

Historical Patterns in Street Crime and National Security Policing

It is a well-known fact that race discrimination is present in the policing and prosecution of street crime as well as national security crimes. In analyzing this discrimination, many useful analogies can be drawn from past experiences with racial and ethnic differences in the development and application of laws in the American justice system. These include Stuntz's perspective on the origins of symbolic and politicized street crime fighting¹, and two historical analogies from David Cole, likening several provisions of the USA PATRIOT Act with laws and cases in effect during the Japanese American internment, and during the McCarthy era.² These analogies are mostly cogent and consistent with the implications of many present-day cases, including that of Alton Nolen, who was recently charged with first-degree murder for the ISIS-style beheading of a co-worker at an Oklahoma food processing plant. This suggests the valuable role historical analogies play in analyzing the consequences of both the fight against street crime and against threats to national security on racial, ethnic, and religious identity.

Stuntz provides a historical perspective on the tough-on-crime image many politicians and law enforcement officials seek to cultivate today. He describes the motivations of the pro-New Deal politicians in the post-Prohibition era and demonstrates how these motivations gave rise to what he calls "the symbolic politics of crime."³ Essentially, New Deal era politicians wished to capitalize on the public concern about crime, but did not want to revert to the centralized control and enforcement of the

¹ Stuntz, W. (2011). *The collapse of American criminal justice*. Cambridge, Mass.: Belknap Press of Harvard University Press. 186-191. -

² Cole, D. (2002). Enemy Aliens. *Stanford Law Review*, 54, 953-1004. -

³ Stuntz 188

Prohibition era, which was not very popular after repeal. In other words, they wished to “claim political credit for fighting crime without bearing responsibility if the fight fails.”⁴

The solution was determined by FBI Director J. Edgar Hoover and Manhattan District Attorney Thomas Dewey. They picked high-profile cases and prosecuted them as publicly as possible. This was followed by the widely televised Kefauver Committee hearings on links between organized crime and big-city Democratic machines in 1950. In the same year, Senator Joe McCarthy of Wisconsin made headlines by repeatedly claiming that the Truman State Department employed dozens of communist spies. Senator Robert Kennedy from Massachusetts built his reputation on the investigation of Jimmy Hoffa and his Teamsters union. This method of publicizing the fight against street crime proved very beneficial to the careers of the crime fighters involved. Many legislators capitalized on this idea; the famous Lindbergh kidnapping in 1932 prompted a federal kidnapping statute and the rise of celebrity gangsters was met by the Anti-Racketeering Act and the National Firearms Act. State legislators also adopted this practice, passing a series of anti-carjacking laws in response to a famous Maryland crime in the 1990s. Many of these laws were purely symbolic; auto theft, kidnapping and murder were already illegal when those laws were passed. Some laws, such as the federal Violence Against Women Act of 1994 led to no prosecutions at all. The reason for their existence, according to Stuntz, was not to criminalize theft and violence (already illegal acts), but to capitalize on the publicity surrounding famous crimes and criminals.⁵

⁴ Stuntz 186

⁵ Stuntz 186-191

Stuntz's analysis of the origins and motivations of the politicization of crime fighting seem convincing. For one, it is easy to see that appearing tough on crime is a great way to score political points today, and has been for at least the last few decades. Richard Nixon used this form of rhetoric to rally his base against the perceived lawlessness of the civil rights movement. He declared his intention to be tough on crime and restore law and order in a manner that was understood to carry a racial message. Reagan followed this by condemning "welfare queens" and criminal "predators" as part of a strategy to "[exploit] racial hostility or resentment for political gain."⁶ Bill Clinton vowed to never let his Republican opponents appear tougher on crime than he, making this point by attending an execution.⁷ In the same way that Hoover, Dewey, Kefauver and others capitalized on the public concern about famous crimes to demonstrate their crime fighting prowess, Presidents Nixon and Reagan capitalized on the public's wariness of the civil rights movement and subtle racist nature to score political points for being tough on crime.

