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ESSAY

RACIAL PROFILING AND ANTITERRORISM EFFORTS

R. Richard Banks†

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INTRODUCTION

Antiterrorism measures have severely restricted the civil liberties of thousands of innocent people. In particular, commentators continue to debate the fairness of the widespread detention, deportation, and prosecution of Arabs and Muslims for non-terrorism related offenses. That debate has focused partly on the issue of racial profiling.¹ Racial profiling may impose substantial burdens on Arabs and Muslims,² which has prompted some commentators to conclude that it should be flatly prohibited.³ Others, given the monumental impor-

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¹ I have previously analyzed issues related to the racial profiling controversy in R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003) [hereinafter Banks, *Beyond Profiling*]; R. Richard Banks, *Race-Based Suspect Selection and Color-blind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1081–82 (2001) [hereinafter Banks, *Race-Based Suspect Selection*].

² If Arabs and Muslims are initially investigated as a result of racial profiling, then their detention, deportation, and prosecution would result from racial profiling as well. Moreover, racial profiling may independently influence any subsequent decision to arrest, detain, prosecute, or deport individuals.

³ See, e.g., David A. Harris, *Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terror?*, 17 CRIM. JUST., Summer 2002, at 36, 37.

tance of averting future acts of terrorism, unreservedly endorse racial profiling.⁴ Still others accept racial profiling with great ambivalence.⁵

In this Essay, I move beyond the question of whether racial profiling in antiterrorism efforts should be permitted and consider instead how its prohibition would influence its identification. My goal is to show that a prohibition of racial profiling in antiterrorism efforts would highlight—indeed exacerbate—disagreement about whether specific investigative decisions constitute racial profiling. The nature of the terrorist threat dramatizes the indeterminate boundary of each component of racial profiling. One might probe whether the profiling of Arabs and Muslims should be regarded as racial.⁶ In this Essay, I assume, for the sake of argument, that nationality, ethnicity, religion, and other criteria employed to select terrorism suspects are racial or equally objectionable.

I focus in this Essay on the fuzziness of the concept of profiling. Not all selection of suspects on the basis of race is racial profiling. Law enforcement officers do not engage in racial profiling if they investigate individuals of a particular race because they are seeking a suspect described as a member of that race. The selection of Arabs and Muslims as terrorism suspects will often straddle the boundary separating suspect description reliance and profiling. For example, have law enforcement officers engaged in racial profiling by investigating a seemingly credible tip from a member of the public that is itself based on racial profiling? What if officers question only members of a specific racial group in order to thwart a criminal gang comprised exclusively of individuals of that race? Finally, might the widespread questioning of thousands of Arabs and Muslims because they match some aspect of a description of a known or alleged terrorist seem tantamount to racial profiling? Such uses of race might plausibly be viewed as either profiling *or* suspect description reliance.

Dispute about whether particular instances of race-based suspect selection constitute racial profiling would partly reflect divergent normative evaluation of those practices. A proponent of a particular in-

⁴ See, e.g., Mathias Risse & Richard J. Zeckhauser, *Racial Profiling* (Kennedy School of Government Working Paper Series No. RWP03-021, Sept. 2003), available at http://www.ksg.harvard.edu/research/working_papers/index.htm; Peter H. Schuck, *Context is Everything with Racial Profiling*, L.A. TIMES, Jan. 27, 2002, at M6; Jonathan Turley, *Use Profiling Judiciously*, L.A. TIMES, Jan. 4, 2002, at B13.

⁵ See John Derbyshire, *A (Potentially) Useful Tool*, RESPONSIVE COMMUNITY, Winter 2001/2002, at 67, 67–70; Stephen J. Ellmann, *Racial Profiling and Terrorism*, 19 N.Y.L. SCH. J. HUM. RTS. 305, 314–47 (2003); Michael Kinsley, *Discrimination We're Afraid to Be Against*, RESPONSIVE COMMUNITY, Winter 2001/2002, at 64, 64–66; Vikram Amar, *Life After 9/11: The Golden Rule of Racial Profiling*, L.A. TIMES, Sept. 22, 2002, at M2.

⁶ Is the image of the swarthy terrorist racial? Are the characteristics on the basis of which antiterrorism targets are selected—nationality, ethnicity, language, or religion—tantamount to race?

vestigative decision would tend to view it as akin to suspect description reliance, while one opposed to that use of race would be more likely to declare it racial profiling. The same normative disagreement that shapes the debate about the permissibility of racial profiling would subvert efforts to reach consensus as to whether particular practices signify racial profiling.⁷ A prohibition of racial profiling would likely thus relocate, rather than resolve, normative disagreement about the fairness of the widespread investigation of Arabs and Muslims.

Part I identifies the suspect description reliance that is contrasted with, and constitutes the boundary of, racial profiling. Part II describes methods of selecting terrorism suspects that straddle the suspect description/profile boundary and, therefore, would be viewed as racial profiling by some but not by others.

I

THE SUSPECT DESCRIPTION BOUNDARY OF RACIAL PROFILING

A. The Permissibility of Suspect Description Reliance

Racial profiling refers to any law enforcement decision based at least in part on the belief that members of a particular racial group are more likely to commit the crime under investigation than are members of other groups.⁸ The hallmark of racial profiling, then, is reliance on a stereotype that members of a particular racial group tend to engage in a certain type of criminal activity more frequently than members of other groups.⁹ Racial stereotyping has been con-

⁷ The same process is evident in debate about whether racial profiling refers to any reliance on a racial stereotype, or only to those instances when the stereotype is the sole or predominant factor in the decision to investigate. Some commentators would define racial profiling as *any* reliance on racial stereotypes in investigative decisionmaking. See Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 664–65 (2002); Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13 & 20, 1999, at 30, 32–33. Others, however, would define racial profiling more narrowly as only those investigative decisions in which racial stereotyping is a *predominant* or *sole* factor. See Heather Mac Donald, *The Myth of Racial Profiling*, 11 CITY J., Spring 2001, at 14, 20.

