"; detaining and deporting Arabs and Muslims who are uninvolved in terrorism; and the singling out of young Arab men for questioning based on nothing

other than their ethnicity. Just as African Americans, Hispanics, and other minorities have been targeted by police officers investigating street crime and immigration violations, federal agents have targeted Arabs, Muslims and, in some cases, those who appear to be Arab, Muslim, South Asian or Sikh in the anti-terrorism campaign, despite the absence of particularized suspicion.

The same arguments against traditional profiling apply to terrorism profiling.

First, terrorism profiling, like traditional profiling, is based on broad and inaccurate stereotypes about the propensity of certain racial, religious or ethnic groups to engage in particular criminal activity. Not all drug crimes are committed by African Americans, Hispanics and other minorities. The overwhelming number of minorities are law abiding citizens. Likewise, not all terrorism is committed by Arabs or Muslims, and not all Arabs or Muslims are terrorists.

Second, profiling in the terrorism context is no more useful as a law enforcement tactic than profiling in the street-crime context. Anti-terror profiling, like traditional profiling, is a crude and inadequate substitute for behavior-based enforcement.

Third, like traditional profiling, anti-terror profiling alienates communities that otherwise are natural allies to law enforcement.

The similarities between traditional profiling and terrorism profiling make clear that *all* manifestations of racial profiling are wrong and should be banned.

**Chapter IV** makes recommendations to combat all forms of racial profiling:

First, every federal, state, and local law enforcement agency should expressly ban the use of racial profiling.

Second, the ban on racial profiling should be legally enforceable, including by private citizens.

Third, Federal, state, and local law enforcement agencies should adopt procedures to give effect to the profiling ban, including disciplinary procedures against officers found to have engaged in profiling; complaint procedures for those who claim to have been subjected to profiling; and data collection procedures.

Fourth, Federal and state funds should be made available for law enforcement agencies to establish systems to end racial profiling, such as early warning and officer training systems.

Fifth, nationwide standards should be developed for the accreditation of law enforcement agencies, and such standards should include express guidance on racial profiling.

Sixth, police oversight agencies, such as the Civil Rights Division of the Justice Department, should give priority to the investigation and remediation of racial profiling.

Seventh, law enforcement agencies should strive for a more diverse workforce, in order to better serve the public.

Eighth, a public education campaign is necessary to explain the myths behind racial profiling, the effects of profiling on minorities, and the flaws of profiling as a law enforcement tool.

The events of September 11 were devastating to all Americans. But an effective anti-terror campaign can be waged without compromising America's commitment to equality under the law. This commitment is most severely tested in times of crisis. The nation now regrets the internment of thousands of Japanese-Americans during World War II, which serves as a precedent of what can happen when fear of a distant enemy erodes core constitutional values. The current debate over racial profiling provides an opportunity to address a similar problem now, before it becomes a painful historical memory.

## **Introduction**

In the months preceding September 11, 2001, a national consensus had emerged on the need to combat racial profiling. In the fearful aftermath of the terrorist attacks, some reevaluated their views. It is now time to dispel those doubts, reawaken the national consensus, and ban racial profiling in America.

Racial profiling occurs when law enforcement agents impermissibly consider race, religion, ethnicity, or national origin in deciding who to investigate.<sup>1</sup> The practice was widespread before September 11 and has persisted since then, both in the street-level context in which it originally arose and in the new context of terrorism. This Report examines the use of racial profiling in both of these contexts, describes the impact profiling has on minorities and their communities, debunks the myths and assumptions that fuel profiling, and makes recommendations aimed at ending this practice.

For years, African Americans, Latinos,<sup>2</sup> and other minorities complained that they received unwarranted police scrutiny in their cars and on the streets, but their complaints were routinely ignored. By early 2001, this had changed. Rigorous empirical evidence developed in civil rights lawsuits and other studies of police practices revealed that the so-called "driving while Black or Brown" phenomenon was more than anecdotal. Minority drivers were, in fact, stopped and searched more than similarly-situated Whites. The data also showed that minority pedestrians were stopped and frisked at a disproportionate rate, and that, in general, federal, state, and local law enforcement officials frequently used race as a

basis for determining who to investigate for such activity as drug trafficking, gang involvement, and immigration violations. Polls showed that Americans of *all* races and ethnicities believed racial profiling to be a widespread practice.<sup>3</sup>

Government actions and words mirrored the public's increased concern about profiling. In the mid-1990's, the Civil Rights Division of the U.S. Justice Department entered into far-reaching settlement agreements to address profiling by certain state and local law enforcement agencies, such as the Los Angeles Police Department and the New Jersey State Police. Many states and localities imposed data collection and other requirements to address racial disparities in police practices. And by early 2001, concerns about profiling were voiced at the highest levels of the federal government. Attorney General Ashcroft publicly condemned profiling,<sup>4</sup> and on February 27, 2001, President Bush told a joint session of Congress that profiling "[is] wrong and we will end it in America."<sup>5</sup>

On June 6, 2001, Senator Russell Feingold (D-Wis.) and Representative John Conyers (D-Mich.) took the President at his word and introduced the End Racial Profiling Act of 2001 (hereafter "ERPA").<sup>6</sup> With seven Republicans among its original cosponsors, the bill went far beyond past congressional profiling proposals, which simply sought to determine the scope of the profiling problem by requiring the collection of traffic stop data.<sup>7</sup> Already armed with empirical evidence proving that racial profiling was widespread, the sponsors of ERPA aimed higher, banning the practice of profiling; authorizing judicial enforcement of that ban by the victims of profiling (as well as by the federal government); and requiring state and local law enforcement agencies to collect traffic stop and other law enforcement data and to establish institutional safeguards against profiling as a condition of federal funding. ERPA also established a federal grant program to provide state and local governments with the resources they would need to implement these anti-racial profiling initiatives. Support for the bill was widespread; enactment of a comprehensive federal racial profiling law seemed imminent.

On September 11, the world changed. The 19 men who hijacked airplanes to carry out the horrific terror attacks on the World Trade Center and the Pentagon were Arabs from Muslim countries. The federal government immediately focused massive investigative resources and law enforcement attention on Arabs, Arab Americans, and Muslims. That focus continues to this day and in some cases encompasses individuals who are perceived to be, but are not, Arab or Muslim, such as Sikhs and other South Asians.

The Bush Administration claims that its anti-terrorism efforts do not amount to racial profiling, but singling out for questioning and detention Arabs, Muslims, and South Asians and selective application of the immigration laws to nationals of Arab and Muslim countries, are practices that speak louder than words. Meanwhile, some commentators have explicitly called for the profiling of Arabs and other Muslims as a means to combat terrorism.<sup>8</sup> In the aftermath of September 11, conduct that most Americans had come to view as unacceptable and contrary to America's constitutional ideals became mistakenly regarded by many as a legitimate and effective method of law enforcement in certain contexts.<sup>9</sup>

The events of September 11 also halted congressional efforts to address "traditional" racial profiling - the use of racial profiling to address street-level crime and immigration violations - despite abundant evidence that such profiling continued unabated. Notwithstanding the President's pledge to Congress, neither the House nor the Senate took up ERPA after September 11.

Indeed, recent legislative activity has *hindered* the effort to eliminate racial profiling. Last summer, Congress passed and the President signed a Customs Service reauthorization bill that expanded legal immunity for Customs officers engaged in unconstitutional searches, despite evidence from the General Accounting Office ("GAO") that the Customs Service has a history of racial profiling.<sup>10</sup> Efforts to end racial profiling in general have been hampered by the Administration's efforts to legitimate the practice within the context of its counter-terrorism campaign.

This approach is flawed on two levels. First, as noted above, the problem of "traditional" racial profiling has persisted post-September 11 and is unrelated to the threat of terrorism. Second, and more important, the practice of profiling to fight terrorism is itself fundamentally flawed. Like "traditional" profiling, profiling of Arabs and Muslims is based on unfair and inaccurate stereotypes regarding a particular racial or religious group's tendency to commit certain types of crimes. It is an ineffective - indeed counterproductive - method of fighting crime and violates core constitutional values.

While these concerns were drowned out in the months following September 11, it is now time to reestablish the national consensus against racial profiling. The purpose of this Report is to do so, in three ways:

- First, to highlight the persistence of "traditional," street-level racial profiling and review why such profiling is ineffective, harmful, and unacceptable;
- Second, to identify the different forms of anti-terrorism profiling post-September 11, highlight the parallels between these practices and traditional profiling, and explain why profiling is as flawed a law enforcement tactic in the terrorism context as in its traditional form; and
- Third, to explain the need to ban racial profiling at all levels of government and in all its manifestations.

Chapter I of this Report defines racial profiling and provides several examples of the practice. The next two sections of the Report parallel one another: Chapter II addresses "traditional" profiling and Chapter III addresses anti-terror profiling; both Chapters identify forms of profiling and then explain why profiling is a flawed law enforcement tactic. This comparative approach exposes the many similarities between the two types of profiling -- the addition of "driving while Arab" to the profiling lexicon alongside "driving while Black" and "driving while Brown"; the involvement of certain specific federal law enforcement agencies, such as the Immigration and Naturalization Service, in both types of racial profiling; the inaccurate and unfair stereotypes that drive both types of profiling; and the flawed nature of profiling as a law enforcement tactic in both the traditional and terrorism contexts. These similarities make clear that the public should consider and policymakers should address all manifestations of profiling at the same time. Chapter IV makes recommendations in this regard.

The events of September 11 were devastating to all Americans. These events cannot, however, cause us to lose sight of America's commitment to equality under the law. This commitment is most severely tested in times of crisis. The nation now regrets the internment of thousands of Japanese Americans during World War II, which serves as a precedent of what can happen when fear of a distant enemy erodes core constitutional values. The current debate over racial profiling gives us a chance to address a similar problem now, before it becomes a painful historical memory.

## **I. What is Racial Profiling?**

In May 1992, Robert Wilkins, a Harvard-trained African American attorney, was returning home from a family funeral in Chicago with three members of his extended family, two males and one female. While driving in a rental vehicle on the interstate highway near Cumberland, Maryland, they were pulled over for speeding by a state trooper who asked for consent to search the vehicle. Wilkins, fully aware of his constitutional rights, refused to consent to a search. The officer detained Wilkins and his family outside the car for almost an hour, in the rain, until a drug-sniffing dog was brought to search the vehicle. The search turned up nothing and the police officer simply issued a ticket. Wilkins later learned that his family had been stopped because he and his relatives fit the profile developed and used by Maryland State Police to uncover drug-running activity along the highway: they were male, Black, and driving a rental car.<sup>11</sup>

In October 1999, Alberto Lovato, a 29-year-old Latino musician, was pulled over by a Los Angeles police officer, allegedly for using the right turn lane to pass other vehicles. Police records show that the officer stopped Mr. Lovato more than 15 miles away from the site of the alleged violation. The officer did not ask for Mr. Lovato's license or registration; instead he drew his gun and told Mr. Lovato to get out of his car and lie face down on the ground. After two other officers arrived, Mr. Lovato was frisked, handcuffed so tightly that he sustained serious cuts on his wrists, and detained for more than an hour while he was questioned about gang membership, drugs and weapons. Eventually the officers took Mr. Lovato to jail where he was detained for several more hours.<sup>12</sup>

In 1993, two 15-year old Asian American girls, Minhtran Tran and Quyen Pham, were shopping in a strip mall in Garden Grove, California. Both girls were honor students and had never had any contact with law enforcement. As they were leaving the mall, the girls were confronted by Garden Grove police who accused them of making trouble and asked whether the girls belonged to gangs. The police questioned the girls, placed them against a wall and, without their consent, photographed them. Although the girls had not been charged or cited and had done nothing wrong, their photograph was posted in the Garden Grove Police Department. The police maintained that the girls had been identified as wrongdoers because they were dressed in "gang attire." In fact, the girls were dressed in form fitting shirts and baggy pants - common dress for American teenagers. What soon became evident was that the girls' race determined their treatment by the police: Orange County police had specifically identified Asian youth as being involved in gang activity.<sup>13</sup>

On September 14, 2001, an Indian American motorist and three family members were pulled over and ticketed by a Maryland state trooper because their car had broken taillights. The trooper interrogated the family, questioned them about their nationality, and asked for proof of citizenship. When the motorist said that their passports were at home, the officer allegedly stated, "You are lying. You are Arabs involved in terrorism." He ordered them out of the car, had them put their hands on the hood, and searched the car. When he discovered a knife in a toolbox, the officer handcuffed the driver and later reported that the driver "wore and carried a butcher knife, a dangerous deadly weapon, concealed upon and about his person." The driver was detained for several hours but eventually released.<sup>14</sup>

The individuals described above were all investigated by police who considered race in determining who should be suspected of criminal activity. Certain minorities, the officers assumed, are more likely than other people to engage in certain types of criminal behavior. When it came time for these police officers to exercise discretion about who to stop for conduct that thousands of Americans engage in - i.e., committing minor traffic violations or dressing a certain way -- these officials chose to stop and detain minorities. The police engaged in this activity without any actual evidence, such as a suspect description, that any of the individuals stopped had committed a crime. In all these cases, race became a proxy for specific evidence of involvement in criminal activity. This is the essence of racial profiling.

