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Terrorism and Profiling: Shifting the Focus From Criteria to Effects

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Daphne Barak-Erez

Abstract

The article evaluates the proposal made by Heymann and Kayyem in their book *Protecting Liberty in an Age of Terror* to replace the practice of ethnic profiling by nationality-based profiling. It argues that in many circumstances this proposed alternative is not less offensive than ethnic profiling, especially when there is high correlation between ethnicity and nationality, and that at the same time it does not prove to be an effective alternative in many other circumstances, especially in the context of immigration countries. Ultimately, the article proposes a shift in the focus of the debate on profiling from the controversy around the legitimate criteria for profiling to the context in which profiling is used and the kind of decisions to which it applies. The argument in this regard is that profiling is criticized also because it was used in the context of decisions with long-lasting effects on people's lives - for the purpose of completely denying people an entrance to a country or for detaining them (in the Korematsu example). Therefore, rather than focusing only on the question of the criteria used for profiling, it would be better also to ensure that profiling is used only with regard to enforcement decisions that do not have long-lasting effects on the lives of innocent people.

TERRORISM AND PROFILING: SHIFTING THE FOCUS FROM CRITERIA TO EFFECTS

*Daphne Barak-Erez**

INTRODUCTION

The use of group distinctions as a method of law enforcement has been the subject of study and controversy for a long time. Usually, the controversy derived from the association of profiling with racism, quite often for good reasons, considering past experience with racist law-enforcement in the United States,¹ as well as the most notable historic example of the incarceration of American citizens of Japanese origin during World War II, approved by the Supreme Court in the highly criticized *Korematsu* decision.² The new threats of high-scale terrorism in which certain groups are significantly more represented, namely Muslims with Middle-Eastern connections, have brought the issue of profiling again to the fore.³ The analysis of the use of profiling contained in Philip B. Heymann and Juliette N. Kayyem's *Protecting Liberty in an Age of Terror*⁴ should be understood in this broader

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¹ For general literature on the use of racial profiling in the general area of law enforcement, see DARIN D. FREDRICKSON & RAYMOND P. SILJANDER, RACIAL PROFILING: ELIMINATING THE CONFUSION BETWEEN RACIAL AND CRIMINAL PROFILING AND CLARIFYING WHAT CONSTITUTES UNFAIR DISCRIMINATION AND PERSECUTION (2002); JAMES T. O'REILLY, POLICE TRAFFIC STOPS AND RACIAL PROFILING: RESOLVING MANAGEMENT, LABOR AND CIVIL RIGHTS CONFLICTS (2002); and FRED C. PAMPEL, RACIAL PROFILING (2004).

² *Korematsu v. United States*, 323 U.S. 214 (1944).

³ For the different views on this issue in the public debate, see Stuart Taylor Jr., *The Skies Won't Be Safe until We Use Commonsense Profiling*, in CIVIL LIBERTIES VS. NATIONAL SECURITY: IN A POST 9/11 WORLD 157 (M. Katherine B. Darmer et al. eds., 2004) (in support of racial profiling); David A. Harris, *Racial Profiling Revisited: "Just Common Sense" in the Fight against Terror?*, in CIVIL LIBERTIES VS. NATIONAL SECURITY: IN A POST 9/11 WORLD, *supra*, at 163 (against racial profiling); and Ralph Temple, *The Sorrow and the Pity of Racial Profiling*, in IT'S A FREE COUNTRY: PERSONAL FREEDOM IN AMERICA AFTER SEPTEMBER 11, at 69 (Danny Goldberg et al., eds., 2002) (against racial profiling). For the re-emergence of the issue of racial profiling following September 11th, see, for example, Samuel Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); and R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2003).

⁴ PHILIP B. HEYMANN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* (2005). This issue is discussed in Chapter 9, which is entitled "Distinctions Based on



context as an aspiration to reconcile the bad experience of the past with the need to consider all effective means in order to prevent high-scale terrorist attacks. Basically, the authors profess to deal with this tension by moving from the use of racial and ethnic profiling to the use of nationality-based profiling. This Article is dedicated to an evaluation of their approach, followed by a proposal of an alternative perspective on the matter, which focuses on a distinction between various uses of profiling according to their lasting influence on the lives of those who are subjected to the practice of profiling.

