

Afterward: September 11th and Racial Profiling

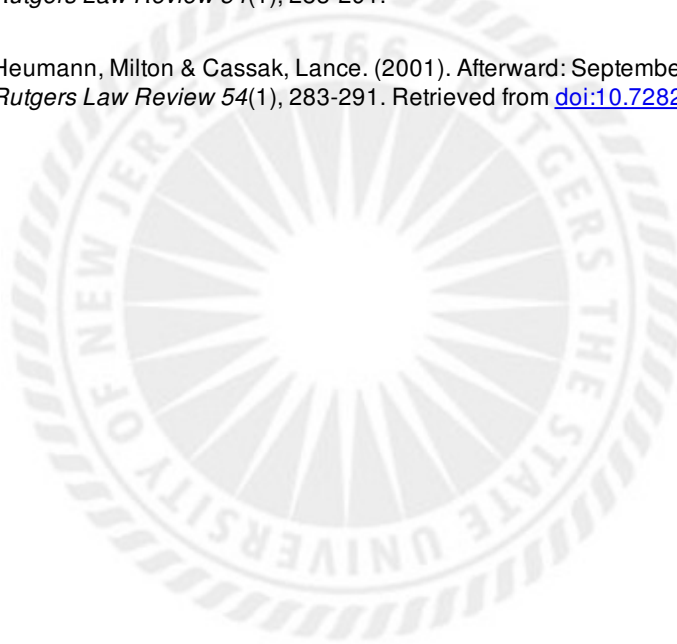
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AFTERWARD: SEPTEMBER 11TH AND RACIAL PROFILING

Milton Heumann and Lance Cassak***

The last edition of the Rutgers Law Review published the Article, Profiles in Justice? Police Discretion, Symbolic Assailants, and Stereotyping in which the Authors discussed various aspects about the practice and current debate over racial profiling. As noted in a postscript, that Article was being prepared for publication just as the monstrous and tragic events of September 11, 2001 occurred, and too late to assess or include observations about how those events affect the debate about profiling. Although we are still in the wake of those events, it is clear that the terrorist attacks have re-invigorated the debate over racial profiling. As we contemplate, both as a nation and individually, how the events of that day will change our lives in this country, it has been frequently observed that there are few, if any, areas of life that the terrorist attack did not touch. That includes the practice of "racial profiling," which was the subject of the previous Article. Though too soon after the events to provide definitive comments on how September 11th will affect the larger public debate on racial profiling, a few observations, albeit tentative ones, can be offered.

I. THE INITIAL RESPONSES

Discussion of the subject of racial or ethnic¹ profiling in newspapers and over the airwaves emerged within a day or two of the attack and continues² with many voices, if not most, wondering whether, as a nation, we have rushed too quickly to condemn racial profiling.³

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1. In the context in which it is raised, it probably makes more sense to describe this as ethnic rather than racial profiling. For the purpose of this brief afterward, however, we will use the more commonly used term of racial profiling.

2. Within three weeks of September 11th, no fewer than eleven articles appeared in major newspapers raising the question whether attitudes towards racial profiling would change in light of the terrorist attacks.

3. In fact, across the country there are reports by several minorities who are not of Middle Eastern descent, but fall victim to profiling because they are perceived to be, including Latinos and South Asians. Annie Nakao, *Arab Americans Caught in Profile*

Many have raised the issue of whether, had law enforcement employed racial profiling, the terrorist attacks could have been prevented; some have simply insisted that racial profiling *would* have prevented the attacks, although evidentiary support for that conclusion did not accompany the assertion.

For others, what occurred on September 11th has prompted more ambivalent feelings. Justice Sandra Day O'Connor, after visiting Ground Zero at the World Trade Center, noted, "we're likely to experience more restrictions on our personal freedom than has ever been the case in our country."⁴ Yet she also quoted Margaret Thatcher, cautioning that "[w]here law ends, tyranny begins."⁵ And, stressing the need for attorneys, she raised some interesting questions:

First, can a society that prides itself on equality before the law, treat terrorists differently from ordinary criminals? And where do we draw the line between them? Second, at what point does the cost to civil liberties from legislation designed to prevent terrorism outweigh the added security that legislation provides?⁶

