

CONCERNS WITH MITCHELL D. SILBER & ARVIN BHATT, N.Y. POLICE DEP'T, *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* (AUGUST 2007)

This memo concerns the New York Police Department report “Radicalization in the West” (“the Report”), and briefly enumerates issues of concern with the argument and details of the Report. In the main, the memo raises the concern that the Report applies a highly questionable methodology to draw conclusions unwarranted by its insufficient data set, conclusions that likely will result in racial and religious profiling deleterious both to civil liberties and to genuine efforts at attaining security.

I. BACKGROUND

The Report, published by the New York Police Department (“NYPD”) Intelligence Division in August 2006, is designed to “assist policymakers and law enforcement officials ... by providing a thorough understanding of the kind of threat we face domestically.” (2) Drawing on five case studies of arrests and prosecutions outside the United States, the Report argues that “there is a remarkable consistency in the behaviors and trajectory of each of the plots across the stages” and that “this consistency provides a tool for predictability. (7) The Report then contends that its case studies yield a consistent pattern of four stages, with consistent indicia characterizing each stage present also in alleged U.S. terrorist conspiracies. (19, 56)

The Report is flawed in its guiding assumption and its methodology, and suggests deeply troubling policy choices that while not clearly spelled that are nonetheless clear by implication. Principally, the Report uses a sample set of five convicted or alleged terrorists to draw conclusions about the significance of religious conduct without any analysis of the significance of that same conduct for millions of coreligionists. That is, the Report draws conclusions about the meaning of religious conduct by deliberately focusing on the five cases in which such conduct arguably had connections to terrorism and ignoring the millions of cases in which the same conduct clearly did not. The Report also draws conclusions that are not even supported by its own limited data set. The Report’s conclusions not only do not reflect methodologically sustainable results, but also reflect and embody stereotypical misconceptions about the connection between Islam and terrorism.

Disseminated to other law enforcement agencies—and within the NYPD—it is likely to increase levels of religious and racial profiling in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Its practical effect will be to burden substantially the religious practices of Muslim citizens in violation of the Free Exercise Clause of the First Amendment. Finally, its flawed empirical ratiocinations license a law-enforcement and legislative push toward deeply troubling community-wide measures of surveillance or worse. Past violations of ethnic minorities’ civil liberties have been similarly underwritten by supposedly dispassionate evidence of hidden seditious dangers—and have turned out to be in fact animated by pseudo-scientific racialized thinking of the most invidious kind.¹ We should not take that route again.

II. CONCERNS ABOUT THE REPORT

- The Report explicitly disavows religious profiling (which would violate NYPD policy), but in fact licenses and encourages policing activity on the basis of religious conduct engaged in by millions of co-religionists. In drawing such inferences, its methodology is flawed. The Report draws conclusions about the meaning of religious conduct, moreover, from a sample set of five cases linked to terrorism without considering the millions of other cases in which the same conduct has no connection to terrorism.
 - For example, the Report describes as “typical signatures” conduct such as “[g]iving up cigarettes, gambling and urban hip-hop gangster clothes” “[w]earing traditional Islamic clothing, growing a beard”; and [b]ecoming involved in social activism and community issues” (31; 59) The doctrinally mandated prayer (five times a day) that millions of Muslims engage in is also designated as evidence of radicalization. (39)
 - Another example of a different kind of profiling is the delineation of “archetypes” of terrorists that amount to little more than designation of converts and imams as “suspect.” (29, 38) In particular, imams with limited or no command of English may prove vulnerable to misunderstanding.
 - Religious profiling as implicitly suggested by the Report will directly and predictably burden the Free Exercise interests of Muslim-Americans. This will occur not simply because policing treating religious practice as a harbinger of terrorism will necessarily impinge directly on a considerable amount of religious conduct, but also because such policing will have a “chilling effect”: The foreseeable consequence of the Report’s dissemination and endorsement is that Muslims will be obliged to curtail legitimate and in-fact innocent religious conduct that has no connection to any form of violence.

¹ In late 1941 and early 1942, General John L. DeWitt, the senior Army commander on the West Coast, transmitted rumors of sedition by Japanese-Americans that the Navy knew to be false. See GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 290-91 (2004). From this flawed germ came the Japanese-American internment.