⁸ Scholarly commentators have defined racial profiling in various ways. See, e.g., Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 11 n.6 (2003) (defining racial profiling as “the allocation of scarce, non-trivial law enforcement attention . . . entirely or substantially on the basis of national origin or race”); Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1202–07 (2003) (defining racial profiling as “the inappropriate use of race, ethnicity, or national origin, rather than behavior or individualized suspicion, to focus on an individual for additional investigation” (footnote omitted)).

⁹ Throughout this Essay, I do not intend to equate racial stereotypes with racial animus. Nor do I want to imply that stereotypes are necessarily erroneous or irrational. I use stereotype in a descriptive sense, to refer simply to a good faith belief in trait or behavioral differences among racial groups. See Arthur Isak Applbaum, *Response: Racial Generalization, Police Discretion, and Bayesian Contractualism*, in HANDLED WITH DISCRETION 145 (John

demned by both scholarly commentators¹⁰ and the Supreme Court.¹¹ But not all decisions to investigate individuals of a particular race reflect that sort of stereotyping. The conventional view, as law Professors Samuel Gross and Debra Livingston have noted, is that it "is not racial profiling for an officer to question, stop, search, arrest, or otherwise investigate a person because his race or ethnicity matches information about a perpetrator of a specific crime that the officer is investigating."¹² A prohibition of racial profiling would not preclude officers from investigating only members of a particular race if they are seeking a specific criminal wrongdoer who has been identified as a member of that race.¹³

While numerous courts have held that the racial component of a suspect description is insufficient by itself to justify a stop,¹⁴ no court has held that suspect description reliance is discriminatory¹⁵ or that race cannot serve as an "identifying characteristic."¹⁶ As the Sixth Circuit has stated, "[c]ommon sense dictates that, when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the

Kleinig ed., 1996); David Wasserman, *Racial Generalizations and Police Discretion*, in *HANDLED WITH DISCRETION*, *supra*, at 115.

¹⁰ See, e.g., JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 13-14 (1997).

¹¹ See, e.g., *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991); *Batson v. Kentucky*, 476 U.S. 79, 85-88 (1986).

¹² Samuel R. Gross & Debra Livingston, Essay, *Racial Profiling Under Attack*, 102 *COLUM. L. REV.* 1413, 1415 (2002); see Susan Sachs, *In the Search for Suspects, Sensitivities Over Profiling*, *N.Y. TIMES*, Sept. 26, 2001, at A19.

¹³ See, e.g., *Brown v. State*, 592 So. 2d 1237 (Fla. Dist. Ct. App. 1992); *Commonwealth v. Mercado*, 663 N.E.2d 243 (Mass. 1996); *Commonwealth v. McDonald*, 740 A.2d 267 (Pa. Super. Ct. 1999).

¹⁴ See, e.g., *Washington v. Lambert*, 98 F.3d 1181, 1190-92 (9th Cir. 1996); *Buffkins v. City of Omaha*, 922 F.2d 465, 469-70 (8th Cir. 1990); *Burkett v. State*, 736 N.E.2d 304, 307 (Ind. Ct. App. 2000); *State v. Goree*, 742 A.2d 1039, 1047 (N.J. Super. Ct. App. Div. 2000). Of course, courts have found that a race-based suspect description may, in combination with other factors, be sufficient to satisfy the Fourth Amendment reasonable suspicion standard. See, e.g., *Holston v. United States*, 633 A.2d 378, 382-83 (D.C. 1993).

¹⁵ Indeed, challenges to suspect description reliance have rarely alleged equal protection violations, and those that did were promptly rejected. See *United States v. Cuevas-Ceja*, 58 F. Supp. 2d 1175, 1185 (D. Or. 1999); *Valdez v. City of East Hartford*, 26 F. Supp. 2d 376, 383-84 (D. Conn. 1998).

¹⁶ *State v. Ampey*, 609 P.2d 96, 97 (Ariz. Ct. App. 1980); see also *United States v. Kim*, 25 F.3d 1426, 1431 n.3 (9th Cir. 1994) (describing race as a "relevant factor").

perpetrator known to the officer include race.”¹⁷ Other courts have reached similar conclusions.¹⁸

Legal scholars have uniformly concluded that suspect description reliance is permissible under the Equal Protection Clause because it is not racially discriminatory.¹⁹ Two decades ago, Professor Sheri Lynn Johnson concluded that officers’ reliance on a race-based suspect description should not be viewed as racially discriminatory.²⁰ More recently, Professors Randall Kennedy and David Cole both have urged that racial profiling be prohibited, yet that officers be permitted to rely on race in efforts to apprehend a known perpetrator.²¹ Other scholars have similarly concluded that suspect description reliance is both constitutionally permissible and practically desirable.²²

B. Suspect Description/Profile Dissimilarity

Suspect description reliance and profiling are widely viewed as fundamentally dissimilar in both their character and use.²³ Profiles rely on a generality about an entire group, whereas suspect descriptions denote the particular characteristics of a specific perpetrator. Indeed, suspect description reliance might be thought not to proceed

¹⁷ See *United States v. Waldon*, 206 F.3d 597, 604 (6th Cir. 2000); *Cartnail v. State*, 753 A.2d 519, 530 (Md. 2000) (“In looking at the description of the suspects, undoubtedly physical characteristics, such as race, gender, ethnicity, hair color, facial features, age, body build, or apparel of a suspect permits winnowing of innocent travelers.” (footnote omitted)); see also *United States v. Davis*, 200 F.3d 1053 (7th Cir. 2000) (upholding investigatory stop as reasonable in part because defendant matched suspect’s racial description); *United States v. Lopez-Martinez*, 25 F.3d 1481, 1490 (10th Cir. 1994) (citing race as a “triggering circumstance”).

¹⁸ See, e.g., *Buffkins*, 922 F.2d at 468; *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982).

¹⁹ Only one commentator, a law student, has proposed that reliance on race-based suspect descriptions be prohibited. See Bela August Walker, Note, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662 (2003).