Another modern-day example of "the symbolic politics of crime" can be seen in the recent history related to Sharia Law in the Oklahoma legislature. Following the beheading committed by Alton Nolen, a group of eight Oklahoma State House Representatives called for an investigation into "potential terrorists in our midst and the role that Sharia law plays in their actions."⁸ Previously to this, Oklahoma voters approved a constitutional amendment that forbade courts from considering "international law" in their decisions. The lawmakers participating in debate surrounding this amendment emphasized Sharia

⁶ Alexander, M. (2010). *The new Jim Crow: Mass incarceration in the age of colorblindness* (Rev. ed.). New York: New Press. 46-47.

⁷ Alexander 55

⁸ Ohlheiser, A. (2014, September 30). What we know about Alton Nolen, who has been charged with murder in the Oklahoma beheading case. Retrieved December 15, 2014.

Law heavily. Critics of the amendment claimed anti-Muslim intent, and the amendment was struck down by a federal judge in 2013. The reasoning was that since the law discriminated among religions, Oklahoma needed to show a compelling state interest, which it did not adequately do so. The symbolic nature of this constitutional amendment is seen in UCLA law professor Eugene Volokh's argument that "even without the constitutional amendment... secular courts may not resolve questions that require interpretation of religious doctrine."⁹ This means that Sharia Law is effectively already banned from Oklahoma courts; as secular courts, they may not interpret and use the religious doctrine of Islam or any other religion. A large amount of the widespread support of the amendment among lawmakers thus seems to be related to the political capitalization of the public's concerns about crime that Stuntz identified, further providing support for his perspective.

A similarly sound analogy on the national security policing side is presented by David Cole, who draws a parallel between the internment of persons of Japanese ancestry during World War II and the present-day treatment of Arabs and Muslims in the United States. This treatment includes profiling, ideological exclusion, and unlawful detention.

In post-9/11 America, profiling of Arabs and Muslims takes many forms. In November 2001, the Justice Department selected a group of 5000 young immigrant men, based on their age, date of arrival, and country of origin; they were "virtually all" Arabs or Muslims. In January 2002, the Justice Department prioritized the deportation of 6000 young immigrant men out of the waiting list of 300,000. Once again, most of these men

⁹ Gershman, J. (2013, August 16). Oklahoma Ban on Sharia Law Unconstitutional, US Judge Rules. Retrieved December 15, 2014

were from Arab countries¹⁰. There is, of course, the well-known and reported profiling that takes place at American airports.

Ideological exclusion is a provision of the USA PATRIOT Act, which denies admission to aliens who are determined to have endorsed or voiced support for a terrorist group – speech that would be legal if uttered by a citizen.¹¹ The PATRIOT Act also gives the Attorney General the power to indefinitely detain aliens if he has “reasonable grounds to believe” that one or more of the anti-terrorism provisions of the Immigration and Nationality Act apply to them.¹² The Justice Department has conducted secret preventive detention of an unknown number of people. Those detained on immigration charges have been tried in proceedings closed to the public. Many of these detainees are reported to have been in custody for weeks or months before being charged.¹³ Finally, military tribunals are authorized to try alleged terrorist non-citizens, using classified evidence only available to those in the military chain of command. Many of the military detainees are also held without charge in facilities such as Guantanamo Bay, and the vast majority are Arab or Muslim.¹⁴ Cole thus argues that similar “racial and ethnic proxies for suspicion” are at play in both the treatment of Arabs and Muslims today, and the treatment of those with Japanese ancestry during World War II.¹⁵

The analogy of internment as developed by Cole is mostly cogent, with some discrepancies arising between the treatment of Japanese American citizens during World

¹⁰ Cole 975

¹¹ Cole 969-970

¹² Cole 971

¹³ Cole 960-965

¹⁴ Cole 977

¹⁵ Cole 976

War II, and Arabs and Muslims today. As people with Japanese ancestry were automatically profiled as the enemy during World War II, people appearing Arab or Muslim are profiled today in the ways outlined earlier. In the same way as those of Japanese ancestry were considered foreign and thus threatening, Arabs today are seen as a foreign threat. Movies such as *The Seige* connect Islamic religious practices, dress and even the emblematic color green with terrorism.¹⁶ Although there is no formal mass incarceration of Arabs and Muslims today, there still exist thousands of cases of unlawful secret detention against these groups, both at Guantanamo Bay and on US soil.

