

FOREWORD

Symposium: The Permissibility of Race or Ethnicity as a Factor in Assessing the Reasonableness of a Search or Seizure

*Thomas K. Clancy**

The National Center for Justice and the Rule of Law¹ at the University of Mississippi School of Law focuses on issues relating to the criminal justice system, and its purpose is to promote the two concepts comprising the title of the Center. The concept of “justice” appeals to basic notions of equality, equity and fairness, often with an emotive component. In contrast, the phrase “rule of law” refers to the requirement that certain procedures and principles must be followed in each case to reach a correct result. Neither concept is sufficient; rather, both must be utilized to ensure that the criminal justice system fulfills its function in society. The Center implements its mission through projects, conferences, educational programs and publications that examine important criminal law and procedural issues.

In furtherance of that mission, the Center has created the *Fourth Amendment Initiative*. Perhaps no other Amendment has such broad applicability to everyday life as does the Fourth Amendment. The Fourth Amendment is also a very

* Director, National Center for Justice and the Rule of Law, and Visiting Professor, University of Mississippi School of Law. J.D., Vermont Law School; B.A., University of Notre Dame

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complicated area of jurisprudence. Many law enforcement officers are undertrained, and prosecutors, defense attorneys and judges often have limited knowledge of the law. The legal landscape is constantly changing as a result of new technology and court decisions. Yet there is little or no continuing search and seizure training for professionals in the criminal justice system.

The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

On February 12, 2003, the Center held its second annual conference entitled, *The Permissibility of Race or Ethnicity as a Factor in Assessing the Reasonableness of a Search or Seizure*. The Center believes that that conference, and the insightful articles published in this special edition of the *Mississippi Law Journal* stemming from the presentations at the conference, significantly further the Center's mission and, more importantly, make significant contributions to the understanding of Fourth Amendment principles. The Center and I wish to thank the leading legal scholars who participated in the symposium.

Scholars presenting papers were Professor A. Morgan Cloud of Emory University School of Law, Professor David A. Harris of the University of Toledo College of Law, Professor Tracey Maclin of Boston University School of Law and Professor George C. Thomas III of Rutgers, The State University of New Jersey, Center for Law and Justice.

The use of race or ethnicity by law enforcement officials in deciding which persons to search or seize predates the adoption of the Constitution and continues to this day. There are persistent problems with such practices and some uses of race are clearly unconstitutional. But are there any situations where race can be permissibly used as a factor—perhaps one of many—to justify a search or seizure of a person?

Some uses of race raise few or no legitimate concerns.

When the victim of a robbery describes the robber as white, black, dark-skinned or of Asian background, most commentators and courts agree that race and ethnicity are patently permissible to utilize in a police investigation—they are merely descriptive of the suspect of a completed crime.

Other uses of race are clearly impermissible. The selective enforcement of traffic laws by an officer on the basis of the violator's race is widely condemned as intentional racial discrimination. Such targeting of persons *solely* on the basis of their race is intolerable.

Some allegations of the unacceptable use of race are simply ignored—at least by the Supreme Court—where there is an objective basis for the search or seizure. Thus, according to the Court, a traffic stop is justified when a traffic violation has occurred, even though the officer is motivated in part to investigate another crime for which justification is lacking.

There are other situations where there is a fundamental lack of consensus. What about the situation where law enforcement officials have a strong basis for belief that the persons engaged in the criminal behavior fall disproportionately into a particular racial or ethnic group? Assume the following to be true: white males are disproportionately engaged in the illegal methamphetamine manufacturing business; black males at inner city high-drug corners are disproportionately engaged in the street-level distribution of drugs and whites who enter such areas are there to purchase drugs; the terrorist attacks of September 11, 2001, were perpetrated by men who are part of an organization of Islamic extremists of Middle Eastern origin; the Mafia is largely composed of men of Italian background; large numbers of Hispanics have illegally entered the United States through the border with Mexico. Should the race or ethnicity of the person be a permissible factor under such circumstances?

But are the above assumptions factually accurate? How strong a showing of a relationship between race or ethnicity and the criminal behavior must be established before it can be said that reliance on that factor is justified?

Does the type of crime matter in assessing the reasonableness of such use: should only acts of terrorism or

mass destruction warrant the use of race or ethnicity? Or is any crime sufficient?

Does it matter that there is an identified organization composed primarily of a particular racial or ethnic group that is conducting on-going conspiratorial activities?

Does it matter whether the law enforcement agency has a standardized policy—a profile—or should individual law enforcement officials be allowed to rely on their own experiences?

The symposium and the articles that resulted from the presentations addressed these and related topics, providing insight into the proper analytical structure that should be employed to reconcile the needs of law enforcement with the constitutional rights of individuals.

The symposium was held on the campus of the University of Mississippi at the School of Law. Doctor Robert C. Khayat, Chancellor of the University, in his introductory remarks at the symposium, spoke about the University's commemoration of the fortieth anniversary of the integration of Ole Miss. On September 30, 1962, rioting engulfed the University of Mississippi campus when federal officials accompanied James Meredith, a black man, for admission as a student at the then all-white university. The resulting violence took the lives of two men and wounded many others. Forty years later, the University of Mississippi has recalled those events and the subsequent integration of the University with a year-long observance entitled, *Open Doors*. "As the oldest public university in Mississippi, it has been our good fortune to lead the way in a number of important areas," Chancellor Khayat said. "Although the events of 1962 are painful and regrettable, we have built on that experience and have incorporated into the culture of Ole Miss the basic value of respect for the dignity of every individual."