For the sake of focusing the discussion, I will consider as “racial or ethnic profiling” any form of law enforcement that takes into consideration the racial or ethnic affiliations of people. This broad definition includes both profiling based on racist stereotypes and profiling based on intelligence information that suggests a greater probability of attacks committed by people who belong to a certain racial or ethnic group. Some may argue that profiling based on information should not be regarded as an example of racial profiling, because it is not based on racial stereotypes.⁵ I prefer not to choose this easy route. Instead, I assume that for the purpose of considering the social costs of profiling practices, even racial and ethnic profiling that is not based on mere stereotypes should be evaluated in a critical manner (although this critical examination should not always lead to its complete dismissal, for reasons I will discuss further in later sections).

I. THE QUESTION OF EFFECTIVENESS

A major problem with the construction of the profiling debate is that it is conducted against the background of an unclear factual basis. The underlying factual question is whether profiling based on racial or ethnic group affiliation is at all effective, at least in some circumstances. If it is never effective, and even has the potential of diverting enforcement resources to wrong directions, no one should support it. Indeed, even if profiling proves to be effective, the controversy can go on between those who are willing to avoid profiling despite its effectiveness (for the sake of avoiding its social costs) and those who support it (usually, subject to conditions). At any rate, since there is an underlying disagreement about the effectiveness of racial and ethnic

Group Membership.”

⁵ Gross and Livingston show that this distinction is not workable with regard to investigations targeted at Middle Eastern Muslim men after September 11th: such investigations are based on some information about the characteristics of Al-Qaeda members, but that information is very general and leads to a perpetual targeting of this group. *See* Gross & Livingston, *supra* note 3, at 1436.



profiling in the context of current anti-terrorism efforts, the academic debate cannot really move forward, because the various participants in it adopt different factual assumptions. A similar factual controversy affects, from time to time, the debate about the use of physical measures in interrogations. In this context as well, some assume that these measures can promote life-saving investigations (although even this feature may not serve a justification to use them) whereas others assume that this practice may lead to false confessions and therefore should not be used even for utilitarian reasons.

Heymann and Kayyem assume that profiling is effective and necessary. They argue that “[g]iven what we know about terrorist organizations, who and how they recruit and how they plan their attacks, groups of persons identifiable by some unchosen characteristic may reduce the pool of people on which law enforcement must concentrate.”⁶ The rest of their analysis is based on this assumption. Therefore, a word of warning is due at this very preliminary stage: those who do not accept this assumption should reject their conclusions from the start. Addressing the same question, Fred Schauer, for example, was less willing to accept this assumption in his book *Profiles, Probabilities and Stereotypes*.⁷ According to Schauer, ethnic profiling is not really necessary; it is overused, and there are viable alternatives to it (e.g. screening all passengers at airports).⁸

This Article cannot contribute to the resolution of the factual background controversy. The rest of my discussion will accept Heymann and Kayyem’s assumption that group profiling is (at least sometimes) effective. In fact, this assumption is necessary for any discussion of the matter from a human rights perspective. If group profiling is not effective, its use does not pose a human rights dilemma but rather fails a simple rationality test. At the same time, it is important to add a word of warning: the effectiveness of group profiling should be re-examined over time.

II. THE CRITERIA FOR PROFILING: FROM ETHNIC TO NATIONAL PROFILING?

Racial and ethnic profiling is detested mainly because of its racist applications in the past and its tendency to perpetuate racial stereotypes. As mentioned, the United States had an especially bad experience with

⁶ HEYMANN & KAYYEM, *supra* note 4, at 102.

⁷ FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* (2003).

