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Practitioners Essay

## Suspicious People: Profiling and Asian Americans and Pacific Islanders

Navdeep Singh and Jasbir K. Bawa

### Abstract

The experience of the Asian American and Pacific Islander (AAPI) community was defined by suspicion following the attacks on September 11, 2001. An era of national security has altered the relationship between the government, the public, and minority communities. This article explores the development of the current profiling paradigm and its impact on the AAPI community. It offers an assessment of the role the profiling paradigm will play as the AAPI community grows over the next twenty years and offers perspectives on how changing demographics can be used to address racial and religious profiling.

### Introduction

Reflecting on the outlook for the next twenty years for the growing Asian American and Pacific Islander (AAPI) population, William Tamayo said that a challenge for advocates will be “to pierce and thoroughly discredit the ‘racialized patriotism’ that fuels anti-Asian violence (1993, 162). Tamayo’s prediction was prescient, but when Tamayo was describing the future of AAPIs and the challenges they would face due to their population growth, his focus was on the impacts of violence and discrimination arising from an economic and related immigration animus (Tamayo, 1993). He could not have predicted the events of 9/11, or the terrorist attacks in both Paris and San Bernardino in the last months of 2015. Nor could he predict how the attacks dramatically changed public consciousness and political will; brought to fore the tensions and treatment of members of the AAPI community in the national security era; and renewed civil rights tensions that have their roots in the treatment of “the wartime other” American history.

As the AAPI population grows to one in ten in 2040, an entire generation of AAPIs will come of age, or have their formative years,

only knowing and openly experiencing the construct of profiling and an expanded national security state as an open part of their daily lives and daily consciousness (Semple, 2015). Unless reformed, these daily-lived experiences, seen as permissive profiling on the basis of perceived ancestry, faith, or origin, will continue to create barriers to the full participation of the AAPI community in the general body politic. Further, these state actions will also justify differential treatment and suspicion of these populations by the public. Conversely, this environment may also inspire a new generation of civil rights activists who may step forward with a vision of progressive tolerance, acceptance, diversity, and cultural humility, which may create a path forward for uniting the AAPI community and shape a larger, more diverse American populace.

However, the experience of this younger AAPI population in 2040, where the AAPI electorate will be split between naturalized citizens and citizens by birth, will mirror the experiences of the current population, which is majority foreign-born. They will continue to be subject to what Erika Lee describes as the “unstable place of Asian America in contemporary America,” a place characterized by “simultaneous acceptance and rejection” (2014, 374).

The AAPI community must leverage this growing electoral power as they become the fastest-growing group of voters, more than doubling in size, to change narratives and systems that allow them to be otherized and profiled. As the complexion of America changes in 2040, increased diversity to the political and judicial realms provides a voice to the broader coalition of all people of color through shared experiences of profiling, despite the variations of profiling that occurs. If national security remains the trump card for violating the civil liberties of Americans, then racial profiling will not be eliminated, and xenophobia against those perceived to be foreign will remain. Changing this mentality in American law and policy will be a critical factor in changing the trajectory of racial profiling policies in America in the years to come.

### Racial and Religious Profiling: A Violation of Fundamental Civil Rights

Racial profiling is targeting an individual based on perceived race, ethnicity, national origin, or religion by law enforcement or a government/state actor (American Civil Liberties Union, 2015; Leadership Conference, 2015). Profiling occurs when the protected characteristic is impermissibly used, when it is the sole or motivating factor in polic-

ing, or when race is a selective factor (American Civil Liberties Union, 2015). Legally, profiling is a violation of an individual's civil rights; the government denies one the right to equal protection and due process based on one's race or religion (U.S. Department of Justice, 2014).<sup>1</sup> Morally, it is a loss of individual identity in favor of having the dark caricature of otherness forced upon you by the state.

Examples of impermissible profiling would include "driving while black," a practice during which African Americans are pulled over more often out of a generalized suspicion that persons of that race are more likely to engage in criminal activity. Another example is the removal of Arab, Middle Eastern, Muslim, Sikh, and South Asian persons from aircraft because their use of a language other than English; this is combined with a generalized suspicion that individuals or particular ethnicities are more likely to commit terrorist acts.

