

Profiling With Apologies

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I. INTRODUCTION: SETTING THE STAGE

In 1996, I published an article in the *Columbia Law Review* identifying two distinct components of the Fourth Amendment right against unreasonable searches, one of which is primary, and the other secondary.¹ The primary right, I argued, is that of physical privacy against state intrusions. Through a series of hypothetical examples, I illustrated how the right of privacy belongs to the individual as a byproduct of where he is and what he does in his personal spaces.

The examples involved two men who commit identical murders and subsequently hide the victims' bodies in their respective killers' front closets. One murderer succeeds in disguising the smell of decomposing flesh by using an effective room deodorizer, while the other fails, using a cheaper, less effective brand. When a police officer passes the home of one of the killers, she smells the corpse, enters the house and searches the front closet. When a different police officer passes the other killer's home, she cannot smell anything but decides for an arbitrary reason to enter the man's home and search his closet. In yet another hypothetical case, a third officer passes the home of a man who smells like a corpse (he has "dead body odor"), enters and searches the man's closet, but finds nothing illegal.

Analyzing the various hypothetical cases (and a few more that I will spare the reader), I argued that the two murderers have an equal entitlement to privacy in the closets that conceal their victims' bodies (i.e., no entitlement), regardless of the fact that one but not the other used an effective room deodorizer and thus prevented a passing police officer from acquiring probable cause. From their own perspectives, each killer—by using his private space to conceal murder—forfeited any interest in privacy within his closet. Conversely, the third man—the one who smells like a corpse—suffered an undeserved privacy harm, in spite of the fact that the police officer did not engage in wrongdoing by searching him.

Notwithstanding these conclusions, I observed, something significant distinguishes the experience of the two murderers, the one searched legally and the

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¹ Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1456 (1996).

other without probable cause. That distinction, I argued, consists of the experience by the second but not the first of what I called the “targeting harm.” Unlike the right of privacy, the right against targeting does not turn on one’s own behavior or merit. It instead revolves entirely around the state of mind of the other actor.

The officer who decides to search a man’s closet without an adequate evidentiary foundation is targeting the suspect. As I define it, targeting means that a gap exists between an inadequate evidentiary basis for searching and an officer’s decision nonetheless to search. Maybe the officer disapproved of the political bumper sticker on the suspect’s car or perhaps she disliked the suspect for another personal reason. The officer may even have targeted the suspect for no reason at all, acting simply on a whim. Either way, the official violated the suspect’s right not to be targeted. The officer who could smell the corpse from outside her suspect’s home, by contrast, had a legitimate basis for entering the house, and her behavior accordingly did not result in a targeting harm.

I identified the targeting harm as the kind of violation associated with anti-discrimination law. In the latter context, however, the targeting harm is the primary evil against which the law is directed, and the desert or entitlement of the victim is secondary, a reversal of the priorities implicit in the Fourth Amendment.

For Fourth Amendment purposes, primary is “[t]he right of the people to be secure in their persons, houses, papers and effects,” a right that focuses on people’s lives and their uses of personal space, from their own (rather than suspicious police officers’) perspectives. Therefore, I argued at length in my *Columbia* article, the privacy right turns ultimately on whether the holder of the right is in fact (independent of an officer’s knowledge) engaged in wrongdoing.

Though police must act reasonably, the Fourth Amendment does not represent an all-purpose regulation on police conduct toward private individuals, but instead protects enumerated kinds of security. Curbing improper police motivation is therefore a secondary component of the Fourth Amendment. It is this secondary right against the targeting harm—an entitlement flowing from the reasonableness requirement of the Fourth Amendment—that I will discuss in the present Commentary, as it applies to racial and ethnic profiling in the wake of the September 11 attacks on the World Trade Center and the Pentagon.

Racial profiling embodies the paradigmatic Fourth Amendment targeting harm. In a typical profiling case prior to September 11, a police officer would stop a driver on the highway, allegedly for a minor traffic violation such as low-level speeding, but in fact because the driver was African-American and, therefore, according to the officer, more likely to be carrying drugs. Because of its likely victims, this phenomenon became known as “Driving While Black” (DWB) profiling.

In an article titled “Stopping a Moving Target,” I explored the Fourth Amendment targeting harm on the highway and some potential approaches to

curtailing it.² I argued that in addition to inflicting an excessively harsh experience upon drivers, the discretion police have to stop anyone who violates a minor traffic ordinance guarantees high levels of targeting. Almost everyone on the highway is “guilty” of minor offenses on a regular basis. Carte blanche to stop any “guilty” driver, therefore, necessarily invites personal inclinations and prejudices to fill in the gap between inadequate evidence of a serious offense worthy of a stop, on the one hand, and the decision to stop a particular driver, on the other. Reduce the discretion, I proposed, and the targeting will diminish accordingly. That was before September 11.