⁸ *Id.* at 186–90.



racial profiling.⁹ Against this background, Heymann and Kayyem support a shift from the use of race-based or ethnicity-based profiling to nationality-based profiling. Their proposal overrules the possibility of making group distinctions between citizens based on their former nationalities¹⁰ but enables making distinctions between non-citizens of different nationalities. The nationality criterion is explained as rational considering the assumption regarding one's loyalty to one's state. In addition, the main justification offered for denying the use of profiling based on criteria of race or ethnicity is the fear of internal tensions—"it [nationality-based profiling] does not pit U.S. citizens against each other."¹¹

The arguments Heymann and Kayyem make in favor of the adoption of nationality-based profiling—social cohesion and the significance of one's nationality to one's loyalties—are persuasive but not without flaws.

First, the weight Heymann and Kayyem give to the effect on social cohesion is impressive but somewhat surprising considering their own assumptions. Heymann and Kayyem assume that group-based profiling is effective.¹² If this is true, it seems an overreaching compromise to avoid the use of racial and ethnic profiling with regard to citizens, even in the context of high-priority anti-terrorism enforcement (unless nationality-based profiling is expected to be similarly effective).

Second, the assumption that loyalty is correlated to citizenship is partially questionable. Indeed, suspicions directed at citizens of an enemy state are highly reasonable. At the same time, it is not necessarily unreasonable to assume that not all citizens of a given state (including nations that are friendly to the United States such as England) share the same loyalty to it. Heymann and Kayyem may argue that there are greater probabilities that citizens of countries associated with terrorism will be more inclined to be involved in terrorist activities. The problem is that this rationale does not cut the other way: it does not sufficiently take into account the heterogeneous nature of the populations in countries that Americans do not instinctively associate with terrorism.

A third question is whether their proposal professes to be specific to the American context or also to serve as an alternative for the law of profiling in other countries. Nationality-based profiling may not be adequate for countries like England, where past experience has shown that nationality would be a significantly under-inclusive criterion

⁹ See *supra* text accompanying note 2.

¹⁰ Heymann and Kayyem are willing to broaden this category to include permanent residents. HEYMANN & KAYYEM, *supra* note 4, at 103.

¹¹ *Id.* at 102.

¹² See *supra* text accompanying note 6.



(because instigators of terrorist activities were Muslim citizens).

Fourth, Heymann and Kayyem's proposal does not address the strong correlation between nationality and racial or ethnic affiliation in many states, especially in the Middle East. Is this correlation an additional reason to support the proposal (because it enables the introduction of racial profiling without paying the social price of admitting it), or is it a reason to suspect that the proposal would not gain legitimacy among the public as an alternative for racial profiling? The answer may vary according to one's approach to traditional racial profiling. It is worth noting that if the proposal is understood as a de facto profiling of Arab Muslims, then it will not achieve its professed goal: to secure social cohesion.¹³ American citizens of this origin will not overlook the indirect implications of this form of profiling for the way they are perceived, even if this form of profiling would not be directed at them. At the same time, Heymann and Kayyem are correct in arguing that this implication is less harmful to citizens than racial profiling addressed directly to them by their own countries.

Fifth, it seems that Heymann and Kayyem's proposal should address the practical implications of nationality-based profiling on the lives of American citizens who have family and community relations with foreign nationals who are subjected to this form of profiling. Heymann and Kayyem's discussion assumes that it is possible to maintain an acoustic separation¹⁴ between the negation of profiling with regard to citizens and its partial application with regard to non-citizens. The argument I would like to propose is that this separation is never hermetic and that, accordingly, discriminations among non-nationals always have effects in the domestic scene. The use of the nationality criterion most probably would affect not only *perceptions* regarding citizens who share the origin of the non-nationals subjected to profiling, but also their immediate well-being. This is mainly due to the fact that they may have a personal interest in making entrance to the country in which they live available to friends and relatives. Accordingly, Heymann and Kayyem's proposal still may lead to the social tensions they had wished to avoid.

The relatively new *Adala* decision of the Israeli Supreme Court¹⁵

¹³ See, e.g., Tanya E. Coke, *Racial Profiling Post-9/11: Old Story, New Debate*, in *LOST LIBERTIES—ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM* 91, 101 (Cynthia Brown, ed., 2003) ("Of course, the nationality distinctions we've made in immigration practices, whether 100 years ago or today, are generally little more than a screen for ethnic and racial discrimination.")