Racial profiling is *any* use of race, religion, ethnicity, or national origin by law enforcement agents as a means of deciding who should be investigated, *except* where these characteristics are part of a specific suspect description. Under this definition, racial profiling doesn't only occur when race is the *sole* criterion used by a law enforcement agent in determining who to investigate. Such a definition would be far too narrow. Several of the individuals described above were accused of committing traffic violations, and the Supreme Court has held that the law enforcement practice of stopping vehicles for traffic violations as a pretext for investigating more serious crimes is constitutional.<sup>15</sup> Ms. Tran and Ms. Pham were suspected of gang activity because they were allegedly wearing "gang attire." Indeed, most law enforcement criminal profiles refer to race as one of many factors to guide law enforcement discretion.<sup>16</sup>

Today, overt racism is roundly condemned whenever it comes to light, and it is rare for individuals to be targeted by law enforcement agents *solely* because of their race. However, as demonstrated by the above examples and by the raft of empirical evidence developed in recent years (discussed below), race is often the *decisive* factor in guiding law enforcement decisions about who to stop, search, or question. Selective enforcement based in part on race is no less pernicious or offensive to the principle of equal justice than is enforcement based solely on race. Indeed, because the former form of selective enforcement is more prevalent and more subtle than explicit racism, it may be more damaging to our criminal justice system and constitutional fabric.<sup>17</sup>

## II. "Traditional" Racial Profiling

### A. Forms of Traditional Profiling

#### 1. "Driving While Black or Brown"

The practice of racial profiling can take many forms, the most notorious of which is the "driving while Black" phenomenon illustrated by the Robert Wilkins case. In this scenario, law enforcement agents use selective enforcement of traffic laws as a pretext for stopping and searching Black motorists, who, according to the law enforcement rationale, are particularly likely to be engaged in illegal drug activity. As Alberto Lovato's story demonstrates, Hispanic motorists have also drawn unwarranted attention from the police ("driving while brown"). This is especially true in border areas where enforcement of the drug laws dovetails with enforcement of the immigration laws.<sup>18</sup> And, as demonstrated by the account of the Indian American motorist described above, Arabs, Muslims, Sikhs, and South Asians have increasingly come under suspicion for "driving while Arab" since September 11.

For decades, the "driving while Black or brown" phenomenon was well known in the minority population, but largely unnoticed among other Americans. But beginning in the 1990's, empirical evidence emerged to support the anecdotal accounts of racial profiling on America's highways. This evidence demonstrated that Black and other minority motorists were and are being stopped at a rate far out of proportion to their presence in the overall population or on the highways. For example:

- A U.S. Department of Justice report on police contacts with the public concluded that in 1999, African Americans were 20 percent more likely to be stopped than White Americans, and 50 percent more likely than Whites to have experienced more than one stop.<sup>19</sup> Police were more than twice as likely to search an African American or Hispanic driver than a White driver.<sup>20</sup>
- In the three-year period from January 1995 to December 1997, Blacks comprised more than 70 percent of the drivers stopped and searched by the Maryland State Highway Patrol, although they made up only 17.5 percent of the overall drivers (and overall speeders).<sup>21</sup> These disparities were explained by a state document called the "Criminal Intelligence Report," which contained an explicit policy targeting Black motorists.<sup>22</sup>
- A study of traffic stops on the New Jersey Turnpike between 1988-1991 found that Blacks were 35 percent of those stopped, though only 13.5 percent of the cars on the turnpike had a Black occupant and Blacks were only 15 percent of all traffic violators.<sup>23</sup> A 1999 State Attorney General's Report studying Turnpike stops and searches in 1997-1998 concluded that almost 80 percent of searches involved Blacks and other minorities.<sup>24</sup>
- In the early 1990's, an investigation of the practices of the Volusia County, Florida Sheriff's Department revealed that although Blacks or Hispanics were only five percent of the drivers on a portion of I-95 that ran through the county, they were nearly 70 percent of drivers stopped

on that stretch of highway. Blacks and Hispanics were not only stopped more than Whites, they were also stopped for longer periods of time than Whites.<sup>25</sup>

Recent studies confirm the persistence of the "driving while Black or brown" phenomenon. LAPD data for the period July-November 2002 reveals that while Blacks comprised only 10 percent of the overall population of Los Angeles, they were 18 percent of those subjected to traffic stops. Moreover, 22 percent of Blacks who were stopped were asked to step out of their cars, as compared to only seven percent of Whites stopped. Once out of their cars, 67 percent of Blacks were patted down and 85 percent subjected to a body search. Fifty-five percent of Hispanics removed from their cars were patted down and 84 percent searched. By contrast, only 50 percent of Whites were patted down and 71 percent searched.<sup>26</sup>

Statistics from Massachusetts for the period April 2001-November 2002 are consistent with these findings. Black and Hispanic drivers in the state were ticketed at about twice their share of the population (10 percent of the ticketed versus 4.6 percent of the population for Blacks, 9.6 percent of the ticketed versus 5.6 percent of the population for Hispanics). After ticketing, Blacks and Hispanics were 50 percent more likely than Whites to have their cars searched.<sup>27</sup>

A study of 2001 traffic stops in San Diego found similar results. African Americans comprise seven percent of the city's estimated driving population, but are 10 percent of those stopped and 16 percent of those searched. Hispanics comprise 22 percent of the driving population, but are 28 percent of those stopped and 50 percent of those searched. Whites, by contrast, are 55 percent of San Diego's driving population, but only 50 percent of those stopped and 29 percent of those searched.<sup>28</sup> Finally, vehicle searches made by the Colorado State Patrol in 2002 revealed disproportionate targeting of Hispanics: Hispanics were thirty-three percent of those searched, though only 17 percent of Colorado's population is Hispanic.<sup>29</sup>

While these studies all focus on state or local law enforcement agencies, the United States government bears significant responsibility for the "driving while Black or brown" phenomenon. The Volusia County program discussed above was part of a network of drug interdiction programs established and funded by federal authorities under the name "Operation Pipeline." Law enforcement officers participating in Operation Pipeline were encouraged by federal authorities to use race as a factor in determining who might be involved in illegal drug activity.<sup>30</sup> And it was the Drug Enforcement Agency that encouraged New Mexico state police to use a "cocaine courier profile," one element of which was that "[t]he vehicle occupants are usually resident aliens from Colombia."<sup>31</sup>

Traffic stops account for 52 percent of contacts between police and American citizens.<sup>32</sup> Disparities in vehicle stops and searches therefore are instrumental in defining the treatment of minorities by law enforcement generally and informing perceptions of the fairness of the criminal justice system.

## 2. "Stop and Frisk" Tactics

Just as minority *motorists* are subject to profiling, so too are minority *pedestrians*. This is especially true with the advent of community-based policing strategies, which often provide street level law enforcement officers with wide discretion to "clean up" the communities they patrol by whatever means seem expedient. As Professor Angela Davis has noted, "The practical effect of this deference [to law enforcement discretion] is the assimilation of police officers' subjective beliefs, biases, hunches, and prejudices into law."<sup>33</sup> And, as in the motor vehicle context, such discretion in the pedestrian context is exercised to the detriment of minorities, who are perceived to pose a threat to public safety even if they have done nothing wrong. African American Harvard Law Professor Charles Ogletree says, "If I'm dressed in a knit cap and hooded jacket, I'm probable cause."<sup>34</sup>

The "stop and frisk" practices of the New York City Police Department in the 1990's demonstrate how community policing can turn into racial profiling. Predictably, Black and Hispanic New Yorkers were disproportionately targeted for stop and frisk patdowns. A December 1999 report by the New York State Attorney General found that of the 175,000 stops engaged in by NYPD officers from January 1988 through March 1999, almost 84 percent were of Blacks and Hispanics, despite the fact that those groups made up less than half of New York City's population. By contrast, only 13 percent of the stops were of White New Yorkers, who make up 43 percent of the city's population. The state Attorney General also identified racial disparities in stop rates within White neighborhoods - in precincts that were approximately 90 percent White, more than 53 percent of the total stops were of Blacks and Hispanics. Thus, more stops of minorities occurred in general in the city, and more stops of minorities than of Whites occurred even in majority-White neighborhoods.<sup>35</sup>

Recent pedestrian stop statistics from Los Angeles are consistent with those from New York City. While Blacks make up only 11 percent of the population of Los Angeles, they were subjected to 36 percent of the pedestrian stops. Meanwhile Whites, who make up 30 percent of the city's population, were subjected to only 18 percent of the stops. Only 24 percent of Whites who were stopped in Los Angeles were searched, while nearly half of Blacks and Hispanics stopped were searched. Overall, Whites were 11 percent of those searched, Blacks 40 percent, and Hispanics 46 percent.<sup>36</sup>

Racial profiling of pedestrians in New York has contributed to several well-publicized tragedies in recent years. Amadou Diallo was a young Black man living in a predominantly minority neighborhood in New York City. On the night of February 4, 1999, Diallo was approached by four NYPD officers as he stood by the front steps of his apartment building. He reached for his wallet to produce identification, and the police officers, thinking that Diallo was reaching for a gun, fired 41 gunshots and killed him. Testifying in his own defense, one of the officers who shot Diallo noted that "[t]he way he was peering up and down the block" had made the officers suspicious. "He stepped backward, back into the vestibule as we were approaching, like he didn't want to be seen ... and I'm trying to figure out what's going on. You know - what's this guy up to? I was getting a little leery, from the training, of my past experience of arrests, involving gun arrests."<sup>37</sup> It is hard to imagine that Diallo's race did not contribute to the officers' unwarranted suspicions.

The same assumptions that lead police to engage in disproportionate stops of minority drivers leads them to engage in disproportionate stops of minority pedestrians. For Amadou Diallo and others like him, these assumptions produced tragic results. The Diallo case made headlines throughout the country, but countless incidents that do not result in death occur every day and escape public notice. These incidents contribute to a well-grounded fear among minorities that the police will assume the worst about them, and on a dark street corner that assumption can be fatal.<sup>38</sup>

### ***3. Customs Service Profiling***

Racial profiling at U.S. ports of entry has long been commonplace. Drug courier profiles used by the Customs Service have regularly included race as a factor in guiding law enforcement discretion. Anecdotal and, later, statistical evidence revealed that the Customs Service was disproportionately targeting Black women as part of its drug interdiction efforts, based on the assumption that Black women were likely to act as couriers of drugs into the United States.

The experience of Yvette Bradley is illustrative. On April 5, 1999, Ms. Bradley, an advertising executive, returned to the United States from a vacation to Jamaica with her sister. While going through customs at Newark International Airport, Ms. Bradley and her sister were both drawn aside for searches of their luggage - searches which, they noticed, were being carried out on large numbers of Black female passengers, but few White females. After her luggage had been searched, Ms. Bradley was directed to a room off to the side of the customs clearance area. In that room, Ms. Bradley was subjected to a humiliating body search, which included a (female) Customs agent touching her breasts and genital area and actually penetrating her. The search turned up nothing.<sup>39</sup>

A 2000 General Accounting Office Report on U.S. Customs Service practices confirmed Ms. Bradley's perception that Black females were being targeted for searches by Customs officials. Data from 102,000 personal searches conducted by the Customs Service in 1997-1998 revealed that in Fiscal Year 1998, Black female U.S. citizens were nine times more likely, and Hispanic female U.S. citizens four times more likely, than White female U.S. citizens to be x-rayed on suspicion of drug smuggling.<sup>40</sup> Black women were also more likely than any other groups to be strip-searched. Black and Hispanic men and women were more likely overall to be x-rayed after being patted down or frisked than White men and women.<sup>41</sup>

### ***4. Profiling in the Immigration Context***

The United States is a nation of immigrants. Nevertheless, immigration enforcement policies have often targeted specific groups of immigrants for disproportionate and improper attention. As discussed in Chapter III, since September 11, Arabs and Muslims have been the focus of selective and unfair immigration enforcement. And America's immigration policies have long been premised on the view that Hispanics make up the majority of undocumented persons in the United States and that, therefore, any given Hispanic in the United States may well be here illegally. These presumptions were given legal

foundation by the United States Supreme Court, which in 1975, relying on statistical data that Mexicans were 85 percent of the undocumented persons in the United States, held that a police officer may rely on an individual's perceived Mexican appearance in determining whether to make a stop.<sup>42</sup>

The immigration context has been fertile ground for profiling against Hispanics. A 1999 study by the National Council of La Raza identified a pattern of selective enforcement of U.S. immigration laws by the Immigration and Naturalization Service and local officials. Individuals who appear to be of Hispanic origin - even if they are U.S. citizens, legal permanent residents or otherwise lawfully in the United States - have been targeted by authorities and subjected to interrogation and detention for suspected violations of immigration or criminal laws.<sup>43</sup>