What has changed? In some respects, nothing. The War on Drugs continues as before, and the Drug Enforcement Administration even tells us that people who use drugs are complicit in acts of terror against the United States.³ Perhaps as a result of such questionable logic, DWB stops on the highway continue, along with vehicle searches for drugs.⁴ Partly in response to these practices, the Supreme Court of New Jersey ruled that state police must have a reasonable suspicion of wrongdoing before performing a consent search of a lawfully stopped vehicle.⁵ This requirement might deter profile stops to the extent that police single out African-Americans and other minority drivers on the basis of the unsupported intuition that their vehicles are likely to contain drugs. Once a “consent search” is prohibited in a routine traffic stop, the reason for the stop itself may disappear.⁶

If we look past the War on Drugs and consider the threat of terrorism, however, a great deal *has* changed, and the meaning of “reasonableness” within the Fourth Amendment could be flexible enough to accommodate that change. I hope to articulate a vision of profiling and the Fourth Amendment that does not overly offend—even as it expresses the features of nationality-profiling for terrorists that distinguish it, under some circumstances, from DWB profiling for drug couriers.

My focus here is on the limited kind of profiling initiated in November 2001, when Attorney General Ashcroft announced plans for FBI and local law enforcement officials to question approximately 5,000 Arab and Muslim aliens in the United States,⁷ and in March of 2002, when he said there would be additional

² Sherry F. Colb, *Stopping a Moving Target*, 3 RUTGERS RACE & L. REV. 191, 191 (2001).

³ See *Agency to End Ads That Link Drugs, Terror*, WASH. POST, Apr. 2, 2003, at A11; News Release, Department of Justice, Drug Enforcement Agency, DEA and Giuliani Open National Museum Exhibit on Drugs and Terrorism (Sept. 3, 2002), available at 2002 WL 2007977.

⁴ See, e.g., Bruce Landis, *Minorities More Likely to be Searched in Traffic Stops*, PROVIDENCE JOURNAL-BULLETIN, June 1, 2003, at A1.

⁵ *State v. Carty*, 790 A.2d 903, 903 (N.J. 2002).

⁶ See Sherry F. Colb, *A Proposed Moratorium on Highway Consent Searches: One Way To Fight Racial Profiling* (Aug. 15, 2001), FINDLAW'S LEGAL COMMENTARY at <http://writ.news.findlaw.com/colb/2001815.html>.

⁷ The Justice Department selected for questioning more than 5,000 recent immigrants who met the profile of “men between [the] ages 18 and 33 with a U.S. address who have entered the United States since Jan. 1, 2000, on tourist, student and business nonimmigrant visas from a country where

interviews,⁸ as well as in March of 2003, when the FBI began voluntary interviews with 11,000 Iraqi nationals living in the United States.⁹ I shall assume for purposes of this Commentary that questioning was limited to people willing to cooperate voluntarily and, therefore, not subjected to the sorts of pressure that qualify as legal compulsion. My focus is therefore on the government's decision to *target* people on the basis of nationality, ethnicity, religion, and gender, rather than on a high degree of intrusion into protected spaces.

Why do I choose to focus on what may seem like one of the less serious intrusions, the voluntary questioning of Arab and Muslim men, many of whom are in the United States on student visas?¹⁰ I do so for a few reasons. The first is that as a professor who considers teaching one of the great joys of life, I empathize and feel protective of students. They are generally honorable and decent people who, at great personal cost, embark on a worthy quest for knowledge and understanding. A student who happens to be Arab or Muslim but against whom there is no individualized basis for suspecting terrorism is therefore very sympathetic, because we have every reason to believe that he or she is innocent. In stark contrast, it may be difficult for many of us to empathize with a person who is detained on the basis of evidence of terrorism, even if the suspicion is based *in part* on the person's ethnicity or nationality.

The difference between these two potential victims of targeting goes back to the connection I have proposed between a person's innocence, on the one hand, and her right to privacy and security against searches and seizures, on the other. The murderer who hides his victim seems unentitled to privacy in the place of concealment, and the innocent person who happens to smell like a corpse (and therefore inadvertently gives rise to probable cause) is very sympathetic and, in the ideal Fourth Amendment universe, would not be forced to suffer any invasion of his private space.

