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Rational Profiling in America's Airports

I. INTRODUCTION

America was indelibly changed on September 11, 2001. Early that morning, American Airlines Flight 11 and United Airlines Flight 175 departed Boston for Los Angeles. Both aircraft were hijacked by members of Usama Bin Laden's Al-Qaeda terrorist network. All nineteen hijackers were male, between twenty and forty-five years old, and of Middle Eastern descent.¹ Armed with box-cutters, hijackers took control of these aircraft, altered the flight courses, and crashed them into the twin towers of the World Trade Center in New York City. That same morning, American Airlines Flight 77 departed Washington's Dulles Airport for Los Angeles, was hijacked, and crashed into the Pentagon. United Airlines Flight 93 left Newark Airport for San Francisco, was hijacked and crashed near Shanksville, Pennsylvania.² An estimated 3,000 people were killed in these attacks.³

Before September 11, the 1983 truck bombings of U.S. and French military barracks in Beirut, Lebanon, which claimed a total of 295 lives, stood as the deadliest act of terrorism in United States history. The September 11 attacks "produced casualty figures more than ten times those of the 1983 barracks attacks."⁴

September 11 underscored many of the trends in international terrorism identified in recent years by the FBI, CIA, and other intelligence-gathering agencies. The attacks were the first suicide attacks

1. Federation for American Immigration Reform, *World Trade Center and Pentagon Terrorist's Identity and Immigration Status* (last visited Oct. 10, 2001) <http://www.fairus.org/html/04178101.htm>.

2. U.S. Department of Justice, *Remarks of Attorney General John Ashcroft Sept. 11, 2001* (last visited Mar. 26, 2002) <http://www.usdoj.gov/ag/agcrisisremarks.htm>.

3. The count of September 11 victims has continued to change more than one year since the attacks. As of October 7, 2002, the "official toll" kept by the New York City Police Department listed 2,797 victims. See The Sacramento Bee, *World Trade Center victims list drops below 2,800* (last visited Nov. 8, 2002) http://www.sacbee.com/24hour/special_reports/terrorism/story/565774p-4447662c.html. The number of victims at the Pentagon and in Pennsylvania have remained at 184 and 40, respectively. See *Official count of victims of Sept. 11 attacks* (last visited Nov. 8, 2002) <http://www.chron.com/cs/CDA/story.htm/nation/1570718>.

4. FBI, *Statement for the Record of Dale L. Watson, Executive Assistant Director Counterterrorism and Counterintelligence, Federal Bureau of Investigation, on The Terrorist Threat Confronting the United States* (Feb. 6, 2002) <http://www.fbi.gov/congress/congress02/watson020602.htm>.

by international terrorists within the United States.⁵ The attacks demonstrated an apparent shift in some terrorist organizations from formally structured groups to loosely affiliated, decentralized cells. September 11 also exemplified a change in tactics and methodologies among international terrorists to focus on producing mass casualties.⁶

Contrary to their intended purpose, the September 11 attacks galvanized the United States and its resolve to combat terrorism. Military operations against Al-Qaeda elements in Afghanistan began within weeks of September 11, and resulted in the nearly complete destruction of the Taliban infrastructure. President Bush signed the “Aviation and Transportation Security Act” into law in November 2001.⁷ This law makes airport security personnel federal employees, implements Sky Marshal programs, and creates a new Federal Transportation Security Administration (FTSA) to oversee the security operations of all modes of commercial passenger transportation.⁸ As of October 1, 2002, the U.S. Department of Justice had designated 39 groups as “terrorist organizations” and frozen the assets of 62 organizations that support terrorism.⁹

Despite the success of these measures according to the FBI, the threat of terrorism represents “a significant challenge to the United States for the foreseeable future.”¹⁰ Terrorists will likely continue to “focus on attacks that yield significant destruction and high casualties, thus maximizing worldwide media attention and public anxiety.”¹¹

5. *Id.*

6. *Id.* The threat of domestic terrorism (acts perpetrated within the United States by U.S. citizens, without foreign direction) is no less significant. Between 1980 and 2000, the FBI recorded 335 incidents or suspected incidents of terrorism in this country. Of these, 247 were attributed to domestic terrorists, while 88 were determined to be international in origin. *Id.*

7. Pub. L. No. 107-71, § 105, 115 Stat. 597, 607-08 (2001).

8. Robert Longley, *New Airport Security Measures* (Nov. 18, 2001) <http://usgovinfo.about.com/library/weekly/aa111801a.htm>.

9. Remarks of Attorney General John Ashcroft (last visited November 8, 2002) <http://www.usdoj.gov/ag/speeches/2002/100102agremarkstousattorneysconference.htm>. America’s responses have not been purely punitive. Private donations to the victims of the September 11 attacks have totaled more than \$1 billion dollars. See *The September 11th Fund* (last visited Mar. 26, 2002) <http://www.uwnyc.org/sep11/>; See also *United Way, of America* (last visited Mar. 26, 2002) <http://national.unitedway.org/index.cfm>; CNN, *Red Cross Unveils Plan for September 11 Funds* (Jan. 31, 2002) <http://www.cnn.com/2002/US/01/31/rec.liberty.fund/>. Between October 2001 and March 1, 2002, the World Food Program delivered 333,000 tons of food to Afghanistan. See *The Iowa Channel, War on Terrorism: At a Glance* (Mar. 26, 2002) <http://www.theiowachannel.com/news/960658/detail.html>. In the months following September 11, the United States sent ten shipments of medical supplies to Afghanistan, enough to support 100,000 people for three months. *Id.* The United States also provided nearly \$4.4 million to provide food, shelter, clothing, and medicine and school supplies through America’s Fund for Afghan Children. *Id.*

10. FBI, *supra* note 4, at <http://www.fbi.gov/congress/congress02/watson020602.htm>.

11. *Id.*

This paper focuses on legal issues surrounding security measures at airports, measures that could have prevented the September 11 tragedy and will serve to protect against similar attacks in the future. Particularly, this paper seeks to answer the following question: Should the FTSA incorporate consideration of race, gender, and age into airport profiling procedures? Such a suggestion raises legitimate concerns and constitutional arguments.¹² “Racial profiling of any kind is anathema to our criminal justice system.”¹³ The alternative argument, however, seems equally compelling. “Today we’re at war with a terror network that just killed [3,000] innocents and has anonymous agents in our country planning more slaughter. Are we really supposed to ignore the one identifiable fact we know about them?”¹⁴

II. RICHARD KIMBLE: A PROFILING EXAMPLE

In the 1993 movie *The Fugitive*,¹⁵ Harrison Ford played Dr. Richard Kimble, an affluent Chicago surgeon who returns home one night to find his wife murdered and her murderer – a one-armed man – escaping. Kimble is charged with the crime, convicted, sent to prison, then escapes and spends the rest of the movie tracking down the one-armed man using a fairly straightforward methodology. First, he compares the type of prosthetic arm he had seen the murderer wearing to a hospital’s database and compiles a list of people who had been fitted with such a device. Kimble then uses other factors (such as the age of the patient, whether the prosthetic arm was on the right or left-hand, etc.) to narrow the list to five candidates. He then tracks down each candidate, one of whom turns out to be his wife’s murderer. The one-armed man is arrested and Kimble exonerated.

Perhaps Richard Kimble was on to something. Imagine what would have happened had Kimble conducted his search without considering “the one identifiable fact [he] knew about [the murderer].”¹⁶ He would have spent years searching the entire population of Chicago, two-armed

12. Much of this paper will compare airport profiling to incidents of racial profiling, primarily because legal issues surrounding racial discrimination predominate over the relatively minor issues of age discrimination (targeting adults) and gender discrimination (targeting males). Nevertheless, the emphasis of this paper deals with incorporating scrutiny of all three characteristics (race, gender, and age) into airport profiling techniques.

