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Is profiling a constitutionally-permissible weapon in the War on Terror? No

By David Oscar Markus

"A Man for All Seasons," Sir Thomas More, Chancellor of England under Henry the VIII, was asked by his daughter's suitor if he'd give the devil the benefit of law. More replied, "Yes. What would you do, cut a great road through the law to get after the devil?" "Yes," the suitor answered, "I'd cut down every law in England to do that." More responded:

Oh? And when the last law was down and the devil turned round on you where would you hide, ... the laws all being flat? This country is planted thick with laws from coast to coast — man's laws, not God's — and if you cut them down ... do you really think you could stand upright in the winds that would blow then? Yes, I give the benefit of law, for my own safety's sake.

September 11th has had some absolutely horrific repercussions. One of these is that some of our most ardent champions of liberty are willing to cut down the constitutional protections on which our country is based. Milton Hirsch, normally one of liberty's most faithful champions, demonstrates his willingness to do so in his column on the adjoining page.

Our history of racial profiling

It is particularly troubling that Milt, an ardent student of history, has taken the view that the racial profiling of Muslims is okay. If American history has taught us anything, it has taught that racial profiling is wrong.

The most infamous example is, of course, the internment of Japanese Americans, approved by the Supreme Court in *Korematsu v. United States*.1 In 1942, President Roosevelt signed Executive Order 9066 and Congress passed Exclusion Order No. 34, forcing "all person of Japanese ancestry, both alien and non-alien" to move from their homes on the Pacific Coast to inland camps. The Court justified this now-condemned action2 with the same arguments that Milt asserts, while both try to distance themselves from the racial implications of their arguments. *Compare Korematsu*3 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue") with *Hirsch* (stating that the characterization of profiling as racist is "dangerous and foolish").

History gives us numerous other examples of the "foolishness" of profiling. For example, the profiling of Italian Americans during WWII was recently condemned by Congress in the Wartime Violation of Italian American Civil Liberties Act. Our practice of rounding up and placing Germans in camps during WWII, resulted in senators calling for a commission to review these offenses. A more recent profiling disaster, "DWB" or "driving while black," is discussed below.

In reference to INS' practice of ordering thousands of individuals from the Middle East to answer government questions without any suspicion that those individuals have done anything wrong, Milt says, "What's the big deal?" Woodrow Wilson asked the same question in 1919 when his attorney general executed raids in more than 30 cities that resulted in

arrests of thousands of suspected communists for questioning.

The big deal is that this affects the innocent and does little to catch the guilty. Terrorists are not likely to register with INS, even if asked politely. The big deal is that this so-called benign registration resulted in thousands of innocent people being detained for no good reason.4 The big deal is that the bedrock of our country, our Constitution, and specifically the Fourth Amendment condemns general searches and seizures without specific, particular, and individualized suspicion that a particular person, and not some group, has done something wrong.5

Requirement of individualized suspicion
The Fourth Amendment's individualized suspicion requirement "has a legal pedigree as old as the Fourth Amendment itself."6 Indeed, the Framers' insistence on the requirement of specific and individualized suspicion grew out of suspicionless searches and seizures permitted by general warrants and writs of assistance in England and early America.7 Such warrants and writs permitted officers to search and seize whatever and whomever they pleased. It was abuse of this general power and discretion that led to the founding of our country and to the Fourth Amendment.

This unfettered discretion has left us frustrated with the profiling used in the War on Drugs and used to pull over minority drivers. Prosecutors have long argued that law enforcement should be able to use the following facts, either individually or collectively, as a basis for reasonable suspicion: 1) that a person is traveling from a source country (pick your country here because every country qualifies); 2) that the person is traveling alone; 3) or with other adults; 4) or with kids; 5) that the person looks nervous; 6) or is too calm; 7) that the person is wearing loose fitting clothes; 8) or the clothes are too tight; 9) that the person is traveling without sufficient luggage; 10) or with too much; 11) that the person is driving on certain roads; 12) or avoiding others; 13) that the person is driving too slow; 14) or too fast. You get the idea.8

To date, such profiling has been universally criticized because the casting of such a wide net to catch a few guilty fish does away with the Fourth Amendment.9 So too with DWB. This phenomenon has been well documented and roundly criticized.10

Because race is not an inherently suspicious characteristic, it should not be used as reason to stop. "It is law that racial incongruity, *i.e.*, a person of any race being allegedly 'out of place' in a particular geographic area, should never constitute a finding of reasonable suspicion of criminal behavior."11 Milt attempts to separate himself from race-based profiling with statistic-based profiling. Putting aside the fact that one can get a statistic to justify anything and can easily manipulate statistics to support a bias, the statistical argument will not help his case.