An innocent person (rightly) has a strong emotional appeal and a correspondingly important place in the meaning of Fourth Amendment security

terrorists might plot attacks." Tom Brune, *U.S. to Question Immigrants: Terror Probe Seeks 5,000 Who Fit Profile*, NEWSDAY, Nov. 14, 2001, at A62. While answering questions is voluntary, many believe that being questioned at all is intrusive, and others fear that "cooperation may lead to the same fate as that of those already detained." Jodi Wilgoren, *A Nation Challenged: The Detainees; Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, "Why?"*, N.Y. TIMES, Nov. 25, 2001, at 1B.

⁸ See Philip Shenon, *A Nation Challenged: The Interviews; Justice Dept. Wants to Query More Foreigners*, N.Y. TIMES, Mar. 21, 2002, at A19.

⁹ See Jerry Seper, *11,000 Iraqi Nationals Get "Voluntary" Interviews; FBI Arrests One, Expels Five, Detains 29 in U.S.*, WASH. TIMES, Apr. 18, 2003, at A4.

¹⁰ See Deborah Barfield Berry, *Arabs Question FBI's Questions*, NEWSDAY, Dec. 23, 2001, at A23 (listing those questioned as including people here on student visas, tourism visas, and work visas); Jacques Steinberg, *A Nation Challenged: The Students; U.S. Has Covered 200 Campuses to Check up on Mideast Students*, N.Y. TIMES, Nov. 12, 2001, at A1.

from unreasonable searches and seizures. I therefore choose to examine terrorism-targeting precisely in this context, one in which the person who is targeted will predictably and appropriately elicit the greatest sympathy and outrage at his predicament.

A second reason for selecting voluntary questioning is that it may not rise to the level of a search or seizure at all. In other words, police may question people without triggering the protections of the Fourth Amendment.¹¹ To the extent that questioning is directed on the basis of suspect classifications, it may be subject to equal protection scrutiny but need not necessarily conform to the reasonableness requirements of the Fourth Amendment.¹²

I therefore choose a category of intrusion that is directed at sympathetic, innocent people (a highly entitled group), and that does not intrude very much on privacy and liberty, in relative terms. My hope is that this combination will bring to the surface the pure costs of targeting (separate from the possibly greater and more salient costs of incarceration, whatever the basis), as well as the degree to which available justifications necessarily redistribute benefits and burdens in a manner that may require both more and less than a simple pronouncement that the targeting is or is not justifiable from a constitutional perspective.

II. JUSTIFICATIONS FOR TERRORISM PROFILING

A. *Strong Correlation*

When the FBI and local law enforcement agencies first embarked on an enterprise of mass questioning of Arab and Muslim men, they likely had two objectives. The first and primary goal was to obtain leads.¹³ The second may have been to identify actual terrorists among those questioned. Primarily, again, the law enforcement hope was that some interviewees might have had occasion to learn about other individuals who themselves had knowledge of or a connection to terrorism. Because each September 11 terrorist on the airplanes was of Middle-Eastern nationality and had apparently committed himself to the enterprise of attacking U.S. civilians as part of an understanding of his own national and religious identity, it made some sense to assume that most other aspiring terrorists aligned with the goals of those who attacked this country on that day would self-identify as Arab or Muslim as well. On this plausible assumption, it might have also followed that the population of Muslims and Arabs residing in this country

¹¹ See *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968).

¹² See *Whren v. United States*, 517 U.S. 806, 813 (1996).

¹³ Attorney General John Ashcroft explained that the Justice Department's efforts at questioning thousands of young men matching the profile of the September 11 hijackers is "an intelligence-gathering initiative" and that "[i]t is critical that we expand our knowledge of terrorist networks operating within the United States." Brune, *supra* note 7.

would, as a group, have a higher concentration of useful information to offer our intelligence community than the population at large.

If these inferences were correct, then even though virtually all of the people questioned would be innocent and uninvolved in terrorism, it was nonetheless likely that some of them would have useful information to give investigators, if they were willing to cooperate with their questioners. For one thing, it is unclear why a terrorist would choose to come forward and cooperate with authorities. For another, if a terrorist chose to speak with law enforcement, the probable result would be the collection of disinformation rather than the arrest of a guilty suspect.

In short, if Arabs and Muslims had *willingly* cooperated with law enforcement in the search for information regarding terrorism, it seems likely that the voluntary questioning would have proven productive, but not in the way that interrogation of criminal suspects is ordinarily productive. The odds of innocence were too great for that. Speaking with innocent people, one of whom might have occasion to provide a lead, however, could nevertheless be a worthwhile endeavor, if conducted properly.¹⁴

By contrast to the extremely high probability that an aspiring terrorist will turn out to be Arab and/or Muslim, the DWB profiling that has for several years drawn large-scale condemnation does not carry a similar likelihood of success. As discussed earlier, in the typical DWB stop, police decide to pull over a minority driver on the pretext of a routine traffic violation of the sort that is virtually ubiquitous on the highway. The true motive is often a racially targeted quest for drugs. Because a traffic violation does not provide probable cause for a search, the ensuing searches (also disproportionately experienced by minority drivers) occur with the “consent” of the drivers. In such a situation, the likelihood that a minority driver has drugs in his car, just because he has engaged in one of the minor traffic violations of which almost everyone on the highway is guilty, is quite small.