An example of such targeting was "Operation Restoration" in Chandler, Arizona, a 1997 joint endeavor between the Chandler Police Department and the U.S. Border Patrol. According to a study by the Arizona Attorney General, local police and Border Patrol officers implementing Operation Restoration "without a doubt . . . stopped, detained, and interrogated [Chandler residents] . . . purely because of the color of their skin."<sup>44</sup> Recent evidence further supports the conclusion that immigration enforcement efforts rely on profiling. A 2001 New York Times report revealed that INS agents in New York City often relied in whole or in part on race, Spanish accent, and other racial or ethnic characteristics in determining whether to undertake investigations.<sup>45</sup>

Immigration-related profiling of Hispanics does not just occur at the border, but also in the interior of the country. For example, litigation in Ohio revealed that the State Highway Patrol, an agency with no official role whatsoever in immigration enforcement, engaged in the practice of stopping Hispanics and seizing without cause their green cards in an effort to determine if they were violating immigration laws.<sup>46</sup>

The statistics cited by the U.S. Supreme Court over a quarter-century ago in *Brignoni-Ponce* are obsolete: Hispanics now constitute a much larger percentage of the legal U.S. population than they did in 1975 and a smaller percentage of the population of undocumented persons in the United States than at that time. In the 1990's alone, the Hispanic population of the United States grew by 38 percent.<sup>47</sup> The majority of Hispanics in the United States are citizens.<sup>48</sup> Nevertheless, the statistics demonstrate that INS has continued to focus disproportionate enforcement energy on Hispanics, especially those of Mexican ancestry. While Mexicans constituted less than half of the total number of undocumented persons in the United States in 1996, they were nearly three-quarters (73.5%) of those deported in that year. While Hispanics in 1996 constituted about 60 percent of all undocumented persons in the United States, they were over 90 percent of those subjected to INS enforcement actions.<sup>49</sup>

In his book *Profiles in Injustice*, Professor David Harris, an expert on racial profiling, recounts the story of U.S. District Judge Filemon Vela and his encounters with Border Patrol agents. On several occasions, agents stopped cars Judge Vela was driving or riding in and, without any basis for believing he was in

the United States illegally, questioned him and others in the car (including members of his staff and an Assistant U.S. Attorney) about their immigration status.<sup>50</sup> Judge Vela realized that if the Border Patrol could stop and question without legal basis a federal judge and prosecutor, they could do it to anyone and that this development would be disastrous for our constitutional system.<sup>51</sup> Experience has proven Judge Vela right on both counts.

## **B. The Myths Behind Traditional Racial Profiling**

Those who continue to defend "traditional" racial profiling argue that profiling is a rational response to patterns of criminal conduct. These arguments rest implicitly or explicitly on two assumptions, each of which is not only flawed, but also pernicious and divisive.

The first assumption is that minorities commit the majority of crimes and that it is therefore a sensible use of police resources to focus on the behavior of those individuals. Carl Williams, Superintendent of the New Jersey State Police until his dismissal in March 1999, who stated in defense of racial profiling that "mostly minorities" traffic in marijuana and cocaine, epitomized this attitude.<sup>52</sup> The assumption, shared by many, that minorities commit most crimes is flatly incorrect with respect to those crimes most commonly associated with racial profiling - drug crimes. Blacks and Hispanics commit drug offenses at a rate generally proportional to their percentage of the United States population: African Americans represent approximately 12 to 13 percent of the U.S. population and, in 2000, 11 percent of all illicit drug users.<sup>53</sup> Similarly, while Hispanics constitute about 13 percent of the United States population,<sup>54</sup> they were, in 2000, 10 percent of illicit drug users.<sup>55</sup> While involvement in drug *trafficking* is harder to measure, a National Institute of Justice report indicates that drug users tend to purchase from members of their own racial or ethnic group, which suggests that use rates and trafficking rates are likely to be similar.<sup>56</sup> And for the past two decades, drug use among Black youths has been consistently *lower* per capita than among White youths.<sup>57</sup>

These conclusions are borne out by data on traffic stops and other forms of racial profiling, which almost uniformly reveal that "hit rates" (i.e., discovery of contraband or evidence of other illegal conduct) among minorities stopped and searched by the police are *lower than or the same as* hit rates for Whites who are stopped and searched. For example:

- According to a Department of Justice survey of 1999 traffic stops, officers found contraband more often when they searched Whites than when they searched African Americans (17 percent versus eight percent).<sup>58</sup>
- In 2000, New Jersey State troopers found contraband during stops of White-driven vehicles 25 percent of the time, while they found contraband during stops of Black-driven vehicles 13 percent of the time and Latino-driven vehicles only 5 percent of the time.<sup>59</sup>
- According to the GAO report on U.S. Customs Service practices, while Black female U.S. citizens were nine times as likely to be x-rayed following a frisk or pat-down as White female

U.S. citizens, they were less than half as likely to be found to be carrying contraband after these x-rays.<sup>60</sup>

- According to the New York Attorney General's Report on NYPD "stop and frisk" practices, stops of minorities were less likely to yield arrests than stops of Whites. The NYPD arrested one White New Yorker for every eight stops, one Hispanic New Yorker for every nine stops, and one Black New Yorker for every 9.5 stops. The statistics for stops engaged in by the NYPD's plain clothes Street Crimes Unit were even starker - this unit stopped 16.3 Blacks per arrest, 14.5 Hispanics per arrest, but only 9.7 Whites per arrest.<sup>61</sup>
- Recent data from the LAPD indicates that while White pedestrians were stopped and searched by LAPD less per capita than Black or Hispanic pedestrians, the hit rates for all three populations were about the same: 21 percent of White pedestrians who were searched by LAPD were found in possession of evidence of a crime, as compared to 22 percent of Blacks and 20 percent of Hispanics.<sup>62</sup>
- Traffic stop data from Massachusetts from April 2001-November 2002 reveals that 16 percent of Whites searched were charged with a drug offense, as compared to 12 percent of Blacks and 10 percent of Hispanics, despite the fact that both Blacks and Hispanics were stopped and searched more than Whites.<sup>63</sup>

These "hit rate" statistics render implausible any defense of racial profiling on the ground that minorities commit more drug crimes than White Americans.

The argument, made by some defenders of profiling, that minorities commit more violent crimes than Whites ignores the nature of racial profiling, which has nothing to do with violent crime.<sup>64</sup> In the violent crime context, profiling is rare because it is unnecessary - such crimes typically feature a complaining victim who provides police with a specific suspect description. Profiling is used to address crimes *without* complaining witnesses, in particular drug possession and trafficking offenses.<sup>65</sup> And while there is clearly a connection between certain acts of criminal violence and the drug trade, the incidence of violent crime is less a function of who uses or sells drugs than of who lives in poor and dangerous neighborhoods.<sup>66</sup> The data is unassailable: stopping and searching Blacks or Hispanics at a disproportionately high rate *will not* yield more drug arrests. In fact, the opposite is often true.

The baseless assumption that most criminals are minorities is accompanied by the second, equally flawed assumption that many, or most, minorities are criminals. The premise of racial profiling is that random checks of Blacks or Hispanics are likely to yield evidence of a crime. But there is no basis for that assumption. Even after being disproportionately targeted for stops and searches, most Blacks are not arrested because the vast majority of those stopped are innocent of the suspected criminal conduct. Less than 10 percent of all Blacks are even arrested in a single year.<sup>67</sup> The overwhelming majority of minorities in the United States - like the vast majority of Whites - are law-abiding citizens. The hit rate data discussed above amply demonstrates this point.

A third assumption sometimes relied on by proponents of the particular practice of pretextual traffic stops is that minority motorists are more likely to speed than White motorists and that police are therefore justified in pulling over minorities at a disproportionate rate.<sup>68</sup> Even if this were true (and studies such as Professor John Lamberth's in Maryland and New Jersey prove otherwise), differences in driving between minorities and Whites cannot explain away the practice of racial profiling, for several reasons.

First, data on speeding does not take into account the fact that motorists are pulled over for any number of traffic violations that do not involve speeding. Many minority motorists, including several identified in this Report, have been pulled over for pretextual traffic offenses other than speeding. As Professor Harris has noted, the traffic code is a law enforcement agent's best friend because virtually anyone can be found to have violated it in some way at almost any time.<sup>69</sup>

Second, data on speeding cannot explain why Black and Hispanic motorists, once stopped by the police, are *searched* at a disproportionately higher rate than Whites. A traffic offense alone does not give a police officer the right to search a car. To have the right to search, the officer must observe something that gives him or her probable cause to believe a crime is afoot or must ask the driver for permission to search. Racial disparities in the incidence of consensual searches, as demonstrated above, cannot be explained by differences in driving patterns and furnishes the best evidence of profiling.

Finally, explaining disparities in traffic stops with speeding data is naïve. Police use traffic stops as a *pretext* to investigate other types of criminal activity. Their decisions about who to stop - like their decisions about who to search - are premised less on who violates the traffic laws than on whom they baselessly assume is engaged in more serious criminal activity.

### **C. The Consequences of Racial Profiling**

The assumptions that most criminals are minorities and that most minorities are criminals, and the racial profiling that flows from these assumptions, have extreme negative consequences.

#### **1. The Innocent**

By "racializing" crime and "criminalizing" race, law enforcement officials place the burden of law enforcement on minorities who are investigated but found entirely innocent of any wrongdoing. For every person in possession of drugs who is apprehended through profiling, many more law-abiding minorities are treated as if they were criminals. The humiliation experienced by a person who has been unfairly profiled cannot be overstated.

In June 1993, Larry Sykes, a Black vice president of a Toledo, Ohio bank, was driving home from an economic development conference in Cleveland when he was pulled over because his car had no front

license plate. Mr. Sykes' paperwork was in order, but the officer, instead of simply issuing a ticket or warning, started frisking him and asked if he was carrying any drugs or weapons. After Mr. Sykes questioned the basis for these inquiries, the officer ordered him to stand next to the car with his legs spread and his hands on top of the car. As Mr. Sykes took this position, a bus full of his fellow Cleveland conference delegates drove by and witnessed him being treated as a common criminal. Sykes was released without a ticket, citation, warning or apology, and said later: "I never felt so degraded, humiliated and belittled in all my life."<sup>70</sup>

Mr. Sykes' feelings are not unique. Texas State Judge Gilberto Hinojosa, the subject of immigration-related profiling on many occasions, has stated that Southern Texas "feels like occupied territory . . . It does not feel like we're in the United States of America."<sup>71</sup> Such alienation is a common consequence of being profiled.

Exposure to profiling has behavioral as well as emotional consequences. Many African Americans and other minorities choose to drive in certain cars and on certain routes, and to dress in certain clothes, in order to avoid drawing the attention of police.<sup>72</sup> Or they choose to live in areas where they will not stand out as much, thereby reinforcing patterns of residential segregation.<sup>73</sup> A 1999 Gallup Poll revealed that 42 percent of African Americans, and 72 percent of African American males between the ages of 18 and 34, believe they have been stopped by police because of their race.<sup>74</sup> For African Americans, Hispanics, and other minorities, this is a way of life.<sup>75</sup>

## **2. The Guilty**

Defenders of profiling who claim that minorities commit more crimes and therefore deserve special attention from the authorities point to statistics showing that America's prison population is predominantly composed of minorities. What they fail to acknowledge, however, is that racial profiling itself contributes to the disparity in arrest and crime rates that, in turn, leads to the minority-majority prison population. Racial profiling becomes a self-fulfilling prophecy. As Professor David Harris has written:

Because police will look for drug crime among Black drivers, they will find it disproportionately among Black drivers. More Blacks will be arrested, prosecuted, convicted, and jailed, thereby reinforcing the idea that Blacks constitute the majority of drug offenders. This will provide a continuing motive and justification for stopping more Black drivers as a rational way of using resources to catch the most criminals.<sup>76</sup>

And, indeed, this prophecy has come to pass. As noted earlier, while Blacks are just 12 percent of the U.S. population and 11 percent of drug users, and despite the fact that racial profiling yields no more (and often fewer) arrests of minorities than of Whites for drug crimes, Blacks are 38 percent of those arrested for drug offenses and 59 percent of those convicted for drug offenses.<sup>77</sup> Similarly, while Hispanics make up about 13 percent of the population and 10 percent of illicit drug users, they are 37

percent of the overall prison population.<sup>78</sup> Moreover, more frequent stops and then arrests of minorities also result in longer sentences for minorities because disproportionate arrest rates generate more extensive criminal histories for minorities, which in turn influence sentencing outcomes.<sup>79</sup>

The end result is a lost generation of African American, Hispanic, and other minority males. Almost one in three Black males aged 20-29 is on any given day under some form of criminal supervision - either in prison or in jail, or on probation or parole.<sup>80</sup> As of 1995, one in 14 adult Black males was in prison or jail on any given day.<sup>81</sup> And a Black male born in 1991 has a 33 percent chance of spending part of his life in prison. A Hispanic male born in 1991 has a one in six chance of spending time in prison.<sup>82</sup>

There are also collateral consequences to the burgeoning minority prison population. In 46 states and the District of Columbia, convicted adults in prison cannot vote. Thirty-two states also disenfranchise felons on parole, while 29 states disenfranchise felons on probation. Because of the disproportionately large percentage of convicted Black criminals, a circumstance to which profiling contributes, 1.4 million Black men - 13 percent of all adult Black males - are denied the right to vote. In two states, 31 percent of all adult Black males are permanently disenfranchised.<sup>83</sup> Thus, profiling rolls back one of the hardest-fought gains of the civil rights movement - the right to vote.

