

**USING RACE OR ETHNICITY AS A
FACTOR IN ASSESSING THE
REASONABLENESS OF FOURTH
AMENDMENT ACTIVITY: DESCRIPTION,
YES; PREDICTION, NO**

*David A. Harris**

I. INTRODUCTION

Of all of the modern United States Supreme Court opinions in constitutional criminal procedure, it is surely fair to say that few have proven to be as important as *Katz v. United States*.¹ Although the majority opinion in *Katz* was written by Justice Stewart, it is Justice John Marshall Harlan's concurring opinion that has become the rule governing the Fourth Amendment status of police actions—so much so that when we think of *Katz* it is first, and perhaps only, the Harlan concurrence, not the majority opinion, that we have in mind. In that famous concurrence, Justice Harlan supplied the formulation for how courts should judge whether a police action constitutes a search or seizure.² First, ask whether the defendant had “exhibited an actual (subjective) expectation of privacy.”³ If so, Justice Harlan said, ask whether that expect-

* E.N. Balk Professor of Law and Values, University of Toledo College of Law and Soros Senior Justice Fellow, Open Society Institute in New York. Author of *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002).

¹ 389 U.S. 347 (1967).

² *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

³ *Id.*

tation is "one that society is prepared to recognize as `reasonable.'"⁴ The Harlan test spawned a host of decisions by the Court aimed at deciding whether particular police practices invaded reasonable expectations of privacy, including everything from airplane flyovers⁵ to compulsory drug testing⁶ to searches using the newest technologies.⁷

Nevertheless, there were signs toward the end of his career that Justice Harlan had had second thoughts about his *Katz* concurrence. These misgivings surfaced in Justice Harlan's dissenting opinion in *United States v. White*.⁸ In *White*, an informant wearing a transmitting device had several conversations with the defendant that were broadcast to government agents.⁹ At trial, the government sought to use the conversations against the defendant; since the informant had disappeared, the government introduced the conversations into evidence through the testimony of the agents who heard it over the transmitter.¹⁰ Based on Justice Harlan's *Katz* test and on other cases that discussed the risk of the betrayal of the privacy of conversations by government informants as a risk that all citizens assume, a plurality ruled that the defendant had assumed the risk that the person he was talking to would betray him.¹¹ In addition, the Court said, the defendant had no reasonable expectation of privacy as to his private conversation with the informant.¹² Justice Harlan found this unsatisfactory.¹³ The most interesting part of his dissent comes near its end. He was not entirely satisfied that the Court should simply compare what police did to

⁴ *Id.*

⁵ *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

⁶ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-18 (1989).

⁷ *Kyllo v. United States*, 533 U.S. 27, 27-28 (2001).

⁸ 401 U.S. 745, 768-95 (1971) (Harlan, J., dissenting).

⁹ *White*, 401 U.S. at 746-47 (plurality opinion).

¹⁰ *Id.* (plurality opinion).

¹¹ *Id.* at 752 (plurality opinion).

¹² *Id.* at 751-52 (plurality opinion).

¹³ *Id.* at 768-95 (Harlan, J., dissenting).

2003]

DESCRIPTION, YES; PREDICTION, NO

425

existing expectations of privacy in society.¹⁴ Justice Harlan thought they should do more.

The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.¹⁵

Generalizing beyond the specifics of *White*, Justice Harlan seemed to want us to understand that, in the context of making decisions under the Fourth Amendment, it is not enough to simply ask what society expects *now*, or what the law is *at this moment*. The answers to such questions may be no more than interfacing reflections of the same thing and, perhaps more importantly, they tell us little about the desirability of new types of police conduct that we face now, and that we will face in the future. In other words, at least as important as asking what the law and society's expectations of privacy *are* is asking what they *ought to be*. When we assess a new variety of potentially intrusive police conduct, we should ask not just whether the current law and our current expectations permit it, but whether they *should* permit it. We should, Justice Harlan implies, be asking the larger question: just what kind of society do we want to have?

As we ponder the role that race and ethnicity play in

¹⁴ *Id.* at 786 (Harlan, J., dissenting).

¹⁵ *Id.* (Harlan, J., dissenting).

assessing the reasonableness of searches and seizures, Justice Harlan's words in *White* seem almost eerily prophetic. It is a relatively simple matter to assess whether the law, as it stands, allows law enforcement to use race or ethnicity as indicators of suspicious Fourth Amendment activity. The Court set down its rule on this question almost thirty years ago: yes, ethnic or racial characteristics can serve as legitimate causes for suspicion in at least some limited category of situations.¹⁶ The Court has never changed this rule, and in fact has shown that it sees no reason to do this. But Justice Harlan's words obligate us to look further, to ask what the law on this important question should be.

It is an understatement to call this question delicate, important and visible to the larger public. In the late 1990s and all the way into 2001, the issue of racial profiling—the use of race by police as one factor among others in deciding whom to stop, question and search—became a matter of widespread public concern. Polling data showed that almost sixty percent of the American public—not just African Americans and Latinos, who had most frequently found themselves the victims of racial profiling, but Americans of all races and ethnicities—knew what racial profiling was and considered it to be widespread.¹⁷ Additionally, eighty-one percent of those polled disapproved of the practice.¹⁸ Agreement of over eighty percent on *anything* in the United States today represents a strong consensus; on an issue involving race, it is almost unheard of. But after the terrible terrorist attacks of September 11, 2001, this consensus shifted dramatically. In the post September 11 environment, polling data again pointed to sixty percent of Americans. But this time, the message was different. Almost sixty percent of Americans—including African Americans and Latinos—now thought racial profiling was acceptable and even necessary as

¹⁶ See *infra* notes 23-36 and accompanying text.

¹⁷ GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1999*, at 238 (2000).

¹⁸ *Id.*

long as those under observation were Arabs and Muslims at airports.¹⁹ This thought, that profiling of Arabs and Muslims was both necessary and made obvious common sense, was heard not only around office water coolers and at kitchen tables, but in writings in the most influential publications in the nation.²⁰ And it is not hard to understand why. All nineteen of the suicide hijackers of September 11 were from one narrow demographic group: they were young Muslim men from the Arab world. How could it *not* make sense to target our enforcement efforts at these same people? Thus, the question we address at this symposium has a remarkable currency, and a strong salience to people far beyond the walls of academia. *It matters*, in a profound sense; whether or not we take race or ethnic appearance into account in assessing the reasonableness of Fourth Amendment activity will affect our safety and our society quite directly. And that, of course, makes Justice Harlan's message to us all the more important, maybe more important than it has ever been. All of us—not only judges, but scholars, policy makers and citizens—must ask not only what society expects and the law permits, but what we *should* expect and permit. In short, we cannot be satisfied with asking whether the law would allow us to use race or ethnicity to assess suspicion; we must ask whether this is desirable. And of course, in so doing, we ask the larger questions. At a time when we face perhaps the most profound threat to our safety imaginable—the undeterrable killer bent on mass murder—we must ask what kind of law enforcement

¹⁹ Jeffrey M. Jones, *Americans Felt Uneasy Toward Arabs Even Before September 11*, THE GALLUP POLL MONTHLY, Sept. 2001, at 52-53; Jason L. Riley, *Racial Profiling and Terrorism*, WALL ST. J., Oct. 24, 2001, at A22.

²⁰ Stanley Crouch, *U.S. Must Stay Tough About Sealing Borders*, N.Y. DAILY NEWS, Mar. 16, 2001, at 41; Jonah Goldberg, *Profiles in Profiling*, NAT'L REV., Nov. 14, 2001, available at <http://www.nationalreview.com/goldberg/goldberg111401.shtml>; Charles Krauthammer, *The Case for Profiling*, TIME, Mar. 18, 2002, at 104; Kathleen Parker, *All is Fair in This War Except for Insensitivity*, CHI. TRIB., Sept. 26, 2001, at 19.

our society should have. These are not easy times, and this is not an easy question. But there is no escaping our duty to ask.

Giving these questions careful thought is not easy in a time of great (and justified) fear, especially when the highest officials in our government discourage any dissension from their actions by declaring that opinions and assertions that do not support their law enforcement tactics “only aid terrorists.”²¹ Nevertheless, these issues must be confronted if we are to do our best to be safe from the terrorists, and to retain what is best for our society and most important to our constitutional values. Clear thinking on the use of race and ethnicity produces answers that run counter to the conventional wisdom. Race or ethnic appearance should be used as criteria for assessing the reasonableness of Fourth Amendment activity in only a limited way. Race or ethnic appearance can and should be used to describe a known suspect or suspects—that is, to tell law enforcement officers and the public what particular suspects look like. But race or ethnic appearance should *not* be used in efforts to predict who might be involved in unknown criminal behavior. Race as a description helps to ensure public safety by focusing law enforcement officers on real targets and giving them a way to eliminate most other people as suspects. Race used as a predictor hinders law enforcement, blunting its effectiveness in real and measurable ways, even as it offends important constitutional principles and creates the most difficult moral problems. In short, using race as a predictor is not a good tool for police. It is a legal, moral and practical dead end.

Section II begins with a brief discussion of what the law is on the use of race in the Fourth Amendment context. Section III then moves us into the center of the matter: what should the law be on this important question? It begins with a discussion of the legal and historical underpinnings of the Fourth Amendment, moves to a discussion of the moral

²¹ *Excerpts From Attorney General's Testimony Before Senate Judiciary Committee*, N.Y. TIMES, Dec. 7, 2001, at B6.

2003]

DESCRIPTION, YES; PREDICTION, NO

429

difficulties of using race as a predictor of criminal behavior and then illuminates the practical dimensions of the problem, arguing that using race or ethnicity to assess the reasonableness of Fourth Amendment activity will make it more difficult for law enforcement agencies to make us safe and to secure our freedoms as Americans. Section IV will attempt to apply the description/prediction dichotomy to a difficult example: the facts of the troubling case of *Brown v. City of Oneonta*.²²

II. WHAT THE LAW IS: *BRIGNONI-PONCE*, *MARTINEZ-FUERTE*, AND *WHREN*

The first question is whether the law, as it stands, allows the use of race or ethnicity in assessing the reasonableness of Fourth Amendment activity. The answer is yes. The Supreme Court's Fourth Amendment decisions do indeed allow law enforcement to use race or ethnicity to decide whether an individual is suspicious enough to justify a search or seizure. In fact, the Court has actually taken the Fourth Amendment out of the equation by allowing police practices that almost certainly involve racial bias in law enforcement without any Fourth Amendment challenge. The Supreme Court has, at best, marginalized concerns about race-based enforcement; at worst, it might be said to have encouraged it.

A. *Brignoni-Ponce and Martinez-Fuerte*

The Court's clearest statement on the use of race or ethnic appearance came more than twenty-five years ago, in a pair of cases involving stops of illegal immigrants near the U.S.-Mexican border in Southern California. In the first of these cases, *United States v. Brignoni-Ponce*,²³ the government charged the defendant with knowingly transporting illegal

²² 221 F.3d 329 (2d Cir. 2000).