13. *Martinez v. Mt. Prospect*, 92 F. Supp. 2d 780, 782 (N.D. Ill. 2000).

14. Michael Kinsley, *Racial Profiling at the Airport*, SLATE (last visited Sept. 28, 2001) <http://slate.msn.com/?id=116347>. This article stated there were 6,000 September 11 victims, but more recent estimates have lowered the casualty count to slightly more than 3,000. See The Iowa Channel, *supra* note 9, at <http://www.theiowachannel.com/news/960658/detail.html>.

15. *The Fugitive* (Warner Bros. 1993).

16. Kinsley, *supra* note 14, at <http://slate.msn.com/?id=116347>.

and one-armed alike, male and female, young and old, black, white, Hispanic, Asian, and so on. Faced with such a daunting task, he likely would have given up his search and turned himself in to the U.S. Marshals.

Consider this example in light of the September 11 attacks. All nineteen hijackers were adult males of middle-eastern ethnicity.¹⁷ What might happen if America ignores the identifiable facts we know about hijackers? The FTSA must decide whether to modify current profiling procedures to include consideration of race, gender, and age. The following sections will discuss some of the legal arguments for and against such a policy, compare and contrast airport profiling to other instances of profiling, and explain current airport profiling procedures.

III. CONSTITUTIONAL AND LEGAL RAMIFICATIONS OF PROFILING

Modifying airport profiling procedures to include scrutiny of race, gender, and age has the potential to impact fundamental constitutional rights. Such a possibility requires us to consider the constitutional and legal ramifications of profiling before such changes are implemented.

The Fourteenth Amendment prohibits the creation or enforcement of “any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁸ The Equal Protection Clause “prohibits selective enforcement of the law based on considerations such as race” and is the “the constitutional basis for objecting to intentionally discriminatory application of laws.”¹⁹ Several recent cases have discussed racial profiling, particularly where police use race as the sole factor in pulling over black motorists.²⁰

17. Fifteen of the September 11 terrorists were from Saudi Arabia, two were from the United Arab Republic, and the remaining two were from Egypt and Lebanon, respectively. *See* <http://www.fairus.org/html/04178101.htm> (last visited Nov. 12, 2002).

18. U.S. CONST. amend. XIV, § 1. The modifications to airport profiling procedures discussed in this paper could have an impact on any airline passenger whose combined characteristics (race, gender, age, method of purchasing ticket, etc.) warrant heightened scrutiny. Since both U.S. citizens as well as non-citizens could incur such scrutiny, discussion of Fourteenth Amendment implications is relevant.

19. *Whren v. U.S.*, 517 U.S. 806, 813 (1996). Despite assumptions to the contrary, the Fourth Amendment’s prohibition against “unreasonable searches and seizures” and requirement of “probable cause” do not appear to apply to these circumstances. *See Id. Cf. U.S. v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975), which held that the Fourth Amendment “applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.”

20. This issue is commonly called “DWB” – “driving while black.” *See Illinois v. Wardlow*, 528 U.S. 119 (2000); *Chavez v. Ill. St. Police*, 251 F.3d 612 (7th Cir. 2001); *U.S. v. Montero Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000); *Martinez v. Mt. Prospect*, 92 F. Supp. 2d 780, 782 (N.D. Ill. 2000); *U.S. v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998); *Chavez v. Ill. St. Police*, 251

Judicial consensus, expressed in varying degrees of emphasis, is that “the Constitution prohibits selective enforcement of the law based on considerations such as race.”²¹ Although use of race and ethnicity for such purposes has been severely limited,²² such use has never been precluded:

All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.²³

Reliance on “racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.”²⁴ The qualified language of these decisions demonstrates judicial recognition of circumstances where profiling race may have “probative value”²⁵ and, having passed “a most searching examination,”²⁶ be utilized by law enforcement and security personnel.

Did the September 11 attacks, carried out by Middle Eastern adult males, create such circumstances? Could their race, gender, and age have had probative value had such factors been included in airport profiling procedures? Does the threat of further terrorist attacks warrant such measures? Answers to these questions may be found by examining historical examples of mandated restrictions on civil liberties during wartime, as well as contemporary instances of racial profiling.

A. Clarification of Terms: Discrimination and Profiling

Discussions of race and similar “hot-button issues”²⁷ are often hindered by divergent interpretations of certain words or phrases. For example, the term “discrimination,” as applied to most legal issues, is frequently perceived as having an inherently negative connotation. The Supreme Court recent noted, “many [traffic] stops never lead to an arrest, which further exacerbates the perceptions of *discrimination* felt by racial

F.3d 612 (7th Cir. 2001). For further discussion regarding DWB, see *infra* p. 17.

21. *Whren v. U.S.*, 517 U.S. 806, 813 (1996).

22. *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

23. *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

24. *Montero-Camargo*, 208 F.3d at 1134, (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986)).

25. *Montero-Camargo*, 208 F.3d at 1134.

26. *Id.*

27. Corpwatch, *Bush Urged to Support Anti-Racism Summit* (July 31, 2001) <http://www.corpwatch.org/bulletins/PBD.jsp?articleid=408>.

minorities and people living in high crime areas.”²⁸ The unspoken assumption is that discrimination based on race is *always* suspect. Indeed, some courts feel “it is critical that our legal system assist in the elimination of *all* racial discrimination. We must constantly strive to ensure that race plays *no* role in the day-to-day operation of our justice system.”²⁹

Similarly, “racial profiling” is often understood to have a negative implication, which is that race (or whatever status is being “discriminated” against or “profiled”) is the *only* factor justifying increased scrutiny by police or other security officials. For example, the court in *Lemon v. MTS* noted that “[d]efendants’ employee . . . utilized racial profiling as the sole basis for detaining plaintiff.”³⁰ The court understood “racial profiling” to mean that race was the only consideration used in that case.

Employment-related matters are another area of law involving frequent allegations of discrimination. Although race-based discrimination in employment is immediately suspect, some scholars have noted that it may be rational in some circumstances.³¹ As a rule, “the law prohibits even such ‘rational’ discrimination because of this society’s long history of racial injustice and the harmful effects of race-based decisions.”³² However, the law does not always require an ipso facto rejection of discrimination. “Rational discrimination against persons with disabilities is constitutionally permissible in a way that rational discrimination against religious practices is not.”³³

Absolutist interpretation of terms such as “profiling” and “discrimination” is unwarranted, because racial discrimination, as well as other forms of discrimination, is not unconstitutional on its face. Virtually every major statement on racial discrimination or racial profiling is qualified or limited in some sense. “Racial discriminations are *in most circumstances* irrelevant and therefore prohibited.”³⁴ “Distinctions between citizens *solely* because of their ancestry are by their very nature odious to a free people whose institutions are founded

28. *Illinois v. Wardlow*, 528 U.S. 119, 133 (2000) (emphasis added).

29. *Martinez v. Mt. Prospect*, 92 F. Supp. 2d 780, 781 (N.D. Ill. 2000) (emphasis added).

30. *Lemon v. MTS*, 2001 WL 872639 (E.D. Pa. 2001).

31. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 516 (1987).

32. Pauline Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NWULR 1497, 1518 (Summer, 2002).

33. *Erickson v. Board of Governors of St. Coll. and Univ. for N.E. Ill.*, 207 F.3d 945, 951 (7th Cir. 2000) (emphasis added).

