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Targeting the Foreign Born by Race and Nationality: Counter-Productive in the War on Terrorism

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TARGETING THE FOREIGN BORN BY RACE AND NATIONALITY: COUNTER- PRODUCTIVE IN THE “WAR ON TERRORISM”?

By Thomas M. McDonnell*

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I. INTRODUCTION

The terrorist attacks of September 11, perpetrated by Islamic extremists from foreign lands, have branded American consciousness perhaps even more deeply than any other strike against the nation in the modern era.¹ The first major attack on the mainland United States in nearly 200 years,² September

¹ The Japanese surprise attack on Pearl Harbor may have been a greater blow to our security, but that attack did not occur on the mainland and did not involve the loss of as many civilians as did the September 11 attacks.

² The last such attack occurred during the War of 1812, when the British, among other things, attacked Washington D.C. and burned the Capitol and the

11 has been burned into body politic and represents a visible threat to our security and to our way of life. Americans naturally have demanded immediate measures to apprehend those responsible and to insure that similar attacks may not happen again.

Governmental officials responded frenetically to September 11. Among other things, federal authorities immediately questioned and detained hundreds of immigrants from Islamic countries,³ and Congress rushed to pass the Patriot Act⁴ in such a short time that not only did our representatives little debate the bill, but few had time to read the "complex, far reaching anti-terrorism [and anti-immigrant] legislation" in its entirety.⁵ Following the aftermath of September 11, policies and practices against the foreign born have continued. Aside from President Bush's authorizing military tribunals to try only foreigners, not American citizens;⁶ both the state and federal governments, often with the help of private citizens,⁷ have engaged in unprec-

White House. See *War of 1812*, 27 FUNK & WAGNALLS ENCYCLOPEDIA 143 (1986). The 1993 World Trade Center bombing pales in comparison.

³ See *Center for Nat'l Security Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

⁴ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2002).

⁵ Robin Toner & Neil L. Lewis, *A NATION CHALLENGED: House Passes Terrorism Bill Much Like Senate's, But With 5-Year Limit*, N.Y. TIMES, Oct. 13, 2001, at B6. The Patriot Act contains several provisions that may in application, if not on their face, be unfair to immigrants. Section 411, for example, makes an immigrant deportable for contributing "material support" to an organization designated by the Secretary of State as a terrorist organization. The Act does not require that the immigrant know the organization has been so designated or that the support provided will contribute to a terrorist operation. See *New Antiterrorism Legislation Summarized*, in 78 INTERPRETER RELEASES 1703, 1704 (Nov. 5, 2001). Section 412 permits the Attorney General to detain any alien he certifies that he "reasonably believes to be a terrorist or to have engaged in any other activity that endangers the national security of the United States." *Id.*

⁶ See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001). The United States also initially targeted only visitors from predominately Arab and Muslim countries, requiring them to be fingerprinted, photographed, and subjected to interrogation under oath. See *infra* notes 65-71 and accompanying text.

⁷ See *infra* notes 37-38 and accompanying text (discussing the role that racial profiling by American citizens has played in detaining Arab and Muslim looking immigrants). Since September 11, Arabs and Muslims living in the United States have reported increased incidence of discrimination in housing and employment. See Muzaffar A. Chishti, Doris Meissner, *et al.*, *America's Challenge: Domestic Se-*

edented racial profiling of innocent South Asians, Arabs and Muslims living in this country.⁸

Times of emergency may justify certain restrictions on liberties, but the nature of the terrorist challenge calls for a much more measured and nuanced response. Al Qaeda is said to have cells operating in as many as sixty countries.⁹ Furthermore, Al Qaeda is best described as a decentralized network of extremist Islamic groups and individuals rather than a unified military organization.¹⁰ To reduce or eliminate the threat they pose requires the cooperation of the governments, police officers, and individual citizens in the countries where Al Qaeda linked individuals and groups operate. Such help is necessary to obtain intelligence, arrest, capture, prosecution, and extradition of alleged terrorists, not to mention to cut off their funds and to confiscate their arms and other assets. The thesis of this article is that to the extent the United States discriminates against or otherwise unfairly treats Arabs and Muslims living here or wishing to visit here, the more difficult it will be for the United States to get the help we so desperately need not only in the

curity, Civil Liberties, and National Unity after September 11, in 80 INTERPRETER RELEASES 1193, 1195-96 (Aug. 25, 2003) (noting that the Equal Employment Opportunity Commission ("EEOC") "received over 700 complaints concerning September 11-related employment discrimination in the first 15 months after the attacks"). In addition, hate crimes against Muslims "soared after September 11, rising more than 1,500 percent [but] [t]he number of violent hate crimes has since tapered off." *Id.* at 1195. See also *United States, Hate Crimes Against Arabs and Muslims and Persons Perceived to be Arab or Muslim After September 11*, 14 HUMAN RIGHTS WATCH ANNUAL REPORT No. 6(g) (Nov. 2002) (noting that Arab and Muslim organizations reported over 2,000 hate crimes and the FBI received a seventeen fold increase in complaints of hate crimes in 2001 after September 11).

⁸ See *infra* notes 94-96 and accompanying text.

⁹ See Dan Balz & Bob Woodward, *America's Chaotic Road to War; Bush's Global Strategy Began to Take Shape in First Frantic Hours After Attack*, WASH. POST, Jan. 27, 2002, at A1. The destruction of the Afghan camps had "one perverse and unintended effect[:] Terrorists and their supporters who had formerly been concentrated in one known place were dispersed to home regions and new hideouts like Chechnya, Yemen, East Africa and Georgia's Pankisi Gorge. Regional commanders of Al Qaeda, says Rohan Gunaratna, author of a leading book on the network, are now 'operating independently of centralized control' . . . [and] no longer depend on anything from bin Laden and his top brass except for ideological inspiration." Michael Elliot, *World: Why the War on Terror Will Never End; Bomb Attacks in Riyadh and Casablanca Suggest That Even on the Run, al-Qaeda is a Resilient Threat to the West*, 161 TIME MAG. no. 21, May 26, 2003, at 26, available at 2003 WL 7740534.

¹⁰ See *id.*; see also *infra* notes 171-174 and accompanying text.

United States, but also in Arab and Muslim countries and communities throughout the world.

II. "WAR ON TERRORISM," DANGEROUSLY OVERBROAD RHETORIC

It has now become clear that the phrase "the war on terrorism" has not only become unthinkingly part of the lexicon but also dangerously overbroad. One commentator put it aptly:

Wars have typically been fought against proper nouns (Germany, say) for the good reason that proper nouns can surrender and promise not to do it again. Wars against common nouns (poverty, crime, drugs) have been less successful. Such opponents never give up. The war on terrorism, unfortunately, falls into the second category.¹¹

Emergency measures put into effect because of the "war on terrorism" may likewise never end and, by invoking such a broad description of the threat, governmental officials may justify enforcement actions both at home and abroad that have little to do with our immediate security.¹² The Executive's calculated use of this broad and vague phrase, "the war on terrorism," which the media have largely accepted without question, has led us down some dangerous paths and is still leading us in scary directions. Rather than claiming to fight the amorphous "war on terrorism,"¹³ we should specifically name the enemy,¹⁴ Al Qaeda, and those, like the Taliban, who lend support to Al

¹¹ Granville Byford, *The Wrong War*, FOREIGN AFF., July-Aug. 2002, at 34, available at 2002 WL 2085047. Byford states that common nouns, such as "terrorism" (as in the "war on terrorism") are vague and imprecise whereas proper nouns, "Germany" or "Iraq," for example, are concrete. When determining whether to use armed force, involving the killing of human beings and the destruction of property, government officials in a democracy have an obligation to identify with a reasonable degree of definiteness the country, organization, or individuals who are the object of the plan of attack. Cf. *City of Chicago v. Morales*, 527 U.S. 41 (1999) (requiring a criminal loitering statute to be reasonably definite).

¹² For a thoughtful discussion of how to characterize this conflict, see generally Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFF., Jan.-Feb. 2004 (arguing that it should not be considered a war, but a police action against a criminal organization); Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002) (characterizing the devastation inflicted in the September 11 attacks and the official response by NATO and the United States as emblematic of a war).

¹³ Jordan J. Paust, *War and Enemy Status after 9/11*, 28 YALE J. INT'L L. 325, 326-27 (2003) (noting that Al Qaeda does not even meet the definition of insur-

Qaeda, and other individuals and groups, like Islamic Jihad, that are allied with Al Qaeda.¹⁵

Part I of this Article discusses the practices of the racial profiling that the federal government has put in place after September 11. Part II of this Article discusses a history and analysis of racial profiling both in the street crime context and in the context of counter-terrorism. Part III of this article discusses combating a terrorist organization like Al Qaeda and the link both domestically and internationally to racial profiling of Arabs, Muslims, Sikhs, and South Asians.

III. ETHNIC AND RACIAL PROFILING IN THE WAKE OF SEPTEMBER 11

Despite strong words from high-ranking government officials that the Executive Branch is not engaged in ethnic profiling of Arabs and Muslims,¹⁶ the policies and practices of

gency and, consequently, a "war" is not the proper legal description of an effort to eradicate it). But see Wedgwood, *supra* note 12, at 328.

¹⁴ See Ruth Wedgwood, *Cause for Alarm: Legal Action Can Bring Victories, But Preventing Terrorism Calls for Tougher Tactics*, WASH. POST, June 3, 2001, at B01, available at 2001 WL 17633356 (arguing that the courts and law enforcement alone cannot prevail against Al Qaeda and its allies).

¹⁵ See Richard Falk, Fawaz Gerges, George Lopez, William Nash, & Ruth Wedgwood, *The "War" on Terrorism: What Rules Apply?* (New York Forum #1), Dec. 17, 2001, available at <http://www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/147?PHPSESSID> (Professor Falk defends the notion of denominating the conflict as a war, particularly against Afghanistan, but adds, "We also need to rely on the 'Just War' framework to assess whether the kinds of undertakings that occur in the post-Afghanistan phase of this war have any persuasive relationship to the threat that was posed by the attack on September 11th and by the Osama bin Laden visionary terrorism that lies behind it. In that sense, I am deeply opposed to any extension of military operations beyond Afghanistan. Any post-Afghanistan efforts to address this threat of mega-terrorism should rely on a law enforcement approach - that is, police cooperation with foreign governments, trying to interdict financial support, trying to use covert operations - in order to weaken the capacity of other portions of the global terrorist network to function"). But see Paust, *supra* note 13, at 326-27 (criticizing the characterization of the conflict against Al Qaeda as a "war").

¹⁶ David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

To those who pit Americans against immigrants and citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends.

Id. (quoting Attorney General John Ashcroft's Dec. 6, 2001 address). I am indebted to Professor Cole for his leadership and inspiration in this area.

Executive departments belie that claim. Specifically, those departments have carried out the following: (1) Arresting in mass Arab and Muslim immigrants,¹⁷ and carrying out Preventive Detention;¹⁸ (2) Conducting secret (closed) immigration hearings for these detainees;¹⁹ (3) (a) Requiring all male Arab and Muslim nationals sixteen and older who have been residing here with student visas, visitors' visas, and other temporary visas to personally register with the Immigration and Naturalization Service ("INS");²⁰ and (b) Requiring that visitors from

¹⁷ *Id.* at 961. Leadership Conference on Civil Rights and Education Fund, *Wrong Then, Wrong Now, Racial Profiling before and after September 11, 2001*, at 23, available at http://www.civilrights.org/publications/reports/racial_profiling_report.pdf [hereinafter Civil Rights and Education Fund] (noting that after September 11, the government "detained hundreds—perhaps thousands—of Arabs, South Asians and Muslims on suspicion of terrorist activity.") *Id.* (citing *Center for Nat'l Security Studies v. Dep't of Justice*, 215 F. Supp. 2d 94 (D.C. Cir. 2002)).

¹⁸ Professor Cole estimated that 2,000 Arab and Muslim immigrants had been held for months without charge by April 2002. *See* Cole, *supra* note 16, at 960. *See also* *Center for Nat'l Security Studies v. Dep't of Justice*, 331 F.3d 918, 921 (D.C. Cir. June 17, 2003) (noting that in the course of the post Sept. 11 investigation, the government interviewed over 1,000 persons, detained 700 of them for violation of immigration laws, 134 on federal criminal charges, and an undisclosed number as material witnesses); Lawyers Committee for Human Rights, *Treatment of Immigrants, Refugees, and Minorities, in A YEAR OF LOSS*, at http://www.lchr.org/us_law/loss/loss_ch3a.htm (last visited June 20, 2003).

¹⁹ *See* Civil Rights and Education Fund, *supra* note 17, at 23-25. *See also* Cole, *supra* note 16, at 962.

²⁰ Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002), available at 2002 WL 31464912. This order, issued by Attorney General John Ashcroft, required males from certain Muslim countries to register in person at an INS office by December 16, 2002. The order covered those males who are were over the age of sixteen and who held tourist visas, business visitor visas, student visas and other temporary visas. The order applied to "nationals or citizens of Iran, Iraq, Libya, Sudan or Syria . . ." *Id.* An "alien" who does not comply with this order commits an immigration law violation and is subject to deportation. *Id.* ("A willful failure to comply with the requirements of this Notice constitutes a failure to maintain nonimmigrant status under section 237(a)(1)(C)(i) of the Act, 8 U.S.C. 1227(a)(1)(C)(i)"). *See* 8 CFR 214.1(f). *See also* Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 51 n.27 (2003). Attorney General Ashcroft issued similar orders covering nationals from other Arab and Muslim countries as well as from North Korea. *See* Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,526 (Nov. 22, 2002) (requiring males, sixteen and older, from Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates and Yemen to register by January 10, 2003). *See also* Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,136 (Dec. 16, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,642 (ordering male nationals 16 and above,

Arab and other selected countries be fingerprinted, photographed, and subject to an interrogation under oath at ports of entry;²¹ (4) Changing priority for deporting "aliens," namely, the INS's seeking to deport 6,000 from Arab countries first, ahead of the 314,000 foreign nationals who have absconded;²² (5) The Justice Department's interviewing 5,000-8,000 young immigrant men based solely on their age, date of arrival, and country from which they have come, all being either Arabs or Muslims;²³ and (6) Enlisting state and local police to enforce immigration laws, thereby implicitly encouraging those police forces to engage in more traditional racial profiling of Arabs, Muslims, Sikhs and South Asians, namely, by stopping for questioning and investigation Arab appearing drivers and pedestrians.²⁴ All these policies and practices will be examined in turn.

