

Unit I

Investigative Profiling: Legal Developments and Empirical Research

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The Rhetoric of Racial Profiling

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In 1988 few of us, if any, had heard the term “racial profiling.” A dozen years later, everybody knew about racial profiling and almost everybody agreed that it’s bad. That remains the case. There is nearly universal agreement that racial profiling is bad and illegal. This is a singular turn of events for a phrase that is simply shorthand for a claim of racial discrimination in the administration of criminal justice. In this chapter, I try to track that development.

The Beginning

If you search the Lexis database for the earliest reported American court decisions to use the phrase “racial profiling,” one of the first cases you’ll run into is *United States v. Miller*,¹ which was decided by the United States Court of Appeal for the Eleventh Circuit in June of 1987. Here are the critical facts, as described by the court:

The appellant, Miller, was driving northbound on Interstate 95 near Orlando, Florida, on June 18, 1985. Florida Highway Patrol Trooper Robert Vogel was parked perpendicular to the northbound lanes, with his headlights illuminating passing vehicles and their occupants. Miller drove by Trooper Vogel at approximately 9:40 p.m. Based on the facts that Miller was driving just below the posted speed limit of 55 miles per hour, Miller was driving a car with out-of-state license plates, and Miller did not turn his head to look into the headlights of Trooper Vogel’s parked car, Trooper Vogel decided to pursue Miller’s car in order to stop and search the car for drugs.²

Trooper Vogel then followed Mr. Miller until Miller “allowed his right wheels to cross over the White painted lane marker about four inches, in violation of Florida traffic laws,”³ and then stopped Miller—officially because of this technical violation of the traffic rules, but actually, as Trooper Vogel admitted, to search for drugs.⁴

¹ *United States v. Miller*, 821 F.2d 546 (11th Cir. 1987).

² *Id.* at 547.

³ *Id.*

⁴ *Id.* at 459.

All of this may sound familiar if you have read other descriptions of racial profiling on the highway. But there's a problem. The term "racial profiling" does not appear anywhere in the court's opinion, nor does any similar term, nor the word "race" or any related word, nor any specific racial or ethnic reference such as "Black," "White," or "Hispanic." The reason this case shows up in a Lexis search is that "racial profiling" is mentioned, apparently inexplicably, in the "overview" of the case that was written by the Lexis staff: "The court held that the initial stop was illegal and violated the U.S. Const. amend. IV because the trooper had engaged in racial profiling."⁵

Literally, this description of the Eleventh Circuit's 1987 opinion is flat wrong. Racial profiling is not mentioned by the court. But in another sense, the Lexis editors may have gotten it right, even if that's clear only in revisionist retrospect. What Trooper Vogel did may well have been "racial profiling," as we now use the term—and if so, it did violate the constitution, although probably not the Fourth Amendment as we now understand it. In any event, the case did explicitly involve "profiling," if not racial. Before there was "racial profiling" there was "profiling" generally, and specifically "drug courier profiling." That is what the *Miller* opinion, as originally written, was about. In the late 1980s and 1990s "drug courier profiling" morphed into "racial profiling," and the officer who stopped Mr. Miller, Trooper Robert L. Vogel, was a central actor in that drama.

"Profiling" is used by law enforcement officers to help them find needles in haystacks—to identify the few bad guys hiding in plain view among the mass of ordinary people. The idea is to use visible cues to narrow the field of possible suspects to a manageable scope, and then focus attention on that smaller group. For the process to work, the cues that are used in the profile must in fact correlate with the misbehavior at issue. I have my doubts about the actual value of the profiles I've read and heard about, but that issue is beyond the scope of this chapter.

The earliest investigative "profiles" that went by that name were the "hijacker profiles" that were used in American airports in the late 1960s and early 1970s.⁶ From our blood-soaked vantage point in the early twenty-first century, there is a quaint innocence to that period: Hijackers mostly flew planes to Cuba (not counting the cult-figure hijacker "D.B. Cooper," who collected \$200,000 in ransom and parachuted into the Oregon night⁷), and usually they merely threatened violence. In that context, hijacker profiles were used for a purpose that has long since become obsolete: to decide *which* passengers and bags to scan for weapons. The earliest mention of profiling of any sort in Lexis is this abbreviated abstract of a story from September 1972:

⁵ United States v. Miller, 1987 U.S. App. LEXIS 8112, at *1 (11th Cir 1987).

⁶ David A. Harris, *PROFILES IN INJUSTICE* at 17 (The New Press: New York, 2002).

⁷ Douglas Pasternak, *Skyjacker at Large, Florida Widow Thinks She Has Found Him*, US News & World Report, 7/24/00, available at: <http://www.usnews.com/usnews/doubleissue/mysteries/cooper.htm>

FAA repts on Sept 6 that its hijacker behavioral profile has led to discovery of small arsenal hidden in violin case at Cleveland Airport; say J Jeusnik, owner of cache, was asked to open case after his actions matched those in behavioral profile; attempted to board Amer Airlines flight to Tucson with weapons.⁸

Four months later, in January 1973, the Federal Aviation Administration (FAA) adopted an early version of the current practice, requiring *all* passengers to pass through metal detectors and to have all carry-on luggage X-rayed.⁹

The next stop on the line was “drug courier profiling,” also typically practiced in airports. Maybe it was a coincidence; maybe the earlier practice of hijacker profiling at airports morphed into this new form. In any event, starting in the mid-1970s federal Drug Enforcement Agency (DEA) agents began to use behavioral and demographic profiles to try to identify air travelers who were transporting drugs.¹⁰

The practice mushroomed. Between 1976 and 1986 more than 140 reported federal cases involved airport stops by DEA agents based on a “drug courier profile,”¹¹ plus an unknown number of unreported court cases—which, of course, is only the tip of an iceberg. It’s anybody’s guess how many suspects were found with drugs and pled guilty with no court decision on the legality of the search, or how many innocent travelers were stopped or searched but never charged.

The DEA has never published an official description of the drug courier profiles it has used. That would defeat their purpose. However, DEA agents have testified to some of the components in court cases over the years. The net effect is a bad joke. The tell-tale signs of a drug courier include: buying a one-way ticket or buying a round-trip ticket; paying in large denomination bills or paying in small denomination bills; walking quickly through the terminal, or walking slowly through the terminal; being one of the first passengers to deplane, or the last passenger to deplane, or deplaning in the middle of the crowd; traveling with a companion or traveling alone; carrying no luggage, a small tote bag, or a medium-size bag, or taking a lot of luggage; behaving nervously, or appearing calm and cool.¹² The common denominator, of course, is that the defendant before the court did or had whatever it took to fit the profile de jour.

The DEA agents who testified about drug courier profiles of the 1970s and 1980s sometimes admitted that they took into account racial characteristics. For example, in a case in 1978 an agent said that “a Black [man] arriving from a

⁸ Lexis, Information Bank Abstracts, NEW YORK TIMES, September 7, 1972, Thursday, Page 85, Column 8 (AP).

⁹ Judy Rumerman, *Aviation Security*, available at the U.S. Centennial of Flight Commission Web site, at: http://www.centennialofflight.gov/essay/Government_Role/security/POL18.htm

¹⁰ Harris, *supra* note 6 at 19–21.

¹¹ Charles L. Becton, *The Drug Courier Profile: “All Seems Infected That Th’ Infected Spy, as All Looks Yellow to the Jaundic’d Eye,”* 65 N.C. L. Rev. 417 (1987).

¹² *Id.* at 438–54, 474–80; see also David Cole, *No EQUAL JUSTICE* at 47–52 (The New Press: New York, 1999).

major heroin distribution point”¹³ was singled out for attention. In a different case, in 1977, a DEA agent testified that “[i]n the majority of cases the courier has been a Black female.”¹⁴ And in another case, in 1979, an agent testified that “the fact that a person is of Spanish descent would ... make us more aware of them.”¹⁵ Until the 1990s, however, courts simply reported these admissions that race was used in deciding who to stop and search without suggesting that they raised any special legal concerns.¹⁶

The final step in the evolution of the modern practice that became known as “racial profiling” was to apply the logic of drug courier profiling to the highway. Which brings us back to Trooper Robert L. Vogel. In the early 1980s, American law enforcement agencies became concerned about large drug shipments that were believed to arrive in Florida by water from Latin America, and to be distributed from there across the United States by land. Vogel, who had joined the Florida Highway Patrol in 1972,¹⁷ focused on the second part of this operation, drug distribution over the highways. By his own account, he had a natural talent for spotting drug dealers.¹⁸ That may be true, but Vogel’s lasting contribution to the enterprise was less idiosyncratic. He invented two investigative techniques that have been widely emulated.