34. *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943) (emphasis added).

upon the doctrine of equality.”³⁵ “All legal restrictions which curtail the civil rights of a single racial group are immediately *suspect* . . . [and] courts *must subject them to the most rigid scrutiny*.”³⁶ The law can and does accommodate a distinction between legally permissible “rational” discrimination and impermissible antagonistic discrimination. “Antidiscrimination laws are not predicated upon the existence of economically ‘rational’ discrimination; the problem that exists *and which such laws target* is, to a large extent, stubborn but irrational prejudice.”³⁷

Such a distinction is vital when discussing airport profiling. For example, racial profiling is “generally understood to mean the *improper* use of race as a basis for taking law enforcement action.”³⁸ This unspoken generalization is sometimes harmful, because failure to acknowledge or articulate the distinction between “proper” and “improper” discrimination leads to a fading of that important difference. Given the urgent need to improve security at our airports, this distinction must be clarified and brought to the forefront of any discussions regarding profiling.

Many arguments posited against profiling rely on a blurring of the line between prejudicial, animus-based discrimination and measured, rational, controlled profiling. “If ‘racial profiling’ means anything specific at all, it means rational discrimination: racial discrimination with a non-racist rationale.”³⁹ Profiling or other discriminatory measures which use race as the *sole* factor are virtually useless from a practical point of view. But measures which consider multiple factors, including race, gender, and age, may be justified in certain circumstances. Our judicial system has recognized that extremely urgent situations – such as wartime – may require restrictions on civil liberties that would normally be facially unconstitutional.⁴⁰

B. A “Clear and Present Danger”?

During World War I, Congress passed the Espionage Act, which forbade speech inciting insubordination or refusal to serve in the armed forces of the United States.⁴¹ A number of subsequent cases resulted in

35. *Id.* (emphasis added).

36. *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (emphasis added).

37. *Lam v. University of Haw.*, 40 F.3d 1551, 1563 (9th Cir. 1994) (emphasis added).

38. *Chavez v. Illinois. St. Police*, 251 F.3d 612, 620 (7th Cir. 2001) (emphasis added).

39. Kinsley, *supra* note 14, at <http://slate.msn.com/?id=116347>.

40. See *infra* B. “A ‘Clear and Present danger,’” ? which discusses this issue in more detail.

41. Espionage Act of June 15, 1917, ch. 30, tit. XI, 40 Stat. 228-30, codified at 18 U.S.C. §§ 611-33 (1925).

the “Clear and Present Danger” test.⁴² Although those cases centered on the First Amendment right to free speech, the reasoning from them can be applied to our current situation:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.⁴³

Does the current situation facing America – the ongoing threat of terrorism – justify the inclusion of race, gender, and age in profiling procedures at airports and other ports of entry? Are such measures proportional in “proximity and degree” to the danger of terrorist hijackings? Our society has gone to great lengths to avoid facing the painful truth that, in some circumstances, race can have probative value. A recent article in *The Atlantic* summarized the situation rather well:

The mathematical probability that a randomly chosen Arab passenger might attempt a mass-murder-suicide hijacking—while tiny—is considerably higher than the probability that a randomly chosen white, black, Hispanic, or Asian passenger might do the same. In constitutional-law parlance, while racial profiling may be presumptively unconstitutional, that presumption is overcome in the case of airline passengers, because the government has a compelling interest in preventing mass-murder-suicide hijackings, and because close scrutiny of Arab-looking people is narrowly tailored to protect that interest.⁴⁴

America faces a “clear and present danger” of hijackers taking control of airplanes and either killing passengers or using these aircraft as flying bombs. All nineteen terrorists involved in the September 11 attacks belonged to the “Al-Qaeda terrorist network headed by Usama Bin Laden [which has] clearly emerged as the most urgent threat to U.S. interests.”⁴⁵ These hijackers were exclusively adult males of Middle Eastern ethnicity.⁴⁶

42. See *Schenck v. U.S.*, 249 U.S. 47, 52 (1919); *Abrams v. U.S.*, 250 U.S. 616, 628 (1919); and *Gitlow v. New York*, 268 U.S. 625, 632 (1925).

43. *Schenck*, 249 U.S. at 52.

44. Stuart Taylor, Jr., *The Case for Using Racial Profiling at Airports*, ATLANTIC (last visited Sept. 25, 2001) <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm>.

45. FBI, *supra* note 4, at <http://www.fbi.gov/congress/congress02/watson020602.htm>.

46. Federation for American Immigration Reform, *supra* note 1, at <http://www.fairus.org/html/04178101.htm>.

America must eliminate this danger in such a way as to minimize the impact on the civil liberties of minority groups such as OMEAs (people who are “of middle eastern appearance”⁴⁷) while maximizing our opportunity to prevent similar attacks in the future. The decision to include consideration of race, gender, and age in airport profiling must not be based on animus or used as a pretext to target a specific ethnic group. Nevertheless, America must also consider whether the current emergent circumstances warrant adopting security measures that could be otherwise construed as infringing on civil liberties.

C. *Examples of Questionable Discrimination*

America’s checkered history of race relations no doubt contributes to its hesitancy to adopt security measures that, though initially well-intentioned, might eventually become a pretext for inappropriate discrimination against minorities. Some of our country’s most regrettable episodes occurred during attempts to shore up national security, including the Alien and Sedition Acts of 1798 and Civil War measures such as President Lincoln’s suspension of the writ of habeas corpus.⁴⁸ Implementing a profiling system that includes consideration of race, gender, and age must be done with the standards of “rigid scrutiny”⁴⁹ mandated by the Supreme Court.⁵⁰

This section examines two instances of race-based discrimination in our nation’s history: the Japanese internment camps during World War II and the more recent instances of “driving while black.”⁵¹ This section also attempts to identify differences between these events and the modified profiling procedures that could be implemented in airports. These fundamental differences, both in rationale and implementation, distinguish airport profiling from the unfortunate discrimination faced by Japanese-Americans during World War II.

47. John Derbyshire, *At First Glance: Racial Profiling, Burning Hotter*, NAT’L REV. ONLINE (visited Oct. 5, 2001) <http://www.nationalreview.com/derbyshire/derbyshire100501.shtml>.

48. Alien Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570; Sedition Act of July 14, 1798, ch. 74, § 1, 1 Stat. 596; see also Ken Armstrong, *Many Fear Loss of Freedoms*, CHI. TRIB. (Visited Sept. 16, 2001) <http://www.chicagotribune.com/news/specials/chi-0109160286sep16.story?coll=chi-newsspecials-hed>.

49. *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

50. As columnist Stuart Taylor noted in *The Atlantic*, “The emergency measures adopted now could be with us for decades, because this emergency is not going away. So we’d better be careful. History is replete with hasty emergency legislation that we later came to regret—from the Alien and Sedition Acts to the detention camps for Japanese-Americans—and with abuses of the new powers years later by officials whose invocations of national security proved overblown or even fraudulent.” Taylor, *supra* note 44, at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm>.

51. *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996).