Finally, the massive incarceration of minority males has an extreme destabilizing effect on minority communities. It skews the male-female ratio in those communities, increases the likelihood that children will not be raised by both parents, and contributes to the fragmentation of inner city neighborhoods that renders the crime-race linkage a self-fulfilling prophecy.<sup>84</sup>

### **III. Profiling and Terrorism**

The terrible events of September 11, 2001 have left an indelible mark on the profiling debate. In response to the attacks, the federal government has engaged in a sweeping anti-terror campaign focused almost exclusively on individuals who are of Arab or South Asian descent, Muslim, or Sikhs.<sup>85</sup> Many of the tactics in this campaign amount to racial profiling - that is, they involve the use of racial, religious or ethnic stereotypes by law enforcement officials in determining who to target as part of the anti-terrorism effort. The anti-terror campaign has prevented any rational discussion of profiling generally - including traditional profiling, which as demonstrated by the data from Los Angeles, San Diego, Colorado, and Massachusetts, continues unabated since September 11. The suggestion is that one cannot condemn racial profiling because to do so will hinder the war on terrorism and undermine national security.<sup>86</sup>

The argument that racial profiling cannot be addressed without compromising the anti-terrorism effort is fundamentally wrong because it incorrectly assumes that profiling is necessary and useful to that effort. The opposite is true: terrorism profiling is a flawed law enforcement tactic that diverts precious anti-terrorism resources, alienates potential allies in the anti-terrorism struggle, and is inconsistent with cherished notions of freedom and equality. Certainly, if terrorism profiling does not work, its use to

fight terrorism is no defense to its use in the effort to fight street crimes. The only conclusion that can be drawn from a review of terrorism profiling is that these practices are no more workable or acceptable in the terrorism context than in the "traditional," street-level context. Racial profiling in any manifestation is a flawed law enforcement tactic that is in direct conflict with constitutional values.

Any discussion of what to do about terrorism must of course acknowledge the need for heightened security and increased vigilance against the terrorist threat. It should also be acknowledged that suspicion directed at Arabs, South Asians, and Muslims in the wake of September 11 - like the suspicion that Blacks, Hispanics and other minorities are linked to street-level criminal activity and immigration violations -- is rarely motivated by overt racism.<sup>87</sup> Rather, much of the support for post-September 11 profiling against Arabs, South Asians, Muslims, and Sikhs, is motivated by the confusion and anxiety that has gripped the nation since the terrorist attacks. Americans are unaccustomed to living under siege and the threat of continuing terrorist attacks by al Qaeda and others has caused inappropriate and unfair action by the state (and also by private citizens) toward those perceived to pose the threat.

Nevertheless, selectively targeting Arabs, Muslims, South Asians, and Sikhs for increased law enforcement attention based on race, ethnicity, or religion is flawed for three reasons. First, such profiling is based on the same kinds of myths about particular groups and their propensity for particular criminal activity that fuel traditional, street-level profiling. Second, like street-level profiling, terrorism profiling is simply not an effective tool against the illegal activity it is designed to stop. Third, like traditional profiling, terrorism profiling and the selective enforcement of immigration laws that accompanies it are inconsistent with basic constitutional principles.

## **A. Forms of Terrorism Profiling**

### **1. "Driving While Arab"**

As demonstrated by the account of the Indian American motorist set forth in Chapter I, "driving while Arab" has joined the profiling lexicon alongside "driving while Black" and "driving while brown" since September 11. Arabs, Muslims, South Asians, and Sikhs are now subjected to traffic stops and searches based in whole or in part on their race, ethnicity, or religion due to law enforcement perceptions that they are likely participants in terrorist activity. For example:

- On October 4, 2001, in Gwinnett, Georgia, an Arab American motorist was pulled over by a patrol car following an illegal U-turn. The police officer approached the car with gun drawn. He ordered the motorist out of his car, searched him, threatened him, and called him a "bin Laden supporter."<sup>88</sup>
- On December 5, 2001, in Burbank, Illinois, a veiled Muslim woman was stopped by a police officer for driving with suspended plates. After she showed the officer her license and regis-

tration, as requested, the officer allegedly asked her when Ramadan would be over. She was arrested for driving with suspended plates, was pushed by the officer as she got in the patrol car, and was asked inappropriate questions about her hair by the officer. The woman was released later that day.<sup>89</sup>

- On October 8, 2001, in Alexandria, Virginia, two police officers stopped an Arab American motorist and his two Arab American passengers, questioned them about the verse of the Koran hanging from the car's rear view mirror, and inquired about documents and photocopies in the backseat. After asking for and receiving the motorist's and passengers' identification cards, the police officer returned to his car and drove off without explanation. He returned 10 minutes later, explaining that he had had to take another call.<sup>90</sup>

As in the traditional profiling context, other types of stops have become occasions for profiling in the terrorism context. On September 12, 2001, Providence, Rhode Island police stormed an Amtrak train and removed four men, including Sher J.B. Singh, a Sikh man who was carrying a Kirpan, a blunt ceremonial dagger that must be carried by Sikh men as part of their religion. All the men were released except for Mr. Singh, who was arrested for carrying a concealed weapon.<sup>91</sup> According to the man, he was strip-searched and asked by one of the officers, "How is Osama Bin Laden?"<sup>92</sup>

To be sure, many law enforcement agencies have aggressively investigated hate crimes against Arabs, Muslims, South Asians, and Sikhs, and have otherwise shielded them from abuse and intolerance.<sup>93</sup> But some state and local law enforcement officers are clearly acting on the basis of assumptions about the propensity of certain racial, ethnic and religious groups to engage in terrorism -- in the same way they have long assumed African American or Hispanic involvement in drug crimes and immigration violations -- and in the process are stopping, searching, and arresting many innocent people. While the "driving while Arab" phenomenon is recent enough that detailed statistical data does not exist on this subject, there is no evidence to suggest that traffic stops of Arabs, Muslims, South Asians, or Sikhs have yielded a significant number of arrests for terrorist activity.

## **2. Detentions and Deportations**

A particularly disturbing form of terrorism profiling has been the federal government's use of race as a basis for the detention without due process of Arabs, Muslims and South Asians and its subsequent use of the anti-terrorism investigation as a vehicle for the disproportionate application of U.S. immigration laws against detainees who are found to be innocent of any terrorist activity.<sup>94</sup>

In the wake of September 11, the United States detained hundreds - perhaps thousands - of Arabs, South Asians and Muslims on suspicion of terrorist activity.<sup>95</sup> Almost none of these individuals were ultimately found to have been in any way involved in terrorism. Yet many continued to be held without being formally charged with any crime or immigration violation. For example, two Pakistani immigrants were arrested on October 2 and detained for 49 days before being charged with overstaying their

visas.<sup>96</sup> In another case, an Israeli of unidentified ethnic background was held for 66 days before being charged with entering the country illegally.<sup>97</sup> Many of those who were ultimately charged with immigration violations were held to be deportable based on relatively trivial offenses. One Palestinian man was detained and charged for failing to notify INS of a change of address; and a Pakistani was detained and charged with helping some illegal immigrants find housing.<sup>98</sup> It has been reported that during some of the often unexplained detentions, law enforcement officials "interrogated [the detainees] rudely and even abusively, limited their access to families and lawyers severely, threw them into jails where guards and other prisoners taunted and (in at least one case) badly beat them, kept them behind bars long after abandoning any claim that they were terrorists, and offered those released little explanation, no apologies, and no compensation."<sup>99</sup>

The story of Ali al Maqtari, a French teacher from Yemen, provides a chilling example of what many Arabs and Muslims have faced since September 11. Mr. al Maqtari was married on June 1, 2001 to an American citizen and was therefore himself eligible for citizenship. On September 15, 2001, Mr. al Maqtari and his wife drove up to the Fort Campbell, Kentucky, U.S. army base so that she could report for duty as a new recruit. Federal agents descended on them, separated them and questioned Mr. al Maqtari for 12 hours. The federal agents falsely accused Mr. al Maqtari of violating the immigration laws, abusing his wife, and conspiring with terrorists from Russia; claimed to have evidence against him which proved not to exist; and threatened him with beatings. Even after polygraph tests showed that he was telling the truth, but after INS and FBI officials indicated he would be freed, Mr. al Maqtari was held for an additional seven weeks, during which time he was housed with hardened criminals in two separate jails, taunted by guards, and limited to one phone call per week.<sup>100</sup> Mr. al Maqtari's experience supports the conclusion of Amnesty International that "a significant number of detainees continue to be deprived of certain basic rights guaranteed under international law."<sup>101</sup>

Since September 11, race, ethnicity and religion have become proxies for suspected terrorist activity, which in turn has become a pretext for the application of immigration laws in an unequal manner toward Arabs, South Asians, and Muslims.<sup>102</sup> Along the way, the federal government has treated many of these individuals in a manner that shocks the conscience and would not have been tolerated before September 11.<sup>103</sup>

### ***3. The Questioning of Arab Men***

In the fall of 2001, in the immediate aftermath of September 11, the federal government announced a nationwide campaign to question the thousands of Arab men who had entered the United States after January 1, 2000 on non-immigrant (i.e., student, tourist, or other temporary) visas. The government acknowledged that none of these men were individually suspected of wrongdoing, but stated that the questioning was designed to uncover leads that might prove useful to the anti-terrorism struggle. Of course, the only link drawn by the federal government between terrorism and the interviewees was that the men were all Middle Eastern.

Attorney General Ashcroft emphasized that the interviews were voluntary and friendly. But internal DOJ memoranda suggesting that interviewees could be held on bond if authorities developed an interest in them belied these representations.<sup>104</sup> And indeed, the authorities detained about 20 men who were questioned, although in each case only for immigration violations, not on suspicion of terrorist activity.<sup>105</sup>

In planning these interviews - which were expected to number 5000 in late 2001 and an additional 3000 in early 2002 - the federal government sought the support of state and local governments and law enforcement agencies. In a stunning reversal, many of these state and local offices balked at assisting federal authorities, arguing that to single out Arab men for questioning amounted to racial profiling.<sup>106</sup> Nevertheless, the interviews were carried out as planned. Ninety percent of those sought for questioning appeared and were interrogated about their political and religious beliefs and those of their families; whether they sympathized with the September 11 hijackers; whether they had any scientific or weapons training; and where they had traveled. It is not believed that any person interviewed provided any useful information to law enforcement authorities,<sup>107</sup> although Attorney General Ashcroft claimed that the interviews "generated a significant number of leads . . . into the September 11 attacks . . . fostered new trust between law enforcement' and the Arab and Muslim communities, and helped to disrupt potential terrorist activities." <sup>108</sup>

#### **4. Alien Registration Requirements**

Most forms of profiling, such as "driving while Black," feature the exercise of law enforcement discretion based on certain assumptions about the propensity of a particular group toward certain criminal behavior. This discretion is exercised on a case-by-case basis at the point of contact. That is, the officer observes and decides to take action against a person who the officer believes, based on the assumptions under which he operates, is likely to engage in criminal activity.

But profiling can also occur at a more general level, when a law enforcement institution makes the determination that an entire group of people is so dangerous that all persons in that group should automatically receive heightened attention. In such cases, profiling is not a function of the exercise of law enforcement discretion, but represents the absence of law enforcement discretion.

An example of this type of profiling is the alien registration program, which went into effect in late 2002. The program enforces a requirement that foreign visitors to the United States register with the INS and keep law enforcement apprised of their whereabouts. The Justice Department claims that the registration program will eventually cover visitors from all foreign countries, but the first individuals subjected to the requirements were visitors from five Arab or Muslim countries - Iran, Iraq, Syria, Sudan, Libya - and those from North Korea - who were required to register by December 16, 2002. Pakistan, Indonesia, and Saudi Arabia were later added to the original list and, overall, the program has now been extended to cover 25 countries, 24 of which have significant Arab and/or Muslim populations.<sup>109</sup> Registrants are required to re-register annually.