In this context of impermissible profiling, the role of law enforcement and the state or state-sanctioned actor is critical. By sanctioning profiling and the use of protected characteristics, the state is engaging in discrimination and creates a culture that allows others to engage in that discrimination.

A key term is *perceived characteristic*. The individual being profiled does not actually have to be a member of the group being profiled. The motivation of the profiler and the role of race or the other perceived characteristic in that motivation is the concern.

### A History of State-Sanctioned Otherness

Profiling and discrimination, or suspicion based solely on one's background, are not new. America has a history of creating separate legal structures, *de jure* and *de facto*, based on perceptions of race, ethnicity, and national origin. These laws and structures, which promoted disparate treatment, have directly targeted and affected the AAPI community. With many of these laws and incidents targeting the economic disempowerment of the AAPI community, and contributing to the pattern of an economic animus, it is no wonder that the focus and experience of the AAPI community would presuppose a grounding in economic-motivated violence.<sup>2</sup> However, there are examples, most notably the forced removal and detention of Japanese Americans during World War II, which laid the precedent for today's profiling.

The 1942 decision to relocate and intern more than 110,000 West Coast people of Japanese descent (including more than seventy thousand Japanese Americans) was made on gross generalizations about

their lack of loyalty to America and motivations of racial solidarity by the Solicitor General (Lane, 2012). Despite having evidence to the contrary from the Justice Department, the U.S. Navy, and the Federal Communication Commission, the rationale for the internship was, according to the Supreme Court, that “there were disloyal members of that population whose number and strength could not be precisely and quickly ascertained” (ibid., 694). But this was simply not true. According to the Commission on Wartime Relocation and Internment of Civilians, “The broad historical causes that shaped these decisions were race prejudice, war hysteria, and a failure of political leadership” (ibid., 694). This emphasis on political leadership occurred again when the Supreme Court decision convicting Fred Korematsu in *Korematsu v. United States*, 323 U.S. 214 (1944), was reviewed by the U.S. District Court for the Northern District of California in 1984. The Court observed that when “petty fears and prejudices. . .are so easily aroused” politicians and judges “must be prepared to exercise their authority to protect all citizens” (*Korematsu v. United States*, 1984).

Sadly, the politicians in the post-9/11 era have fallen prey to the same types of racial animus that existed against the Japanese during World War II through the rationalization of racism. The racism against the one racial group is rationalized as a means to protect the nation. “The term rational is really important because the way that much of the rhetoric in the civil rights movement and the way that racism was directly countered was by taking racism and characterizing it as an irrational process. . . . Instead what we’re doing is protecting national security, that is a very rational process” (Aziz, 2011, 91). Based on *Korematsu*, even the Supreme Court did not think the internment was racist, rather that it was a rational national security process “because we are at war with the Japanese empire” (ibid., 91). For example, on November 18, 2015, in attempting to rationalize why America should not permit Syrian refugees’ entry into the country, one Virginia mayor compared the sequestering of Japanese Americans after the bombing of Pearl Harbor to the threat posed by the Islamic State in Iraq and Syria (ISIS) and stated that “the threat of harm to America from ISIS now is just as real and serious as that from our enemies then” (Victor, 2015).

### Threat of the Other: The Terror of Today

The black-white racial dynamic, which had long defined race relations in America, has evolved to explicitly include other communities and ethnicities. As evidenced by the projections of the growth of the

Asian American population in 2040, this growth will continue to change the dynamic and understanding of racial politics and impacts.

The dynamic of racialized fear and suspicion has evolved in the national consciousness to explicitly encompass the “Brown other”—those perceived as Latino and Arab, Middle Eastern, Muslim, Sikh, or South Asian<sup>3</sup>—as the other and inherently worthy of suspicion. Brownness has come to symbolize both the “foreign other”: the “other” who is in the United States to take jobs—the lingering economic motivation—or to promote the drug trade, and the “terrorist other” bent on destroying the American way of life, the American government, American values, and killing Americans in the homeland.

The racialization of hate is not limited to perceived background based on skin color alone. In the present day, religious articles and practice, such as the Sikh turban or the Muslim hijab, stand in as markers of otherness (Singh, 2013).