²³ 422 U.S. 873 (1975).

immigrants.²⁴ Border patrol agents on “roving patrol,” looking for suspected illegal immigrants from a patrol car, not a fixed checkpoint, arrested the defendant after they stopped him and discovered that both of his passengers had entered the country illegally.²⁵ The border patrol agents candidly admitted that they stopped the car for one reason only: the occupants “appear[ed] to be of Mexican ancestry.”²⁶ Though the stop was brief, the Justices still characterized it as a seizure for Fourth Amendment purposes.²⁷ The Court found the justification for the stop of the defendant—that the occupants of the car looked Mexican—to be far too thin to accept.²⁸ Given the government’s important interest in policing the border against illegal immigration, the minimal intrusion imposed by a brief stop, and the lack of any practical alternative, the Court said that an officer conducting a roving patrol may briefly stop and question the driver and passengers of a vehicle, as long as the officer’s observations lead him reasonably to suspect that the vehicle contains illegal aliens.²⁹ The Court said that the questioning can include immigration status and suspicious circumstances observed by the officer.³⁰ These stops cannot, however, occur without any evidence raising suspicion; the officer must have at least some fact-based reason to consider the vehicle and its occupants suspicious.³¹ Most importantly for purposes of this discussion, the Court took care to say that reasonable suspicion could not rest entirely on the Mexican appearance

²⁴ *Brignoni-Ponce*, 422 U.S. at 875.

²⁵ *Id.* at 874-75.

²⁶ *Id.* at 876. The Court noted that the Government attempted to argue that there were other factors that supported the stop, including the location of the encounter near the Mexican border. *Id.* at 886 n.11. But the Court would have none of it, describing this as an “after-the-fact justification” unsupported by any evidence or even a bare assertion in the trial court. *Id.*

²⁷ *Id.* at 880-83.

²⁸ *Id.* at 885-86.

²⁹ *Id.* at 881-82, 884.

³⁰ *Id.* at 881-82.

³¹ *Id.* at 884.

2003]

DESCRIPTION, YES; PREDICTION, NO

431

of the suspects.³² That one factor alone could not serve as sufficient legal justification for a brief detention: “standing alone [Mexican appearance] does not justify stopping all Mexican-Americans to ask if they are aliens.”³³

But even as it declared ethnic appearance off limits as the basis for reasonable suspicion, the Court carefully noted in *Brignoni-Ponce* that, when combined with other factors, racial or ethnic features might be an acceptable way to judge the reasonableness of a search or seizure.³⁴ The Court said that, even though “[l]arge numbers of native-born and naturalized [American] citizens have the physical characteristics identified with Mexican ancestry” and even though relatively few of them are aliens, a court might legitimately take ethnic appearance into consideration as one factor among others in deciding whether police had reasonable suspicion sufficient to make a stop.³⁵ After all, the Court stated, “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.”³⁶ Thus, while *Brignoni-Ponce* appears to restrict the use of ethnic appearance as a factor in deciding whether reasonable suspicion exists, it actually does so only in the most narrow sense: in situations where ethnic appearance is the only factor involved. And it leaves the door open to using ethnic appearance when it is among several factors.

Just one term later, the Court found itself presented with the very question it left open in *Brignoni-Ponce*: could ethnic appearance form the basis of reasonable suspicion when it was not the only factor, but one of several factors? *United States v. Martinez-Fuerte*³⁷ presented the Court with facts just

³² *Id.* at 887.

³³ *Id.*

³⁴ *Id.* at 886-87.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 428 U.S. 543 (1976).

marginally different than those in *Brignoni-Ponce*. Again, the setting was Southern California and again, the issue concerned policing the U.S. border against illegal immigration from Mexico.³⁸ However, there was one important difference: the defendants were stopped and apprehended not by a roving patrol, but at a fixed checkpoint—a well-designated place on the road at which vehicles must slow down and stop for brief observation by law enforcement personnel.³⁹ This observation, or “screening,” was done in the open, with officers and their equipment visible and signs posted.⁴⁰ The screener could then choose to send the vehicle and its occupants to an area for a secondary screening, which included a brief detention and questioning.⁴¹

The Court considered the difference between the roving patrol in *Brignoni-Ponce* and the fixed checkpoint in *Martinez-Fuerte* to be a critical factor in its decision on an important issue: unlike roving patrols which required some modicum of fact-based suspicion to allow a stop, fixed checkpoints did not require any individual suspicion.⁴² Police officers need not have any reason to suspect any particular vehicle or its occupants of involvement in wrongdoing in order to make a brief stop at a fixed checkpoint.⁴³ More important for this discussion, however, is that the Court made clear that the Mexican appearance of the vehicle's occupants could play a role in sustaining a claim that law enforcement officers had had reasonable suspicion to make a stop; it was permissible for race to be one of several factors.⁴⁴ “[I]t is constitutional,” the Court said, “to refer motorists selectively to the secondary inspection area . . . on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of

³⁸ *Martinez-Fuerte*, 428 U.S. at 545.

³⁹ *Id.* at 545-46.

⁴⁰ *Id.*

⁴¹ *Id.* at 546.

⁴² *Id.* at 560-62.

⁴³ *Id.* at 562.

⁴⁴ *Id.* at 563.

apparent Mexican ancestry, we perceive no constitutional violation.⁴⁵ The Court erased any lingering doubt on the issue by citing directly to *Brignoni-Ponce*'s tentative and hypothetical answer to the question.⁴⁶ Thus, after *Martinez-Fuerte* the law was clear. A person's ancestry, as manifested in his appearance, could indeed form at least part of the basis for a decision about whom to stop, question and search. In fact, suspicion might be based "largely" on ethnic appearance.⁴⁷ The Constitution did not prohibit this.

B. United States v. Whren

If *Brignoni-Ponce* and *Martinez-Fuerte* tell us a lot about whether the law allows the use of race or ethnic appearance to assess suspicion, the case of *United States v. Whren*⁴⁸ helps complete the picture. What *Whren* tells us about the use of race to show reasonable suspicion is perhaps more oblique than what we learned from *Brignoni-Ponce* and *Martinez-Fuerte*, but it is no less important.

Whren involved a scenario familiar to both scholars of criminal law and to police officers: a drug bust based on a traffic stop. In *Whren*, police officers observed two young black men⁴⁹ in a Nissan Pathfinder sport utility vehicle with temporary license tags.⁵⁰ The officers saw no evidence of criminal activity, but they were suspicious enough to use a traffic offense they saw the driver commit as a reason to pull the car over.⁵¹ The officers admitted that they had no interest in traffic enforcement.⁵² Moreover, the regulations of their

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 517 U.S. 806 (1996).

⁴⁹ *Whren*, 517 U.S. at 810.

⁵⁰ *Id.* at 808.

⁵¹ *Id.*

⁵² *Id.* at 809.

department prohibited plain clothes vice officers like themselves, and any officers driving unmarked vehicles, from doing traffic enforcement except in the most extreme circumstances.⁵³ Their purpose was to investigate the possibility that the two occupants of the vehicle were involved in crime, and they used traffic enforcement as a pretext to detain them.⁵⁴ The Supreme Court held that this use of a pretext to “fish” for evidence did not violate the Fourth Amendment.⁵⁵ As long as the officers had, in fact, observed a traffic violation, they had full, adequate and complete probable cause to stop the vehicle.⁵⁶ The fact that the traffic violation may have been nothing more than an excuse for the stop, that the officers may have been manifestly uninterested in traffic enforcement, or even that no reasonable officer would have made such a traffic stop, made no difference.⁵⁷ As long as the officers could have stopped the defendant for a traffic violation, the actual reason for the stop remained immaterial.⁵⁸ The Fourth Amendment, the Court held, did not preclude the use of such a pretext.⁵⁹

Just as important as allowing “fishing,” the Court was confronted with two critical arguments from the defendants. First, the defendants said that state traffic codes were so detailed and that the codes regulated driving and vehicles to such a degree that no driver could avoid committing some offense.⁶⁰ This would mean that if any traffic offense could be used as a pretext, officers would effectively have nearly unlimited discretion to stop any vehicle, any time they chose.⁶¹ The Justices were not persuaded by this argument;

⁵³ *Id.* at 815 (citing Washington, D.C., Metropolitan Police Department regulations to this effect).

⁵⁴ *Id.* at 809.

⁵⁵ *Id.* at 812-13.

⁵⁶ *Id.* at 809.

⁵⁷ *Id.* at 817-18.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 810.

⁶¹ *Id.*

2003]

DESCRIPTION, YES; PREDICTION, NO

435

they were simply unwilling, they said, to draw lines indicating which kinds of offenses could warrant a stop.⁶² Second, and more importantly, the defendants argued that there was every reason to expect that traffic enforcement imbued with such an immense amount of discretion would inevitably result in racially-biased law enforcement.⁶³ They presented the Justices with statistical evidence that this had indeed been occurring in at least one other jurisdiction in similar situations.⁶⁴ The Court dismissed this contention with a bland wave of its judicial hand. If the defendants could indeed show that police used racially-biased law enforcement tactics, the officers' actions would violate the Constitution.⁶⁵ But the proper avenue of redress for such conduct was not the Fourth Amendment and its exclusionary rule.⁶⁶ Rather, defendants should bring a civil lawsuit alleging a violation of the Equal Protection Clause.⁶⁷ In other words, while using racially-biased law enforcement tactics was not permitted under the Constitution, a motion to suppress under the Fourth Amendment was not the way to address the violation.⁶⁸ As a result, courts hearing criminal cases would no longer play any role in scrutinizing the alleged use of stops and searches in a racially discriminatory fashion. That would be left to courts hearing civil complaints. And given the difficulty of filing—and winning—such cases, there would likely be very few of them.

Thus, as we ask what the law is regarding whether police can use race or ethnic appearance to assess the reasonableness of Fourth Amendment intrusions, the answer

⁶² *Id.* at 818-19.

⁶³ *Id.* at 810.

⁶⁴ *Id.* at 812.

⁶⁵ *Id.* at 813.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

is not all that difficult to figure out. Yes, race or ethnic appearance can indeed play a role in at least certain situations to assess possible suspects, as long as it is not the only factor in doing so. And the courts cannot do anything in a criminal action to address the use of race or ethnic appearance, at least as far as suppressing evidence under the Fourth Amendment. Given how difficult it will be for plaintiffs to obtain redress in a civil action, the Court has sent police departments a message: no, it is not legal to use race or ethnic appearance by itself to assess whether or not someone is suspicious, but you can do it if you consider any other factors along with it. And if you do use race or ethnic appearance alone, don't worry too much. There is a risk of a lawsuit, but it is vanishingly small.