First, Vogel developed a highway drug courier profile that was similar in kind to those used in airports, but different in content. Suspicious factors included a car not registered to the driver, driving in the early morning hours, objects out of place (e.g., a spare tire in the back seat), a male driver, and occupants who avoided eye contact with the trooper.¹⁹

¹³ *United States v. Coleman*, 450 F. Supp. 433, 439 n. 7 (E.D. Mich. 1978).

¹⁴ *United States v. McClain*, 452 F. Supp. 195, 199 (E.D. Mich. 1977).

¹⁵ *United States v. Vasquez*, 612 F.2d 1338, 1353 n. 10 (2d Cir. 1979).

¹⁶ Charles L. Becton, then a judge on the North Carolina Court of Appeals, is a telling example. In 1987 Judge Becton published an excellent article describing and criticizing the DEA’s drug courier profiles in great detail. See Becton, *supra* note 11. Judge Becton described how DEA agents testified to explicit reliance on racial factors, but attached no special significance to this use of race, noting only, as with other factors, that the agents were inconsistent and wedded to the wisdom of hindsight.

One of the first courts to focus on the use of race in police profiles was the United States Court of Appeals for the Sixth Circuit. In 1988, a single judge of that court wrote in a concurring opinion “we do not ... express any view on the constitutional permissibility of basing stops and/or arrests on “profiles” containing racial characteristics.” *United States v. Pino*, 855 F.2d 357 (6th Cir. 1988) (Jones, J., concurring). Four years later the court commented ambiguously that the inclusion of racial components in a drug courier profile raised “due process and equal protection implications,” *United States v. Taylor*, 956 F.2d 572, 589 (6th Cir. 1992), and in an unpublished opinion the next year that court said that it would be unconstitutional for an officer “to approach ... a person of color *solely* because of that person’s color, absent a compelling justification,” but that there was no proof that the DEA agents had done so in that particular case. *United States v. Jennings*, 1993 U.S. App. LEXIS 926, *11 (6th Cir. 1993) (emphasis added); see also *United States v. Travis*, 62 F.3d 170 (6th Cir. 1995), *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997).

¹⁷ Harris, *supra* note 6 at 21–23.

¹⁸ Gary Webb, *DWB**, Esquire, April 1999, pp. 118–127 at p. 122.

¹⁹ Harris, *supra* note 6 at 22.

This profile alone, however, wouldn't do the trick. In an airport, an officer can approach a suspect on foot and in the course of what is classified by courts as a voluntary interaction ask questions, observe the person up close, gather additional information that might justify a detention or a search of the suspect, or perhaps ask for "voluntary" consent to search the suspect's bags. Invariably, in this and every other context, almost all suspects do "consent" to searches when asked by police officers, probably because it never occurs to them that they have a choice.²⁰ On the highway, however, the very first step is an *involuntary* stop. The suspect's car has to be pulled over—which is classified as a coercive seizure—before the officer can get close enough to ask any questions or see the interior of the car. Under the Fourth Amendment, that means that the officer must have a "particularized" suspicion about that car—"probable cause" to believe that a crime is afoot, or at least a "reasonable suspicion" based on specific "articulable facts,"²¹ before he turns on his flashing lights.

The limited information that Trooper Vogel could gather through the windows of his cruiser usually did not satisfy the courts. In *United States v. Smith*,²² for example, "Trooper Vogel stopped a car because two young men were traveling at 3:00 a.m. in an out-of-state car being driven in accordance with all traffic regulations." The Eleventh Circuit condemned Vogel's "profile" as "a classic example of those 'inarticulate hunches' that are insufficient to justify a seizure under the fourth amendment."²³ In other words, because Vogel didn't have the required "reasonable suspicion" based on "articulable facts," the evidence found in a search of the car—including a kilogram of cocaine—could not be used in court.

Second, Vogel also pioneered the classic solution to the legal problem posed by the limited informational value of his highway drug courier profile: the pretextual stop. As every driver knows, there are hundreds of technical violations for which a car may be stopped, most of which are rarely enforced—"burned-out license plate lights, out-of-kilter headlights, obscured tags, and windshield cracks"²⁴—not to mention speeding (which is nearly universal) and straying over a white line, one of Vogel's favorites. If he observed any of these things, Vogel could stop the car for that traffic or equipment violation, however trivial, and then, as in an airport, look carefully at the car and its occupants, ask questions, gather additional information that might justify further action, and perhaps ask for (and routinely get) consent to conduct a search. Defendants who were prosecuted on the basis of the searches that followed some of these stops objected. They argued that the arresting officers used trivial traffic violations as pretexts to circumvent the "particularized suspicion" requirements of the Fourth Amendment, and they

²⁰ See Samuel R. Gross & Katherine Y. Barnes, Road Work: Racial Profiling and Drug Interdiction on the Highway, 101 Mich. L. Rev 651, 675–77 (2002).

²¹ *Terry v. Ohio*, 392 U.S. 1, 26–27 (1967).

²² 799 F.2d 704, 707 (11th Cir. 1986).

²³ *Id.* See also *State v. Johnson*, 561 So. 2d 1139 (Fla. 1990).

²⁴ Webb, *supra* note 18 at 123.

sometimes won. It was the pretextual nature of the stop (rather than “racial profiling,” as Lexis decided years later) that troubled the Eleventh Circuit in *United States v. Miller*,²⁵ the 1987 case with which we began:

[T]he record reveals that Trooper Vogel made the stop because of his hope to catch a courier, and not because the appellant strayed over the white line a few inches for a few seconds. Based on the record, we hold that a reasonable officer would not have stopped Miller absent some other motive. Thus ... we hold that the initial stop of Miller’s car was not legitimate.

As a result, the court suppressed cocaine that Vogel found in a consensual search following this pretextual stop.

Nine years later, in 1996, the Supreme Court overruled *Miller* and other lower court cases that prohibited pretextual traffic stops. In *Whren v. United States*,²⁶ the Court held that: “[T]he constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations of the individual officers involved Subjective intentions play no role in ordinary ... Fourth Amendment analysis.”

Whren authorizes police officers to conduct pretextual stops with impunity, but such stops were also common before *Whren*, and rarely disapproved. Some courts rejected the legal argument against pretextual stops years before the Supreme Court reached the issue.²⁷ Other courts rejected similar claims for lack of proof. The problem was the difficulty of showing the officer’s pretextual purpose in making the stop if he didn’t happen to admit it. Consider *Esteen v. State*, a Florida state court decision, also from 1987:

Trooper Robert Vogel was in his marked vehicle parked on the median of I-95. Parked alongside him in another patrol car was Trooper Collins and his narcotics dog, Dixie. Vogel observed a northbound car traveling at about 45 MPH and driving in an erratic fashion, which he described as “weaving within the right lane”²⁸

This sounds like the prologue to another drug stop, but this time, rather than admitting it as he did in *Miller*, Vogel testified that he did not have any suspicion that the driver was transporting drugs and that he stopped the car only because of his concern that the driver was drunk or asleep, or because the vehicle might be having some mechanical difficulty.²⁹

Therefore, the court concluded, “the record supports the trial court’s finding that Vogel was justified in making the stop.”³⁰

²⁵ 821 F.2d 546, 549 (11th Cir. 1987).

²⁶ *Whren v. United States*, 517 U.S. 806, 813 (1996).

²⁷ See, e.g., *State v. Irvin*, 483 So. 2d 461, 462 (Fl. App. 5th Dist. 1986) (“[T]hat the police may have wished or even intended to detain a suspect for another reason does not invalidate an apprehension which follows the commission of a traffic or other offense which would subject any member of the public to a similar detention.”)

²⁸ *Esteen v. State*, 503 So. 2d 356 (Fl. App. 5th Dist. 1987).

²⁹ *Id.* at 358.

³⁰ *Id.*

The Middle

Trooper Vogel attracted attention. He was honored repeatedly by law enforcement organizations, and in 1987 was the subject of a flattering profile on *60 Minutes*. In 1988 Vogel was elected Sheriff of Volusia County, Florida. One of his first official acts was to set up a “Selective Enforcement Team” of deputies trained in his own techniques of highway drug profiling.³¹ By then his fame had spread beyond Florida to Washington, where the DEA was developing a nationwide program of highway drug interdiction, Operation Pipeline.

Law enforcement in the United States is notoriously fragmented. If the French Ministry of the Interior were to develop a national plan for drug interdiction it would implement that plan directly, through the French National Police and the national Gendarmerie, the two agencies responsible for law enforcement in urban and rural areas, respectively.³² In the United States there are approximately 18,000 separate police agencies.³³ The great majority of law enforcement is carried out by local police forces, typically sheriffs’ departments with elected sheriffs in command (for example, Robert Vogel in Volusia County, Florida, as of 1988), or municipal police forces under the command of police chiefs chosen by local elected officials. To create a national program in the United States, the DEA had to recruit the voluntary participation of hundreds if not thousands of these state and local police forces, and construct a framework in which they could work as independent agencies.