A. *Mass Arrests and Preventive Detention of Arab and Muslim Immigrants*

Within a matter of weeks after September 11, the federal government began to arrest a large number of primarily Arab

from Pakistan and Saudi Arabia, to register between January 13, 2003 and February 21, 2003).

²¹ Civil Rights and Education Fund, *supra* note 17, at 25-26.

²² DOJ Focusing on Removal of 6,000 Men for Al Qaeda Haven Countries, in 79 INTERPRETER RELEASES 115, 115-16 (Jan. 21, 2002); Cole, *supra* note 16, at 975 (citing Dan Eggen & Cheryl W. Thompson, *U.S. Seeks Thousands of Fugitive Deportees; Middle Eastern Men Are Focus of Search*, WASH. POST, Jan. 8, 2002, at A1).

²³ Civil Rights and Education Fund, *supra* note 17, at 24-25. The mandatory interrogation program required Arab men who had entered the United States on non-immigrant visas before January 1, 2000 to report to the Department of Homeland Security for questioning. (Non-immigrant visas include student visas, tourist visas, business visas, and other temporary visas). *Id.* Although Attorney General John Ashcroft apparently stated that the interviews were to be "voluntary and friendly," a Department of Justice Memorandum authorized holding "interested" individuals on bond. *Id.* at 25 n.104 (citing *Memo Adds to Suspicions of Immigrants on Interviews*, N.Y. TIMES, Nov. 29, 2001). This is not to mention continued incommunicado indefinite detention of Arabs and Muslims in Guantanamo Bay. The focus of this discussion, however, is on the treatment of Arabs and Muslims in the United States.

²⁴ See Civil Rights and Education Fund, *supra* note 17, at 22-23. See also DOJ Focusing on Removal of 6,000 Men for Al Qaeda Haven Countries, *supra* note 22, at 116 (quoting the Arab American Anti-Discrimination Committee ("ADC")) ("The ADC stressed that [the government] has the right to remove persons who are not in the country legally but said that it is 'unconscionable' to proceed 'based on a hierarchy that is ethnically defined'").

and Muslim immigrants.²⁵ The federal government stopped reporting the number when it reached 1,147,²⁶ but at least 1,200 persons were arrested and later charged with immigration violations.²⁷ One scholar estimates that 2,000 had been arrested by April 2002.²⁸ A significant additional number of individuals were held as “material witnesses.”²⁹ Only a handful of the detentions ultimately resulted in arrests for terrorist offenses.³⁰ Many of the detainees were held for weeks or months without charge.³¹ Few were permitted initial access to counsel.³² Some against whom orders of deportation or voluntary departure had already been served and entered were still held by the INS, even though they had been scheduled to leave the country.³³ Preventive detention generally is not permitted in the United States, but it was essentially carried out against some of these detainees:

²⁵ Susan M. Akram & Kevin R. Johnson, “Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy,” *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 331 (2002) (citing, *inter alia*, David E. Rovella, *Clock Ticks on 9/11 Detentions*, NAT’L L. J., Nov. 5, 2001, at A1).

²⁶ See Cole, *supra* note 16, at 960.

²⁷ See Chishti & Meissner, *supra* note 7, at 1194.

²⁸ Cole, *supra* note 16, at 960.

²⁹ See Akram & Johnson, *supra* note 25, at 327 (noting that a large number of Arab and Muslim citizens were put into custody as “material witnesses” in the aftermath of 9/11). One study found that “nearly 50 people” have been detained as material witnesses since September 11. See Chishti & Meissner, *supra* note 7, at 1195.

³⁰ See Chishti & Meissner, *supra* note 7, at 1194-95.

³¹ Cole, *supra* note 16, at 962 (citing Amnesty Int’l, *Amnesty International’s Concerns Regarding Post September 11 Detentions in the USA* (Mar. 14, 2002), available at <http://web.amnesty.org/library/Index/ENGAMR510442002>); Dan Eggen, *Delays Cited in Charging Detainees; With Legal Latitude, INS Sometimes Took Weeks*, WASH. POST, Jan. 15, 2002, at A1; Dan Eggen, *Long Wait for Filing of Charges Common for Sept. 11 Detainees; Delays Reasonable, INS Officials Say*, WASH. POST, JAN. 19, 2002, at A12). See also Chishti & Meissner, *supra* note 7, at 1194 (noting that of the 406 detainees from whom information was available, over half were held “for more than five weeks. Almost nine percent were detained for more than nine months before being released or repatriated”).

³² See Chishti & Meissner, *supra* note 7, at 1194 (“Many of these detainees had severe problems notifying or communicating with their family members and lawyers or arranging for representation at all”).

³³ Cole, *supra* note 16, at 964. See also Chishti & Meissner, *supra* note 7, at 1194 (“Of the detainees for whom such information was available, approximately 52 percent were believed to be subject to a Federal Bureau of Investigation (“FBI”) hold, preventing their repatriation for weeks or months even after they were ordered removed from the U.S. and did not appeal”).

[Of all those arrested, 752] were charged with immigration violations. These so-called "special interest" immigration detainees were presumed guilty of links to terrorism and incarcerated for months until the government "cleared" them of such connections. By February 2002, the Department of Justice acknowledged that most of the original "special interest" detainees were no longer of interest to its anti-terrorist efforts, and none were indicted for crimes related to the September 11 attacks. Most were deported for visa violations.³⁴

One study of the detentions revealed that more than one-third of the detainees for whom information was available came from either Egypt or Pakistan.³⁵ The researchers were unable to find any rational basis for targeting nationals from these two countries.³⁶ Perhaps more troubling, the researchers found that the arrest of foreign nationals from Muslim countries did not appear to be based on an official policy of racial profiling but upon private citizens, engaging in racial profiling themselves, who phoned in tips to law enforcement agents about Muslims or Muslim looking individuals living in their communities or places of work.³⁷ Apparently, law enforcement personnel acquiesced in the practice of racial profiling by picking up those whom citizens had identified.³⁸

B. *Conducting Secret (Closed) Immigration Hearings for the Arab and Muslim Immigrants Who Were Arrested and Detained*

The public, the press, and family members have been excluded from virtually all immigration hearings conducted for these immigrants.³⁹ Before September 11, immigration judges had the discretion to close immigration hearings on a case-by-

³⁴ Alison Parker & Jamie Fellner, *Above the Law: Executive Power after September 11 in the United States*, in HUMAN RIGHTS WATCH WORLD REPORT 2004 (2004), available at http://hrw.org/wr2k4/8.htm#_Toc58744957.

³⁵ Chishti & Meissner, *supra* note 7, at 1194.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* The study also showed that the "majority of noncitizens detained since September 11 . . . had spouses, children, or other family relationships in the U.S." *Id.*

³⁹ See Cole, *supra* note 16, at 961. See also Memorandum from the Chief Immigration Judge, *infra* note 41 and accompanying Instructions to Immigration Judges.

case basis. Generally, immigration hearings were not closed.⁴⁰ The Attorney General, however, changed the rule, requiring immigration judges to close the proceedings at the request of the prosecutor.⁴¹ Apparently, the Justice Department ordered all the prosecutors to make such a request in these post September 11 cases.⁴² Attorneys representing the immigrants during the closed hearings reported that no classified information had been introduced in the hearings.⁴³ Although due process is more limited in immigration hearings than in a criminal trial, the principle of public trials and hearings is fundamental.⁴⁴ It should only be deviated from in cases of extreme necessity. The blanket approach here, where virtually every one of these immigrants had a closed proceeding, on its face violates that principle, particularly absent any apparent demonstrated need for the closures in all these cases.⁴⁵

⁴⁰ See *North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288, 299-300 (D. N.J. 2002) (noting that the immigration regulations promulgated since 1964 created a presumption that deportation hearings would be open) (citing 8 C.F.R. § 242.16(a) and 8 C.F.R. § 3.27), *rev'd*, 308 F.3d 198 (3d Cir. 2002), *cert. denied* 123 S. Ct. 2215 (2003) (holding that the INS may close so-called "special interest" immigration deportation hearings).

⁴¹ Memorandum from Michael Creppy, Chief Immigration Law Judge, to All Immigration Judges (Sept. 21, 2001), in 78 INTERPRETER RELEASES 1836 (Dec. 3, 2001). The memorandum states as follows: "[T]he Attorney General has implemented additional security procedures for certain cases in the Immigration Court. Those procedures require us to hold the hearings individually, to close the hearing[s] to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court." *Id.* (emphasis added). The instructions that were subsequently issued state in part as follows: "The courtroom must be closed for these cases . . . no visitors, no family, no press." *Instructions for Cases Requiring Additional Security*, in 78 INTERPRETER RELEASES 1837 (Dec. 3, 2001).

⁴² See *id.*; but see *Akram & Johnson*, *supra* note 25, at 321 (noting that by 1999, the government used secret evidence in 25 removal proceedings brought against Arab and Muslim immigrants).

⁴³ See *Cole*, *supra* note 16, at 961.

⁴⁴ See *id.* See also *Richmond Newspapers Inc., v. Virginia*, 448 U.S. 555 (1980).

⁴⁵ The Sixth Circuit noted as follows:

Nothing in the Creppy directive counsels that it is limited to "a small segment of particularly dangerous individuals." In fact, the Government so much as argues that certain non-citizens known to have no links to terrorism will be designated "special interest" cases. Supposedly, closing a more targeted class would allow terrorists to draw inferences from which hearings are open and which are closed.

Detroit Free Press v. Ashcroft, 303 F.3d 681, 692 (6th Cir. 2002) (holding that INS may not close "special interest" immigration deportation cases).

Aside from closing the immigration hearings, the Justice Department has conducted the proceedings against these immigrants in virtually unparalleled secrecy.⁴⁶ "Chief Immigration Judge Michael Creppy has instructed immigration judges not to list the cases on the public docket, and to refuse to confirm or deny that they even exist."⁴⁷ The Justice Department has refused to disclose the names of those it detained.⁴⁸ The United States Supreme Court has refused to grant certiorari in a case challenging that decision.⁴⁹

1. *Requiring Arab and Muslim Immigrants who have been residing here with student visas, visitors visas, and other temporary visas to personally register with the immigration authorities*

During the Iran Hostage crisis, all Iranian students studying in the United States were required to report to the INS.⁵⁰ As a result, the INS deported a significant number of Iranians.⁵¹ The Justice Department issued a similar order, under its "Special Registration" Program, part of the National Security Entry-Exit Registration System ("NSEERS"),⁵² requiring that the following personally appear at Immigration and Naturalization offices: foreign born males, sixteen years of age or older, from almost exclusively Arab and Muslim countries, who hold student visas, visitors' visas, and other temporary visas.⁵³ Ap-

⁴⁶ See *Instructions for Cases Requiring Additional Security*, *supra* note 41, at 1837 ("This restriction on information includes confirming or denying whether such a case is on the docket or scheduled for a hearing . . . You should instruct all courtroom personnel, including both court employees and contract interpreters, that they are not to discuss the case with anyone").

⁴⁷ *Id.* See also Cole, *supra* note 16, at 961 (citing Memorandum from Chief Immigration Judge Michael Creppy, *supra* note 41).

⁴⁸ See Cole, *supra* note 16, at 960.

⁴⁹ North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

⁵⁰ 8 C.F.R. § 214.5 (1981). See also *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979) (upholding INS regulations requiring Iranian students to report to the INS).

⁵¹ See *Shoae v. INS*, 704 F.2d 1079 (9th Cir. 1983) (upholding an Iranian student's deportation).

⁵² Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 67,766, 67,7667 (Nov. 6, 2002).

⁵³ See State Department Press Releases and Documents, *New Entry-Exit System to Focus on Individuals, Not 'Broad Categories'*, FED. NEWS & INFO. DISPATCH, Dec. 2, 2003, available at 2003 WL 64739209. There are three components to Na-

parently, the Justice Department planned to have the program cover all foreign visitors, but it started with Iran, Iraq, Syria, Sudan, Libya and North Korea, all Arab and Muslim countries except North Korea.⁵⁴ The Department established four groups from the following countries that were required to come in and register at designated dates: “[I] Iraq, Iran, Libya, Sudan and Syria; [II] Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates and Yemen; [III] Bangladesh, Egypt, Indonesia, Jordan and Kuwait; and [IV] Saudi Arabia and Pakistan.”⁵⁵ The first registration deadline was in December 2002;⁵⁶ the registration deadline for the first two groups ended February 7, 2003.⁵⁷ The third group’s deadline was March 21, 2003,⁵⁸ and the fourth group’s deadline was April 25, 2003.⁵⁹

tional Security Entry-Exit Registration System: the “Special Registration” program described above; the “Point of Entry Registration,” [hereinafter POE] for those who are at the point of entering the country; and “Exit-Departure” controls for those who are leaving the country. *Id.* at 1. The POE program is described *infra* notes 65 to 71 and accompanying text. See also Davies, *supra* note 20, at 51 n.27 (2003) (noting that Attorney General John Ashcroft “instituted special registration requirements known as the National Security Entry-Exit Registration System (NSEERS) that require select individuals to be fingerprinted, photographed, and interviewed under oath at United States ports-of-entry. These registration requirements were subsequently extended to nationals of certain designated countries who had already been permitted to enter the United States These Registration requirements affect non-immigrant aliens from four groups of countries: Iraq, Iran, Libya, Sudan and Syria; Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates and Yemen; Bangladesh, Egypt, Indonesia, Jordan and Kuwait; and Saudi Arabia and Pakistan”). Professor Davies also notes that the FBI appears to be openly investigating Arab and Muslims in the United States. See *id.* (citing Eric Lichtblau, *FBI Tells Offices to Count Local Muslims and Mosques*, N.Y. TIMES, Jan. 28, 2003, at A13).

⁵⁴ See Davies, *supra* note 20, at 51 n.27.

⁵⁵ *Id.* See also State Department Press Release on New Exit-Entry System, *supra* note 53, at 2.