III. WHAT THE LAW OUGHT TO BE: WHEN SHOULD WE
CONSIDER RACE AN ACCEPTABLE FACTOR IN JUDGING
REASONABLE SUSPICION?

If it is relatively easy to understand what the law is on the use of race to assess suspicion, what the law ought to be is both considerably more complex and of far greater importance. Law enforcement may properly use race in deciding whether or not reasonable suspicion exists when race comes from a description of a known suspect. In such a situation, race becomes part—a vital part—of a particularized reason for individual suspicion. This is not only good police work; it is good for society in general. By way of contrast, race should not be used as an indicator of suspicion when it is used as a predictor—that is, a factor in deciding which person in a group of strangers is more likely than others to be involved in some as-yet-unknown crime. In the latter situation, race is used as a proxy to indicate a greater propensity to be involved in crime, based on statistical prediction. This use of race represents a profound mistake—in the sense of both police work and policy. In the following sections of this paper, I will attempt to justify this “description versus prediction” rule on three bases. First, law and history demonstrate that the

2003]

DESCRIPTION, YES; PREDICTION, NO

437

Constitution permits using race only as a description. Using race as a predictor runs directly contrary to the history and purposes of the Fourth Amendment. Second, a powerful moral argument makes clear that, even if using race as a predictor has some statistical basis, using race this way is profoundly wrongheaded. Third, using race as a predictor of suspicion fails to make any practical contribution to policing. Rather, race as a predictor of criminality does not provide the boost to policing that its proponents usually claim. Predicting criminal behavior with race actually damages policing, making it less effective and driving a wedge between law enforcement officers and those they serve. And in this time of special risk from terrorism on our own soil, using race as a predictor is a mistake we simply cannot afford to make.

A. The Legal Argument: The History of the Fourth Amendment and the Requirement of Individualized Suspicion

1. The Meaning of the Fourth Amendment: Disjunctive vs. Conjunctive Theories of the Text

The legal argument concerning the use of race to indicate suspicion must begin with the central question in Fourth Amendment jurisprudence: what does the Fourth Amendment mean? The last few years have seen a lively academic debate concerning the meaning of the Amendment, most of it centered on the relationship of the Amendment's two clauses. The first clause says that the "persons, houses, papers, and effects" of the people are to be secure against unreasonable searches.⁶⁹ The second clause, joined to the first by the word "and," specifies the requirements the government must meet for the issuance of search warrants: probable cause, sworn allegations describing the facts supporting probable cause and

⁶⁹ U.S. CONST. amend. IV, cl. 1.

specific descriptions of the persons, objects or places to be searched or seized.⁷⁰ Essentially, the debate boils down to whether the requirements of the second clause should be read to apply to all searches and seizures. If they did, most searches would require warrants, and even those excepted from this general rule would require probable cause based on specific facts. In other words, searches would have to conform to the requirements of the second clause in order not to be considered (using the terminology of the first clause) unreasonable. Justice Frankfurter may have been the most prominent proponent of this view.

These words are not just a literary composition. . . . One cannot wrench “unreasonable searches” from the text and context and historic content of the Fourth Amendment. . . . When the Fourth Amendment outlawed “unreasonable searches” and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is “unreasonable” unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued “upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized.”⁷¹

Others disagree. Telford Taylor, whose work on the question⁷² has gained prominence from the fact that it has been relied on by Akhil Amar,⁷³ has argued that the framers of the Fourth Amendment meant for it to limit the issuance of warrants.⁷⁴ According to this view, the framers were not at all concerned about warrantless searches.⁷⁵ Thus, the argument

⁷⁰ *Id.* at cl. 2.

⁷¹ *United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) (Frankfurter, J., dissenting) (citations omitted).

⁷² TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969).

⁷³ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (relying on Taylor and dedicated to Taylor).

⁷⁴ TAYLOR, *supra* note 72, at 44-46.

⁷⁵ Amar, *supra* note 73, at 761-62.

goes, the Fourth Amendment does not mandate that most searches require warrants.⁷⁶ Taylor views the two clauses of the Amendment as distinct.⁷⁷ The first requires only that searches and seizures be reasonable, and the second specifies how law enforcement shall conduct searches with warrants.⁷⁸ Nothing in the Amendment indicates when warrants are to be used, or what factors will support a finding that a search or seizure is reasonable.⁷⁹ According to those who accept Taylor's view, the question is not whether it was reasonable to obtain a warrant, but "whether the search itself was reasonable."⁸⁰ The answer to that question, in turn, depends on the facts of each case; whether or not a warrant was obtained is just one of the facts to be weighed in determining reasonableness. This interpretation of the meaning of the Fourth Amendment means, effectively, that judges evaluating the constitutionality of any particular search or seizure are left free to supply the content of the idea of what is reasonable according to how they see any particular case.⁸¹ A majority of the Supreme Court has put it this way:

What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are "unreasonable" searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.⁸²

⁷⁶ *Id.* at 761.

⁷⁷ *Id.* at 762; see also Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 521 (1995).

⁷⁸ Amar, *supra* note 73, at 762; Clancy, *supra* note 77, at 521-22.

⁷⁹ Amar, *supra* note 73, at 761-64.

⁸⁰ Clancy, *supra* note 77, at 522 (citing *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950)).

⁸¹ Amar, *supra* note 73, at 769.

⁸² *Rabinowitz*, 339 U.S. at 63.

The Supreme Court's current majority subscribes to this “disjunctive” theory. Instead of searching for the characteristics of reasonable searches and seizures as described in the warrant clause, the Court now believes that whether a particular search is reasonable “is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.”⁸³

2. The Centrality of Individual Suspicion

This is clearly a dispute of great significance, but it overlooks something important: the core concept of the Fourth Amendment is not which clause should govern, but the requirement of individualized suspicion for any Fourth Amendment intrusion. In other words, history shows that the framers would have required all searches and seizures, whether or not they were based on a warrant, to be based on particularized, individual suspicion. William Cuddihy provides a new contribution to the debate over the Fourth Amendment's meaning—a scholarly work that Justice O'Connor has called “one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken”⁸⁴ (Justice O'Connor cited it approvingly thirteen times in just a few pages of one of her opinions).⁸⁵ In his work, entitled *The Fourth Amendment: Origins and Original Meaning*,⁸⁶ Cuddihy has done the hard, tedious and thorough work of digging and sifting through historical materials to find the Amendment's core. Cuddihy's work—three volumes, with 1560 pages of text and footnotes as well as additional

⁸³ E.g., *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

⁸⁴ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting)

⁸⁵ *Acton*, 515 U.S. at 669-73.

⁸⁶ William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602-1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

pages of appendices, tables and the like—is a masterwork of thoroughness, detail and scope, even if the reader sometimes wishes for better editing and organization.⁸⁷ Cuddihy has much to say about the debate over the clauses of the Fourth Amendment. But it is another, related aspect of Cuddihy's history of the Fourth Amendment that illuminates the question of how we should use race to assess suspicion in police investigation. The historical record, Cuddihy asserts, strongly supports the idea that the Fourth Amendment was intended to limit government action and discretion to conduct not just searches and seizures *with* warrants, but a wide variety of searches and seizures *without* warrants.⁸⁸

Cuddihy points out the importance of individual suspicion—the idea that the authorities had to have reasons for suspicion that centered on particular individuals by virtue of their conduct. Long pre-dating the Fourth Amendment, there existed in England not only the idea that searches and seizures could be unreasonable, but that particularized suspicion was absolutely required in order for a search or seizure to be considered reasonable.⁸⁹ Cuddihy finds evidence that these intrusions required some type of particularized suspicion as far back as the thirteenth century.⁹⁰ Professor Tom Clancy, director of the National Center for Justice and the Rule of Law at the University of Mississippi School of Law, has written persuasively about the importance of individualized suspicion to both the history of the Fourth Amendment and our current struggle over the meaning of the Amendment's two clauses as they relate to the question of

⁸⁷ *E.g.*, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1713, 1720 (1996) (making explicit mention of work's great length and insufficient organization, stating that “no other important history so needs an editor.”).

⁸⁸ Cuddihy, *supra* note 86, at civ.

⁸⁹ *Id.* at 854.

⁹⁰ *Id.* at 853-54.

what searches and seizures are reasonable.⁹¹ Professor Clancy explains the importance of individualized suspicion this way:

The requirement of some level of individualized suspicion operates to limit the government's discretionary authority to search and seize. Individualized suspicion, also called particularized suspicion, serves to preclude arbitrary and general searches and seizures and mandates specific justification for each intrusion. It places the focus of the inquiry concerning the permissibility of a search or seizure upon the circumstances presented by the private party or object of the search or seizure; if and only if the individual or object provides a reason for governmental inquiry may the government intrude.⁹²

Like Cuddihy, Clancy sees the importance of looking at the full historical context of the Fourth Amendment in order to have a real understanding of its meaning. According to Clancy, we must look at the events that preceded the drafting of Constitution and the Bill of Rights, most particularly the search and seizure practices of the time.⁹³ With only limited exceptions, Clancy says, "there was no right to search or seize without a warrant. The exceptions to the use of the warrant . . . required individualized suspicion of criminal activity to justify the search or seizure."⁹⁴ The "core complaint" of the framers revealed by a close study of history, Clancy notes, was not that the searches or seizures to which the authorities subjected the framers did or did not utilize warrants or other kinds of authority. Rather, "it was the general, suspicionless nature of the searches and seizures."⁹⁵ Therefore it is not surprising that among the most fundamental of the principles held by the framers in this connection was the requirement of particularized, individual

⁹¹ Clancy, *supra* note 77, at 483.

⁹² *Id.* at 485 (footnotes omitted).

⁹³ *Id.* at 526.

⁹⁴ *Id.* at 527.

⁹⁵ *Id.* at 528.

2003]

DESCRIPTION, YES; PREDICTION, NO

443

suspicion.⁹⁶ The warrant clause of the Fourth Amendment, Clancy explains, spelled out the requirements of a warrant as a way not just of regulating searches with warrants, but of making explicit what the requirements of a reasonable search were.⁹⁷ Thus, the historical context reveals that the warrant clause not only served to describe what a warrant must contain, but also to protect the colonists from all types of suspicionless searches and seizures.

By so prescribing the requirements of a search pursuant to a warrant, the framers were seeking to ensure that freedom from suspicionless intrusions was guaranteed. Thus, for the former colonists, particularized suspicion of wrongdoing was an irreducible minimum for a search or seizure. . . . [They] believed individualized suspicion to be an inherent component of the concept of reasonableness.⁹⁸

Clancy's conclusions dovetail particularly well with Cuddihy's. Ranging "far beyond the commonly cited sources," like the writs of assistance cases in Massachusetts, the English cases of the 1760s concerning general searches for publications that criticized the government, and the few pieces of evidence concerning the drafting of the Amendment itself to present "an overwhelming documentary record" spanning centuries, Cuddihy shows that Clancy's broad conception of the Fourth Amendment is correct.⁹⁹ "Many kinds of searches and seizures were unreasonable within the original meaning of the amendment, not just general warrants," among them warrantless general searches and warrants allowing searches of multiple locations.¹⁰⁰ The idea that particularized suspicion was an absolute requirement of

⁹⁶ *Id.*

⁹⁷ *Id.* at 528-29.

