TOWARD A TORT-BASED THEORY OF CIVIL RIGHTS, CIVIL LIBERTIES, AND RACIAL JUSTICE

*Jody D. Armour**

Civil rights and civil justice (especially that aspect of the civil justice system that centers on personal injury law) are wedded in many ways. This essay focuses on a critical conceptual connection between the two—namely, the way in which the general analytical framework of tort law debunks the mistaken assumptions underlying the practice of racial profiling, one of the most pressing civil rights and racial justice concerns of our day. Because the same mistaken assumptions that buttress racial profiling also undergird increasingly popular cutbacks in civil liberties in the name of greater homeland safety, tort jurisprudence also provides crucial theoretical and normative leverage for understanding and ultimately combating such retrenchment.

It comes as no surprise that principles and perspectives drawn from tort law provide the ideal touchstones for evaluating the stated justifications for racial profiling (and other curtailments of civil liberties). For, at bottom, these justifications center on the increased safety provided by profiling and reducing civil liberties. And, of course, the most basic concern of accident law (the main though not only subject of the torts) is how we think about and strike the balance between safety and other competing but important social interests.

The formula most frequently invoked to express this balancing process is "B<PL." The "B" represents the burden of precautions while the "PL" represents the gravity of injury multiplied (i.e., discounted) by the probability of its occurrence. According to this formula, when the burden ("B") or expected cost of accident

* Jody D. Armour is the Roy P. Crocker Professor of Law at University of Southern California Law School.

prevention is less than the expected cost of the accidents that a given precaution can prevent ("PL"), then the actor is at fault for failing to take that precaution. Put differently, the world is full of risks ("PL"s abound) but safety costs (reducing those risks) requires an adjustment of competing interests. The B<PL formula provides a way of thinking about how much invasion of health and safety interests we are willing to socially accept in return for competing social interests and values.

I will deploy both this distinctly tort test of reasonableness and other tort perspectives in analyzing the practice of racial profiling. Defenders of racial profiling (e.g., economist Walter Williams, columnist Richard Cohen, pundit Dinesh D'Souza)[1] contend that, given statistics demonstrating Blacks' disproportionate engagement in street crime, it is reasonable to perceive a greater threat from someone Black than someone White. Walter Williams, a conservative Black economist, refers to someone who does so as an "Intelligent Bayesian," named for Sir Thomas Bayes, the father of statistics.[2] For Williams, stereotypes are merely statistical generalizations, probabilistic rules of thumb that, when accurate, help people make speedy and often difficult decisions in a world of imperfect information. The "Bayesian's" argument is simple: "As much as I regret it, I must act differently toward Blacks because it is logical to do so." According to the Bayesian, because race is statistically related to the risk of crime a person poses, it is rational to discriminate on the basis of race when making such assessments. "Rational discrimination" is his watchword. And he admonishes us not to equate rational discrimination with racism, which is commonly understood as irrational animus toward another group.

Although some might take issue with the claim that there are differences in rates of street crime by race, I will assume for the sake of further analysis that, tragically, such differences exist. Given that the blight of institutional racism continues to disproportionately limit the life chances of African Americans, and that desperate

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1. *See, e.g.*, Walter E. Williams, *The Intelligent Bayesian, in The Jeweler's Dilemma*, THE NEW REPUBLIC, Nov. 10, 1986, at 18; Richard Cohen, *A Study in Differences*, WASH. POST, May 28, 2002, at A17, 2002 WL 21747539; DINESH D'SOUZA, THE END OF RACISM 245–87 (1995).