The core of Operation Pipeline was training: “Each year, the [DEA], with the assistance of state and local highway officer, conduct[ed] dozens of training schools across the country, attended by other state and local highway officers.” In addition, DEA resources made it possible for “state and local agencies ... to share real-time information with other agencies,” and to “immediately obtain the results of their record checks and receive detailed analysis of drug seizures.”³⁴ The DEA’s official history of Operation Pipeline says that “the success of [unrelated] highway interdiction programs [in the early 1980s] in New Mexico and New Jersey eventually led to the creation of Operation Pipeline in 1984.”³⁵ That may be, but both by his own account³⁶ and that of Operation Pipeline instructors,³⁷ the training

³¹ Webb, *supra* note 18 at 123.

³² Ministère de l’Intérieur, *The General Directorate of the National Police*, available at: <http://www.interieur.gouv.fr/rubriques/divers/anglais/dgpn>; Ministère de l’Intérieur, *The General Directorate of the National Gendarmerie*, available at: <http://www.interieur.gouv.fr/rubriques/divers/anglais/gendarmerie>

³³ U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *Law Enforcement Statistics*, available at: <http://www.ojp.usdoj.gov/bjs/lawenf.htm>

³⁴ U.S. Drug Enforcement Agency, *Operations Pipeline and Convoy*, available at: <http://www.usdoj.gov/dea/programs/pipecon.htm>

³⁵ *Id.*

³⁶ Harris, *supra* note 6 at 22.

³⁷ Webb, *supra* note 18 at 123.

program they used was a direct application of the profiling techniques developed by Robert Vogel. Ultimately, some 27,000 officers across the country received such training.³⁸

It's easy to see how this program might have been sold to state and local police officials. The key argument would have been that participation in Operation Pipeline would not cost their agencies a dime. They could do it in the interstices of their existing operations, as they went about their other work, as a form of law enforcement multitasking.

The most important duties of highway patrol officers are infrequent events: They must respond to periodic accidents and other emergencies, police extreme violations of traffic regulations (drivers who do 130 miles an hour, or drag race in traffic), and handle occasional nontraffic crimes on the highway. In between times they may deter routine traffic violations to some extent by sporadic enforcement of speed limits and other official rules, but their most important jobs are to be available and to be visible. As long as all they need to do, most of the time, is be there and give out some tickets, why not troll for drugs along the way? After all, the officers have virtually unlimited discretion in choosing which few cars to stop, and are at least as visible as otherwise when they question a drug suspect by the side of the road or conduct a search for drugs. Of course, the state and local officers who do this need training, backup, coordination—the very items that Operation Pipeline was happy to provide.

In reality, no major operational program is cost free. Training and coordination take time, processing drug arrests takes time, and focusing attention on drugs takes time and attention from other law enforcement activities. In a 1998 pamphlet extolling Operation Pipeline, the California Highway Patrol emphasized how well it fit with their other duties:

What the Department has learned from Operation Pipeline training is that an enthusiastic traffic officer with training who vigorously works the roads for speeders, drunk drivers, car thieves, safety belt violators and unregistered vehicles is also the most likely to catch drug couriers.³⁹

The truth was less of a win-win proposition. By 1996, the California Highway Patrol had organized special drug interdiction units whose “primary objective” was “highway drug interdiction ... to apprehend drug traffickers and confiscate illegal drugs.” The officers involved were told, in so many words, that traffic safety was not their concern: “Continue to concentrate on drug enforcement duties” wrote one supervisor, “and let the field officers handle the traffic problems.”⁴⁰

³⁸ Id.

³⁹ California Highway Patrol, *Operation Pipeline Training Targets Drugs*, (1998), available at: <http://www.chp.ca.gov/pdf/per98-12.pdf>

⁴⁰ Cal. State Assembly Democratic Caucus Task Force on Gov't Oversight, *Operation Pipeline: California Joint Legislative Task Force Report* (Sept. 29, 1999), available at <http://www.aclunc.org/discrimination/webb-report.html> (hereinafter “Pipeline Report”).

The costs of participation in Operation Pipeline, however, were opportunity costs. Traffic and law enforcement may have suffered in other respects,⁴¹ but there was little or no drain on the budgets of the agencies involved. The benefits, on the other hand, were visible and substantial. Then as now, traffic enforcement is boring, but a big drug bust is a catch—\$10,000 worth of cocaine seized, two bad guys put away. It's a satisfying, attention grabbing, career-building success; it generates headlines and trophies. And it also probably generates cash. In the mid-1980s, almost simultaneously with the beginning of Operation Pipeline, there was another major development in the War on Drugs: a dramatic increase in the seizure and forfeiture of the assets of drug suspects, and in the use of those forfeited assets to fund local police forces.

Forfeiture is an old practice. The common type—"civil forfeiture"—is described legally as a proceeding against an asset, the thing itself rather than its owner, because it is of a type that is defined as forfeited to the government. Under federal law that includes illegal drugs, any equipment and materials used in their manufacture and distribution, all vehicles or weapons or other equipment used to transport or distribute such drugs, any real estate used to violate drug laws, and any money, negotiable instruments, securities, or other things of value obtained as the proceeds of illegal drug transactions or intended for use in such transactions.⁴² The procedure for civil forfeiture is attractively simple, from the point of view of the government. The asset in question may be seized if there is probable cause to believe that it is forfeitable.⁴³ No criminal charges are necessary; the government merely takes possession of property that is presumably its own. A "claimant"—that is, the owner or a co-owner—may contest the seizure, but in such a proceeding, once the government has presented enough evidence to show probable cause to believe that the asset is forfeitable, the claimant has the burden of proving by a preponderance of the evidence that the forfeiture is improper.⁴⁴

Until 1984, the proceeds of federal forfeitures were deposited in the general fund of the United States Treasury. In 1984, Congress created two special forfeiture funds earmarked for law enforcement, in the Department of Justice and in the United States Customs Service,⁴⁵ and amended governing law to permit the federal government to "transfer the [forfeited] property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property."⁴⁶ This change coincided with a huge increase in drug-related forfeitures. The amount deposited in the Justice Department's

⁴¹ Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 San Diego L. Rev. 79 (1996); Bruce L. Benson et al., *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 Pub. Choice 21 (1995).

⁴² 21 USC §881.

⁴³ 18 USCS §981(b)(2).

⁴⁴ 19 USCS §1615, 18 USC §981(d).

⁴⁵ GAO, *Asset Forfeiture: Historical Perspective on Asset Forfeiture Issues* (March 19, 1996), p. 3.

⁴⁶ 21 USCS §881(e)(1)(A).

Asset Forfeiture Fund (including criminal as well as civil forfeitures) grew from \$27 million in 1985 to \$556 million in 1993.⁴⁷ The amount that was transferred to state and local police agencies grew in parallel, from \$23 million in 1986 to \$283 million in 1991.⁴⁸

Forfeiture is also available under many state laws, although the terms are not always as appealing to law enforcement. In Missouri, for example, proceeds of forfeitures are earmarked for education.⁴⁹ But if the forfeiture is part of a program with federal participation—for example, Operation Pipeline—state or local officers can seize assets, turn them over to the feds, and get most of the proceeds back directly from the Department of Justice. This is a particularly desirable form of funding because it is independent of local taxpayers and local elected officials. A report prepared for the Department of Justice in 1993 describes an extreme version of this incentive, and its implications for the “multijurisdictional drug task forces” the DEA was busy setting up around the country:

Asset seizures play an important role in the operation of [multijurisdictional drug] task forces. One “big bust” can provide a task force with the resources to become financially independent. Once financially independent, a task force can choose to operate without Federal or state assistance.⁵⁰

In other words, if a police commander wins big in this lottery he can become a politically independent, self-financing bounty hunter.

But how to do it? To win you have to find drugs, in quantity, and that turns out to be quite hard. Many Operation Pipeline officers did not share Robert Vogel’s record of success, or perhaps they were less comfortable than Vogel with a high rate of failure. Sometimes they complained about their failures, and were told to persevere. “Keep up your enthusiasm. I know that it seems that seizures can be few and far between,” a California Highway Patrol supervisor wrote to a Pipeline officer who over a 9-month period had stopped more than 1200 cars, searched 163, and found drugs only 18 times.⁵¹ As best we can tell, the overall record in California is comparable: fewer than 10% of highway drug searches, and a tiny fraction of highway drug *stops*, produced any contraband drugs.⁵² In New Jersey, a report by the state Attorney General’s Office found that only 19% of highway searches produced an arrest or a seizure, and a much smaller fraction of all drug stops.⁵³

⁴⁷ CIVIL ASSET REFORM ACT, Report 106-192, Committee on the Judiciary, House of Representatives (Rep. Hyde Chair), 106th Congress, 1st sess., June 18, 1999, p. 4.