Similarly ambivalent comments have come from ironic, if not unexpected quarters, with some qualifying, if not fully abandoning, earlier concerns about racial profiling. Thus, from New Jersey Attorney General John Farmer, whose state has served as a focal point in the battle over racial profiling and whose state police are under a Department of Justice consent decree to stop the practice, come measured remarks that appear to stop short of a blanket rejection of racial profiling:

"Last week's events will put a lot of pressure on law enforcement to strike the proper balance between public safety and individual liberty. If you look at American history, liberties have always been calibrated based on the nature of the public threat we have experienced But I don't think it will come to a point where we will sacrifice our individual liberties to maintain public safety."⁷

Similarly, Floyd Abrams, who a few years ago served on a panel

Snare; Detained, Denied Boarding or Kicked off Planes for Looking Middle Eastern, S.F. CHRON., Sept. 28, 2001, at A1.

4. Linda Greenhouse, *A Nation Challenged: The Supreme Court; in New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

5. *Id.*

6. *Id.*

7. Kathy Barrett Carter, *Some See New Need for Racial Profiling*, STAR-LEDGER (Newark, N.J.), Sept. 20, 2001, at 24. Likewise, New Jersey's Attorney General has indicated that some level of profiling may be necessary or desirable in the interest of securing our safety as we face the new threat of mass terrorism. See John Farmer, Jr., *Now is the Time to Reconsider Profiling*, REC. (Bergen County, N.J.), Sept. 26, 2001, at L11.

that advised against profiling on airlines based on factors such as race and national origin, said after the attacks on the World Trade Center and the Pentagon that the airline industry will be challenged to "walk a line that avoids simplistic ethnic profiling while still allowing common-sense law enforcement."⁸

In addition, Abram said:

"It would be a dereliction of duty to the American public to forget that the people who committed these terrible crimes all spoke Arabic to each other "At the same time . . . we don't want to be in a position where we're pulling every Arab-American out of line for detailed strip-searches. At the same time, we have to protect ourselves."⁹

Such sentiments are not limited to those already on the public record regarding profiling. Columnist Michael Kinsley of *Slate*, in addressing the issue of whether racial profiling was among appropriate police practices in response to terrorist attacks, wrote,

"[T]he considerations are practical. How much is at stake in forbidding a particular act of discrimination? . . . [W]e're at war with a terrorist network that just killed 6,000 innocents and has anonymous agents in our country planning more slaughter. Are we really supposed to ignore the one identifiable fact that we know about them?"¹⁰

Kinsley stopped short of endorsing blanket use of security measures based on a person's race or ethnicity, attempting to set a balancing test to prevent the use of generalizations as a vehicle for pure discrimination.¹¹ Another commentator suggested profiling based on race and religion, focusing efforts on those who are both Arab and Muslim, but sparing the large numbers of Arabs who are Catholic, Jewish, and Protestant.¹² Many who expressed distress over attacks on Muslims around the country reflected their own ambivalence in news reports. "Those interviewed spoke of national ideals of colorblindness—but nearly in the same breath they said that for the sake of national safety, the police should single out Arab-looking men for

8. Barrett Carter, *supra* note 7, at 24 (quoting Floyd Abrams, a First Amendment expert). For a discussion of airline profiling approaches developed since September 11th, see David Armstrong & Joseph Pereira, *Flight Risks: Airlines Adopt Aggressive Passenger Profiling Systems*, ANN ARBOR NEWS, Oct. 28, 2001, at A-3.

9. Barrett Carter, *supra* note 7, at 24.

10. Michael Kinsley, *When is Racial Profiling Okay?*, WASH. POST, Sept. 30, 2001, at B07.

11. *Id.*

12. Chris Mooney, *Smart—and Stupid—Profiling*, AM. PROSPECTS ONLINE, Oct. 23, 2001, available at <http://www.americanprospect.com/webfeatures/2001/10/mooney-c-10-23.html>.