⁵⁶ Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 67,766, 67,767 (Nov. 6, 2002).

⁵⁷ Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 77,136, 77,137 (Dec. 16, 2002). See also Permission for Certain Non-immigrant Aliens From Designated Countries to Register in a Timely Fashion, 68 Fed. Reg. 2,366 (Jan. 16, 2003) (reopening the registration period for the first two groups, extending the time for them to register to Feb. 7, 2003).

⁵⁸ Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2,363-03, 2,364 (Jan. 16, 2003) (requiring the specified nationals from Bangladesh, Egypt, Indonesia, Jordan and Kuwait to register by March 28, 2003).

Although the Justice Department initially assured those subject to the call-in registration program that the purpose of the registration was to track foreigners and to obtain leads on terrorists, the Department also used the registration process to determine if those registering had violated immigration regulations. Apparently, 500 to 1000 individuals "were detained" after registering on December 10, 2003 "in the Los Angeles/Orange County area alone"⁶⁰

The program, however, apparently yielded little in the way of arrests for terrorist crimes. See table below.

a. Mandatory Registration and Detention Data

Number of Arab and Muslim Immigrants Registered	82,581 ⁶¹
Number of Notices of Appear Issued (charging immigration law Violations)	13,153
Number of Arab and Muslim Immigrants Detained Overall	2,761
Number Deported (although BICS noted that many have taken Voluntary departure and many are still in proceedings)	2
Number Charged with Terrorism Related Crimes	0 ⁶²

Although the ethnic profiling of Arabs and Muslims may have yielded intelligence⁶³ (but not arrests), these figures do suggest that the crude tool of profiling may not be greatly advancing the government's cause against Al Qaeda and its allies.⁶⁴

⁵⁹ Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 8,046, 8,047 (Feb. 19, 2003) (extending the previous deadline). See also State Department Press Release on New Exit-Entry System, *supra* note 53, at 2.

⁶⁰ *Id.* Such a policy may be counter-productive for other reasons. Individuals who have information about terrorist activity, but who have minor immigration infractions may decide not to register or to cooperate with authorities. *Id.*

⁶¹ As of December 2, 2003 when the Department of State announced that the Special Registration Program was to end, 83,519 individuals had been registered. State Department Press Release on New Entry-Exit System, *supra* note 53, at 2.

⁶² Data from Asian American Legal Defense Fund, citing to the Bureau of Citizenship and Immigration Services (formerly part of the Immigration and Naturalization Service), current as of May 11, 2003.

⁶³ It is not known what intelligence leads, if any, have come from these various programs.

⁶⁴ Michael Janofsky, *9/11 Panel Calls Policies On Immigration Ineffective*, N.Y. TIMES, Apr. 17, 2004, at A8 (9/11 Commission's preliminary report concluded,

2. *Requiring that visitors from Arab and other selected countries be fingerprinted, photographed, and subject to an interrogation under oath at ports-of-entry*

A second aspect of the National Security Entry-Exit Registration System required selected individuals at various points of entry to be fingerprinted, photographed, and subject to interrogation under oath.⁶⁵ Again this program targeted foreigners from the same twenty-four Arab and Muslim countries, with the addition of North Korea.⁶⁶ These controls applied to students, tourists, business visitors, and other temporary visa holders.⁶⁷

After considerable protest on the part of the Arab-American community and others, the Department of Homeland Security ("DHS") decided to abolish the mandatory annual re-registration requirement, under the Special Registration Program or under the Port of Entry ("POE") program, effective December 2, 2003.⁶⁸ Department of Homeland Security Deputy Secretary, Asa Hutchinson said that DHS "will utilize a more tailored system that is individual-specific rather than the broad categories [of people] by geography."⁶⁹ By September 30, 2003, 177,260 people had registered with the NSEERS program as a whole.

among other things, that these programs racially profiling Arabs and Muslims in the United States were a failure).

⁶⁵ See Davies, *supra* note 20, at 51 n.27.

⁶⁶ See *id.* See also *supra* note 54 and accompanying text.

⁶⁷ These measures were subsequently expanded under the US-VISIT program to include other countries, Brazil being among the countries on the list. Irate at these security measures, a Brazilian judge ordered that all visitors from the United States to Brazil be subject to the same treatment. See Audrey Hudson & S.A. Miller, *U.S. Requires Fingerprints, Photos From Foreign Visitors*, WASH. TIMES, Jan. 6, 2004, at A01. The U.S. Visit program requires biometric identification of all visitors and non-immigrants, including foreigners entering the United States to study here. Implementation of the United States Visitor and Immigrant Status Indicator Technology Program ("US-Visit"); Biometric Requirements, 69 Fed. Reg. 468, 468 (Jan. 5, 2004). The DHS plans to expand this program to include visitors from all countries. It appears that it essentially will supplant NSEERS. *Id.* at 476.

⁶⁸ State Dep't Press Release on New Exit-Entry Procedures, *supra* note 53, at 1; Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67,578 (Dec. 2, 2003) (to be codified as 8 C.F.R. Part 264) ("Supplementary Information" section for this interim rule states that DHS "will use a more tailored system in which it will notify individual aliens of future registration requirements"). By the way, the DHS absorbed the INS on March 1, 2003.

⁶⁹ See State Dep't Press Release on New Exit-Entry Procedures, *supra* note 53, at 1.

They will not have to re-register annually as had been required under the original program.⁷⁰ Exit controls, however, for these individuals remain in effect.⁷¹

C. *Changing priority for deporting "aliens," namely, the Immigration and Naturalization Service's seeking to deport 6,000 from Arab countries first, ahead of the 314,000 foreign nationals who have absconded*

At first glance, the so-called "Absconder Apprehension Initiative" appears to be a sound enforcement tactic. Of the estimated 314,000 foreign born from nations around the world who have removal orders against them, the government has targeted the approximately 6,000 from Arab and Muslim countries first.⁷² The September 11 hijackers and Al Qaeda were Arab and Muslim. The argument runs that other members of Al Qaeda might be among the 6,000 from these selected "Al Qaeda harboring" countries.⁷³

The difficulty is that the targeted persons are being singled out solely because of their nationality. This kind of racial profiling has apparently yielded little, if any, intelligence or arrests for terrorism offenses, when employed in the call-in registration program or in the "voluntary" interview program.⁷⁴ The Absconder Initiative has apparently been equally fruitless. A report of the Presidential Commission investigating the September 11 attacks expressly found as follows: "[W]e have not learned that any of the absconders were deported under a terrorism statute, prosecuted for terrorist-related crimes or

⁷⁰ See Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, *supra* note 68, at 67,581.

⁷¹ *Id.* at 67,580. See also Kathleen Taylor, Editorial, SEATTLE POST INTELLIGENCER, Dec. 18, 2003 (noting that temporary immigrants from the named 25 countries have to leave the United States from designated points of entry and must register upon leaving the country).

⁷² *Middle Eastern "Absconders" to be Rounded Up*, 7 BENDER'S IMMIGR. BULL. NO. 5, Mar. 1, 2002, at 264. It is estimated that approximately 1,000 of the 6,000 absconders have felony convictions. They will be targeted for deportation first; then the rest will follow. *Id.*

⁷³ American Immigration Lawyers Association, *Boiling the Frog Slowly: Executive Branch Actions Since September 11, 2001*, 7 BENDER'S IMMIGR. BULL. NO. 20, Oct. 15, 2002, at 1237. INS Commissioner Ziglar announced the initiative in December 2001. *Id.*

⁷⁴ See *infra* note 140 and accompanying text.

linked in any way to terrorism.”⁷⁵ As some commentators have noted, including the former Commissioner of the INS, “This [absconder initiative] has marginal security benefits, while further equating national origin with dangerousness.”⁷⁶ Furthermore, there is every reason to believe that Arabs and Muslims living here or abroad will see this as yet another example of American government blatantly discriminating against individuals with Arab and Islamic backgrounds.⁷⁷

D. *The Justice Department Task Force’s interviewing 5,000-8,000 young immigrant men based solely on their age, date of arrival, and country from which they have come, all being either Arabs or Muslims*

The Justice Department also initiated a Task Force program to “voluntarily” interview 5,000 immigrant men, between the ages of eighteen and thirty-three, who came almost exclusively from Arab or Muslim countries and who entered the United States after January 1, 2000.⁷⁸ The program was expanded to include an additional 3,000. The Task Force was composed not only of Justice Department personnel, but also of local and state police officers.⁷⁹ Nominally to obtain leads on terrorism both here and abroad, a Justice Department memo suggests that the voluntary interviews also had the purpose of potentially arresting suspicious interviewees and those who had

⁷⁵ Janofsky, *supra* note 64, at A8. The Commission reported that as of “early 2003, 1,139 had been apprehended, a group that included 803 who had been deported, 224 who were awaiting deportation and 45 who were prosecuted on other criminal charges . . .” *Id.*

⁷⁶ Chishti & Meissner, *supra* note 7, at 1195.

⁷⁷ Cam Simpson, Flynn McRoberts and Liz Sly, *Immigration Crackdown Shatters Muslims’ Lives*, CHIC. TRIB., Nov. 16, 2003, at C1. Cf. Geneive Abdo & E.A. Torriero, *Spy Charges Dropped, but Fear Remains; Chaplain’s Kin Feel ‘Like the Enemy’*, CHIC. TRIB., May 3, 2004, at 1 (although espionage charges were dropped against Army Capt. James Yee for allegedly mishandling classified documents in Guantanamo Bay, Muslims feel targeted by the government).

⁷⁸ Akram & Johnson, *supra* note 25, at 334 (citing DOJ Orders Incentives, ‘Voluntary’ Interviews of Aliens to Obtain Info on Terrorists; Foreign Students, Visa Processing Under State Dept. Scrutiny, in 78 INTERPRETER RELEASES 1816, 1817-17 (2001)).

⁷⁹ DOJ Orders Incentives, ‘Voluntary’ Interviews of Aliens to Obtain Info on Terrorists; Foreign Students, Visa Processing Under State Dept. Scrutiny, *supra* note 78, at 1817-18.

violated immigration laws.⁸⁰ Apparently, approximately twenty have been arrested as a result of the interviews.⁸¹ Before the interviews, the authorities apparently lacked either probable cause or reasonable suspicion that any of these immigrants had committed immigration violations, let alone that they were engaged in terrorist crimes or knew about terrorist activities. The basis of the interviews was the nationality of the targeted persons, plus their gender, age and time of entry.

E. *Enlisting state and local police in immigration enforcement, implicitly encouraging those police forces to engage in more traditional racial profiling of Arabs, Muslims, Sikhs and South Asians, namely, by stopping for questioning and investigating Arab appearing drivers and pedestrians*⁸²

Before September 11, state and local police were generally precluded from enforcing the civil provisions of immigration

⁸⁰ Akram & Johnson, *supra* note 25, at 334 (citing Memorandum from the Deputy Attorney General, to all United States Attorneys and all Members of the Anti-terrorism Task Forces (Nov. 9, 2001), reprinted in DOJ Orders Incentives, "Voluntary" Interviews of Aliens to Obtain Info on Terrorists, Foreign Students, Visa Processing Under State Dept. Scrutiny, *supra* note 78, at app. The memorandum states in relevant part as follows: "While the primary purpose of these interviews is not to ascertain the legality of the individuals' immigration status, the federal responsibility to enforce the immigration laws, as exercised by the Immigration and Naturalization Service is an important one. Therefore, if you suspect that a particular individual may be in violation of the federal immigration laws, you should call the INS representative on your Anti-Terrorism Task Force or the INS officials at the closest Law Enforcement Support Center. Those officials will advise you whether the individual is in violation of the immigration laws and whether he should be detained." *Id.* at 1829, 1830.

⁸¹ Civil Rights and Education Fund, *supra* note 17, at 24-25. The approximately 20 who were detained were held for immigration violations, not for terrorist linked offenses. *Id.* The Department planned on interviewing approximately 5,000 in 2001 and 3,000 in 2002; approximately 90 percent appeared. *Id.* Although it is not known whether any useful leads concerning terrorist activity were obtained from those who reported, there is little reported evidence to suggest that the questioning of Arab men provided substantial intelligence on terrorists. *Id.* Some police departments refused to participate in the interrogations, because of concerns about racial profiling. See *id.* n.106 (citing Fox Butterfield, *Police are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at B7) (quoting the Seattle chief of police who states that racial profiling was a sensitive problem because "[w]e don't want to harm relationships with community members that we have worked for years to build [since] [w]e depend on information that these people bring to us when they come to trust us").

⁸² See Civil Rights and Education Fund, *supra* note 17, at 22-23.

laws.⁸³ Reasons for discouraging local policing in this area included the complexity of immigration law, an area that is generally outside a police officer's training and knowledge, and the risk of discriminatory enforcement of the law against people of color and other "foreign looking" individuals.⁸⁴ The Justice Department, however, changed that policy, enlisting the aid of state and local police to enforce the immigration laws.⁸⁵ For example, the Justice Department added to the FBI's National Crime Information ("NCIC") Database, the names of more than

⁸³ See Kevin Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 863 n.90 (2003) (citing *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power") (citations omitted)); see, e.g., *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (holding that most of Proposition 187, a California law seeking to effectively regulate undocumented immigration, was preempted by federal law). But see Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121 (1994) (contending that states should have an increased role in immigration regulation). See also Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L. J. 50, 66 (1994) (citing a 1989 Memorandum of Understanding between the INS and the City of San Francisco, agreeing that the San Francisco police will not enforce the federal immigration law). But see Paul Smith, *An Argument Against Mandatory Reporting of Undocumented Immigrants*, 29 COLUM. J. L. SOC. PROB. 147 (1995) (noting that although generally prohibited from enforcing the civil provisions of the Immigration and Naturalization Act, there exists no constitutional preemption for state and local police from enforcing the criminal provisions of the INA) (citing *Gonzales v. City of Peoria*, 722 F.2d 469, 475 (9th Cir. 1983); *Gates v. Superior Court*, 193 Cal. App. 3d 205, 214-15 (1987); Hawley, *The Powers of Local Law Enforcement to Enforce Immigration Laws*, 99-6 IMMIGRATION BRIEFINGS (June 1999).