Even if there is a correlation between race and drug possession with the intent to distribute, as some claim, it is a minor one that would render the failure to look for drugs among whites a major mistake. Further, the stop of a vehicle is a far more significant intrusion—one that necessarily qualifies, for example, as a Fourth Amendment seizure—than voluntary questioning,¹⁵ and it necessarily implies suspicion of guilt in a way that the questioning outlined above does not. DWB profiling, in other words, does not take place with the primary objective of encouraging innocent minority drivers to help police track down guilty drug-dealers. The goal is to find as many criminals and as much drugs as possible *in the stopped cars*.

¹⁴ Morton Halperin of the Center for National Security Studies, for example, spoke out in favor of the questioning of more than 5,000 recent immigrant men if the Justice Department “selected the [men] by objective criteria and are going to interview them in a way that makes clear they are not in detention and the questions are not about their beliefs or political activities.” Brune, *supra* note 7.

¹⁵ Of course, the content and style of actual questioning are crucial variables in determining whether such questioning is truly voluntary. Calling it “voluntary” does not, *ipso facto*, make it so.

B. *Compelling Governmental Interest*

In its equal protection doctrine, the Supreme Court has held that the government may employ racial classifications only when such classifications are narrowly tailored to further a compelling state interest.¹⁶ Though I have focused here on the Fourth Amendment, the Fourteenth Amendment equal protection clause¹⁷ analysis is structurally very similar. In Fourth Amendment law, for example, in addition to adhering to warrant and probable cause requirements, all searches and seizures must be “reasonable.” Probable cause and a warrant normally suffice to satisfy the reasonableness requirement (and are sometimes not even necessary). But in a small class of cases, the Supreme Court has recognized that intrusions may be serious enough to require more than probable cause and a warrant. One notable example is the use of deadly force against a fleeing felon, which is prohibited in the absence of a serious risk that an escapee will cause death or serious bodily harm to others.¹⁸

It goes without saying that protecting Americans from the violence of terrorists constitutes a significant and compelling governmental interest, for equal protection or Fourth Amendment purposes.¹⁹ To take an unlikely hypothetical scenario, if police had good reason to believe that a specific suspect climbing over a fence would detonate explosives in a crowded mall if allowed to escape, the police could—under existing precedent—shoot the person to death.

The strength of a governmental interest affects the Fourth Amendment reasonableness of any procedure that law enforcement chooses to adopt, whether that measure is highly intrusive (as in the deadly force scenario) or is targeted on the basis of a suspect classification, such as race or nationality, or both. Significantly, the interest in apprehending those who possess illicit drugs is far less compelling than that in preventing terrorist violence.

There is, of course, a whole range of opinion on the War on Drugs. While some people, such as Attorney General Ashcroft, embrace it with an ardent lover’s intensity, many others believe that drug use itself is a victimless crime and that the provision of drugs to users—while socially detrimental—is therefore not the sort of harm that justifies the severity of sentences that our criminal justice system

¹⁶ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 214 (1944).

¹⁷ U.S. CONST. amend. XIV, § 1 (“ . . . 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 See *Tennessee v. Garner*, 471 U.S. 1 (1985).

¹⁹ Questions of necessity and less restrictive alternatives will play a role, of course, in shaping our specific reactions to national and ethnic profiling and will animate equal protection analysis as well.

imposes. Some commentators favor decriminalization of drugs, while others propose mandatory treatment in lieu of incarceration.²⁰

Regardless of one's position along this continuum, however, the relative priority of anti-terrorism and anti-drug efforts, respectively, should be obvious to virtually anyone who thinks about it. To take a trivial example, it is unlikely that a President and Vice President of the United States and a Justice on the United States Supreme Court would admit to having engaged in violent acts of terror and expect everyone to forgive and forget (as has occurred with respect to drug use).