⁴⁸ Annual Report of the Dept. of Justice Asset Forfeiture Program, Fiscal Year 1996, p. 3.

⁴⁹ Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 52–53, n. 66 (1998).

⁵⁰ Justice Research and Statistics Association, Multijurisdictional Drug Control Task Forces: A Five-Year Review 1988–1992, p. 9 (Oct 1993), quoted in Blumenson & Nilsen, *supra* note 49, at 35.

⁵¹ Pipeline Report, *supra* note 40 at 19.

⁵² *Id.* at 20.

⁵³ Peter Verniero & Paul H. Zouber, Attorney Gen. of N.J., Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 28 (1999).

Unfortunately, the problem is built into the plan. The reason highway patrol officers can do this sort of drug interdiction in the first place is that they have the discretion to stop virtually any one of the thousands of drivers who speed by them. By the same token, however, they must make their initial choices on the basis of very limited information: what they can see at high speed, from a distance. As a result, they rarely find what they are looking for. Not surprisingly, the officers use any clue that might improve their odds, and race is a clue that is always available and widely believed to be associated with drug trafficking.

A DEA web site states: "Although Operation Pipeline relies in part on training officers to use characteristics to determine potential drug traffickers, it is important to understand that the program does not advocate such profiling by race or ethnic background."⁵⁴ The accuracy of this statement depends on what the meaning of the word "advocate" is. The DEA and other federal drug control agencies certainly provided detailed, specific information that could be read as instructions on how (and why) to conduct racial profiling, if a police force happened to be interested. For example, in 1999 the web site of the Office of National Drug Control Policy told visitors that in Trenton, New Jersey, "crack dealers are predominantly African-American males," powder cocaine dealers are "predominantly Latino," heroin traffickers are "mostly Latinos," and the marijuana market is "controlled by Jamaicans."⁵⁵ As recently as 2001 that office reported that "New York City-based Dominican DTOs [Drug Trafficking Organizations] are prominently mentioned as having an ever-increasing role in supplying heroin and cocaine to DTOs" in the Washington/Baltimore area, while "Jamaican DTOs continue their marijuana distribution activities" in that area.⁵⁶ This is not the slightest bit surprising. The original, airport-based, drug courier profiles on the 1970 and early 1980s frequently included race or ethnicity as a factor—as we have seen—but at that time the racial aspect of those profiles received little attention.

Robert Vogel himself has denied that race was ever an element of the drug courier profiles he taught. Lou Garcia, a canine-unit deputy who worked in Vogel's Selective Enforcement Team in Volusia County, remembers things differently. In an interview for a 1999 article, Garcia described a meeting on the

⁵⁴ U.S. Drug Enforcement Administration, *Operations Pipeline and Convoy*, available at: <http://www.dea.gov/programs/pipecon.htm>

⁵⁵ C. J. Chivers, *Ex-Police Leader's Claim of Bias Attacked*, N.Y. Times, Oct. 4, 1999, at B4.

⁵⁶ Office of Nat'l Drug Control Policy, National Drug Control Strategy, The High Intensity Drug Trafficking Area Program: 2000, at 164–65 (2001). See also, e.g., Nat'l Narcotics Intelligence Consumers Comm. ("NNICC"), The NNICC Report 1997: The Supply of Illicit Drugs to the United States (1998):

Colombia-based traffickers continued to control wholesale level cocaine distribution throughout the heavily populated northeastern United States ... often employing Dominican criminals as subordinates ... In major U.S. cities, organized criminal groups of Cuban, Jamaican, and Mexican nationals, as well as African-American and ethnic Dominican gangs, dominated the retail market.

median strip of highway I-95 at which Vogel told his Selective Enforcement deputies to focus on Black and Hispanic drivers. Garcia thought the injunction was superfluous: “I knew who they were stopping. I saw the people. It was Blacks, mostly, and they were all being pulled over for weaving. The Black race was the only race I knew that wasn’t able to stay in the lane.”⁵⁷

There’s a name for this race-specific traffic violation: Driving While Black.⁵⁸

The End

On Sunday, February 28, 1999, the Newark *Star Ledger* published a lengthy interview with Colonel Carl Williams of the New Jersey State Police on the subject of drug interdiction. Williams explained: “Today with this drug problem, the drug problem is cocaine or marijuana. It is most likely a minority group that’s involved with that ...” Williams condemned racial profiling—“As far as racial profiling is concerned, that is absolutely not right. It never has been condoned in the State Police and it never will be condoned in the State Police”—but he said that the illegal drug trade is ethnically balkanized: “If you’re looking at the methamphetamine market, that seems to be controlled by motorcycle gangs, which are basically predominantly White. If you’re looking at heroin and stuff like that, your involvement there is more or less Jamaicans.” Hours later, still on Sunday, New Jersey Governor Christie Whitman fired him from his job as superintendent of the New Jersey State Police because “his comments today are inconsistent with our efforts to enhance public confidence in the State Police.”⁵⁹ Six months later Colonel Williams sued the state for damages, pointing out that he had said nothing that couldn’t be found on federal government web sites.⁶⁰

On April 20, 1999, the Attorney General of New Jersey—after years of defending the New Jersey State Police in court and in public—switched sides. He dropped an appeal of a trial-court decision condemning highway stops on the New Jersey Turnpike, and simultaneously issued his own report that racial profiling by the State Police was “real.”⁶¹

What happened?

⁵⁷ Webb, *supra* note 18 at 125.

⁵⁸ “Driving While Black” appears to be an older term than “racial profiling.” There are news stories that refer to it in the early 1990s as a concept that was well known in the Black community. For example, a story from 1990 quotes a Black teenager from Teaneck, NJ: “We get arrested for D.W.B. ... You know, driving while Black.” Tim Golden, *Residents and Police Share Lingering Doubts in Teaneck*, New York Times, 5/21/1990, p. B1.

⁵⁹ Kathy Barrett Carter & Ron Marisco, *Whitman Fires Chief of State Police*, Star Ledger (New Jersey), Mar. 1, 1999, at 1A.

⁶⁰ See notes 55 and 56 *supra*, and accompanying text.

⁶¹ Peter Verniero, Att’y Gen. of N.J., *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* (1999).

Colonel Williams' comments require some unpacking. He says that racial profiling is "absolutely not right" and that his troopers have never done it, but he goes on to give a detailed racial description of drug crimes. What should we make of this?

At first blush, Williams seems to have done no more than restate the common law enforcement position that minority groups dominate major drug trafficking in the United States. Supporters have described him as an honest cop who was fired for telling the unpleasant, non-PC truth.⁶² In their view, he was saying: "We don't target by race, we just arrest those who should be arrested. Maybe it's unfortunate that most of them turn out to be Black and Hispanic, but that's not our fault." But Colonel Williams' comments could also be interpreted as a wink and a nod in defense of racial profiling: "Of course we stop and search motorists based on their race—because it works. The first rule of duck hunting is hunt where the ducks are. So cut us some slack." He didn't *say* that—the official line had to be the opposite—but didn't he imply it?

It is certainly not news, now or in 1999, that American police devote a disproportionate amount of their attention to racial and ethnic minorities, especially African Americans. They usually get away with it. If it's seen as a problem at all, they just deny that race had anything to do with their behavior, and that's the end of it. Official hypocrisy about race is hardly new. So why was Colonel Williams tossed overboard?