⁸⁴ See Mithre J. Sandrasagra, *U.S.: Rights Groups Fight Use in Immigration Cases*, INTER PRESS SERVICE, Dec. 18, 2003, available at 2003 WL 66986827; see also Linda Reyna Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L. J. 9, 12 (1994) (noting that local police enforcement risks violating the rights of United States citizens, legal residents, and aliens); Johnson, *supra* note 83, at 363-64 (noting patterns of the police abuse of undocumented immigrants).

⁸⁵ DOJ Legal Opinion Would Broaden Use of State, Local Personnel in Immigration Enforcement, in 79 INTERPRETER RELEASES 519 (Apr. 8, 2002) (noting that the DOJ Office of Legal Counsel is issuing an opinion permitting local police to enforce the civil provisions of the Immigration laws, reversing its 1996 opinion). See also Marie Taylor, *Immigration Enforcement Post September 11, Safeguarding the Civil Rights of Middle Eastern American and Immigrant Communities*, 17 GEO. L. J. 63, 91 (2002) (citing Eric Schmidt, *Ruling Clears Way to Use State Police in Immigration Duty*, N.Y. TIMES, Apr. 4, 2002, at A15). The House is debating a bill that would expressly authorize state and local police to enforce immigration laws. See *House Subcommittee Debates Local Enforcement of Immigration Laws under Proposed CLEAR Act*, in 80 INTERPRETER RELEASES 1407 (Oct. 13, 2003); H.R. 2671, 149 Cong. Rec. H6463 (daily ed. July 9, 2003).

300,000 "aliens" who remained in the country despite deportation or removal orders.⁸⁶ Local law enforcement personnel can access the NCIC.⁸⁷ The INS Commissioner explained that this policy change would enable local and state police to help with "removal efforts."⁸⁸ Furthermore, the Justice Department asked local police forces to help interview 8,000 Muslim males, as noted in the previous section.⁸⁹

Although using the local police to enforce immigration regulations in the wake of September 11 may appear superficially reasonable, such a policy raises serious questions.⁹⁰ "Co-opting state and local police to make immigration arrests undermines public safety and encourages racial profiling."⁹¹ It discourages undocumented immigrants from coming forward to help the po-

⁸⁶ See *INS Commissioner Announces Data Sharing Arrangement with the FBI, Other Security Measures*, in 78 INTERPRETER RELEASES 1899 (Dec. 17, 2001) (citing Chris Adams, *INS to Put in Federal Criminal Databases the Names of People Ordered Deported*, WALL ST. J., Dec. 6, 2001, at A22).

⁸⁷ *Id.* ("Sharing this information with the FBI will allow local law enforcement personnel to assist with removal efforts").

⁸⁸ *Id.*

⁸⁹ See Chishti & Meissner, *supra* note 7, at 1195 ("Problems occurred [in the 'voluntary interview' program] when poorly trained police officials were tasked to implement the program").

⁹⁰ In testifying before Congress, Members of the Mexican Legal Defense Fund noted:

Immigrants, generally, prefer not to draw attention to themselves from the government or the private sector even if they are here legally. This explains, in part, why Latino immigrants under-report when they are the victims of crime or when they are the victim of illegal civil practices, such as employment discrimination, unsafe working environments, or housing discrimination even though they experience these practices in significant numbers. Current trends post-9/11 to involve local law enforcement in enforcing immigration laws, particularly civil laws, will only drive Latino immigrant communities further underground and make them less willing to provide information to law enforcement that would be helpful in solving crimes and resolving legal violations that affect not just Latinos but others with whom they work and live. *It will also lead to less cooperation from immigrant communities with law enforcement searching for leads to fight terrorism.*

INS Interior Enforcement Strategy: Hearing Before the House Comm. on the Judiciary, Subcomm. on Immigration and Claims Interior Enforcement Strategy, 107th Cong. (June 19, 2002) (statement of Marisa J. Demeo, Regional Counsel, and Aisha Qaasim, Legislative Staff Attorney, Mexican American Legal Defense and Educational Fund (MALDEF)), available at 2002 WL 20318304 (emphasis added).

⁹¹ Sandrasagra, *supra* note 84 (quoting Raul Yzaguirre, president and CEO of the National Council of La Raza).

lice solve crimes.⁹² Numerous police departments, the National Association of Counties, and the National League of Cities have taken stands against using state and local police to make immigration arrests.⁹³

Unfortunately, there appears to be substantial evidence that state and local police are engaging in racial profiling of Arabs, Muslims, Sikhs, and South Asians.⁹⁴ As in the case of profiling of Blacks and Latinos, many local police are apparently stopping Arab looking drivers pretextually, solely or in part because of their appearance.⁹⁵ Arab looking individuals are also being stopped or questioned in other places at least in part because of their ethnicity.⁹⁶

IV. RACIAL PROFILING: A HISTORY AND AN ANALYSIS

A. *September 11 as Justifying Racial Profiling*

Given the nationality of the authors of the September 11 attacks, why should we not target immigrants and visitors from Arab and Muslim countries for investigation, prosecution, and deportation? After all, there may be other sleeper Al Qaeda cells here in the United States.⁹⁷ Furthermore, Arab, Muslims, and their organizations may be financing terror groups against us.

⁹² See Johnson, *supra* note 83, at 864.

⁹³ Sandrasagra, *supra* note 84.

⁹⁴ See Teresa Watanabe, *Anti-Muslim Incidents Rise, Study Finds; Group Says Hate Crimes and Harassment in California Tripled in 2003 from Previous Year*, L.A. TIMES, May 3, 2004, at B1; Mary Beth Sheridan, *Bias Against Muslims Up 70%; Radio Talk Shows, Iraq War Among Reasons, Study Finds*, WASH. POST, May 3, 2004, at A12.

⁹⁵ See Civil Rights and Education Fund, *supra* note 17, at 22-23 (discussing cases of "Driving while Arab (or Arab looking)").

⁹⁶ See *id.* at 23. Aside from this local profiling, "flying while Arab," the profiling of Arab and Muslim airline passengers by private screeners and now governmental officials, has reached unprecedented heights. *Id.* at 27-28. See also Charu A. Chandrasekhar, *Note & Comment: Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L. J. 215 (2003).

⁹⁷ "[I]f the people that are flying your airplanes into buildings are from the Middle East, you don't look for New Zealanders." Chandrasekhar, *supra* note 96, at 223 n.48 (quoting Nurith C. Aizenman, *Middle Eastern Travelers Face Scrutiny; Arab American Activist Attacks Lengthy Interrogations as Profiling, Doubts Usefulness*, WASH. POST, Sept. 23, 2001, at A11 (quoting a former security head of the Federal Aviation Administration)).

For example, Stuart Taylor has opposed racial profiling black drivers for drugs, "Driving While Black" (DWB). He argues, however, that racial profiling of Arabs and Muslims is justified in airports, because *inter alia* "preventing mass murder . . . is [an] infinitely more important rationale than the rationale behind DWB profiling (finding illegal drugs or guns) [and] [a] virulent perversion of Islam is, so far, the only mass movement in the world so committed to mass-murdering Americans that its fanatics are willing to kill themselves in the process [and that some of these people] have lived legally in America for years" ⁹⁸ Taylor adds that "DWB is singularly race-based, which contravenes both the letter and the spirit of the Constitution. Airport profiling takes multiple factors into account, such as when the ticket was purchased, how the subject responds to questions, etc." ⁹⁹

This argument, however, fails to recognize how crude the device of racial profiling is, the ease with which Osama bin Laden and Al Qaeda can circumvent it, ¹⁰⁰ the corrosive effect it can have on Arabs and Muslims and Middle Eastern appearing men living here and abroad, and how much it creates the perception of an American anti-Arab and anti-Muslim animus ¹⁰¹ both at home and in other parts of the world.

History may help explain why both this intuitive and reasoned justification of ethnic profiling is wrong. In World War II,

⁹⁸ R. Spencer Macdonald, *Notes & Comments: Rational Profiling in America's Airports*, 17 BYU J. PUB. L. 113, 126 (2002) (citing Stuart Taylor, Jr., *The Case for Using Racial Profiling at Airports*, ATLANTIC, Sept. 25, 2001, available at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm>).

⁹⁹ *Id.*

¹⁰⁰ *Cf.* Ruth Wedgwood, *The Enemy Within*, WALL ST. J., June 14, 2002, at A12, available at 2002 WL-WSJ 3397712 (noting that Al Qaeda can circumvent watch-lists (and presumably profiles) by recruiting American citizens).

¹⁰¹ The Department of Transportation issued a policy statement less than a month after September 11 prohibiting racial profiling by airlines: "Do not subject persons or their property to inspection, search and/or detention solely because they appear to be Arab, Middle Eastern, Asian, and/or Muslim; or solely because they speak Arabic, Farsi, or another foreign language; or solely because they speak with an accent that may lead you to believe they are Arab, Middle Eastern, Asian, and/or Muslim." Chandrasekhar, *supra* note 96, at 218 (quoting Policy Statement, U.S. Dep't of Transp. Office of Aviation Enforcement and Proceedings, Carrying Out Transportation Inspection and Safety Responsibilities in a Nondiscriminatory Manner (Oct. 12, 2001) (emailed to airline trade associations and major U.S. airlines on Oct. 17, 2001), available at <http://airconsumer.ost.dot.gov/rules/20011012.htm>).

we interned 110,000 to 120,000 people of Japanese descent, including 70,000 American citizens.¹⁰² We interned relatively few German Americans and Italian Americans during that conflict.¹⁰³

Americans generally regard the internments as a blot on our history. Nearly every member presently serving on the United States Supreme Court has condemned *Korematsu v. United States*,¹⁰⁴ the decision that upheld the Japanese internments against constitutional attack. Congress has condemned the program and enacted legislation, authorizing reparations to surviving victims.¹⁰⁵

But perhaps most significant for this analysis, few, if any, Japanese-Americans or Japanese immigrants ever engaged in espionage, sabotage, or acts against the United States during World War II.¹⁰⁶ Unlike the present "war against terrorism," the United States had declared war against the enemy, Japan, and, at least the non-citizen Japanese immigrants then residing here theoretically owed their allegiance to that country.¹⁰⁷ De-

¹⁰² Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of Japanese American Internment*, 17 CRIM. JUST. 52, 52-53 (2002).

¹⁰³ Evelyn Nieves, *Past Recalled for Japanese-Americans*, N.Y. TIMES, Sept. 27, 2001, at A26 (noting that aside from more than 120,000 ethnic Japanese internees, the United States government interned, during World War II, "nearly 11,000 Germans and German-Americans and 2,000 Italians"). As heinous a crime as September 11 was, it pales in comparison with World War II. In that conflict Americans alone lost 292,131 to battle deaths and 115,187 to deaths from other causes. *World War II*, 27 FUNK & WAGNALLS ENCYCLOPEDIA 448 (1986). Total Allied civilian and military losses were 44 million, those of the Axis were 11 million. *Id.*

¹⁰⁴ *Korematsu v. United States*, 323 U.S. 214 (1944). See also Cole, *supra* note 16, at 993 n.165.

¹⁰⁵ Civil Liberties Act of 1988, 50 U.S.C. § 1989a (1988) (apologizing for the internments and providing restitution to the victims). See also Teresa Watanabe, *Donor Fund UCLA Chair on WWII Internment*, L.A. TIMES, Feb. 15, 2003, at B1.

¹⁰⁶ See Wu, *supra* note 102, at 55; see also Robert Pear, *\$1.5 Billion Urged For Japanese Held in War*, N.Y. TIMES, June 17, 1983, at A1. Although a Congressional Commission investigating the internments found that the United States had intercepted Japanese diplomatic cables indicating that they were employing some ethnic Japanese in the United States for espionage, the Commission concluded that "no documented acts of espionage, sabotage or fifth-column activity were shown to have been committed" by ethnic Japanese in this country. *Id.*

¹⁰⁷ See *The Nottelbohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6, 1955), available at 1955 WL 1 (noting that nationality denotes a "bond of allegiance" by the national to his or her country).

spite that presumption,¹⁰⁸ nationality and ethnicity actually provided little basis for demonstrating that the individuals involved posed a threat to us.

B. *United States Practice of Racial Profiling Before September 11*

Well before September 11, the United States had an unfortunate history with race relations generally and, more specifically, with allowing the police to pick out, stop, question, and investigate individuals based wholly or in part on their race.¹⁰⁹ Many police throughout the country often routinely stopped black and Latino drivers, suspecting (or hoping) to find evidence of drugs or other crimes.¹¹⁰ In the last five years, however, racial profiling has been increasingly attacked. DWB, a description of the police practice of routinely stopping black male drivers, has been roundly condemned.¹¹¹ Picking individuals

¹⁰⁸ National and international law permit the detention of "enemy aliens" during wartime. See Cole, *supra* note 16, at 959 (citing the Enemy Alien Act of 1798).

¹⁰⁹ The Supreme Court has upheld the use of pretextual traffic stops in an effort to catch what the police suspect to be individuals who have engaged in criminal activity. See *Whren v. United States*, 517 U.S. 806 (1996). "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." Civil Rights and Education Fund, *supra* note 17, at 11 (emphasis added). Note that the Civil Rights and Education Fund also observed that profiling includes "law enforcement activity that relies *in part*, as well as solely, on race (in the absence of a specific suspect description). . . ." Such a definition of racial profiling was included in consent decrees between the Department of Justice and the State of New Jersey. *Id.* at 37 n.17 (citing Consent Decree in *United States v. State of New Jersey*, Civil No. 99-5970, 2 (MLC) (Dec. 30, 1999), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm>. "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." Civil Rights and Education Fund Report, *supra* note 17, at 11. See also *supra* note 151 and accompanying text.

¹¹⁰ Civil Rights and Education Fund, *supra* note 17, at 12 (citing studies showing that blacks were stopped in significantly higher numbers than whites, including a study that between 1988 and 1991, "[b]lacks were 35 percent of those stopped" on the New Jersey Turnpike "though only 13.5 percent of the cars on the Turnpike had a [b]lack occupant and [b]lacks were only 15 percent of all traffic violators").