III. THE TARGETING HARM

As I explained earlier, the targeting harm refers to the harm of being singled out for intrusive treatment without an adequate evidentiary foundation, the sort of conduct that provokes a person to ask, "Why me?" It is a harm against which even the undeserving person retains an entitlement. The guilty person who conceals a body in his closet (and who deserves to be caught and punished), for example, should still be free from unreasonable decisions to subject him to surveillance. Similarly, an incompetent employee should still be free from termination motivated by her advanced age, her race, or her gender. If an official knows of no good reason to treat one person differently from another, then his decision to proceed with differential treatment produces a targeting harm. The fact that unbeknownst to the official, the person has individually earned such differential treatment, moreover, does not vitiate the targeting harm.

The Bush Administration's policy of questioning thousands of Arab and Muslim aliens necessarily imposes a kind of targeting harm.²¹ Though the intrusiveness of a voluntary interview may not be great, the very fact that it is taking place because of a person's ethnicity or nationality, rather than because of individualized suspicion of wrongdoing, represents an injury. When a person has done nothing wrong or illegal and has given no one reason to suspect him of misconduct, a request that he take time out of his schedule to answer questions about terrorism can be insulting. Though questioning a large number of Arab and Muslim men could yield useful information, the odds of learning much in any one interview are slim, and the likelihood that the interviewee is himself a terrorist is vanishingly small. In other words, though the interviews may be justified in the aggregate, in each specific case the interview will almost certainly feel arbitrary and bigoted to the person being questioned.

²⁰ See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 880 (2000) (arguing that drug treatment courts, "by breaking down the distinction between incarceration and treatment[,] can be an effective and less radical means of drug-law reform than decriminalization).

²¹ See, e.g., Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY OF AM. L. 295 (2002).

Nonetheless, and this is the critical point, targeting might be “reasonable” in the aggregate. Consider the 1999 case of *Brown v. Oneonta*.²² A man broke into the home of a 77-year-old woman and attacked her, causing minor injuries.²³ After the attack, the victim reported to the police that although she did not see the man’s face, she determined from the color of his hand and forearm that he was black. She also concluded from the speed of his step that he was young. She indicated as well that the assailant would have a knife cut on his hand from his struggle with her.

In response to this information, the police obtained the names of all black students registered at the nearby State University of New York College of Oneonta and attempted to locate and question each of them. Finding no suspects through this first sweep, the police went on to question non-white persons on the streets of Oneonta and to inspect their hands for cuts resembling those inflicted by the victim in the case. This attempt similarly failed to produce suspects. The people subjected to questioning and inspection subsequently filed a lawsuit against the City of Oneonta, alleging various statutory and constitutional violations, the latter of which included equal protection claims and Fourth Amendment claims.

The Second Circuit Court of Appeals, in a modified opinion by Judge Walker, ruled that questioning and inspecting black people did not violate the equal protection clause, because police acted as a direct consequence of the victim’s identification of her assailant as black.²⁴ Police did not apply the law in a racially discriminatory fashion but merely relied on the details of identification that the victim was able to offer. In contrast, the court said that if there were actual searches or seizures based only on race and gender, such searches or seizures *would* violate the Fourth Amendment.²⁵ The fact that people share such physical traits with the perpetrator of a crime is insufficient grounds for conducting a “reasonable suspicion” stop permitted by *Terry v. Ohio*.²⁶ Accordingly, the court went on to determine, on the factual record, which of the various plaintiffs had apparently been seized in violation of the Fourth Amendment.²⁷

In short, on the court’s analysis, a state actor’s underlying reason for treating some people differently from others on the basis of race is significant. If a police officer stops a black person because he is black, but the basis for the racial stop is the description of the perpetrator by a victim or witness, then not only might the

²² 221 F.3d 329, 329 (2d Cir. 1999), *cert. denied*, 534 U.S. 816 (2001). For an interesting analysis of the case, see R. Richard Banks, *The Story of Brown v. City of Oneonta: The Uncertain Meaning of Racially Discriminatory Policing Under the Equal Protection Clause*, in CONSTITUTIONAL LAW STORIES 223 (Michael C. Dorf ed., 2004).

²³ *Brown*, 221 F.3d at 334.

²⁴ *Id.* at 337–38.

²⁵ *See id.* at 334, 340.

²⁶ 392 U.S. 1 (1968).

²⁷ *Brown*, 221 F.3d at 340–41.

stop survive equal protection strict scrutiny, but it might indeed fail to trigger that scrutiny in the first place.²⁸ However, because a stop based only on race and gender is not “reasonable” (i.e., likely to yield a viable suspect), such a stop *does* violate the Fourth Amendment.²⁹

At first glance, the notion that a racially based stop would violate the Fourth Amendment but not equal protection looks peculiar, given the Supreme Court’s decision in *Whren v. United States*, in which it specifically urged plaintiffs to pursue remedies for racially discriminatory stops under the equal protection clause rather than under the Fourth Amendment.³⁰ How can a purported justification for stopping a black person on the basis of his race (the fact that the assailant was himself a black man), then, be sufficient to avoid an equal protection challenge but insufficient to satisfy a threshold “reasonableness” inquiry?

