

DEBATE

RACIAL PROFILING AND THE WAR ON TERROR

For Professor David Rudovsky, of Penn, there is just as little to recommend the racial profiling techniques employed by law enforcement in the “War on Terror” as there is in the “War on Crime.” Rudovsky argues that profiling is inaccurate—both as to whom it targets and whom it does not—susceptible to abuse, and counterproductive to intelligence-gathering efforts. He goes on to note that the painful lessons of history likewise counsel against its continued use. Professor R. Richard Banks, of Stanford Law School, shares much of Rudovsky’s concern, but maintains that “[a]ccording primacy to the issue of racial profiling is more likely to impede than to clarify our thinking about the fairness and effectiveness of law enforcement measures.” Banks concludes that it is better to evaluate directly the fairness and efficacy of antiterrorism measures, without the distraction of trying to decide whether a challenged practice should be viewed as racial profiling.

OPENING STATEMENT

*Racial Profiling: No More Justified in the War on
Terrorism than It Is in the War on Crime*

David Rudovsky[†]

In the wake of 9/11, the Bush Administration invoked broad notions of executive power to fight the “War on Terror.” Five years later, there is much dispute over the constitutionality and efficacy of many of these programs, including National Security Agency (NSA) electronic surveillance, incarceration and treatment of “enemy combatants” at Guantanamo Bay, “rendition” of terror suspects to other countries for interrogation, the practice of “alternative interrogation” of suspects in our custody, and limits on habeas corpus.

This dialogue will focus on another law enforcement tactic that has been equally controversial: racial profiling. Before the events of

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9/11, there was a strong national consensus that racial profiling was both unwise and ineffective. President Clinton condemned racial profiling as “morally indefensible,” presidential candidates George W. Bush and Al Gore both agreed that the practice should be abandoned, and up to 80% of the public found this practice to be unfair.

Yet, while almost all agreed that it was impermissible to stop or search someone *solely* on the basis of race, some in law enforcement urged that reliance on race, in conjunction with other factors, was legitimate, even if race was not part of a specific suspect description. By this reasoning, the widespread practice of racial profiling in the “War on Drugs” was justified as reflecting the supposedly disproportionate numbers of racial minorities involved in drug trafficking.

This conventional law enforcement “wisdom” did not withstand empirical and legal scrutiny. As the Attorney General of New Jersey reported in his investigation of racial profiling on the New Jersey Turnpike:

The evidence for this conclusion is, in reality, tautological and reflects as much as anything the initial stereotypes of those who rely upon these statistics. To a large extent, these statistics have been used to grease the wheels of a vicious cycle—a self-fulfilling prophecy where law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources and targeted drug enforcement efforts.

The most obvious problem in relying on arrest statistics, of course, is that these numbers refer only to persons who were found to be involved in criminal activity (putting aside for the moment the presumption of innocence). Arrest statistics, by definition, do not show the number of persons who were detained or investigated who, as it turned out, were not found to be trafficking drugs or carrying weapons. Consistent with our human nature, we in law enforcement proudly display seized drug shipments or “hits” as a kind of trophy, but pay scant attention to our far more frequent “misses,” that is, those instances where stops and searches failed to discover contraband.

Empirical evidence supports this view. On the New Jersey Turnpike, seizures of contraband made incident to traffic stops were at a rate of 10.5% from white drivers and 13.5% from African-American drivers. In Maryland, searches on I-95 resulted in “find rates” that were roughly equal by race. Yet, in these states as in others, the rate of stops and searches of African-American drivers, which ranged up to 60-70% of the stops, was vastly disproportionate to both the rate of drug possession and the number of minority drivers.

The events of 9/11 reignited both the practice of racial profiling and the debate over its use. Since Al Qaeda was a Muslim organiza-

tion and the planes were hijacked by nineteen Arab Muslim men from the Middle East, did it not make sense to single out Arab Muslims in any investigatory efforts? Many people who had condemned racial profiling in the War on Drugs were now convinced that it would be an effective tool in the War on Terror.