1. Japanese internment during World War II

On December 8, 1941, one day after the bombing of Pearl Harbor by a Japanese air force, Congress declared war against Japan. Two months later, President Franklin D. Roosevelt signed Executive Order 9066, which stated, “the successful prosecution of the war requires every possible protection against . . . sabotage.”⁵² This order authorized the Secretary of War to prescribe military areas “from which any or all persons may be excluded.”⁵³ In February, 1942, General J.L. DeWitt, Military Commander of the Western Defense Command, issued the first of two proclamations. The first proclamation established “military areas and zones” comprising “the southern part of Arizona [and] all the coastal region of the three Pacific Coast states.”⁵⁴ The second proclamation issued weeks later expanded these areas.⁵⁵

President Roosevelt then issued Executive Order 9102 establishing the “War Relocation Authority.”⁵⁶ Under these authorities, an estimated 120,000 Japanese internees – two-thirds of who were United States citizens⁵⁷ – were removed from America’s west coast, home to many military bases and manufacturing plants. These areas were considered vulnerable to Japanese attack.⁵⁸ President Roosevelt also appointed a commission to evaluate “what, if any, dereliction . . . in the American chain of command that allowed the Japanese to take the Americans completely by surprise.”⁵⁹ This Commission found evidence of extensive espionage conducted prior the attack on Pearl Harbor.⁶⁰

Numerous lawsuits were filed as a result of these forced relocations. In *Hirabayashi v. United States*, an American-born Japanese man

52. Exec. Order No. 9066, 7 FR 1407, 1942 WL 4050 (Pres.); see also *Hirabayashi v. U.S.*, 320 U.S. 81, 85 (1943).

53. *Id.* at 86.

54. *Id.* at 86-87.

55. *Id.*

56. *Id.*

57. Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 75 (1998).

58. Declan McCullagh, *Why Liberty Suffers in Wartime*, WIRED NEWS (Sept. 24, 2001) <http://www.wired.com/news/print/0,1294,47051,00.html>.

59. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME*, 189 (Alfred A. Knopf 1998).

60. *Id.* at 189-90, which states: “There were . . . Japanese spies on the Island of Oahu [some of whom] were Japanese consular agents and others were persons having no open relations with the Japanese foreign service. These spies collected, and through various channels transmitted, information to the Japanese Empire respecting the military and naval establishments and dispositions on the Island . . . [The Japanese knew] the exact location of vital air fields, hangars, and other structures. They also knew accurately where certain important naval vessels would be berthed. Their fliers had the most detailed maps, courses, and bearings, so that each could attack a given vessel or field. Each seems to have been given a specified mission.”

disobeyed the curfew requirement imposed by the military pursuant to President Roosevelt's executive order.⁶¹ Although the Court recognized that racial discrimination is "by [its] very nature odious to a free people,"⁶² it upheld the constitutionality of these measures:

[T]he danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others . . . The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.⁶³

A similar situation arose in *Korematsu v. United States*, where, as in *Hirabayashi*, the Court upheld the security measures, holding that the government's actions were not "beyond the war power of Congress and the Executive."⁶⁴ The Court had no doubt that most Japanese-Americans "were loyal to this country," but agreed with military authorities that "it was impossible to bring about an immediate segregation of the disloyal."⁶⁵ This reasoning apparently had an arguably valid basis:

The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.⁶⁶

61. *Hirabayashi*, 320 U.S. at 83.

62. *Id.* at 101.

63. *Id.* at 100-01.

64. *Korematsu v. U.S.*, 323 U.S. 214, 217 (1944).

65. *Id.* at 219-220.

66. *Id.* at 219.

Hirabayashi and *Korematsu* have since been harshly criticized by both the courts and civil liberties groups.⁶⁷ Yet the underlying concept – that an emergent and genuine threat to the United States as a whole can supersede even important and fundamental rights – seems particularly relevant to considerations of airport security in light of September 11. Further, a number of significant differences exist between the Japanese internments of World War II and the recent calls for profiling at airports:

- Different Players, Different Goals: Pearl Harbor was a military target, attacked by a military force. September 11 marked the beginning of a “focus on attacks that yield significant destruction and high casualties, thus maximizing worldwide media attention and public anxiety.”⁶⁸ Japan had hoped to disable America’s naval capacities with a one-time strike. Al-Qaeda extremists, on the other hand, adhere to “the international jihad movement”⁶⁹ seeking the actual destruction – not merely disabling – of America.
- Proportional Harm: Some Japanese were interned in camps during a substantial portion of World War II. Some were allowed to leave provided that they joined the military or relocate to the eastern and Midwestern portions of the United States.⁷⁰ The degree of harm suffered by the Japanese was much more serious than what *might* be experienced by those who are profiled at airports.⁷¹
- Sunset Provision: One of the most unjust attributes of the Japanese internment episode was its open-endedness. A policy was formulated in the heat of the moment to get the Japanese into internment camps, but exit strategies took quite some time to develop and implement. Modification to current airport profiling procedures could include a “sunset provision” requiring that these measures expire unless Congress acts to extend them.⁷²

67. See e.g., the criticisms of *Hirabayashi* in *U.S. v. Keane*, 852 F.2d 199 (7th Cir. 1988); *Blanton v. U.S.*, 94 F.3d 227 (6th Cir. 1996); *Estate of McKinney ex rel. McKinney v. U.S.*, 71 F.3d 779 (9th Cir. 1995); *Moody v. U.S.*, 874 F.2d 1575 (11th Cir. 1989); *U.S. v. Craig*, 907 F.2d 653 (7th Cir. 1990); *U.S. v. Keane*, 852 F.2d 199 (7th Cir. 1988).

68. FBI, *supra* note 4, at <http://www.fbi.gov/congress/congress02/watson020602.htm>.

69. *Id.*

70. REHNQUIST, *supra* note 59, at 200-03.

71. As a recent article noted, “assuming these [profiling] procedures do work, it’s hard to argue that helping to avoid another Sept. 11 is not worth the imposition, which is pretty small: inconvenience and embarrassment, as opposed to losing a job or getting lynched.” Kinsley, *supra* note 14, at <http://slate.msn.com/?id=116347>.

72. A sunset provision could also act as a safety valve in case the modified profiling procedures are ineffective or result in significant civil rights violations.

2. DWB – “driving while black”

Another controversial form of discrimination is “any action taken by a state trooper during a traffic stop that is based upon racial or ethnic stereotypes and that has the effect of treating minority motorists differently than non-minority motorists.”⁷³ Such pretextual traffic stops have become known as DWB – “driving while black.”⁷⁴ Police argue that profiling young black men is not a matter of racism, but of statistics. Though black males aged fifteen to twenty-four constitute only one percent of the population, they are responsible for up to twenty percent of violent crime.⁷⁵ Critics of this practice argue “it is unfair . . . to visit disproportionate burdens upon one segment of the population, defined by its racial characteristics . . . because race is immutable and therefore cannot be altered to avoid unwanted disparate treatment.”⁷⁶ Others acknowledge the validity of the statistics cited by police in defense of DWB, but still say that profiling is not a part of good police work. “Racial profiling poisons the water. It’s one of the things that makes racial minorities distrust the police and that makes their work more difficult,” says Harvard law professor Randall Kennedy. “Even if it’s true, if it works . . . it’s too socially horrible for America.”⁷⁷ Such arguments would also seem applicable to persons subjected to increased scrutiny in airports.

Many other arguments suggest valid and reasonable objections to DWB profiling.⁷⁸ Yet, as with the Japanese internment camps, several significant distinctions arise between DWB and profiling race, gender, and age at airports. Columnist Stuart Taylor argues,

[DWB] should be deemed unconstitutional even when there is a statistically valid basis for believing that it will help catch more drug dealers or violent criminals. . . . This benefit is far outweighed by the costs: Such racial profiling is hard to distinguish from—and sometimes involves—plain old racist harassment of groups that have long

73. *White v. Williams*, 179 F. Supp. 2d 405, 410 (D.N.J. 2002).

74. *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996).