When the program was announced, Justice Department officials defended it on the grounds that the requirements were merely administrative measures that would assist the anti-terrorism struggle by helping authorities keep track of visitors to the United States - not as a vehicle for prosecuting or investigating these individuals for activity unrelated to terrorism. These representations proved false. Almost immediately after the registration requirements went into effect, the government began to detain registrants found to have been guilty of immigration violations, not terrorism. According to reports, 500-1000 registrants were detained in the Los Angeles/Orange County area alone when they attempted to meet the initial December 10 registration deadline.<sup>110</sup>

Many of the detainees had committed only minor immigration infractions, had experienced delays or difficulties in adjusting their status to citizen or legal permanent resident, and/or had been living in the United States legally for years, often with spouses and families. In one such case, a Moroccan man living in the Washington, D.C., area with an application for legal permanent residency pending was handcuffed, placed in leg irons, and held in a county jail overnight. He now faces deportation, even though he was not found to be connected at all to terrorism.<sup>111</sup>

Most of the detainees have been released, but problems linger with the registration program in general. Some registrants have reported being subjected to verbal abuse and taunting by government officials. According to the relative of one anonymous registrant, officials at one Florida registration site mockingly offered ham sandwiches to hungry registrants who had been held for hours and interrogated about their immigration status and suggested that the registrants wash their hands in "camel's milk" before being fingerprinted.<sup>112</sup>

The recent experience of Ejaz Haider, an editor at one of Pakistan's most respected English-language news magazines and a visiting research fellow at the Brookings Institution, demonstrates the twisting of INS registration programs into vehicles for the unfair treatment of Arabs, South Asians, and Muslims under the guise of counter-terrorism. Pursuant to INS regulations, Mr. Haider registered in the United States upon his arrival and was told to report for an interview within 40 days. Mr. Haider subsequently checked with both the State Department and INS and was told that in fact that he did not have to report for the interview. On January 28, however, Mr. Haider was accosted by two INS agents in front of the Brookings Institution, taken into custody, fingerprinted, photographed, and told that he would spend the night in jail. Only the intervention of Mr. Haider's colleagues at Brookings and the Pakistani Foreign Minister caused his release and saved him further hardship.<sup>113</sup> Most visitors to the United States are not so well-connected and have been forced to endure even more extreme hardship and embarrassment, for no other reason than that they come from Arab, South Asian, or Muslim countries.<sup>114</sup>

The registration program has not only become another pretext for the disproportionate targeting of Arabs, South Asians, and Muslims. There is also no evidence that the program has been useful to the anti-terrorism struggle.<sup>115</sup> In fact, as The Washington Post has pointed out, "The bait and switch, which punishes and humiliates those who tried to follow the rules, can only undermine the purpose of the registration program."<sup>116</sup>

## 5. "Flying While Arab"

This Report does not attempt to cover hate crimes and other acts of private discrimination against Arabs, Muslims, South Asians, and Sikhs after September 11, simply because such actions, while deplorable, do not qualify as "profiling" by law enforcement officials. However, there is one area of discrimination, while technically not "profiling" is closely analogous: the practice by airport screeners targeting Arabs, Muslims, and those thought to be Arab and Muslim for extra scrutiny - the so-called "flying while Arab" phenomenon.

Until the implementation of the Aviation and Transportation Security Act ("ATSA") in 2002,<sup>117</sup> airport screening and security activities had both a public and private component: these activities were undertaken by the airlines and airports, but under Federal Aviation Administration supervision. Since the implementation of ATSA, the government has become directly responsible for airport security. Thus, while much of the discriminatory treatment of Arabs, South Asians, Muslims, and Sikhs at U.S. airports began with actions by private security officials (though some then featured the intervention of public law enforcement officials), future security efforts will be undertaken by the federal government. It remains to be seen whether the "flying while Arab" syndrome will persist under the new federal system.

Discrimination against Arabs, South Asians, Muslims, and Sikhs at U.S. airports as part of anti-terrorism efforts did not begin after September 11. The phenomenon of "flying while Arab" has been part of the profiling landscape since the late 1980's. In particular, the bombing of Pan Am flight 103 over Lockerbie, Scotland in 1988, which was perpetrated by Arab terrorists, caused many Americans to link the threat of airline-related terrorism with Arabs. By the mid-1990's, the popular association of Arabs and Muslims with terrorist activities caused the American public to immediately suspect Arab and/or Muslim involvement whenever an unnatural disaster of significant proportions occurred. In the wake of the Oklahoma City bombing in 1995, law enforcement officials immediately posted bulletins looking for Arabs and/or Muslims, and authorities detained a Jordanian.<sup>118</sup> That terrorist attack, of course, turned out to be the work of an Anglo-American, Timothy McVeigh. Similarly, the 1996 crash of TWA flight 800 off Long Island was initially attributed to Arab terrorists by many, but ultimately attributed to equipment malfunction. After that crash, large numbers of Arab Americans, Muslims, and other Middle Eastern-looking airline passengers were subjected to harsh questioning, demeaning treatment, and searches of their personal possessions. Some were told that they were receiving special treatment because they "fit a profile."<sup>119</sup>

Discriminatory screening and abusive treatment of Arabs and Muslims by airport personnel continued well into the 1990's.<sup>120</sup> The FAA attempted to address these abuses in 1998 through its implementation of the Computer Assisted Passenger Screening (CAPS) system, which standardized the criteria for deciding which passengers to scrutinize closely. While the elements of CAPS have not been made public, the government insists that the CAPS system does not rely on race or ethnicity in determining who should be subjected to heightened scrutiny at airports.<sup>121</sup>

Since September 11, the "flying while Arab" phenomenon has returned with a vengeance. Passengers perceived to be Arab or Muslim have experienced abuse or humiliation, have been subjected to especially intrusive security screening procedures, and have even been ordered off planes for no reason other than that they appeared to be Arab or Muslim and were therefore perceived to be terrorist threats. The most notorious example of this treatment involved Secret Service Agent Walid Shatter, an Arab American who was flying to Texas on Christmas Day 2001 to join President Bush's security detail. Agent Shatter was removed from his flight when a flight attendant spotted a book on Middle Eastern history on his seat and airline officials refused to believe that his credentials and badge were authentic.<sup>122</sup> There is no question that Agent Shatter would not have been treated in this manner had he not been Arab American. The same can be said of scores of Arabs, South Asians, Muslims, and Sikhs who experienced discrimination at airports and on airplanes post-September 11. The following anecdotes are illustrative:

- On January 1, 2002, an Arab American passenger en route to Washington, D.C. passed through security checks, submitted his boarding pass, and stood in line at the jet way during boarding. Two police officers approached him and escorted him back to the airport. When he asked why this had happened, the officers informed the passenger that the airplane's pilot had requested that he be "checked out" because he had an "Arabic name." Three FBI agents then appeared and questioned the passenger about his identity.<sup>123</sup>
- On October 28, 2001, three Arab American women were prevented from boarding their flight to New York City from Minneapolis because airline personnel had overheard them quietly praying before the flight and became concerned on hearing one of the women say the word "Allah."<sup>124</sup>
- On October 10, 2001, a Muslim businessman was singled out for extra interrogation before boarding a flight from Los Angeles to Tampa. When he inquired about why he was receiving this extraordinary attention, he was told by the airline employee that "[m]aybe you were acting suspiciously or maybe (because of) the way you look."<sup>125</sup>
- On November 7, 2001, a 22-year-old Muslim American woman was asked to remove her head scarf - which many Muslim women wear for religious reasons - after passing through an airport metal detector *without* setting it off. After a manual detector was passed along her body, again revealing nothing, she was asked to remove her head scarf and was escorted to a private room where female airport security personnel conducted a full body search and ran their fingers through her hair.<sup>126</sup>

Clearly, it has become commonplace for security personnel to exercise their discretion in a manner that distinguishes Arabs, South Asians, Muslims, and Sikhs from the rest of the air traveling public. This treatment is based on the unfair assumption that Arabs and Muslims share a general propensity for terrorist activity and is directly analogous to the treatment of Blacks and other minorities on America's highways and streets.

## **B. Why Profiling is a Flawed Anti-Terrorism Tactic**

As in the street crime context, terrorism profiling is a crude substitute for behavior-based enforcement. It violates core American values, including the constitutional guarantee of equal protection. It also hinders anti-terrorism efforts because it alienates people and communities that are critical to the success of the anti-terrorism effort.

### **1. The Myths Driving Terrorism Profiling**

The assumptions driving terrorism profiling are the same as those behind traditional, street-level profiling - i.e., that a particular crime (here, terrorism) is most likely to be committed by members of a particular racial, ethnic or religious group, and that members of that group are, in general, likely to be involved in that kind of criminal activity. As in the street-crime context, these assumptions are flawed.

First, it is not true that terrorist acts are necessarily perpetrated by Arabs, or that the perpetrator of a terrorist act is likely to be an Arab. While all the men involved in the September 11 hijackings were Arab nationals, Richard Reid, who on December 22, 2001 tried to ignite an explosive device on a trans-Atlantic flight, was a British citizen of Jamaican ancestry. Prior to September 11, the bloodiest act of terrorism on United States soil was perpetrated by Timothy McVeigh. Non-Arabs like John Walker Lindh can be found in the ranks of the Taliban, al Qaeda and other terrorist organizations. At the same time, the overwhelming majority of Arabs, Arab Americans, Muslims, South Asians and Sikhs are law-abiding persons who would never think of engaging in terrorism.

### **2. Why Profiling Hinders the Anti-Terrorism Effort.**

Focusing on the many Arabs, South Asians, Muslims, and Sikhs who clearly pose no threat to national security detracts from the anti-terrorism effort. First, it diverts precious law enforcement resources away from investigations of individuals - including Arabs and Muslims - who have been linked to terrorist activity by specific and credible evidence. Second, it ignores the possibility that someone who does not fit the profile may be engaged in terrorism, or may be an unwitting accomplice to terrorism.

That race is an ineffective measure of an individual's terrorist intentions was made clear in a memorandum circulated to American law enforcement agents worldwide by a group of senior U.S. law enforcement officials in October 2002. The memorandum, entitled "Assessing Behaviors," emphasized that focusing on the racial characteristics of individuals was a waste of law enforcement resources and might cause law enforcement officials to ignore suspicious behavior, past or present, by someone who did not fit a racial profile. One of the authors of the report noted: "Fundamentally, believing that you can achieve safety by looking at characteristics instead of behaviors is silly. If your goal is preventing attacks . . . you want your eyes and ears looking for pre-attack behaviors, not characteristics."<sup>127</sup>

The memorandum urged investigators to focus on actual behavior involving selection of targets, recruitment and organization of members, acquisition of skills, assessing vulnerabilities of targets,

acquiring financing, probing boundaries, communicating with conspirators, using insiders, maintaining secrecy, and acquiring weapons.<sup>128</sup> An emphasis on race, the memorandum noted, distracts from the observance of potentially suspicious behavior. This memorandum answers one of the main arguments of those who support racial profiling in the context of airport searches - i.e., that it is simply logical to focus precious law enforcement resources on Arab men rather than on older women from Minnesota or Swedish au pairs.<sup>129</sup> What U.S. intelligence experts have made clear is that *any* emphasis on personal characteristics, rather than on behavior, misdirects scarce anti-terrorism resources.

This is not to say that law enforcement can never rely on race in fighting terrorism. As in street-level law enforcement, it is permissible to rely on race as part of a suspect-specific description. No one argues, for example, that the police cannot follow up on a specific tip that a group of Arabs is plotting terrorist acts in a particular apartment building by questioning Arabs who live in that building. Assuming the reliability of the source or the specificity of the information, identification of an individual's race carries with it the real potential for uncovering criminal activity.<sup>130</sup>

Profiling, by contrast, is a scattershot device that is so crude as to be virtually useless. It is no coincidence that the questioning of 8000 young Arab men in late 2001-early 2002 yielded virtually no leads about terrorism - there was no evidence to suggest that any of these men knew anything about terrorism in the first place.