For the Bush Administration, there was no hesitation. Within days of the 9/11 attacks, the Department of Justice (DOJ) launched the first large-scale detention of persons based on race and country of origin since the internment of Japanese Americans in World War II. Thousands of suspected immigration violators were incarcerated under a veil of secrecy that left their families, employers, and even their lawyers completely in the dark as to their location or the nature of the charges against them. Ultimately, over 700 foreign nationals were detained for significant periods of time by order of the Attorney General as persons “of interest” to the 9/11 investigation. As it turned out, the only basis for the government’s “interest” in these 700 individuals was their Arab and Muslim identities. There was no individualized suspicion.

Soon thereafter, the government widened the racial and ethnic profiling net in a “Special Registration” program and “Absconder Apprehension Initiative” that resulted in the arrest and preventive detentions of several thousand additional Muslims and Arabs. Once again, the stated basis for the detention was a suspected link to terrorism, but, as before, this link was simply one of ethnicity. Ethnic profiling was also the basis for the November 2001 order of Attorney General Ashcroft to interview 5000 persons, aged eighteen to thirty-three, who had legally entered the United States in the past two years from countries linked to terrorism.

Meanwhile, at airports and at the country’s borders, it was apparent that Muslims and Arabs were being targeted for special attention for questioning, searches, and even for decisions prohibiting them from flying. The government insisted that it was not engaged in racial or ethnic profiling, but its practices spoke in far different terms. Indeed, in 2003, in issuing guidelines on the use of race in criminal investigations, the DOJ essentially codified the government’s split personality with respect to racial profiling: racial profiling was “wrong” and “stereotyping certain races as having greater propensity to commit crimes is absolutely prohibited,” but “efforts to defend and safeguard against threats to the national security or the integrity of the Nation’s borders” are exempt from racial profiling prohibitions.

In declaring that racial profiling is wrong and immoral, except where national security is at stake, the government asserts that there is something unique about the War on Terror that makes ethnicity and race legitimate factors when the same tactics have been found to be both ineffective and contrary to equal protection principles in other criminal investigations. The answer has been that terrorism threats in the United States are almost entirely a function of racial and ethnic-based hatred, and that those who would commit terrorist acts in the future almost assuredly are Al Qaeda members or supporters, who are, therefore, of Muslim and Arab extraction. Presumably, it is this high correlation between the targeted ethnic population and the criminal acts that distinguishes profiling in terrorism investigations from that which occurs in other contexts.

There are several fundamental flaws in this approach. First, it simply is not true that contemporary terrorists are from a single ethnic group. Richard Reid—the “shoe bomber”—did not fit the profile, as his mother was British and his father was Jamaican. Nor did John Walker Lindh, an American, who was convicted for his activities with Al Qaeda. Since Islamic tenets are part of the religious principles of millions of persons outside of the Middle East, it is difficult to see how a focus on Muslim Arabs will prevent attacks by others. It would be surprising if Al Qaeda, which has shown an ability to adjust to efforts to destroy its organization, would not be sufficiently flexible to arm persons who do not meet our profiles. And we should not forget that the Oklahoma City bombers and others who have committed terrorist acts were home grown and of various religious backgrounds and races.

Second, even if the underlying assumption is correct, with over one million Muslims in the United States, how do you begin to narrow the field? Are all of them suspects? Only young Muslim men? Whatever the standard, we are left with the same problem that haunts the use of all profiles and stereotypes. Assume that 90% of a certain type of crime is committed by a particular racial or religious group, that there are over a million persons who comprise that group, and that 1000 of them are involved in the criminal activity. That leaves 99.9% of the suspect group innocent, yet somehow presumed at risk for criminal behavior. We should not employ race or ethnicity when more effective techniques of law enforcement—such as criminal intelligence or observations of criminal conduct—are available. Indeed, our experience since 9/11 demonstrates that racial profiling does not work. Of the thousands of persons detained as immigration violators in the wake of 9/11, only one person was charged with terrorist crimes. We might not expect the government to bat 1.000 or even

.300, but when the batting average is near zero, we should look carefully at the tools that are being used.