Clear parallels can be seen in the Japanese American internment cases, such as *Korematsu v. United States* and the cases against immigrants detained by the INS, particularly *Kiareldeen v. Reno*. In *Kiareldeen*, a Palestinian man was detained by the INS and the FBI for overstaying a student visa. The INS and FBI claimed that he was a “suspected member of a terrorist organization and a threat to national security,” and that he had “forfeited” his due process rights by conceding that he had overstayed his visa.¹⁷ Kiareldeen was held in custody for a year and a half with no charges brought against him, and the only “evidence” was provided by his ex-wife and kept secret. In the Japanese American internment cases, the court accepted the government’s claim of “military necessity” at face value without evidence. Similarly, the FBI and INS in *Kiareldeen* attempted to assert unilaterally, without providing evidence to a court, that an individual was a threat to national security, and that his detention was a military necessity. In *Kiareldeen*, the district court ruled that the secret evidence was impermissible, and that

¹⁶ Saito, Natsu Taylor (2001). *Symbolism under Siege: Japanese American Redress and the Racing of Arab Americans as Terrorists*. 8 Asian Am. L.J. 1. 11-13.

¹⁷ Saito 22

there existed a pattern of concealment and misdirection by the government. Similarly, in the 1984 case that vacated Fred Korematsu's conviction, the district court declared that the government had omitted relevant information and provided misleading information to the Supreme Court in the original case.¹⁸ These parallels between the Japanese American internment cases and the immigrant detainee cases therefore lend credence to Cole's analogy.

Despite these similarities, the internment differed from the current treatment of Arabs and Muslims in a key way – the internment had a much larger impact on US citizens. Two thirds of the 110,000 persons of Japanese ancestry interned during World War II were American citizens. In contrast, today's indefinite detention and military tribunal laws apply only to non-citizens.¹⁹ Two contemporary cases illustrate this difference. The first is that of John Walker Lindh, an American citizen who was fighting for the Taliban in Afghanistan when he was captured in January 2002. He was transported to Alexandria, VA for a trial in a civilian criminal court.²⁰ Had Lindh not been a citizen, he would most likely have been indefinitely held without trial or charged as an enemy combatant, as many other captured alleged terrorists have been. The case of Alton Nolen, a converted Muslim who beheaded his co-worker and publicly expressed support for groups such as ISIS, also illustrates the typical treatment of American citizens in terrorism related cases. Nolen is being tried in a civilian criminal court, but it is not hard to see that were he an alien, he could have been held indefinitely or deported just for his statements of support for known terrorist

¹⁸ Saito 21-24

¹⁹ Cole 959

²⁰ Cole 953-954

groups.²¹ Cole admits that the treatment of citizens is a point of difference between the Japanese American internment and the current treatment of Arabs and Muslims. He claims that the mistreatment of Arab and Muslim aliens will lead to similar mistreatment and civil rights violations of citizens. In some ways, this can already be seen – it is difficult to know if the Arab being profiled currently is an American citizen or not.²² It remains to be seen whether indefinite detainment or military tribunals are applied to American citizens in the future.

Cole also draws a parallel between the imposition of guilt by association in present day America and the McCarthy era. During the McCarthy era, there were over 300 laws at the local, state and federal level that penalized those who were sympathetic to or associated with the Communist Party, regardless of specific intent to further the group's illegal ends. These laws denied Communists teaching positions, passports, and security clearances, in addition to subjecting Communists to imprisonment, deportation, and harassment. These abuses were essentially those of the "red scare" of the early 20th century, but committed towards both citizens and aliens. Eventually, the Supreme Court ruled against guilt by association laws, determining that imposition of civil or criminal penalties for mere association with a group without evidence to suggest intent to further the group's illegal ends was in violation of the First Amendment and the Due Process Clause of the Fifth Amendment.²³

Guilt by association was resurrected by the PATRIOT Act, section 411. This version only applies to aliens, and criminalizes all associational conduct with a designated terrorist

²¹ Ohlheiser (2014)