#### Civil Rights and National Security: A Conflict between Two Aims?

Since the 9/11 attacks in 2001, America has struggled to protect its national security and, simultaneously, protect the civil rights of all the people who live within this nation. The practice of racial profiling because of increased suspicion of criminality represents a conflict between those two aims. It is instructive to look at how the balance between those aims changed around 9/11: how they persist this many years later and how they may project their rootedness in both the public psyche and the actions of the state over the next twenty years.

In November 2000, the U.S. Department of Justice denounced the use of racial profiling on the grounds that it violated important principles of democracy and equality. Less than a year following the Department of Justice statements, any aspiration of eliminating race as a factor in law enforcement investigations had vanished.

Days after 9/11, the Justice Department “launched the first large-scale detention of persons based on race and country of origin since the internment of Japanese Americans in World War II” (Etienne, 2011, 1524-5). Thousands of immigrants were secretly incarcerated, and more than seven hundred Arab or Muslim foreign nationals were arrested for investigation by order of the Attorney General (Etienne, 2011).

The Department of Justice ordered five thousand Middle Eastern men to be questioned regarding their links to terrorist organizations and implemented a “Special Registration” program resulting in the detention of several thousand Middle Easterners (ibid.). Not a single ter-

rorism conviction resulted from this program. The specifics of this National Security Entry-Exit Registration System revealed it to be a clear example of discriminatory and arbitrary profiling.<sup>4</sup>

As the AAPI population increases to one in ten Americans, it will occupy more spaces across the United States. The community will continue to have a significant foreign-born population, which implies that transnational ties will continue to play a significant role for the community. Accordingly, an examination of the border and travel reveals a different experience for members of profiled communities, which will impact more and more AAPIs as their ties and needs grow.

South Asians frequently encounter additional searches and questioning by U.S. Customs and Border Protection (CBP) officials at U.S. ports of entry upon returning from trips abroad and even for domestic travels. On either of these tracks, CBP agents may select a traveler for a secondary enhanced screening that can include an intrusive body and baggage searches, extensive questioning, and detention.<sup>5</sup>

The scrutiny is even higher for those with religious attire such as Muslim hijabs or Sikh turbans as they passed through the nation's airports. Approximately one-third of Muslim Americans have South Asian heritage and almost all Sikh Americans trace their roots to South Asia (Sikh American Legal Defense and Education Fund, 2016; Southern Poverty Law Center, 2015). "In the wake of 9/11, law enforcement officials across the nation detained and mistreated hundreds of innocent Americans because of their appearance. Others were forced off planes by pilots or crew members for the same reasons" (Singh, 2014). In 2007, following the implementation of new rules by the Transportation Security Administration, Sikh Americans were forced to remove their turbans in a practice akin to a strip search in view of the public and place their article of faith on the conveyor belt with objects like shoes and laptops in order to fly (Sikh American Legal Defense and Education Fund, 2016).

In addition to the typical screening process, travelers with religious attire have additional screenings and stand in plain view of all other passengers while an officer waves a metal-detecting wand over their religious attire (turban/hijab) and have it swabbed to check for chemical or explosive residue. Often there is a complete pat down or removal of the garment (Singh, 2013b). If you have never been through it, it is difficult to imagine living the life of a "false positive," and being not so-randomly stopped at airports, train stations, and borders. Think about the time, the inconvenience, the insult to your dignity. Think about trying to calm your children who are bewildered and frightened

by armed men pulling you aside. As one Sikh civil rights advocate with a turban and a beard wrote “I am concerned about what the majority of people think when they see me—a man with brown skin, a beard, and a turban—pulled aside for additional screening. One time a young boy came up to me as I was being secondarily screened and he asked a question that broke my heart: ‘Why are you in time-out? Did you do something wrong?’” (Singh, 2010; Singh, 2013a).

### Brown Skin: Permission for Hate Crimes and Vandalism

Since the 9/11 terrorists were brown-skinned Muslim men, it created a situation in which not only were Muslims targets, but also anyone who was perceived to be Muslim was a target. This is still true today. Native Americans, Hispanic, anyone with brown skin is suspicious. In the immediate eight weeks of the post-September 11 violence were the murders of as many as nineteen people, including Balbir Singh Sodhi, Waqar Hasan, Adel Karas, Saed Mujtahid, Jayantilal Patel, Surjit Singh Samra, Abdo Ali Ahmed, Abdullah Mohammed Nimer, and Vasudev Patel (Ahmad, 2004). In addition, these incidents have included the fire bombings of mosques, temples, and *gurdwaras*; assaults by fist, gun, knife, and Molotov cocktail; acts of vandalism and property destruction against homes, businesses, and places of worship; and numerous instances of verbal harassment and intimidation (ibid.). The actual number of incidents is impossible to know, as racial shame, uncertain immigration status, and language barriers inhibit many victims of hate crimes from ever reporting them (ibid.).