Indeed, even where race or ethnicity is used as a factor among others, there is a significant risk of abuse. In November 2006, the government settled a claim by lawyer Brandon Mayfield for \$2 million for his wrongful arrest as a terror suspect after his fingerprints were erroneously matched to those on a bag of detonators in Madrid. As the DOJ Inspector General determined, because of Mayfield's Islamic beliefs, investigators did not reexamine the case even after Spanish police challenged their fingerprint findings.

Third, there are distinct disadvantages to racial profiling. Where criminal conduct is organized within communities, one of the most effective law enforcement responses is the development of intelligence from within those communities. Thus, if the belief is that terrorist cells might be operating in a particular Muslim community, it is essential to develop reliable intelligence from members of the local population. Racial profiling may well undermine such efforts. If the community believes that it is the "enemy" by virtue of its ethnic identity, it will be far more difficult to encourage its members to report suspicious activity. We should not expect support from those we target as presumptive terrorists.

Finally, history has something to teach us as well. The most notorious and ineffective government national security programs have been built on racial stereotypes. For instance, the Palmer raids after World War I—in which thousands of immigrants were arrested, beaten, deported, and imprisoned in the wake of a terrorist bombing in the United States—targeted immigrants by ethnicity and amounted to nothing more than a vicious reprisal based on group characteristics. The internment of Japanese Americans during World War II, perhaps the greatest stain on our constitutional fabric aside from slavery and Jim Crow discrimination, reflected the unwise triumph of racism over fair national security policies. Even the ideological profiling of the McCarthy era was destructive of basic American values.

The wisdom reflected in equal protection principles applies equally to criminal and terrorist investigations, and we act at our peril in disregarding fundamental protections in the hope of achieving greater security.

REBUTTAL

*Why Racial Profiling Is the Wrong Question*R. Richard Banks[†]

I found much of value in Professor Rudovsky's thoughtful discussion of antiterrorism and drug interdiction efforts. I share his assessment that both the War on Drugs and the War on Terror—his primary focus—have gone awry in important respects and warrant vigorous criticism. I join Professor Rudovsky in opposing ineffectual antiterrorism practices that unjustifiably burden large numbers of innocent Arabs and Muslims.

I do not, however, agree with a premise on which his argument seems to rest: that a commitment to end racial profiling would eliminate, or at least substantially reduce, misguided and overbroad measures that burden large numbers of innocent Arabs and Muslims. Racial profiling is the wrong question in the War on Terror. While the invocation of racial profiling may pack a rhetorical punch and help to motivate political activism, focusing on the issue of racial profiling does not help us better evaluate the efficacy or fairness of antiterrorism measures.

Commentators use the term racial profiling to refer to the selection of suspects on the basis of racial (and, for the purposes of this discussion, ethnic or religious) stereotypes that implicate large numbers of innocent people. Not all uses of race in the selection of suspects, however, constitute racial profiling. Law enforcement officers do not engage in racial profiling if they investigate individuals of a particular race because they are seeking a criminal suspect described as a member of that race. The use of race as a component of a suspect description is a widespread and accepted practice that no court has ever regarded as racially discriminatory, much less prohibited. Similarly, commentators view law enforcement officers' use of suspect descriptions that include race as not only permissible, but desirable, even if racial profiling is flatly prohibited.

The distinction between (permissible) suspect description reliance and (impermissible) profiling is especially fuzzy in the antiterrorism context. Many antiterrorism measures assailed by some as racial profiling might be viewed by others as permissible uses of suspect descriptions. Currently, law enforcement agents may be seeking hundreds, or even thousands, of individuals—predominantly Arab or

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Muslim men—who are suspected of participating in, supporting, or having information about terrorist activity. Suppose that airline security personnel or immigration officials at border checkpoints subject those individuals who match some key aspects of a description of a known or suspected terrorist—for example, name and nationality—to additional, and burdensome, questioning. To many, this approach would seem a form of racial profiling, inasmuch as it could result in the investigation of many thousands of innocent Arabs and Muslims and further stigmatize the entire group as potential terrorists. Others though might view the agents' questioning of (only) those who match some aspect of the description of a specific terrorist suspect as a sensible means of preventing any known terrorists from boarding an airplane within or to the United States.

