

# THE CONSERVATIVE CASE AGAINST RACIAL PROFILING IN THE WAR ON TERRORISM

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## I. INTRODUCTION

Although it now seems like something from the distant past, racial profiling was a hot political issue in 2001. The crime known as DWB, or *driving while black*, had emerged from the shadows of casual conversation and had become the subject of fairly intense public controversy. That controversy, however, was almost entirely concerned with questions about facts and remedies, not about principles. We had what appeared to be a clear national consensus that it was completely improper for the police to use racial stereotypes when selecting individuals for stops or searches—even if it might be true that members of certain racial groups are more likely than other groups to be guilty of specific criminal behavior.<sup>1</sup>

The controversy was mostly focused on whether the police were in fact commonly using such stereotypes, especially when choosing which motorists to pull over for traffic violations that are so common that the police necessarily ignore them most of the time. Generally speaking, conservatives were probably more skeptical about claims that racial profiling was actually very common,<sup>2</sup> while liber-

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<sup>1</sup> One empirical study concluded that the Maryland State Police have engaged in racial profiling when making stops on I-95 and that the stereotypes employed by the police were accurate at least to this extent: Among black and Hispanic drivers, a larger percentage of the stops uncovered substantial quantities of illegal drugs. See Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. (forthcoming) (manuscript on file with the author), available at [http://ssrn.com/abstract\\_id=331260](http://ssrn.com/abstract_id=331260).

<sup>2</sup> See, e.g., Katherine Kersten, *Race to Conclusions: What the Activists Don't Tell You About Racial Profiling*, WEEKLY STANDARD, Aug. 20, 2001, at 27 (arguing that studies purporting to demonstrate racial profiling often do not actually support the conclusions drawn from them); Heather Mac Donald, *Profiling Myth Smashed—Yet Bush Justice Dept. Still*

als were more willing to believe that it was a serious problem.<sup>3</sup> But almost nobody argued that the police should be allowed to engage in this practice.<sup>4</sup>

Then came 9/11. All of the hijackers who carried out the attacks that day were Arab men,<sup>5</sup> and commentators began saying that racial profiling is an appropriate tool for the war on terrorism. And the public seems to agree. Polls have shown strong majorities in favor of subjecting those of Arab descent to extra scrutiny at airports.<sup>6</sup> Interestingly, blacks and Arab-Americans were even more likely than whites to favor such policies.<sup>7</sup>

By now, most of us have had the opportunity to see little old ladies stopped for humiliating random searches at the boarding gates in the airports, while far more dangerous looking men have walked down the jetways without so much as a second look from the security screeners. Conservatives, in particular, have skewered the government for persisting with these apparently silly, and quite possibly very dangerous, policies.<sup>8</sup> This is consistent with the general

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*Bashes N.J. Law Enforcement*, N.Y. POST, March 27, 2002 (arguing that police do not systematically employ racial profiling in traffic stops—they simply “stop blacks more for speeding because blacks speed more” often than other groups).

<sup>3</sup> See, e.g., *Racial Profiling: The Importance of Federal Legislation, Hearing on the End Racial Profiling Act of 2001, S. 989 Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary* (Aug. 1, 2001), 2001 WL 26185903 (testimony of Professor David A. Harris, University of Toledo College of Law) (arguing that racial profiling is the result of racially biased institutional practices that are ineffective in apprehending criminals and that these practices are also immoral).

<sup>4</sup> See, e.g., Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 (2002) (citing a 1999 national poll in which eighty-one percent of respondents disapproved of racial profiling).

<sup>5</sup> See, e.g., Jason L. Riley, *Racial Profiling and Terrorism*, WALL ST. J., Oct. 24, 2001, at A22 (“Of the 19 hijackers responsible for last month’s calamity, all were Arabic, all were practitioners of Islam[,] and all came from known state incubators of terrorism in the Middle East.”); see also Fred Barnes, *Arm the Pilots and Profile the Passengers*, WEEKLY STANDARD, June 3, 2002, at 12 (“All of the September 11 hijackers were young Arab males.”).

<sup>6</sup> See, e.g., Gross, *supra* note 4, at 1413- 14 (citing a post-9/11 poll in which fifty-eight percent of respondents supported more intensive security checks for Arabs before they would be allowed to board airplanes).