Statistics

For the last 200 years, this country has remained faithful to the idea that a reasonable action under the Fourth Amendment requires specific and individualized probable cause. Today, probable cause requires a finding that, under the totality of the circumstances, "there is a fair probability that . . . evidence of a crime will be found."12 Phrased differently, it requires "known facts and circumstances . . . sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."13

Milt takes this to mean that the Fourth Amendment is satisfied if the odds of crime-stopping are increased by singling out a certain group of people. But such a standard is silly, as better odds do not equate to individualized suspicion.

Take the following exaggerated stats: Suppose 1 in 1,000,000 Americans is a terrorist; suppose further that 1 in 100,000 of Middle-Eastern descent is a terrorist. Milt argues that because there is a higher "correlation . . . between personal factors or behaviors on the one hand, and evidence of crime on the other," law enforcement is "compel[led]" to use that factor. But that reasoning leads to absurd results. Under Milt's reasoning, 99,999 Muslims who have done nothing to justify suspicion will be subjected to unreasonable searches and seizures. In reality, the number of innocent affected is going to be a great deal higher. Our country and our

Constitution do not tolerate encroaching on such a high number of innocent people to catch the few guilty.

This is why Milt's Jeep example fails. For starters, Jeeps don't have rights. Cars are different than people. Of course we would recall Jeep Hindenbergs, and not other models, if we could determine that a percentage of Hindenbergs are going to roll over, even if that percentage was very small. We don't care that many of the recalled Hindenbergs would never roll over. We don't want to risk that they would. We are willing to sacrifice the innocent Hindenbergs for the guilty. That sacrifice does not translate to human beings with individual rights. Living in a free country, we do risk that we will not catch everyone who commits crimes. This is the choice we made when we decided to be free. Other countries, like some of the ones Milt complains about in his article — Iraq, Iran, Libya, and Syria — have much lower crime rates because they aren't willing to take the same risks.

But that is what makes our country great. And that is why Milt and I have criticized recent cases, like United States v. Arvizu,14 that give more discretion to law enforcement to profile. In criticizing that case, we said that "the central concern of Fourth Amendment jurisprudence [is] curbing police discretion. The more police discretion there is, the more likely that innocent people are going to be subject to the prejudices and biases of police officers." Today, however, Milt says that so long as those prejudices and biases can be backed up by some numbers, we should accept them. Anything can be backed up with numbers. Once that door is cracked open, even ever so slightly, prosecutors and officers are going to drive a freight train through it with dazzling charts and statistics to support stops of every type including, but certainly not limited to, numbers 1 through 14 above. The racial profiling door should remain closed.

Conclusion

In these emotional times, it is too easy to sacrifice our individual liberties in favor of safety and security. Milt plays to that emotion with lines like: "It was unfair when thousands lost their lives in the Twin Towers. It is unfair that their widows and widowers and orphans must make do without them." But Milt knows better. Those same emotional arguments are being used to justify the suspension of other constitutional guarantees, such as one's right to counsel. In our May 2002 column, we quoted Justice William O. Douglas' dissent in Terry. I remind Milt of that quote here:

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. . . . If the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can seize and search him in their discretion, we enter a new regime.15

Notes

1. 323 U.S. 214 (1944)
2. The government did much more than intern the Japanese; it searched their homes without warrants, it separated families into different camps, and it prohibited prayer.
3. *Korematsu*, 323 U.S. at 223.
4. See FindLaw, December 19, 2002, *Hundreds of Muslin Immigrants Rounded Up in California*, accessed at <http://news.findlaw.com/international/s/20021219/attackimmigrationdc.html> (quoting critics' comparisons to the internment of Japanese during WWII); *INS registration policy unfair for law-abiding Muslims, critics say*, Miami Herald, Dec. 22, 2002 at A11 (stating that the policy of detention may harm more than help the war on terrorism).
5. See also Milton Hirsch and David Oscar Markus, United States v. Arvizu, *The Adjective as Jurisprudence*, The Champion (May 2002).
6. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 678 (1995) (O'Connor, J., dissenting).
7. See Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 938 (1997); Thomas K. Clancy, The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures, 25 U. Mem. L. Rev. 483, 528 (1995) (describing the "core complaint" of the colonists as the general, baseless searches that were executed without "individualized suspicion").