²² Cole 997-1003

²³ Cole 994-997

group. Any aliens associated with a terrorist group are subject to deportation. Cole's analogy to the McCarthy era is cogent. Current law essentially criminalizes association with any group that has been involved in a civil war, or has been involved in a crime of violence – from a pro-life group that threatened abortion clinic workers, to the Northern Alliance in Afghanistan. Had this law been on the books in the 1980s, thousands of aliens would have been subject to deportation as terrorists for supporting the anti-apartheid African National Congress before it came to power, and was removed from the State Department's list of terrorist groups. As discussed earlier, since deportation proceedings are mostly conducted in closed hearings, often with secret evidence used, it is thus very easy to penalize an alien for association with an undesirable group – just as those associated with the Communist Party were penalized for mere association with the group during the McCarthy era.²⁴ There have also been attempts to apply the PATRIOT Act's provisions to citizens; the government attempted to use secret evidence against Kiardeeen in the *Kiardeeen v. Reno* case discussed earlier.²⁵ This seems to mirror the way penalties for Communist associations were first imposed on aliens during the "red scare", and later on citizens during the McCarthy era.

This analogy has implications for the Nolen case as well. In particular, before committing the beheading, Nolen had posted many inflammatory statements of support for various terrorist groups on social networks, including pictures of Osama bin Laden and a video of another beheading. He reportedly also tried to convert his co-workers to Islam.²⁶ Had the PATRIOT Act's provisions been modified to apply to both citizens and aliens, it is

²⁴ Cole 966-969

²⁵ Cole 1001-1003

²⁶ Ohlheiser (2014)

possible that Nolen's speech and proselytizing could have been used as a reason to subject him to military tribunals, indefinite detention, or at the very least, several extra charges for supporting known terrorist groups.

Historical analogies play a valuable role in analyzing both modern street crime policing and national security policing. Modern street crime policing is extremely politicized, with most actors in the system seeking a tough-on-crime image. The historical analogy of the New Deal-era politicians looking to capitalize on public interest in crime, or of Presidents Nixon and Reagan looking to capitalize on public fear still holds. This is seen in the dialogue surrounding the very recent Nolen case, with lawmakers calling for investigations into Sharia Law as a purely symbolic statement; Sharia Law already cannot be used by courts and a constitutional amendment in Oklahoma to make it specifically illegal was struck down by a federal judge. The national security analogies expose the historical overreactions in national security policing of the past, including the Japanese internment during World War II, and the criminalization of Communist Party supporters during the McCarthy era. These analogies serve as useful context for the treatment and civil rights violations of Arabs and Muslims in the War on Terror, which many feel is another case of overreaction in national security policing. This context makes a very strong case for history repeating itself in the realm of national security policing, and a repeating pattern can be seen – the rights of aliens are first violated in the name of national security, followed by the rights of citizens. This leads to backlash among citizens, forcing the government to scale back some of these rights violations. Currently, the War on Terror is having an increasingly negative effect on citizens, including through profiling of American citizens of Arab descent and mass surveillance of citizens' communications. It remains to be seen

whether these rights violations associated with the War on Terror will result in the same backlash, and the same scaling back of violations, as seen in the Japanese American internment and the McCarthy era.

Works Cited

Alexander, M. (2010). *The new Jim Crow: Mass incarceration in the age of colorblindness*

(Rev. ed.). New York: New Press.

Cole, D. (2002). Enemy Aliens. *Stanford Law Review*, 54, 953-1004.

Gershman, J. (2013, August 16). Oklahoma Ban on Sharia Law Unconstitutional, US Judge

Rules. Retrieved December 15, 2014, from

<http://blogs.wsj.com/law/2013/08/16/oklahoma-ban-on-sharia-law-unconstitutional-us-judge-rules/>

Ohlheiser, A. (2014, September 30). What we know about Alton Nolen, who has been

charged with murder in the Oklahoma beheading case. Retrieved December 15, 2014,

from <http://www.washingtonpost.com/news/post-nation/wp/2014/09/30/what-we-know-about-alton-nolen-who-has-been-charged-with-murder-in-the-oklahoma-beheading-case/>

Saito, Natsu Taylor (2001). *Symbolism under Siege: Japanese American Redress and the*

Racing of Arab Americans as Terrorists. 8 Asian Am. L.J. 1

Stuntz, W. (2011). *The collapse of American criminal justice*. Cambridge, Mass.: Belknap

Press of Harvard University Press.

MIT OpenCourseWare
<http://ocw.mit.edu>

21H.319 Race, Crime, and Citizenship in American Law
Fall 2014

For information about citing these materials or our Terms of Use, visit: <http://ocw.mit.edu/terms>.