<sup>7</sup> See Milton Heumann & Lance Cassak, *Afterward: September 11th and Racial Profiling*, 54 RUTGERS L. REV. 283, 286- 87 (2001) (citing a Gallup poll in which it was reported that seventy-one percent of blacks and sixty-three percent of other minority respondents were in favor of employing greater security measures before boarding planes with Arabs, whereas only fifty-seven percent of white respondents were in favor of such measures); Riley, *supra* note 5, at A22 (referencing, among others, a Detroit news survey that reported that Arab Americans are in support of extra questioning or inspections for travelers of Arab descent).

<sup>8</sup> See, e.g., *Profiles in Timidity* (Editorial), WALL ST. J., Jan. 25, 2002, at A18 (arguing that it is absurd for airport security screeners not to employ racial profiling to search Arabs and Muslims more carefully); see also Barnes, *supra* note 5, at 12 (arguing that although racial profiling might not be politically correct, it is necessary in order to prevent future terrorism); Scott Johnson, *Better Unsafe Than (Occasionally) Sorry? Meet One of the Crusaders Blocking Intelligent Profiling of Terrorists*, AM. ENTER., Jan./Feb. 2003, at 28, 30 (“The war on racial

tendencies of conservatives to be more supportive than liberals of aggressive law enforcement techniques and to be less likely to believe that police officers are prone to racist behavior.<sup>9</sup> Political correctness, obsessive pandering to racial sensitivities, bureaucratic mindlessness—whatever the diagnosis, the cure is taken to be obvious: Stop the silliness, we're told, and get serious about protecting us from another attack, which we can be quite sure will not be carried out by septuagenarian Norwegian-American women.

In my opinion, this new enthusiasm for racial profiling is misguided. My argument has three main points.

First, racial profiling or racial stereotyping is something that all of us do all the time. There are good reasons why we do it, and there are also good reasons why we need to make an effort not to do too much of it.

Second, free societies—and especially free markets—foster profound forces that tend to curb irrational racial stereotyping. These mechanisms certainly do not work perfectly, but they do work.

Third, governments are highly prone to excessive racial stereotyping and are largely immune from the forces that keep this practice in check in the private sector. For that reason, government policies that entail racial profiling should be treated with the greatest skepticism. Not only do they threaten the legitimate interests of various racial groups, but they tend to distract government agencies from alternative policies that are likely to work at least as well.

Certainly, we should not pander to left-wing racial mau-mauing if doing so will leave us vulnerable to another catastrophe like 9/11. But by the same token, let's also avoid pandering to dysfunctional bureaucratic imperatives that have their own potential for disaster. In short, I agree with the conservative commentators who think that the war on terrorism is a serious business that we should all be treating in a serious way. But I disagree with the conclusion that racial profiling is likely to make an important contribution to that effort.

The most important reason for being skeptical about racial profiling is one that ought to be shared by the left and right alike: it threatens to undermine the important national goal of making all

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profiling has obscured two important facts: Racial profiling does not exist where the ACLU has persuaded everyone it does, such as on the nation's highways and streets. And it does not exist where it should, in the nation's airports and airlines.").

<sup>9</sup> This is not to say that no liberals have endorsed racial profiling as an anti-terrorism tool—for some have done so. *See, e.g.*, Gross, *supra* note 4, at 1414 n.3 (2002) (collecting examples from across the political spectrum). I focus here on the conservative proponents of this tool because my goal is to articulate conservative objections to it.

races equal under the law. I will focus here on an additional reason that should be especially appealing to conservatives: the danger of government abuses.

## II. RACIAL PROFILING IS AN INERADICABLE PART OF HUMAN LIFE

The term *racial profiling* was apparently coined to describe the behavior of some police officers who stopped black motorists for minor traffic violations in hopes of discovering illegal drugs or other contraband in the car.<sup>10</sup> If the practice can be justified, it must be on the assumption that blacks are statistically more likely to be carrying contraband.

This practice is just a particular example of the more general phenomenon of racial or ethnic stereotyping.<sup>11</sup> We all see, or believe we see, that certain characteristics are not randomly distributed throughout the population. Some of these patterns indubitably reflect reality. Other patterns that many people believe that they see might not in fact exist. But there are enough statistically large differences among racial groups that stereotyping is not always or merely the result of prejudice or thoughtlessness.