2. Williams, *supra* note 1, at 18.

circumstances increase the likelihood that individuals caught in this web may turn to desperate undertakings, such a disparity, if it exists, should sadden but not surprise us. As the great tort scholar Guido Calabresi points out: "[O]ne need not be a racist to admit the possibility that the stereotypes may have some truth to them. I don't believe in race, but if people are treated badly in a racist society on account of an irrelevant characteristic such as color or language, it should not be surprising if they react to that treatment in their everyday behavior."[3]

At bottom, therefore, the issue distills to this: Assuming statistics show the existence of some rational relation between race and the risk of crime, would discrimination on this basis—we could term such discrimination "rational discrimination"—be reasonable? Answering this decisive question requires us to examine the relationship between rationality and reasonableness; tort law and jurisprudence have much to say about the nature of reasonableness. Answering this questions also calls on us to undertake certain epistemological inquiries, such as the relationship between factual determinations and value judgments (which are commonly assumed to be independent of one another but which I will show actually are not). Certain features of the B<PL formula also shed clarifying light on this subject; drawing on them we will outline a "tort theory of knowledge," if you will. In the end, I will try to demonstrate through this analysis the shared conceptual, theoretical, philosophical, and normative linkages between civil rights and civil justice viewed through the lenses of torts.

I. WHY RATIONAL DISCRIMINATION IS NOT REASONABLE

The most readily apparent objection to the reasonableness claim of the Bayesian challenges the statistical *method* employed to assess the victim's dangerousness. Neither private nor judicial judgments about a particular member of a class, the argument goes, should rest on evidence about the class to which he or she belongs. Despite the attractiveness of this principle, and occasional court admonitions to avoid statistical inferences about individuals, private and judicial

3. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 28 (1985).

decision makers routinely rely on statistical evidence to judge past facts and predict future behavior. Lenders use statistics concerning age, marital status, location or residence, income, and assets to predict whether a borrower will repay a loan. Parole commissions may also use statistical techniques to predict parole success, considering factors such as number of prior convictions, type of crime, employment history, and family ties.[4] And courts consider nonindividualized statistical probabilities when deciding whether to allow injured litigants to use epidemiological proof of causation in their lawsuits.

To accept the usefulness of statistical generalizations as a general matter, however, is *not* to agree that such generalizations are appropriate everywhere. For the use of statistical generalizations entails significant social costs, notwithstanding obvious benefits to defendants. The fatal flaw in the "Bayesian" argument lies in the failure to take account of the costs of acting on Bayesian's racial generalizations. Instead, Bayesians assume that the rationality of their factual judgments is all that matters in assessing the reasonableness of their reactions. Thus, they assert that if racial identity incrementally increases the likelihood that an ambiguous Black man is about to attack (i.e., if it incrementally bolsters the accuracy of their factual judgment that they are under attack), then it is *reasonable* for them to use deadly force against the Black more quickly than a similarly situated White. Whether a reaction is *reasonable*, however, hinges not only on the rationality of its underlying factual judgments, but equally on the consequences of error if those factual judgments are mistaken.

Consider one example of the injustices that lurk in the Bayesian's lopsided attention to rationality. Ira Glasser of the American Civil Liberties Union tells the story of a Black couple who, some years ago, took in a movie in Times Square. It was raining when they came out of the theater about 11 P.M., so the husband went by himself for the car, which was parked in a garage several blocks away. When he returned to pick up his wife, she had disappeared. The man eventually discovered that his wife, who was

4. Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1420–22 (1979).

five months pregnant, had been arrested by the police, put in jail, strip-searched and booked on charges of loitering for the purpose of prostitution.

The arresting officer in this shocking incident may well have viewed himself as an Intelligent Bayesian. Perhaps wrongly, let's assume that at the time he made the arrest, there was a high incidence of prostitution in Times Square, most of the prostitutes were unescorted women, a disproportionate number of them were Black, and most transactions occurred between 10 P.M. and 2 A.M. The officer might assert that, from his standpoint, there was significant evidence to support his factual judgment that the woman was a prostitute—she was a woman, Black, unescorted, and in Times Square at 11 o'clock at night. Even if we assume that his belief was rational in the sense that there was factual support for it, his *decision* to act on this belief in the way he did was patently *unreasonable*, not to mention outrageous and reprehensible. The reason his actions were unreasonable is because the costs of potential mistakes were so grievous. Given the enormous costs of potential mistakes, we rightly condemn him for not doing more to reduce the risk of being mistaken before subjecting this woman to such treatment. Many of us may express our concerns about the terrible costs of being wrong in this situation, as well as doubt about whether the officer's factual judgments were rational. But, upon careful reflection, we see that we are really saying that given the potential for mistakes and the terrible consequences of his mistake, the actions of the officer were unreasonable, even if his factual judgment was rational in the sense that there were circumstances to support it.