¹⁴ This terminology was most famously used in another context. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625 (1984).

¹⁵ HCJ 7052/03 *Adala v. Minister of Interior* (to be published, June 15, 2006), available at <http://elyon1.court.gov.il/files/03/520/070/a47/03070520.a47.htm> (in Hebrew).



on the law that prohibited Palestinians from Israel's occupied territories from entering Israel exemplifies this problem.¹⁶ This decision dealt with an amendment to the Israeli Citizenship law—enacted in 2003, during the time of the second Intifada—that completely denied the possibility of family reunion within Israel of Israeli citizens and their partners who are residents of the occupied territories. This new amendment was explained as a measure against the danger of disloyalty of people from the territories. It is a living example (although a particularly harsh one) of Heymann and Kayyem's proposal to use the nationality criterion in the context of immigration. In practice, although it targeted Palestinians from the territories, the new amendment also affected Israeli citizens of Palestinian origin, who could not establish family life with partners who belong to the same group and maintain residence in Israel. The petition in this matter to the Israeli Supreme Court argued that the new amendment infringed the right to family life of these Israeli citizens, as well as discriminated against them relative to Jewish citizens. The petition was dismissed in a decision given by a split court, by a very slim majority of six Justices (against five Justices in the minority).¹⁷

III. THE INSTITUTIONAL ASPECTS OF PROFILING LAW

The discussion of profiling law is usually focused on the advantages of the use of profiling and on the legitimate criteria or circumstances for its use. Accordingly, Heymann and Kayyem's proposal is similarly focused on these issues. It is not less significant, however, to address the institutional questions of the issue of profiling; that is, to ask whether the powers and rules in the area of profiling should be delegated to and regulated by the legislature or by the executive.

The institutional questions in the area of terrorism law obviously are not unique to the practice of profiling and are present in other contexts as well. (For example, regarding detentions: can they be based on presidential orders or do they necessitate specific legislation?)¹⁸ Still, institutional questions are especially relevant in the context of profiling law because it involves anti-terrorism measures that most countries tend not to regulate expressly through legislation. At this point in time, the fact is that even countries with relatively developed

¹⁶ Citizenship and Entrance to Israel Law (Temporary Provision), 5763-2003, available at http://www.knesset.gov.il/laws/special/eng/citizenship_law.htm (unofficial translation provided by the Knesset, Israel's Parliament).

¹⁷ See *infra* Part IV for a more detailed discussion of the *Adala* decision.

¹⁸ This question was partially addressed in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).



anti-terrorism laws have refrained from legislating on this issue. The examples in this regard include, in addition to the United States,¹⁹ England,²⁰ Canada,²¹ and Israel.²²

As already indicated, Heymann and Kayyem concentrate on the substantive issues of profiling and do not treat the institutional question as central. Still, legislation on this matter may have significance because when the use of profiling is based only on executive guidelines the probability of infringement of human rights grows.

IV. SHIFTING THE FOCUS: FROM CRITERIA TO EFFECTS

At this point, I would like to propose a shift in the focus of the debate from the controversy around the legitimate criteria for profiling to the context in which profiling is used and the kind of decisions to which it applies. My argument in this regard is that profiling was attacked also because it was used in the context of decisions with long-lasting effects on people's lives—for the purpose of completely denying people an entrance to a country or for detaining them (in the *Korematsu* example). Therefore, rather than focusing only on the question of the criteria used for profiling, it would be better also to ensure that profiling is used only with regard to enforcement decisions that do not have long-lasting effects on the lives of innocent people. From this perspective, it should be easier to accept the use of profiling for short-time searches and much harder, if not impossible, to justify a complete denial of the possibility to immigrate based on the applicant's group affiliation. In a similar manner, there should be a distinction between the use of profiling as the basis for applying a more detailed visa process (which may be acceptable) and the use of profiling for the purpose of completely denying a visa without any individual evaluation process. I

¹⁹ For guidelines (which do not come from the legislature) in this area, see U.S. Department of Justice, Civil Rights Div., *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, in *CIVIL LIBERTIES VS. NATIONAL SECURITY: IN A POST 9/11 WORLD*, *supra* note 3, at 175.

