Racial Profiling

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1. Introduction

1.1 Racial profiling is a matter of considerable concern in the U.S. and elsewhere. Yet, perhaps because of its sensitive nature, there is almost no philosophical reflection on this subject. This essay provides a normative assessment of racial profiling and invites more philosophical discussion of this subject. Our argument rests on two assumptions about the productivity of profiling in curbing crime. First, we posit that there is a significant correlation between membership in certain racial groups and the propensity to commit certain crimes. Second, we assume that given such a propensity, to stop, search, or investigate members of such groups differentially will help curb crime. That is, we assume that such measures eliminate more crime than other measures for equivalent

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1 We have benefited from conversations about this material with Miriam Avins, Archon Fung, Brian Jacob, Todd Pittinsky, Peter Schuck, Ani Satz, Andrew Williams, and students in a joint class on statistics and ethics at the Kennedy School in October 2002. We are grateful to Arthur Applbaum, Frances Kamm, Simon Keller, Fred Schauer, and Alan Wertheimer for helpful comments. We have benefited from reading unpublished chapters on profiling by Fred Schauer (to appear in Profiles, Probabilities, and Stereotypes, Belknap Press, 2003). Thanks to Avedis Koutoujian for research assistance.

2 The are exceptions: There is a debate started by Levin (1992) and Thomas (1992), which includes Adler (1993), Corlett (1993), Cox (1993), and Pojman (1993), and a reply by Levin (1994). This discussion addresses response to black crime, rather than profiling in particular. Second, there are the contributions by Wasserman, McGary, and Applbaum in Kleinig (1996). Legal scholarship is more extensive. See, for example, Gross (2002) and Schuck (2002) for law-oriented views on moral concerns about profiling.
expenditures of resources and disruption. If these assumptions fail (which may well be the case), the question addressed in this paper no longer arises. But if they hold, we argue that police and security measures making race an important characteristic in deciding whom to stop, search, or investigate are morally justified in a broad range of cases, including many cases that tend to be controversial.

3 For an empirical discussion of the correlation between membership in certain racial groups and the propensity to commit certain crimes, cf. Lauritsen and Sampson (1998) and references therein. See also the appendix of Loury (2002), the homepage of the U.S. Department of Justice, and the homepage of the Racial Profiling Data Collection Resource Center at Northeastern University at http://www.racialprofilinganalysis.neu.edu/index.php. These assumptions are of course controversial. For instance, the Boston Globe reported on January 6, 2003, that police officers in Massachusetts are far more likely to search the car of a black or Hispanic driver pulled over for a traffic violation than the car of a white driver; but that whites are more likely to face drug charges following such searches. One possible explanation is that the police are better able to identify white offenders, which leads to a higher success rate. An alternative explanation is that white drivers are simply more likely to possess drugs. If statistically valid records showed that white drivers were more likely to possess drugs, our reasoning would suggest that whites be stopped and searched more frequently. The second assumption does not follow from the first. For example, stopping and searching individuals may not be effective in preventing or deterring crime. Or, while race is correlated with forms of crime, much of the predictive value of race may be carried by other factors. (For instance, one cannot derive from the fact that most terrorists are of Arab descent that being of Arab descent is a relevant factor because the same or greater predictive power might be carried by other easily observed factors, e.g., recently spent time in nations where terrorists are trained.) The second assumption alone is sufficient for our purposes, but is unlikely to hold unless the first holds. This study takes no stance on the truth of those assumptions: an assessment of their truth is beyond the limits of what we can accomplish here. If these assumptions are not satisfied, there is no hint of moral justification for profiling. In 2.1, we define racial profiling as “any police-initiated action that relies on the race, ethnicity, or national origin and not merely on the behavior of an individual.” So neither in this definition nor in the formulation of the second assumption are we assuming that the relevant investigative measures are exclusively based on race.

4 We assume that there are no issues that arise for private security services but not for the police.
Three different issues are commonly conflated in the discussion of “racial profiling.” The first is the use of race as an information-carrier for investigative purposes; the second is the “disproportionate” use of race as an information carrier (though we shall see that it is hard to spell out what that means), and the third is the abuse of police authority. Many if not most discussions of racial profiling are primarily concerned with the second and third issues, and pay little or no attention to the distinctions among these three issues. Our argument leads to a defense of the use of race as an information-carrier for investigative purposes.