The answer is complicated. The court of appeals in *Brown* may have been distinguishing between two kinds of racial profiling, only one of which violates the equal protection clause. The impermissible type relies on negative stereotypes about groups of people and *assumes* that an unknown criminal must be a black person, based on generalizations the profiler draws about crime and criminals. It uses race, in other words, as a proxy for criminality. In contrast, the permissible type uses race as a descriptive fact about an identifiable person, not unlike height, weight or eye color. But using this descriptive fact in isolation, though not impermissible racial profiling, does not provide a sufficient evidentiary basis for a stop.

Judged on a case-by-case basis, of course, a racially based sweep of area men—regardless of its foundation—does appear to inflict a targeting harm upon each man who is stopped, fingerprinted, questioned, or otherwise singled out by the police. In this sense, police *do* commit an equal protection harm against each individual man. Nonetheless, one could come to a different and surprising conclusion on the distinct question of whether *the aggregate* of targeted intrusions is justifiable if, as a whole, it is very likely to yield a suspect. Let me clarify.

A decision about whether a police action is cost-justified from a normative standpoint depends in part on how important it is to catch the criminal. In equal protection terms, we would ask whether an interest is “compelling.” The seriousness of the offense at issue enters the calculus.³¹ In *Brown v. Oneonta*, the crimes were breaking and entering and an attack resulting in minor injuries. For such criminal conduct, the urgency of capture would seem insufficient to justify targeting.

²⁸ *Id.* at 337–38.

²⁹ *Id.* at 337–38, 340.

³⁰ See *Whren v. United States*, 517 U.S. 806, 813 (1996).

³¹ For an extensive analysis of the proper role of necessity and proportionality in Fourth Amendment analysis, for example, see Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness”*, 98 COLUM. L. REV. 1642, 1642 (1998).

Another feature of the cost/benefit calculus that arguably inheres in both the notion of Fourth Amendment reasonableness and the equal protection “compelling interest” test, is the probability that the entire roundup will yield the perpetrator. Even though a probability of 100% as to the group would not amount to probable cause for an individual search, seizure or fingerprinting, it could add strength to the government’s case for going forward with an action that would cause a targeting harm to every person caught in the dragnet (including the guilty man who is ultimately apprehended).

Admittedly, targeting may seem incompatible with the notion of a “reasonable” neighborhood sweep. Sometimes, however, a government action can be individually unreasonable and unjustifiable but reasonable and justifiable as part of an aggregate. One example is the sobriety checkpoint system approved by the Court in *Michigan Dept. of State Police v. Sitz*,³² in which everyone who drove up to a checkpoint was stopped by the police and briefly questioned to determine sobriety. Were only one non-suspicious driver singled out for a sobriety stop, such a stop would violate the Fourth Amendment, as the Court essentially held in *Delaware v. Prouse*,³³ because of the extremely small likelihood of apprehending a drunk driver under such circumstances.³⁴

In the aggregate, however, the stops are permissible for two reasons. One is that stopping everyone is more productive than stopping just one person. The other reason, which I have articulated in my work but which is left implicit in the Court’s ruling, is that by stopping everyone, police avoid committing a targeting harm.³⁵ What is impermissible on an individual basis may therefore become legal in the aggregate, at least where the intrusion is relatively minor.

In the terrorism-questioning-by-profile case, of course, in contrast to my analysis of sobriety and license checkpoints, one does *not* avoid the targeting harm by expanding the population of those suffering an intrusion. That is because the entire group is targeted for a racial or ethnic trait, rather than randomly chosen. One feature that *Sitz* and the post-9/11 profiling *do* share, however, and which distinguishes them from *Prouse*, *Whren*, and DWB profiling generally, is that at checkpoints and in widescale questioning, the government *expects* most of the people intruded upon to be innocent.

Moreover, if we examine the checkpoint cases again, we discover that even there, although targeting has been mitigated, it has not been truly eliminated. Consider what is and is not random, for example, about a license and registration checkpoint. Officials randomly select the individuals to be stopped (perhaps every second person or every fifth person or the people selected by some other random

³² 496 U.S. 444, 444 (1990).

³³ 440 U.S. 648, 648 (1979).

³⁴ *See id.* at 661.