Racial profiling is particularly foolish in the anti-terrorism context for three additional reasons. First, even if one accepts the false assumption that terrorists are likely to be Arab or Muslim, the *application* of the profile is fraught with error. The experience of Sher J.B. Singh, a Sikh, described above, demonstrates how many persons who are neither Arab nor Muslim can get caught up in the terrorism profiling web. Consider these other examples from the airport security context:

- On October 22, 2001, four Hispanic businessmen were escorted off a Delta flight after passengers alerted airline staff that the men appeared to be Middle Eastern.<sup>131</sup>
- On September 26, 2001, a group of six passengers of Indian ethnicity were questioned aboard a United Airlines flight from Los Angeles to Washington, D.C. The men were taken to the back of the plane, where they were first questioned by a pilot and then by FBI and INS.<sup>132</sup>
- On September 24, 2001, a Canadian woman of Indian origin was removed from her US Airways flight from Toronto to Las Vegas because her last name was similar in pronunciation to the name of one of the September 11 hijackers, Mohammed Atta. She was told that her name was "Middle Eastern" and therefore suspicious.<sup>133</sup>
- A flight bound for New York's LaGuardia Airport was accompanied on its descent by a military plane after a passenger raised suspicions about a group of entertainers from India who were passing notes and changing seats. The group was detained for questioning and released five hours later without being charged. The passengers were not terrorists; they were animated because they were excited about visiting New York.<sup>134</sup>

Thus, the profile of a terrorist as an Arab or Muslim has been applied to individuals who are neither Arab nor Muslim (e.g., Hispanics, Indians, and Sikhs). Profiling of Arabs and Muslims amounts to selective enforcement of the law against anyone with a certain type of "swarthy" foreign-looking appearance even if they do not in fact fit the terrorist profile. The profile is then useless in fighting terrorism, as well as offensive to an ever-broadening category of persons.<sup>135</sup>

Second, using racial profiling in the anti-terrorism effort is a classic example of refighting the last war. As noted above, al Qaeda and other terrorist organizations are pan-ethnic: they include Asians, Anglos, and ethnic Europeans. They are also adaptive, dynamic organizations that will learn how to use non-Arabs such as Richard Reid to carry out terrorist attacks, or to smuggle explosive devices onto planes in the luggage of innocent people.<sup>136</sup> The fact that the September 11 hijackers were Arab means little in predicting who the next terrorists will be. Racial profiling in any case is a crude mechanism; against an enemy like al Qaeda it is virtually useless. Third, and perhaps most important, the use of profiling in the anti-terrorism context, as in the street-crime context, alienates the very people that federal authorities have deemed instrumental in the anti-terrorism fight. Arab, South Asian, and Muslim communities may yield useful information to those fighting terrorism. Arabs and Arab Americans also offer the government an important source of Arabic speakers and translators. The singling out of Arabs, South Asians, Muslims, and Sikhs for investigation regardless of whether any credible evidence links them to terrorism will simply alienate these individuals and compromise the anti-terrorism effort.<sup>137</sup> In particular, to the extent that federal authorities use the anti-terrorism effort as a pretext for detaining or deporting immigration law violators, individuals who might have information that is useful against terrorism may be afraid to come forward. At a minimum, those individuals will choose not to register, thereby defeating the very purpose of the registration program.<sup>138</sup>

The alienation that results from terrorism profiling is compounded by the clumsy and insensitive manner in which it has thus far been carried out. As demonstrated by the many examples in this report, Arabs, South Asians, Muslims, and Sikhs who have tried to cooperate with authorities and to comply with the law have consistently been met by verbal (and sometimes physical) abuse; complete insensitivity to their cultural and religious practices; and a general lack of respect. As in the "driving while Black" context, this treatment has caused many Arabs, South Asians, Muslims, and Sikhs to alter their behavior in order to avoid confrontations with authorities. Khaled Saffuri, a Lebanese man living in Great Falls, Virginia, says he makes sure to shave closely and wear a suit every time he flies; stays silent during flights and makes sure not to go to the bathroom in the middle of the flight; and sometimes avoids flying altogether in favor of long drives to his destinations in order to avoid air travel.<sup>139</sup> In October 2002, Canada even issued a travel advisory warning those of its citizens born in Middle Eastern countries against traveling to the United States because of the hassles they would encounter.<sup>140</sup> One celebrated Canadian, author Rohinton Mistry, who is of Indian descent and neither Arab nor Muslim, cancelled his book tour of the United States because he was "repeatedly and rudely" stopped at each airport along his tour route.<sup>141</sup>

Recent events have demonstrated the futility of relying on profiles to predict who engages in targeted violence. In the fall of 2002, the Washington, D.C., area was shaken by a series of sniper attacks.

Traditional profiles of serial killers assume that they are disaffected White men. Of course, the two men charged with the attacks are Black - an African American Gulf War Veteran, John Allen Muhammad, and Jamaican-born John Lee Malvo. Their capture was hailed by law enforcement authorities as a triumph of "old fashioned police work" and entailed the investigation of multiple leads, the pursuit of evidence nationwide, and the use of the media and the public to help develop the facts.<sup>142</sup> The investigation showed how reliance on a profile "can have [police] chasing a stereotype while the real culprit slips away."<sup>143</sup>

Profiling has proven to be an inaccurate indicator of other types of targeted violent crimes. Traditional profiles presumed that political assassins were male. But women - Sarah Jane Moore and Lynette "Squeaky" Fromm - carried out assassination attempts on the life of President Ford.<sup>144</sup> And in a situation directly analogous to the one facing Arabs and Muslims today, the 10 individuals found to be spying for Japan during World War II were Caucasian. They clearly did not fit the profile that caused America to order the internment of thousands of Japanese Americans.<sup>145</sup>

The same kind of old-fashioned police work that tracks down serial killers, assassins, and spies will help catch terrorists, not reliance on broad, inaccurate, and confusing racial stereotypes. Federal authorities have also taken many useful steps to improve airport security that pose no threat to civil rights. The use of improved technology to detect explosives, luggage matching protocols, better training of screeners, and reinforcing of cockpit doors, for example, are all prudent measures to enhance airport security. *These* are the types of weapons, along with behavior-based surveillance, that will win the war against terrorism.

Those who support the use of profiling against Arabs, South Asians, Muslims, and Sikhs argue that America must resort to profiling given the stakes. The opposite is in fact true. The stakes are so high that the nation cannot afford to use an anti-terrorism mechanism as deeply flawed as racial profiling.

Winning the war on terrorism requires sacrifice *from all Americans*. The assumption that terrorism is only an Arab or Muslim problem fosters the false impression that the problem can simply be eradicated if the government has free rein to deal with "those people" and leaves the rest of us alone. As one commentator has noted, in analogizing the current treatment of Arabs, South Asians, Muslims, and Sikhs to the treatment of Japanese Americans during World War II, "[i]t turns out . . . to be easy enough to surrender the civil rights of somebody else."<sup>146</sup> This is a convenient way to fight terrorism, but it is also, as discussed above, ineffective.

And in a moral sense, the scapegoating inherent in profiling is wrong. America will win the war on terrorism through shared sacrifice, not by placing the burdens of the fight on a few.<sup>147</sup>

#### **IV. The Need to Combat Profiling**

As discussed at the outset of this report, before September 11, 2001, a consensus existed on the need to eliminate racial profiling in America. The events of September 11 blurred this goal, both because the anti-terrorism struggle has dominated the attention of lawmakers to the exclusion of many other issues and because efforts to end profiling are seen, erroneously, as an obstacle to fighting terrorism.

While the need to combat terrorism remains of paramount concern to all Americans, a comprehensive effort to eliminate racial profiling is still essential. Traditional forms of profiling remain pervasive, as demonstrated by the recent data from Los Angeles, San Diego, Colorado, and Massachusetts. Meanwhile, the misguided use of terrorism profiling shows no sign of abating. The actions taken today to address racial profiling will have a profound impact on future generations and their ability to effectively balance the needs of law enforcement - both in the street-level and terrorism contexts - with the preservation of America's commitment to equality and justice.

The recommendations that follow are designed to achieve this balance.

#### **Recommendations**

***Recommendation One: Every federal, state, and local law enforcement agency should expressly ban the use of racial profiling.***

Any such ban should incorporate the definition of racial profiling used in this report - i.e., any use of race, religion, ethnicity, or national origin to decide who to subject to law enforcement investigation, except where race, religion, ethnicity, or national origin is part of a specific suspect description.

***Recommendation Two: Bans on profiling should be legally enforceable, including by private citizens.***

Relief available to citizens should be limited to injunctions against the agencies found to have engaged in profiling, and should not include money damages. This approach takes account of the fact that profiling is a systemic problem, not the result of a few "bad apples" scattered through law enforcement.

***Recommendation Three: Federal, state and local law enforcement agencies should adopt procedures to give effect to the ban on profiling, including:***

1. The implementation of disciplinary procedures for officers who engage in profiling;
2. The establishment of complaint procedures for victims of racial profiling; and

3. The collection of data on routine law enforcement activities, such as traffic and pedestrian stops, airport screening activities under the ATSA, INS enforcement actions, and U.S. Customs Service searches. Data collection guidelines should specifically provide for the collection of data regarding not only African Americans, but also Hispanics, Asians and Asian Americans, Arabs and Arab Americans, and Sikhs and other South Asians.

Implementation of these procedures should be a condition of federal and state funding.

***Recommendation Four: Federal and state funds should be made available for law enforcement agencies to establish systems to end racial profiling.***

Such funds could be used, for example, to:

1. Train law enforcement officers to avoid racial profiling and to interact more respectfully with the public;
2. Acquire and use technology to facilitate the collection of data;
3. Acquire equipment, such as in-car video cameras, portable computer systems, and other technology that can be used to verify the accuracy of data collected;
4. Create "early warning" systems and other feedback systems that help identify officers or units of officers at risk of racial profiling;
5. Implement procedures for receiving, investigation, and responding to complaints alleging racial profiling; and
6. Establish management systems to ensure that supervisors are held accountable for the conduct of their subordinates.

***Recommendation Five: Nationwide standards should be developed for the accreditation of law enforcement agencies.***

Such standards should include specific guidance on traffic stop procedures, the use of force, and interaction between police officers and multi-cultural communities.

***Recommendation Six: Police oversight agencies, such as the Civil Rights Division of the U.S. Justice Department, should give higher priority to the investigation and remediation of racial profiling.***

The Civil Rights Division's activities in the 1990's were critical to exposing the widespread existence of racial profiling. The Division's continued involvement will be critical to ending that practice.

***Recommendation Seven: Law enforcement agencies should strive for a diverse workforce.***

To be sure, minority officers may also engage in racial profiling, but "a workforce that reflects the diversity of the community served . . . conveys a sense of fairness and equity to the public."<sup>148</sup>

***Recommendation Eight: A public education campaign is necessary to explain the myths behind racial profiling, the effects of profiling on minorities, and the flaws of profiling as a law enforcement tool.***

As discussed throughout this Report, profiling is often the product of ignorance and fear rather than overt racism. Until those misconceptions are uprooted, profiling will remain.

Many of these recommendations have been part of federal legislative proposals in recent years. The End Racial Profiling Act introduced last Congress by Senator Feingold and Representative Conyers would have accomplished these goals. In the 105th and 106th Congresses, Representative Conyers introduced the Traffic Stops Statistics Study Act, which required collection of traffic stop data by state and local law enforcement officials.<sup>149</sup> And in 2000, Representative Conyers introduced the Law Enforcement Trust and Accountability Act, designed to improve accountability for profiling and other police misconduct.<sup>150</sup> Moreover, in the past several years, at least 20 States have enacted laws that mandate data collection and otherwise seek to address racial profiling. Numerous local jurisdictions have taken similar steps.

Some of these efforts are bearing fruit. Many jurisdictions have developed effective community policing strategies that facilitate communication between law enforcement and minority communities and that do not depend on broad, divisive, and unconstitutional stereotypes.<sup>151</sup> But the data is clear: traditional profiling continues. And the struggle against terrorism creates a new context in which the old problems have emerged.

**Conclusion**

We must continue to fight an aggressive war against terrorism. But September 11 can no longer be an excuse either for not taking decisive action to remedy the decades-old problem of traditional profiling or for not discussing seriously how newer forms of profiling should be addressed. It is time to revive the national consensus that existed on this issue before the September 11 tragedy, to broaden the discussion of profiling to meet new civil rights challenges, and to make sure that the nation stays faithful to its core constitutional principles of fairness and equality.

## Endnotes

<sup>1</sup> Unless otherwise indicated, the terms "racial profiling" and "profiling" are used interchangeably in this Report. This terminology is not meant to suggest that all criminal profiling is wrong; the consideration of statistically relevant non-racial factors in solving crimes is of course appropriate, and, as discussed below, even the consideration of race is permissible as part of a suspect-specific description.

<sup>2</sup> The terms "Black" and "African American" are used interchangeably in this Report, as are the terms "Hispanic" and "Latino."

<sup>3</sup> In a 1999 Gallup Poll, 77 percent of African Americans believed that racial profiling was widespread and 56 percent of White Americans agreed. David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (The New Press 2002) (hereafter *Profiles in Injustice*), at 121, n.71. See also Julia Vitullo-Martin, "Fairness Not Simply a Matter of Black and White," *Chicago Tribune*, November 13, 1997 (citing poll by the Joint Center for Political and Economic Studies indicating that 81 percent of Blacks and 56 percent of Whites agree that police are more likely to harass and discriminate against Blacks than against Whites). Even minority conservatives, such as African American commentator Armstrong Williams have acknowledged the existence of, and the need to eliminate, racial profiling. E.g., Armstrong Williams, "Police and Profiling," *The Washington Times*, March 24, 2001.

<sup>4</sup> Eric Ferkenhoff and Noah Isackson, "Ashcroft Calls on Police to End Racial Profiling," *Chicago Tribune*, April 7, 2001.

<sup>5</sup> Presidential Address Before a Joint Session of the Congress on Administration Goals, February 27, 2001, *Weekly Compilation of Presidential Documents*, Vol. 37, no. 9 (March 5, 2001) at 354.

<sup>6</sup> H.R. 2074/S. 989, 107th Cong., 1st Sess. (June 6, 2001).

<sup>7</sup> E.g., The Traffic Stops Statistics Study Act of 1999, H.R. 1443, 106th Cong., 1st Sess. (April 15, 1999) (sponsored by Rep. Conyers).