¹¹¹ Before September 11, President George W. Bush not only condemned racial profiling, but committed to stopping it in America: Racial profiling "is wrong and we will end it in America." Mike Allen, *Bush Issues Ban On Racial Profiling; Policy Makes Exceptions For Security*, WASH. POST, June 18, 2003, at A14, available at 2003 WL 56498502. Attorney General John Ashcroft also condemned racial profil-

out because they belong to a minority group and then subjecting them to criminal investigation encourages lazy police practices,¹¹² humiliates the individuals who are so selected,¹¹³ and causes resentment in the minority community against the police.¹¹⁴ Lastly, such “racial profiling,” which is bound to produce a large number of false positives, is an inefficient use of scarce police resources.¹¹⁵

C. *The Fallacy of Racial Profiling*

In a country as racially diverse as the United States with millions of people representing each identifiable ethnic or racial group, the racial or ethnic background of an individual has virtually no probative value except to exclude that person from the “circle of suspicion.”¹¹⁶ Thus, for example, let us assume that reliable witnesses told the police that they saw a white male

ing. Eric Ferkehnhoff and Noah Isakson, *Ashcroft Calls on Police to End Racial Profiling*, CHIC. TRIB., Apr. 7, 2001, at 17. The House introduced a bill not only to ban racial profiling, but also to permit profiling victims to sue the police. See H.R. 2074/S, 107th Cong., (2001). After September 11, neither the House nor the Senate moved on the bill. See also *infra* note 137 (discussing, *inter alia*, the reinroduction of the “End the Racial Profiling Act”).

¹¹² See Davies, *supra* note 20, at 63 (noting the unreliability of determining whom the United States Customs Service decided to strip search using a racial profile). See also David A. Harris, *Let's Look at What Counts: Racial Profiling Doesn't Stop Common Criminals. It Won't Stop Terrorists, Either*, LEGAL TIMES, Sept. 22, 2003, at 60 (“[U]sing race takes law enforcement eyes off what counts [suspicious behavior not ethnic background], making them [the police] less effective”).

¹¹³ For example, United States District Court Judge Filemon Vela has apparently been frequently stopped around Brownsville, Texas by Boarder Patrol agents and questioned, because of his Latino appearance. See Civil Rights and Education Fund, *supra* note 17, at 16-17 (citing DAVID HARRIS, PROFILES IN INJUSTICE 3-6 (2002)).

¹¹⁴ See Davies, *supra* note 20, at 74.

¹¹⁵ Professor Harris notes that using racial profiling unnecessarily increases the suspect pool:

All of those in the suspect category [as a result of their racial or ethnic profile] then have to be stopped, questioned, searched, and investigated, even when their behavior would not have pointed to any reason to do this. This spreads our finite investigative resources too thin. It's like looking for a needle in a haystack, but adding more hay.

Harris, *supra* note 112, at 60. See also Cole, *supra* note 16, at 976-77.

¹¹⁶ See Davies, *supra* note 20, at 65-66; United States v. Collins, 532 F.2d 79, 85 (8th Cir. 1976) (Heaney, J., dissenting) (“While the factor of race *eliminates from suspicion all persons of another race*, it cannot be used to create suspicion of a particular person of that race” (emphasis added)).

leave a van (which turned out to be filled with explosives) outside of the federal building in Oklahoma City. The explosives are subsequently detonated, causing massive loss of life and property. In investigating this crime, the police could properly exclude all non-white persons from the "circle of suspects."¹¹⁷ That the alleged perpetrator is apparently white and male hardly justifies questioning every white male in Oklahoma or in surrounding states. Not only would it require enormous police resources to do so, the odds of finding the actual perpetrator by this method would be exceedingly remote.

One might argue that there are fewer members in a minority group than there are whites in the United States.¹¹⁸ Mathematical analysis, however, supports the notion that race or ethnicity alone provide scant basis for suspecting an individual of terrorist crimes. Most population surveys estimate that there are 2.8 million to 6 million Arab and Muslims immigrants living in the United States.¹¹⁹ In purely mathematical terms, the odds that race or ethnicity alone will yield suspects is in the

¹¹⁷ For purposes of this hypothetical, assume a lone perpetrator carried out the bombing. See Davies, *supra* note 17, at 54-63 (setting forth a series of hypotheticals to explain racial and ethnic profiling and how it violates basic principles of fundamental fairness).

¹¹⁸ Whites, however, are projected to be an increasingly smaller part of the overall population of the United States. See Leonel Sanchez, *Migration to Fuel Census Growth; Tripling of Hispanic, Asian Populations in U.S. Expected by 2050*, SAN DIEGO TRIB., Mar. 18, 2004, at A3.

¹¹⁹ See Bill Broadway, *Number of U.S. Muslims Depends on Who's Counting*, WASH. POST, Nov. 24, 2001, at A1 (noting that a study commissioned by four Muslim organizations estimated the number of Muslims living here to be six to seven million, that a study commissioned by the American Jewish Committee estimated the number to be from 1.5 to 3.5 million, that 2001 Britannica Book of Year estimated 4.1 million, and that a City University of New York telephone survey estimated 2.8 million). See also Davies, *supra* note 20, at 52 (estimating 3.5 million). Another survey using census data from 1990 and 2000 estimated that at that time there were nearly 2.9 Muslims in the United States, John R. Logan & Glenn Denanne, *The Muslim World in Metropolitan America*, (Lewis Mumford Center for Comparative Urban and Regional Research, University at Albany) Aug. 15, 2003. Since by law an individual's religious affiliation may not be inquired of by the census takers, the exact numbers of Muslims living in the United States is not definitively known. Some estimate the number to be as high as six millions others in between two million and three million. See Joyce Howard Price, *1.2 Million Arabs in U.S., Census States*, WASH. TIMES, Dec. 3, 2003, available at <http://washington-times.com/national/20031203-113839-9531r.htm> (noting that the 2000 census reported 1.2 million Arabs, but that many Arabs do not practice the Muslim faith and that many Muslims are not Arab).

order of one in several thousands, odds so remote as to make race or nationality relatively little help in identifying terrorists.¹²⁰

Professor Davies explains these phenomena through the following hypotheticals. Assume a reliable witness identifies the perpetrator of a robbery as being a "white male." One could set forth the following syllogism:

Major Premise: "The person who committed this robbery was a white male."

Minor Premise: "Defendant is a non-white male."

Conclusion: "Defendant did not commit this robbery."¹²¹

The result of this syllogism appears almost self-evident, but Professor Davies correctly points out that the converse is not true:

Major Premise: "The person who committed this robbery was a white male."

Minor Premise: "Defendant is a white male."

Conclusion: "Defendant committed the robbery."¹²²

Unless there is only one white male, the syllogism is false. She notes:

[T]he addition of just one other white male to the cohort would reduce the chances of Defendant's responsibility for the crime by a full half. The addition of two white males to the group would lower the odds to one third, and so on. This should make it clear how the possession of a characteristic shared by a group very quickly loses its usefulness as means of including a particular individual within a circle of suspicion. The significance of group characteristics, such as race or ethnicity, drops precipitously as more and more persons are known to share that same characteristic. In a diverse population, which espouses a commitment to the principle of unfettered freedom of movement, its utility quickly approaches (even if it never quite reaches) zero.¹²³

The mathematical result appears counter-intuitive, but it demonstrates that racial or ethnic profiling is among the shallowest bases for suspecting a particular individual of criminal activity

¹²⁰ See Davies, *supra* note 20, at 73-74.

¹²¹ See *id.* at 66.

¹²² *Id.*

¹²³ *Id.*

in a society like ours, with millions representing each ethnic group.¹²⁴

D. *Racial Profiling Encourages Sloppy and Inefficient Police Practices*

Relying on racial profiles rather than evidence that a particular person or persons have engaged in criminal or other terrorist activities stifles sound policing and investigating practices. By focusing on individuals who fit a racial profile, the police are inevitably going to come up with a large number of false positives.¹²⁵ This may have the effect of lulling officers and causing them to overlook those who do not fit the profile.¹²⁶ For example, Richard Reid, the Al Qaeda shoe bomber, is a British citizen, originally from Jamaica, and is not Arab or "Middle-Eastern looking."¹²⁷ Zacarias Moussaoui, the only person charged with conspiring to carry out the September 11 attacks, is a French citizen. Jose Padilla, the alleged dirty bomber, is a Puerto Rican American.¹²⁸ None of these individuals would have been subject to the "Special Registration" program after having arrived in the United States.

¹²⁴ See Harris, *supra* note 112, at 60 ("But the third thing the study [commissioned by the New York Attorney General] revealed was even more important. When police used race or ethnicity as one factor — not the only factor, but just one factor among many — to decide who to stop, their "hit rate" [the rate at which police succeeded in finding dope or guns or in making arrests] was lower than when they made no use of race."). But see R. Spencer MacDonald, *supra* note 98, at 133 (quoting Gary T. Marx & Nancy Reichman, *Routinizing the Discovery of Secrets: Computers as Informants*, 27 AM. BEHAVIORAL SCIENTIST 423 ("[T]here is nothing illegal or exceptional about being [a middle-eastern] male, purchasing a one-way airline ticket, paying for it with cash, and obtaining the ticket last minute at the airport. But analysis suggests that when these factors occur together, the chances of a skyjacking attempt are increased"); Daniel Pipes, *A Call for Intelligent Profiling*, N.Y. SUN, Dec. 30, 2003, at 7.

¹²⁵ Cole, *supra* note 16, at 976-77; see also Harris, *supra* note 112, at 60.

¹²⁶ Apparently some United States governmental officials have recognized this problem and are fearful that Al Qaeda will use some non-Arab or Muslim appearing individuals to carry out an attack on the United States. Frank Millar, *Police Quiz al-Qaeda Suspects as US Warns of Attacks*, IRISH TIMES, Jan. 19, 2002, at 13, available at 2002 WL 4782744.

¹²⁷ See Cole, *supra* note 16, at 976.

¹²⁸ See Human Rights Watch, *Arbitrary Detention, in PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES* (Aug. 2002), available at <http://www.hrw.org/reports/2002/us911/USA-08082-05.htm>.

During World War II, the Japanese apparently relied primarily upon Caucasian spies, not those of Japanese ancestry.¹²⁹ Al Qaeda is said to have over one billion dollars in assets.¹³⁰ With such resources, Al Qaeda could easily hire white Americans or non-Arab or non-Muslim nationals to carry out operations in the United States. Senior law enforcement officials stated in a memo of October 2002, which “circulated to American law enforcement agents worldwide,” that “[f]undamentally, believing that you can achieve safety by looking at characteristics [racial profiling] is silly. If your goal is preventing attacks . . . you want your eyes and ears looking for pre-attack behaviors, not characteristics.”¹³¹

Some police officials have argued that members of minority groups commit certain crimes in greater numbers than other racial groups, justifying the use of race as grounds for “reasonable suspicion.”¹³² Researchers and scholars have questioned this assumption, particularly in the context of drug offenses.¹³³ Some scholars argue that racial profiling of minorities has created a self-fulfilling prophecy: because more members of minority groups are investigated, more are found criminally

¹²⁹ See *The Erosion Of Online Privacy Rights in the Recent Tide of Terrorism*, 8 COMP. L. REV. & TECH. J. 131, 139 (2003) (noting that “during the entire course of the war, ten people were convicted of spying for Japan, all of whom were Caucasian” (citing Debra LaFountaine & Pei P. Wang, *Historical Background* (1995) [and] . . . Curtis B. Munson, *The Munson Report*, available in part at http://www.curriculumunits.com/crucible/whunts/munson_report.htm (last visited Oct. 25, 2003) (noting in this special report to President Roosevelt that all evidence pointed to the fact that Japanese Americans were perfectly loyal to the United States)). No case of espionage has been documented against any Japanese immigrants or Japanese-Americans for activities during World War II. See Pear, *supra* note 106, at A1.

¹³⁰ Zachary Abuza, *Funding Terrorism in Southeast Asia: The Financial Network of Al Qaeda and Jemaah Islamiya*, 25 CONT. SOUTHEAST ASIA 169 Aug. 1, 2003, available at 2003 WL 58378389; *Indian Sleuths Probe Diamond Network Links with Al Qaeda*, PRESS TRUST OF INDIA, June 23, 2002.

¹³¹ Civil Rights and Education Fund, *supra* note 17, at 29 (quoting Bill Dedman, *Words of Caution Airport Security: Memo Warns Against Use of Profiling as Defense*, BOSTON GLOBE, Oct. 12, 2001).

¹³² See Civil Rights and Education Fund, *supra* note 17, at 17. See also R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 578 n.29 (2003) (quoting Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 2001, (Magazine)) (quoting a Los Angeles police chief, Bernard Parks: “It’s not the fault of the police when they stop minority males. . . . It’s the fault of the minority males for committing the crime”).

¹³³ See Civil Rights and Education Fund, *supra* note 17, at 17-19

responsible for the target offenses.¹³⁴ Had white persons been investigated as thoroughly, according to these scholars, more white persons would be found criminally responsible for the target offenses.¹³⁵

To the extent that some minorities are believed to commit certain crimes more than other groups, query whether the difference may be attributable to economic class rather than to race or ethnic group identification.¹³⁶ If one controls for economic class, might even the perceived difference in crime rates among racial groups disappear or become significantly less? Even assuming *arguendo* that some racial groups commit more of a certain offense than others do, statistics demonstrate that the overwhelming number of members of a given race or ethnic group are law abiding. Since race or national origin is generally an improbable indicator of criminality, racial profiling is unjustified even if one accepts for argument sake the above-mentioned assumption.¹³⁷

¹³⁴ *Developments in the Law- Race and the Criminal Process, Racial Discrimination on the Beat: Extending the Racial Critique to Police Conduct*, 10 HARV. L. REV. 1494, 1496 (1988) (arguing that targeting African-Americans leads to higher arrests and convictions for African-Americans which the police then use to justify continuing to target African-Americans). See also Banks, *supra* note 132, at 578 n.31 (citing MARC MAUER, RACE TO INCARCERATE 143 (1999); Scott L. Johnson, *The Self-fulfilling Nature of Police Profiles, in THE SYSTEM IN BLACK AND WHITE* 93 (Michael W. Markowitz & Delores D. Jones-Brown eds., 2000)).

¹³⁵ *Id.*

¹³⁶ See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L. J. 214, 238 (1983) (citing McNelly & Pope, *Race and Involvement in Common Law Personal Crime: A Response to Hindelang*, 8 REV. BLACK POL. ECON. 405, 405-06 (1978)).