In the antiterrorism context, many practices that involve suspect descriptions may nonetheless seem to many a form of profiling because they burden so many innocent Arabs and Muslims. The terrorist threat is ongoing and nationwide, and much of the intelligence on which antiterrorism agents rely is likely not specific as to time or place. The dissemination of terrorist descriptions to law enforcement agencies throughout the nation only exacerbates the potential burden on innocent people. Even suspect descriptions that are specific as to time and place—for example, that three Arab men will attempt to blow up the George Washington Bridge next week—may nonetheless be so vague that they encompass a large number of people.

The permissibility of suspect description reliance also raises a question about the characterization of other investigatory decisions that disproportionately burden Arabs and Muslims. For example, if antiterrorism agents are seeking a specific suspect who is known to be a deeply religious Muslim, would a decision to investigate mosques in a city where the suspect has been known to reside constitute racial or religious profiling? What if the authorities focus their investigation on a neighborhood with many immigrants from an Arab suspect's home country? In both cases, the authorities' efforts to apprehend a particular suspect would undoubtedly burden innocent people, many of whom would be Arab or Muslim.

Such measures might be criticized as racial profiling, *or* defended as a sensible and nondiscriminatory means of locating a particular suspect. Some might emphasize the purpose of the investigation in characterizing it as the permissible use of a suspect description; others might highlight its broad scope and impact on Arab and Muslim communities in declaring it another instance of profiling.

The prospects for agreement about what constitutes racial profiling are further undermined by the fact that the terrorist threat is posed by the criminal enterprise known as Al Qaeda, whose members, as with most gangs, are bound together by a shared social identity—in this case religious fundamentalism. A decision to investigate only individuals who share a salient characteristic of gang membership—for example, a commitment to a fundamentalist version of Islam—straddles the boundary between suspect description reliance and racial profiling. The consideration of religion in an effort to apprehend members of a gang that is organized along religious lines might be viewed as profiling *or* as suspect description reliance. The law enforcement officers would have a specific description, but it would be of a criminal organization rather than an individual. Even if antiterrorism agents are not looking for a specific individual, would it be racial profiling to focus attention on fundamentalist Muslim groups? What if antiterrorism agents scrutinize charitable organizations that send money to Muslim religious groups in countries with an active Al Qaeda presence? Or, what if agents subject electronic or internet communications written in languages used by Al Qaeda operatives to especially close scrutiny?

Once we recognize the likelihood of disagreement about whether particular practices that burden Arabs and Muslims should be viewed as racial profiling, it should become clear that not much should turn on the question of racial profiling, nor, more generally, on the question of whether race—or religion, or nationality—was part of any government agent's decision-making process. Some practices that do not rely on race—for example, the proliferation and indiscriminate use of no-fly lists—might be objectionable and unfair for a whole host of reasons. Other practices that do consider race—or nationality or religion—might be perfectly sensible. Rather than attempting to resolve disagreement about whether particular practices constitute racial profiling, a more sensible and useful approach would be to consider directly whether the challenged practices are effective and fair. Focusing directly on the issues of fairness and efficacy would not resolve disagreement. But it would properly frame the inquiry.

According primacy to the issue of racial profiling is more likely to impede than to clarify our thinking about the fairness and effectiveness of law enforcement measures. Consider the campaign against racial profiling in drug interdiction. By the late 1990s, racial profiling in drug interdiction efforts had been uniformly denounced by activists, politicians, and high ranking law enforcement officials alike. Literally hundreds of law enforcement agencies or legislative bodies pro-

hibited racial profiling and began to collect data concerning law enforcement officers' stop-search practices.

One would be wrong to assume, though, that these reforms typically eliminated the racial disparities in stops, searches, arrests, or incarceration that had prompted the anti-racial profiling campaign in the first place. In fact, racial disparities persisted in the overwhelming majority of jurisdictions, including New Jersey, which Professor Rudovsky correctly identifies as having been a focal point of the racial profiling controversy.