³⁵ Colb, *supra* note 1, at 1487–91.

formula). Rarely random, however, is the geographical placement of the checkpoint itself.³⁶ Police place checkpoints at locations where they expect disproportionate misconduct. Expectations about misconduct are based on generalizations that do not apply to all or even most individuals who commute into or out of a particular area. When police choose to stop everyone (or every other person, etc.) in group A but not in group B, without having a reasonable suspicion against any one of the individuals in either category, each person in group A suffers a kind of targeting harm.

The targeting harm may be mitigated, however, by the fact that it is inflicted in a manner that acknowledges the obvious reality that no single person stopped is individually suspected of wrongdoing. The individual's innocence, in other words, is understood by all involved parties, and this understanding potentially reduces the oppressiveness of the encounter, even as it reduces the apparent payoff for the government.

In the individual checkpoint case, there is no evidentiary basis for suspecting any particular person stopped of wrongdoing, and that fact creates a targeting harm. But because of the large numbers targeted *simultaneously* at a checkpoint, and the consequent salience to everyone of the fact that most people in the group are innocent of wrongdoing, the sting of the targeting harm may be diminished. In addition to this reduction in the targeting harm, there might also be an aggregate justification for carrying it out precisely *because* it is not a one-shot deal, but is instead a large-scale operation that promises to yield fruit. There is thus a case to be made for optional questioning of large groups of Arab, Muslim men to gather potential leads in the search for terrorists.

Even if one found such a case compelling, however, that conclusion would not and should not end the inquiry.

IV. PAYING FOR THE "JUSTIFIED" TARGETING HARM

Assume that questioning large numbers of Arab and Muslim men in the United States would likely yield information that could save the lives of many potential victims of terrorism. Assume further that we decide the tradeoff is worthwhile. Does that make the targeting harm vanish? If one performed a standard utilitarian calculus, one might say that despite any targeting harm, the evil of leaving would-be victims of terrorism unprotected is greater than the evil of targeting in this limited way. But an alternative approach to utility—pareto-optimality—might be more appropriate in a constitutional system such as ours, where equality and Fourth Amendment norms caution against distributional inequities.

³⁶ See Rob Modic, *Dayton Defends Driver's License Checks*, DAYTON DAILY NEWS, Jan. 11, 2001, at 3B; *Pennsauken Halts Plan for Controversial Checkpoints*, THE RECORD (NORTHERN NEW JERSEY), July 13, 1994, at A5.

Under an approach that assesses distributional effects, we might note that even if ultimately productive, the targeting of Arabs and Muslims takes something (freedom from targeting) away from a select class and transfers a potentially resulting benefit (increased safety from terrorism) to everyone. Targeting a particular group of people might nonetheless make sense, and by hypothesis, here it does. In important respects, however, the decision to target a group of people as an effective means of protecting the public safety is still a metaphorical “taking,” analogous to the taking of private property for public use under the Fifth Amendment.³⁷ As such, the victims of the “taking” may be entitled to just compensation, even as the targeting remains justifiable.³⁸

Consider the following example. Imagine that a rape victim tells police that her assailant is white and has red hair. Police then stop all white men with red hair in the streets and require them to provide fingerprints. The crime is serious, and the danger of leaving the criminal at large is substantial. The fingerprinting campaign may yield a suspect who is ultimately convicted. If we decide as a society that the seriousness of the offense and the likelihood of successful apprehension is sufficient to support what the police did, the white redheads stopped would nonetheless have a legitimate targeting complaint.³⁹ Short of prohibiting the campaign altogether, which we might decide would be a mistake, giving the redheads “just compensation” could accomplish two important objectives.

The first objective would be to acknowledge and compensate people for the sacrifice they are being forced to make to protect the whole group’s safety. In this vein, compensation would serve the function of an apology, and it would thereby force the public and the police to understand a sacrifice for what it is: a tax that is disproportionately borne by one group of individuals, almost all of whom are innocent of any wrongdoing. An official apology could help address, for example, the hurt feelings suffered as a result of public indifference or insensitivity, along

³⁷ U.S. CONST. amend. V, cl. 4 (providing in relevant part, “nor shall private property be taken for public use, without just compensation”).

³⁸ See, e.g., Doris Bloodsworth, *Terrorism Witness Fights to Stay*, ORLANDO SENTINEL TRIBUNE, Nov. 22, 2002, at B3 (noting that 250 people have received special visas since Ashcroft implemented the Responsible Cooperators Program). The Responsible Cooperators Program offers immigrants an incentive to cooperate and provide “useful and reliable” information about terrorist activities in return for a special “S visa, that grants nonimmigrant status for three years and then allows holders to apply for citizenship.” Ken Fireman & Tom Brune, *Cooperation Deal; Immigrants Helping Terrorism Probe Offered Visa Help*, NEWSDAY, Nov. 30, 2001, at A5. Support has been expressed for “rewards” for immigrant cooperation with terrorist investigations. See Neil A. Lewis, *A Nation Challenged: The Informants; Immigrants Offered Incentives to Give Evidence on Terrorists*, N.Y. TIMES, Nov. 30, 2001, at B7 (quoting David Cole, a lawyer with the Center for Constitutional Rights, “I think we’re much more likely to get the assistance of the immigrant community if we offer rewards rather than treat them as suspects based on their ethnicity or country of origin.”).