75. John Stossel, *Rethinking Racial Profiling: How the Attacks Have Changed Views*, ABC NEWS (Oct. 3, 2001) http://abcnews.go.com/sections/2020/2020/2020_011002_racial_profiling_stossel.html. Interestingly, this particular issue may not have significant support in the black community. In a recent poll, two out of three NAACP members answered “no” when asked “Should black cops put pressure on Bush to back anti-racial profiling bills?” See NAACP, *Poll Results*, at (last visited Mar. 26, 2002) <http://www.naacp.org/polls/results.php>.

76. Sherry F. Colb, *The New Face of Racial Profiling: How Terrorism Affects The Debate*, at (Oct. 10, 2001) <http://writ.news.findlaw.com/colb/20011010.html>.

77. Stossel, *supra* note 75, at http://abcnews.go.com/sections/2020/2020/2020_011002_racial_profiling_stossel.html.

78. See David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (Dec 1999).

experienced discrimination at every stage of the criminal justice process. It subjects thousands of innocent people to the kind of humiliation that characterizes police states. It hurts law enforcement in the long run by fomenting fear and distrust among potential witnesses, tipsters, and jurors. It is rarely justified by any risk of imminent violence. And it makes a mockery of conservative preachings that the Constitution is colorblind.⁷⁹

Taylor goes on to note four differences between DWB and airport profiling:

- The rationale for airport profiling (preventing mass murder) is infinitely more important than the rationale behind DWB profiling (finding illegal drugs or guns).⁸⁰
- A virulent perversion of Islam is, so far, the only mass movement in the world so committed to mass-murdering Americans that its fanatics are willing to kill themselves in the process.⁸¹
- This movement includes people who have lived legally in America for years (some of whom may be citizens), so the risk of weapons being smuggled onto airliners cannot be eliminated by giving special scrutiny only to foreign nationals.⁸²

Additional distinctions between these two practices further demonstrate the plausibility of encouraging one (airport profiling) while condemning the other (DWB):

- DWB is singularly race-based, which contravenes both the letter and the spirit of the Constitution. Airport profiling takes multiple factors into account, such as when the ticket was purchased, how the subject responds to questions, etc.
- Police employ DWB profiling primarily as a drug interdiction technique. Because the vast majority of such interdictions yield a very small quantity of drugs, their social impact is insignificant (although the aggregate result can have a substantial effect). Airport profiling, on the other hand, seeks to eliminate criminal acts that, though singular and isolated, will have a significant impact on our society.

Some empirical evidence exists to justify both the World War II internment of ethnic Japanese and the more recent practice of profiling

79. Taylor, *supra* note 44 at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm>.

80. *Id.*

81. *Id.*

82. *Id.* *Legal* proscriptions against discrimination notwithstanding, there is no *logical* reason to consider nationality but not race, gender, and age.

black motorists. Nevertheless, the costs of these practices far outweigh their benefits. The same cannot be said for airport profiling. The crime to be averted is a significant state interest. A profiling system incorporating multiple factors – including race, gender, and age – can avoid most, if not all, of the criticisms leveled against previous single- or dual-factor profiles.

D. Examples of Rational Discrimination

State-endorsed discrimination is hardly a phenomenon restricted to World War II. American society currently tolerates – even advocates – a surprising number of openly discriminatory policies. These practices are justified by citing societal interests that presumably outweigh the harm suffered by those groups against which these policies discriminate. This section explores three examples of discriminatory practices that are either tolerated or openly encouraged and evaluates whether corollary arguments can be drawn between these social policies and profiling at airports. If rational discrimination can further societal interests such as education opportunities, employment opportunities, and military cohesiveness, then the law can certainly accommodate rational discrimination in matters of airport security.

1. Affirmative action

Affirmative action is a general term referring to social policies calling for “minorities and women to be given special consideration in employment, education and contracting decisions.”⁸³ Supporters of this policy claim to be “dedicated to the advancement of affirmative action, equal opportunity and the elimination of discrimination on the basis of race, gender, ethnic background or any other criterion that deprives people of opportunities to live and work.”⁸⁴ Affirmative action suggests that the remedy for America’s “long history of racial and sexual discrimination”⁸⁵ is, ironically, contemporary preferences based on race or sex:

In its modern form, affirmative action can call for an admissions officer faced with two similarly qualified applicants to choose the minority over the white, or for a manager to recruit and hire a qualified woman for a job instead of a man. Affirmative action decisions are

83. Dan Froomkin, *Affirmative Action Under Attack*, WASH. POST (Oct. 1998) <http://www.washingtonpost.com/wp-srv/politics/special/affirm/affirm.htm>.

84. American Association for Affirmative Action, *Welcome to Affirmativeaction.org* (last visited March 26, 2002) <http://www.affirmativeaction.org/>.

85. Froomkin, *supra* note 83, at <http://www.washingtonpost.com/wp-srv/politics/special/affirm/affirm.htm>.

generally not supposed to be based on quotas, nor are they supposed to give any preference to unqualified candidates. And they are not supposed to harm anyone through “reverse discrimination.”⁸⁶

Scrutiny of the comparative costs and benefits of affirmative action is beyond the scope of this paper.⁸⁷ That it is a form of intentional, state-endorsed discrimination, however, is beyond question. If peacetime initiatives may use discriminatory criteria to further racial equality, should not wartime initiatives similarly use rationally discriminatory criteria to further “our national defense?”⁸⁸

2. *Military discrimination: homosexuals; women in certain combat roles*

Military service “is fundamentally different from civilian life,”⁸⁹ and therefore governed by a modified form of jurisprudence. Persons in the armed forces are subject to “the Uniform Code of Military Justice and other statutory provisions . . . to which may be added the unwritten common law of the usage and custom of military service as well as regulations and authorized by the President as Commander in Chief of the Armed Forces.”⁹⁰ This body of law, fully recognized by civil courts in both times of peace and of war,⁹¹ provides two more examples of state-endorsed discrimination: the exclusion of women from certain combat roles and prohibition against homosexuals serving in any military capacity.

The United States “has more women in its military than any other nation,” yet women are still barred from most combat positions.⁹² This prohibition stems from the Women’s Armed Services Integration Act of

86. *Id.*

87. There are voluminous legal articles available on this subject. See e.g. Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000); Robert J. Donahue, *Racial Diversity as a Compelling Governmental Interest*, 30 IND. L. REV. 523 (1997); Dinesh D’Souza & Christopher Edley, Jr., *Affirmative Action Debate: Should Race-based Affirmative Action be Abandoned as a National Policy?*, 60 ALB. L. REV. 425 (1996); Lino Graglia, *Affirmative Action: Have Race- and Gender-Conscious Remedies Outlived Their Usefulness? Yes: Reverse Discrimination Serves No One*, A.B.A. J. May 1995, at 40; Jeremy Moeser, *Hopwood v. Texas: The Beginning of the End for Racial Preference Programs in Higher Education*, 48 MERCER L. REV. 941 (1997); L. Darnell Weeden, *Yo, Hopwood, Sayinging No to Race-Based Affirmative Action is the Right Thing to Do from an Afrocentric Perspective*, 27 CUMB. L. REV. 533 (1996-1997).

88. *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943).

89. 10 U.S.C. § 654(a)(15) (1994).

90. Legal Information Institute, *Military Law: An Overview* (Mar. 26, 2002) <http://www.law.cornell.edu/topics/military.html>.

91. *Id.*

92. Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMLIN J. PUB. L. & POL’Y 199, (Spring 1994).