To see this, consider two situations, in each of which I claim to know that my pet dog, a temperamental, unpredictable Rottweiler, is chained to a tree in our fenced-in backyard. In the first case, I personally hook the chain to his collar three hours before bedtime. As I am turning in for the night, my significant other asks me whether the dog is chained. If he really is still chained, he will simply spend the night in his doghouse as usual. But if he is not still chained, he will roam the backyard all night, strategically squirting urine on lawn chairs and fixtures in service of his territorial instincts. It takes fifteen minutes the following morning for me to retrace his steps and hose down all that he has marked—a chore I do not relish

but cannot honestly characterize as more than an inconvenience. In such a case I would confidently claim to know the dog is chained and dive into bed.

In contrast, if my sister's one-year-old infant wanted to play in an area of our backyard beyond the reach of the chain and my sister asked me whether the dog was leashed, I would not claim to know that he was if I had not checked on him in three hours. Put differently, it would not be *reasonable* for me to claim to know he was leashed in this situation. This is true even though the statistical risk of error in my factual judgment that the dog is leashedCthat is, the *accuracy* of my factual judgment about the dogCwould be exactly the same in both situations. For the costs of error in the second case (the life of my niece) are infinitely greater than the costs of error in the first (momentary inconvenience). Thus, before claiming to know that he is leashed in the second case, I would gather more information to further reduce the risk of error by, for example, double-checking the chain and yanking on the collar several times. Holding the risk of error about the security of the leash constant in the two situations, my willingness to claim to know that the dog was secured would vary according to the social consequences of error. Put differently, even if the rationality or accuracy of my factual judgment was the same in two situations, my willingness to claim to know something would vary according to the social consequences of error.

Bayesians try to avoid discussion of the consequences of error by focusing solely on their subjective factual judgments—specifically, on whether their hastier conclusion that the "ambiguous" Black man was about to attack was rational given that Blacks pose a marginally greater risk of assault than Whites. It is true that judging that one knows something may be a subjective thought process, a "state of mind." For example, when the officer, upon seeing the unescorted Black woman in Times Square in the late evening, concluded that she was a prostitute, something purely subjective occurred in his thought processes.

What the Bayesians overlook, however, is that the hastier conclusion that they are under attack leads them to make a *decision* to *more hastily shoot* a Black man. The reasonableness of that *decision* and *act* (hastier use of deadly force against Blacks) is just as

much at issue in these situations as the rationality of their hastier factual judgment that they were about to be attacked. To return to the Rottweiler example, to *claim* to know that something is the case is more than a thought process; it is the performance of a social *act*—it is to say something that lends assurance to others and which they will rely upon. In this respect a claim to knowledge is like a promise, another clearly social act. Thus, when I tell my wife as I hop into bed that I know the Rottweiler is leashed, I am assuring her that the risks of error in my factual judgment about the leash can be safely disregarded in view of the not-too-weighty interests (convenience) that a wrong judgment may injure. Likewise, when I tell my sister that I know the dog is leashed (which I do only after drastically reducing the risk of error by gathering more information on the condition of the leash), I am assuring her that the drastically reduced risks of error in my factual judgment are sufficiently small that they can be safely disregarded in view of the extremely weighty interests that a wrong judgment may injure.

This same analysis applies to factual judgments and acts of the Bayesian. The Bayesian's hastier conclusion that an "ambiguous Black$\forall$ is about to attack may be a subjective thought process—a subjective factual judgment. But when Bayesians decide to act on their race-based factual judgments by using deadly force more quickly against ambiguous Blacks, they imply that the risks of error in their hastier use of deadly force against Blacks can be safely disregarded in view of the interests that wrong predictions will injure.