questioning."¹³

For some, including some who would otherwise object to racial profiling, the events of September 11th appear to have provided an epiphany of sorts, prompting a realization that they engage in racial profiling of a type that they would otherwise criticize.¹⁴ Indeed, perhaps most interesting, and some measure of how the events of September 11th may be changing the debate, are comments and attitudes from members of the minority communities that one would otherwise expect to be among racial profiling's harshest critics. In response to a reporter's questions about racial profiling in light of the terrorist attacks, one African-American man noted that he has been a victim of racial profiling many times and knows "[I]t's wrong."¹⁵ Yet he admitted to doing it himself; for example, if people of Middle Eastern descent got on a plane, he said, "I'd be nervous. It sickens me that I feel that way, but it's the real world."¹⁶ A Hispanic man expressed a similar sentiment saying that he was absolutely against racial profiling, but would be anxious in the airline scenario.¹⁷ Even a prominent Arab-American living in Chicago was receptive to the idea of *some* profiling directed against Arabs or Muslims: "Hey, I don't want to get hijacked, either, whether it's by an Arab or someone else."¹⁸ Some, including Stuart Taylor of the National Journal, condemned racial profiling practices against African-Americans in the strongest terms, but nonetheless argued in the aftermath of September 11th for an exception to a ban against racial profiling to allow use of heightened security measures against "Arab-looking" persons.¹⁹

A couple of recent polls suggest that those sentiments are not isolated. A recent Gallup poll showed that 71% of African-Americans and 63% of other "non-white" respondents would support special, more intensive security measures before boarding airplanes with Arabs, including United States citizens of Arab descent; a smaller majority of whites—57%—favored such a policy.²⁰ Another poll reflected

13. Sam Howe Verhovek, *A Nation Challenged: Civil Liberties; Americans Give in to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1.

14. This echoes comments made by many in law enforcement at the time racial profiling was coming under intense scrutiny, that every one engages in racial profiling and that they are being unfairly criticized for the practice. Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 51.

15. Verhovek, *supra* note 13, at A1.

16. *Id.*

17. *Id.*

18. Clarence Page, *My, Oh My, Look Who's Profiling Now*, CHI. TRIB., Oct. 3, 2001, at N23.

19. Stuart Taylor, Jr., *Politically Incorrect Profiling: A Matter of Life or Death*, 33 NAT'L J. 3406, 3406 (2001), available at <http://www.nationaljournal.com/members/buzz/2001/openingargument/110501.htm>.

20. See Page, *supra* note 18, at N23.

that 64% of African-Americans and 56% of other "non-white" respondents would support a requirement that Arabs, including United States citizens of Arab descent, be required to carry special identification.²¹ Indeed, a poll reported in the *Detroit Free Press* found that 61% of Arab-Americans supported heightened security of persons with Middle-Eastern features and accents.²²

This is not to say that everyone has embraced racial profiling as an acceptable tool to use in combating terrorism. On the one side there are charges that profiling "is pure racism and should not stand."²³ Congressman Robert Menendez of New Jersey, for example, objected to the idea of stopping more people of Middle Eastern background for questioning, comparing the practice to the internment of Japanese-Americans during World War II. His colleague Rush Holt called for better policing, rather than racial profiling: "Racial profiling is intellectually lazy. It's never good policing."²⁴ And noted criminal defense attorney and self-proclaimed civil libertarian Alan Dershowitz has recommended implementation of a system using national identification cards, partly as a substitute for racial profiling.²⁵

II. RACIAL PROFILING IN THE AFTERMATH OF THE ATTACKS

Of course, there is nothing wrong with re-opening the debate over racial profiling or taking it in a different direction, particularly in connection with so important a topic as efforts to detect and prevent terrorism. Reconsideration of whether there is a role for racial profiling in the battle against terrorism to a large extent raises again some of the issues we have explored in *Profiles in Justice? Police Discretion, Symbolic Assailants, and Stereotyping*,²⁶ although in a radically new setting. Whether the new debate clarifies any of the old issues remains to be seen.

21. *Id.* Attorney Ronald Kuby, who has made a career in progressive causes including representing minority defendants in high-visibility cases, was asked recently why African-Americans seemed to support racial profiling after the September 11th attacks. He surmised that since the targets of the new racial profiling were members of a group other than African-Americans, African-Americans no longer felt victimized by the practice but instead had become part of the "us" group in the "us vs. them" scenario. *Curtis & Kuby* (77WABC radio broadcast, Oct. 5, 2001), available at <http://www.curtisandkuby.net>.