In fact, I think, we cannot help noticing some of these patterns, and we cannot help being influenced by them. I'll just offer one piece of evidence for this proposition. A few years ago, Jesse Jackson made the following statement: "There is nothing more painful for me at this stage in my life than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody white and feel relieved. How humiliating."<sup>12</sup>

Jesse Jackson was obviously not motivated by prejudice against black people. He was simply admitting that he had noticed what official statistics confirm; namely, that blacks commit robbery at much higher rates than whites do.<sup>13</sup> The stereotype that Jackson

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<sup>10</sup> See *id.* at 1426 n.53 (stating that the first use of the terms "racial profile" or "racial profiling" in a published news article occurred in the *New York Times* in an early 1990 report on drug interdiction). The first use in a published court opinion occurred in *United States v. Whren*, 53 F.3d 371, 373 (D.C. Cir. 1995), *aff'd*, 517 U.S. 806 (1996). *Id.*

<sup>11</sup> The term "*racial profiling*" is sometimes used to describe a wider range of phenomena. For a useful discussion of the line-drawing problems that can arise in this area, see Roger Clegg & Keith Noreika, *Racial Profiling, Equal Protection, and the War Against Terrorism*, available at <http://www.federalistsociety.org/Publications/Terrorism/racialprofiling.htm> (last visited Feb. 21, 2003).

<sup>12</sup> Paul Glastris & Jeannye Thornton, *A New Civil Rights Frontier: After His Own Home and Neighborhood Were Invaded by Street Punks, Jesse Jackson Dedicated Himself to Battling Black-on-Black Crime*, U.S. NEWS & WORLD REP., Jan. 17, 1994.

<sup>13</sup> The proportion of blacks arrested for robbery is some four times higher than the black proportion of the population. See FBI, UNIFORM CRIME REPORTS, CRIME INDEX OFFENSES

was employing is accurate in a statistical or probabalistic sense—even though it's also true that most blacks are not robbers and that almost half of all robbers are white.<sup>14</sup>

Obviously, that leaves lots of questions about what actions people should or should not take on the basis of such statistically accurate stereotypes. My only point here is that people inevitably become aware that there are differences among racial and ethnic groups and that people inevitably take account of these differences—even if they try not to do so. Of course, it is also true that our natural habit of noticing different patterns or tendencies among groups sometimes leads us to employ stereotypes that are *not* statistically accurate. Furthermore, both accurate and inaccurate stereotypes may operate at a subconscious level.<sup>15</sup>

### III. PRIVATE SECTOR RACIAL PROFILING IS CONSTRAINED BY MARKET FORCES

American citizens are permitted to employ stereotypes in many of their private dealings with one another, regardless of whether the stereotypes that they use are accurate or not. If somebody decides to avoid a predominantly black neighborhood because he believes that it is safer to take an alternative route through a mostly white area, he has not violated any law. Similarly, if a black person avoids going through a white neighborhood for fear of encountering a racist gang, that is his privilege. Similarly, if somebody decides to make a charitable contribution to a soup kitchen in a Hispanic neighborhood because he believes that Hispanics are more likely to suffer from poverty than whites, or if he makes a contribution to Tay-Sachs research because he believes that Jews are more likely to suffer from that disease, he has not violated any law.

Not only are such actions perfectly legal, but you will rarely hear anybody advocate that they be made illegal. And this does not depend on whether the stereotypes are accurate or not. In some areas of private life, however, the law *has* intervened to prohibit private actions based on racial stereotypes. As a practical matter, the most

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REPORTED 35 2001 (“By race, 53.8 percent of the [robbery] arrestees were black, 44.5 percent were white, and 1.7 percent were other races.”), *available at* <http://www.fbi.gov/ucr/ucreports.htm> (last visited Jan. 26, 2003) .