⁹⁸ *Id.* at 529-30.

⁹⁹ Cloud, *supra* note 87, at 1716.

¹⁰⁰ Cuddihy, *supra* note 86, at civ.

any reasonable search preceded the American Revolution by hundreds of years.¹⁰¹ The Fourth Amendment's banning of the general warrant addressed not only that particular device, but rather was part and parcel of "a larger scheme to extinguish general searches categorically."¹⁰² By the 1770s and 1780s, Cuddihy says, colonial critics protested all types of general searches, with or without warrants.¹⁰³ Professor Morgan Cloud, who has studied Cuddihy's work carefully, notes that Cuddihy's extensive review of the historical record in the years immediately before the drafting of the Fourth Amendment "supports [Cuddihy's] conclusion that a consensus began to emerge rejecting broad categories of searches and seizures as unreasonable, including general searches conducted with or without warrants. . . . All were included within the meaning of unreasonable searches and seizures in the Amendment, although the text only specified general warrants."¹⁰⁴ Thus both Clancy and Cuddihy help us understand that in order to be true to the Fourth Amendment's purposes and its history, searches or seizures, whether with or without warrants, must be based on individualized, particular suspicion. Mere group membership, or the idea that some suspicion inheres in a particular situation, will not do.

The historical baseline requirement that government officials have individualized suspicion has been repeated and re-emphasized enough times by the modern Supreme Court that it remains good law, even in the face of a number of cases that seem to dispose of the individual suspicion requirement in favor of a balancing of interests test. In the modern era, one first sees the requirement of individualized suspicion strongly emphasized in *Terry v. Ohio*, the case that, ironically, also brought the "balancing of interests" view to real

¹⁰¹ *Id.* at 1499.

¹⁰² *Id.*

¹⁰³ *Id.* at 1486, 1499-1500.

¹⁰⁴ Cloud, *supra* note 87, at 1724.

2003]

DESCRIPTION, YES; PREDICTION, NO

445

prominence.¹⁰⁵ Scholars of constitutional criminal procedure know *Terry* as the case that gave the Supreme Court's imprimatur to searches and seizures performed with less than probable cause. In situations where a police officer had reasonable, articulable suspicion (a standard not quantified in any solid way by the Court, but clearly meant to require less evidence than the probable cause standard would) that crime was afoot and that a person under observation was involved in it, the police officer could temporarily detain a suspect.¹⁰⁶ If the officer suspected the presence of weapons, she could perform a cursory search of the defendant to confirm or dispel that suspicion.¹⁰⁷ The Court explicitly balanced the intrusion of a stop and frisk on the individual against the need of the government for this kind of investigatory tactic; one can argue from this that *Terry* marked the beginning of the use of what eventually became the reasoning that has justified suspicionless searches in any number of situations.¹⁰⁸ Nevertheless, the Court's opinion in *Terry* explicitly restated the importance of individualized suspicion in assessing the reasonableness of searches and seizures under the Fourth Amendment.¹⁰⁹ Reasonable suspicion, the Court said, means something more than a hunch or a gut feeling about a person

¹⁰⁵ 392 U.S. 1 (1968).

¹⁰⁶ *Terry*, 392 U.S. at 28.

¹⁰⁷ *Id.* at 24.

¹⁰⁸ *Id.* at 20.

[T]he conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures. . . . In order to assess the reasonableness of [the police officer's] conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails."

Id. at 20-21 (citing *Camara v. Mun. Court*, 387 U.S. 523, 534-37 (1967)).

¹⁰⁹ *Id.* at 24.

the police observe. “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”¹¹⁰ The Court punctuated this demand for specific, individualized suspicion as a basis for Fourth Amendment intrusions with a simple, clear footnote: “[T]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.”¹¹¹ It anchors this unambiguous statement by citing no fewer than thirteen of its own search and seizure cases dating from the 1920s, 1930s, 1940s, 1950s and 1960s, and even one from the 1870s—an unbroken line of decisions reflecting and restating this core Fourth Amendment requirement.¹¹²

The Court reaffirmed this position strongly over a decade later in *United States v. Cortez*.¹¹³ In a case involving the temporary detention of a suspect involved in possible illegal immigration, the Court re-examined the level of suspicion required for a *Terry* stop.¹¹⁴ The terms that courts had used to describe the amount of evidence required—“founded suspicion” and “articulable reasons,” for example—are not, the Court said, “self-defining.”¹¹⁵ Any assessment must look at all of the circumstances: “the whole picture,” in the words of the Court.¹¹⁶ And that whole picture must contain facts sufficient to give the officer individualized suspicion about the suspects: “Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.”¹¹⁷ This process of assessing suspicion, the Court

¹¹⁰ *Id.* at 20-22.

¹¹¹ *Id.* at 21 n.18.

¹¹² *Id.*

¹¹³ 449 U.S. 411 (1981).

¹¹⁴ *Cortez*, 449 U.S. at 414-16.

¹¹⁵ *Id.* at 417.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 417-18.

2003]

DESCRIPTION, YES; PREDICTION, NO

447

said, “must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.”¹¹⁸ Quoting directly from *Terry's* critical footnote, the majority in *Cortez* chose to speak emphatically: “Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, supra, said that “[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence.*”¹¹⁹ The Supreme Court went to considerable lengths to reaffirm the requirement of individual suspicion in the 1990s in *Minnesota v. Dickerson*.¹²⁰ *Dickerson* involved the propriety of a *Terry* “pat down” search.¹²¹ Writing for the majority, Justice White used the case to restate and reaffirm the Court's commitment to the principles of *Terry*. The police officer, Justice White said, must be able to point to specific facts indicating that the suspect may be involved in crime and may be armed in order to perform a stop and frisk.¹²² More importantly, those facts may not be general indications of suspicion; rather, they must demonstrate that the particular individual seems suspicious.¹²³ And in *Illinois v. Wardlow*,¹²⁴ an even more recent case, the Court repeated the requirement of individual suspicion. Even as it allowed the police to make a *Terry* stop based on a very small, arguably ambiguous set of factors,¹²⁵ the

¹¹⁸ *Id.* at 418.

¹¹⁹ *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)) (emphasis in original).

¹²⁰ 508 U.S. 366 (1993).

¹²¹ *Dickerson*, 508 U.S. at 373.

¹²² *Id.*

¹²³ *Id.* “*Terry* further held that “[w]hen an officer is justified in believing that *the individual* whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,’ the officer may conduct a patdown search” *Id.* (quoting *Terry*, 392 U.S. at 24) (emphasis added).

¹²⁴ 528 U.S. 119 (2000).

¹²⁵ The Court upheld a *Terry* stop on the basis of just two factors: presence in an area known for drug sales, and flight upon seeing police. *Wardlow*, 528 U.S. at 124-25.

Court said in *Wardlow* that suspicion must concern individual suspects.¹²⁶

But by the end of the 1980s, one could see the development of a countertrend in the Court's Fourth Amendment cases. In these cases, which the Court put under the rubric of "administrative searches," the Court began to use a balancing test in which it weighed the interests of the government against those of individuals, instead of requiring particular, individualized suspicion. These cases involved "needs beyond those of ordinary law enforcement;"¹²⁷ they often concerned intrusions on large groups of people without any suspicion at all. For example, in *Skinner v. Railway Labor Executives' Ass'n*,¹²⁸ the Court allowed the suspicionless testing of railroad employees involved in accidents, given the great danger to public safety, the frequent presence of drugs and alcohol as a factor in such accidents, the absence of any other practical way to ascertain the cause of these accidents and the relatively minor intrusion imposed by alcohol and drug testing.¹²⁹ In *National Treasury Employees Union v. Von Raab*,¹³⁰ the Court allowed suspicionless drug testing of employees of the U.S. Customs Service without any particularized evidence of a drug problem, based simply on the strength of the government's interests and the insubstantial intrusion on individuals.¹³¹ In *Michigan Department of State Police v. Sitz*,¹³² the Justices decided that police did not violate the Fourth Amendment when they stopped over a hundred drivers at a sobriety checkpoint without any individual suspicion about any one of them.¹³³

¹²⁶ *Id.* at 124-26 (holding that facts, even those consistent with innocence, must show that officers have reasonable suspicion that suspect under observation is involved in crime).

¹²⁷ *See, e.g.,* *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001).

¹²⁸ 489 U.S. 602 (1989).

¹²⁹ *Skinner*, 489 U.S. at 619-23.

¹³⁰ 489 U.S. 656 (1989).

¹³¹ *Von Raab*, 489 U.S. at 665-67.

¹³² 496 U.S. 444 (1990).

¹³³ *Sitz*, 496 U.S. at 455.

And in two cases—one in 1995,¹³⁴ the other in 2002¹³⁵—the Court has allowed suspicionless drug testing of public school students as a condition for participation in extracurricular activities, even activities that involve no loss of privacy (such as communal undressing for athletics) or risk of injury inherent in the activity (e.g., playing football) that drug use might exacerbate.¹³⁶

Thus, anyone arguing that individualized suspicion sits at the center of the Fourth Amendment must confront these cases. Have the Justices simply decided to go another direction? If so, are they correct? The above review of the historical roots of the Fourth Amendment makes clear that these “special needs beyond ordinary law enforcement” cases cannot claim to rest on the foundations of our constitutional law of search and seizure. Rather, they are profoundly ahistorical; the Court can only justify them by ignoring what the Fourth Amendment was clearly meant to do, and ruling in the name of policy goals that the current Court prefers. They are, in short, a perfect example of a Supreme Court reshaping constitutional guarantees to fit its idea of what is desirable. Thus, one perfectly plausible, though aggressive, position is that the drug testing and other cases that ignore the requirement of individualized suspicion is simply that these cases are wrong—inconsistent with the Amendment's history and central purpose—and should be reversed.