¹³⁷ State and federal courts have been slow to condemn racial profiling by governmental officials. Although authority exists for the proposition that police may not stop an individual based *solely* on that individual's race, *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975), the Supreme Court has specifically upheld pretextual traffic stops where the officer has used race in whole or in part as the real reason for the stop. *Whren v. United States*, 517 U.S. 806 (1996); cf. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (reinstating district court's order denying discovery to claimant in a selective prosecution claim and ruling that "claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose'"). Lower courts have followed the Supreme Court's lead in endorsing racial profiling:

See, e.g., *United States v. Harrington*, 636 F.2d 1182, 1184 (9th Cir. 1980) (finding significance in the fact that a "Mexican" male visited defendant's hotel room); *United States v. Collins*, 532 F.2d 79, 82 (8th Cir. 1976) (rejecting the defendant's claim that his skin color is irrelevant because "the color of a person's skin, be it black or white, is an identifying factor which,

while insufficient by itself, assists the police in narrowing the scope of their identification procedure.”); *State v. Dean*, 543 P.2d 425, 427 (Ariz. 1975) (“[T]he fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an officer and the court in determining whether an investigation and detention is reasonable and therefore lawful.”); *see also* *United States v. Richard*, 535 F.2d 246, 248-49 (3d Cir. 1976) (holding that, even though an informant may be using race as the only basis for suspicion, if police couple this with other factors, a reasonable articulable suspicion to initiate a Terry stop may be justified); *State v. Barber*, 823 P.2d 1068, 1075 (Wash. 1992) (noting that race may sometimes be a factor in a stop). Even a fairly recent case seems to have looked the other way regarding charges of racial profiling. *See* *United States v. Stone*, 73 F. Supp. 2d 441, 447 (S.D.N.Y. 1999) (“Nevertheless, even assuming that the defendant was singled out for closer inspection on the basis of his race in concert with the time and the location in which he walked, I am satisfied that the officers’ subsequent actions fully comply with the Fourth Amendment. . . .”).

Sean P. Trende, Note: *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 356 n.151 (2000).

A few courts have begun to provide redress to those who have been victims of racial profiling. For example, the Ninth Circuit has expressly repudiated the language in *Brignoni-Ponce*, suggesting that race may be a factor to be considered in stopping individuals suspected of committing immigration violations. *United States v. Montero-Camargo*, 208 F.3d 112 (9th Cir. 2000). The court stated that “[t]he likelihood that in an area in which the majority or even a substantial part- of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.” *Id.* at 1132 (citing *United States v. Salinas*, 940 F.2d 392, 394-95 (9th Cir. 1991)). Given the widely reported racial profiling of African-Americans by the New Jersey State police, the New Jersey courts appear to have applied *Armstrong* far more liberally, permitting discovery of police records on stops and profiling only upon a showing of colorable discrimination. *See, e.g., State v. Ballard*, 752 A.2d 735, 752 (N.J. Super. Ct. App. Div. 2000); *see also* *State v. Kennedy*, 588 A.2d 834 (N.J. Super. Ct. App. Div. 1991). A few other courts have likewise ruled that racial profiling is unlawful:

See, e.g., City of St. Paul v. Uber, 450 N.W.2d 623, 628 (Minn. Ct. App. 1990) (reversing a conviction where part of the officers’ suspicion stemmed from the defendant’s being a white person in a black neighborhood); *Lowery v. Commonwealth*, 388 S.E.2d 265, 267 (Va. Ct. App. 1990) (“While we agree that the State has a substantial interest in apprehending drug traffickers, we do not agree with the Commonwealth’s argument that this type of racial classification is necessary to accomplish that objective. A person’s race or national origin does not indicate a propensity to traffic in drugs.”); *State v. Barber*, 823 P.2d 1068, 1075 (Wash. 1992) (“Distinctions between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality.”); *see also* *United States v. Montero-Camargo*, 208 F.3d 1122, 1131-36 (9th Cir. 2000) (holding that language justifying the use of race at border stops in

Regarding Arab and Muslim immigrants, not to mention Sikhs and South Asians, there is little data to support the conclusion that members of those populations are more likely to engage in terrorist activities against the United States than members of other groups.¹³⁸ After all, before September 11, the

Brignoni-Ponce was "dictum," that circumstances and subsequent Supreme Court decisions had changed to justify abrogation of that "dictum," and abrogating that "dictum"; . . . cf. *Washington v. Lambert*, 98 F.3d 1181 passim (9th Cir. 1996) (condemning repeatedly the indignities suffered by African-Americans at the hands of law enforcement officials); *Martinez v. Village of Mount Prospect*, 92 F. Supp. 2d 780, 782-85 (N.D. Ill. 2000) (approving a settlement agreement, while offering three pages of policy reasons for allowing more racial profiling cases to proceed).

Trende, *supra*, at 357 n.153.

It is, however, generally not considered racial profiling for the police, after they have received a specific description of a perpetrator, including the perpetrator's race, to stop individuals of the same race as the perpetrator. See MINN. STAT. ANN. § 626.8471(2) (2003) ("Racial profiling does not include law enforcement's use of race or ethnicity to determine whether a person matches a specific description of a particular subject"). Even in such a case, however, the police should not be empowered to stop and investigate every member of a minority community sharing the same racial characteristic as the perpetrator. See *Brown v. Oneonta*, 253 F.3d 769, 781 (2d Cir. 2000) (denying hearing *en banc*) (Calabresi, J., dissenting) ("Is the state creating an express racial classification that can only be approved if it survives strict scrutiny when state officers (like the police) ignore essentially everything but the racial part of a victim's description, and, acting solely on that racial element, stop and question all members of that race they can get hold of, even those who grossly fail to fit the victim's description? The answer to that question, all but ignored by the panel, seems to me—both on the precedents and on plain logic—to be a resounding yes").

Aside from the courts, Congress and some state legislatures have taken some beginning steps to stop racial profiling. A bill has been re-introduced in Congress that would require that police create a record of the race of all persons who are stopped along with other relevant criteria to help prevent racial profiling. See *Sens. Corzine, Feingold Introduce New Racial Profiling Bill*, ST. NEWS SERVICE, Feb. 26, 2004, available at 2004 WL 62442723. The bill would also give victims of racial profiling a private cause of action. *Id.* Some states have enacted legislation aimed at reducing or eliminating racial profiling. See, e.g., N.J. STAT. ANN. § 2C:30-5(d) (2004); MINN. STAT. ANN. § 626.8471. For a list of states with some form of anti-racial profiling legislation and a brief description thereof, see David A. Harris, *The Reality of Racial Disparity In Criminal Justice: The Significance of Data Collection*, 66 L. & CONTEMP. PROB. 71, 82 n.57 (2003). In some other states, legislators are proposing similar measures. See, e.g., Bruce Landis, *Proposal Focuses on Racial Profiling*, PROVID. J.-BULL., Feb. 24, 2004, at B-01 (noting that two Rhode Island legislators are proposing a bill to eliminate racial profiling).

¹³⁸ "[T]errorism is not a Muslim monopoly." Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety*, 1 OHIO ST. J. CRIM. L. 9, 26 (2003). There are terrorists on both the left and the right, from American Nazis

author of the most serious terrorist crime on United States soil was a white, Roman Catholic male who was raised in upstate New York.¹³⁹ Perhaps the most telling evidence of the ineffectiveness of racial profiling is the apparent failure of the government's policies profiling Arabs, Muslims, Sikhs, and South Asians to uncover substantial terrorist criminal activity against the United States.

E. *Racial Profiling Offends Arabs, Muslims, Sikhs and South Asians and Their Communities, Discouraging Them from Being Willing Allies in the Fight Against Terrorism*

Some have argued that although Arabs and Muslims living in the United States have been subjected to racial profiling, such a measure is reasonable given the enormity of September 11 and the ethnic identity of the perpetrators and of the membership of Al Qaeda.¹⁴⁰ Furthermore, the government has detained some Arabs and Muslims and has scrutinized the activities of many Arabs and Muslims; but it has not forcibly detained all Arabs and Muslims regardless of their citizenship as we did to the Japanese during World War II. Many Americans are likely to agree with Kathleen Parker, who stated, "[b]eing threatened or otherwise harmed because of your ethnic origin is persecution. Being subjected to a little extra scrutiny because, as it happens, your ethnic origin is the same as that of terrorists who just killed more than 6,000 innocent civilians, is inconvenience."¹⁴¹

The targets of racial profiling, however, appear to have a different perception. "Even the suggestion that people should tolerate modest impositions is galling . . . [w]hat looks like a

and some in the so-called Patriot movement, to environmental terrorists, not to mention lone acting individuals like the Unabomber.

¹³⁹ For a good discussion of Timothy McVeigh, see Peter G. Chronis, *Prejudiced Profilers Had Sniper Figured All Wrong*, DENV. POST, Oct. 29, 2002, at B-07, available at 2002 WL 6579220.

¹⁴⁰ Cf. Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103 (2003) (arguing that racial profiling may be appropriate in some circumstances and that the major failure of internment the Japanese during World War II was the enormity of the deprivation, not the racial profiling itself).

¹⁴¹ Davies, *supra* note 20, at 46 (quoting Kathleen Parker, *All is Fair in War Except Insensitivity*, ORLANDO SENTINEL, Sept. 23, 2001, at A15).

light touch to observers can feel like an awfully heavy hand to those who feel it.”¹⁴² There is some evidence that racial profiling might inflict both humiliation and “psychic harm.”¹⁴³ For example, in June 1993, a black bank executive was pulled over by Toledo, Ohio police allegedly for not having a front license plate. He had just attended a conference. Instead of issuing a ticket, the officer required him to assume a spread eagle position while the officer subjected him to a body search. At that precise moment, a bus of conference participants passed by. He is reported to have stated, “I never felt so degraded, humiliated and belittled in all my life.”¹⁴⁴ Likewise, Texas state judge Gilberto Hinojosa is often pulled over by immigration authorities because of his Latino appearance. He stated that “Southern Texas ‘feels like occupied territory . . . [i]t does not feel like we’re in the United States of America.’”¹⁴⁵

Alternatively, consider Ejaz Haider, an editor of an English-Language news magazine in Pakistan, who was visiting the United States as a Fellow of the Brookings Institution, in Washington, D.C. Complying with immigration regulations upon arriving here, Mr. Haider registered with the INS who told him to report for an interview within forty days.¹⁴⁶ After speaking with officials in the State Department and INS, he was told he did not have to report. INS agents subsequently arrested him and told him he would be spending a night in jail.¹⁴⁷ Through the intercession of the Brookings Institution, he was released, but others lacking such connections may have faced harsher treatment.¹⁴⁸

¹⁴² Wu, *supra* note 102, at 57.

¹⁴³ See, e.g., Banks, *supra* note 132, at 591 n.112 (citing Paul Brest, *The Supreme Court, 1975—In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 9-10 (1976)).

¹⁴⁴ Civil Rights and Education Fund, *supra* note 17, at 20.

¹⁴⁵ *Id.* at 20 (quoting Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000).

¹⁴⁶ Civil Rights and Education Fund, *supra* note 17, at 26 (citing George Lardner, Jr., *Brookings Scholar is Detained by INS; Registration Rule Snags Pakistani Editor*, WASH. POST., Feb. 5, 2003). See also Ejaz Haider, *Wrong Message to the Muslim World*, WASH. POST., Feb. 5, 2003, at A23.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Racial profiling is humiliating because it amounts to discriminatory treatment based on race.¹⁴⁹ In the anti-terrorism context, the population as a whole does not share the burden of heightened security measures. Rather, those who share the burden are a discrete and insular minority, the foreign born from a select group of countries and others who look like them.¹⁵⁰ Racial profiling amounts to presuming someone is a criminal solely because of his or her race or nationality. Even when race is "but a factor" among other factors considered, it helps serve as a substitute for real evidence that a person may be involved in criminal activity.¹⁵¹

What authorities seem to ignore is the effect that such race based policies have on the innocent individuals and the communities that the policies inevitably touch.¹⁵² The overwhelming number of Arabs, Muslims, Sikhs, and South Asians that live or temporarily reside in the United States are law-abiding. They

¹⁴⁹ Justice Brennan noted the effects of racial profiling persons of Mexican ancestry:

To be singled out for referral and to be detained and interrogated must be upsetting to any motorist. One wonders what actual experience supports my Brethren's conclusion that referrals "should not be frightening or offensive because of their public and relatively routine nature." In point of fact, referrals, viewed in context, are not relatively routine; thousands are otherwise permitted to pass. But for the arbitrarily selected motorists who must suffer the delay and humiliation of detention and interrogation, the experience can obviously be upsetting. And that experience is particularly vexing for the motorist of Mexican ancestry who is selectively referred, knowing that the officers' target is the Mexican alien. That deep resentment will be stirred by a sense of unfair discrimination is not difficult to foresee.

United States v. Martinez-Fuerte, 428 U.S. 543, 572-73 (1976) (Brennan, J., dissenting) (citations omitted).

¹⁵⁰ See *Cole*, *supra* note 16, at 960, 981 (quoting John Hart Ely for the proposition that 'aliens' were an 'easy case' for a 'discrete and insular minority').

¹⁵¹ Note that the bill entitled, "End Racial Profiling Act of 2004" makes any use of race illegal in deciding whether to stop a motorist absent a specific description of the perpetrator. See also Harris, *supra* notes 112, at 60 (noting that police were less effective in identifying perpetrators even when using racial profiling only "as a factor" than when the police looked solely at suspect behavior and did not profile at all).

¹⁵² In the domestic context, racial profiling undermines the credibility of the police and, "[a]s a result, it is a natural reaction of distrustful law abiding citizens to think of officers as enemies and fail to cooperate with them in community policing programs and general investigations." Jenna K. Perrin, Note, *Towards Eradicating the Pervasive Problem of Racial Profiling in Minnesota: State v. Fort* 660 N.W.2d 415 (Minn. 2003), 27 HAMLINE L. REV. 63, 99 (2004).

are or could be our natural allies in the so-called "war against terrorism." They are in the best position to know if members of their communities are plotting against us.¹⁵³ They could give us intelligence, leads, tips, and serve as witnesses to any planned "terrorist activity." Good law enforcement requires developing close ties to community leaders and the trust of individual members of the community.¹⁵⁴ Racially profiling Arabs, Muslims, and others weakens ties to community leaders and undermines the trust of the community in the fairness and impartiality of law enforcement officials.¹⁵⁵ Instead of enhancing security, racial profiling thus may be threatening our security, by weakening the best source of evidence we would probably be able to obtain, evidence from others in the Arab, Muslim, Sikh, and South Asian communities. The next section discusses the international implications of mistreating Arabs and Muslims in the United States and elsewhere.