As the debate matured, disagreement about the propriety of racial profiling transformed into disagreement about the existence of racial profiling. Civil rights activists and law enforcement agencies often drew contrary conclusions from the same empirical evidence. Disparities that activists viewed as incontrovertible evidence of racial profiling were typically defended by law enforcement agencies as a simple reflection of the demographics of crime, particularly drug trafficking. Widespread agreement about the impermissibility of racial profiling in drug interdiction efforts relocated disagreement to the question of whether law enforcement officers had engaged in racial profiling. I would expect a similar sort of process to operate in the antiterrorism context.

In conclusion, then, while I oppose many of the same policies that Professor Rudovsky finds objectionable, the reason for my opposition is not that such policies entail racial profiling. Rather, I oppose those practices that I judge as ineffectual—practices that often are desperate efforts to calm our fears rather than enhance our security. And I would oppose even those potentially useful policies that, in my view, impose greater burdens on Arabs and Muslims than it is fair to ask them to bear. In assessing efficacy and fairness, I see no need to ask, “have antiterrorism agents engaged in racial profiling?”

CLOSING ARGUMENT

David Rudovsky

I welcome Professor Banks' response to my opening statement, in particular his argument that “racial profiling is the wrong question in the War on Terror.” Since we both examine investigatory methods with respect to standards of fairness and efficiency, his challenge to my racial profiling arguments helps to frame this debate.

Professor Banks recognizes that the selection of suspects on the basis of racial characteristics implicates large numbers of innocent

persons, and that the problem is “especially acute” in the terror context. However, he believes that a racial profiling focus does not provide a sound basis upon which to evaluate particular investigative methods. More specifically, he asserts that in dealing with Al Qaeda and its fundamentalist and violent version of Islam, law enforcement may have good reason to target Arabs and Muslims. According to Professor Banks, the question that should be asked is whether the investigatory methods are fair and effective.

Maybe we are saying the same thing—with different terminology—but I strongly believe that in applying these criteria, the insights we have gained regarding the moral and strategic flaws of racial profiling are integral to a credible determination of whether certain methods are fair and effective. If racial profiling generally leads to both unfair and ineffective law enforcement, why should we ignore these lessons in the War on Terror?

The examples provided by Professor Banks demonstrate the usefulness of the consideration of racial profiling factors. He discusses the problems faced by investigators in responding to ongoing threats of terrorism where intelligence is not specific as to time or place and to those problems posed in more particularized settings; for example where—hypothetically—information is received that three Arab men are planning to blow up the George Washington Bridge. As I argued in the opening statement, a limited focus on Arabs or Muslims in the more generalized context is unfair and ineffective because it is racial profiling: an undifferentiated suspicion of many of a particular race or ethnic group, where only a few may be guilty. Where the police have a suspect description by race and a targeted location, the problems associated with racial profiling are mitigated, but not eliminated. For example, if police have information that three white men are planning a robbery of a specific bank, while they may limit their investigation to white men, Fourth Amendment principles should still apply with respect to *what* investigative steps may be taken. This information, standing alone, would not justify forcible stops, detentions, or searches of all white men observed in the proximity of the bank. Indeed, the interplay of non-discrimination and privacy principles is critical. Generalized surveillance of Arab and Muslim men near the bridge may be appropriate depending on the nature of the intelligence, but a mere rumor would not justify the detention or search of all of these men. The same can be said with respect to a suspect who is known to frequent a particular mosque. If the information provides sufficient cause under the Fourth Amendment, police surely have grounds to surveil the area to facilitate the stop or arrest of the suspect. However, without more information connecting the suspect

criminal conduct to others in the mosque, there are no legitimate grounds to further intrude into those premises. If police investigation of mafia-related crimes did not warrant suspicion of all persons of Italian descent, the War on Terror should not justify an open season on Arab and Muslim men.