1.2 Racial profiling is controversial because it raises a range of fundamental issues, most importantly the equality of treatment across racial groups. Perhaps surprisingly, our case in support of profiling is consistent with the claim that far-reaching measures must be taken to decrease racial inequality. This may be surprising because some seem to think that arguments in support of racial profiling can speak only to those who disregard the disadvantaged status of racial minorities, or to those who callously ignore the subtleties

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5 An example is Harris (1999a), an ACLU report. The report is about “racial profiling,” but it discusses the second and third issues only. Obviously, these two issues constitute enormous problems. (For instance, Harris (1999b) concludes: “It is virtually impossible to find African-American people who do not feel that they have experienced racial profiling. The statistics presented here show that this is more than just the retelling of stories based on isolated instances of police behavior.”) Nevertheless, it is important to keep the relevant discussions apart.

6 We are not concerned with the practice of “profiling” in general: we do not discuss conceptual issues that arise in attempts to analyze profiling as such, nor do we address moral issues that arise on that general level. Both our conceptual analysis and our normative inquiry move at the less abstract level of racial profiling. Schauer’s forthcoming Profiles, Probabilities, and Stereotypes addresses the broader issues. One reader suggested the useful distinction between “racial profiling as we know it,” which is characterized by all the three features we distinguish above, and “racial profiling as it might be,” which uses race for police purposes in ways that strike us as justifiable.
of this debate. \[7\] Showing why this supposition is false is one task of our analysis. We investigate two argumentative strategies trying to show that profiling is wrong: a utilitarian argument, and multiple non-consequentialist arguments. These arguments fail to defeat the case for profiling. We also investigate an argument in support of profiling based on the self-interest of minorities. While this argument comes with qualifications, it is crucial for our rebuttal of one non-consequentialist objection. The relevant constitutional questions turn on the Fourth Amendment (banning “unreasonable searches and seizures”) and the Equal Protection Clause of the Fourteenth Amendment. There is much debate about the application of these amendments to racial profiling. Yet our concern is with moral issues, rather than with constitutional interpretation. \[8\]

Section 2 discusses the defining characteristics of racial profiling. Section 3 elaborates the distinction between racial profiling, police abuse, and disproportionate use of race of screening. Since many discussions of racial profiling suffer from a lack of conceptual clarification, such “stage-setting” is essential: there is no set of useful distinctions in place that we can easily draw on. Readers who have thought a lot about

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7 Glasser (2000), for instance, compares racial profiling with Jim Crow and the internment of Japanese Americans during World War II. West (1993) lists examples of how white supremacy lingers, mentioning racial profiling alongside drug convictions and death-row executions (cf. preface to the 2001 edition, p XV, while the preface to the 1994 mentions how West himself was subject to abusive racial profiling).

8 For the legal issues, cf. Banks (2001), Johnson (1983), Maclin (1998), Russell (2001), Silton (2002), Stuntz (1998), Thompson (1999); see also Skolnick and Caplovitz (2001). Some believe that the debate about profiling is really about the truth of the assumptions we are making at the beginning of the introduction. This strikes us as false. There are at least three different debates, each of which significant: the first is about the correlation between race and crime and the effectiveness of profiling; the second is about the legal aspects of such profiling, and the third is about the moral aspects, our concern.
profiling may wish to skim these sections. Section 4 explores the utilitarian argument, and section 5 takes up the non-consequentialist arguments. Section 6 outlines the argument that racial profiling may be in the interest in particular of the African-American community. Section 7 concludes.

2. Defining Racial Profiling

2.1 The term “racial profiling” was introduced to criticize abusive police practices and thus carries connotations of illegitimacy.\[1\] Thus, to explore profiling without a bias built into its definition, we must assess how to understand profiling, and how to keep it distinct from other issues.

In a typical approach, Ramirez et al. (2000) define profiling as “any police-initiated action that relies on the race, ethnicity, or national origin, rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.” This definition captures a pre-theoretical account many people have. Our definition will be different from this one in a manner that facilitates normative inquiry.