When the government profiles against a group in the interests of national security, companies will do the same because they too want to be safe. When the general public sees the government and companies treating one racial group differently, it legitimizes their private biases.

In late 2015, after the Paris and San Bernardino terrorist attacks, when the leading Republican nominee for president suggested that all traveling Muslims be barred from entering the United States, hatred and suspicion followed (Diamond, 2015). Legislative proposals were made to exclude Syrian refugees and place restrictions on the visa waiver program, programs that benefitted the AAPI community, justified by national security. In the days that followed those attacks and the subsequent political rhetoric, suspicion of brown skin, hate crimes, and vandalism are as prevalent as ever. Accounts indicate that almost two major hate incidents a day happened in the month following the attacks, creating an environment of hate worse than the days following 9/11 (Campbell, 2015).



## Implications for a Growing Population: 2040 Recommendations and Strategies for Change

As the AAPI population and the Arab, Muslim, Sikh, and South Asian segment grows, they will continue to be impacted on an individual- and group-identity level by the impacts of profiling and state-sanctioned otherness. Communities are subject to the nature of the political environment.

For the next two decades, national security will likely continue to be a defining concern of the body politic and the reorientation of law enforcement at all levels of government will continue. What regions of the world and which specific groups are in the public consciousness will change, but the underlying themes, treatments, and impacts will not, ensuring that members of the AAPI community will be impacted. As the AAPI population grows, their daily interactions with law enforcement and the state will increase. This increase in interactions, barring appropriate steps, will create more opportunities for impermissible profiling. The recommendations and strategies to help end racial profiling in the future and/or affect positive changes of the dire trajectory that the AAPI population faces are as follows:

### *ENFORCEABLE FEDERAL PROHIBITIONS ON PROFILING TO PREVENT THE REOCCURRENCE AND EXPANSION OF TARGETING OF AAPI COMMUNITIES*

The Department of Justice must revise and improve its “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity” (2014).<sup>6</sup> This document is merely guidance. It is not binding on the federal government, is open to different interpretation by departments such as the Department of Homeland Security, and has no legal effect on state and local law enforcement. Therefore, for racial and religious profiling to end in the future, the community must use its increasing political and voting power to urge the passage of laws like the End Racial Profiling Act (S. 1056, 2015, and H.R. 1933, 2015), which would put in place a ban on profiling and condition the receipt of federal funds by local law enforcement agencies on their implementation of bans on profiling. It would also create a cause of action for victims of profiling.

### *ENFORCEABLE STATE AND LOCAL PROHIBITIONS*

Federal laws are limited in their ability to define rules for state and local law enforcement agencies. In lieu of and to supplement federal action, the AAPI community must leverage its political power by or-

ganizing on the state and local level, including within coalitions, to get the passage of prohibitions on profiling with enforceable and effective remedies for those agencies and officials who engage in impermissible profiling. If our future has any chance for ending racial profiling, crafting local remedies is key.

#### *EFFECTIVE IMPLEMENTATION*

The practical reality of politics is that a body can pass laws, but if they are not effectively implemented they have limited value. The AAPI community must ensure that there is sustained training on racial profiling prevention and funding to engage in such training. First, AAPIs must be involved in the development of training standards to ensure they address community concerns about profiling in an effective manner. Second, local AAPI communities must develop relationships with law enforcement agencies, which can request funding for programs, and policy makers, who can budget sustained funding, to ensure their long-term implementation. Third, the AAPI community must continually monitor and work with agencies to improve the programs in order to address effectiveness over the long term and to affect structural change. The community must hold officials accountable for effectively implementing antiprofiling programs and policies.