22. See Taylor, *supra* note 19, at 3406.

23. Kirk D. Richards, *Middle Eastern People Being Booted off Planes*, COLUMBUS DISPATCH, Sept. 28, 2001, at 01A (quoting Nihan Awad, Director of the Council on American-Islamic Relations in Washington, D.C.).

24. Raymond Hernandez, *New Racial Profiling Debates Puts Legislators to the Test*, N.Y. TIMES, Sept. 30, 2001, § 14NJ, at 2.

25. Alan M. Dershowitz, *Why Fear National ID Cards?*, N.Y. TIMES, Oct. 13, 2001, at A23.

26. Milton Heumann & Lance Cassak, *Profiles in Justice? Police Discretion, Symbolic Assailants, and Stereotyping*, 53 RUTGERS L. REV. 911 (2001).

Most important in this regard, there is the question, still largely skirted as this issue has become revisited, of what exactly one means by racial profiling. Is it consideration of race or ethnicity alone, or consideration of race or ethnicity as one of a number of factors?²⁷ Is it enough, for example, to pull an Arab or a Muslim person off a commercial airplane based on that fact alone,²⁸ or does law enforcement need to know more, such as how long before the flight the person had been in the United States, what he did while he was in the United States, with whom he had associated with, and/or whether he had taken flying lessons? For better or worse, based on some of the incidents so far in the wake of the attacks, it appears that a person's Middle Eastern ancestry alone has been enough to prompt action (at least by citizens).²⁹

Nonetheless, it is possible to envision use of racial profiling in the battle against terrorism consistent with some of the strictures laid down so far. We might begin with the assumption that stopping a person for questioning based solely on the fact that he appears to be Arab or Muslim is not permissible. However, as long as the Supreme Court and other federal courts remain wedded to the principle set forth in the *United States v. Martinez-Fuerte*,³⁰ that race or ethnicity may be one factor among many that can be considered in the decision to stop someone, one might argue that a stop based on the fact that a person is Arab or Muslim combined with other factors, *could* justify the stop. But what are the "other factors" that could legitimately be added to the profile? Would it be enough that there was not one person of Middle Eastern descent, but a group of Arabs or Muslims? Does it strengthen or weaken the decision to stop if the group has congregated near an Arab-American community in cities such as Brooklyn, New York, Dearborn, Michigan, or Paterson, New Jersey? Near an airport or reservoir? In any of the cities—for example, Boston, Massachusetts or Daytona Beach, Florida—associated with those who carried out the September 11th hijackings?

Assuming that one can identify the appropriate "other factors" to be included in the profile, there is also the issue of what the investigative stop would entail. Questioning alone might not cross the line; treatment analogous to what Japanese-Americans suffered during

27. See Mooney, *supra* note 12 (finding profiling based on race and religion acceptable).

28. See, e.g., Katherine Corcoran & John Hubner, *Haunted by Plane Attacks, Some Struggle with Suspicion*, SAN JOSE MERCURY NEWS, Sept. 24, 2001, at 1A (identifying a new offense, "Flying While Arab", obviously influenced by the "Driving While Black" of more traditional profiling).

29. See Kinsley, *supra* note 10, at B07 (describing efforts of passengers to remove three Arab passengers who had already cleared security).

30. 428 U.S. 543, 566 (1976).

World War II³¹ clearly would (and no one has argued for that, yet). But what about a broad range of investigative tools in between? Assuming that law enforcement has stopped someone based on the fact that the person is Arab or Muslim *plus* the hypothetical "other factors" needed to justify the stop, how far, if at all, can they go to determine whether the person is up to anything? Evidence of the threat posed by the person in this setting might be more elusive than the type of evidence police routinely look for in a stop at an airport based on the drug courier profile or in connection with a traffic stop. How far beyond mere questioning, if at all, can police go to require a person to demonstrate proof of long time residency in a location, significant ties to a "mainstream" community, or any other fact that would allay concerns that prompted the stop in the first place? Could the police, for example, remove such a person from an airplane or train, or insist that some members of the group take a later flight or train? At this point at least, we believe that even if attitudes towards racial profiling change, prompting more leeway for law enforcement to employ the practice, the intrusions that change occasions will stop short of the most extreme measures that are universally considered to be indefensible (such as what happened to Japanese-Americans during World War II). But there is considerable play in how we balance the variables in this regard. Exactly where that line will be drawn and whether that will be consistent with cherished attitudes toward civil liberties or a significant compromising of those attitudes has become a central issue in the new debate.