The short answer is that the type of highway drug interdiction that Operation Pipeline promoted was a dumb idea, and the racial profiling it incorporated was crude and obvious. Operation Pipeline put thousands of police officers out on the highway across the country in a competitive and potentially lucrative search for drugs and money. Their task: to spot drug couriers—who were described to them as Black and Hispanic—at a distance, among the huge anonymous stream of cars speeding by. Unsurprisingly, these officers concentrated heavily on Black and Hispanic drivers. With little else to go on, they did so in a transparent and indiscriminate manner, which provoked a powerful backlash. The cops were caught red handed.⁶³

The legal issue at stake here is not difficult. The police may not target Blacks because they believe that Blacks as a group are likely to be criminals. That's racial profiling, and it is illegal. In *Whren v. United States*, the same opinion in which the Supreme Court held that it was constitutional to use traffic stops as a

⁶² Heather MacDonald, *The Myth of Racial Profiling*, City Journal Vol. 11, No.2 (Spring 2001), available at http://www.city-journal.org/html/11_2_the_myth.html

⁶³ Operation Pipeline was a dumb idea in another respect as well: It had no major impact on the flow of illegal drugs. For example, drug interdiction by the Maryland State Police on I-95—described officially as one of the most successful programs of its kind—was designed to cut off the flow of drugs to from New York and New Jersey to the Washington/ Baltimore metropolitan area. Judging from official reports, however, from 1995 through 2000 the Maryland State Policed managed to seize less than half of 1% of the cocaine consumed in Washington and Baltimore. Gross & Barnes, *supra* note 20 at 750–53.

pretext for drug investigations,⁶⁴ the Court also reiterated that “the Constitution prohibits selective enforcement of the law based on considerations such as race.”⁶⁵ The Court added that race-specific policing violates the equal protection clause of the Fourteenth Amendment and not the Fourth Amendment prohibition on unreasonable searches, but it’s illegal all the same.

The factual question is much more of a problem. Did the cops target *Blacks*? Or did they just do their job and target *criminals*, most of whom happen to be Black? In most contexts it’s very hard to tell.

Suppose that 80% of the young men who are stopped, questioned, and sometimes searched by police officers in a particular city are Black, even though 60% of the population is White. It might look like the cops are deliberately going after Blacks, but maybe they are just focusing on high-crime neighborhoods, and those are the areas where the pedestrians and the residents are overwhelmingly Black. In addition, the decision to stop a specific person might be based on a wide range of observations by an officer operating at close range. These observations may justify the officer’s decision in non-racial terms: “there was a bulge in his pocket;” “when he saw me he attempted to conceal an object under his coat;” “he kept looking over his shoulder;” and so forth. In any event, the initial encounter between the officer and the suspect will probably be considered “consensual,”⁶⁶ and it may provide additional non-racial case-specific information—“he answered my questions evasively”—that could justify a more extensive and coercive intrusion, usually a detention or a pat-down search .

The police may do a passable job of honing in on young Black men on the street who are more likely than average to be involved in criminal activities. It’s not obvious, but it’s possible. Whether they do or not, they will probably be able to explain any particular encounter in race-neutral terms, and they will certainly be able to say that because each stop was based on unique observations, no overall racial motive can be inferred from the racial makeup of the suspects. Equally important, on the streets of a large city the cops know where to look for lower class young Black men, and can spot them at a distance. Black lawyers, grandmothers, teachers, and servicemen are unlikely to get caught in the net.

Highway stops, by contrast, are stylized. An officer in a cruiser pulls up behind a car and turns on his flashing light and perhaps his siren, ordering the driver to stop. In deciding to do so, he can only rely on the few things he can see: the license plate, model and appearance of the car; the speed and direction of travel; other traffic violations; and the appearance of the occupants, including, of course, race and gender. As a result, it is hard to narrow the field to a plausible set of suspects, and equally hard to argue that the officer made a plausible, legitimate, holistic nonracial judgment that this car might be dirty.

⁶⁴ 517 U.S. 806, 813 (1996). See *supra* note 26 and accompanying text.

⁶⁵ *Id.*

⁶⁶ See *supra*, note 20 and accompanying text.

Highways are also impersonal and democratic. Everybody in America drives; there are no ghettos or exclusive neighborhoods on the interstate. If you stop people by race on the highway, you're likely to get a reasonably representative cross section of that race, Hispanic teachers and Black civil servants, as well as jobless high school dropouts and undocumented aliens.

In short, racial profiling is a much riskier on the highway than on city streets. It's easier to spot, easier to prove, harder to defend, and more likely to victimize substantial law-abiding citizens. The backlash was not long in coming. I'll mention only a few highlights.

- In June, 1992, the *Orlando Sentinel* ran a series of articles collectively entitled "Tainted Cash or Easy Money?" The paper ultimately won a Pulitzer Prize for this series, "For exposing the unjust seizure of millions of dollars from motorists—most of them minorities—by a sheriff's drug squad." The subject of the series: Sheriff Bob Vogel of Volusia County and his Selective Enforcement Team. A look at some of the headlines gives an outline of the story:

June 14: "Volusia Deputies Have Seized \$8 Million From I-95 Motorists. The Trap Is for Drug Dealers, but Money Is the Object. Three of Every Four Drivers Were Never Charged."

June 15: "Blacks, Hispanics Big Losers in Cash Seizures. A Review of Volusia Sheriff's Records Shows that Minorities Were the Targets in 90 Percent of Cash Seizures Without Arrests."

June 16: "Confiscated Cash Bankrolls Fight Against Drugs. Critics Say the Seizure Law Encourages Police Agencies to Spend Time Looking for Drug Money Instead of Fighting Crime."

June 17: "Videotape Gives a Look at Volusia Squad's Tactics. The Tape Reflects the Findings of a 'Sentinel' Investigation. In 31 Traffic Stops, 25 of the Drivers are Black or Hispanic."

As the *Sentinel* pointed out, the Selective Enforcement Team did occasionally seize large quantities of drugs, or hoards of cash that were obviously intended for criminal purposes. But their day-to-day business had sunk to the level of highway robbery. In one case, for example, a deputy sheriff stopped Joseph Kea, a Black Navy reservist from Savannah, Georgia, for driving 6 miles over the speed limit.⁶⁷ Kea was issued a warning, and consented to a search of his car. The deputy found his Navy uniform in the trunk, and a nylon bag with \$3,989 in cash. The deputy decided that this meant that Kea was a drug trafficker and seized the money, but did not arrest Kea. Kea hired a lawyer who provided the sheriff's office with pay stubs to account for the cash. After eight months of bickering the sheriff's office agreed to a "settlement:" they returned \$2,989 and kept \$1,000. Kea's lawyer took another 25% of Kea's share of his own money, as a fee.

⁶⁷ Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, *Orlando Sentinel*, June 14, 1992, at A1.

- Early in the morning of May 8, 1992, a Maryland State Trooper stopped a car in which Robert Wilkins, an African American lawyer, was driving from Chicago to Washington, D.C. He was returning from the funeral his grandfather, a minister, with his aunt, uncle, and cousin, driving through the night to get to work that morning. The trooper asked for consent to search the car because they had “problems with rental cars coming up and down the highway with drugs.” Mr. Wilkins was a deputy public defender in the Public Defender Service for the District of Columbia. Unlike almost all drivers who are asked, he refused to agree to the search. In response, the trooper had the family wait for over half an hour and then stand out in the rain while a German shepherd sniffed the car carefully but found nothing.⁶⁸ This stop got a lot of attention. Wilkins became the lead plaintiff in the first of two racial profiling class action lawsuits brought by the ACLU against the Maryland State Police, along with many other innocent Black motorists, from all walks of life, who had been stopped, sniffed, or searched.
- In 1993, the New Jersey Office of the Public Defender began a systematic effort to prove that the New Jersey State Police engaged in racial profiling.⁶⁹ They focused on the southern end of the New Jersey Turnpike, New Jersey’s portion of I-95, which runs from Miami, Florida, to the Canadian border in Maine. The office hired Professor John Lamberth, chair of the psychology department at Temple University, who conducted two surveys of a sort that could never be done on city streets. First, he had fixed observers watch the cars passing by on the Turnpike and record the race of the drivers, between 8 a.m. and 8 p.m., in June of 1993; 13.5% of the cars had a Black occupant. Second, he had an observer drive the highway with cruise control set to the speed limit, and count the number of cars that passed him, the number he passed, and the race of the occupants. More than 98% of the cars passed the observer, and therefore could have been stopped for speeding; of these “violators,” 15% were Black. On the other hand, official records showed that 46% of those stopped were Black, which means that Black speeders were about five times as likely to be stopped as nonblack speeders, even lumping drug stops together with ordinary traffic stops.
- In January 1995 the ACLU and the Maryland State Police agreed to a court-supervised settlement of the racial profiling suit that followed the May 1992 stop of Robert Wilkins and his family.⁷⁰ Under the settlement, the State Police—while continuing to deny that they engaged in racial profiling—agreed to maintain detailed information on car searches on I-95 in Maryland. In 1996, using the records collected as part of this settlement, Professor Lambert

⁶⁸ Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Miami L. Rev 425, 439–40 (1997).

⁶⁹ See *State v. Soto*, 324 N.J. Super. 66; 734 A.2d 350 (1996).