²⁰ For example, the House of Lords inferred the possibility of making decisions based on profiling from a stop-and-search provision included in anti-terrorism legislation. See *R v. Comm'r of Police* [2006] 2 A.C. 307 (H.L.) (U.K.).

²¹ See Sujit Choudhry & Kent Roach, *Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability*, 41 *OSGOODE HALL L.J.* 1 (2003); KENT ROACH, *SEPTEMBER 11: CONSEQUENCES FOR CANADA* 73-74 (2003). At present, Canadian law includes express legislation against profiling only in the context of detention powers. See *Emergencies Act*, R.S.C., ch. 22 (4th Supp.), § 4 (1985).

²² Israel has enacted various anti-terrorism measures, but refrained from doing so regarding the two "hot" topics of interrogation measures and profiling. In practice, Israel is known for using profiling as a security measure (for example, in the context of aviation security for many years) and was often criticized for that by Western countries, until September 11th.



believe that this distinction may redeem profiling from some of the bitter controversies that currently surround it.

The route proposed here diverts from traditional legal distinctions. In principle, immigration decisions are considered the prerogative of each country. Following this tradition, Heymann and Kayyem propose to apply their nationality-based profiling in the area of immigration.²³ While this proposal has the potential of gaining support, because it is so much rooted in current practices, it should be reconsidered and reformulated in a way that will take into account the context of the decision and the question of its long-lasting effects.

The Israeli amendment, which had put a complete bar on family unification with Palestinian relatives from the occupied territories,²⁴ may serve as a good example for the analysis of this argument. The judgment of the Israeli Supreme Court on this matter in the *Adala* case did not center on the issue of the legitimacy of the criteria adopted for the profiling policy written into the law but rather on its effects. All of the Justices shared the view that the use of nationality-based distinctions for the purpose of immigration is justified, especially in times of an armed conflict (as they characterized the prevailing situation in the occupied territories). However, they expressed different views regarding the extent to which this criterion may be used. The minority opinion, written by Chief Justice Aharon Barak (with four other Justices concurring), was that the petition should be accepted because the measure promoted by the state failed the proportionality test (as the amendment not only put limitations on immigration of residents of the territories but rather completely barred it). In contrast, the Justices in the majority were willing to uphold the law against the background of the grave security situation (with some nuances which reflected different views regarding the extent of their support of the practice in the long term).

I propose a view similar to the one expressed by the minority Justices of the Israeli Supreme Court: profiling should be opposed mainly when it is used in a way that has long-lasting impacts on the lives of innocent people. According to this view, an amendment to the Israeli citizenship law should have been upheld even if it included additional burdens directed at Palestinians, if these burdens were limited to inspections and conditions (rather than encompassing a complete ban on the possibility for Palestinians to enter Israel, which would have enormous long-lasting effects on the lives of innocent people). In short, the practice of profiling should be subjected to a proportionality review that takes into account also the relative costs of the profiling practice and not only its legitimate causes and its abstention from racist

²³ HEYMANN & KAYYEM, *supra* note 4, at 106.

²⁴ *See supra* note 14.



considerations.

CONCLUSION

Although profiling has been in existence for a long time, it is a relatively neglected zone of study. For years, it was left to internal executive decisions, even ad-hoc decisions. One of the virtues of Heymann and Kayyem's book is that it highlights the issue of profiling and tries to address it in a candid manner. More specifically, it calls for a non-racist method of profiling, rather than for its complete elimination. This pragmatism should be praised. At the same time, even a modest form of profiling remains problematic, also when it follows a nationality-based criterion. The discussion on this matter should, therefore, continue. The analysis contained in this Article tried to add a new component to the profiling debate—the distinction between short-term uses and long-lasting uses of profiling, derived from the proportionality test. This distinction has the potential to improve the balance struck in this area between effectiveness and human rights.