<sup>8</sup> See, e.g., Stuart Taylor, Jr., "Points of View," *Legal Times*, November 5, 2001. See also Kathleen Parker, "All Is Fair in This War Except for Insensitivity," *Chicago Tribune*, September 26, 2001.

<sup>9</sup> Compare, e.g., Stuart Taylor, Jr., "Cabbies, Cops, Pizza Deliveries, and Racial Profiling," 32 Nat'l J. 1891 (2000) (arguing that profiling is unconstitutional) with Stuart Taylor, Jr., "Points of View," *supra* (arguing in favor of profiling in the terrorism context).

<sup>10</sup> See the Trade Act of 2002, Pub. L. 107-216 (August 6, 2002), Section 341. The GAO Report on Customs Service Profiling is discussed in Chapter II.A.3, *supra*.

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<sup>11</sup> *Profiles in Injustice* at 8-10.

<sup>12</sup> *Gonzalez v. Los Angeles Police Dep't*, No. 00-CV-1450 (C.D. Cal. 2000).

<sup>13</sup> *Profiles in Injustice* at 6-8.

<sup>14</sup> American Arab Anti-Discrimination Committee, *Report on Hate Crimes and Discrimination Against Arab Americans* (2003) (hereafter *ADC Report*), at 41.

<sup>15</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>16</sup> *Profiles in Injustice* at 21-23, 48-52 (describing evolution of profiling for drug-related crimes).

<sup>17</sup> The definition of profiling as law enforcement activity that relies in part, as well as solely, on race (in the absence of a specific suspect description) was used in consent decrees entered into by the Department of Justice and those state and local law enforcement agencies that were sued by the Department in the 1990's for engaging in widespread profiling. See, e.g., Consent Decree in *United States v. State of New Jersey*, Civil No. 99-5970 (MLC) (December 30, 1999), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm>, at 2.

<sup>18</sup> See also *Profiles in Injustice* at 3-6 (discussing the case of U.S. District Judge Filemon Vela in Brownsville, Texas). As discussed below, immigration-related profiling of Hispanics and other immigrant groups has also become more common in the interior of the United States in recent years.

<sup>19</sup> United States Department of Justice, Bureau of Justice Statistics, *Contacts Between Police and the Public* (2001) (hereafter *Contacts Between Police and the Public*) at 13.

<sup>20</sup> *Id.* at 18.

<sup>21</sup> David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (The New Press 1999) (hereafter *No Equal Justice*), at 36 and n. 66. See also *Profiles in Injustice* at 60-62 and accompanying notes.

<sup>22</sup> *Profiles in Injustice* at 61.

<sup>23</sup> *Id.* at 55. These findings led statistician John Lamberth to conclude "the disparity outlined here is strongly consistent with the existence of a discriminatory policy, official or de facto, of targeting blacks for stops and investigation . . ." *Id.* at 56 (quoting Report of John Lamberth, *Revised Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers/Travelers on the New Jersey Turnpike Between Interchanges 1 and 3 from the Years 1988 Through 1991*, at 26, 28).

<sup>24</sup> *Id.* at 59.

<sup>25</sup> *No Equal Justice* at 36-37.

<sup>26</sup> Tina Daunt and Jill Leovy, "LAPD Offers 1st Data on Traffic Stops; Study finds Blacks and Latinos are Far More Likely to be Searched when Pulled over by Police," *Los Angeles Times*, January 7, 2003.

<sup>27</sup> Bill Dedman and Francie Latour, "Traffic Citations Reveal Disparity in Police Searches," *Boston Globe*, January 6, 2003 (hereafter "Dedman and Latour"). Especially likely to be searched were Blacks or Hispanics driving in new cars. *Id.*

<sup>28</sup> Tony Perry, "San Diego Traffic Stops Higher for Blacks, Latinos," *Los Angeles Times*, January 14, 2003.

<sup>29</sup> Owen Good, "Hispanics' Vehicles Are More Likely To Be Examined," *Rocky Mountain News*, February 5, 2003.

<sup>30</sup> See *Profiles in Injustice* at 48-53 (discussing Operation Pipeline and federal authorities' encouragement of race-based profiling).

<sup>31</sup> Gary Webb, "DWB: Police Stops Motorists to Check for Drugs," *Esquire*, April 1, 1999.

<sup>32</sup> *Profiles in Injustice* at 99.

<sup>33</sup> Angela J. Davis, "Prosecution and Race: The Power and Privilege of Discretion," *67 Fordham L. Rev.* 13, 27 (1998).

<sup>34</sup> Ellen Goodman, "Simpson Case Divides Us By Race," *Boston Globe*, July 10, 1994 (quoting Professor Ogletree).

<sup>35</sup> Office of the Attorney General, *The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of New York from the Office of the Attorney General* (December 1999) (hereafter *New York Attorney General's Report*), at 94-100, 106.

<sup>36</sup> See *Los Angeles Police Department Field Data Statistics, Citywide*, available at <http://www.lapdonline.org>, Chart 1.

<sup>37</sup> Howard Chua-Eoan, "Black and Blue," *Time*, March 6, 2000.

<sup>38</sup> Racial profiling has even reached into schools, where the tactic is used as a means of investigating gang-related activity. A particularly egregious example of such profiling occurred on February 22, 2001 at a Union City, California high school. Sixty mostly Hispanic and Asian students were rounded up and detained on suspicion of belonging to gangs, even though in many instances the students had no gang affiliations. The law enforcement officers' emphasis on race rather than on conduct was evidenced by the fact that among the students rounded up were White students uninvolved in gang activity, but who looked Hispanic and were with Hispanic friends. Deborah Kong, "School Roundup Illegally Targeted Asians, Hispanics, Say Students," *Associated Press*, February 4, 2003. See generally *Profiles in Injustice* at 135-139 (discussing gang-related profiling of Asian American youths).

<sup>39</sup> See *Profiles in Injustice* at 208-213 (describing the experience of Bradley and other Black women with the Customs Service).

<sup>40</sup> General Accounting Office, *United States Customs Service: Better Targeting of Passengers for Personal Searches Could Produce Better Results* (March 2000) (hereafter *GAO Customs Service Report*) at 10, 15.

<sup>41</sup> *Id.* at 12-13.

<sup>42</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975) (citing statistics and noting that "the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" in establishing reasonable suspicion for a stop).

<sup>43</sup> National Council of La Raza, *The Mainstreaming of Hate: A Report on Latinos and Harassment, Hate Violence, and Law Enforcement Abuse in the 90's* (1999) (hereafter *The Mainstreaming of Hate*). As discussed below, the focus of immigration enforcement has shifted somewhat to Arabs and Muslims since September 11, 2001. See Ch. III, below.

<sup>44</sup> *Id.* at 26 (quoting Arizona Attorney General report).

<sup>45</sup> Susan Sachs, "Files Suggest Profiling of Latinos Led to Immigration Raids," *The New York Times*, May 1, 2001.

<sup>46</sup> *Farm Labor Organizing Committee et al. v. Ohio State Highway Patrol*, Case #: 96-CV-7580 (N.D. Ohio 1996). As the Chandler, Arizona, and Ohio cases indicate, the problems associated with immigration-related profiling have been exacerbated by the increased deputization of local law enforcement officers by the federal government to do immigration-related work. See generally, National Council of La Raza, *Immigration Enforcement by Local Police: The Impact on the Civil Rights of Latinos* (February 2003).

<sup>47</sup> United States Census Bureau, "Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin: April 1, 1990 to November 1, 2000" (August 25, 2000). The courts have recognized the obsolescence of the *Brignoni-Ponce* analysis. See, e.g., *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (use of Hispanic appearance is of such low probative value in an area where a substantial part of the population is Hispanic that it cannot be considered as a factor relevant to a determination of reasonable suspicion for a vehicle stop).

<sup>48</sup> Testimony of Raul Yzaguirre, President, National Council of La Raza, on Racial Profiling, Senate Judiciary Subcommittee on the Constitution, Federalism and Property Rights, August 1, 2001 (hereafter "Yzaguirre Testimony"), at 1.

<sup>49</sup> 1996 Statistical Handbook of the Immigration and Naturalization Service (1997).

<sup>50</sup> *Profiles in Injustice* at 3-6.

<sup>51</sup> *Id.* at 5.

<sup>52</sup> *Id.* at 58 (quoting Joe Donohue, "Trooper Boss: Race Plays a Role in Drug Crimes," *Newark Star-Ledger*, February 10, 1999). Superintendent Williams justified his statement by pointing out that when senior U.S. officials went overseas to discuss the drug trade, they went to Mexico and not to Ireland or England.

<sup>53</sup> National Council of La Raza, *Latinos and the Federal Criminal Justice System* (July 2002) (hereafter *Latinos and the Federal Criminal Justice System*) at 3 (citing data from the Department of Health and Human Services).

<sup>54</sup> Yzaguirre testimony at 1.

<sup>55</sup> *Latinos and the Federal Criminal Justice System* at 3. See also Substance Abuse and Mental Health Services Administration, 2001 National Household Survey on Drug Abuse (noting that 7.4 percent of blacks, 7.2 percent of Whites, and 6.4 percent of Hispanics used illicit drugs in the preceding month).

<sup>56</sup> K. Jack Riley, "Crack, Powder Cocaine and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities," National Institute of Justice, United States Department of Justice (December 1997) at 1.

<sup>57</sup> David A. Harris, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters," 84 *Minn. L. Rev.* 265, 296 (1999) (hereafter "Why 'Driving While Black' Matters") (citing National Institute on Drug Abuse, "Drug Use Among Racial/Ethnic Minorities" (1997)).

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<sup>58</sup> *Contacts Between Police and the Public* at 22.

<sup>59</sup> *Profiles in Injustice* at 80.

<sup>60</sup> *GAO Customs Service Report* at 2.

<sup>61</sup> *New York Attorney General's Report* at 111-117.

<sup>62</sup> See *Los Angeles Police Department Field Data Statistics, Citywide*, available at <http://www.lapdonline.org>, at Chart 1.

<sup>63</sup> Dedman and Latour, *Boston Globe*, January 6, 2003, *supra* n. 27.

<sup>64</sup> See, e.g., Heather MacDonald, "The War on the Police . . . and How It Harms the War on Terrorism," *The Weekly Standard* (Vol. 7, Issue 16), December 31, 2001.

<sup>65</sup> Interestingly, consent searches of the kind that accompany profiling on the streets or highways are unlikely to yield the discovery of large quantities of drugs, even when drugs are found at all. See *Profiles in Injustice* at 86 (noting that most drug seizures that accompany consent searches are of amounts that suggest personal use and not intent to distribute).

<sup>66</sup> Violent crime rates are tied to poverty rates. See generally Marc Mauer, *Race to Incarcerate* (The New Press 1999) at 163-170. To the extent that violent crime rates are higher in Black neighborhoods, it is because Blacks in the United States are disproportionately poor. *Id.* This does not mean that they use or sell drugs more. In fact, the evidence shows that they do not.

<sup>67</sup> Statistical Abstract of the United States, Tables 12 and 358 (comparing 1997 statistics) (1999). See also "Developments in the Law - Race and the Criminal Process," 101 Harv. L. Rev. 1472, 1508 (1988).

<sup>68</sup> See, e.g., Heather MacDonald, "The Racial Profiling Myth Debunked," *The City Journal*, March 29, 2002, available at [http://www.cityjournal.org/html/11\\_2\\_the\\_myth.html](http://www.cityjournal.org/html/11_2_the_myth.html) (relying on unpublished study finding that Black drivers on the New Jersey turnpike are twice as likely to speed as White drivers).

<sup>69</sup> *Profiles in Injustice* at 30-33 (noting, at page 32, that "[a] traffic offense is not a chance occurrence but an inevitability.")

<sup>70</sup> *Id.* at 91-94.

<sup>71</sup> Jim Yardley, "Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics," *The New York Times*, January 26, 2000 (quoting Judge Hinojosa).

<sup>72</sup> *Profiles in Injustice*. at 98-99.

<sup>73</sup> *Id.* at 102-106.

<sup>74</sup> Kevin Robbins, "In Gallup Poll, Most Say They Believe Police 'Racial Profiling' Is Widespread," *St. Louis Post-Dispatch*, December 9, 1999.

<sup>75</sup> Profiling may even dampen minority support for highway safety programs. A poll of Michigan drivers commissioned by the Michigan Office of Highway Safety Planning revealed that 61 percent of African American drivers *and* almost half of White drivers believed that Michigan's new seatbelt law might give the police an additional pretext to stop Black drivers. "Standard Enforcement - A Michigan Perspective," EPIC/MRA, Lansing, Michigan, January 2000 (cited in *Profiles in Injustice* at 121).

<sup>76</sup> "While 'Driving While Black' Matters" at 297.

<sup>77</sup> E.g., Bureau of Justice Statistics, United States Department of Justice, "Sourcebook of Criminal Justice Statistics 1997," at 338 (table 4.10), 422 (table 5.46).

<sup>78</sup> "Latinos and the Federal Criminal Justice System" at 4.