To determine whether the risks of error in race-based predictions about Blacks can be safely—that is, reasonably—disregarded, it is necessary to balance the *costs of waiting* for an "ambiguous" or "suspicious" Black man to clarify his violent intentions against the *costs of not waiting*. All predictions of human behavior present some risk of error. The more information we possess about a given situation, the smaller the risk of error in our judgments about it. Taking the time to gather information is costly, however. And nowhere are information costs higher than in self-defense cases, where the only way to gather more information is to wait for "suspicious" persons to manifest their violent intentions more clearly before responding with force. Here the cost of waiting translates into

increased risk for people who want to defend themselves successfully. If they consider Blacks to pose a "significantly" greater threat of assault than Whites, they will not wait as long for an "ambiguous" Black man to clarify his violent intentions as for a White man.

On the other hand, the *costs of not waiting* as long for Blacks with unclear intentions as for similarly situated Whites include both the risks of error in race-based generalizations and the social consequences of error when the predictions prove false. First, consider the risks of error in race-based generalizations. Take the statistic for Black males arrested for violent assaults of approximately two percent (which is still much greater than the actual probability that a Black male will rob a stranger, since the violent assaults statistic also includes, *inter alia*, arrests for domestic violence, barroom brawls, street fights, heat of passion altercations between friends and acquaintances, turf wars between gang members, and conflicts growing out of drug transactions), and assume this number represents the risk that the Black man entering the bank lobby in our hypothetical scenario was about to attack the woman at the ATM. Further assume that if this scenario occurred fifty different times and involved fifty different women throughout the city, then in two percent of the cases—or one out of fifty times—the woman's belief that she was under attack would be correct. This means that of the fifty Blacks against whom defenders will use hastier lethal force because of racial generalizations, forty-nine will be innocent.

Next, consider the social consequences of error. The costs of error in race-based predictions of violence go well beyond the physical injuries suffered by the innocent Black victims of false predictions. Not waiting as long for Blacks to clarify their intentions has a profound "chilling effect" on Black participation in core community activities. That is, hastier use of force against Blacks forces Blacks who do not want to be mistaken for assailants to avoid ostensibly public places (such as "White" neighborhoods, automatic tellers, and even tony boutiques) and core community activities (such as shopping, jogging, sightseeing, or just "hanging out"). Further, Blacks who do venture into the public arena are compelled to stifle self-expression and move about in a withdrawn, timorous fashion lest

they appear threatening to some anxious gun-toting pedestrian or subway rider.

An analogy may underscore the grim reality of "chilling effects." When I described the Times Square incident to a Black woman who teaches law at a major Midwestern university, she confided that she had also been mistaken for a prostitute on two occasions. On one, she had an appointment to meet someone at a hotel entrance. As she waited just outside the lobby door, a man in a business suit sidled up to her and asked what her services were going for. Ever since, she has strictly avoided meeting people at the entrances of hotels or in hotel lobbies, even though many law school conferences take place in hotels. On those occasions when she has no choice but to meet a group of people in a hotel lobby, she makes sure she arrives a little late so that she does not end up standing alone in the lobby before others arrive.

Another cost of not waiting concerns the denial of moral agency inflicted on Blacks by race-based suspicions. Race-based predictions of people's behavior reduces them to predictable objects rather than treating them as moral beings capable of personal autonomy.[5] Of course, all predictions of human behavior undermine respect for personal autonomy to some degree. But respect for another's autonomy is especially undermined when the forecast that a person will choose to act violently is based on a factor—such as race—over which that person has no control.[6]

Moreover, humiliation and stigmatization must be counted among the most painful costs of race-based suspicions. It is too easy for some to trivialize the severe psychological, emotional, and even spiritual costs to Blacks of being treated like criminals. For instance, according to Suzanna Sherry, a vocal critic of progressive feminist and minority perspectives on American justice, "[The] description of the young Black man who felt resentment when a White woman with a baby crossed the street to avoid him naturally invites a comparison: he fears for his emotional well-being; but she fears for her physical safety. I, *at least, would rather be snubbed than raped.*"[7] In saying

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5. Underwood, *supra* note 4, at 1414–16, 1434–36.