²⁰ Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983). She reasoned that “[a]lthough the suspect’s race is noted and weighed in the decision to detain, no generalizations about the characteristics, behavior, or appropriate treatment of the racial group are employed. Rather, the suspect’s race is used solely to help substantiate his identity as the individual involved in a particular offense.” *Id.* at 243.

²¹ See Kennedy, *supra* note 7, at 34; see also DAVID COLE, NO EQUAL JUSTICE 50 (1999); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 137 cmt. (1997).

²² See, e.g., Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1006–07 (1999).

²³ For example, the New Jersey State Attorney General condemned racial profiling and then observed that “[n]o one disputes, of course, that police can take a [person’s] race into account in deciding whether [a] person is the individual who is described in a wanted bulletin; in this instance, race or ethnicity is used only as an identifier.” PETER VERNIERO & PAUL H. ZOUBEK, STATE OF NEW JERSEY, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 52 (1999), available at http://www.state.nj.us/lps/intm_419.pdf.

on the basis of race²⁴ except in the sense of describing an assailant's appearance through a morally unproblematic cataloguing of visually salient characteristics that may include eye and hair color.²⁵

Profiles and suspect descriptions are also thought to be used quite differently. Whereas a profile may be used across a wide variety of circumstances, use of a suspect description is thought to be temporally and geographically bounded. Law enforcement officers only question individuals matching the suspect description during the time when, and in the place where, the perpetrator is likely to be apprehended.²⁶ Profiles are thought to result in the widespread and indiscriminate investigation of the profiled group. Suspect descriptions, in contrast, are assumed to narrowly target only those individuals who most resemble the perpetrator. Consequently, profiles are viewed as an invidious use of race that stigmatizes a group as crime prone, while suspect description reliance is perceived as innocuous.²⁷

However dissimilar profiling and suspect description reliance appear to be, it will often be unclear whether particular antiterrorism measures belong in one category or the other. Such uncertainty may reflect the possibility, as I have suggested previously, that racial profiling and suspect description reliance are not as dissimilar as commonly thought.²⁸ Alternatively, dispute about whether particular decisions to investigate Arabs and Muslims constitute racial profiling may simply reflect the fact that the terrorist threat raises precisely those circumstances at the boundary of otherwise distinct uses of race. The argument of this Essay is consistent with either interpretation.

²⁴ See Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 97-98 (2003).

²⁵ If the use of race to investigate those who most resemble the perpetrator is unconstitutional race consciousness, then the ideal of colorblindness would entail an unrealizable and absurdly literal blindness to the physical features indicative of race. See Banks, *Race-Based Suspect Selection*, *supra* note I, at 1108-24.

²⁶ Officers typically use profiles to thwart ongoing criminal activity or future crimes, and suspect descriptions to solve completed crimes. See *id.* at 1082, 1107-08. However, suspect descriptions may be used to apprehend perpetrators of ongoing crimes as well.

²⁷ For a fuller discussion of the ways in which these two uses of race might be distinguished, see *id.* at 1091-96.

²⁸ See *id.* at 1096-1108. Both uses of race tend to result in the disparate burdening of historically disadvantaged racial minorities, see *id.* at 1097-99, and both may help to apprehend criminal wrongdoers, see *id.* at 1099-1101. The usefulness of each reflects the centrality of race in American society and culture. See *id.* at 1109-12; Banks, *Beyond Profiling*, *supra* note I, at 598.

II THE SELECTION OF TERRORISM SUSPECTS

In some cases the investigation of Arabs and Muslims will seem like persuasive evidence of racial profiling.²⁹ Other decisions to investigate Arabs and Muslims, however, could plausibly be placed on either side of the suspect description/profiling divide. Such decisions will seem like racial profiling in some ways and suspect description reliance in other ways. One reason that commentators may characterize the same practice differently is that they may draw different inferences about the subjective motivations of law enforcement officers.³⁰ Rather than emphasize the divergent characterizations that result from alternative assessments of officers' intent, in what follows I discuss three features of the terrorist threat that highlight the fuzziness

²⁹ For example, immediately after 9/11, airline personnel frequently attempted to have people who appeared to be Middle Eastern removed from commercial flights simply because they looked "suspicious." See, e.g., Dan Eggen & Katherine Shaver, *In Aftermath of Hijackings, Air Travel Jitters Remain*, WASH. POST, Apr. 30, 2002, at A2; Ken Ellingwood & Nicholas Riccardi, *Arab Americans Enduring Hard Stares of Other Fliers*, L.A. TIMES, Sept. 20, 2001, at A1; *Lawsuits Accuse 4 Airlines of Bias; Men Say Perceived Ethnicity Got Them Taken Off Flights*, WASH. POST, June 5, 2002, at A1. The Council on American-Islamic Relations (CAIR) reported that 42% of the complaints it received in 2002 were complaints of racial profiling in airports by airline representatives or local and federal agents. See COUNCIL ON AMERICAN-ISLAMIC RELATIONS RESEARCH CENTER, *THE STATUS OF MUSLIM CIVIL RIGHTS IN THE UNITED STATES: STEREOTYPES AND CIVIL LIBERTIES* 12, 18–24 (2002), available at <http://www.cair-net.org/civilrights2002/civilrights2002.pdf>. The federal government enacted the alien registration system in 2002. U.S. DEP'T OF JUSTICE, NATIONAL SECURITY ENTRY-EXIT REGISTRATION SYSTEM FACT SHEET, at <http://www.usdoj.gov/ag/speeches/2002/natlsecenryexittrackingssys.htm> (June 5, 2002); see also *Threats and Responses: The Visitors*, N.Y. TIMES, Sept. 23, 2002, at A17 (discussing registration requirements, including photographs and fingerprinting, for visitors from some foreign countries). It then partially suspended them in 2003. See U.S. DEP'T OF STATE, INTERNATIONAL INFORMATION PROGRAMS, U.S. CHANGES NATIONAL SECURITY ENTRY/EXIT REGISTRATION SYSTEM, at <http://usinfo.state.gov/topical/pol/terror/texts/03120104.htm> (Dec. 1, 2003); Rachel L. Swarns, *Special Registration for Arab Immigrants Will Reportedly Stop*, N.Y. TIMES, Nov. 22, 2003, at A16. The system required non-immigrant visa holders from certain countries to register with the INS and to inform the authorities of certain changes in their status. This registration requirement initially applied only to aliens from Iraq, Iran, Sudan, and Libya but was later expanded to include a variety of other countries, most of which were predominantly Muslim. See U.S. DEP'T OF JUSTICE, *supra*; Rachel L. Swarns & Christopher Drew, *Fearful, Angry or Confused, Muslim Immigrants Register*, N.Y. TIMES, Apr. 25, 2003, at A1; *Threats and Responses: The Visitors*, *supra*. The Absconder Apprehension Initiative entails the selective enforcement of immigration laws against individuals from certain countries. Memorandum from the Deputy Attorney General to INS Commissioner, FBI Director, Director U.S. Marshals Service, U.S. Attorneys, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002) [hereinafter Absconder Guidance], at <http://news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf>; see Dan Eggen, *U.S. Search Finds 585 Deportee "Absconders"*, WASH. POST, May 30, 2002, at A7; see also Steve Fainaru, *U.S. Deported 131 Pakistanis in Secret Airlift*, WASH. POST, July 10, 2002, at A1 (reporting the deportation of absconders, none of whom were linked to terrorism).

