



FOURTH AMENDMENT FORUM

BY MILTON HIRSCH AND DAVID OSCAR MARKUS

Depending on whose version you believe, it was hours,¹ or days, or at most weeks² after the July 7, 2005, subway bombing in London when the New York City Police Department started stationing officers at subway entrances. What instructions were given to New York's Finest is a matter of some dispute. The police assert adamantly that they're using the rhythm method: "Checked at the turnstiles of the nation's largest subway system are every fifth, twelfth or twentieth passenger carrying a parcel, bag or rucksack."³ New Yorkers — by nature a cynical and disbelieving lot — are not so sure.

Police officials took pains ... to describe the searches as entirely random, hoping to allay fears of racial profiling. "We are looking at backpack size or containers large enough to house explosives that we know have been used in these mass transit attacks," said Paul J. Browne, chief spokesman for the city police. "The protocol would be to pick the fifth backpack in each group of 10. If a Middle Eastern man is number four, he would not get checked."⁴

All of which invites the question: Which method — random selection of passengers versus profiling — is less offensive to the Fourth Amendment guarantee against unreasonable searches and seizures?

The Case FOR Profiling

— MILTON HIRSCH

Q: Officer, if I understand your testimony correctly, you were checking every tenth subway passenger. Is that correct?

A: That's right. Those were my instructions.

Q: It didn't matter how a passenger appeared. You checked every tenth passenger?

A: That's right.

Q: It didn't matter how a passenger behaved. You checked every tenth passenger?

A: That's what I said.

Q: Shortly before the tragic explosion that killed tens of thousands of people, you saw a passenger enter the subway wearing a *keffiyeh*. Isn't that correct?

A: That's right.

Q: It was a red, checkered *keffiyeh*?

A: Yes.

Q: And the passenger wearing that *keffiyeh* was a young man, dark complected, with a beard?

A: Yeah.

Q: You thought that he looked Middle Eastern?

The Case AGAINST Profiling

— DAVID OSCAR MARKUS

I do know that it's true that if you wanted to reduce crime, you could, if that were your sole purpose, you could abort every black baby in this country, and your crime rate would go down.

— Former Reagan Administration
Education Secretary Bill Bennett

Whether it's in the name of reducing crime or reducing terror, people never stop floating theories that trample on our Constitution and on what makes us American, or in the case of Bill Bennett, a theory that tramples on humanity. Putting aside the asinine theory mentioned above, there are many ways we can assuredly reduce the crime rate and even the terrorism rate. I guarantee that simply repealing the Fourth Amendment would decrease crime. But simply because something may statistically reduce crime or terror (aborting all babies would certainly reduce crime as well), doesn't mean we should do it. Nevertheless, Milt proposes we should start profiling in the hopes of decreasing terror.

Milt and I had this debate before. He was wrong then, but I guess he wants a rematch now after the recent London bombings when emotion is high. He's wrong now too for many reasons that I explain below. You should know that I was tempted, after reading his half of the argument and seeing words like *keffiyeh*, *Panglossian*, *probens*, and *probandum*, to respond as simply and elegantly as *My Cousin Vinny* did in his opening statement, "Everything he just said is bullshit." But *The Champion*

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A: Could have been. I don't know where he was from.

Q: And he seemed nervous?

A: I thought so.

Q: And he was wearing a loose, bulky jacket — in August?

A: Yeah.

Q: But you didn't ask to pat him down, or to look in his backpack?

A: No. He wasn't the tenth passenger. My instructions were to ask to frisk every tenth passenger, and not to engage in racial profiling.

Q: What number passenger was he?

A: He was ninth. The tenth passenger was an 86-year-old tourist from Denmark. She was on her way to Rockefeller Center to see the Rockettes. She told me she had waited all her life to see the Rockettes.

Q: Did you find anything suspicious on her person?

A: No.

Q: What's the next thing you remember?

A: Just as the subway doors closed, I heard a voice yell, "*Alahuakbar!*" The next thing I remember after that is waking up in the hospital.

The foregoing is not an actual trial transcript.

Not yet.

The Fourth Amendment, by its terms, does not proscribe searches or seizures. Rather, the Fourth Amendment purports to divest the government of a power to search unreasonably, or to seize unreasonably. If a search is not justifiable by reference to reason, it is presumptively unconstitutional. If a search is justifiable by reference to reason it may pass constitutional muster, depending on other particular doctrinal features of our Fourth Amendment jurisprudence. All this, I take it, is apodictic.

Of all searches and seizures — indeed of all exercises of governmental power — the most unreasonable are those that proceed from the arbitrary and capricious exercise of power. No search can be termed reasonable if it is one for which the governmental agent performing the search need neither have nor give a reason. This, too, I take it, is apodictic.