The crucial feature of the Ramirez definition is that it \textit{contrasts} (a) the use of race, ethnicity, or national origin with (b) the use of the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity. That is, racial profiling relies on (a) \textit{rather than} (b). Including this contrast in the definition raises problems for two reasons. First, (a) mentions a feature of investigative methods, namely, the use of race, ethnicity,

or national origin, whereas (b) mentions both a feature of investigative methods ("rely on information pertaining to individuals") and the goal of such investigations, namely the apprehension of criminals. Thus contrasting (a) and (b) suggests that profiling serves purposes other than the apprehension of criminals, and thus gives an aura of illegitimacy to racial profiling by definition. Second, writing the contrast between (a) and (b) into the definition suggests that either one uses race, ethnicity, national origins, and possibly other information about group-membership, or one uses specific information on suspicious activity, namely information about the behavior of an individual or information that leads the police to an individual identified as a criminal. However, we would still need to talk about profiling if a combination of the two criteria motivated action. For example, it would still be profiling if police stopped 40% of blacks exceeding the speed limit by 10 mph but only 20% of whites.

Thus the definition suggested by Ramirez et al. prejudices the moral assessment of racial profiling; nor does it capture some of the moral issues of concern when discussing profiling. In response to these concerns, we define racial profiling as “any police-initiated action that relies on the race, ethnicity, or national origin and not merely on the behavior of an individual.” Our question then is: Are such actions justified under

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10 Compare other definition of profiling: Banks (2001) defines racial profiling as follows: “[R]acial profiling constitutes the intentional consideration of race in a manner that disparately impacts certain racial minority groups, contributing to the disproportionate investigation, detention, and mistreatment of innocent members of those groups.” So just like Rameriz et al., Banks defines profiling in a manner meant to solicit moral condemnation. Would Banks approve a racial profiling measure that only involved disproportionate investigation of certain groups of citizens? There is no way to know. Compare the definition proposed by Gross and Livingston (2002), who submit that “‘racial profiling’ occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of
circumstances that may occur widely? We believe that they are, but our definition of racial profiling alone does not suggest that answer.

2.2 Keeping our definition of racial profiling in mind, we need to specify the focus of our discussion. To begin, we distinguish among three different paradigmatic cases of profiling. We then specify the type of profiling discussed in this study, and how such an inquiry illuminates other types of profiling. The first paradigmatic case of profiling includes measures employing race and ethnicity that seek to apprehend individuals who have committed specific crimes. One example is the search for the DC Sniper in fall 2002. The second includes racial, ethnic, or nationality screening at airports, which has been widely discussed after 9/11. The difference between this kind of case and “Sniper-scenarios” is that in airport screening profiling is not used to apprehend individuals who have committed crimes or who are likely soon to do so. Rather, profiling is used because there exists a salient threat (hijacking of planes), and it is deemed impossible or excessively expensive to search all individuals involved in this setting. Screening is used as a routine measure to apprehend individuals who may be planning on committing the

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that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime that the officer is investigating” (p 1415). By drawing on the individual officer’s beliefs, this definition is more exclusive than ours. But defining profiling in this manner is peculiar. What if the officer disagrees with official police policies and thus does not have the relevant belief, but happens to implement it? It might be useful to distinguish between “racial profiling at the policy level,” and “an individual police officer’s being engaged in racial profiling.” There can be the one without the other, but we are interested in profiling at the policy level.

11 According to the definitions of racial profiling offered by Ramirez et al. and by Gross and Livingston, this sort of police action does not count as racial profiling.

12 To what extent, if any, such profiling takes place is surprisingly unreported.
relevant crimes, to deter such people, and to reassure passengers. By way of contrast with the case of stopping people on the highway, to be considered next, this setting is rather confined: such procedures apply only to people about to board a plane, who are in a position to expect such measures and the discomfort that accompanies them. The third case involves search and investigation on highways that relies (in part) on racial criteria, with the goal of intercepting drug traffic, or search and investigation on city streets with the goal of finding, say, illegal weapons. In such cases, the search is not meant to apprehend individuals wanted for specific crimes that were just committed, nor is the search part of routine measures all individuals engaged in certain activities can reasonably expect. In such cases, any particular individual has only a slim chance of being searched. Thus such searches tend to be disruptive and personally troubling, and individuals are in no position to integrate them into a daily routine.