³⁰ For example, one may believe that law enforcement officers are employing a profile even when they purport to rely on a suspect description.

of the *conceptual* distinction between profiling and suspect description reliance.

A. Pervasive Suspect Description Reliance

Law enforcement officers' use of even a single suspect description may sometimes seem tantamount to racial profiling. For example, in the investigation that gave rise to *Brown v. City of Oneonta*,³¹ a police department attempted to question every single young black man in a small upstate New York town in order to apprehend an assailant described only as young, black, and male.³² In the view of many commentators, the application of a thin suspect description to justify a dragnet investigation of hundreds of young black men appeared to be racial profiling at its worst.³³ The Second Circuit, however, held that the law enforcement officers' investigation was consistent with the Equal Protection Clause and did not even warrant strict scrutiny.³⁴ As the court reasoned: "In acting on . . . a description that included race as one of several elements[, the] defendants did not engage in a suspect racial classification The description . . . was a legitimate classification within which potential suspects might be found."³⁵ In other instances as well, law enforcement officers have used descriptions of an individual suspect to justify investigating a large number of people.³⁶

In this type of case, even assuming that the officers were attempting to apprehend a particular perpetrator, their investigation could defensibly be viewed either as suspect description reliance or profiling. Their desire to apprehend a specific perpetrator might warrant the designation of suspect description reliance. On the other hand, the broad scope of the investigation might cause some to view it as racial profiling.

³¹ 221 F.3d 329 (2d Cir. 2000).

³² The law enforcement authorities received the description of the assailant from an elderly woman with whom he briefly struggled after breaking in to a private residence during the night. The woman could describe the intruder only as a young, black male. *Id.* at 334.

³³ One *New York Times* columnist, for example, proclaimed that people were being stopped for "breathing while black," a play on "driving while black," which refers to law enforcement officers' racial profiling of black motorists. Bob Herbert, *Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29.

³⁴ *Oneonta*, 221 F.3d at 337-39.

³⁵ *Id.* at 337-38. A fuller discussion of all aspects of the case can be found in R. Richard Banks, *The Story of Brown v. City of Oneonta: The Uncertain Meaning of Racial Discrimination under the Equal Protection Clause*, in CONSTITUTIONAL LAW STORIES 223 (Michael Dorf ed., 2004).

³⁶ See, e.g., Sam Walker, *In Michigan, A Community Clashes Over DNA Testing*, CHRISTIAN SCI. MONITOR, Jan. 26, 1995, at 1 (reporting outrage of local black leaders by the "random interrogation of black men" conducted in a rape investigation).

In the antiterrorism context, hundreds of known terrorists, predominantly Arab or Muslim men, are sought by law enforcement authorities.³⁷ Thousands of others are suspected of supporting or having information about terrorist activity.³⁸ Efforts to find these individuals that begin with a description may nonetheless appear to many to be racial profiling. The search for terrorists cannot be as temporally or geographically limited as suspect description reliance in ordinary law enforcement.³⁹ The terrorist threat is ongoing nationwide, and much of the intelligence information on which antiterrorism agents rely is likely not specific as to time or place.⁴⁰ The integration of terrorist databases maintained by various federal agencies will only exacerbate the extent to which investigations that begin with a suspect description may come to seem like racial profiling.⁴¹

Imagine a process in which airline security personnel subject those passengers who match some key aspects of a description of a known terrorist—for example, name and nationality—to additional questioning.⁴² This sort of investigation might well be viewed as racial

³⁷ See Philip Shenon & David Johnston, *Seeking Terrorist Plots, the F.B.I. Is Tracking Hundreds of Muslims*, N.Y. TIMES, Oct. 6, 2002, § 1, at 4.

³⁸ Lenny Savino, *Publicizing Terror Suspect List Troubles Civil Libertarians*, PITTSBURGH POST-GAZETTE, Apr. 13, 2002, at A7. According to the Justice Department, the terrorist watch list contains tens of thousands of names compiled by domestic and foreign intelligence-gathering agencies. The list will be used to screen visa applicants and aid Customs and Immigration officers. *Id.*

³⁹ See, e.g., CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003) (stating that in ordinary law enforcement, officers "may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization") [hereinafter U.S. DEP'T OF JUSTICE, GUIDANCE], at http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

⁴⁰ See *id.* ("Because terrorist organizations might aim to engage in unexpected acts of catastrophic violence in any available part of the country (indeed, in multiple places simultaneously, if possible), there can be no expectation that the information must be specific to a particular locale or even to a particular identified scheme.").