<sup>14</sup> *See id.*

<sup>15</sup> At the *Albany Law Review* symposium where this paper was first presented, a member of the audience—who seemed to be responding to my presentation—gave a lengthy defense of affirmative action programs. In the course of her statement, she claimed that “White America feels a sense of entitlement.” I doubt that the speaker was even conscious that she was employing a racial stereotype.

important of these areas is employment. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees or applicants for employment because of their race.<sup>16</sup> This statute not only forbids an employer from discriminating against an individual because he dislikes people of that race, but it also forbids the use of any racial stereotypes—even if the employer can prove that the stereotypes are statistically accurate.<sup>17</sup>

It turns out that there are some interesting economic and policy issues arising from the difference between discrimination based on racial hostility or invalid stereotypes and discrimination based on statistically *valid* stereotypes.

Generally speaking, wage discrimination based on irrational hostility or invalid stereotypes will be eliminated or minimized over the long run by the operation of market forces. Consider, for example, what would happen if the owner of a factory decided to pay black employees twenty percent less than white employees for the same work just because the owner disliked blacks or mistakenly believed that blacks are more lazy and shiftless than whites. The factory's workforce might or might not become all white, but it would certainly become less efficient than it would be if the owner did not engage in such irrational discrimination. This will lead to reduced profits and ultimately, perhaps, even to a business failure. Either way, the owner will have financial incentives to stop discriminating or to sell the business to someone who doesn't share his prejudices.

Now consider a different example. An employer has a factory in which most of the jobs require very little formal education but where the employer must make significant investments in on-the-job training. In this situation, the employer will have incentives to screen applicants for moral qualities such as reliability and diligence that are difficult to observe directly. Now suppose that the factory is located in a large city near two ethnically different neighborhoods. One neighborhood is predominantly black, very poor, with high rates of welfare dependency, alcoholism, and drug addiction. The other neighborhood is predominantly Hispanic and largely composed of recent immigrants, with high rates of church attendance, few welfare recipients, and very little substance abuse.

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<sup>16</sup> Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 253, 255 (1964) (codified as amended at 42 U.S.C. § 2000e *et seq.*)

<sup>17</sup> See, e.g., *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 709 (1978) ("Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute that was designed to make race irrelevant in the employment market, could not reasonably be construed to permit a take-home-pay differential based on a racial classification." (citation and footnotes omitted)).

In this situation, an employer might find that it is economically efficient to discriminate against black job applicants and in favor of Hispanic applicants. In this hypothetical, just as in the first hypothetical, the employer violates the law by engaging in racial discrimination. The differences between the two cases have led to an interesting debate about whether the benefits of Title VII outweigh the inefficiencies that it generates.<sup>18</sup> Ultimately, one's position in that debate depends on empirical issues, as well as on one's evaluation of the relative importance of economic efficiency versus the principle of discouraging racial discrimination. For my purposes here, the important point is that the market by itself will tend to suppress inefficient or irrational discrimination. But with *government* employers—indeed with government more generally—the situation is almost the opposite.

#### IV. GOVERNMENTS HAVE STRONG TENDENCIES TO OVERUSE AND MISUSE RACIAL STEREOTYPES

In free markets, irrational discrimination is punished because those who engage in it must absorb some of the costs. Conversely, rational discrimination is rewarded. When governments discriminate, however, the costs and benefits are entirely political—not economic. Governments do not go out of business, no matter how inefficient they are, and they do not respond to economic incentives except when economic forces and political forces are aligned in the same direction. This point can be illustrated with two examples from the area of employment discrimination.

The Davis-Bacon Act of 1931 requires construction workers on federally funded projects to receive what is called the “prevailing wage,” which generally means union wage levels.<sup>19</sup> This statute was enacted to protect the jobs of unionized white workers in the North whose jobs were threatened by non-unionized workers (often black migrants from the South) who were willing to work for market wages rather than for the supra-competitive wages that were demanded by the construction unions.<sup>20</sup> The legislative history of the

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<sup>18</sup> For an introduction to the debate, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 504–05 (1992) (arguing that there is no adequate theoretical foundation or practical justification for outlawing discrimination in the private sector). For a sample of the arguments that have been advanced against Epstein's position, along with his response, see the *Title VII Symposium: A Critique of Epstein's Forbidden Grounds* in the Winter, 1994 issue of the *San Diego Law Review*.

<sup>19</sup> See Davis-Bacon Act, Ch. 411, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C. § 276a-5 (2000)).