Searches based on random selection — arbitrarily picking every fifth, tenth, or twentieth subway passenger — are just such exercises of brute, capricious power. A subway passenger is stopped and frisked not because he has done anything wrong, nor because there is any reason to believe he will do anything wrong, but because, by the serendipity of arithmetic, he was not fourth or sixth in line but fifth. If he had elbowed the passenger in front of him out of the way he would not have been searched. If he had permitted the passenger behind him to pass him in line he would not have been searched. If he had arrived a moment earlier or a moment later he would not have been searched. Can anything less supportable by reason be imagined?⁵

In a Panglossian world no search or seizure would be based on less than probable cause.⁶ We do not live in such a world, and the law does not pretend that we do. The Supreme Court has long since determined that police may seize and search upon mere suspicion, so long as the suspicion be particularized and reasonable, not arbitrary and capricious.⁷ All

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wanted a little more, so here goes:

Milt's legal explanation of the Fourth Amendment sounds more like a reincarnation of a Rehnquist opinion than that from a defender of liberty. He starts out his discussion regarding the Fourth Amendment by saying it requires nothing other than reasonableness. For the past five years, we have been arguing against such a relaxed interpretation of the Fourth Amendment. But now that terror has reared its ugly head again, Milt is ready to give away the farm.

Not so fast. The Fourth Amendment requires that before one is subjected to a search, even and especially in times like these, the executive branch officer must have some individualized suspicion. The Fourth Amendment's individualized suspicion requirement "has a legal pedigree as old as the Fourth Amendment itself."¹² Indeed, the Framers's 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.¹³ 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 black drivers, commonly referred to as DWB — Driving While Black. As I have discussed in these pages before, 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; 13) or too fast. You get the idea.¹⁴

To date, courts have universally rejected use of such profiling because the casting of such a wide net to catch a few guilty fish does away with the Fourth Amendment. So too with DWB. This phenomenon has been well documented¹⁵ and roundly criticized. Because the Fourth requires individualized suspicion, I do not agree with purely random stops either. Our officers should target those who reasonably and legitimately rouse his suspicion.

Race, however, 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."¹⁶

Milt attempts to separate himself from the above-condemned race-based profiling in curious ways. He says that he only wants to subject Muslims to profiling, not anyone else. Think about that one for a second! Once you are prepared to accept the proposition that race-based profiling is acceptable for Muslims, there is nothing to stop use of this law enforcement "tool" in any other context. Take, for example, Bennett's insane thesis quoted at the beginning of the article. Milt's support for the student who wrote for the *Daily Tar Heel* is misplaced. She was discharged not merely for advocating that racial profiling is a sound method for screening, but for taking this argument to its dangerous extreme: "I want all Arabs to be stripped naked and cavity-searched if they get within 100 yards

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we can ask of police is that they make every fair effort to distinguish between those to whom suspicion attaches and those to whom it does not; and having done so, that they respect the right of the latter to go about their business without interruption. Stopping every fifth or tenth or twentieth wayfarer is a complete abandonment of any attempt to distinguish between those to whom suspicion attaches and those to whom it does not.

I suspect that David knows (and secretly accepts) all this. His position is not so much a defense of random selection as it is an attack on profiling. He rejects profiling not because it isn't a better means of separating those who are potentially dangerous from those who probably aren't than is random selection — *anything* would be a better means of separating those who are potentially dangerous from those who probably aren't, because random selection makes no attempt to do so — but because (and I freely admit this) profiling is politically incorrect. (David went to law school at Harvard, where Political Correctness is a two-semester course.)

New York's subways are an excellent laboratory in which to test the validity of the Political Correctness approach to Fourth Amendment jurisprudence. As the *London Times* observed in its editorial, "One thing we know is that not all Muslims are *ihadis*, but so far all [*ihadis*] have been Muslims."⁸ The same article quotes New York Councilman James S. Oddo, a Republican who represents parts of Staten Island and Brooklyn, as follows: "Plain and simply, young Arab fundamentalists are the individuals undertaking these acts of terror."⁹ So: given what appears to be the generally recognized, and irrefragable, fact that the terrorism from which New Yorkers seek to protect themselves these days is Muslim/Arab terrorism, what are the objections to New York City police paying particular attention to Muslim- or Arab-looking subway passengers?

According to the doctrine of Political Correctness, there are two such objections. First, the contemplated police conduct is unconscionably overbroad. Even if all present-day terrorists and would-be terrorists are Muslims or Arabs or both, they represent but a tiny fraction of the Muslim and Arab world. Subjecting all those who appear to be Muslim or Arab to special scrutiny is — so the argument runs — unjustifiable and unfair where, as here, it is based upon the conduct of an infinitesimal minority. Second, and more emphatically, the P.C. theorists argue that singling out a religious or ethnic group for disparate treatment is un-American and violative of the spirit, if not the very letter, of the Equal Protection provision of the Fourteenth Amendment. Both arguments have an undeniable appeal to the heartstrings. Let's consider whether either appeals to logic.