⁴¹ Attorney General John Ashcroft has directed the Justice Department to share the names of suspected terrorists by adding the names to the National Crime Information Center database. See Josh Meyer, *Sharing Ordered for Terror Suspects' List*, L.A. TIMES, Apr. 12, 2002, at A28; Savino, *supra* note 38; News Release, Dep't of Justice, New Terrorist Screening Center Established: Federal Government Consolidates Terrorist Screening into Single Comprehensive Anti-Terrorist Watchlist (Sept. 16, 2003), available at <http://www.fbi.gov/pressrel/pressrel03/tscpr091603.htm>; see also LAWYERS COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 24–26 (2003) (describing the airlines' use of a terrorist watch list), available at <http://www.humanrightsfirst.org/pubs/description/Assessing/AssessingtheNewNormal.pdf>.

⁴² Airlines do engage in profiling. It is not clear, however, whether it should be viewed as racial profiling. See Press Release, U.S. Dep't of Homeland Security, Fact Sheet CAPPS II at a Glance (Feb. 12, 2004), available at <http://www.dhs.gov/dhspublic/display?theme=43&content=3162&print=true>; Press Release, U.S. Dep't of Homeland Security, CAPPS II: Myths and Facts (Feb. 13, 2003), available at <http://www.dhs.gov/dhspublic/>

profiling.⁴³ It would likely result in the investigation of thousands of innocent Arabs and Muslims and could further the stigmatization of the entire group as potential terrorists. On the other hand, it might also be viewed simply as an effort to prevent any known terrorists from boarding an airplane within or to the United States.⁴⁴ As long as antiterrorism agents only question those who match some aspect of the description of a specific terrorist suspect, one might decline to view this investigation as racial profiling.

Suspect descriptions that are specific as to time and place may nonetheless be so vague that they encompass a large number of people. Consider, for example, an intelligence report that three Arab men will attempt to blow up the George Washington Bridge next week.⁴⁵ Such a limited description would subject to scrutiny nearly all men in the vicinity of the George Washington Bridge who appear to be Arab.

The permissibility of suspect description reliance might create disagreement about the characterization of other race-related decisions as well. For example, if law enforcement officers are seeking a specific assailant, they should be able to look where they are likely to find that person, even if that determination involves some consideration of race. If the suspect is deeply religious, antiterrorism agents might investigate mosques in a city where he or she has been known to reside. Similarly, the authorities might focus their investigation on a neighborhood with many immigrants from the suspect's home country. For some, the use of the suspect's religion alone to justify the investigation, say, of every mosque in a city would be racial profiling. For others, however, the fact that the authorities were legitimately seeking that specific individual would be sufficient to exempt the investigation from the racial profiling designation.

Consider as well the Justice Department's effort to interview thousands of men who entered the United States from certain coun-

display?theme=43&content=3163&print=true. Airlines use of a no fly list is close to what I have in mind here. The no fly list has generated substantial controversy. See Lisa Friedman, *No Fly List: Men with Common Name Being Searched at Airports Across U.S.*, L.A. DAILY NEWS, June 14, 2003; *FBI Documents Fail to Reveal How the "No Fly" List Makes Americans Safer: ACLU of Northern California's Analysis of FBI's FOIA Response* (Dec. 3, 2003), at <http://www.aclu.org/Files/OpenFile.cfm?id=14518>.

⁴³ See, e.g., Susan Sachs, *5 Passengers Say Airlines Discriminated by Looks*, N.Y. TIMES, June 5, 2002, at B4.

⁴⁴ No one with the name Osama bin Laden who holds a passport from Saudi Arabia, Afghanistan, or Pakistan, should be able to enter the United States without receiving substantial additional scrutiny. Nor should anyone with the same name as any other alleged terrorist be permitted to enter the United States without receiving additional scrutiny.

⁴⁵ See generally CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003) (giving examples of when additional race-based scrutiny may be warranted), available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm.

tries during a particular time period.⁴⁶ The program would constitute racial profiling if it were premised on the stereotype that Middle Eastern men are likely to be engaged in terrorist activity.⁴⁷ Indeed, the policy was condemned by many for stigmatizing an entire community as potential terrorists.⁴⁸ On the other hand, the interview program might not reflect racial profiling if it targeted those Middle Eastern men who might have had some personal contact with the individuals involved in the events of 9/11 or who might have had information useful in locating any of the specific individuals already identified as known or suspected terrorists.⁴⁹

B. Suspect Descriptions Derived from Profiles

Antiterrorism agents' use of tips provided by members of the public might also be viewed either as racial profiling *or* as a species of suspect description reliance. Consider this scenario: a private citizen reports a suspicious person in his neighborhood. The police question the only person in the vicinity who fits the description, a tall, black

⁴⁶ Interviewees were chosen based on the type of visa and passport held, as well as certain characteristics such as gender, age, and date of entry into the United States. See Naftali Bendavid, *Ashcroft: U.S. to Interview 3,000 More Arab Nationals*, CHI. TRIB., Mar. 21, 2002, at N13 (reporting that 3,000 more young Arab men, recently arrived from countries with an al Qaeda presence, would be interviewed, in addition to the 5,000 interviewed at the end of 2001).

⁴⁷ See Cuéllar, *supra* note 8, at 16 n.26; see also Bendavid, *supra* note 46 (quoting a spokesman for the Council on American-Islamic Relations who described the interviews as “an ineffective law-enforcement tool” that “perpetuates racial and religious profiling”); Robert Tanner, *Police Nationwide Divided Over Whether to Cooperate with Federal Interviews of Middle Eastern Men*, ASSOCIATED PRESS, Dec. 3, 2001 (reporting varied reactions from local law enforcement departments).

⁴⁸ See Bendavid, *supra* note 46 (reporting that critics had condemned the interview procedures as “demoniz[ing] young Arab men as potential terrorists”). Some local law enforcement agencies expressed reluctance to participate in the program. See Tanner, *supra* note 47.