V. COMBATING A TERRORIST ORGANIZATION LIKE AL QAEDA

Examining the policies of the United States towards Iraq and Al Qaeda, one gets the impression that, to paraphrase Einstein's comment about the advent of the nuclear bomb,¹⁵⁶ Sep-

¹⁵³ See Dripps, *supra* note 138, at 27. Professor Dripps notes as follows: "[A]ny division of suspects along racial, ethnic or religious lines runs the standing risk of invidious discrimination. Many entirely innocent persons will be targeted simply because of national origin or religion. This not only compromises an important principle; it also runs the risk of alienating the very people who are in the best position to observe suspicious activity among persons of Middle Eastern extraction or Islamic faith." *Id.*

¹⁵⁴ Maintaining trust and close ties to the community enhances police effectiveness:

Establishing and maintaining mutual trust is the central goal of community partnership. Trust will give the police greater access to valuable information that can lead to the prevention of and solution of crimes. It will also engender support for police activities and provide a basis for a productive working relationship with the community that will find solutions to local problems.

About Community Policing (The Community Policing Consortium), available at <http://www.communitypolicing.org/about2.html>; see also Butterfield, *supra* note 81, at B7 (quoting the Seattle police's chief's concern about racial profiling because of the importance of the police gaining the trust of the community).

¹⁵⁵ See preceding note for a statement of some principles underlying effective policing.

¹⁵⁶ "The unleashed power of the atom has changed everything save our modes of thinking, and we thus drift toward unparalleled catastrophes." JOHN BARTLETT, *FAMILIAR QUOTATIONS* (15th ed. 1980) (quoting Albert Einstein).

tember 11 has changed everything but our thinking. The Executive Branch has certainly attempted to change our ideas about fundamental legal principles such as access to legal counsel, confidentiality of communications with counsel, the condemnation of indefinite detention, of torture and degrading treatment, and of so-called preventive wars against countries that do not immediately threaten us. But such reflexive ideas and policies seem based on the notion that we live in a vacuum, that any violations of basic principles of domestic or international law that we commit in the name of security are not only justified, but will necessarily advance our security. The growing evidence, however, suggests that the Executive's international and domestic policies directed against Arabs and Muslims may actually be counter-productive in the "war on terror."

In the fight against Al Qaeda, we must consider with whom we are dealing and the most effective approach for reducing, if not eliminating, the threat to our cities and suburbs, facilities, aircraft, communications, and, above all, our people.¹⁵⁷ There are more than one billion Muslims in the world.¹⁵⁸ In the Arab world, there are more than 200 million people.¹⁵⁹ Few democracies exist in the Islamic world,¹⁶⁰ virtually all of the Arab coun-

¹⁵⁷ Portions of this article and particularly this section are taken from Thomas M. McDonnell, *The Death Penalty: An Obstacle to the "War on Terrorism"?* 37 VAND. J. TRANS. L. 353, 394-400 (2004).

¹⁵⁸ *Islam*, FUNK AND WAGNALLS NEW ENCYCLOPEDIA (2003), available at http://www.lexis.com/research/retrieve/frames?_m=6ec0981c4a1412a6af627022a84ab295&docnum=8&_fmtstr=FULL&_startdoc=1&wchp=dGLbVlb-lSIWV&_md5=eea604a6d0ff069d9aef5cae87849b5e.

¹⁵⁹ *Arabs*, FUNK AND WAGNALLS NEW ENCYCLOPEDIA (2003), available at http://www.lexis.com/research/retrieve/frames?_m=doadadda87b4653fc5a82a58437f828c&docnum=15&_fmtstr=FULL&_startdoc=11&wchp=dGLbVlb-lSIWV&_md5=7c7fd68e8fd4dde8235ea80d85e39afec.

¹⁶⁰ The leading one is Turkey, which, unfortunately, possesses one of the worst, if not the worst, human rights records in Europe. See Amnesty Int'l., *Turkey: Endemic Torture Must End Immediately* (Nov. 8, 2001), at <http://web.amnesty.org/ai.nsf/Index/EUR440772001?OpenDocument&of=COUNTRIES/TURKEY>. Turkey's parliament has, however, abolished the death penalty in peacetime, a step that Amnesty International had been urging for decades and which the European Union has required as a condition of Turkey's membership. See Amnesty Int'l., *Turkey: Abolition of the Death Penalty Welcomed* (Aug. 2, 2002), at <http://web.amnesty.org/ai.nsf/Index/EUR440362002?OpenDocument&of=Abolition COUNTRIES/TURKEY>. Whether this also signals that Turkey will end its practice of torture and other human rights abuses remains to be seen.

tries are run by dictators or kings, some more despotic than others.¹⁶¹ The Arab countries rank last in the world in ratings on freedom of the press and other freedoms.¹⁶² Aside from the lack of individual rights, the standard of living has declined in that part of the world for the last thirty years.¹⁶³ Nearly 50 percent of the population in the Arab world is under the age of 25,¹⁶⁴ with one-third under the age of fifteen.¹⁶⁵ In the oil rich countries—the Gulf States, for example, economic wealth “has benefited a relatively few, and has not been distributed to poorer Islamic countries or to their very large migrant communities.”¹⁶⁶ The young face little chance of climbing out of devastating and demoralizing poverty and repression.¹⁶⁷

¹⁶¹ See BERNARD LEWIS, *THE CRISIS OF ISLAM* 117-18 (2002); see also Fareed Zakaria, *The Politics of Rage: Why Do They Hate Us?*, NEWSWEEK, Oct. 15, 2001, at 22.

¹⁶² Zakaria, *supra* note 161, at 24.

¹⁶³ *Id.* at 25. See also LEWIS, *supra* note 161, at 114-17. Concerning economic failure, Lewis notes that “Israel’s per capita GDP was three and half times that of Lebanon and Syria, twelve times that of Jordan, and thirteen and a half times that of Egypt.” *Id.* at 117 (citing Arab Human Development Report 2002; Creating Opportunities for Future Generations, sponsored by the Regional Bureau for Arab States/UNDP, Arab Fund for Economic and Social Development). He discussed the intellectual life of the Arab world again quoting the Arab Human Development Report, “The Arab world translates about 330 books annually, one-fifth of the number that Greece translates. The accumulative total of translated books since the Caliph Maa’moun’s [*sic*] time [the ninth century] is about 100,000, almost the average Spain translates in one year.” *Id.* at 115-16. Even in Saudi Arabia, per capita income plummeted from \$28,600 in 1981 to \$6,800 in 2001. Eric Rouleau, *Trouble in the Kingdom*, FOREIGN AFF., July-Aug. 2002, at 75, 85.

¹⁶⁴ Zakaria, *supra* note 161, at 22, 32.

¹⁶⁵ *Id.* “Today, two in five Saudis are under 15 years old. [Saudi Arabia’s] population has exploded while its economy has stagnated with the result that its per capita income has dropped.” Michael Scott Doran, *Palestine, Iraq, and American Strategy*, FOREIGN AFF., Jan.-Feb. 2003, at 19, 28. See also Editorial, *The Anger of Arab Youth*, N.Y. TIMES, Aug. 15, 2002, at A22.

¹⁶⁶ Max Taylor & John Horgan, *The Psychological and Behavioural Bases of Islamic Fundamentalism*, 13 TERRORISM & POL. VIOLENCE 37, 41 (2001). These commentators add that “to many devout Muslims the effects of increased oil wealth have been to increase the influence of the West and challenge the social basis of Islam, rather than to complement and enhance it.” *Id.*

¹⁶⁷ “Even if many terrorists are not directly driven by poverty, the inequities of globalization feed a general anti-Westernism that is a seedbed for Islamism.” Michael Hirsh, *Bush and the World*, FOREIGN AFF., Sept.-Oct. 2002, at 18, 28. But see ALAN DERSHOWITZ, *WHY TERRORISM WORKS* 25 (2002) (noting that “the vast majority of groups with equivalent or more compelling causes—and with far greater poverty and disadvantage—have never resorted to terrorism.”); FAREED ZAKARIA, *THE FUTURE OF FREEDOM ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 138 (2003) (arguing that “[t]he problem is wealth not poverty” and that the

"Throughout the region [the Middle East,] the [Arab] people have become ever more disillusioned with the deeply-entrenched dictatorships in the their own countries, with the collapse of democratic institutions, hollow nationalistic rhetoric, and with their failing economies."¹⁶⁸

Given the failure of economic and political institutions in the Arab world, it is not surprising that religion has emerged as a major force.¹⁶⁹ In the Muslim culture, religion and politics are intertwined in a way reminiscent of Western Europe before the Reformation.¹⁷⁰ The fight against terrorism thus needs to embrace the social and political reality of the Arab world and the nature of the organization we are fighting.

The available evidence suggests that Al Qaeda is a network rather than a single, unified military organization.¹⁷¹ As one commentator has written, "[h]aving suffered the destruction of

unearned income from oil revenues, or, for example in the case of Egypt from the Suez Canal and United States, "relieves the government of the need to tax its people—and in return provide something to them, in the form of accountability, transparency, and even representation").

¹⁶⁸ See Abbas Amant, *Empowered through Violence, The Re-inventing of Islamic Extremism*, in *THE AGE OF TERROR* 29 (Strobe Talbot & Nayan Chanda eds. 2001). See also LEWIS, *supra* note 161, at 117-19. Given the failure of the economic and political institutions in Islamic countries, their people are outraged: "The resulting anger is naturally directed first against their rulers, and then against those whom they see as keeping those rulers in power for selfish reasons." *Id.* at 119.

¹⁶⁹ Noted religious scholar, Karen Armstrong, has observed that the resounding defeat of the Arab States by Israel in the 1967 war led to a religious revival in the Arab States: "After the humiliating defeat of the Arab Armies during the 1967 Six Day War against Israel, there was a swing toward religion throughout the Middle East." KAREN ARMSTRONG, *ISLAM: A SHORT HISTORY* 171 (2000).

¹⁷⁰ *Id.* at 169-73. See also LEWIS, *supra* note 161, at 6-8 (noting that [d]uring Muhammad's lifetime, the Muslims became at once a political and a religious community with the Prophet as head of state" and contending that Islam remains deeply involved with politics and state power); Taylor & Horgan, *supra* note 166, at 42 (noting that one of the central positions of Islamic fundamentalism is "the general equation of the state with the implementation of Islam").

¹⁷¹ See Diaa Rashwan, *Impossible to Fight*, *AL-AHRAM WKLY.*, Aug. 8-14, 2002, available at <http://www.weekly.ahram.org.eg/2002/598/op11.htm> (last visited June 20, 2003) (observing that Americans had now accepted the European view that "Al Qa'eda is actually nothing more than a network and that the violent Islamacist groups have no unified command, but communicate and cooperate when it suits their different purposes."). Al Qaeda was created in the 1980s from three terrorist organizations: "bin Laden's circle of 'Afghan' Arabs, together with two factions from Egypt, the Islamic Group and Egyptian Islamic Jihad, the latter led by Dr. Ayman al-Zawahiri, Al Qaeda's top theoretician." See Paul Berman, *The Philosopher of Islamic Terror*, *N.Y. TIMES*, Mar. 23, 2003, § 6 (Magazine), at 24.

its sanctuary in Afghanistan two years ago, Al Qaeda's decentralized organization has become more decentralized still."¹⁷² Another commentator has analogized Al Qaeda to "a holding company run by a council (*shura*) including representatives of terrorist movements."¹⁷³ It has also been described as the terrorist equivalent of the Ford Foundation, providing money and other resources for individual terrorists or movements that propose terrorist projects.¹⁷⁴

The nature of the organization suggests the means of combating it. Tactically, the United States and its allies must bring to justice those responsible for carrying out the outrages of September 11 and defeat those who continue to attempt to terrorize the United States.¹⁷⁵ Strategically, the United States and its Coalition partners must take steps to end support in the Arab and greater Muslim world for Al Qaeda and others who would resort to terrorism.¹⁷⁶ The decentralized nature of Al Qaeda

¹⁷² Jessica Stern, *The Protean Enemy*, FOREIGN AFF., Jul.-Aug. 2003, at 27, available at 2003 WL 57276699. Stern adds that Al Qaeda apparently has put into practice so-called "leaderless resistance," a tactic popularized by Louis Beam of the Aryan Nations, an American Neo-Nazi group. With the advent of the Internet, leaders do not necessarily have to secretly issue orders or to "pay operatives," rather, "they inspire small cells or individuals to take action on their own initiative." *Id.* See also Eric Bonabeau, *Scale Free Networks*, SCIENCE, May 2003, abstract available at <http://www.sciam.com/article.cfm?colID=1&articleID=000312F5-B86B-1E90-8EA5809EC5880000>.

¹⁷³ See Pierre Conesa, *Background to Washington's War on Terror, Al Qaida, The Sect*, LE MONDE DIPLOMATIQUE, Jan. 2002, available at http://mondediplo.com/2002/01/07sect?var_s=zacarias+moussaoui.

¹⁷⁴ Scott Peterson, *Islamacists Escalate Fight in N. Iraq*, THE CHRISTIAN SCI. MONITOR, Nov. 22, 2002, at 1 (quoting James Lindsay of the Brookings Institution). See also JASON BURKE, AL QAEDA, CASTING A SHADOW OF TERROR 208 (2003) (noting that the "Al Qaeda hardcore" rejected volunteers who requested a martyrdom operation unless they "came up with their own ideas for attacks"). Al Qaeda can also be analogized to joint venture capitalists: ("individuals would approach the chief executive and the board (bin Laden, Atef, et al.) with ideas they believed were worthy of support"); or a publishing house: ("freelancers would approach them with ideas that would sometimes be funded and resourced but often rejected"). *Id.*

¹⁷⁵ See Nicholas Lemann, *Letter from Washington, What Terrorists Want; Is There a Better Way to Defeat Al Qaeda?*, NEW YORKER, Oct. 29, 2001, at 36.