³⁹ Cf. *Davis v. Mississippi*, 394 U.S. 721, 721 (1969).

with the unavoidable insult that comes from being singled out in this way, no matter how politely.⁴⁰

The second objective of just compensation, one that resembles a goal of compensation schemes in tort law generally, would be to ensure that the surrounding society absorbs in some measure the cost of targeted burdens. In times of public danger, people may be willing to sacrifice more than usual, in the form of tax money and even civil liberties. But when the cost comes out of the pockets of a relatively small group of people, then it is predictably easy for others to tolerate that externalized cost, regardless of whether or not it is warranted. The payment of compensation thereby helps to ensure that when people determine that profiling is worthwhile, they do so because they are honestly willing to pay the costs in exchange for the benefit, not simply because they can free-ride on someone else's unjustified suffering.

V. CONCLUSION

It is difficult to speak in favor of profiling without some ambivalence. There are countless examples of unreasonable profiling of the sort that should make us ashamed. The World War II internment of Japanese Americans and the DWB phenomenon on the highway are two compelling examples. I therefore advance my proposal tentatively and with the understanding that over time, we will learn more and come to see whether profiling was the right way to proceed.

I have argued in this commentary that under limited circumstances, profiling on the basis of nationality may be constitutionally permissible and even appropriate. One such set of circumstances that we may currently be facing involves a particular type of homicidal violence, known as terrorism against U.S. civilians, the perpetrators of which may be likely at this time to belong to a group identifiable as Arab Muslim men from the Middle East. Under the proposal, profiled individuals could be subjected only to interrogation that is voluntary in nature (rather than detentions or other, more severe, deprivations of liberty) and in return for suffering the targeting harm in this form, would be compensated in the manner of those suffering Fifth Amendment takings of private property who are entitled to "just compensation."

⁴⁰ The emotional significance of an apology (or the lack of one) cannot be overstated, even when injuries are far more severe than exposure to brief, voluntary, targeted questioning. In one case, for example, a terrorism tip that turned out to be false led to the arrest of Tarek Albasti and eight other men, all of whom were "rounded up, shackled, paraded in front of a newspaper photographer and jailed for a week." In describing the incident to Indiana FBI Chief Thomas V. Fuentes, the wife of Mr. Albasti emphasized that after the incident, "[m]y husband was released, and in 19 months nobody has ever said, I'm sorry about what happened." See Michael Moss, *Threats and Responses: Law Enforcement; False Terrorism Tips to F.B.I. Uproot the Lives of Suspects*, N.Y. TIMES, June 19, 2003, at A1.

I selected the circumstances outlined above for a variety of reasons. One is the gravity of terrorist threats, which gives the government a compelling interest in effectively putting a stop to them. Another reason is the strong correlation between nationality and participation, as evidenced by the nineteen men who hijacked the airplanes used for mass murder of Americans on September 11, 2001, and by other instances of terror against Americans abroad. And a third—paradoxically—is the fact that the people profiled will almost all be innocent, and obviously so.

Their innocence turns their profiling into that of the less severe sort evident at checkpoints and roadblocks approved by the U.S. Supreme Court, in which individuals were stopped in large numbers in the hopes of finding someone among them engaged in wrongdoing. Though a roadblock may be erected in a manner that gives rise to a targeting harm against the population thought to contain more people who drive without a license, or drive drunk, such profiling does not single out any one individual as a *likely* perpetrator on the basis of his or her profiled characteristic. The same may be said regarding profiling used to detect terrorism.

The requirement of just compensation further emphasizes the likely innocence of each targeted individual and functions as a species of apology for and internalization of an acknowledged instance of discrimination. Though we may need to proceed in this manner—a manner that is far from ideal and hopefully temporary in nature—we must not forget the cost we impose on people who have done nothing wrong and who have in no way forfeited the right to our respect and good will. To apologize is to recognize that those persons who fall within the net of profiling suffer a harm disproportionate to the benefit that they individually will experience, and that they do so to ensure that they and we may all be more secure. They are accordingly owed reparations, in advance, for that indignity, whenever it occurs.