There are many other cases in which profiling is used. These three paradigmatic cases differ in the extent to which a crime or a threat is immediate, in the extent to which security measures can be expected, and in the magnitude of the imposition involved. Profiling tends to be the more controversial the less immediacy there is to the crime or threat to which it is related, the less one can reasonably expect to be subject to such measures, and the greater their imposition. (Also, profiling tends to be more controversial the less obvious it is – or the less it is the case -- that everybody searched is affected by the goal of the investigation, and the greater the magnitude of the possible harm; however, our cases do not make this clear.) Therefore, our argument mostly addresses cases of the third, most controversial sort, such as highway searches. We claim that profiling can be justified even in such cases, and take this to entail that it is justified a
fortiori in other cases. Somebody claiming that profiling is justified in the first or second but not in the third, would need to argue for that distinction. This study addresses the routine use of profiling for the prosecution, identification, and prevention of crimes.

3. Racial Profiling, Police Abuse, and Disproportionate Screening

3.1 To focus the discussion further, we address two subjects that tend to be conflated with profiling as we have defined it: police abuse, and disproportionate screening of minorities.

Profiling actions tend to make the headlines mostly when they are coupled with abusive police behavior, whether rude words, demeaning demands, or physical force. As a result, when racial profiling is debated abuse almost always plays a prominent role. The following cases are widely cited and rather typical of the sort of case that tends to be quoted when profiling is discussed:

"Driving in the wrong car." Dr. Elmo Randolph, an African-American dentist, commutes from Bergen County to his office near Newark, New Jersey. Between 1991 and 2000, state troopers stopped him more than 50 times. Randolph claims that he does not drive at excessive speeds and that he has never been issued a ticket. Instead, troopers approach his gold BMW, request his license and registration, and ask if he has any drugs or weapons in his car.

"Traveling in the Wrong Neighborhood." Police stop African-Americans traveling through predominately white areas because the police believe that they do not “belong” there and may be engaged in criminal activity. This type of profiling was reported by Alvin Penn, the African-American deputy president of the Connecticut State Senate. In 1996, a Trumbull, CT, police

13 We take these examples from Ramirez et al. (2000), but all three are widely quoted. Cf. also Harris (1999a) for a long list of such cases.
officer stopped Penn as he drove his van through this predominately white suburban town. After reviewing Penn’s license and registration, the officer asked Penn if he knew which town he was in. (Bridgeport, where African-Americans and Latinos comprise 75 percent of the population, borders Trumbull, which is 98% white.) Penn asked why he needed to know which town he was in. The officer told him that he was not required to give Penn a reason for the stop and that, if he made an issue of it, the officer would cite him for speeding.

“Petty traffic violations.” Petty traffic violations are under-inflated tires, failure to signal before switching lanes, equipment failures, or speeding less than 10 miles above the limit. Consider the account of Robert Wilkins, a public defender in D.C., who went to a funeral in Ohio in 1992. For the return trip, he and some relatives rented a Cadillac. They were stopped for speeding in Maryland while driving 60 in a 55-mph zone. The group was forced to stand in the rain for an extended period while officers and drug-sniffing dogs searched their car. Nothing was found.

The police officers in the Wilkins and Penn cases were abusive, while Randolph’s case seems extreme as far as the number of stops is concerned. While it is hard to obtain data quantifying the frequency and severity of abuse, police abuse must be rectified independently. The urgency of this problem, wherever it exists, is great. Possible measures include continued training, intensified supervision (e.g., videotaping police-civilian encounters), and stiff punishment for abusers. Yet while many people’s attitudes toward profiling seem to depend on the perception of how much abuse occurs, police abuse and profiling as we define it are different problems that must be assessed independently and that have different remedies.

14 Changing assignments of officers would be useful because both officers and people who are profiled tend to be “repeat players,” as Kennedy (1999) puts it. That is, officers are frustrated from past experiences with individuals who resent being searched, and those individuals in turn are frustrated from past experiences with frustrated officers, etc.
3.2 The other subject that tends to be conflated with profiling is the “disproportionate” investigation of minorities. Two different ideas of proportionality are relevant: proportionality vis-a-vis the goals of the investigation, and proportionality as fairness. In the first case, a racial group would be investigated disproportionately if its members were screened more (or less) than is useful to pursue the goals of the investigation. In the second case, investigation would be disproportionate if fairness, say, in the distribution of burdens, were violated. Much indignation about profiling arises because it seems to affect minorities “disproportionately;” but it is not always clear which sense of proportionality