6. *Id.*

7. Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375, 375 (1992) (emphasis added).

that she would rather be "snubbed" than raped, Sherry speciously pits two certainties against each other—the certainty of being "snubbed" against the certainty of being raped. This is a gross distortion of the situation. In truth, the situation pits an extremely remote risk of being raped by a random Black man (nothing in the description of the situation suggested that the young man was acting in a threatening or erratic way) against the certainty of being "snubbed." Sherry's non sequitur vividly illustrates the rationality subverting power of stereotypes, for only by tapping the "Black as rapist" stereotype can she regard a rape by an ordinary Black man on an ordinary street *not* as an extremely remote risk but as a foregone conclusion.

More telling for "cost of not waiting" analysis is Sherry's trivialization of the humiliation and resentment suffered by the young Black man who was treated like a rapist. Characterizing the young man's injury as a case of being "snubbed" lumps it with breaches of social etiquette such as being ignored by an acquaintance or failing to receive an invitation to an ice cream social. The euphemism carries with it nothing of the relentless, cumulative, dehumanizing reality of these manifestations of the Black Tax par excellence. "Here we go again," muses the young Black man. "She's tripping all over herself to cross over to the other sidewalk, all the while cutting her eyes at me like I'm Willie Horton on work furlough. Somebody said being invisible was a terrible thing. I know something worse . . . being too visible . . . walking around with a screaming BIG BLACK MAN warning ineradicably tattooed across your forehead. They look right through invisible men, but the too-visible ones they use like movie screens for the projection of their most demeaning, pornographic images. I always feel like taking a bath after these encounters, but with so many to contend with every day, if I tried to bathe after every one, I'd live in the bathtub." From the standpoint of doing justice to the severe dignitary injuries inflicted by these "microaggressions," a better comparison than "I'd rather be snubbed than raped" would be "I'd rather have waves of strangers successively spit in my face than run the extremely remote risk that a random anonymous Black man might rape me."

Once we consider the risks of error and the grave social

consequences of error generated by statistical generalizations about race, we see that much more than number crunching is involved in assessing the reasonableness of using lethal force on the basis of such generalizations. Considerations of fairness and social justice figure as centrally in these assessments of reasonableness as considerations of factual accuracy. Telling defenders that they cannot base their decisions to shoot on racial generalizations may require them to wait slightly longer—as long as they would if the ambiguous person were White—than they would if they were allowed to use such generalizations. The costs of waiting (increased risk for defender) are not trivial. But when balanced against the costs of not waiting (injury or death to numerous innocent victims, exclusion of Blacks from core community activities, objectification, stigmatization, and humiliation), the scales of justice tilt decidedly in favor of the defender assuming the marginal additional risks of waiting.

Citizens are frequently called upon to incur additional risks for important principles and social values. Drafts for military service are obvious examples. Perhaps less obvious, but much more pervasive, are the health and safety risks we all incur in the interest of values such as freedom of expression, the right to bear arms, and even the less lofty values of technological progress (motor vehicles, for instance, take many more lives each year than they save, including many pedestrians)[8] and convenience (increases in the speed limit for cars exposes everyone on the highway to substantially greater danger, including those who continue to drive at the old lower speed limit).[9] We allow teenagers to drive, even though they generate an

8. Pedestrian deaths alone accounted for more than 13 percent of traffic fatalities in the United States in 1994, according to the National Highway Traffic Safety Administration. Of 40,000 traffic-related deaths in 1994, nearly 5,500 were pedestrians, of which 800 were children age fifteen or under. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS 1994—PEDESTRIANS 2, *at* www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSF94/pedfct94.pdf (last visited Aug. 1, 2005).

9. "A study by the Texas Transportation Institute at Texas A&M University looked at highway deaths in the state four years before and four years after rural speed limits were raised to 65 mph in 1987. The study found the serious accident rate rose 25 percent." Lisa Teachey, *Good News for Houston Drivers*, HOUSTON CHRON., Nov. 11, 1995, at 33, 1995 WL 9415267. (In 1993, an updated study showed the death and injury statistics went back to

astonishingly disproportionate percentage of accidents, because we think it is important that they enjoy access to adult activities as part of their maturation process. Similarly, we license individuals with disabilities and prosthetic devices to drive, and hold them to a lower legal standard of reasonable care (in effect allowing them to generate more than ordinary risks without liability), because we believe it is important that they have equal access to core community activities. The list goes on, but this partial one suffices to show that expecting citizens to incur additional risks (especially additional risks as small as the ones being considered here) for the sake of important social interests is a familiar feature of our legal culture and social morality.