<sup>20</sup> See DAVID E. BERNSTEIN, *ONLY ONE PLACE REDRESS: AFRICAN AMERICANS, LABOR*

statute shows that it was driven, at least in part, by a racially discriminatory intent.<sup>21</sup> Perhaps we should not be surprised that such motivations would have moved Congress in 1931. But this statute is still in force today, even though it is highly inefficient and even though it probably continues to have racially discriminatory effects on black workers as a group.<sup>22</sup> The only explanation is political. The labor unions have been sufficiently powerful to resist every attempt at reform, and the adverse economic and racial effects have been treated as irrelevant in the political process.

My second example is so-called affirmative action in government employment.<sup>23</sup> In its traditional forms, affirmative action is based on a form of racial profiling or stereotyping.<sup>24</sup> Members of certain minority groups are thought to deserve special preferences because members of those groups have previously been victimized by discrimination that prevented them from competing on fair terms in the employment markets. The government promoted affirmative action as a temporary device meant to compensate for this prior, presumptively irrational, discrimination.

In the mid-1960s, when affirmative action programs began, the stereotype of minorities who had been victimized by long-standing patterns of discrimination had considerable statistical validity, especially—but not exclusively—in the Jim Crow South. No disinterested observer, however, could possibly believe that the stereotype is just as true today as it was in 1965. The Supreme Court, moreover, has ruled that these programs are unconstitutional except in narrowly defined circumstances.<sup>25</sup> Nevertheless, government agencies have stubbornly resisted reform, and in many instances, government agencies have expanded their use of racial preferences dramatically, even while the underlying justification has become in-

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REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 66- 84 (2001) (discussing the origin and effects of the Davis-Bacon Act).

<sup>21</sup> See *id.* at 73- 74 (describing the racially based motivations that led to the statute).

<sup>22</sup> See generally Daniel P. Kessler & Lawrence F. Katz, *Prevailing Wage Laws and Construction Labor Markets*, 54 *INDUS. & LAB. REL. REV.* 259, 268- 73 (2001).

<sup>23</sup> For purposes of this discussion, I leave aside the complicated relationship between the nominally voluntary affirmative action programs in the private sector and the legal regime that often renders them effectively mandatory. For a brief discussion of this issue, see *Johnson v. Santa Clara Transportation Agency*, 480 U.S. 616, 673- 77 (1987) (Scalia, J., dissenting).

<sup>24</sup> See generally HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960- 1972* (1990).

<sup>25</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (racial preferences are subject to strict scrutiny under the Fifth Amendment); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (racial preferences are subject to strict scrutiny under the Fourteenth Amendment).



creasingly difficult to maintain with a straight face.<sup>26</sup>

Interest-groups politics is largely responsible for this.<sup>27</sup> There is, however, an additional reason that governments persist in using racial quotas and preferences; namely, that they are comparatively easy to administer. It is often difficult to find out whether someone has actually been a victim of illegal discrimination. It is even more difficult to figure out whether someone has had to overcome enough disadvantages in life that his successes in doing so make him a good bet for employment even if his paper credentials are less impressive than those of his competitors for a given job. It is quite easy, however, to find out whether someone is black, Hispanic, or a member of some other designated ethnic group.

Using these categories also makes it easy for government agencies to measure their own accomplishments and to measure the accomplishments of the employees assigned to carry out the affirmative action programs. It is thus very easy for these minority preferences—originally envisioned as temporary devices that would help eliminate discrimination—to become transformed from a means to an end in itself. If a government personnel manager succeeds in hiring X percent minorities next year, it need not matter to him or to his agency whether that success has contributed in any way at all to the goal of eliminating racial discrimination.

These natural tendencies of government bureaucracies to use easily administered rules, and to transform means into ends, arise in large part from the fact that these agencies do not internalize the costs of their errors and inefficiencies. The directors of the CIA and the FBI, for example, recently testified before Congress that nobody in their organizations had been disciplined for any mistakes in failing to prevent the terrorist attacks on 9/11.<sup>28</sup> Moreover, the directors themselves are obviously still in their jobs. Now contrast this with the fate of former FBI Director William Sessions, who lost his job after he was accused by an ethics official of self-indulgence in the use of the perquisites of his office.<sup>29</sup>

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<sup>26</sup> See, e.g., Roger Clegg, *Federal Employment Discrimination*, 3 ENGAGE: THE J. OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS, Oct. 2002, at 12; Stuart Taylor, Jr., *When Affirmative Action Is Nothing but Discrimination*, 34 NAT'L J. 2685 (2002).