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Some may be inclined to argue that abuse and profiling are not independent. The following claims seem to us to be true, and they justify our thesis that police abuse and racial profiling are independent issues: (1) If police abuse simply ceased to occur, profiling would still be an effective means to crime reduction, but would also still be in need of justification. (2) If no racial profiling occurred, police abuse would still persist. Claims (1) and (2) are consistent with the following claims: (3) Racial profiling plays some causal role in the occurrence of abuse. (For example, both racial minorities and police are “repeat players;” they encounter each other frequently and thus their interactions are shaped by frustration acquired in past encounters.) (4) Police abuse helps stimulate some of the activities that racial profiling is intending to reduce. (The perception of the police as a hostile force may increase one’s willingness to commit certain crimes.) (5) Some police officers practice racial profiling predominantly as a form of harassment, and thus the practice of racial profiling brings about many situations in which police abuse becomes possible to begin with. We do not take a view on whether (3), (4), and (5) are true. Part of our position, then, is that there can be profiling without police abuse. One specific form of police abuse is misuse of police discretion. In light of the persistent racial problems in the U.S, police discretion should not be exercised to pursue minorities disproportionately for petty traffic offenses, which have few implications for other crimes. Such use of discretion seems to have higher costs than benefits and should be rejected. Plausibly, however, minorities are tracked down for such offenses just because racial profiling is frowned on by the public. Thus, individual police officers are looking for justifications other than racial or ethnic membership to search or investigate minorities in cases in which they are really interested in screening minorities because of some underlying crime pattern. If so, this rather controversial sort of exercise of police discretion would occur much less frequently if suitable measures of racial profiling could be used officially.
is meant. Banks (2001), for instance, introduces disproportionality into the definition of profiling, suggesting that “racial profiling constitutes the intentional consideration of race in a manner that disparately impacts certain racial minority groups, contributing to the disproportionate investigation, detention, and mistreatment of innocent members of those groups.” It is unclear which sense of “disproportionate” Banks has in mind.

What we refer to when discussing the disproportionate screening of minorities is the sense of proportionality relative to the goal of the investigation. We think that individuals have a legitimate complaint if racial profiling occurs in a manner disproportionate vis-a-vis the goal of the investigation. Yet it is often hard to say what counts as disproportionate in that sense. One reasonable goal for screening is to pursue the strategy that catches the most criminals per individual screened. Say eyewitness testimony suggests that there is a 60% chance that a crime was committed by an African-American man, and African-American males make up 25% of the population; one should then inspect only African-American males, and \textit{mutatis mutandis} for other scenarios. The reason is that an African-American male is \(2.4 = \frac{60\%}{25\%}\) times as likely to be guilty as

\[\text{\footnotesize 16 Proportionality as fairness appears in section 5, when we discuss non-consequentialist objections to profiling. While our discussion there will not be explicitly about proportionality, one way of looking at that section is precisely that it articulates concerns on behalf of such proportionality. One idea of proportionality motivated by fairness is that if members of a racial group G committed, say, 40\% of the relevant crimes, that 40\% of the searches should be targeted towards members of G. The discussion beginning in the next paragraph should show why this suggestion does not capture an idea of proportionality vis-a-vis the goals of the investigation. The same is true for the proposal that, if 40\% of the inhabitants of a certain area belong to G, then 40\% of the searches would have to be of them; the proposal that each perpetrator should have an equal likelihood of being apprehended; and the proposal that, for each racial group, each innocent person must have an equal likelihood of being left alone.}\]
a person selected at random. Assume that we know that 10% of a group of individuals engage in an illegal activity, but only 5% of the population at large. Targeting all inspections to the high-risk group, as opposed to the general population, doubles the number of illegals caught per inspection made.

However, even if we were sticking to an efficiency criterion for curbing crime, this “target-the-most-likely” strategy would fail. We also have to worry about deterrence. If the police only went after the most likely perpetrators, others would get a “free crime:” thus police would be creating incentives for members of initially low-risk groups to commit crimes. For instance, in anti-terrorism measures, we cannot exclusively go by the group since otherwise new classes of “shoe-bombers” would emerge, and terrorist groups would redouble efforts to recruit people from untargeted groups. Focusing energies on the basis of demographic profiles also discards useful information. For example, in routine uses of profiling for intercepting drug traffic or seizing illegal weapons, indicators beyond race and gender are telling. A Caucasian American talking to a Colombian drug dealer on the street at midnight is more likely to be involved in drug trade than a random Colombian immigrant engaged in the same activity. The number of successful arrests would be far lower if ethnicity alone were used in targeting.