Other issues in the current debate also loom in this new setting. Of course, there is the issue of whether a racial profile, however it is composed, actually increases the effectiveness of law enforcement in rooting out the problem. At this point, it is difficult to tell whether racial profiling will serve as anything more than a placebo, reflecting *some* action being taken by a nation hungry for such signs, yet without any measure that the action is effective. Moreover, even if it is effective, are the psychological and other costs of racial profiling stressed by commentators such as Randall Kennedy³² sufficiently high with regard to Arabs or Muslims so as to counsel against the practice? Or does the argument only apply to racial profiling as it came to be understood in the 1990's, largely against African-Americans as a discrete and insular minority that has had a history of discrimination and similar mistreatment at the hands of law enforcement in this country?

But there is more. Consideration of the use of racial profiling in

31. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); PETER H. IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983).

32. See Heumann & Cassak, *supra* note 26, at 935-39 nn.119-36.

any efforts to prevent terrorism, in addition to re-stating familiar issues, raises new ones. The central one involves context. It is worth remembering that the new category of investigative stops created by *Terry v. Ohio*³³ that gave rise to what has evolved into racial profiling was borne out of a pragmatic balancing of the relative interests involved.³⁴ Without minimizing the problems associated with illegal drug use, there are few who would question that the threat posed by what occurred on September 11th exceeds—by a considerable amount—the threat posed by illegal drugs. Terrorism, in a word, convincingly “trumps” drugs. However one strikes the balance when a racial profile is used to stop drug couriers, the stakes appear much higher now. Where is the balance to be drawn when the conduct law enforcement hopes to detect and prevent could result in the deaths of thousands, if not more, and the disruption of major cities, financial centers, and government institutions?

This is the critical new issue that, in fact, overwhelms all others. Indeed, if this is a War Against Terrorism, much of the debate of the past couple of years becomes irrelevant, or at least requires a decidedly different approach. *Inter arma, silen leges*; in times of war, law is silent, goes the old expression. This may not be absolutely true but, just as the initial formulation of the “clear and present danger” test, in many regards hostile to free speech, was arguably influenced by the backdrop of World War I and the Red Scare,³⁵ so too the context in which racial profiling is now being considered is certain to raise a host of new questions and provoke answers to those questions different than the previous debate would suggest. Not only is there the question of *how* the balance is to be struck—including who is properly the target of racial profiling in this setting and what investigative practices we will allow—but perhaps more important is the question of *who* determines how the balance is struck.

Also, who in law enforcement should do the racial profiling: law enforcement officers trained in counter-terrorism measures or any law enforcement personnel assigned to guard airports, patrol the highways, or walk the streets? If the former, are there sufficient resources and manpower to accomplish anything meaningful and, just

33. 392 U.S. 1 (1968).

34. Heumann & Cassak, *supra* note 26, at 975 n.319.

35. See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). On the wartime background on these cases and the development of this doctrine, see PAUL L. MURPHY, *WORLD WAR I AND THE ORIGINS OF CIVIL LIBERTIES IN THE UNITED STATES* (1979); RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* (1987). *But see* DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997) (arguing that restrictive elements of the clear and present danger test had their roots in pre-war developments and thought).

as important, satisfy the cry for action that has prompted the reconsideration of racial profiling? If the latter, can we be certain that racial profiling in this circumstance will involve the drawing of reasonable inferences based on years of relevant law enforcement experience, or instead, become the type of "hunch policing" that has appropriately attracted the harshest criticism?

Finally, there is yet another new issue raised by the prospect of using racial profiling in light of September 11th related to the issue of context just discussed. Assume that the imperatives of the fight to eradicate terrorism produce a consensus that racial profiling in some form is a legitimate law enforcement tool. Would that consensus be necessarily limited to the fight against terrorism or would it expand, either as a theoretical matter or practical matter, to other areas of law enforcement? Can we realistically restrict the use of racial profiling only to the fight against terrorism or is the reconsideration of the practice in this context going to prompt a sea of change in attitudes about racial profiling in general, such that those who approve of the practice will become the dominant voices? This remains to be seen.