⁴⁹ As one Justice Department official explained:

The names of approximately 5,000 individuals that were sent to the ATTFs [Anti-terrorism Task Forces] as part of this effort are those who we believe may have information that is helpful to the investigation or to disrupting ongoing terrorist activity. The names were compiled using common-sense criteria that take into account the manner, according to our intelligence sources, in which Al Qaeda traditionally has operated. Thus, for example, the list includes individuals who entered the United States with a passport from a foreign country in which Al Qaeda has operated or recruited; who entered the United States after January 1, 2000; and who are males between the ages of 18 and 33.

Viet D. Dinh, Foreword, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 403 (2002). As the Justice Department's February 2002 status report stated, “[the] rationale in selecting these characteristics was that their demographic similarity to the terrorists would make them more likely to reside in the same communities or be members of the same social groups and, therefore, more likely to be aware of suspicious activity.” U.S. GAO, HOMELAND SECURITY: JUSTICE DEPARTMENT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001, at 7 (Apr. 2003), available at <http://www.gao.gov/new.items/d03459.pdf>.

man, who, it turns out, was simply walking through the neighborhood.⁵⁰ Assuming that the neighbor who reported the black man as suspicious engaged in racial profiling,⁵¹ should the police officers' subsequent questioning of him be viewed as racial profiling? The police likely did not decide to question the man as a result of stereotypes they held about black men. Rather, they simply sought to question individuals who matched the description of the alleged wrongdoer.⁵² The officers might have investigated this suspicious person just as if a witness had relayed a description of a suspect in a robbery,⁵³ shooting,⁵⁴ homicide,⁵⁵ or transaction at an open-air drug market.⁵⁶ The officers treated the profile-induced judgment of the private citizen as a straightforward suspect description. Yet, on the other hand, they would not have investigated the man were it not for the reporting neighbor's racial stereotyping. A prohibition of racial profiling would not necessarily bar the police from acting on the basis of a suspect description that is itself the product of such profiling.⁵⁷

Similar scenarios frequently arise in the antiterrorism context.⁵⁸ Because members of the public remain so acutely afraid of potential

⁵⁰ For examples of this scenario, see *People v. Smith*, 566 N.E.2d 939 (Ill. App. Ct. 1991) (holding that officers' prolonged questioning of a black male, initially identified as a "suspicious person" by a member of the public, was not constitutionally unreasonable), and Debra Dickerson, *Racial Profiling: Are We All Really Equal in the Eyes of the Law?*, L.A. TIMES, July 16, 2000, at M1 (describing various instances of profiling). See also Susan Sachs, *Files Suggest Profiling of Latinos Led to Immigration Raids*, N.Y. TIMES, May 1, 2001, at B1 (reporting on INS raid prompted by anonymous tip and racial characteristics).

⁵¹ If the neighbor viewed the man as suspicious because of a stereotype of black men as criminals, then the neighbor engaged in racial profiling. On the other hand, the neighbor might have viewed the man as "out of place" based on the neighbor's personal knowledge that the residents of the neighborhood were all white, a judgment that would not reflect the same sort of racial stereotyping.

⁵² See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329, 337–38 (2d Cir. 2000) (describing this as an ordinary and legitimate law enforcement practice).

⁵³ See, e.g., *Franklin v. State*, 750 So. 2d 63, 64 (Fla. Dist. Ct. App. 1999).

⁵⁴ See, e.g., *Commonwealth v. Mercado*, 663 N.E.2d 243, 244 (Mass. 1996).

⁵⁵ See, e.g., *In re A.P.*, 617 A.2d 764, 768–69 (Pa. Super. Ct. 1992).

⁵⁶ See, e.g., *Brown v. State*, 592 So.2d 1237, 1237–38 (Fla. Dist. Ct. App. 1992); *People v. Rivera*, 650 N.E.2d 1084, 1086 (Ill. App. Ct. 1995); *Burkett v. State*, 736 N.E.2d 304, 305 (Ind. Ct. App. 2000).

⁵⁷ The point here is not to answer this question, but simply to highlight its difficulty. To try to extend the profiling prohibition to those citizens who report "suspicious," "threatening," or "violent" people would leave the police in an untenable position. They could neither discount nor ignore the concern of an emergency caller, nor could they easily differentiate between reports based on suspect descriptions and those that rely on racial profiles.

⁵⁸ Both state and federal law enforcement agencies have solicited citizen involvement in fighting the war against terrorism. For example, Attorney General John Ashcroft proposed Operation TIPS (Terrorist Information and Prevention System), establishing a formal procedure through which citizens could report suspicious activities they encountered in their daily lives—but it was subsequently abandoned due to opposition from several groups. See Press Release, Department of Justice, Statement of Barbara Comstock, Director of Public Affairs, Regarding the TIPS Program (July 16, 2002), available at <http://www>.

terrorist acts,⁵⁹ they will be especially likely to draw stereotyped inferences about others' behavior and intentions and report their suspicions to law enforcement authorities.⁶⁰ Profiles will be transformed into suspect descriptions as a fearful public reads ominous meanings into innocent behavior by those who are stereotyped as terrorists.⁶¹ Consider the widely reported controversy initiated by Eunice Stone.⁶² One morning in September 2002 (approximately one year after 9/11) she reported to law enforcement officers that she had overheard three Middle Eastern men seated next to her in a restaurant in Georgia laughing about 9/11 and implying that future terrorist attacks were underway.⁶³ According to one news report, Ms. Stone said:

At first, you know, I just went ahead with my breakfast. . . . But they were laughing. And I have very good hearing . . . [I] heard one of the men say, "If they mourn Sept. 11, what will they think about Sept. 13?" A moment later . . . one of the men asked, "Do you think that will bring it down?" "Well, if that doesn't bring it down, I have contacts to bring it down," . . . another man replied.⁶⁴