This analysis applies with equal force to shopkeepers, cab-drivers, and any other class of decision makers prone to screen "suspicious" persons on the basis of race. Shopkeepers and cab-drivers incur some risk in admitting "ambiguous" individuals. Yet, reducing Black Americans to second-class citizens denies them equitable participation in social and commercial existence. It subjects the overwhelming majority of innocent Blacks to demeaning assumptions and microaggressions and; contributes to the establishment of a de facto system of apartheid by private discriminatory decisions. These are the costs of race-based screening and they cannot be morally justified by the incremental risk. Sometimes, tragically, the risk of violent robbery, albeit small, is realized. By the same token, the risk of death or serious injury in automobiles and airplanes, albeit small, is realized hundreds of thousands of times every year. Yet we continue to expose ourselves to the risks of the airways and highways in ever-growing numbers. We simply do not live in a risk-free society, nor are we willing to sacrifice the values and conveniences that a dramatically less risky society would cost. Viewing our risk-laden social existence from this broader, tort-based perspective, incremental race-based risks are not meaningfully different from thousands of other incremental risks we assume every day in return for a comfortable, convenient, decent, and democratic way of life. Accordingly, we must accept

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their levels before the speed limits increased in 1987). *Id.* "According to the National Safety Council, a nongovernmental, not-for-profit public service organization dedicated to reducing accidental deaths and injuries, raising speed limits could jeopardize highway safety across the country." *Id.*

incremental, race-based risks as the price of living in a just, humane, democratic society, as just, humane, democratic citizens.

In sum, the "Reasonable Person" does not discriminate against Blacks on the basis of racial generalizations. The Reasonable Person can be fairly expected to surmount his or her discriminatory impulses and incur incremental race-based risks to protect vital democratic values. Because the reasonable and the moral are flip sides of the same coin,[10] an individual who shoots or screens others on racial grounds engages in blameworthy conduct. Bluntly put, the Bayesian's decision to discriminate against Blacks on the basis of statistical generalizations is racist.

Some readers may recoil at the use of the value-laden term "racist" to describe ostensibly rational racial discrimination. Assessments of reasonableness, however, essentially turn on a balancing of values, making the term "reasonable" itself a value-laden expression. Referring to Bayesians' discriminatory decisions as racist simply stresses that they strike an unreasonable balance in a way that wrongfully devalues or undervalues the democratic interests of Black Americans in being treated as full and equal citizens.

Saying that so-called rational discrimination is racist is not the same as saying that all cabdrivers, shopkeepers, and others who have historically discriminated against Blacks on grounds they believed to be rational are incorrigible racists. Many well-intentioned people simply have not had the enormous costs and incremental gains of their discriminatory decisions put in perspective. The racist is the person who says, "Yes, I appreciate the large risks of error and the grave social consequences of error that racial generalizations involve. And, yes, I understand that every day I willingly expose myself to many risks greater than those incremental risks posed by Blacks, in some cases for lofty reasons and in other cases for very mundane ones. Nevertheless, I do not consider the interests of Black Americans worth incurring any incremental risks. So I will not buzz them in, pick them up, or wait as long to shoot an 'ambiguous one' as I would wait for a similarly situated White." Appeals to principle

10. *See* Jody Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 789–90 (1994).

like those developed in this discussion may reach only those well-intentioned people who seek to avoid racism, and who therefore can be persuaded to stop engaging in racist practices. Racially illiberal Americans who refuse to adequately credit the interests of Blacks in their decision making, on the other hand, require alternative approaches to helping them avoid discrimination.

This analysis retains its vitality even if the risk estimates concerning Black assaults are modified. There may continue to be debate about the most accurate risk-of-assault statistics for Blacks, but as long as the risks of error in the racial generalizations remain high, and the social consequences of error remain grave and far-reaching, moral and policy arguments against using statistical generalizations to visit serious injuries on Blacks remain compelling.