- The Report equates political and community activism that is squarely protected by the First Amendment and that is practiced daily by literally thousands (if not more) of Muslim Americans. (31, 70) No other ethnic or religious group is singled out for stigma for social activism, despite the fact that other ethnic cohorts in the United States have historically been linked to terrorism overseas (e.g., Catholic Irish; Tamil).
- The Report picks out details as salient indicators of law enforcement concern that are common to many people (and not just Muslims). For example, the Report contends that engaging in group outdoor activities is an indication of imminent danger. (44) It also picks out “wilted plants” as a sign of an impending ploy. (49) At best, this is confusing. At worse, this is further invitation to open-ended discretion that gives free rein to individual biases.
- The Report contains language that unfairly and inaccurately suggests that a majority (or at least a substantial plurality) of Muslims in the United States present a threat to public order. For example, the Report makes the unsupported claim that violent ideologies are “proliferating ... at a logarithmic rate.” (9) In each case study, it equates the relevant “environment” as the number of Muslims in a country. (25) And, more worryingly, it baldly asserts that “radicalization permeat[es] New York City, especially its Muslim communities.” (66) These statements in context and convey the false and dangerous impression that a majority of American Muslims are dangerous radicals. Taken out of context—as they surely will be—they are an invitation to other law enforcement agencies to engage in religious and racial profiling. Worse, it is not unlikely they will be picked up by private entities and used as justification for private discrimination, hate attacks, or worse.
- The methodology of the Report is flawed in ways that render its conclusions suspect even on its own terms. Even in terms of the analysis the Report purports to follow, therefore, the five case studies do not support the inferences expressly drawn.
 - The Report draws conclusions about the salience of religious conduct by looking at a statistically insignificant (five) pool of cases. This fundamental problem of sample selection renders its conclusions highly suspect.
 - The Report is premised on deeply dubious foundational assumptions about the reasons for radicalization that reflect political positions with nothing to do with national security considerations. For example, the Report makes the unsustainable claim that European welfare and asylum policies “have exacerbated the speed in which [sic] radicalization has spread.” (56) The Report does not pause to ponder comparative rates of terrorism’s incidence in Scandinavia (general welfare and asylum policies) with the United Kingdom (less generous policies). Rather, this statements reflects an extraneous political position, and also a pervasive absence of sustained analysis underpinning the Report’s conclusions.
 - The Report justifies its telescopic focus back along the allegedly inevitable process of radicalization by contending that its last two stages in the radicalization process happen so fast that intervention is infeasible. (43) This assertion is not even supported by the Report’s own analysis of durations—as graphically illustrated in two separate charts. (54, 81)

- The Report describes radicalization as a “funnel”; it concedes that not everyone who enters the funnel “become[s] a terrorist” but nonetheless states that this does not mean “he or she is no longer a threat,” *i.e.*, that the funnel manifests a one-way process. (10). But this conclusion is wholly unsupported by the five cases studies and contradicted by other evidence cited in the report.
 - First, the Report selected five cases in which arrests and prosecutions occurred: It therefore did not even claim to study the consequences of “entering the funnel”: It cherry-picked one set of cases leaving the “funnel.” It is logically impossible to draw any inference from the skewed sample set the Report uses.
 - Second, the Report includes evidence that some people who interact with groups and individuals with openly violent aims “broke contact” with their leader and “ultimately dismantled” their “cluster.” (62) Yet the Report rejects precisely this kind of de-escalation as impossible. Again, there is no effort to grapple honestly with the data the Report itself gathers.
 - Finally, the necessary implication of the Report is that even a person categorized as being in Stage 1 (“Pre-radicalization”) or Stage 2 (“Self-identification”) inevitably presents a threat or will support terrorism. Yet in these stages, by the Report’s own logic has not “intensifie[d] his beliefs, wholly adopt[ed] jihadi-Salafi ideology” let alone decided to commit an act of violence. (36) That is, a person with neither the ideological framework nor the actual intention to commit violence presents an irreducible threat: This is a tremendously dangerous (and unproven) claim. Its unavoidable consequence is that law enforcement should eschew the search for specific idea of violence, but should look at young Muslim men with are becoming more religious.
- The Report will lead to counterproductive tactics that will harm national security directly or indirectly. Although the Report does not spell out its policy implications, the general thrust of its arguments—for example it’s identification of “archetypes” and “signatures”—is to enable earlier identification of alleged conspiracies. Yet, it is far from clear this will produce much more than harmful racial and religious profiling.
 - Many of the indicia belabored the Report are so pervasive as to provide no guidance at all; outdoor sports and “wilted plants” are good examples. It is always possible to pick out ex post some fact that is somehow linked to a conspiracy; whether that fact is more generally indicative, of course, depends on its incidence in a broader sample set and whether it is easily avoidable. The Report makes no effort to correct for this kind of hindsight bias.
 - Religious profiling is a not merely wrong in and of itself. It is also self-evidently self-defeating: Past studies of terrorism suggests that profiling (particularly for behavioral characteristics that can be camouflaged or foregone) simply generates circumvention by actual terrorists.² Hence, the Report in

² See BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 123-25 (2007) (describing the problem in general terms); *id.* at 229 ([W]e simply have no idea whether racial profiling would be an effective counterterrorism measure or would lead instead to more attacks. As a result, there is no good reason to make the rights trade-off that would be associated with racial profiling in the counterterrorism context.”).

effect is promoting massive expenditures of ill-targeted resources in ways that will yield few (if any) accurate hits.

- Finally, the policies implicitly promoted in the Report will undermine the trust and confidence of Muslim communities. The Report carries the unmistakable, and highly offensive, message that the NYPD regards the majority of Muslim Americans as potential threats. The Report mentions in one instance tips and leads originating from a community (52), but never examines the effect its publication or adoption would have on individual willingness to approach the police. No advance insight into social psychology is needed, however, to predict the effect of the contemptuous, facile, and prejudiced generalizations embodied in the Report will have on Muslim Americans.

In light of its foreseeable stigmatizing effects, and its inferential but unavoidable advocacy of racial and religious profiling, the Report likely will inflict tangible harm on vulnerable minorities, while at the same time inviting the misuse of investigative resources in ways that do not further legitimate national security goals.

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