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17 It is not the likelihood that the criminal is from a particular group that determines the expected payoff per person searched. It is that likelihood divided by the proportion of that group in the population.

18 The dangers of over-reliance on race are illustrated by the recent experience with the Washington-area sniper in fall 2002, where on the basis of past experience with serial killers, the authorities judged that the perpetrator was a white man working alone. One consequence was that the two African-American perpetrators, working together, are believed to have passed through road blocks despite incriminating evidence in their van.
The efficient screening procedure – that is, the optimal mix across groups and thus the one that involves proportionate screening in the sense intended here -- will take into account deterrence, the likelihood that members of different groups have engaged in criminal activities, and the import of non-demographic indicators of criminal activity. (Some additional complications arise because people can be grouped in different ways; but we will ignore such complications.) Screening of some individuals from all groups, albeit with different probabilities, also indicates that we are not subjecting specific groups to actions that we would not impose on others; it is the frequency of the actions, not the actions themselves, that differs across groups.

The considerations that determine the appropriate mix and thus fix what “disproportionate” means are complex. Given that security is a concern, that search resources are limited, and that the disruption caused is a cost, search probabilities must attend to the relative risk ratio for different groups. The relative risk ratio is the likelihood that a random member of one group committed a (the) crime as opposed to a random person in another group. But the risk ratio should be only one of a number of considerations.

One implication of this point is that the benchmark of appropriate proportionate search will be hard to establish, and controversial in itself. Thus complaints that members of a certain group are investigated “disproportionately” will tend to be difficult to assess. But to the extent that they can be made credible, we endorse them, and submit that, alongside police abuse, disproportionate screening of minorities must be condemned even if one endorses (as we do) the use of race in police investigations. We are aware that critics often do not think of disproportionality vis-à-vis the goals of the investigation
when complaining that minorities are affected disproportionately by such measures. Yet section 5 offers reasons why there is no legitimate complaint drawing on the disproportionate distribution of burdens.

We also assume that, if profiling is practiced to begin with, it must be applied across the board, other things being equal. It is illegitimate for a jurisdiction to apply racial profiling only in cases in which the targets are minorities, but not when the priority targets would be mostly whites. For instance, one practice that some jurisdictions find useful for crime reduction is to stop African-American drivers in neighborhoods where few or no African-Americans live. But that jurisdiction may also have good reason to stop whites in African-American areas, for instance, because they are likely to be looking for drugs. Or that same jurisdiction may also have good reason to keep an eye on young people, of whatever race, driving around in a retirement community. What this all amounts to depends on the respective jurisdiction, but if profiling of high-risk groups is applied, it should be applied regardless of which group would be the primary target in a particular case. Police should be seen to apply profiling even-handedly.

3.3 We conclude with two remarks. First, it is sometimes pointed out that many African-Americans do time for crimes that should not be crimes to begin with, that is, allegedly victimless drug-related offenses. Therefore, to screen African-Americans differentially compounds the error. However, the question of whether certain drugs should be legalized or their possession should not be penalized, is a different matter. We are interested in the legitimacy of profiling given that certain minorities are more likely to commit certain crimes that society takes seriously, whatever those crimes are. If drugs are
legalized or their possession ignored, and membership in minorities is not correlated with other criminal activity, the question addressed in this paper no longer arises.

Second, it is sometimes argued that there is a moral difference between using race as one of many criteria for profiling and using race as the only criterion; at any rate, the use of race as one of several criteria for profiling strikes many people as more innocuous than using race as the only criterion. One might be tempted to dismiss this as plainly false: for in both cases race is being used to narrow down a group, except that in the first case the group that is being narrowed down is “all individuals (say, within a certain jurisdiction),” whereas in the second case it is “all individuals who also meet other criteria.” However, this temptation must be resisted in light of what Kagan (1988) calls the additive fallacy and of what Kamm (1996) calls the principle of contextual interaction. Kagan and Kamm warn us that moral factors may not play the same role and carry the same weight in different contexts, and may contribute to moral assessments in ways that turn on other factors present in the respective situation. Thus Kagan and Kamm caution us to resist the inference from the claim that the use of some factor (here: race) is problematic in a context in which it appears by itself, to the claim that, therefore, the use of this factor is still problematic even if other factors are present. Nevertheless, it seems