1948,⁹³ which both advanced and limited women's opportunities in the armed forces. This Act accomplished four things:

- It gave women permanent status in the military.⁹⁴
- It established that women could constitute two percent of all enlisted personnel, and it limited the number of female officers to ten percent of the total female enlisted strength.⁹⁵
- It limited women's role in the military by excluding women from combat duties, combat units, and combat ships. (The Act allowed each branch of service considerable leeway in determining which assignments it would categorize as "combat" or "combat-support.")⁹⁶

Women, however, are not alone when it comes to discriminatory military policies. Persons who "demonstrate a propensity or intent to engage in homosexual acts"⁹⁷ are prohibited from serving in the Armed Forces at all. In November 1992, President-Elect Clinton announced that he planned to lift the military's long-standing ban on gays and lesbians.⁹⁸ An extended debate on the issue culminated in a July 1993 compromise, known as "don't ask, don't tell," allowing homosexuals to serve in the armed forces "as long as they did not proclaim their homosexuality or engage in homosexual conduct."⁹⁹ This policy also required that military commanders not try to find out the sexual orientation of personnel.¹⁰⁰ The United States Supreme Court has consistently declined to hear cases involving homosexuals being discharged from the military.¹⁰¹

The armed forces discriminate, in varying degrees, against women, homosexuals, and even men.¹⁰² Regardless of the relative merits of these policies and their underlying justifications, their existence alone is sufficient to demonstrate that the Constitution can accommodate reasoned, rational discrimination in certain circumstances.

93. Women's Armed Services Integration Act of 1948, Pub.L.No. 80-625, 62 Stat. 368 (1948).

94. Pamela R. Jones, *Women in the Crossfire: Should The Court Allow It?*, 78 CORNELL L. REV. 252 (1993).

95. *Id.*

96. *Id.*

97. 10 U.S.C. § 654(a)(15).

98. Facts on File, *Issues and Controversies: Gays in the Military* (Mar. 6, 1998) <http://www.facts.com/icof/i00062.htm>.

99. *Id.*

100. *Id.*

101. See *Holmes v. California Army Nat. Guard*, 525 U.S. 1067 (1999); *Richenberg v. Cohen*, 522 U.S. 807 (1997); *Thomasson v. Perry*, 519 U.S. 948 (1996).

102. The current system for military draft inducts only men, a practice which has been upheld by the U.S. Supreme Court. See *Rostker v. Goldberg*, 453 U.S. 57 (1981).

3. Federally funded gender/age discrimination in Louisiana

“State highway safety officials in Louisiana in November 2001 announced they received a \$700,000 federal grant to help crack down on two groups of chronic violators of the state’s seat belt law: drivers and passengers of pick-up trucks, and all male drivers and passengers between 18 and 55.”¹⁰³ Louisiana Highway Safety Commission Executive Director James Champagne noted that state and federal studies have consistently shown that pick-up drivers and all male drivers are less likely to buckle up than any other groups of drivers or front-seat passengers. “We will be looking at all male drivers, especially those who drive pickup trucks who refuse to buckle up.”¹⁰⁴ Champagne also plans on targeting male pickup drivers

“from the Florida Parishes to the New Orleans area to the Houma and Thibodaux area, [because] that’s where 65 percent of the pickups in the state are.” Asked if the targeting of males and pickup drivers and passengers is profiling of a certain group, Champagne said, “Absolutely . . . [The lack of seat belt use] is a gender problem. It is a male problem in all parts of the state. It is an 18-to-55 (year-olds) problem.”¹⁰⁵

Rather than couch this discriminatory practice in safer terms, Mr. Champagne openly acknowledges that he is profiling a certain group of people based on their gender, age, residence, and type of vehicle, and he is doing so at government expense. While his application of the law may be ultimately misguided, his methodology seems fairly logical. He has approached the problematic behavior with no thoughts of special treatment – positive or negative – to those participating in it.

E. Profiling at Ports of Entry: Three Examples

The propriety and constitutionality of race, gender, or age discrimination must be determined according the context in which such discrimination occurs. The following section describes two situations where profiling procedures which included consideration of race worked.

103. Ed Anderson, *Police to Harness Seat Belt Scofflaws*, TIMES-PICAYUNE (Nov. 10, 2001) <http://www.nola.com/news/t-p/capital/index.ssf?newsstory/drive10.html>.

104. *Id.*

105. *Id.*

1. Ahmed Rassam

In late 1999, customs officials in Port Angeles, Washington were on the lookout for Middle Eastern men when they stopped Ahmed Rassam, an Algerian, after he crossed into the United States from Canada.¹⁰⁶ A search of his car yielded bomb-making materials that prosecutors later said were intended for an attack on a Los Angeles airport.¹⁰⁷ Investigators say the materials were similar to those used in attacks on the American embassies in Africa. Rassam now faces 140 years in jail and is said to be giving officials valuable information about Usama Bin Laden's terrorist network.¹⁰⁸ "So," notes John Stossel, "profiling worked."¹⁰⁹

2. Richard Reid

During a December 2001 flight from Paris to Miami, a flight attendant noticed Richard Reid – a British citizen and convert to Islam – trying to ignite the soles of his shoes, which turned out to be made of explosives. The flight attendant and other passengers succeeded in subduing him.¹¹⁰ Mr. Reid also aroused the suspicion of airline employees in Paris's DeGaulle airport when he purchased a one-way ticket in cash and did not check any luggage. The CEO of American Airlines, Don Carty, stated, "Our people brought the passenger to the attention of French authorities, and it was only after those authorities cleared him, that he was allowed to board the flight on Saturday."¹¹¹ Despite being singled out for questioning twice, French authorities eventually let Reid board the aircraft.¹¹²

This incident is an important lesson in several ways. First, Richard Reid was not subjected to an administered and controlled profiling procedure, so the French authorities had no reasonable grounds to detain him. A profiling process could very well have resolved this problem. Second, this incident demonstrates the necessity of scrutinizing both objective characteristics (such as purchasing a one-way ticket with cash) and subjective observations (such as suspicious behavior). Finally, this

106. Stossel, *supra* note 75, at http://abcnews.go.com/sections/2020/2020/2020_011002_racialprofiling_stossel.html.

107. *Id.*

108. *Id.*

109. *Id.*

110. CNN, *Authorities: Alleged Shoe Bomber Did Not Act Alone* (Jan. 26, 2002) <http://asia.cnn.com/2002/US/01/25/reid.candiotti/>.

111. Lisa Stark, *Patching Up Security Holes*, ABC NEWS (Dec. 24, 2001) http://abcnews.go.com/sections/wnt/DailyNews/shoebomb_security011224.html.

112. *Id.*

event demonstrates the differences, both in rationale and implementation, between rational airport profiling and antagonistic profiling. Richard Reid was not scrutinized because of his race,¹¹³ but because he demonstrated several characteristics that, taken together, aroused suspicion.¹¹⁴

IV. CHANGES IN AIRPORT SECURITY MEASURES

There is no silver bullet or quick fix for terrorism. No single program or agency can protect U.S. interests from groups so enthralled with the prospect of our destruction. America can and should, however, continue to improve security measures at airports. This section evaluates some of the changes taking place in airport security, including the profiling procedures currently in place.

A. *Airport Security Federalization Act*

In November 2001, President Bush signed the Airport Security Federalization Bill of 2001 into law. On January 18, 2002, airports across the country implemented the first security measures designed to “improve security at airports by requiring airlines to screen bags and travelers for explosives, either through the use of high-tech bomb x-ray devices, bag matching, random searches, manual searches or bomb-sniffing dogs.”¹¹⁵ One of the provisions of the Act is requires that a computer-assisted passenger prescreening system “will be used to screen all passengers, rather than just those who check in at a ticket counter.”¹¹⁶

B. *On-Site Security Measures: Profiling*

In addition to indiscriminate security measures such as metal detectors and baggage screening, airport profiling “permits investigators to correlate a number of distinct data items in order to assess how close a person . . . comes to a predetermined characterization or model of infraction. The modal characteristics and behavior patterns of known violations . . . are determined relative to the characteristics of others

113. “And who is Richard Reid? A Saudi? An Iraqi? An Afghan? Well, not exactly. Reid was born in Bromley, Kent. His mother is British and his father believed to be of Jamaican origin.” James Thurgood, *A Breeding Ground for Terror* (last visited Nov. 13, 2002) <http://www.spearhead-uk.com/0201-jt.html>.