At the very least, one can say that the “special needs cases” are an exception to what is still now, and always has been, the rule in Fourth Amendment jurisprudence. The Court has always told us that this exception to the requirement of individualized suspicion is exactly that: an exception. It is, by its terms, used for noncriminal purposes only. Police agencies may not use it for run-of-the-mill

¹³⁴ *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹³⁵ *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

¹³⁶ *Earls*, 536 U.S. at 831-32, 836-37.

criminal law enforcement. While some have found this justification a bit thin, it is what the Supreme Court has said in each and every one of these cases. And with two recent decisions, the Court has reinforced this distinction. In *City of Indianapolis v. Edmond*,¹³⁷ local police attempted to take the *Sitz* sobriety checkpoint case to the next logical scenario: a checkpoint for detecting drug-possessing drivers. The police argued that the checkpoint was simply meeting the “special need” of the damage caused by drug use.¹³⁸ Not so, the Court said; this was simply a checkpoint constructed to enforce the criminal law against drugs.¹³⁹ And in *Ferguson v. City of Charleston*,¹⁴⁰ the Court drew a similar line against a program that tested mothers for drug use. The state attempted to justify its actions under a “special need” to safeguard the health of newborns,¹⁴¹ but the Court observed that the details of the program showed that it was actually directed toward arresting and prosecuting the mothers.¹⁴² Thus, the Justices said, this was not a program designed to meet a special need at all; rather, it constituted enforcement of the criminal law, pure and simple.¹⁴³ And if police want to do criminal investigation and enforcement, the Court said, actions that impact Fourth Amendment rights of citizens must be based on individualized suspicion.¹⁴⁴

3. The Importance of Individualized Suspicion to the Proper Use of Race or Ethnic Appearance in the Assessment of Reasonableness

Once we understand the importance of individualized suspicion to a clear and accurate interpretation of the Fourth

¹³⁷ 531 U.S. 32 (2000).

¹³⁸ *Edmond*, 531 U.S. at 40-41.

¹³⁹ *Id.* at 41-42.

¹⁴⁰ 532 U.S. 67 (2001).

¹⁴¹ *Ferguson*, 532 U.S. at 81.

¹⁴² *Id.* at 82-83.

¹⁴³ *Id.* at 82-86.

¹⁴⁴ *Id.* at 79-80 n.15.

2003]

DESCRIPTION, YES; PREDICTION, NO

451

Amendment, the proper way that law enforcement should make use of race or ethnic appearance in assessing Fourth Amendment intrusions comes into focus. Race and ethnic appearance have a legitimate place in police work. These physical characteristics can help police by describing individuals, and their use in this respect is and always has been constitutionally permissible. But when race and ethnic appearance begin to play a role not as concrete indicators of individual suspicion but instead as tools for statistical prediction, we move away from what squares with the Fourth Amendment's history and purpose. In short, the law should reflect an important difference between the two ways that police have used race and ethnicity: as a description and as a predictor.

The use of race or ethnic appearance as a way of describing a known suspect is both an efficacious and a constitutional way to do police work. When the police have a description of a known suspect that includes race—for example, that the perpetrator of a crime that has just occurred is five feet ten inches tall, weighs about 190 pounds, has short black curly hair and a bushy mustache, is wearing blue jeans and a tee shirt with a particular logo on it, and is black—there is absolutely no reason to omit the race of the suspect from the bulletin that the police department puts out to its officers. In fact, race is one of the most important physical characteristics of a criminal that one could include in this description. It is something a witness can easily see and remember, like clothing, hair style, or facial hair. But, even better than all of those, it is immutable. A mustache, beard or head can be shaved, hair can be colored or trimmed, and clothing can be changed with ease. Not so with race. Such an unchangeable, highly visible trait has real value in accurately describing the suspect. Therefore, using race or ethnic appearance this way, to assess the reasonableness of a search or seizure, dovetails with both the history and purposes of the Fourth Amendment and is useful to the work of the police.

When a person observed by police shares the racial or ethnic characteristics of a known suspect, the presence of that characteristic (along with any others, of course) serves to make it more likely that the person under observation is, in fact, the suspect. Race or ethnic appearance is both important and proper to use in such a situation. It focuses police work and any Fourth Amendment intrusions that occur as part of an investigation through the proper lens: individual suspicion. When the person police seek is black, a person under observation who is black matches the description in an important way. While that fact alone could never be enough to give police a quantum of suspicion sufficient to *meet* any legal standard, including reasonable suspicion, it can legitimately be one of the things that *contributes to* individual suspicion.

It is when we begin to use race or ethnic appearance not to describe a known suspect, but to predict the probability that any random stranger may be involved in an as-yet-unknown crime, that we stray from the Fourth Amendment's history and purpose and the protections it is supposed to afford. This, of course, is the essence of racial profiling: race or ethnic appearance is used as a proxy characteristic to indicate a greater propensity to be involved in crime. Police officers cannot look at any particular person and see that he or she is a drug courier or dealer, especially as that person drives down a roadway. But anyone can see the person's skin color or ethnic features. If we believe that persons in a particular racial or ethnic group are more likely to be drug dealers or bank robbers or terrorists, and we see a person who belongs to that group, a law enforcement officer who uses racial profiling will use the person's racial or ethnic characteristics to make a prediction. Since people in this racial or ethnic group are more likely to be (fill in the blank: drug dealers, bank robbers or terrorists), the person I am observing is more likely to be one, too. I can therefore predict that it is more likely that I will find a (fill in the blank) if I stop this person than if I stop a person not belonging to this group. Based on this prediction and other facts I observe, I'll make the stop of this driver. This kind of prediction is based

2003]

DESCRIPTION, YES; PREDICTION, NO

453

not on an individual's sharing a characteristic of a known suspect who has perpetrated a particular crime, but on sharing the characteristics of a large group of people, only a small percentage of whom may have committed any known kind of crime at any point in the past, and none of whom has committed any known crime in conjunction with the particular person under observation. This sharing of characteristics says very little, if anything at all, about the person under observation, except that he belongs to some particular large racial or ethnic group; it lends nothing to individual suspicion. In short, in terms of the particular and specific indicators of individual suspicion that the Fourth Amendment requires the government to have before a search or seizure is allowed, race or ethnic appearance adds nothing. Regardless of what the *Martinez-Fuerte* case says to the contrary, this predictive use of racial or ethnic characteristics should not be allowed under the Fourth Amendment.

B. The Moral Dimension: Group Guilt

Beyond legal considerations, one must consider the moral aspect of this use of race. Using race as a predictor is akin to assigning guilt by association: it is, in every way, morally indefensible.

Anglo-American criminal law, and most other mature legal systems, strongly align themselves with a fundamental idea: the assignment of criminal blameworthiness depends upon individual responsibility for individual actions. It is fundamental in our system that a person cannot be held responsible for a crime unless the crime was the doing of that particular individual.¹⁴⁵ While we permit punishment for subsidiary roles in crimes—the accomplice who encourages the person pulling the trigger, or the driver of the getaway

¹⁴⁵ *E.g.*, MODEL PENAL CODE § 2.01(1) (1962) (“A person is not guilty of an offense unless his liability is based on conduct . . .”).

car for the bank robbery—these actors have themselves still done *something* to deserve punishment, even if it is only to support or encourage the main actor.¹⁴⁶ By the same token, we require not just action for criminal liability—the proverbial *actus reus* so familiar to students of criminal law—but that the action be voluntary.¹⁴⁷ That is, it cannot be the result of an unconscious action or a spasm, such as the movement of a limb during a seizure. Scholars of criminal law explain that, without a voluntary, willed action, we would feel deep discomfort affixing moral blameworthiness to the individual. It is only when individuals act consciously that they deserve blame and criminal sanctions.¹⁴⁸ For it is only then that we deem them individually responsible for the consequences of their acts. In sum, we feel that it is morally wrong to pin blame on a person who, ultimately, is not responsible for it.

Perhaps just as important, the American legal tradition should make us deeply suspicious of anything that smacks of guilt by association with, or membership in, an unpopular group—what we might call group guilt. Group guilt can be both immensely powerful and deeply troubling when used to punish people or focus suspicion on them merely for their associations: for example, membership in the Communist Party during the late 1940s and 1950s. A certain number of people were members of the Party then, and more had been members in the past. Regardless of their individual beliefs or

¹⁴⁶ *Id.* § 2.06(3)(a)(ii) (“A person is an accomplice of another person in the commission of an offense if: with the purpose of promoting or facilitating the commission of the offense, he . . . aids or agrees or attempts to aid such other person in planning or committing it.”).

¹⁴⁷ *Id.* § 2.01(1) (stating that criminal liability requires “conduct that includes a voluntary act”); *Martin v. State*, 17 So. 2d 427, 427 (1944) (holding that intoxicated man dragged from home into street by police and arrested for “being drunk on a public highway” was not guilty because he did not appear in street voluntarily, and even though statute did not require voluntariness by its terms, “a voluntary appearance is presupposed”).

¹⁴⁸ *E.g.*, Michael S. Moore, *Responsibility and the Unconscious*, 53 CAL. L. REV. 1563, 1567 (1980) (“One is responsible only for those consequences that are caused by his actions, and not for those things in which his body, but not his acting self, is causally implicated.”).

2003]

DESCRIPTION, YES; PREDICTION, NO

455

deeds, either in the 1950s or in the past, all were despised, some were hunted down, some even went to jail. Mere membership in the party, past or present, carried grave consequences for one's life and career. The abuses of the period based on group membership are well documented, but this kind of group guilt was not confined to 1950s McCarthyism. For example, in the 1988 presidential election campaign, Vice President and candidate George Bush made a regular practice of attacking his opponent, Michael Dukakis, as "a card-carrying member of the ACLU."¹⁴⁹ Bush got double mileage out of this: first, by virtue of the resemblance of his phrase to the 1950s tag of shame as "a card carrying member of the Communist Party," and more importantly from the blatant attempt to smear Dukakis with the negative image of a group that, while integral to the preservation of the Bill of Rights in the twentieth century, has never been universally popular with mainstream America.

But smearing, ruining or even jailing people is not the worst kind of problem associated with group guilt. Membership in the Communist Party may be unpopular, ridiculous or even stupid. It may make one a pariah, and may cause others to feel that the member is a low-functioning, lunatic loser. It is also something else, at least in this country: optional. All members of the Communist Party joined voluntarily; no one compelled them to do so, and there was never anything to prevent them from leaving the party, as many of them did. Michael Dukakis was free to join, or to quit, the ACLU; he might, at any particular time, subscribe to the organization's beliefs and principles, or he might decide that they were not for him. His association with the group was his choice, a choice that, generally speaking, he or anyone else would be free to reverse at any point.¹⁵⁰ Group guilt based on

¹⁴⁹ Jack Nelson, *Campaign Seen as Becoming Highly Negative*, L.A. TIMES, Aug. 11, 1988, at 1.