#### *DIVERSITY IN LAW ENFORCEMENT AND POLICY MAKERS*

In addition to laws and policies, AAPIs must be part of law enforcement agencies and other policy-making agencies, which are likely to profile, to bring a culture of diversity and acceptance inside the organizations. Engaging and being part of these agencies creates an internal voice for the community, a voice that can be used to caution against implicit bias and provide credible insight into minority cultural and religious practices. Law enforcement and policy makers must reflect the populations they serve, especially where populations are majority minority and more importantly where populations are in the minority. By removing barriers to employment, actively engaging in the political process, and proactively taking steps to engage agencies, through education, partnership, and recruitment, AAPIs can address structural racism, lack of diversity, and lack cultural understanding that isolates and casts a suspicious eye on AAPI communities. AAPIs must ensure that law enforcement and policy makers reflect and are mindful of the diversity of the communities they serve to ensure that 2040 addresses the injustices of AAPI racial profiling in 2015. Then racial and religious equality for AAPI in 2040 can look very different than 2015.

## Conclusion

The national security environment will define the experience of the AAPI community over the next twenty-five years, until 2040, vis-à-vis profiling. As the AAPI population grows, the nature and number of its interactions with law enforcement at all levels will increase, and the biases perpetuated by law enforcement will heavily influence the way the next generation of AAPIs defines its relationship with government, particularly Arab, Middle Eastern, Muslim, Sikh, and South Asians. And the actions of government will, in turn, define what is permissible for the rest of society.

The history of AAPIs in America and the lessons of the forced relocation and detention of Japanese Americans continue to color the lens through which the community evaluates and experiences profiling in the post-9/11 era. The lesson is clear—without vigilance and developing political power, political power that is capable of producing structural change—the AAPI community is subject to the continued indignity of suspicious people.

As Justice Antonin Scalia said to law students in Hawaii, “[O]f course, *Korematsu* was wrong. . . . But you are kidding yourself if you think the same thing will not happen again. . . . *Inter arma enim silent leges*. . . . In times of war, the laws fall silent. . . . It was wrong, but I would not be surprised to see it happen again. . . . It’s no justification but it is the reality” (McAvoy, 2014; Somin, 2014).

## Notes

1. In *Whren v. United States*, 517 U.S. 806 (1996), the Supreme Court only said that race cannot be the sole factor in conducting a stop; there may be other pretextual factors that allow the stop to occur.
2. Examples include the Alien Land Laws passed in states like California, fears of the “Yellow Peril” and the “Tide of Turbans” of late nineteenth and early twentieth century, the Bellingham Riots in 1907, and the murder of Vincent Chin in 1982. See, e.g., Lee (2014).
3. No discussion of the impacts of the post-9/11 era would be complete without fully reflecting the experiences of the Arab, Middle Eastern, Muslim, Sikh, and South Asian communities, and treating them as a collective due to their shared experience, perception of their communities, and coalition work. For the purposes of this article, the Arab experience will be explicitly included and implicitly understood to be part of the described groups due to their intertwined nature and political organizing in the post-9/11 context. However, it should be remembered that the Arab/Middle Eastern population is a separate and distinct group from those who also identify as part of the AAPI population. See, e.g., Wiltz (2014).

4. In April 2011, the Department of Homeland Security ended the program but has maintained the program's regulatory structure, ready to be revived if the department so chooses. See Rights Working Group (2012).
5. South Asian travelers returning to or entering the United States for the first time have been targeted for detailed interrogation about political views, family, friends, financial transactions, and religious beliefs. Their cell phones, computers, personal papers, business cards, and books are searched and copied with virtually no evidence that an individual poses a threat; and they are often subjected to prolonged detention and referral to immigration authorities. Part of the reason why this occurs is the result of a 2008 Guidance issued by CBP that states that "in the course of a border search, and absent individualized suspicion, officers can review and analyze the information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the U.S." In addition, the year prior to the issuance of this guidance, CBP lowered the threshold for invading passengers' privacy from a "probable cause" to a "reasonable suspicion" standard. See U.S. Customs and Border Protection (2008, 1); South Asian Americans Leading Together (2012).
6. When the updates to the 2003 Guidance were released, a national coalition of eighty-two organizations, including leading AAPI and AMEMSSA groups, expressed their "serious concerns" around the document, despite the fact that it dramatically expanded the number of protected classes. The 2014 Guidance retains broad national and border security exemptions, allowing the Transportation Security Administration and the CBP the latitude to continue the previously described profiling. It creates clear opportunities for surveillance and mapping of communities.

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