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19 For a defense of the position that drugs should be legalized, see Husak (1992). It has been suggested to us that the question of which crimes “society takes seriously” may all by itself be a racist matter: it is because of irrational fear of black violence and general black-led moral decay that police spend so high a proportion of their effort on fighting "black" crimes, and as a result even innocent blacks are more likely to be the subject of police attention. We find it hard to assess this claim, but if it is true it would certain complicate the situation.

20 There are obvious parallels here to the affirmative action debate relating to higher education. There, race is but one of many factors, a critical ethical matter for many observers.
fair to say that the use of race still stands in need of justification if race is used in conjunction with other factors; and this is so although it does not simply follow from the fact that the use of race in isolation poses a problem. Using race as the *only* criterion would be absurd. For it would mean investigating people who on different grounds are likely to be innocent while not investigating others whose characteristics make them much more likely to be guilty. Factors other than race will almost always be helpful.

4. The Utilitarian Argument

4.1 For the remainder of this study, we will be talking about racial profiling in the broad sense defined in 2.1, and with the understanding that (a) police abuse is a different problem that needs addressing anyway, and that (b) screening of minorities out of proportion to what is useful to the goals of the investigation is illegitimate.

Racial profiling is commonly justified on utilitarian grounds. Certain crimes, so the argument goes, are committed disproportionately by certain racial groups. Thus special efforts at crime reduction directed at members of minorities are justified, if not required.

Kennedy (1999) is a useful starting point for exploring the utilitarian stance in this debate. Kennedy embraces that stance, but disputes that it justifies profiling.\(^{21}\) He argues that a critical category of costs has been omitted: the frustration of minorities and the increasing loss of trust in the police. Once these costs are incorporated, a utilitarian argument *against* profiling emerges, says Kennedy. Yet Kennedy’s argument fails, since he miscomputes an important feature of the calculation of social welfare. We agree that

\(^{21}\) Kennedy (1999), in turn, is based on Kennedy (1997), in particular chapter 4.
from a utilitarian viewpoint one must also consider costs like the frustration and hostility that profiling generates in minority communities. Yet profiling seems to have such effects only against the background of a society that minorities already perceive as racist. While profiling causes inconvenience, sometimes considerable, the primary cause of frustration among minorities seems to be underlying racism (including police abuse) or underlying socio-economic disadvantages, rather than profiling as such. If other conditions were maintained but profiling were stopped (following, say, a sweeping court ruling), the level of hostility in minority communities would not be significantly lowered. If this claim is correct (and the next paragraph presents an argument for it), then what must be considered in the cost-benefit assessment is the incremental increase in frustration and hostility caused by acts of profiling, not the overall level of frustration. Then, arguably, the benefits of profiling as measures of crime-reduction outweigh its costs.

Now we need to argue that racial profiling as such is not the primary cause of frustration among minorities. This argument does not aim to show that the frustration and pain minorities feel on account of profiling is unreal or negligible. The point is that there would be little (or much less) frustration and pain if it were not for the presence of other causes. To see this, consider parallel cases. Men between 15 and 40 commit a disproportionate number of violent crimes. Thus screening of such men (at the expense of similar controls of women above the age of 60) is justifiable in certain contexts. Hardly anybody (including those men) finds such measures offensive, because no particular hurt is connected to membership in that group. Similarly, the white community did not object
to the disproportionate (albeit misplaced) attention given to whites in the search for the
Washington-area sniper in 2002. As another example, Ben Gurion Airport employs strict
screening mechanisms to visitors exiting Israel. Security personnel decide in interviews
whom to search. One criterion that tends to trigger a search is if the visitor spent time in
Arab areas. Again it seems that this measure is not offensive, given the security problems
emerging from such areas. (This comparison is relevant only as long as we talk about
tourists: if we are talking about Arabs it becomes question-begging.)

