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University of California Hastings College of the Law

PROF. C. KEITH WINGATE

Racial Profiling by Vikram Amar, Professor of Law

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When my older brother, who like me is a native-born American citizen of Indian ancestry, told me last week that he was mistaken for an Arab and hassled by some construction workers, my first reaction was not what it should have been --how troubling it is that innocent Arabs in this country are facing suspicion and hostility. Instead, I thought how wrong and stupid it is that people in the United States can't tell an Indian from an Arab. Racial discrimination, it turns out, can be quite indiscriminate. Ironically, it would actually be a good thing if even more of us --Indians, Asians, Europeans, Latinos, etc. --could put ourselves (or be placed) in the shoes of Arab Americans.

Racial profiles pose a dilemma because on one hand they can be, and have been, used to perpetuate evil racial hierarchies. But on the other hand, the use of race in many profiles is not entirely irrational --race is sometimes a relevant characteristic. For example, as Professor Richard Banks has pointed out, nobody objects to taking account of a suspect's race (provided by a witness to a crime) when the police decide whom to target or investigate. While this use of race seems harmless enough, it does single out persons --many of whom are innocent --for special investigation and suspicion because of their race. And like other more extreme forms of racial profiling --which may also be logically rational --witness descriptions that include race may be abused by police and serve as a pretext for old-fashioned racism.

So the issue is not whether race can ever enter into the picture, but rather how and when. Today there is much talk about racial profiles because a person's Middle-Eastern race may to some limited extent correlate to his citizenship status and/or his affiliation with some persons who may be involved in terrorist groups, both of which could be legitimate bases for federal investigation and action. The key question --both legally and morally --is whether the same race-based measures being talked about would be considered if the terrorist attacks in New York and DC were linked not to brown-skinned Arabs, but rather to some racially identifiable and numerically manageable group within the white majority. For example, if the highjackings were committed by 19 youthful neo-Nazis based in Sweden, would we treat tall, blue-eyed, extremely light-skinned and fair-haired young men with the same public and private suspicion we are seeing against Arab-looking people now? Would we be eavesdropping to see if they had Nordic foreign accents? Peering over their shoulders to see what they were reading?

If not, then the racial profiling all of us (to some extent or another) are engaged in reflects some racial hostility and insensitivity, and must be

resisted. But if so, then even though we may be acting in race-specific way in the moment, at some higher (and perhaps more important) level of generality, we are acting in a race-neutral way --in that everyone's race is equally respected (or should I say suspected.) For instance, one big reason why we allow police to act on race-based witness descriptions is our collective sense that police use a witness' statement that the perpetrator was black no differently than a statement describing him as white.

How do we know how we would react if the racial identities in today's crisis were somehow changed? We can't, at least not for sure --the question is very difficult. But there are factors we can examine in each instance of racial profiling to give us a clue. First, we should focus on the kind of burden we are imposing on members of the minority racial group. Consider various proposals discussed in a CNN/USA Today poll conducted on September 13. 58 percent of Americans favored "more intensive security checks" for persons (including American citizens) of Arab descent; 49 percent favored "special identification cards" for such people; and 32 percent backed "special surveillance" for them.

Checking someone's driver's license extra carefully and asking him a few more questions at an airport about his citizenship is very different from a prolonged custodial interrogation or denying him a seat on the plane altogether. Forcing only one racial group to carry special ID cards imposes huge psychological burdens, especially when one knows history and remembers the Nazi treatment of Jews. And what is meant by "special surveillance?" Visual observation in public places is one thing --phone and E-mail taps are another matter entirely. In general, the larger the burden we are imposing on a group, the less likely we would all impose it on ourselves if the racial roles were reversed.

We should also look at whether race is being used in conjunction with whole host of other factors, or rather as a primary factor. Use of race as a last winnowing tie-breaker to narrow a small number of possibly suspicious persons to an even smaller and more manageable number is very different than use of race to subject great numbers of people to aspersion and indignity. For instance, police use of a witness statement declaring only that a perpetrator was "Latino" is very different (and more dangerous) than use of one describing the criminal as "Latino, five-foot-eight, 160 pounds, wearing blue jeans and a red polo shirt, and bearing a tattoo on his left wrist."

Are there durational and geographical limits on the use of various racial profiles? If so, they seem more reasonable and less gratuitously burdensome. For example, if there were a specific and credible threat that Al Qaeda forces were set to attack more airplanes on a particular day, then more extensive use of racial profiling on that day in airports would seem in order. But since America's "new war" is one of indefinite duration and scope, then we must ask whether we would all be willing to impose on ourselves an indefinite race-based burden of inconvenience and stigmatization.

We should also ask whether there are things we could be doing to minimize the insult to those who are burdened. Sometimes, that means extending the burdened class beyond the racial minority. For example, perhaps asking all airport passengers (even those whose profiles suggest no threat at all) a few more questions will waste some time, but it will also blunt the feelings

of unequal treatment suffered by racial minorities. In a similar vein, a national ID card for everyone would surely be a better --and more constitutionally just --solution than "special" ID cards for some groups.

And even when we by practical necessity act to single a racial group out, there are things we can do to show respect. For instance, if airport officials were to apologize to all those dark-skinned persons who were questioned more aggressively than white people, that would help. Perhaps even token compensation, like free movie headsets, would remove some of the sting. So too might the invited involvement of leaders of the affected minority communities in crafting solutions --even racial profile solutions -- to these vexing problems. All these factors help us discern the social meaning of any particular racial profile and the intent and sensitivity behind it. In that way, they help us answer the question -- "would we do this to white people"?

Finally, racial profiling by government may be quite different than by private organizations. Because government is answerable to the people in way corporate America is not, we might trust government to use the dangerous and blunt weapon of race more than, say, Delta Airlines or Wal-Mart. So, if decisions are to be made about who should be removed from planes or stores, those decisions should be made by public officials, not private employees. But we must also remember that some private organizations or individuals may have a constitutional right to discriminate on the basis of race as a means of expressing themselves. Racial profiling in, say, dating, is probably quite common and somewhat accepted. The big point is that racial profiling is very complicated stuff, and we must be nuanced, careful and most of all even-handed in how we approach it. Sometimes this might mean that Middle-Eastern persons -- and those of us who are sometimes mistaken for them -- may bear a burden because of race. But before we go down that road, each of us try to imagine what we tried to imagine as to the bombing victims themselves -- What if it were I?

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For problems or questions regarding this web contact: wingatek@uchastings.edu
UC Hastings College of the Law 200 McAllister Street, SF, CA 94102
Tel: 415-565-4630 Fax: 415-565-4865
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