⁷⁰ *Wilkins v. Maryland State Police*. Civil Case No. CCB-93-468 (D. Md. 1993) (settlement agreement) (copy on file with authors).

conducted a traffic survey in Maryland similar to the one he had done in New Jersey, with similar findings.⁷¹

- Also in 1996, a Superior Court judge in New Jersey issued a detailed opinion condemning the New Jersey State Police and excluding drugs seized in 17 cases because of racial profiling on the New Jersey Turnpike.⁷² By then, in addition to the statistical evidence, there was, among other items, testimony from former troopers that they had been “trained and coached to make race based profile stops.”⁷³

This last the decision was the ruling on racial profiling that the New Jersey Attorney General first appealed, in 1996, and then conceded in 1999. In between, the level of public exposure leaped ahead. For 1996, there are five news stories in the Lexis database that refer to “racial profiling” in the body of the story. For 1999 there are 2714 such stories,⁷⁴ including many attacks on the practice and a major detailed expose of Operation Pipeline.⁷⁵ Racial profiling had become a political liability to anybody who might be associated with it, so the Governor and the Attorney General of New Jersey threw in the towel.

Racial profiling in New Jersey drew more attention than in other states, so it makes sense to spot The End at this about-face by the state government of New Jersey. It’s an arbitrary line. What’s clear is that by the 2000 presidential campaign racial profiling was an identified public enemy. For example, on January 28, 2000, the *State Journal-Register* of Springfield, Illinois, ran a column that began:

In a year of presidential primaries that features some of the most boring and bland candidates in the last 20 years, there seems to be only one issue thus far that has created much excitement—racial profiling.

The three leading candidates—Democrats Al Gore and Bill Bradley and Republican George W. Bush—have all offered their views on the problem. They all agree that racial profiling is a disgrace and a social cancer that is eating away at our society.⁷⁶

Less than a month later, in a debate between the main democratic candidates, Vice President Al Gore of Tennessee and Senator Bill Bradley of New Jersey, the first question was about racial profiling. They responded:

⁷¹ Aff. of Dr. John Lamberth in *Wilkins v. Maryland State Police*, No. CCB-93-468 (D. Md. 1993) (filed November 14, 1996); Mem. in Support of Plaintiffs’ Motion for Enforcement of Settlement Agreement and for Further Relief, *Wilkins*, Exhibit 11 (filed November 14, 1996) (copies on file with authors). For a detailed analysis of the data on racial profiling in Maryland, see Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev 651 (2002).

⁷² *State v. Soto*, 324 N.J. Super. 66; 734 A.2d 350 (1996).

⁷³ *Id.* at 357.

⁷⁴ Since 2000, there have been more than 3000 such stories a year, the limit the search engine will count.

⁷⁵ Webb, *supra* note 18.

⁷⁶ Vibert White, *Make Racism, Hatred and Bigotry Historical Artifacts*, *The State Journal-Register* (Springfield, IL), January 28, 2000, p. 9.

BILL BRADLEY: Last month in the debate in Iowa, when Al said ... that he would issue an executive order, I said, "why doesn't he walk down the hall now and have President Clinton issue an executive order?" (Applause)

AL GORE: First of all, President Clinton has issued a presidential directive under which the information is now being gathered that is necessary for an executive order. Look, we have taken action, but, you know, racial profiling practically began in New Jersey, Senator Bradley. (Cheers and applause)⁷⁷

Epilogue

The End of course was not the end of racial profiling. It was just the end of the story of the rhetoric of racial profiling. We now know what racial profiling is. It's a Bad Thing.

In 1954, the year the Supreme Court decided *Brown v. Board of Education*,⁷⁸ racial segregation was the official policy of a dozen states and thousands of local governments. By 1980, if not earlier, no politician in either major party would defend segregation in public, but our schools and neighborhoods are as segregated as ever to this day. The form has changed and the content has changed, but segregation by race remains a major fact of American life. Racial profiling is more recent and it lost official favor almost as soon as it was named, but it has no more disappeared than segregation. In 1995, for example, Black motorists on I-95 in Maryland were 15 times more likely than Whites to be stopped and searched by Maryland State Troopers; in 2000 they were 6 times more likely to be stopped and searched⁷⁹—an improvement but hardly a cure.

There was a spate of public support for racial profiling after the massive terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001. For example, in the fall of 1999, 81% of respondents on a national poll said they disapproved of "racial profiling,"⁸⁰ and a few conservative commentators were the only people who publicly defended racial profiling on the practical ground that it helps catch bad guys.⁸¹ But after 9/11, on September 14, 2001, a poll found that 58% of Americans favored "requiring Arabs, including those who are U.S. citizens, to undergo special, more intensive security checks before

⁷⁷ Online NewsHour, *Democratic Debates*, Feb. 22, 2000, available at: http://www.pbs.org/newshour/bb/politics/jan-june00/dems_debate2-22.html

⁷⁸ 347 U.S. 483 (1954).

⁷⁹ Gross & Barnes, *supra* note 20 at 720.

⁸⁰ Gallup Poll, Sept. 24, 1999–Nov. 16, 1999, Public Opinion Online, The Roper Center at the University of Connecticut, available at LEXIS, News Library, Rpoll file [hereinafter Roper Data Base] (describing results from question 1, accession no. 0346115, and question 9, accession no. 0346123).

⁸¹ See, e.g., John Derbyshire, *In Defense of Racial Profiling: Where Is Our Common Sense?*, Nat'l Rev., Feb. 19, 2001, at 38; Heather MacDonald, *The Myth of Racial Profiling*, City J., Spring 2001, at 14, 26.

boarding airplanes in the U.S.,”⁸² and similar sentiments were heard from across the political spectrum.⁸³ For example, Floyd Abrams, the celebrated First Amendment lawyer, said that under the scary circumstances we now face, “it seems entirely appropriate to look harder at such people. Remember, Justice [Robert] Jackson said ‘the Constitution is not a suicide pact.’”⁸⁴

Public opinion on racial profiling remains split, depending on how the question is framed. If pollsters describe profiling as a tool in the “fight against terrorism” nearly half approve;⁸⁵ if they describe it as an aspect of law enforcement on the highways or in shopping malls, two-thirds or more say it’s never justified.⁸⁶ But the revisionist rhetoric on racial profiling never stuck, not even right after 9/11. One reason is that by the fall of 2001 government officials up and down the country had just recently committed themselves in public to defeat the cancer of racial profiling, and they were in no position to say otherwise. Consider a bizarre example:

In November of 2001 the Department of Justice began a program of “voluntary” interviews with thousands foreigners residing in America, “the majority Middle Eastern men ages eighteen to thirty-three who came here within the last two years on nonimmigrant visas.”⁸⁷ This certainly sounds like racial or ethnic profiling, but in testimony before the Senate Judiciary Committee, then Assistant Attorney General (later Secretary of Homeland Security) Michael Chertoff said No: “We have emphatically rejected ethnic profiling. What we have looked to are characteristics like country of issuance of passport”⁸⁸ He might as well have said: “We have emphatically rejected age discrimination. What we have looked to are characteristics like date of issuance of birth certificate.”

⁸² Roper Data Base, *supra* note 80 (describing results from question 1, accession no. 0387144, from the Sept. 14, 2001 Gallup Poll); see also David E. Rovella, *Pro-Police Opinions on the Rise, Poll Says Wiretaps, Profiling Gain Juror Support*, Nat’l L.J., Jan. 21, 2002, at A1 (finding that 59% of adults eligible for jury duty say that profiling is acceptable in certain circumstances).

⁸³ See, e.g., Stanley Crouch, *Drawing the Line on Racial Profiling*, N.Y. Daily News, Oct. 4, 2001, at 41; Editorial, *Profiling Debate Resumes*, Denver Post, Oct. 3, 2001, at B6; Michael Kinsley, *When Is Racial Profiling Okay?*, Wash. Post, Sept. 30, 2001, at B7; Stephen J. Singer, *Racial Profiling Also Has a Good Side*, Newsday, Sept. 25, 2001, at A38.

⁸⁴ Henry Weinstein et al., *Racial Profiling Gains Support as Search Tactic*, L.A. Times, Sept. 24, 2001, at A1.

⁸⁵ Opinion Dynamics poll, July 26, 2005 (42% approve, 49% disapprove), Roper Data Base, *supra* note 80 (describing results from question 82, accession no. 1630825).

⁸⁶ Gallup Poll, June 9, 2004 (67% say “never justified” on roads and highways, 72% say “never justified” in shopping malls and stores), Roper Data Base, *supra* note 80 (describing results from question 16, accession no. 0456354 and question 18, accession no. 0456356).

⁸⁷ Allan Lengel, *Arab Men in Detroit to Be Asked to See U.S. Attorney*, Wash. Post, Nov. 27, 2001, at A5.