<sup>79</sup> "Why 'Driving While Black' Matters" at 303.

<sup>80</sup> Marc Mauer, "The Crisis of the African American Male and the Criminal Justice System," Written Testimony Before the U.S. Commission on Civil Rights, April 15-16, 1999 (hereafter "Mauer Civil Rights Commission Testimony") at 2 (citing Marc Mauer and Tracy Huling, "Young Black Americans and the Criminal Justice System: Five Years Later," *The Sentencing Project* (October 1995)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project (October 1998), p.1.

<sup>84</sup> Racial disparities in the criminal justice system also impair the effectiveness of the criminal justice system itself. Minorities are less likely to cooperate as victims or witnesses and less willing to serve as impartial jurors. These issues are discussed in Leadership Conference Education Fund's, *Justice on Trial: Racial Disparities in the Criminal Justice System* (2000) at 47-50.

<sup>85</sup> All Arabs are not Muslim, and all Muslims are not Arab. Some Muslims that many Americans assume to be Arab are in fact not Arab - e.g., Iranians. And some Arabs that many Americans assume to be Muslim are not - for example, there are many Christian Arabs, including a majority of Arab Americans. Further, as noted above, some persons who many Americans assume to be Arab or Muslim, and who have been the subject of post-September 11 profiling, are in fact neither.

<sup>86</sup> E.g., Heather MacDonald, "The War on the Police . . . and How It Harms the War on Terrorism," *supra* n. 64.

<sup>87</sup> See Section II.D, *supra*.

<sup>88</sup> ADC Report at 42.

<sup>89</sup> *Id.* at 43.

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

<sup>91</sup> A number of courts nationwide have held that principles of freedom of religion prevent the application of state concealed weapons laws to Sikhs carrying Kirpans. E.g., *Ohio v. Singh*, 690 N.E. 2d 917 (Ohio App. 1996).

<sup>92</sup> Eric Noonan, "Sikh is Prosecuted for Sword," *Boston Globe*, October 11, 2001. The charges against Mr. Singh were ultimately dropped.

<sup>93</sup> *Id.* at 40 (noting ADC's appreciation for the efforts of state and local law enforcement in the wake of September 11).

<sup>94</sup> In a sense, this tactic reverses the traditional use of traffic stops as a pretext for investigating drug crimes. In the anti-terrorist context, investigation of the more serious activity (*i.e.*, terrorism) ends up serving as a pretext for the punishment of less serious conduct (*i.e.*, immigration violations).

<sup>95</sup> The federal government acknowledged at one point that the number of detainees was in the range of 1200, although it has refused to give out specific information about how many persons were detained and why. This information has been sought by various civil rights groups under the Freedom of Information Act, a request that was upheld in August 2002 by a federal district court. *Center for National Security Studies v. Department of Justice*, 215 F.Supp.2d 94 (D.D.C. 2002). The government has appealed this ruling and the number of current and past detainees remains unknown.

<sup>96</sup> Dan Eggen, "Delays Cited in Charging Detainees: With Legal Latitude, INS Sometimes Took Weeks," *The Washington Post*, January 15, 2002 (noting that a "significant number" of detainees waited over a week before being served with charging documents by INS).

<sup>97</sup> *Id.*

<sup>98</sup> *ADC Report* at 30.

<sup>99</sup> Stuart Taylor, Jr., "War on Detainees? It's Wrong to Abuse Terror Suspects," *Legal Times*, December 10, 2001.

<sup>100</sup> Testimony of Ali al Maqtari before the Senate Judiciary Committee, December 4, 2001.

<sup>101</sup> Amnesty International, "Post 11 September Detainees Deprived of their Basic Rights," March 14, 2002, available at <http://web.amnesty.org/ai.nsf/Index/AMR510442002>.

<sup>102</sup> Another example of disproportionate application of the immigration laws against Arabs and Muslims is the INS' targeting of Middle Easterners among those who have been ordered deported but who have remained in the country - so-called "absconders." There are 315,000 "absconders" in the United States, only 6000 - less than two percent - of whom are from the Middle East. Yet when it was decided by the Bush Administration to enter absconders into the National Crime Database, these 6000 Middle Easterners were the first names entered. *ADC Report* at 34.

<sup>103</sup> It has been argued that individuals who are illegally in the United States are not entitled to the full panoply of constitutional protections. See, e.g., *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984). It cannot be disputed, however, that undocumented aliens are entitled to a broad range of constitutional protections, including equal treatment under the law and due process (*Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Plyler v. Doe*, 457 U.S. 202 (1982)). Moreover, as the story of Ali al Maqtari demonstrates, individuals who are, or who are eligible to become, American citizens have also been caught up in the federal government's detention practices, as well as other post-September 11 limitations on due process.

<sup>104</sup> "Memo Adds to Suspicion of Immigrants on Interviews," *The New York Times*, November 29, 2001.

<sup>105</sup> *ADC Report* at 34.

<sup>106</sup> See Fox Butterfield, "Police Are Split on Questioning of Mideast Men," *The New York Times*, November 22, 2001; Jodi Wilgoren, "University of Michigan Won't Cooperate in Federal Canvas," *The New York Times*, December 1, 2001. See also Michael Janofsky, "Cities Urge Restraint in Fight Against Terror," *The New York Times*, December 23, 2002 (noting the passage in many jurisdictions of resolutions urging the federal government to respect the civil rights of local citizens when fighting terrorism).

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<sup>107</sup> *ADC Report* at 34. See also Dan Eggen, "Interviews of Visa Holders Yield Little So Far," *The Washington Post*, December 8, 2001.

<sup>108</sup> *ADC Report* at 34 (citation omitted).

<sup>109</sup> As of February 2003, those countries are: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syrian, Tunisia, the United Arab Emirates, and Yemen.

<sup>110</sup> James Nash, "INS Frees Some Detainees; No Apology for Middle Easterners' Arrests," *Los Angeles Daily News*, December 20, 2002. The Los Angeles area has a large Iranian population.

<sup>111</sup> Dan Eggen and Nurith Aizenman, "Registration Stirs Panic, Worry: Some Muslim Foreign Nations Risk Arrest to Meet INS Deadline," *The Washington Post*, January 10, 2003 (hereafter "Eggen and Aizenman").

<sup>112</sup> Author's interview with anonymous relative of registrant (January 12, 2003). Islam, of course, forbids the eating of pork.

<sup>113</sup> George Lardner, Jr., "Brookings Scholar is Detained by INS; Registration Rule Snags Pakistani Editor," *The Washington Post*, January 30, 2003.

<sup>114</sup> The mixed advice provided Mr. Haider by U.S. officials adds yet another layer of unfairness to the process. As Mr. Haider himself said, "I did not know I was in violation of the INS policy. Brookings did not know I was in violation. My friends in the State Department did not know I was in violation. And if - even after following the policy closely and calling INS for information - we could not understand the law, what hope can there be for the cabdriver or the restaurant worker who doesn't have the leisure to discover the letter and intent of INS policies." Ejaz Haider, "Wrong Message to the Muslim World," *The Washington Post*, February 5, 2003.

<sup>115</sup> See, e.g., Eggen and Aizenman ("The idea that this [program] has anything to do with security, or is something the government can do to stop terrorism, is absurd.")(quoting Harvard terrorism expert Juliette Kayyem).

<sup>116</sup> Editorial, "The Wrong Way," *The Washington Post*, December 29, 2002.

<sup>117</sup> 107 P.L. 71, 115 Stat. 597 (November 19, 2001)

<sup>118</sup> *Profiles in Injustice* at 141 and n. 37.

<sup>119</sup> *Id.* at 141 and nn. 37, 38.

<sup>120</sup> See *id.* at 140 (describing instances of "flying while Arab").

<sup>121</sup> *Id.* at 141-144 (describing CAPS system).

<sup>122</sup> The flight attendant claimed that the book on Middle Eastern history was in "Arabic-style print." The book was in fact in English. Bob Dart, "Agent Booted Off Flight Was Profiled by Pilot, Lawyers Say," *Atlanta Journal-Constitution*, January 4, 2002.

<sup>123</sup> *ADC Report* at 28.

<sup>124</sup> *Id.* at 25.

<sup>125</sup> *Id.* at 27.

<sup>126</sup> *Id.* at 28.

<sup>127</sup> See Bill Dedman, "Words of Caution Airport Security: Memo Warns Against Use of Profiling as Defense," *Boston Globe*, October 12, 2001 (hereafter "Warning Against Use of Profiling as a Defense") (quoting anonymous co-author of memorandum)

<sup>128</sup> *Id.* See also David A. Harris, "Racial Profiling Revisited: 'Just Common Sense' in the Fight Against Terror?", *Criminal Justice* (Summer 2002), at 40-41 (calling "the observation of suspicious behavior" "the gold standard of traditional policing" and noting deficiencies in America's current intelligence-gathering and -analyzing infrastructure)

<sup>129</sup> *E.g.*, Stuart Taylor, Jr., "Points of View," *Legal Times*, November 5, 2001.

<sup>130</sup> The level of law enforcement response to such a tip may depend on the credibility of the source or the specificity of the tip, as it does in the Fourth Amendment context. See generally *Illinois v. Gates*, 462 U.S. 213 (1983) (applying a totality of the circumstances test in determining the existence of probable cause). For example, a tip from a reliable source that a group of Arabs was plotting a terrorist act in a particular apartment building would surely provide a basis for law enforcement to question Arabs who lived in that building. On the other hand, a tip from an unknown source that Arabs were plotting terrorist acts in the Pacific Northwest is so general as to be useless, and should not provide a basis for law enforcement officials to detain all Arabs found in the Pacific Northwest.

<sup>131</sup> *ADC Report* at 24.

<sup>132</sup> *Id.* at 26.

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

<sup>134</sup> "Arab Travelers Alter Habits While Flying," *Associated Press*, September 11, 2002.

<sup>135</sup> See Frank H. Wu, "Profiling in the Wake of September 11: The Precedent of the Japanese American Internment," *Criminal Justice* (Summer 2002) (hereafter *Japanese Internment*) at 58 (noting that "the post-September 11 backlash of violence has revealed our collective carelessness in assaulting Indian Sikhs - neither Arab nor Muslim but persons who look like they might be Arab or Muslim because of skin color, accents, dress.")

<sup>136</sup> "Warning Against the Use of Profiling as a Defense" (*quoting* Jerrold M. Post, director of the political psychology program at George Washington University).

<sup>137</sup> For example, the detention of 500-1000 Iranians in Southern California aroused the ire of the Iranian community there, which consists largely of individuals who are opposed to Iran's current regime. The son of the former Shah placed a full-page ad in *The Washington Post* the week of the detentions condemning the "unfair targeting" of Iranian immigrants. See Editorial, "The Wrong Way," *The Washington Post*, December 29, 2002.

<sup>138</sup> As one commentator has suggested, the federal government could easily allay the fears of Arab immigrants who are here illegally by promising to use the information gathered through the registration process only to fight terrorism and not to enforce the immigration laws. See Sadiq Reza, "A Trap for Middle Easterners," *The Washington Post*, January 10, 2003.

<sup>139</sup> "Arab Travelers Alter Habits While Flying," *Associated Press*, September 11, 2002.

<sup>140</sup> Vanessa Hua, "World's Tensions Take Local Toll: Security Measures Deter Foreigners from Traveling to the United States," *San Francisco Chronicle*, December 19, 2002.

<sup>141</sup> "Author Cancels Tour After Searches," *Chicago Tribune*, November 4, 2002.

<sup>142</sup> *E.g.*, Clarence Page, "Sniper Suspect Reveals Faults in Profiling Myth," *Daily Press*, November 3, 2002 ("In the end it was old fashioned dogged police work and cooperation from the public and media that cracked the case.")

<sup>143</sup> *Id.*

<sup>144</sup> See "Warnings Against the Use of Profiling as a Defense" (noting that "[w]hat the assassins did have in common were *behaviors*: approaching targets, acquiring weapons, communicating intent") (emphasis added).

<sup>145</sup> Editorial, "Hindsight and Foresight," *Fort Worth Star Telegram*, September 20, 2001 (citing historians Debra LaFontaine and Pei P. Wang).

<sup>146</sup> *Japanese Internment* at 56.

<sup>147</sup> It is also no answer to the problem to say that the burdens placed on Arabs and Muslims in the form of greater airport screening or registration requirements should be accepted because they are minimal. "What looks like a light touch to observers can feel like an awfully heavy hand to those who feel it." *Id.* at 57.

<sup>148</sup> *PERF Report* at 8.

<sup>149</sup> H.R. 118, 105th Cong., 1st Sess (January 7, 1997); H.R. 1443, 106th Cong., 1st Sess. (April 15, 1999).

<sup>150</sup> H.R. 3981, 106th Cong., 2d Sess. (March 15, 2000).

<sup>151</sup> *Profiles in Injustice* at 127-128, 191-192 (discussing San Diego's and other jurisdictions' anti-profiling efforts).





## **LC Education CR Fund**

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