<sup>27</sup> See Nelson Lund, *Illusions of Antidiscrimination Law*, in BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 319, 319-20 (Abigail Thernstrom & Stephan Thernstrom eds., 2002).

<sup>28</sup> Dana Priest and Susan Schmidt, *Al Qaeda Threat Has Increased, Tenet Says; Panel Told Recent Attacks Evoke Pre-9/11 Dangers*, WASH. POST, Oct. 18, 2002, at A1; see also Dana Priest and Susan Schmidt, *Disciplinary Action Urged For Failures Before 9/11*, WASH. POST, Dec. 11, 2002, at A1.

<sup>29</sup> See David Johnston, *Final Act for the F.B.I.'s Director is Painful and Almost Mute*, N.Y.

There may be good reasons why no one has been blamed for the 9/11 disaster. And there undoubtedly are good reasons to forbid government officials from overusing their official perquisites. But it is no accident that those responsible for extremely important government functions are seldom held accountable even for very spectacular failures, while people in government frequently get in big trouble when they violate relatively minor rules. Rules are easy to follow and easy to enforce. Important accomplishments, on the other hand, are difficult to measure, and the responsibility for success or failure is usually shared among large numbers of people spread out among numerous institutions.

Government agencies are ordinarily very good at applying simple rules, but they are often very bad at using common sense, or taking appropriate risks, or adjusting their rules to take account of changing circumstances. Bureaucratic inertia is a very real phenomenon, and it needs to be taken into account as a natural feature of government whenever one thinks about what policies governments should adopt. Just because it might make sense for a private actor, or a private business, to approach a problem in a certain way does not mean that governments should be allowed or encouraged to take the same approach.

This analysis suggests that racial profiling is a very dangerous tool in the hands of the government, and in the long run, one that is likely to do more harm than good. More specifically, if racial profiling is adopted as a government policy in the war on terrorism, it will impose real costs by violating principles of nondiscrimination that our nation has struggled to achieve for a long time, and with only partial success, to incorporate into our law and culture. And it might not do much to prevent another attack.

It is true, of course, that one can at least imagine that racial profiling may be a relatively efficient form of screening suspects in some circumstances, especially if the only alternative is the kind of apparently mindless random searches that we've all seen at the airports.<sup>30</sup> Many of the efficiency benefits of racial profiling, however, can be captured through the use of *other* screening criteria, such as country of origin (a characteristic that should not be confused with

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TIMES, July 21, 1993, at A10.

<sup>30</sup> In practice, the security procedures at the airports might be worse than mindlessly random. An elderly woman that I know, after being repeatedly selected for supposedly random searches at the boarding gates before her flights, finally asked a screener why she had been picked. The answer: "I've had a long day, and you looked easy." In other words, the screener picked out the most *innocuous* looking passenger that she could find, and she wasn't even reluctant to acknowledge what she had done.

race or ethnicity), age, sex, and travel patterns. These alternative criteria do not carry the same poisonous potential that racial and ethnic profiling do, and the law is appropriately more tolerant of these forms of discrimination than it is of racial discrimination.

Nor should we overlook the possibility that racial profiling will become a crutch that law enforcement agencies will rely on to the exclusion of more difficult, but more effective, techniques. Just because the 9/11 terrorists were all men of Middle Eastern descent, and apparently looked the part, does not mean that future terrorists will all be so conspicuously identifiable. Terrorist organizations have already started using women in their attacks against Israel,<sup>31</sup> and it should be obvious by now that it is perfectly conceivable that al-Qaeda can even recruit the occasional white youth from Marin County, California.<sup>32</sup>

Nor need we rely entirely on abstract analysis and common sense. We have had some historical experiences with racial profiling by the government, from which the following two examples are drawn.

Consider first the internment during World War II of more than 120,000 Japanese-Americans, including 70,000 American citizens. Without getting into the legal issues raised in *Korematsu v. United States*<sup>33</sup> and other cases, it is worth remembering a few facts about the racial profiling that the government employed during this episode.