⁸⁸ Michael Chertoff, *Testimony Before the Senate Judiciary Committee Hearing on Preserving Freedoms While Defending Against Terrorism*, Federal News Service, Nov. 28, 2001, available at LEXIS, News Library, News Group File, All.

Mr. Chertoff had little choice. Ten months earlier his boss, Attorney General John Ashcroft, had told the same committee “[t]here should be no loopholes or safe harbors for racial profiling. Official discrimination of this sort is wrong and unconstitutional no matter what the context.”⁸⁹ If it’s that bad the government Doesn’t Do It—and whatever the government does do is, by definition, something else.

In this new atmosphere, the programs that were most conspicuously associated with the racial profiling as it burst in public awareness were in trouble. Some had been under attack for years, and not just from the ACLU and public defenders. Under the Clinton administration, the Civil Rights Division of the Department of Justice investigated some of the very same police forces that the DEA, another branch of the Justice Department, had worked with to develop the practices that caused the uproar. Specifically:

- Sheriff Vogel and his Selective Enforcement Team were investigated starting in 1993. Vogel narrowly escaped federal indictment in 1995, and the investigation was ultimately closed without charges in 1997.⁹⁰ Vogel—who considered himself vindicated—decided to retire from office in 2000.⁹¹
- In 1996 the Department of Justice began an investigation of the racial profiling on the New Jersey Turnpike. It ended on December 30, 1999, with a consent decree that includes provisions for training, supervising and disciplining troopers to prevent profiling in the future.⁹² By the end of 2001, the Department had settled half a dozen similar racial profiling law suits against other police forces, and more were pending.⁹³
- Operation Pipeline itself seems to have gone into a sort of bureaucratic hibernation. Its Web page still exists—and it still boasts about the program’s successes—but the drug seizures it totals up are nearly five years out of date: “Jan. 1986-Dec. 2001.”⁹⁴ After several calls to the DEA asking whether Operation Pipeline was still in existence, we were referred to a public information officer in the Detroit Field Office, who eventually responded by e-mail: “I have tried numerous times to get you the information you need to no avail so I am suggesting that you file a Freedom of Information (FOIA) Request with the DEA. ... I wish I could have been of more assistance ...”⁹⁵

⁸⁹ Nomination of Senator John Ashcroft to the Office of Attorney General: Hearings Before the Senate Comm. on the Judiciary, 107th Cong. (Jan. 22, 2001) (answer from Senator Ashcroft, to written question submitted by Senator Russell D. Feingold), available at <http://www.senate.gov/~leahy/press/200101/ashcroft.html>

⁹⁰ Ludmilla Lelis, *Feds Had Evidence on Vogel; Prosecutor Didn’t Think Case Was Strong Enough to Win*, Orlando Sentinel, Oct. 3, 1997, p. A1.

⁹¹ Amy C. Ripel, *Sheriff Vogel: It’s Time to Go; After Years of Success and Controversy, He Decided Not to Run for a Fourth Term in Volusia*, Orlando Sentinel, June 24, 2000, p. A1.

⁹² United States V. State of New Jersey, Civil No. 99-5970(MLC) (D. NJ. 1999), Joint Application for Entry of Consent Decree, available at: <http://www.usdoj.gov/crt/split/documents/jerseysa.htm>

⁹³ Gross & Barnes, *supra* note 20 at 728 n. 219.

⁹⁴ <http://www.dea.gov/programs/pipecomp.htm>

⁹⁵ The calls and e-mails to the DEA were done by Mr. Joel Flaxman, University of Michigan Law School, Class of 2007.

- Other federal drug programs have also changed their tune, in part. As we have seen, a 2001 national report from the Office of National Drug Control Policy described drug distribution in the Washington/Baltimore area as dominated by “Dominicans” (heroin and cocaine) and “Jamaicans” (marijuana).⁹⁶ The 2004 edition of the report describes those responsible for drug distribution in the same area as “Drug Trafficking Organizations” and “gangs;”⁹⁷ for the New York/New Jersey area there is no longer any description of the drug distributors whatever.⁹⁸ Nevertheless, the old versions survive in descriptions of drug trafficking in areas of the country that were not caught in the racial-profiling spotlight. The same 2004 report continues to discuss the dominance of “African American street gangs” in drug distribution in Wisconsin and Montana, and of “Jamaican” and “Hispanic” traffickers in Ohio.⁹⁹

By now, half a dozen years after *The End* we may have reached at least a temporary equilibrium on racial profiling as a social issue. It has three components: (1) Racial profiling is broadly defined, far more so than when the term originated. (2) Racial profiling is actively condemned. (3) Racial profiling continues, if perhaps less frequently and certainly less conspicuously than before. I will discuss these elements in turn.

The Reach of the Term “Racial Profiling”

A question on a 1999 Gallup poll defined racial profiling as follows: “some police officers stop *motorists* of certain racial or ethnic groups because the officers believe that these groups are more likely than others to commit certain types of crimes.”¹⁰⁰ By 2004 the same polling organization was asking about racial profiling at airports and shopping malls as well.¹⁰¹ Airports, of course, are where “profiling” originated, but it only picked up the adjective “racial” after Driving While Black on interstate highways made profiling a major national issue. The shopping mall is a new context for “profiling,” and not the only one.

In 2000 Kenneth Meeks, an African American journalist, published a book entitled *Driving While Black: What to do if You are a Victim of Racial Profiling*.¹⁰² It includes a chapter on “Driving While Black” (subtitled “the New Jersey Turnpike”)—and chapters on lots of other activities: “Riding the Train While Black,” “Shopping Alone While Black,” “Shopping in a Group While Black,” “Flying While Black,” “Living While Black.” By 2000, it seems, racial profiling had escaped from the highway and spread across the land.

⁹⁶ See *supra* note 56 and accompanying text.

⁹⁷ Office of Nat’l Drug Control Policy, National Drug Control Strategy, The High Intensity Drug Trafficking Area Program: 2004, at 157–63 (2004).

⁹⁸ *Id.* at 97–101.

⁹⁹ *Id.* at 65, 102, 123.

¹⁰⁰ Gallup Poll, Sept. 24, 1999–Nov. 16, 1999, *supra* note 80 (emphasis added).

¹⁰¹ See note 82 *supra*.

¹⁰² Broadway Books (Random House), New York, 2000.

So far I haven't needed a general definition of racial profiling, but I do now:

Racial profiling" occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating.¹⁰³

Under this definition, racial profiling can and does occur on trains and planes, streets, and malls, as well as on I-95. By extension, it includes similar conduct by security officers as well as police, and seizures and deportations as well as investigations. The evacuation and internment of West Coast Japanese Americans during World War II was an outrageous case of mass racial profiling. Racial profiling has been a feature of police work in many settings for as long as we have had police, but that's not what we used to call it. Now anything within shouting distance is called racial profiling, and some beyond. I'll give three of many examples:

- In 1994, the New York City Police Department launched an aggressive anti-gun campaign that resulted in the stopping and frisking of tens of thousands of young Black and Hispanic men. In 1999, after a comprehensive study of this program by the New York State Attorney General, the United States Civil Rights Commission charged the Police Department with racial profiling. The Department replied that it deployed its officers in high-crime neighborhoods that are mostly minority dominated, and that the racial breakdown of those stopped corresponded to the racial makeup of those arrested or suspected of violent crimes.¹⁰⁴ The same dispute could have occurred ten years earlier, but the police practice would have been called something else—"racial discrimination" or perhaps "harassment."
- In 2004 the *Harvard Civil Rights-Civil Liberties Law Review* published an article entitled "The Law and Genetics of Racial Profiling in Medicine."¹⁰⁵ It's not about law enforcement. It's about racial discrimination in medical care—and in part about racial segregation and racial stereotyping. The authors, who never define racial profiling, seem to use the term synonymously with "racial discrimination,"¹⁰⁶ but apparently *The Law and Genetics of Racial Discrimination in Medicine* wouldn't ring the right bell.

¹⁰³ Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 Columbia L. Rev. 1413, 1415 (2002).

¹⁰⁴ Id. at 1431–32.

¹⁰⁵ Erik Lillquist & Charles A. Sullivan, *The Law and Genetics of Racial Profiling in Medicine*, 39 Har. Civ. Rights-Civ. Liberties L. Rev. 391 (2004). This is not the only use of the concept of "racial profiling in medicine," but appears to be the main one in a legal journal.

¹⁰⁶ For example, the section entitled "The Legality of Racial Profiling in Medicine" begins: "From a legal standpoint, the constraints on *race discrimination* in general—let alone in health care—are more limited than might be expected given the strong national consensus against such discrimination." Id. at 442 (emphasis added).