When the men left the restaurant, Ms. Stone grabbed a crayon, wrote down their license plate number and the type of car they were driving, and called the law enforcement authorities to report what she had heard.⁶⁵ A nationwide alert was issued.⁶⁶ More than one hundred law enforcement officers converged on the men early the following morning in Florida. They were detained for more than seventeen hours before law enforcement authorities determined that the men were not

usdoj.gov/opa/pr/2002/July/02_ag_405.htm; Michael Precker, *On the Lookout: We're All Advised to Be Aware of Suspicious Activity Around Us, But When Do We Cross the Line?*, DALLAS MORNING NEWS, Mar. 15, 2003, at 1C. Nonetheless, some state and local jurisdictions may still encourage citizens to report suspicious activities in a manner similar to the abandoned federal program. See, e.g., Nathan Edelson, *Big Brother of the Beltway*, WASH. POST, Apr. 13, 2003, at B8 (describing TIPS messages on the Maryland highway). The superintendent of the New York State Police, for example, has said that people "should err on the side of passing along information, even if it is based only on 'instincts and intuition.'" Adam Liptak, *A Nation of Informers—or Alert Citizens*, N.Y. TIMES, Sept. 22, 2002, § 4, at 1.

⁵⁹ See, e.g., Lori Hope, *Did I Save Lives or Engage in Profiling?*, NEWSWEEK, Apr. 1, 2002, at 12 (discussing the author's own reporting of a fellow airline passenger to flight staff).

⁶⁰ Although civil libertarian groups such as the ACLU have opposed efforts to encourage citizens to inform on others, many commentators have encouraged citizens to pass along to law enforcement agents information about suspicious activities or people. See Liptak, *supra* note 58.

⁶¹ See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576–86 (2002).

⁶² See David M. Halbfinger, *Terror Scare in Florida: False Alarm, But Televised*, N.Y. TIMES, Sept. 14, 2002, at A10; Liptak, *supra* note 58; *Muslim Medical Students Deny Threat*, WASH. POST, Sept. 16, 2002, at A7.

⁶³ Halbfinger, *supra* note 62.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

terrorists and had no explosives in their car.⁶⁷ Instead, they were medical students on their way to Florida to continue their training.⁶⁸

This case dramatizes both the far-reaching effects of stereotypes and the difficulty of categorizing law enforcement investigation in which stereotyping by a private individual is a but-for cause. Ms. Stone may have believed that the men were planning to blow something up. She may have thought that she heard statements that unambiguously expressed such an intent.⁶⁹ In fact, her stereotypes of the men, whom she perceived as Muslim and Middle Eastern, may have influenced not only her interpretation of what they said, but, more fundamentally, her memory of their actual words.⁷⁰

In contrast to the suspicious-man-in-the-neighborhood scenario, law enforcement authorities could not have averted a misguided investigation by asking Ms. Stone a few more questions or obtaining additional details.⁷¹ Eunice Stone claimed that she heard the men joking about 9/11 and making plans to blow something up. Notwithstanding the improbability that terrorists would discuss their plot openly in a roadside diner, government authorities had no choice but to take her information seriously.

Citizen tips may account for a substantial amount of investigative activity in antiterrorism efforts.⁷² Tips were especially plentiful immediately following 9/11;⁷³ the consequences of that dragnet for Arabs and Muslims have been well documented.⁷⁴ The reports of citizen

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Some of the news coverage suggested that the men had played a practical joke and some law enforcement officials suggested that the men be prosecuted for perpetrating a hoax. *See id.* However, it is not that clear that they did, in fact, joke about 9/11. They explained that they may have said something about "bringing it down," as Ms. Stone reported, but that was a reference to potentially bringing a car from Chicago (where they had lived) down to Florida. *See* Christine Chinlund, *Getting the Rest of the Story*, BOSTON GLOBE, Sept. 23, 2002, at A15.

⁷⁰ Stereotypes may influence interpretational memory of information. *See* Jerome S. Bruner & Leo Postman, *An Approach to Social Perception*, in CURRENT TRENDS IN SOCIAL PSYCHOLOGY 71, 88–89 (Wayne Dennis et al. eds., 1948). Postman and his colleague Gordon Allport conducted the classic study in which subjects were shown pictures of a black man and a white man riding a subway. Although the white man was clearly visible in the picture holding a knife blade, the study's subjects incorrectly recalled that the black man was holding the weapon, an error consistent with prevailing racial stereotypes. *See* GORDON W. ALLPORT & LEO POSTMAN, THE PSYCHOLOGY OF RUMOR 111 (1997).

⁷¹ In the suspicious-man-in-the-neighborhood scenario, for example, the officers might have asked the caller precisely what made the man seem suspicious and whether he had engaged in any particular behavior that should arouse suspicion.

⁷² *See* Michael Moss, *False Terrorism Tips to F.B.I. Uproot the Lives of Suspects*, N.Y. TIMES, June 19, 2003, at A1.

⁷³ *See id.*; Volpp, *supra* note 61, at 1577–78.

⁷⁴ *See, e.g.*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS RESEARCH CENTER, *supra* note 29, at 5 (reporting that between 1,200 and 1,700 people were taken into custody in the initial months after the attacks); Mohamed Nimer, *Muslims in America After 9-11*, 7 J. ISLAMIC L. &

informants will often entail racial profiling and will often implicate innocent people.⁷⁵ The difficulty with describing the law enforcement authorities' decision to investigate as racial profiling is that the stereotype prompting the citizen's tip might not become apparent until *after* the authorities investigate. So dire could be the consequences of ignoring a tip, antiterrorism agents have no choice but to investigate seriously all tips.⁷⁶ On the other hand, one might argue that to the extent that antiterrorism agents know that many tips reflect racial profiling, their willingness to uncritically accept and investigate them should count as an illegitimate extension of that racial profiling.