First, people of Japanese descent were the only group subjected to mass incarceration, although we were also at war with Germany and Italy. Second, the government apparently gave no serious consideration to using individualized loyalty hearings, even though this device had been used to deal with people of German and Italian ancestry.<sup>34</sup> Third, and perhaps most telling, the government continued to defend this program in court even after it learned that the army general who initiated the program was acting on a completely unfounded and generalized mistrust of Japanese-Americans.<sup>35</sup> Not only did the government continue to defend the program, it con-

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<sup>31</sup> See Joel Greenberg, *The Terrorist: Daughter Concealed Angry Soul of a Martyr*, N.Y. TIMES, Mar. 31, 2002, at 11 (reporting on terrorist attack in Jerusalem carried out by a female suicide bomber).

<sup>32</sup> See Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. TIMES, July 16, 2002, at A1 (detailing John Walker Lindh's involvement with the Taliban in Afghanistan and his guilty plea in federal court to felony charges).

<sup>33</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>34</sup> See *id.* at 241 (Murphy, J., dissenting).

<sup>35</sup> See *Korematsu v. United States*, 584 F. Supp. 1406, 1416-17 (N.D. Cal. 1984) (discussing the findings of the Commission on Wartime Relocation and Internment of Civilians, which was created by Congress in 1980).

cealed from the Supreme Court what it knew about the absence of any real threat.<sup>36</sup>

Maybe this is all ancient history, which would never be repeated by our more enlightened contemporary politicians and bureaucrats. Maybe. But it is worth remembering that this program was supported by Franklin Roosevelt and by Earl Warren.<sup>37</sup> In any event, it would be easier to treat this as an isolated incident if it were not that this whole episode appears to have been little more than a fairly extreme example of tendencies to which governments are always prone.

The second example is not ancient history. Just recently, the Washington, D.C. area was victimized by a series of random sniper shootings that went on for three weeks, leaving ten people dead and three wounded.<sup>38</sup> Although there is a lot that we do not know about this case and about the way that the police handled it, one feature of the investigation is particularly noteworthy. After two men were arrested for the crimes, Charles Ramsey, the police chief in Washington, D.C., made the following statement: "We were looking for a white van with white people, and we ended up with a blue car with black people . . . ."<sup>39</sup>

The mistake about the vehicle was probably the result of inept evaluations of eyewitness accounts, for we later learned that the police had been told about a suspicious dark sedan leaving the scene of at least one shooting.<sup>40</sup> But the mistake about the race of the suspects appears to have resulted from plain-old racial profiling.

As most people probably know, the airwaves were filled during this period with so-called experts on criminal profiling, among

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<sup>36</sup> See *id.* at 1417 (revealing the existence of internal government letters and memoranda that revealed that the government knowingly withheld information from the courts).

<sup>37</sup> See Exec. Order No. 9066, 7 Fed. Reg. 1,407 (Feb. 19, 1942), 1942 WL 1407; LOS ANGELES ALMANAC, EXECUTIVE ORDER 9066—FEBRUARY 19, 1942 (discussing California Attorney General Earl Warren's support for Japanese American internment camps), available at <http://www.losangelesalmanac.com/topics/History/hi07r.htm> (last visited Feb. 21, 2003).

<sup>38</sup> See Mary Beth Sheridan & Maria Gold, *Malvo's Mother Being Deported to Jamaica; Documents Describe Una James's Efforts to Leave Homeland, Get U.S. Residency*, WASH. POST, Dec. 14, 2002, at B1.

<sup>39</sup> Craig Whitlock & Josh White, *Police Checked Suspect's Plates At Least 10 Times*, WASH. POST, Oct. 26, 2002, at A1.

<sup>40</sup> See Christian Davenport, *The White Truck That Wasn't; Questions Linger About Why Car Spotted by Witnesses Got Little Attention*, WASH. POST, Nov. 18, 2002, at B7 (explaining that in one shooting incident, witnesses saw a dark automobile similar to the Chevrolet Caprice later determined to be the shooters' vehicle); Susan R. Paisner, *The Sniper Investigation? Hold the Applause*, WASH. POST, Nov. 24, 2002, at B3 (raising questions about the police work involved in the sniper shootings by highlighting the vehicles mistakenly identified in the search).

whom the “lone white male” theory seemed to dominate.<sup>41</sup> So far as one could tell, none of these supposed experts had any basis for this theory other than a belief that most serial killers in the past have been white men who operated alone.<sup>42</sup> Judging from Chief Ramsey’s statement, it looks as though the police bought into this same stereotype, which may not in fact even be statistically accurate.<sup>43</sup> Now that the suspects have turned out to be a black illegal alien and a black convert to a radical brand of Islam,<sup>44</sup> perhaps the “lone white male” theory should be considered a kind of politically correct version of racial profiling.