- In February 2006 The Detroit News ran a column complaining that “abortionists disproportionately set up shop in predominately African-American neighborhoods.” The headline for the column was *Stop Racial Profiling of Abortion Clinics*.¹⁰⁷

It’s easy to see why racial profiling became so popular a description after 1999. Like Simon Legree, it’s now a well known and hated villain. There aren’t many who fit that bill.

Racial discrimination in the operation of the criminal justice system is ancient and common, but for the most part nobody cares. It is notoriously hard to prove it in court, and equally hard to get politicians to pay attention. We are used to living in a country in which a third of young Black men are in custody or on probation or on parole. Whether it’s due to discrimination or not, we assume that crime and punishment are much more common among those with dark skin. We’re not surprised to hear that Blacks and Hispanic teenagers are harassed by the police, or that young Black men are nearly eight times as likely to be imprisoned as young White men.¹⁰⁸ We barely notice.

When *racial profiling* became commonplace—the phrase, not the practice—all of a sudden one form of racial discrimination by the police became a national crisis. Naturally, every complaint about racial or ethnic discrimination in law enforcement is now described as racial profiling, plus quite a few that have nothing to do with crime or justice. Some of these complaints clearly do involve racial profiling, strictly speaking, and some, whatever their merits on other grounds, are pretty far afield.

The Response to Racial Profiling

The Department of Justice web site lists dozens of publications on the subject of racial profiling, from short notices to long detailed studies. They are plainly intended for a variety of audiences. For the general public, the tone is set by a six-page “Fact Sheet” released on June 17, 2003, when the Department issued guidelines prohibiting racial profiling by federal agencies. The title (after strongly worded quotes from the President and the Attorney General) is unambiguous: *Racial Profiling Is Wrong and Will Not Be Tolerated*.¹⁰⁹ A different publication is aimed at police commanders: *How to Correctly Collect and Analyze Racial Profiling Data: Your Reputation Depends On It!*¹¹⁰ This 150-page report begins by telling the reader that while a majority of the public believes that the police engage in racial profiling, most police chiefs do not, and that this difference in

¹⁰⁷ James B. Teela, *Stop Racial Profiling of Abortion Clinics*, The Detroit News, February 21, 2006, p. 9A.

¹⁰⁸ Paige M. Harrison & Allen J. Beck, *Prison and Jail Inmates at Midyear 2004*, U.S. Dept. of Justice, Bureau of Justice Statistics (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf>

¹⁰⁹ http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf

¹¹⁰ <http://www.cops.usdoj.gov/mime/open.pdf?Item=770>

views poses a serious threat to law enforcement that should be addressed by careful study, training, and work with the affected communities.

The role of the Justice Department in educating local police forces on racial profiling should not be underestimated. It was certainly crucial in the uphill portion of the trip—when the practice was taking hold—and it may be influential now, on the downhill run. Still, after the firestorm in reaction to racial profiling in New Jersey and Maryland, I think the message would have gotten through on its own. In any event, many police departments have taken it to heart. Hundreds, if not thousands, of police forces across the country have issued rules prohibiting racial profiling,¹¹¹ or developed antiprofiling training programs,¹¹² or both.

Professor John Lamberth, who did the original studies for the New Jersey Public Defender and the Maryland ACLU that proved racial profiling on I-95, has organized an outfit called Lamberth Consulting. The web site tells us that it was “formed in 2000 in an effort to provide racial profiling assessment, training, and communication services to universities, states, counties, cities, civil rights groups, litigators, and communities.”¹¹³ Judging from the testimonials on the web site, his clients are mostly police departments.

Lamberth, of course, is not alone. The Racial Profiling Data Collection Resource Center at Northeastern University (which collaborates with Lamberth Consulting), maintains a web site that lists current news on racial profiling investigations in Iowa, Nevada, Missouri, and Rhode Island.¹¹⁴ Even the most casual search on the Internet produces dozens of stories of racial profiling studies, regulations, and reports by police departments from Syracuse to Seattle—typically with the help of consultants. It’s a budding new service industry.

The Practice of Racial Profiling

How far have these reforms penetrated? To what extent has the practice of racial profiling changed in the last decade? There is no way to tell.

In June 2002, 30% of respondents on a national poll of registered Black voters said that they had been subjected to racial profiling, and an additional 22% said it had happened to a family member or an acquaintance.¹¹⁵ This is not a literal description of external reality. Some respondents who believed that they had been profiled may not have been. On the other hand, it’s a good guess that Blacks who

¹¹¹ Lorie Fridell et al., *Racially-Biased Policing: A Principled Response* 24–26 (2001) (results of 2001 survey indicating 12% of law enforcement agencies had modified racial profiling policies and 19% had adopted new ones), available at <http://www.cops.usdoj.gov/mime/open.pdf?Item=1598>

¹¹² *Id.*

¹¹³ <http://www.lamberthconsulting.com/index.asp>

¹¹⁴ <http://www.racialprofilinganalysis.neu.edu/>

¹¹⁵ Public Opinion Strategies poll, June 20, 2002, Roper Data Base, *supra* note 80 (describing results from question 63, accession no. 0412026).

are not registered to vote are considerably more likely to be victimized by racial profiling than the respondents on this survey. The clearest implication is that in 2002 racial profiling remained a huge issue for African Americans.

Most policing in America is done by local police departments—of which, as I’ve mentioned, there are thousands. It’s all but impossible to get an overall picture of what happens across this deeply fragmented landscape. We do know one thing, however: Racial profiling has not been eradicated.

On May 9, 2005, the *Chicago Tribune* published a story under the headline “Shady Cash Fattens Towns’ Coffers Along Drug Routes.”¹¹⁶ It’s surprisingly familiar:

For years, this small town [Hogansville, Georgia] nestled in the pine forests off Interstate Highway 85 has struggled to keep its Police Department financially afloat. But the town is riding high these days on a \$2.4 million windfall—thanks to drug dealers who happened to be passing through. ...

With the help of the federal Drug Enforcement Administration, small towns across the country are filling their coffers with drug money as a result of federal asset forfeiture laws that allow authorities to seize drug dealers’ property, including cars, cash, and houses used to facilitate crime. ...

Law enforcement officials say the law is a powerful tool in the war against drugs. Opponents claim it encourages racial profiling. ...

While seized money cannot be used to hire personnel, it can be used for police training, equipment, vehicles and, in the case of Hogansville, a new police station, a walking trail and a hefty donation to a youth group.

“This has really changed things for us. We have the best equipment and the best-trained officers in this part of the state,” said City Manager Randy Jordan. “What we do here is not a secret. People know if you come to Hogansville and commit a crime, you are going to jail.” ...

Several police departments have been accused of targeting Hispanic and African-American drivers. ...

In Villa Rica, Ga., off Interstate Highway 20 about 30 miles west of Atlanta, police confiscated about \$2 million from 1998 to 2003, enough to build a new police station. But the city curtailed its program after the Justice Department found that the officers had engaged in racial profiling. A federal report said officers would shine spotlights at oncoming cars to “determine the skin color of the occupants.”

Has anything changed, or is the same old show just moving around, from one venue to another?

In October 1988 the *Los Angeles Times* ran a story titled “Police Adapt ‘Profiling’ Tactic to Grab Car Thieves.”¹¹⁷ The article does not criticize the police.

¹¹⁶ Dahleen Glanton, *Shady Cash Fattens Towns’ Coffers Along Drug Routes*, Chicago Tribune, May 9, 2005, p.1.

¹¹⁷ Michael Connelly, *Police Adapt ‘Profiling’ Tactic to Grab Car Thieves*, Los Angeles Times, October 29, 1988, Metro p. 10.

Quite the opposite. It explains how a pioneering unit of the Los Angeles Police Department was applying techniques learned from drug interdiction to car theft, using a “profiling system” based on “such factors as a driver’s age, race and behavior.” The reporter describes with apparent approval how at one intersection on a particular evening “several Latino youths driving new Toyota pickups were pulled over by surveillance officers. All but one of the drivers were allowed to go on their way when they proved ownership of the vehicles they were driving.”

In 2006 the Los Angeles Police Department is operating under a Federal Court consent decree based in part on charges of racial profiling.¹¹⁸ We can be sure that the innovative 1988 experiment in car-theft policing has long since been officially abandoned—and equally sure that the same thing still happens in Los Angeles today. If nothing else, however, this behavior now has a name. In 2006 no cop in his right mind anywhere in the country would own up to racial profiling in a news interview, let alone with pride, and no major newspaper would publish that description without mentioning, in some form, that we all know that racial profiling is wrong. Along the way, it has probably also become less common.

¹¹⁸ See <http://www.usdoj.gov/crt/split/documents/laconsent.htm>

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