C. Investigating a Criminal Enterprise

The suspect description/profile determination is further complicated by the fact that the terrorist threat is posed by the criminal enterprise known as al Qaeda. When law enforcement officers investigate only individuals of a particular race in an effort to thwart a criminal enterprise organized along racial lines, the suspect description/profile distinction very nearly collapses.⁷⁷ The use of race to apprehend members of a racially defined gang embodies aspects of both suspect description reliance and profiling.⁷⁸ If law enforcement officers know that a particular gang has committed certain crimes and plans to commit additional crimes, then they have a suspect description. But the description is of a criminal organization rather than an individual. Suppose that the authorities know that the criteria for gang membership include race. Only African Americans are members of this gang. Given these facts, have law enforcement officers engaged in racial profiling if they investigate only African Americans? Should that sort of race-based investigation count as suspect description reliance so long as the officers are genuinely attempting to thwart that particular gang? Or, should it count as racial profiling if it promotes a stigmatizing stereotype that casts a blanket of suspicion over a racial group?⁷⁹

CULTURE 1, 25 (2002) (claiming that "a significant number" of Arabs and Muslims remained in detention one year after the 9/11 attacks); Fainaru, *supra* note 29.

⁷⁵ See Moss, *supra* note 72, at A1.

⁷⁶ *Id.*

⁷⁷ See Banks, *Race-Based Suspect Selection*, *supra* note 1, at 1105–06; Gross & Livingston, *supra* note 12, at 1433–34; Thompson, *supra* note 22, at 1005–07.

⁷⁸ See Rosenthal, *supra* note 24, at 98; Thompson, *supra* note 22, at 1005–06. Many commentators are hesitant to assert that the use of race in such circumstances should be viewed as racial profiling. See, e.g., VERNIERO & ZOUBEK, *supra* note 23, at 75–80.

⁷⁹ See, e.g., Dorothy E. Roberts, *Supreme Court Review: Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 786–87 (1999) (reporting that in Denver and Los Angeles nearly half of the young black male population is on a list as suspected gang members).

The terrorism context presents precisely this circumstance. The terrorist threat is posed by a criminal enterprise known as al Qaeda,⁸⁰ whose members, as with most gangs, are bound together by a shared social identity. Al Qaeda is a formally Muslim organization that defines its goals, at least in part, as the defense of Islam. While, of course, most Muslims are not members of al Qaeda, all al Qaeda members are probably Muslim. Moreover, al Qaeda members hail predominantly from certain countries⁸¹ and are more likely to speak some languages than others.⁸²

Because the use of race to thwart a racially identified gang straddles the conceptual boundary of racial profiling, a wide array of antiterrorism measures will straddle that boundary as well. Is it racial profiling to focus particular attention on fundamentalist Muslim groups?⁸³ What if antiterrorism agents scrutinize charitable organizations that send money to Muslim religious groups in countries with an active al Qaeda presence?⁸⁴ Or, what if agents subject electronic or internet communications written in languages used by al Qaeda operatives to especially close scrutiny?⁸⁵ Is the selective deportation of immigrants from certain countries a case of racial profiling or simply a means of thwarting a specific criminal enterprise known to be especially active in those countries?⁸⁶ To some, such practices will seem to be obvious instances of racial profiling. To others, however, they may seem more akin to suspect description reliance.

As should be clear by now, my goal in this Essay has not been to argue that certain practices should or should not count as racial profiling. Rather, I have emphasized the extent to which such an ostensibly descriptive inquiry inevitably turns upon the same normative

⁸⁰ See Eric Pianin & Bradley Graham, *President Issues Ultimatum to Terrorists and Supporters*, WASH. POST, Sept. 21, 2001, at A1 (describing al Qaeda, a collection of loosely affiliated terrorist organizations that spans more than sixty countries and involves thousands of terrorists).

⁸¹ See Cam Simpson et al., *Immigration Crackdown Shatters Muslims' Lives*, CHI. TRIB., Nov. 16, 2003, at C1 (reporting that the Bush Administration claimed to be deporting "people from nations where terrorists operate" and not Muslims specifically); see also U.S. Dep't of State, *Countries Where al Qaeda Has Operated*, at <http://usinfo.state.gov/products/pubs/terrornet/print/sbcountry.htm> (last visited May 24, 2004).

⁸² See Ellmann, *supra* note 5, at 308 n.16.

⁸³ See, e.g., Susan Sachs, *A Muslim Missionary Group Draws New Scrutiny in U.S.*, N.Y. TIMES, July 14, 2003, at A1.

⁸⁴ See, e.g., Douglas Frantz, *U.S.-Based Charity is Under Scrutiny*, N.Y. TIMES, June 14, 2002, at A1; Neil A. Lewis, *After Sept. 11, a Little-Known Court Has A Greater Role*, N.Y. TIMES, May 3, 2002, at A20; Timothy L. O'Brien, *Pakistani Charity is Called Terror Front by U.S. Treasury*, N.Y. TIMES, Oct. 15, 2003, at A10.

⁸⁵ See Ellmann, *supra* note 5, at 308 n.16.

⁸⁶ See, e.g., Absconder Guidance, *supra* note 29. Guidance to law enforcement officials from the deputy attorney general states that the initiative will involve the deportation of several thousand individuals who "come from countries in which there has been [a] Qaeda terrorist presence or activity." *Id.* at 1.

judgment that shapes debate about the permissibility of racial profiling.

CONCLUSION

The fight against terrorism raises immensely important questions not only about the balance between liberty and security, but also about the fairness of antiterrorism efforts that burden innocent Arabs and Muslims to a much greater extent than other innocent people. My primary goal in this Essay has been to suggest that even a consensus that racial profiling should be prohibited in antiterrorism efforts would not decide the permissibility of many of the practices that result in the widespread investigation of innocent Arabs and Muslims. Many of the practices that are central to the antiterrorism effort might be viewed as racial profiling by some people, but not by others. The determination whether particular antiterrorism practices constitute racial profiling would often reflect the same divergent normative judgments that shape debate about the permissibility of racial profiling. Even more broadly, one might consider racial profiling in antiterrorism efforts as one example of the indeterminacy of the notion of racial discrimination.