8. See also The Florida Department of Highway Safety and Motor Vehicles policy entitled "The Common Characteristics of Drug Couriers" (1985) (directing state officers to "be suspicious of rental cars," of motorists who show "scrupulous obedience to traffic laws," of drivers wearing "lots of gold," or who do not "fit the vehicle," and ethnic groups "associated with the drug trade").
9. In fact, before September 11, just about every politician from both sides of the aisle spoke out against law enforcement using race. Even most high-ranking law enforcement officials joined the ranks of those against using race as a tool to fight crime. After September 11, the pendulum swung back and the unified front fell silent.
10. The number of examples are mind-boggling and outside the scope of this article. For a few, *see* Kolender v. Lawson, 461 U.S. 352, 354 (1983) (Lawson, a law abiding African-American man, was stopped or arrested 15 times in primarily white neighborhoods in a 22-month period); Henry Curtis, Statistics Show Pattern of Discrimination, Orlando Sentinel, Aug. 23, 1992 at A11 (stating that 70% of stops made by drug interdiction unit on portion of I-95 in Florida are of African Americans or Hispanics, although they made up only 5% of the drivers on that stretch of the interstate and only about 5% of these stops lead to arrests); Michael Schneider, *State Police I-95 Drug Unit Found to Search Black Motorists 4 Times More Often Than White*, Baltimore Sun, May 23, 1996, at B2 (reporting similar statistics in Maryland four years later). For some articles criticizing the practice, see David Harris, *The Stories, The Statistics, and The Law: Why Driving While Black Matters*, 84 Minn. L. Rev. 265 (1999), and Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333 (1998) (documenting cases).
11. State v. Barber, 823 P.2d 1068 (Wash. 1992).
12. Illinois v. Gates, 462 U.S. 213, 238 (1983).
13. Ornelas v. United States, 517 U.S. 690, 696 (1996); Wong Sun v. United States, 371 U.S. 471, 479 (1963). Milt wants to do away with the well-settled requirement that there be individualized suspicion based on facts and circumstances *specific to the person to be searched*, and instead seeks to justify searches and seizures based merely on membership to a particular group. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("Where the standard is probable cause, a search ... of a person must be supported by probable cause particularized with respect to that person."); Sibron v. New York, 392 U.S. 40, 62-63 (1968) (no probable cause to search person talking to narcotics dealers where officer was "completely ignorant" of specific facts and circumstances implicating person); United States v. Di Re, 332 U.S. 581,587 (1948) (person's "mere presence in a suspected car" does not amount to probable cause to search that person). See also Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989) ("search[es], ..., as a general matter," require "individualized suspicion"); Brown v. Texas, 443 U.S. 47, 52 (1979) ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."); *Vernonia Sch. Dist.*, 515 U.S. at 667 (O'Connor, J., dissenting) (discussing "requirement of individualized suspicion"); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680-81, 684 (1989) (Scalia, J., dissenting) ("individualized" or "particularized" suspicion is necessary component of reasonable search and seizure). *See also* Terry v. Ohio, 392 U.S. 1, 21 n. 18 (1968) ("Th[e] demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."). Specificity and "individualized suspicion" are such essential components of a reasonable search that they are ordinarily required even when probable cause is not, in the context of lesser intrusions that require only "reasonable suspicion." *See, e.g., Skinner*, 489 U.S. at 624 (Even "[w]hen the balance of interests precludes insistence on a showing of probable cause, we have usually required 'some quantum of individualized suspicion' before concluding that a search is reasonable") (quotation omitted); United States v. Cortez, 449 U.S. 411, 418 (1981) (investigative stop of a vehicle must be supported by the "suspicion that the particular individual being stopped is engaged in wrongdoing"). These cases underscore the principle that probable cause must be specific and individualized.
14. 534 U.S. 266 (2002). *See also* Milton Hirsch and David Oscar Markus, The Champion (May 2002).
15. Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J. dissenting).

About the Author

David Oscar Markus is a *magna cum laude* graduate of Harvard Law School. He is a former

Assistant Federal Public De-fender in Miami and is now a partner in Hirsch & Markus, LLP. *The National Law* Journal named him one of the top 40 litigators in the nation under 40 years old.

David Oscar Markus
Two Datran Center, Suite 1200
9130 S. Dadeland Boulevard
Miami, FL 33156
(305) 670-0077
Fax (305) 670-7003
dmarkus@hirschmarkus.com

National Association of Criminal Defense Lawyers (NACDL)
1150 18th St., NW, Suite 950, Washington, DC 20036
(202) 872-8600 • Fax (202) 872-8690 • assist@nacdl.org