114. This is not to say that race shouldn't be considered, but rather that it should not be the sole or predominating factor in profiling methods.

115. John Whitehead, *Terror In Our Airports* (Jan. 26, 2002) http://www.worldnetdaily.com/news/article.asp?article_id=26211.

116. *Id.*

presumed to be nonviolators.”¹¹⁷ Suspected hijackers are profiled through a comparison between these two groups. The most common profiling model is “a simple laundry list of ‘red flag’ characteristics. As more and more of these occur the case in question becomes more suspect. A second, more in-depth, investigation is then carried out to determine if a case that has been flagged as suspicious actually involves the violation.”¹¹⁸

The modifications to profiling procedures suggested in this paper help avoid the pitfalls inherent in other models (such as DWB). A profiling process that incorporates all potentially useful factors is useful in preserving civil liberties because no single indicator is definitive. Rather, “their joint appearance is thought to be associated with an increased probability that a violation will occur or has occurred.”¹¹⁹ For example, “there is nothing illegal or exceptional about being [a middle-eastern] male, purchasing a one-way airline ticket, paying for it with cash, and obtaining the ticket at the last minute at the airport. But analysis suggests that when these factors occur together, the chances of a skyjacking attempt are increased.”¹²⁰ In other words, as the court in *U.S. v. Lopez* stated, while no single screening technique “can by itself completely protect the flying public – without creating an objectionable level of disturbance and inconvenience – probabilities are increased by combining several approaches, thus sufficiently reducing the size of the population which must ultimately be physically interfered with to a practicable and socially acceptable level.”¹²¹

C. Suggested Modifications to Current Profiling Techniques

So-called “hijacker profiles”¹²² are intentionally kept secret to prevent circumvention of identified hijacker characteristics. However, testimony from cases which have challenged these procedures demonstrate that hijacker profiles probably include information on how the ticket is purchased (i.e. whether the ticket is one-way,¹²³ purchased with cash,¹²⁴ purchased on the same day as the flight,¹²⁵ etc.). Further, the

117. Gary T. Marx & Nancy Reichman, *Routinizing the Discovery of Secrets: Computers as Informants*, 27 AM. BEHAVIORAL SCIENTIST 423 (available at (visited March 26, 2002) <http://web.mit.edu/gtmarx/www/secrets.html>).

118. *Id.*

119. *Id.*

120. *Id.*

121. *U.S. v. Lopez*, 328 F. Supp. 1077, 1084-85 (E.D.N.Y. 1971).

122. Charles G. Slepian, *Security at Domestic Aviation Facilities* (last visited Nov. 13, 2002) http://www.frac.com/airline/Domestic_Aviation_Facilities96.asp.

123. *U.S. v. Dalpiaz*, 494 F.2d 374 (6th Cir. 1974).

124. Four of the nineteen September 11 terrorists paid with cash. FBI, *Press Release – 9/27/01*

court in *Lopez* found profiling and its attendant anti-hijacking procedures to be constitutionally valid where:

- The profile has certain established characteristics in which hijackers differ significantly from air-traveling public.¹²⁶
- Such characteristics are easily observed by airport personnel without exercising judgment.¹²⁷
- The profile does not use characteristics which discriminate against any group on the basis of religion, origin, political views, or race.¹²⁸

Any addition to the profile which may introduce “an ethnic element for which there is no experimental basis [raises] serious equal protection problems . . . [and destroys] the essential neutrality and objectivity of the approved profile.”¹²⁹

The premise upon which the court in *Lopez* relied in barring consideration of race is outmoded in regards to airport security. The requisite “experimental basis” for introducing consideration of race (and, presumably, gender and age) into profiling techniques was created on September 11, 2001. “One hundred percent of the people who have hijacked airliners for the purpose of mass-murdering Americans have been Arab men.”¹³⁰ Other characteristics¹³¹ which are currently subject to profiling are not nearly as determinative or as useful for predictive purposes. Therefore the FTSA should modify current profiling procedures to incorporate race, gender, and age into the list of factors which may trigger heightened scrutiny. These modified procedures should be implemented with a sunset provision to ensure that such measures do not last longer than the current circumstances require.

In order to ensure the constitutional and practical feasibility of such modifications, airport security personnel should receive careful, precise training to incorporate observations of these factors into their security measures. Columnist Stuart Taylor suggests that this change of policy could even be beneficial to minorities:

The [Bush] Administration cannot and should not cloak its profiling policy in ambiguity . . . Unless the security people on the ground are told clearly what they should and should not do, they may engage in

– *Hijackers* (Sept. 27, 2001) <http://www.fbi.gov/pressrel/pressrel01/092701hjpgic.htm>.

125. *U.S. v. Moreno*, 475 F.2d 44 (5th Cir. 1973).

126. John N. Glenn, Annotation, *Validity, Under Federal Constitution, of Preflight Procedures Used at Airports to Prevent Hijacking of Aircraft*, 14 A.L.R. FED. 286, 290 (1973).

127. *Id.*

128. *Id.*

129. *U.S. v. Lopez*, 328 F.Supp. 1101 n.28 (E.D.N.Y. 1971).

130. Taylor, *supra* note 44, at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm>.

131. See *supra* note 126.

more (or less) racial profiling than safety requires. And if the Administration uses racial profiling while pretending to reject it, the message to police and citizens around the country will be that it's OK, as long as you lie about it.¹³²

These modified procedures will expand the discretion given to airport security personnel in regards to profiling, but the courts have already demonstrated a willingness to allow such latitude. For example, the broad discretion given to security personnel to execute searches already extends to such amorphous grounds as "the mere presence of a large, unidentifiable dark object in an x-ray picture of carryon luggage,"¹³³ a defendant's "suspicious activity in the airport lounge area,"¹³⁴ even a "mere or unsupported suspicion."¹³⁵ A rational, openly-administered and monitored profiling system that includes consideration of race, gender, and age, is not nearly as expansive and far more objective than "dark objects"¹³⁶ or "mere suspicion."¹³⁷

V. VALID CONCERNS

There have been concerns aired over expansion or use of profiling. Critics argue that profiling is a slippery slope that will result in significant civil rights violations, and that such measures will be ineffective.