¹⁵⁰ The troubling exception, of course, is when people are targeted and tarred

racial or ethnic characteristics is different and, for that reason, profoundly more troubling. One does not choose to have these characteristics; they are, of course, accidents of birth, not organizations one may join or philosophies or sets of beliefs to which one may choose to subscribe. And of course, there is no opting out. Thus, to treat a person as a criminal, or even a suspected criminal, not because he resembles a particular suspect but because he shares characteristics of a large group of people, some very small number of whom may be engaged in some as-yet-undiscovered crimes, literally criminalizes the suspect's particular race or ethnicity. Among extreme examples, one would certainly think of Hitler's Germany, in which being Jewish became, if not literally a criminal offense, then a condition that carried significant social disabilities, stigma and even a basis for deportation and extermination. There is also the example of the massacres of Tutsis in Rwanda in the early 1990s, in which Hutus, egged on and encouraged by their leaders, hacked to death hundreds of thousands of members of the Tutsi tribe. The United States has had its own example of this thinking: the internment of persons of Japanese ancestry on the West Coast during the Second World War. The Japanese internment cannot match either Hitler's Germany or 1900s Rwanda for sheer barbarity and raw cruelty; there is no record anywhere of killing during the internment. Nevertheless, there were significant losses and hardship—lives disrupted, property sold off at fire sale prices, lifetimes of work in stable communities wiped out.¹⁵¹

in the present for associations in the past that they have disavowed, whether recently or long ago. This was the case in the McCarthy era, as the prototypical question from the House Un-American Activities Committee starkly shows: "Are you now, *or have you ever been*, a member of the Communist Party?"

¹⁵¹ For excellent and comprehensive looks at the internment of Japanese Americans, see, for example, LAWSON FUSAO INADA, *ONLY WHAT WE COULD CARRY: THE JAPANESE AMERICAN INTERNMENT EXPERIENCE* (2000), GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* (2001), ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS, AND REPARATIONS: LAW AND THE JAPANESE INTERNMENT* (2001), and Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 CRIM. JUST. 52 (2002).

More importantly, all of these actions operated on the same principle: group guilt. When we decided that all 120,000 persons with Japanese features on the West Coast of the United States—citizens or noncitizens, men or women, old or young—presented a hazard because of their membership in one ethnic group, we used group membership, not individual behavior, to assign significant burdens. Clearly, it is not the same as mass murder by the state because of membership in an ethnic group, but the difference is again one of degree, not kind. It is no wonder that the nation now views the internment of the Japanese as a colossal black mark on our history—a moment in which we failed utterly to live up to our creed, and for which we have apologized to those affected.¹⁵²

Using race or ethnicity in racial profiling as proxy predictors for a greater propensity to commit crime is no different. Though the burden imposed is not nearly so great as that borne by the interned Japanese, let alone the Jews of Hitler's Germany or the Tutsis of Rwanda, the difference is again one of degree. In racial profiling, there are burdens borne by those who feel the sting of the practice: numerous, often unpleasant dealings with the police; treatment as a criminal suspect, despite all of one's education and professional and community standing; the public stigmatization and humiliation of public stops, frisks and vehicle searches; and, perhaps most importantly, the repeated experience of powerlessness at the hands of government authority.¹⁵³ These are not insignificant burdens. When they are imposed on the basis of race, and when it becomes so common within these particular groups that it is almost impossible to meet group members who have not had these experiences, the cumulative costs become tangible and the

¹⁵² Restitution for World War II Internment of Japanese-Americans and Aleuts, 50 U.S.C. app. §§ 1989, 1989(a) (2000).

¹⁵³ For the full flavor of these costs, see DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 1-10, 91-128 (2002).

broad taint of suspected criminality settles over every member of the group.

The scientist and social theorist Steven Pinker of the Massachusetts Institute of Technology has put the moral problem of using statistically-based racial profiling into sharp relief. In his book, *How the Mind Works*,¹⁵⁴ Pinker examines how human beings seem hard-wired to think in categories—what we call stereotypes—when assessing other people.¹⁵⁵ Pinker says that racial stereotypes about criminality may have a correct statistical basis—that is, that particular racial or ethnic groups may be involved in crime at disproportionate rates.¹⁵⁶ Even if this is so, Pinker says, we still should not engage in a practice like racial profiling because it violates our shared moral rules. It is, he says, a repugnant practice

not because it is irrational (in the sense of statistically inaccurate) but because it flouts the moral principle that it is wrong to judge an *individual* using the statistics of a racial or ethnic *group*. The argument against bigotry, then . . . comes from a rule system, in this case a rule of ethics, that tells us when to turn our statistical categorizers off.¹⁵⁷

Racial profiling stigmatizes and penalizes, whether intentionally or not, on the basis of membership in a group. One can hardly imagine any government conduct in the modern United States more odious—or more morally suspect.

C. Practical Considerations: Using Race or Ethnic Appearance

¹⁵⁴ STEVEN PINKER, *HOW THE MIND WORKS* (1997).

¹⁵⁵ *Id.* at 312-13.

¹⁵⁶ *Id.* at 313. Note, however, that this does not mean that basing law enforcement decisions on those stereotypes makes it easier to catch criminals; in fact, the opposite is true. HARRIS, *supra* note 153, at 71-90 (noting that statistics indicate that using race or ethnicity as one factor indicating criminal suspicion results in less successful police work).

¹⁵⁷ PINKER, *supra* note 154, at 313.

2003]

DESCRIPTION, YES; PREDICTION, NO

459

as an Indicator of Suspicion Hinders Police Work

A third set of considerations that also militates against the use of racial or ethnic characteristics for purposes of assessing the reasonableness of Fourth Amendment intrusions has little to do with the U.S. Constitution or morality, and everything to do with the practicalities and efficacy of everyday police work. When police use race or ethnic appearance as one factor among others in assessing who is suspicious enough to warrant being stopped, questioned or searched, the success of police work—the rate at which officers catch bad guys and find illegal guns and drugs—actually drops. That is, police officers are less successful in fighting crime when they use race and ethnicity as indicators of suspicion than when they do not. Put another way, using race or ethnicity this way is like tying lead weights around a police officer's ankles when he or she chases a bad guy.

For years, some observers have argued that domestic law enforcement efforts against drugs and crime must take race and ethnicity into consideration on a statistical basis. African Americans and Latinos are disproportionately involved in drug crime, proponents of profiling have said; therefore, we should concentrate anti-drug police work on them.¹⁵⁸ Many state and local police agencies, led by the federal Drug Enforcement Administration, did exactly that from the late 1980s on.¹⁵⁹ We now know that police departments in many

¹⁵⁸ E.g., Marshall Frank, *Racial Profiling: Better Safe Than Sorry*, MIAMI HERALD, Oct. 19, 1999, at 7B (arguing that racially disproportionate imprisonment of blacks justifies using race as factor to indicate suspicion).

¹⁵⁹ E.g., David Kocieniewski, *New Jersey Argues That the U.S. Wrote the Book on Race Profiling*, N.Y. TIMES, Nov. 29, 2000, at A1; David Kocieniewski & Robert Hanley, *Racial Profiling Was the Routine, New Jersey Finds*, N.Y. TIMES, Nov. 28, 2000, at A1; Gary Webb, *DWB*, ESQUIRE, Apr. 1, 1999, at 118; Task Force on Government Oversight, Report on Operation Pipeline (1999), <http://www.aclunc.org/discrimination/webb-report.html>.

jurisdictions used racial profiling, especially in efforts to get drugs and guns off the highways and out of the cities. For example, state police in Maryland used a profile on Interstate 95 during the 1990s in an effort to apprehend drug couriers.¹⁶⁰ Only seventeen percent of the drivers on the highway were African American, but according to statistics collected by the State Police themselves, *over seventy percent* of those stopped and searched were black.¹⁶¹ Statistics from New Jersey, New York and other jurisdictions showed similar patterns: the only factor that predicted whom police stopped and searched was race or ethnicity.¹⁶² No other factor—not driving behavior, not the crime rate of an area or neighborhood and not reported crimes that involved persons of particular racial or ethnic groups—explained the outcomes that showed great racial or ethnic disproportionalities among those stopped and searched.¹⁶³

As one examines these statistics, what really stands out is how ineffective this profile-based law enforcement has been. If proponents of profiling were right—that police should concentrate on minorities because criminals come disproportionately from minority groups—focusing on “those people” should yield better returns on the investment of law enforcement resources in crime fighting than nonracialized policing does. In other words, using profiles that include race and ethnic appearance should succeed *more often* than enforcement based on other, less sophisticated techniques. In any event, it certainly should not succeed *less often* than traditional policing. But in fact, in police departments that focused on African Americans, Latinos and other minorities, the “hit rates”—the rates of searches that succeeded in finding contraband like drugs or guns—were actually *lower*

¹⁶⁰ Criminal Intelligence Report, No. X-18-00592, Maryland State Police (Apr. 27, 1992).

¹⁶¹ Expert Report of Dr. John Lamberth at 8, *Wilkins v. Md. State Police*, No. MJG-93-468 (D. Md. 1996), *available at* <http://www.mdd.uscourts.gov>.

¹⁶² HARRIS, *supra* note 153, at 53-60, 62-72, 78-84.

¹⁶³ *Id.*

2003]

DESCRIPTION, YES; PREDICTION, NO

461

for minorities than were the hit rates for whites who, of course, were not apprehended by using a racial or ethnic profile.¹⁶⁴ This seems so counterintuitive to many proponents of profiling that they find it hard to accept, but it is true: when race or ethnic appearance became a factor in assessing suspicion—not the only factor but one factor among many—police officers did not get the higher returns on their enforcement efforts that they were expecting. Instead, they did not do as well; their use of nonracial cues (i.e., observation of suspicious behavior) against whites did a better job than racial profiling, and did not sweep such a high number of innocent people into law enforcement's net.

A few examples will illustrate the point. In New Jersey in 2000, in the area of the state that had generated the original complaints about racial profiling in the early 1990s, blacks and Latinos still made up 78% of all of the drivers that New Jersey State Police officers stopped and searched, despite the fact that the driving population was less than 20% minority.¹⁶⁵ In other words, in 2000—*after* New Jersey officials had admitted to using racial profiling,¹⁶⁶ and *after* a federal court decree had been put in place to reform the department¹⁶⁷—State Police officers continued to focus disproportionately on minorities, apparently still believing that this constituted rational law enforcement. Nevertheless, the hit rate for the stops and searches of drivers in these very searches shows that the “it just makes sense” assumption remained dead wrong. The hit rates for these stops and

¹⁶⁴ *Id.* at 79-90.

¹⁶⁵ *In re: Senate Judiciary Committee Investigation Hearings: Hearing Before the Senate Judiciary Comm.*, 209th Leg., Reg. Sess. (N.J. Apr. 3, 2001) [hereinafter *Hearing*].

¹⁶⁶ Peter Verniero & Paul Zoubek, State Police Review Team, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 4 (1999) (“[T]he problem is real—not imagined.”).