The overbreadth argument actually cuts against random selection and in favor of profiling. Terrorists constitute a small portion of the Arab community; but they constitute an even smaller portion of the entire human community. Profiling exposes the Arab community to special scrutiny because of the misconduct of a few Arabs. Random selection exposes the entire human community to special scrutiny because of the misconduct of a few humans. Invigilating all Arabs will inconvenience many people, with only a small likelihood of interdicting a terrorist. Invigilating passengers chosen at random will inconvenience many people, with virtually no likelihood of interdicting a terrorist. All things considered, scrutinizing Arabs will result in less overbreadth and more prevention of terrorism than scrutinizing random selectees.

What most troubles P.C. theorists about profiling, howev-

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of an airport."

Milt is apparently prepared to defend such sentiment because he believes that the statistics demonstrate all terrorists are Muslim. He is simply wrong in this regard. As Mayor Bloomberg recently said when asked why he would not permit profiling: "I think if we've learned anything, it is you can't predict what a terrorist looks like. . . . Terrorists come in all shapes and sizes." He's right. The shoe-bomber was from Britain. What about Ted Kaczynski? Timothy McVeigh? Eric Robert Rudolph? Jose Padilla? Even some of the recent subway bombers arrested in London were British citizens. And more and more terrorists are being raised right here in the United States.

Moreover, it is impossible for police to identify someone as Muslim. What does a Muslim look like? Are we looking for brown skin? That's not going to help much in Miami where Milt and I live. But this is where my opponent has become slippery and has tried to change the focus of the debate. He says that we should be on the lookout not just for skin color, but for someone wearing a loose heavy coat in the summer, a backpack, and exhibiting signs of nervousness. Of course the police should stop such a person. The weakness of Milt's position is easily seen by his insistence on including these other non-race based characteristics into the decision as to whether to stop. No one disputes that the police should be able to stop a Muslim who displays traditional indicia of suspicious behavior. But that's not our debate. Our differences, I thought, center around whether we should pick on people purely because of their ethnic heritage as opposed to people who look like us.

The British police had an opportunity to see if profiling worked immediately after the bombings. A dark skinned man with a bulky jacket ran from police onto the subway. He was shot dead. It turned out he was Brazilian and was not a terrorist. I assume Milt has no problem with the shooting and would argue that if the man was white, he should not have been shot. Any takers?

Even if Milt is statistically correct that all terrorists are Muslims (I don't believe he is), he concedes that picking on people all Muslims will result in "only a small likelihood of interdicting a terrorist." In other words, he concludes that the Fourth Amendment is satisfied if the odds of crime-stopping are increased — even only slightly — by singling out a certain group of people. But such a standard misses the point as better odds do not equate to individualized suspicion.

If even 1 in 100,000 of Middle-Eastern descent is a potential terrorist, profiling will lead to subjecting 99,999 innocent Muslims to be subjected to unreasonable searches and seizures without any real reason to believe that the one potential terrorist actually will be caught. 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.

Conclusion

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. New York Mayor Bloomberg rightly decided that his police officers should not profile and that officers should do "what they've done for the past 235 years" in investigating crime. He explained: "If you had no restrictions [on police searches], number one, you'd give up all our freedoms, and number two, I don't know that you'd necessarily do any better at catching the bad guys." This lesson is repeatedly taught in American history — from *Korematsu*, to the profiling

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er, is that “racial” is the first name in “profiling,” and that profiling is therefore — as they see it — an expression of racism. This is a very serious accusation indeed.

But not all decisions made on the basis of race are made on the basis of racism. To interdict a member of a particular religious or ethnic group because the interdicting officer hates all members of that group is a prejudiced and unreasonable act. To interdict a member of a particular religious or ethnic group because the members of that group commit acts of terrorism is an unprejudiced and reasonable act. Between the *probens* “I hate all (fill in ethnic or racial group of choice)” and the *probandum* “therefore I should use my powers as a police officer to pull over the car I see being driven by a (fill in same ethnic or religious group) because it is more likely that the driver of that car is committing (fill in crime of choice) than it is that some other driver is committing a crime” there is no logical nexus whatever. But between the *probens* “All contemporary suicide bombings and related acts of terrorism are being committed by Arab/Muslim men who make little or no effort to conceal the trappings of their ethnicity” and the *probandum* “therefore I should use my powers as a police officer to frisk the Arab/Moslem-looking young man I see before me because it is more likely that he may represent a threat of terrorism than it is that some other person chosen at random may” there is a logical nexus. In those cases in which courts have disallowed profiling, they have done it on Fourth Amendment reasonableness grounds, not on Fourteenth Amendment equal protection grounds.¹⁰

The argument in the previous paragraph would be an easy sell were it not for the ugly history of racism in the American criminal justice process. Concerns about the kind of profiling that have caused honest and law-abiding Americans to be detained for “driving while black” crop up in the mind of every lawyer, every judge — indeed every American of good will — when the word “profiling” is mentioned.