As an example, Ashraf Khan was born in Pakistan and is currently an American citizen. He is not an Arab.¹³⁸ Not long ago he was seated on a Delta Airlines flight to attend his brother's wedding. He claims a Delta pilot asked him to deplane, saying, "Mr. Khan, I want you to pick up your luggage inside the plane and I don't want you to fly with me on this flight. Me and my crew made a decision that we are not secure flying

132. Taylor, *supra* note 44, at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm>.

133. U.S. v. Clay, 638 F.2d 889, 890-91 (5th Cir. 1981).

134. U.S. v. Moreno, 475 F.2d 44, 45 (5th Cir. 1973).

135. U.S. v. Skipwith, 482 F.2d 1272, 1276 (5th Cir. 1973).

136. Clay, 638 F.2d at 889.

137. Skipwith, 482 F.2d at 1276.

138. Many Americans harbor significant misconceptions of this portion of the world. Afghanistan, Pakistan, and Iran are all Muslim countries, yet none of them have significant Arab populations. See CIA, *The World Factbook: Afghanistan* (last updated Jan. 1, 2002) <http://www.cia.gov/cia/publications/factbook/geos/af.html>; CIA, *The World Factbook: Pakistan*, at (last updated Jan. 1, 2002) <http://www.cia.gov/cia/publications/factbook/geos/pk.html>; CIA, *The World Factbook: Iran* (last updated Jan. 1, 2002) <http://www.cia.gov/cia/publications/factbook/geos/ir.html>.

with you.”¹³⁹ Delta later issued a statement saying it is wrong to act solely based on race.¹⁴⁰

Profiling at airports constitutes a mere fraction of the efforts to improve security since September 11, yet remains a subject of vigorous debate. Mr. Khan’s experience typifies the legitimate concerns aroused when race, gender, and age are injected into profiling modalities. According to statistics from the ACLU and other sources, we are already grappling with racial profiling in airport screening:

- Sixty-seven percent of the passengers subjected to personal searches upon entering the United States were people of color.¹⁴¹
- Black and Latino Americans were four to nine times as likely as white Americans to be X-rayed after being frisked or patted down.¹⁴²
- Black women are more likely than any other U.S. citizens to be strip-searched.¹⁴³

Some opponents of airport profiling have suggested plausible slippery slope consequences which may eventually result from profiling race, gender, and age: “What about the dangers of terrorists smuggling bombs or guns or box cutters onto buses or trains or subways or bridges, or into tunnels or crowded stadiums or office buildings or schools or the Capitol or Disneyland?”¹⁴⁴ Another opponent of airport profiling compares it to a genie escaping from a bottle:

Another problem with this approach is where does the profiling stop? It’s fine to say, well, just at airports, but . . . that’s never the case—once you let it out, it is very hard to put the profiling genie back in the bottle. “Arab-looking men who drive vans and trucks will be profiled as well as Arabs who access the Internet from public libraries; and those who buy fertilizer at the Home Depot for their backyards. As for Arab-looking men who decide to take flying lessons, they should forget about it.”¹⁴⁵

This is a reasonable concern, but the unique circumstances in which profiling will take place make this type of scenario unlikely. First, the

139. Stossel, *supra* note 75, at http://abcnews.go.com/sections/2020/2020/2020_011002_racialprofiling_stossel.html.

140. *Id.*

141. American Civil Liberties Union, *Press Release* (last visited Mar. 26, 2002) <http://www.aclu.org/action/airprofile107.html>.

142. *Id.*

143. *Id.*

144. Taylor, *supra* note 44, at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm>.

145. Tom Regan, *Racial Profiling is not the Answer to Security Concerns*, CHRISTIAN SCI. MONITOR (Oct. 4, 2001) <http://www.csmonitor.com/2001/1004/p25s2-coop.html>.

FTSA must limit application of profiling measures to areas within its jurisdiction: airports and, perhaps eventually, to border crossings. Second, profiling is already an openly and strictly administered procedure. Victims of inappropriate profiling would be free to seek redress for their injuries in the courts. Such a possibility would help to ensure fair, rational application of profiling guidelines. Third, this modified profiling system would have a sunset provision. If the threat of terrorist attacks subsides, so would those measures adopted as a response to them.

In addition to these slippery slope arguments, some opponents of profiling have suggested that such a system is rendered ineffective by our pluralistic society. Columnist John Derbyshire noted the difficulties of deciding who is OMEA (“of middle eastern appearance”¹⁴⁶) and who is not:

OMEA is perhaps a more dubious description even than “black” or “Hispanic.” You can see the difficulties by scanning the photographs of the September 11 hijackers published in our newspapers. A few are unmistakably OMEA. My reaction on seeing the photograph of the first to be identified, Mohamed Atta, was that he looked exactly like my own mental conception of an Arab terrorist. On the other hand, one of his companions on AA Flight 11, Wail al-Shehri, is the spitting image of a boy I went to school with — a boy of entirely English origins, whose name was Hobson. Ahmed al-Nami (UA Flight 93) looks like a Welsh punk rocker. And so on.¹⁴⁷

This argument depends on the assumption that profiling a passenger’s race would be based solely on visual markers. This argument also perpetuates the incorrect assumption that race would be the *only* profiled characteristic. “Of middle eastern appearance”¹⁴⁸ is a rather broad category, and one susceptible to mistakes in judgment. However, a profile that considers race *and* gender *and* age *and* other factors (when the ticket was purchased, if the passenger paid cash, etc.) substantially mitigates the chances of error. As with any security measure, profiling is not an exact science. Metal detectors, bomb-sniffing dogs, and baggage screening machines have all resulted in false alarms, yet no one suggests that such deficiencies invalidate these precautions.

146. Derbyshire, *supra* note 47, at <http://www.nationalreview.com/derbyshire/derbyshire100501.shtml>.

147. *Id.*

148. *Id.*

VI. CONCLUSION

Profiling race, gender, and age is a sensitive topic in our society, particularly in relation to September 11. Many of the arguments both for and against this policy apparently derive from knee-jerk reactions to anything resembling our discriminatory past. And yet frank discussion of airport profiling may ultimately prove beneficial. As columnist John Derbyshire noted, “Crises like [September 11] can generate hysteria . . . but they can also have a clarifying effect on our outlook, sweeping away the wishful thinking of easier times, exposing the hollowness of relativism and moral equivalence, and forcing us to the main point.”¹⁴⁹

Terrorism is a particularly horrible crime. The use – or threat – of deadly violence against innocent civilians is “inherently . . . intolerable”¹⁵⁰ and “deserves absolute condemnation regardless of the perpetrator or the motive.”¹⁵¹ Airport security measures constitute a relatively small, though very important, part of our response to September 11. Rational profiling of airline passengers – including scrutiny of race, gender, and age – may be “an essential component . . . of the effort to ensure that we see no more mass-murder-suicide hijackings.”¹⁵² Columnist Stuart Taylor suggests a scenario which perhaps helps “sweep away the wishful thinking of easier times.”¹⁵³

[P]lease try a thought experiment: A few weeks hence, or a year hence, you are about to board a cross-country flight. Glancing around the departure lounge, you notice lots of white men and women; some black men and women; four young, casually dressed Latino-looking men; and three young, well-dressed Arab-looking men. Would your next thought be, “I sure do hope that the people who let me through security without patting me down didn’t violate Ashcroft’s policy by frisking any of those three guys”? Or more like, “I hope somebody gave those three a good frisking to make sure they didn’t have box cutters”? If the former, perhaps you care less than I do about staying alive. If the latter, you favor racial profiling—at least of Arab-looking men boarding airliners.¹⁵⁴

Richard Kimble in the movie “The Fugitive” utilized all available information to find the one-armed man. He narrowed his search to adult,

149. *Id.*

150. Colb, *supra* note 76, at <http://writ.news.findlaw.com/colb/20011010.html>.

151. Serbian Government, *The Fight Against Terrorism* (June 1998) <http://www.serbia-info.com/news/kosovo/terrorism/fight.html>.

152. Taylor, *supra* note 44, at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm>.

153. Derbyshire, *supra* note 47, at <http://www.nationalreview.com/derbyshire/Derbyshire100501.shtml>.

154. Taylor, *supra* note 44, at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm>.

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one-armed males. Had Kimble failed to take such characteristics into consideration, he would never have found his wife's murderer. Narrowing the pool of potential terrorist suspects at airports by profiling race, gender, age, and other considerations could significantly improve our chances of apprehending terrorists before they act. While some of these measures may prove inconvenient, such costs must be weighed against the greater societal interest.

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