¹⁶⁷ Consent Decree, *United States v. New Jersey*, No. 99-5970 (MLC) (D. N.J. Dec. 30, 1999), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm>.

seizures showed that State Police officers who made them found contraband or warrants on white drivers they stopped and searched at a rate of 25%; for black drivers, the hit rate was only about half that large—13%; for Latinos, it was just 5%.¹⁶⁸ In other words, the police were stopping a disproportionately large share of minorities compared to their presence on the road, yet their rate of success was much lower. When they used only behavioral cues in stopping whites, they did almost *twice as well* as when they stopped blacks and *five times as well* as when they stopped Latinos. In North Carolina, a study by Professor Matthew Zingraff and colleagues showed that black drivers were 68% more likely than white drivers to experience searches at the hands of the state's Highway Patrol.¹⁶⁹ But if Patrol officers thought this would help them catch more bad guys, they found out differently. For whites, the hit rate was 33%; for blacks, it was just 26%.¹⁷⁰

In New York City, where researchers studied the NYPD's use of "stops and frisks" over a fifteen month period,¹⁷¹ they found the same familiar pattern. Blacks and Latinos were disproportionately likely to find themselves stopped and frisked relative to their presence in the city.¹⁷² The comprehensive statistics the study used, gathered by the police department itself, demonstrated that the race of the person frisked was the driving factor behind which people were frisked; no other factor— not the crime rates of the neighborhoods where the stops took place, not the racial or ethnic makeup of the more crime-ridden neighborhoods and not the description given to police by crime

¹⁶⁸ *Hearing, supra* note 165.

¹⁶⁹ Matthew T. Zingraff et al., *Evaluating North Carolina State Highway Patrol Data: Citations, Warnings, and Searches in 1998*, at 24 tbl.11 (2000), available at <http://www.nccrimecontrol.org/shp/ncshpreport.htm>.

¹⁷⁰ *Id.* at 21 tbl.14.

¹⁷¹ Press Release, Elliot Spiter, Attorney General of New York, *The New York City Police Department's "Stop and Frisk" Practices: A Report to the State of New York* 88 (Dec. 1, 1999).

¹⁷² *Id.* at 94-95.

2003]

DESCRIPTION, YES; PREDICTION, NO

463

victims—explained the difference.¹⁷³ More importantly, hit rates showed that, as in North Carolina and New Jersey, the focus on minorities did not help police. The hit rate for whites stopped and frisked by NYPD was 12.6 %; for blacks it was lower, 10.5%; for Latinos it was also lower, at 11.5%.¹⁷⁴ Given the enormous sample size—almost 175,000 stop and frisk incidents—these are statistically significant differences. Even more importantly, they show that, contrary to what profiling's proponents would expect, focusing heavily on minorities yields lower, not higher, rates of return.

D. What About Now? Profiling in the Post 9/11 Era

The low rate of return on stops using racial profiling ought to give pause to those who see ethnic profiling of Arabs and Muslims as the only sensible response to the current threat of al Qaeda terrorism.¹⁷⁵ Using race, ethnic appearance or religion as a way to decide who to regard as a potential terrorist will almost surely produce the same kinds of results: no effect on terrorist activity, treatment of many innocent people as suspects and damage to our enforcement and prevention efforts.

First, subjecting all Middle Easterners to intrusive questioning, stops or searches will have a perverse and unexpected effect: it will spread our enforcement and detection efforts over a huge pool of people whom we would

¹⁷³ *Id.* at 121-22.

¹⁷⁴ *Id.* at 111 tbl.I.B.1.

¹⁷⁵ Crouch, *supra* note 20 (“So if pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out, that is the unfortunate cost they must pay to reside in this nation.”); Goldberg, *supra* note 20 (profiling Middle Eastern men is sensible because “not all Middle Easterners are terrorists, but in this context all terrorists are from the Middle East”); Parker, *supra* note 20 (“When an airport security guard searches a male of Middle Eastern extraction, that’s common sense. A terrorist attack of such enormous proportions, followed by a declaration of war, makes racial profiling a temporary necessity that no patriotic American should protest.”).

not otherwise think worthy of any police attention. The vast majority of people who look like Mohammed Atta and the other suicide hijackers of September 11, 2001, will have nothing to do with any kind of terrorism or with ethnic or religious extremism. Yet a profile that includes race, ethnicity or religion may well include them, drawing them into the universe of people that law enforcement will stop, question and search. Almost all of them will be people who would not otherwise have attracted police attention, because no other aspect of their behavior would have drawn scrutiny. Profiling will thus drain enforcement efforts and resources away from more worthy investigative efforts and tactics that focus on the close observation of behavior, like the buying of expensive one-way tickets with cash just a short time before takeoff, as some of the September 11 hijackers did.

This has several important implications. First, just as happened with African Americans and Latinos in the War on Drugs, profiling of Arabs and Muslims will be overinclusive; it will put many more people under police suspicion of terrorist activity than would otherwise be warranted. Almost all of these people will be hard-working, tax paying, law-abiding individuals. While they might understand a few ethnicity-based government intrusions as a mere inconvenience, repetition of these experiences for large numbers of people within the same ethnic groups will lead to resentment, alienation and anger at the authorities. At a time when we need the cooperation of every citizen in the difficult struggle in which we find ourselves engaged, we can ill afford this.

Second, and perhaps more importantly, focusing on race and ethnicity keeps police attention on a set of surface details that tell us very little, and it draws officers' attention away from what is much more important and concrete: behavior. One of the most important tools law enforcement agents have in preventing crime and catching criminals is observation of behavior. Experienced police officers know that what is important in understanding which particular person in any large group of people one observes might be engaged in illegal activity is not what that person looks like, but what he or she

2003]

DESCRIPTION, YES; PREDICTION, NO

465

does. Investigating people who “look suspicious” will often lead officers down the wrong path; the key to success is to look for and carefully observe suspicious behavior. Anyone who simply looks different may seem strange or suspicious to the untrained eye, but the veteran law enforcement officer knows that suspicious behavior is what really should attract attention and investigation. Thus, focusing on those who “look suspicious” will necessarily take police attention away from those who act suspicious. Even in the current climate, in which we want to do everything possible to prevent another attack like those on the World Trade Center and the Pentagon, law enforcement resources are not infinite. We must make decisions on how we run our investigation and prevention efforts that move us away from doing just anything, and toward doing what is most effective.

Third, if observation of suspicious behavior is one of law enforcement's most important tools, then another is surely the gathering, use and analysis of intelligence. Using profiles that single out Arabs, Muslims and other Middle Easterners will damage our capacity to gather and use intelligence. Understood properly, there is nothing exotic about the idea of intelligence; it simply means information that can be useful to fight wrongdoing. If we are concerned about terrorists of Middle Eastern origin on our own soil, among the most fertile and important places from which to gather intelligence will be Arab-American and Muslim communities. If we adopt a security policy that stigmatizes every member of these groups in airports and other public places with intrusive stops, questioning and searches, we will alienate the members of these communities from law enforcement at precisely the time their help is needed the most. And the larger the population we subject to this treatment, the greater the total amount of damage we inflict on law-abiding persons. The best lesson one could imagine in how important this idea is comes from the town of Lackawanna, New York, a small municipality outside of Buffalo. Seven Yemeni men were arrested in

Lackawanna in September of 2002.¹⁷⁶ The government alleged that all of them were part of an al Qaeda “sleeper” cell, with the aim of inflicting massive damage on the United States.¹⁷⁷ These arrests did not result from intelligence gathered during CIA investigations in the Middle East, from super-secret high tech communications intercepts by the National Security Agency, from military field interrogations in Afghanistan or from the questioning of 5000 Arab “nonsuspects” by the U.S. Department of Justice. Rather, the information that led the FBI to the men came directly from Lackawanna’s Yemeni community.¹⁷⁸ They knew the men, and they knew there were people living among them who might be loyal to al Qaeda.¹⁷⁹ Law enforcement would have known none of this on its own and would never have learned it if not for the willingness of some community members to communicate the information to the FBI. Had these people become fearful or alienated because of the treatment they themselves had suffered at the hands of the government, it could easily have resulted in members of the community becoming fearful enough to hesitate to speak up and give the government this information.¹⁸⁰

¹⁷⁶ John Kifner & Marc Santora, *Judge Denies Bail for 5, Citing Community Safety*, N.Y. TIMES, Oct. 9, 2002, at A16 (relating account of six men arrested on terrorism charges).

¹⁷⁷ *Id.* Federal prosecutors alleged men were “members of a terrorist cell awaiting orders to strike.” *Id.*

¹⁷⁸ Philip Shenon, *Threats and Responses: Indictment; U.S. Says Suspects Awaited an Order for Terror Strike*, N.Y. TIMES, Sept. 15, 2002, at 1 (“[F]ederal law-enforcement officials said that they opened their investigation . . . after receiving information from within the area’s Muslim community months ago that people loyal to al Qaeda might be living among them.”).

¹⁷⁹ *Id.*

¹⁸⁰ Whether or not the residents of Lackawanna would have become fearful enough to be uncooperative and fail to inform law enforcement, or more generally whether the use of “Arab profiling” will make Arab and Muslim communities so fearful that they will not come forward, is obviously an empirical question. If this fear could be quantified, perhaps law enforcement authorities would simply decide that what they believe they gain from profiling is worth more than they might lose in the course of alienating these communities. And perhaps that judgment will ultimately be theirs to make, but

A fourth consideration is that racial and ethnic profiling of Arabs, Middle Easterners and Muslims assumes that we need to worry about only one type of terrorist. We must not forget that, prior to the attacks on September 11, 2001, the most deadly terrorist attack on American soil was carried out not by Middle Easterners with Arabic names and accents, but by two very average American white men: Timothy McVeigh, a U.S. Army veteran from upstate New York, and Terry Nichols, a farmer from Michigan. Fortunately, we were smart enough in the wake of McVeigh's and Nichols's crime not to call for a profile emphasizing the fact that the perpetrators were white males. The unhappy truth is that we just don't know what the next group of terrorists might look like. And since al Qaeda has trained thousands of potential terrorists of all kinds from all over the world, using a racial or ethnic profile will pose no real obstacle to this deadly network.

IV. A DIFFICULT CASE: *BROWN V. CITY OF ONEONTA*

How does the “description versus prediction” rule work in a real case, especially a very difficult one involving policing and race? *Brown v. City of Oneonta*,¹⁸¹ a case from the Northern District of New York that has produced no fewer than three published opinions from the U.S. Court of Appeals for the Second Circuit, gives us the opportunity to explore this question.

The *Oneonta* case began with an unfortunate garden-variety crime. On September 4, 1992, someone broke into a house on the outskirts of the town of Oneonta.¹⁸² The intruder, armed with a knife, assaulted a seventy-seven-year-

the point here is that, at the very least, law enforcement should not decide that profiling is a good idea—a net benefit—without at least considering the possible costs it would carry as well as any potential benefits.

¹⁸¹ 221 F.3d 329 (2000).