That isn’t the kind of profiling we’re talking about here. Armies of people enter and leave the New York subway system every day. It is a statistical certainty that the overwhelming majority of them are not terrorists. It is a dangerous possibility that one or more of them is. The police cannot, and should not, attempt to interdict all of them. That would be constitutionally unreasonable and logistically impossible. What is reasonable is to attempt, as best we can on the limited knowledge and with the limited resources we have, to find the terrorist needle in the innocent haystack. Given the ineluctable fact that “not all Muslims are *jihadis*, but so far all *jihadis* have been Muslims,” that “young Arab fundamentalists are the individuals undertaking these acts of terror,” is it not reasonable — in both the common and the constitutional senses of that word — to profile?

Incidentally, David, the Political Correctness approach to jurisprudence itself engenders results that are as politically incorrect as they are constitutionally flawed. In the Sept. 13 edition of *The Daily Tar Heel*, the highly-regarded student newspaper of the University of North Carolina at Chapel Hill, an undergraduate columnist had the temerity to do exactly what I’m doing here — expressing the view that profiling is a better, sounder, fairer approach to security in subways and at airports than is random selection.¹¹ She was promptly fired from the newspaper. Thus has the First Amendment become a victim in the Political Correctness crusade against profiling.

Let’s don’t let the Fourth Amendment become a victim too, David. Let’s be reasonable.

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of Italian Americans in World War II, to Driving While Black, to arresting thousands of suspected communists in 1919, and so on. Now the push is on to harass Muslims getting on planes and trains. Enough already.

Notes

1. James D. Zirin, *Seek and ye may find*, *The London Times* August 23, 2005 (hereinafter “Zirin”).

2. *New York Daily News*, Monday, August 1, 2005 (“It has been slightly more than a week since the NYPD started searching bags in the subways . . .”). See www.nydailynews.com/news/ideas_opinions/v-pfriendly/story/333225p-284735c.html.

3. Zirin, *supra*. See also (referring to passengers being “selected for search according to a numerical formula (like one out of every ten)”).

4. *New York Subway Riders Face Bag Checks With Somber Tolerance*, *WASHINGTON POST* July 23, 2005. See www.washingtonpost.com/wpdyn/content/article/2005/.../AR2005072201737_pf.htm.

5. It is, of course, no answer to say that the police could set up magnetometers at the turnstiles and thus search everyone who seeks to board the subway. It is not unreasonable to ask one citizen to bear a burden borne by all citizens. It is unreasonable to ask one citizen to bear a burden borne only by some citizens — unless there is a *reason* why that particular citizen, to the exclusion of many others, should bear that particular burden. That four, or nine, or nineteen other citizens happened to pass through the turnstiles ahead of him is not such a reason.

6. All right, in a Panglossian world there would be no crime, no violence, and therefore no need for police or for searches and seizures. The Panglossian world to which I refer is one in which only constitutionally acceptable searches and seizures occur.

7. See *Terry v. Ohio*, 392 U.S. 1 (1968).

8. Zirin, *supra*.

9. *Id.*

10. See, e.g., *Clark v. State*, 677 So.2d 903 (Fla. 2d DCA 1996), finding that the “stolen vehicle profile” provides no reasonable suspicion. Cf. *United States v. Sokolow*, 490 U.S. 1 (1989).

11. See *College Columnist Fired Over Call for Racial Profiling*, *THE FORWARD*, Sept. 23, 2005 at 3. The student editorialist acknowledged, as I do, that profiling at airports and in subways is a very different matter from profiling on the open road. A *jihadi* on a lonely stretch of highway is likely a threat to no one but himself, however malevolent his intentions. A *jihadi* in a busy subway station or airport is another matter entirely. The difference is apparent to anyone concerned with the *reasonableness* of stops and seizures.

12. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 678 (1995) (O’Connor, J., dissenting).

13. 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”).

14. 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”).

15. 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 neigh-

borhoods in a 22-month period); Henry Curtis, *Statistics Show Pattern of Discrimination*, *Orl. Sent.* 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*, *BALT. SUN*, May 23, 1996, at B2 (reporting similar statistics in Maryland four years later).

16. *State v. Barber*, 823 P.2d 1068 (1992). ■

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