Just as racial stereotyping drove the mass internment policy during World War II, the government apparently relied on racial stereotypes in the recent sniper case. Both episodes turned out badly, and I am unaware of counterexamples in which racial profiling programs have actually served as an important and effective law-enforcement tool. In light of the constitutionally dubious nature of this technique, the burden should be on those who advocate its use to show that it actually works and that it is necessary. So far, that burden has not been met.

To their credit, President Bush and his administration have refused to give in to the clamor for racial profiling. They maintain that they are using alternative investigative and prophylactic measures that are at least equally effective.<sup>45</sup> As well they should: Racial profiling is a dangerous government policy, and conservative principles counsel strongly against it.

## V. CONCLUSION: THREE QUALIFICATIONS

In this essay, I have tried to make the conservative case against racial profiling in the war against terrorism. But it is only a case—not a demonstration—and I cannot claim that racial profiling

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<sup>41</sup> See John Leo, *Seeing Through Prisms*, U.S. NEWS & WORLD REP., Nov. 11, 2002, at 61 (analyzing press coverage of the sniper shootings); John O’ Sullivan, *Liberals Off the Mark Again*, CHI. SUN-TIMES, Oct. 29, 2002, at 27 (discussing how myths about the shooters and their characteristics grew through the media).

<sup>42</sup> See Jeffrey Gettleman, *The Hunt for a Sniper: The Theories; Loner, Teenager or Hunter? Experts Offer Three Profiles*, N.Y. TIMES, Oct. 16, 2002, at A19.

<sup>43</sup> See Jonah Goldberg, *Taste: What Happened to the Angry White Male?*, WALL ST. J., Oct. 25, 2002, at W15 (discussing data indicating that whites are statistically underrepresented among sniper-murderers), available at 2002 WL-WSJ 3409817.

<sup>44</sup> See O’ Sullivan, *supra* note 41, at 27.

<sup>45</sup> See, e.g., *Department of Justice Oversight: Preserving Freedoms While Defending Against Terrorism: Before the Senate Judiciary Committee*, 107th Cong., Nov. 28, 2001 (statement of Michael Chertoff, Assistant Attorney General for the Criminal Division), available at LEXIS, News Library, News Group File.

should never in any circumstances be used to fight terrorism. As with many other suspect forms of discrimination, one can imagine circumstances in which the benefits of engaging in racial profiling might greatly outweigh the harms that the practice will cause. And when the potential harms are as great or greater than those we witnessed on 9/11, only a fool would declare that a prohibition against discrimination must be absolute. But the presumption against the use of racial profiling should be extremely strong, and I have seen nothing close to the kind of evidence and argument that would be needed to overcome that presumption.

In arguing that a policy of racial profiling by the government is apt to invite bureaucratic laziness, moreover, I do not mean to suggest that avoiding such a policy will necessarily make the government efficient. There are many other ways in which the government can blunder in its task of protecting us from terrorism. The white-truck theory that the police mistakenly embraced during the sniper investigation is one example, and others are beginning to emerge from investigations of the government's behavior prior to 9/11. Racial profiling by the government is bad, but it is not by any means the only bad thing that government can do.

Finally, and perhaps most important, I have not addressed what I think is the hardest question: What exactly should the government do to prevent its employees from engaging in unauthorized racial profiling? Given my belief that we all have an irresistible tendency to engage in such profiling or stereotyping, and that we often do it unawares, the absence of an official policy of racial profiling will not suffice to eliminate the practice. But, for the same reason, a serious effort to eliminate the practice completely would likely fail, and would certainly have side effects that inhibit some important law-enforcement techniques (such as the use of hunches by experienced officers). I cannot offer a solution to this problem. I hope that I have succeeded, however, in my more modest goal: to challenge the claim that we ought to have an official policy of racial profiling in the war on terrorism.