¹⁷⁶ See Harold H. Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1497-1500 (2003) (criticizing the Bush Administration's largely unilateralist approach to combating terrorism and the Administration's violating international law in the process); Thomas Carothers, *Promoting Democracy and Fighting Terror*, FOREIGN AFF., Jan.-Feb. 2003, at 84, 97 (criticizing the Bush Administration's current strategy in handling the war on terror as not paying enough attention to even

underlies the importance of the United States' gaining the cooperation and good will not only of governments, but also of their law enforcement personnel and of individual citizens in Arab and other Muslim States and communities throughout the world.¹⁷⁷ In other words, to root out those responsible for the

handedly promoting democracy around the world); Michael Hirsh, *supra* note 167, at 17 notes:

But at the same time, the nature of the terrorist threat demonstrated the necessity of bolstering the international community, which is built on nonproliferation agreements, intelligence cooperation, and legitimizing institutions such as the UN, as well as a broad consensus on democracy, free markets, and human rights. It also demonstrates the necessity of a values-driven foreign policy — and of nation building under multilateral auspices in places such as Afghanistan.

Id. at 18. See also Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1750-51 (2003) (noting that the United States is resorting to draconian emergency measures similar to those employed by Great Britain in Northern Ireland against the IRA, measures which both failed to enhance security or to defeat the IRA. The authors advocate "[d]ialogue, cooperation and attention to civil liberties were the necessary and effective elements in the strategy to eliminate terrorism"). Cf. Philip A. Thomas, *Emergency and Anti-Terrorist Power*, 9/11: USA AND UK, 26 FORDHAM INT'L L.J. 1193, 1228 (2003) (quoting Christopher Hewitt's extensive study of British counter-terrorism measures, THE EFFECTIVENESS OF ANTI-TERRORIST POLICIES 94 (1984) ("heavy handed repression is counter productive")); Robert I. Rotberg, *Failed States in a World of Terror*, FOREIGN AFF., July-Aug. 2002, at 127, 130 (concluding that "[s]tate building trumps terror[,] requires the cooperation of many states, and cannot be done "on the cheap").

As one commentator has observed concerning how the then impending war in Iraq was being viewed by American Muslims and others:

If 1 percent of that one billion [the world population of Muslims] felt that they had sympathy for extremist views, then we are dealing with 10 million people. And if 10 percent of those 10 million were a little more active in pursuing those extreme beliefs and views, then we are dealing with a potential pool of one million people from which extremist groups and terrorists can recruit.

Michele Norris & Melissa Block, *All Things Considered, How a potential war with Iraq is being viewed by American Muslims and Others* (Nat'l Public Radio Broadcast, Mar. 14, 2003) available in Lexis, National Public Radio newsfile (quoting Hussein Hakani of the Carnegie Endowment for International Peace).

¹⁷⁷ See Tom Ridge, Secretary of the Department of Homeland Security, *[Address] on Fighting Global Terrorism: Security and Cooperation in the 21st Century before Singapore Institute of Defence and Strategic Studies*, Mar. 4, 2004, available at <http://www.dhs.gov/dhspublic/display?content=3318>. Secretary Ridge stated as follows:

So to fight back [against terrorists], we too must exploit our assets. We must investigate and prosecute and confiscate. We must utilize diplomacy, intelligence, law enforcement and asset seizure — a multilateral approach to a multinational problem. *We must enlist stronger collabora-*

attacks and who pose a continuing threat, we need a firm but measured response simultaneously demonstrating that we are not attacking or applying a double standard to Muslims or Arabs.¹⁷⁸

A classic terrorist tactic is to provoke an overreaction:

One [terrorist] recruiting tactic is to stage spectacular acts of aggression that make the insurgency appear to be powerful and exciting. What the [terrorist] entrepreneur wants to have happen next is a big indiscriminate counterattack, which, in effect, means that his enemy has been put to work as his chief recruiter.¹⁷⁹

Unfortunately, the invasion of Iraq, a Muslim country (albeit with a secular and repressive regime) is likely to be per-

tion and cooperation, and improved information-sharing, both within nations and between them. We must use every available tool to repel these shadow soldiers.

Id. (emphasis added). Cf. THE COMMUNITY POLICING CONSORTIUM, *supra* note 154 (discussing the need for the police to gain cooperation of the community to police effectively on the local level); Butterfield, *supra* note 81, at B7 (same). But see Anthony Cordesman, *How Should the United States Respond to Terrorism* (Cato Institute Policy Forum) Nov. 27, 2000, at 16, at www.artitranscripts.com (last visited June 3, 2003) (arguing that "law enforcement partnerships are extremely political, extremely limited, often inherently corrupt . . ."). See also BRUCE HOFFMAN, *INSIDE TERRORISM* 94-95 (1998):

Whereas secular terrorists attempt to appeal to a constituency variously composed of actual and potential sympathizers, members of the communities they purport 'to defend' or the aggrieved people for whom they claim to speak, religious terrorists are at once activists and constituents engaged in what they regard as a total war. They seek to appeal to no other constituency than themselves. Thus the restraints on violence that are imposed on secular terrorists by the desire to appeal to a tacitly supportive or uncommitted constituency are not relevant to the religious terrorist.

Id. at 94-95.

¹⁷⁸ Cf. LEWIS, *supra* note 161, at 103-12 (noting that many in the Islamic world have criticized the West and particularly the United States for applying a double standard to Muslims and Muslim states). See also Koh, *supra* note 176, at 1509 (noting that United States joined with the European Union in demanding that Turkey not execute notorious Kurdish Terrorist Abdullah Ocalan); Richard Falk, *A Roadmap for War, A Flawed Debate*, Sept. 27, 2002, available at http://www.transnational.org/forum/meet/2002/Falk_WarFlawedDebate.html (last visited Mar. 13, 2003); CALEB CARR, *THE LESSONS OF TERROR* 181 ("This presents us with another enduring truth about the tactics of terror [should a State be tempted to resort to them in response to terrorism]; they must never be viewed as an expedient or a controllable instrument of policy, one which, after its purpose is served, will simply burn itself out").

¹⁷⁹ Lemann, *supra* note 175, at 36 (citing Dr. James Fearon).

ceived as “a big indiscriminate counterattack” in the Arab and Muslim worlds.¹⁸⁰ Likewise, mistreating Arabs and Muslims both in the United States and abroad is likely to strengthen the extremist elements in Muslim communities here and overseas.¹⁸¹ Moderate, more democratic leading elements in those societies have difficulty defending against the argument that the United States is anti-Arab and anti-Muslim.¹⁸² Consequently, we should adopt, not only with use of our military but also with our policies at home, an approach that is most likely

¹⁸⁰ See *Iraq War Helped Al Qaeda*, TORONTO STAR, May 20, 2003, at A1 (quoting Paul Wilkinson, head of the Centre for the Study of Terrorism and Political Violence at St. Andrew's University in Scotland) (“The political masters in U.S. and Europe underestimated the extent to which bin Laden would use the war in Iraq as a propaganda weapon to rejuvenate the movement and attract more funds.”); Steven R. Weisman, *U.S. Must Counteract Image in Muslim World*, Panel Says, N.Y. TIMES, Oct. 1, 2003, at A1 (quoting a Bush Administration panel, “Hostility toward America has reached shocking levels” as a result of the Iraq war and increased tension in the Middle East). Many had predicted this outcome. See, e.g., Don Van Natta Jr. & Desmond Butler, *Anger on Iraq Seen as New Qaeda Recruiting Tool*, N.Y. TIMES, Mar. 16, 2003, at A1 (noting that officials in the United States, Europe, and Africa observed that the then imminent invasion of Iraq caused a sharp increase in efforts “to identify and groom a new generation of terrorist operatives” and the officials worry that the invasion of Iraq “is almost certain to produce a groundswell of recruitment for groups committed to attacks in the United States, Europe and Israel”); Carothers, *supra* note 176 (“A U.S. invasion of Iraq would likely trigger a surge in the already prevalent anti-Americanism in the Middle East, strengthening the hand of hard-line Islamist groups and provoking many Arab government to tighten their grip, rather than experiment more boldly with political liberalization”). But see Fouad Ajami, *Iraq and the Arabs' Future*, FOREIGN AFF., Jan.-Feb. 2003, at 2 (arguing that the United States need not apologize for its unilateralism and that the focus of the invasion “should be modernizing the Arab world”). The prison abuse scandal in Iraq has shocked the Arab and Muslim worlds and is yet another example of their perception of United States having an anti-Arab and Muslim animus. See Cam Simpson, *Arabs cool to Powell at Forum; Diplomat's Speech Touches on Scandal*, CHIC. TRIB., May 16, 2004, at C3; see also Wayne Washington, *Bush Reaches Out to Quell Arab Rage at Inmate Abuse*, BOSTON GLOBE, May 6, 2004, at A1.

¹⁸¹ See Chishti & Meissner, *supra* note 7, at 1196 (“By targeting Muslim and Arab immigrants, the U.S. government has deepened the perception abroad that the U.S. is anti-Muslim and that its democratic values and principles are hypocritical . . . undermining U.S. relationships with exactly the moderate, pro-Western nations and social groups that we need to fight against terrorism”).

¹⁸² *Id.* at 1200 (“Immigration policy should not rely on enforcement programs that give propaganda advantages to terrorist foes and contribute to their ability to influence and recruit alienated younger generations”).

to gain the cooperation of our allies and of the moderates within the Muslim world and that will most likely isolate Al Qaeda.¹⁸³

This article does not discuss economic and political measures necessary to enhance human, civil and economic rights in the Arab and Islamic worlds.¹⁸⁴ To achieve our strategic objective requires we give both the fact and appearance of treating any accused Muslim fairly. For example, after Britain established internment without trial in Northern Ireland in 1971 to combat the Irish Republican Army ("IRA"), a policy that was largely directed only at the Northern Irish Catholic community, support for the IRA increased: "The use of internment effectively alienated a sizeable minority of the population of Northern Ireland and made impossible any cooperation with authorities."¹⁸⁵

That experience is particularly relevant for the fight against Al Qaeda. As previously discussed, one would expect that members of the Arab and Muslim communities in the United States would know most about the activities of other Muslims and Arabs here. Instead of attacking these communi-

¹⁸³ "[This approach would require] obtaining as much specific local information as possible and then, perhaps through the use of native 'subcontractors,' convincing people that linking their future to bin Laden would be a bad idea. It would have to be a slow, careful, patient process that combined punishments of specific violent people with the offer of rewards for potential allies of the West. None of this would alter the strategy of attempting to disrupt bin Laden's access to money and electronic communications and forestall further attacks. But, for the present, quiet is America's friend, *killing, of Americans by bin Laden, and of Arab civilians by Americans, is bin Laden's friend*, because it draws ordinary people as well as combat troops to his side." Lemann, *supra* note 175, at 36 (emphasis added).

When dealing with private terror organizations operating clandestinely in several countries, getting help from the authorities and populace of many countries is essential. Note the recent arrest of five people in Spain believed to be involved in money laundering for Al Qaeda. "Spanish investigators had worked in close cooperation with authorities in Germany and in France . . . [and were] also aided by authorities in the U.S., Tunisia, Switzerland and Portugal." Sebastian Rotella, *THE WORLD 5 Suspects Helped Fund Al Qaeda, Spain Says*, L.A. TIMES, Mar. 9, 2003, at A3.

¹⁸⁴ Peter G. Peterson, *Public Diplomacy and the War on Terrorism*, FOREIGN AFF., Sept.-Oct. 2002, at 74, 75.

¹⁸⁵ O'Connor & Rumann, *supra* note 176, at 1657, 1680. See also *British Actions [in Northern Ireland]*, Frontline (PBS television broadcast, Oct. 21, 1997) available at <http://www.pbs.org/wgbh/pages/frontline/shows/ira/conflict/brits.html> (quoting the Northern Ireland Chief of Police who described the internment policy as "a disaster").

ties, law enforcement should embrace them.¹⁸⁶ In that way, we are more likely to be able to identify and apprehend those likely to be plotting against us.¹⁸⁷ This scattershot method of racial and ethnic profiling is likely to discourage community members from coming forward with the information we need to stop this threat.¹⁸⁸

VI. CONCLUSION

Although understandable given the authors of September 11 and the awesome magnitude of the attacks, the government's policy of racial profiling Arabs and Muslims is likely to contribute to anti-American attitudes both here and abroad, to discourage Arabs and Muslims from cooperating with the United States police and military officials, and to weaken moderate elements of Arab and Muslim societies while strengthening the extremist elements both domestically and internationally.

Additionally, racial profiling is morally wrong. During the Iran hostage crisis, I represented two Iranian students. Then as now, Iranians (like Iraqis) were required to report to and register with the Immigration and Naturalization Service. After walking into the federal building in Los Angeles with my two clients, I saw in the drab corridors of INS a sea of Iranian faces. It was chilling. We are more true to ourselves and can better protect our society by adopting more measured investigative approaches and by doing the hard but time tested methods of investigation, with the aid of the Muslim and Arab communities and in cooperation with our allies throughout the world.

¹⁸⁶ For example, law enforcement officials could establish a program like that of Dearborn, Michigan, which guaranteed that "no immigration consequences would flow from [immigrants] coming forward to be interviewed." Chishti & Meissner, *supra* note 7, at 1198.

¹⁸⁷ Peter M. German, *Money Laundering and Corporate Governance from a Canadian Perspective*, 16 FLA. J. INT'L L. 107, 109 (2003) ("Simply put, a collaborative approach is the only way to detect, deter, and destabilize global criminal entities"). For a discussion of collaboration and cooperation on the community level, see *supra* note 154. For a discussion of such collaboration on the international level, see *supra* note 177.

¹⁸⁸ As one commentator has noted the importance of grass roots efforts against terrorist organizations, "The more useful anti-insurgency [and anti-terrorist] tactic is to compete, literally door to door, for people's loyalty with the coinage of loyalty being willingness to inform on one side or the other)." Lemann, *supra* note 175, at 36.