Investigations of drug activity, underworld violence, terror and other criminal acts implicate a range of law enforcement methods—some common and some distinct—depending on the target. Racial profiling has the distinct potential for discriminatory and counter-productive measures in any of these contexts. Law enforcement based on stereotypes is too blunt, almost always overbroad, and a poor substitute for investigations based on particularized suspicion.

CLOSING ARGUMENT

R. Richard Banks

I continue to find much of value in Professor Rudovsky's discussion of antiterrorism efforts and share his view that the permissibility of such measures should turn on their fairness and effectiveness. However, I do not share Professor Rudovsky's belief that such inquiry would be furthered by trying to decide which practices constitute racial profiling. The same normative disagreement that has shaped debate about the permissibility of racial profiling in the fight against terrorism would subvert efforts to reach consensus about whether particular practices rely on racial profiling.

To understand why, consider again the concept of racial profiling. The term racial profiling, like the broader concept of racial discrimination, is typically used in two different senses, one descriptive, the other evaluative. The characterization of a practice as racially discriminatory denotes a factual observation, a claim, for example, that a police officer decided to investigate a particular individual because of stereotypes about the racial group to which that person belongs. To designate a practice racially discriminatory also connotes moral condemnation of that practice—or at least a judgment that the practice should be impermissible. In common usage, then, the term racial discrimination simultaneously expresses a factual observation and a moral evaluative stance; it both describes and condemns.

To reason, as Professor Rudovsky does, that a practice is objectionable *because* it is racial profiling implicitly posits a factual descriptive claim as the basis for an evaluative one. The relation between the two claims is that the evaluative judgment is a consequence of the de-

scriptive one. The descriptive claim then must precede, and be made independently of, the evaluative one.

One problem with trying to declare antiterrorism practices objectionable *because* they rely on racial profiling is that the antiterrorism context raises precisely the circumstances where evaluative judgments are most likely to shape purportedly factual descriptive claims. Consider a situation that Professor Rudovsky and I both discuss: the government has intelligence information that implicates specific Arab Muslim men in the planning of future acts of terrorism, and, on the basis of that information, subjects to extra scrutiny some large number of Arab Muslim men, none of whom, it turns out, has any connection to terrorist plotting. One might view such antiterrorism measures as racial profiling, in light of the many innocent people burdened without the apprehension of any wrongdoers. Or one might view such measures as the permissible use of suspect descriptions, insofar as the antiterrorism agents were attempting to apprehend specific individuals suspected of terrorist plotting. There is no purely factual basis for preferring one characterization rather than the other.

One's judgment as to whether the challenged practice is racial profiling would likely be shaped by one's assessment of its propriety. A belief that the government should be able to do such a thing would incline one not to view the practice as racial profiling. Conversely, a feeling that such a practice is ineffective and unfair to Arab Muslims might cause one to pronounce it a form of racial profiling. Whatever one's conclusion, the ostensibly factual observation would have been influenced by one's normative evaluation of the particular practice.

A circularity problem arises. It makes little sense to say that a practice is objectionable because it is racial profiling, if the reason one thinks the particular practice is racial profiling is *because* it is unfair and ineffective. Stated more generally, a descriptive claim cannot provide the basis for an evaluative judgment if the descriptive claim already incorporates the evaluative judgment for which it would ostensibly serve as the basis. In the antiterrorism context, the characterization of a practice as racial profiling will often represent a conclusion that it is objectionable, rather than the means of having reached that conclusion. Just as commentators may disagree about the permissibility of racial profiling in antiterrorism efforts, so too would a flat out prohibition intensify disagreement about whether particular practices rely on racial profiling.

Moreover, reliance on descriptive claims that conceal evaluative inquiries might obscure the considerations of fairness and effectiveness that should inform antiterrorism policy. The belief that we are arguing about the factual question of whether a practice is racial pro-

filing might make it more difficult to assess forthrightly the issues of fairness and efficacy. In sum, then, in trying to evaluate the fairness and effectiveness of antiterrorism measures, the belief that we need to decide whether a particular practice is racial profiling not only won't help us. It may hinder us.