¹⁸² *Oneonta*, 221 F.3d at 334.

old woman.¹⁸³ When police responded, the woman told them that she could not identify her attacker's face, since she had been attacked from behind.¹⁸⁴ Based on her view of the attacker's hand and arm, the woman told police that her assailant was a black man, and also said that she thought he was young, based on the speed with which he crossed the room.¹⁸⁵ She also said that the attacker had been cut on the hand with the knife as she struggled with him.¹⁸⁶ A police canine unit tracked the scent of the attacker for several hundred yards in the direction of the campus of the State University of New York College at Oneonta (SUCO), but eventually lost the trail.¹⁸⁷

Oneonta, located in upstate New York, has approximately 10,000 residents, all but 300 of whom are white.¹⁸⁸ In addition, SUCO has some 7500 students; about two percent—roughly 150—are black.¹⁸⁹ These demographic facts are critical to any understanding of what the police did to investigate the crime. Police officials immediately contacted SUCO; they asked for and received a list of all of SUCO's black male students.¹⁹⁰ The police then attempted to locate and question every person on the list.¹⁹¹ This effort uncovered no suspects.¹⁹² During the next few days, the police conducted a “sweep” through the town, stopping and questioning non-whites on the streets of Oneonta and looking for cuts on their hands.¹⁹³

According to the allegations of the plaintiffs, these encounters were often more than simple, polite requests to see their hands. One of the plaintiffs said that a police officer

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

pointed a squad car's spotlight at him. The officer then said, "What are you, stupid? Come here. I want to talk to you."¹⁹⁴ The officer then told the man to show his hands.¹⁹⁵ Another plaintiff, who was driving, was pulled over by a squad car with its lights flashing and siren activated.¹⁹⁶ He was ordered out of the vehicle and made to put his hands on its roof.¹⁹⁷ A third plaintiff was stopped on the street by a number of officers who formed a circle around him.¹⁹⁸ The officers asked where he had been and if he was a student, and then asked him to show identification.¹⁹⁹ After all of this, the plaintiff asked for and received permission to leave, but as soon as he did so he was immediately ordered back and told to show his hands.²⁰⁰ A fourth plaintiff, a female who was waiting for a bus, was approached by an officer who told her that if she wanted to board her bus, she would have to provide identification.²⁰¹ This stop seems particularly odd, given that the suspect was a man. It makes one wonder whether all characteristics of the suspect—even gender—were discarded except for race. No suspect was ever found, as a result of the sweep or otherwise.

The plaintiffs (those discussed in the preceding paragraph and others) filed suit against the police under the U.S. Constitution and federal law, alleging violations of their right to equal protection under the Fourteenth Amendment and their right to be free from unreasonable searches and seizures under the Fourth Amendment.²⁰² The district court denied or dismissed virtually all of the plaintiffs' claims, and the case was appealed to the Second Circuit Court of

¹⁹⁴ *Id.* at 340.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 341.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 334-35.

Appeals.²⁰³ That court affirmed the district court's denial of the plaintiffs' equal protection claims, but reversed and remanded certain aspects of the Fourth Amendment claims.²⁰⁴ That opinion was modified as to the Fourth Amendment claims, leaving at least four of those claims to be litigated in the district court.²⁰⁵ A petition for a rehearing en banc was denied, but—in what is surely a very unusual occurrence—multiple opinions were filed on the denial of rehearing en banc, with three opinions concurring in the denial and three opinions dissenting from it.²⁰⁶

Most of the three Second Circuit opinions center on the equal protection issue in the case. Simply put, in what circumstances does a police investigation that utilizes race constitute a violation of the right to equal protection of the laws? If the question is simple, the answer is surely not. All of the opinions do their best to deal with difficult and troubling questions of equal protection, on both the legal and policy levels. That these questions are complex is due in no small part to the difficulty that any plaintiff has in proving an equal protection case under current Supreme Court precedent, even in cases with the strongest possible facts.

But the equal protection issues are not the most important for this discussion. For our purposes, let us focus on the Fourth Amendment questions the case presents. The district court dismissed the plaintiffs' Fourth Amendment claims because even those plaintiffs who had made factual allegations in affidavits had not, according to the district court, alleged any Fourth Amendment intrusion.²⁰⁷ That is, the district court concluded that, under *Terry v. Ohio*, the plaintiffs' allegations did not show that the plaintiffs had actually been stopped.²⁰⁸ Rather, their encounters with police

²⁰³ *Id.* at 334-36.

²⁰⁴ *Brown v. City of Oneonta*, 195 F.3d 111, 123 (2d Cir. 1999), *amended and superseded by* 221 F.3d 329 (2d Cir. 2000).

²⁰⁵ *Oneonta*, 221 F.3d at 336.

²⁰⁶ *Brown v. City of Oneonta*, 235 F.3d 769, 770 (2d Cir. 2000).

²⁰⁷ *Oneonta*, 221 F.3d at 335.

²⁰⁸ *Id.* at 340.

2003]

DESCRIPTION, YES; PREDICTION, NO

471

did not rise to the level of even temporary detentions under the Fourth Amendment.²⁰⁹ The Second Circuit reversed this finding. The court stated that, at least as to the four plaintiffs discussed above, their encounters with the police were in fact detentions, triggering Fourth Amendment protections.²¹⁰ Whether the detentions violated the Fourth Amendment—that is, whether police had the requisite factual support under *Terry* to make these detentions—the Second Circuit left for the district court to resolve.²¹¹ It vacated summary judgments that the district court had entered against all four of the plaintiffs, and remanded the cases to the district court for further litigation.²¹²

As of this writing, the Fourth Amendment claims of the four plaintiffs remain unresolved by the district court on remand. For our purposes, let us use the facts of the case to ask this question: was the use of race by law enforcement in *Oneonta* proper under the rule proposed in this paper? If the Fourth Amendment should allow the use of race as a description but not as a predicting factor, do the police actions in the case—the stops of students and others in the town either because police found them on the list of black male students supplied by SUCO or because they encountered them in the “sweeps” of the town's streets—pass muster under the rule?

The answer is less than clear. Begin by considering the way in which the police used race. The race of the perpetrator came directly from the victim. Race was one of the only characteristics of her assailant that she actually knew. She had not seen enough of his face to make an identification, and presumably remembered nothing of his clothing. She speculated that he was young, given the speed with which he

²⁰⁹ *Id.*

²¹⁰ *Id.* at 340-41.

²¹¹ *Id.*

²¹² *Id.*

moved across the floor.²¹³ The only things she seemed to know about him with any certainty were his race and gender—the arm she saw belonged to a black man—and the fact that he had a cut on his hand produced during her struggle with him.²¹⁴ All of these characteristics—male, black, visible cut on hand—are valid ways of describing the assailant; they are physical characteristics that one can easily recognize and use to identify someone as either looking or not looking like a particular perpetrator of a particular crime. In that sense, these characteristics are not being used to predict who, among some large group of people, might be involved in an as-yet-unknown crime with, of course, no known suspect. That would be the type of predictive use of race the rule condemns, but it is not happening here. Rather, the police are using race as one trait among three to see who matches the description.

However, this does not mean that what happened in *Oneonta* would not be problematic in an important way. But this is not because what happened violates the “description versus prediction” rule. Rather, the difficulties lie in something much more basic: would the stops of numerous individuals on so little evidence meet even the minimal *Terry* standard of reasonable suspicion? It is, of course, true that that standard is lower than probable cause. The Supreme Court has refused to set any quantitative standard for reasonable suspicion, saying only that a police officer should be able to articulate fact-based suspicion based on her observations, and draw inferences based on her training and experience. Even given such a low standard, however, it is far from clear that a person's race and gender should be enough to subject him to a Fourth Amendment seizure. If that were so, any black man could be seized on those traits alone; once enough time has passed that the perpetrator could have left *Oneonta* and its environs, there is absolutely no reason that this reasoning could not extend to all black men within a large

²¹³ *Id.* at 334.

²¹⁴ *Id.*

2003]

DESCRIPTION, YES; PREDICTION, NO

473

geographic area. At some point, the fact that any particular male black person that police might encounter could be the assailant becomes vanishingly small. Put another way, the little evidence that police have—the fact that the attacker was a black man—loses most, if not all, of its probative value very quickly.

Of course, there is one other course that the police could take that might help them to conduct their investigation. Instead of forcibly and less than courteously stopping people—“What are you, stupid? Come here” or being surrounded by police—the police might try to enlist the cooperation of black men and the entire black community. They would have to take a decidedly different tack. They would have to explain the facts of the situation they faced to each individual they met and wished to talk to, and to the community at large, perhaps through the media. Without demanding or commanding obedience, officers would then request permission to see the hands of black men, and nothing more—no questioning as to who the men were, their whereabouts, occupations or the like, and certainly no frisks or other searches. A brief check of the hands would make all of that superfluous anyway; anyone without a cut could not, by definition, be a suspect. No other intrusion would be even remotely necessary. The person could be thanked and sent on his way, probably in less than a minute. The encounter might go something like this:

Police Officer: Excuse me, sir. Someone's committed a crime in this area. An old woman was attacked with a knife in her home. She didn't see the guy's face, but she saw his arm and hand, so she knows the guy was black, and she saw that he got a cut on his hand when she struggled with him. That's all we have to go on, and we really want to catch this guy before he hurts someone else. Would you mind just showing me your hand?

Black Man: All she said was that he was black and had a cut on his hand?

Police Officer: That's right. That's all we have to go on.

Black man: Sure, I guess, O.K. (Shows officer his hands, which have no cuts). Is that it?

Police Officer: Yes, that's all sir. Thank you for your cooperation.

Black Man: Sure.

Would every encounter go as smoothly and quickly? Not necessarily. Might some men see some subtle racism lurking and be offended, perhaps asking themselves if police would question all the white people in an all-black area if the assailant had been white? Perhaps. Would some perhaps refuse to cooperate for this reason or for any other, such as—perish the thought—on principle, insisting on their constitutional right not to deal with the police absent some fact-based reasonable suspicion? Some probably would. Would that not impede the investigation from the police point of view? Perhaps it would. But the suggestion made here could not have been less successful than what the police actually did, since they found no suspects at all. And the method suggested above would not have brought the police something their own method did: the enmity of many members of their own community and ten years of litigation that, as of this writing, remains unresolved.

V. CONCLUSION

This symposium has encouraged us to ask an important question: what is the proper role of race or ethnicity in assessing the reasonableness of a search or seizure? If the question was important before September 11, 2001, it is only more important now, as we sit in a country in which many thoughtful people have called for using race or ethnicity, among other factors, in judging whether someone might be a potential terrorist.

The rule proposed here—description, yes; prediction, no—will not satisfy everyone. The rule would make the use of race or ethnic appearance off limits in some significant ways in criminal and anti-terrorist investigation. But even if one's

2003]

DESCRIPTION, YES; PREDICTION, NO

475

view is that the history of the Fourth Amendment and its core purposes, as well as any moral qualms, simply must yield to the very real exigencies of the situation, perhaps more practical considerations will give pause. It appears that when race or ethnicity becomes part of the calculus of suspicion—not the only factors, but factors among others—law enforcement becomes less effective. And in today's world, we simply cannot afford that—even if, in the minds of some, our constitutional and moral principles are expendable.