Consider an entirely different case, in which seasons are treated differently: More
crimes are committed during the summer. Thus it is reasonable to have more police
patrols during July and August than during colder months so that people who are
disproportionately out and about in the summer are targeted. Examples of this sort can
be multiplied. It seems fair to conclude that profiling as such does not cause harm; it only
does so if the property according to which profiling is done (that is, the reason why a
person is targeted) is independently associated with the kind of harm brought to the fore
by profiling, or harm that unfortunately has sometimes accompanied profiling, namely,
police abuse.

The argument that it is not profiling itself that is offensive requires more probing,
since much turns on it. Profiling appears to stir two types of resentment. First, individuals
may feel resentment because the property in terms of which they are profiled partly
constitutes their identity. Resentment in such cases is motivated by emotions ranging
from shame to indignation as a reaction to the fact that part of what one is first and

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22 We use the term “primary cause” a fair number of times in a rather loose sense over
the next pages. But the term should be clear enough, and nothing would be gained by
being more cautious in our causation vocabulary.
foremost has come under suspicion. Second, they may feel resentment because they are
treated in terms of a group-membership at the exclusion of their (other) individual
properties and thus feels treated not as they deserve. For example, a black school
principal who has never had a brush with the law may be pulled over, whereas ne’er do
wells, with many past violations and run ins are allowed to drive by. In some instances,
people will feel resentment for both reasons. The second form of resentment does not
depend on why one is targeted. While this form of resentment does not conform to the
thesis we submitted in the preceding paragraph -- that profiling as such does not cause
harm, but only does so if the reason why one is profiled is independently associated with
harm --, it can be eased straightforwardly. Once people understand why it makes sense
under the circumstances to treat them in terms of one of their properties, they are likely to
acquiesce, though perhaps with a residue of resentment. At any rate, it would be
reasonable to expect such acquiescence. It is not a problem that this form of resentment
does not conform to our thesis. For the first form of resentment, however, it seems true
that the degree to which one feels resentment depends on the regard in which that
property is held, and so does one’s willingness or ability to acquiesce. This is all that
matters for our argument. This is also reflected in our examples. Being profiled in terms
of one’s age group does not hurt, at least in cultures admiring youth.\footnote{Consider the case of higher car insurance rights for young drivers. They could
complain that it is not their fault that they are presently at a certain age range and that this
fact should not entail that they end up with high insurance rates. In response, one could
point to the overall higher accident risk that young people carry, and in addition, that
everybody goes through this age range and will later be in a position to benefit from
lower rates. It seems that once this is explained, acquiescence can reasonably be
expected. – Gender here presents an interesting case. In some jurisdictions, such as}

racial

profiling does because it brings to the fore underlying hurt in a race-sensitive society.\footnote{However,}
4.2 However, arguing that racial profiling itself is not the “primary cause” of the pain and frustration triggered by racial profiling is but the first step in objecting to Kennedy’s argument. What must be assessed as well is whether the incremental damage done to, say, the African-American community from profiling is itself not too large for it to outweigh the advantages gained by crime reduction. This calculation of incremental damage should be conducted taking as given current practices of society (such as racism and racial disparities). This requirement makes our argument more difficult. The argument in 4.1 seems to provide some basis to think that even using this criterion the incremental costs of profiling are not too great, but it would not be unreasonable for some doubts to persist. Acts of profiling inflicted upon, say, individual African-Americans, and the expectation of future occurrences of such measures that African-Americans share also contribute to the frustration caused (and thus to the costs incurred) by racial profiling.

It would be hard to assess conclusively the harm caused by profiling all by itself over and above the harm that can be traced to underlying racism and disadvantage. But at least there are measures we could take to alleviate the pain and frustration done by profiling over and above underlying causes. For instance, everybody who is screened but not arrested could receive an appropriate compensation for the inconvenience.\textsuperscript{55} This

Massachusetts, rates are not permitted by gender, although young males have much higher accident rates than young females. Its advocates sometimes portray this equal rates approach as a feminist measure.

\textsuperscript{24} Admittedly, racial profiling does reinforce racist perceptions on the side of all parties involved. This observation, however, is quite consistent with what we say above.

\textsuperscript{25} Presumably the transactions costs, e.g., recording payments and preventing fraud, would not make this procedure too expensive. Some additional questions arise here, though: should there be compensation unless somebody is arrested, or unless somebody
would be important for the gesture as well as for the money. In addition, everybody must be informed about the reasoning behind profiling and the compensation arrangement. In particular, everybody (and most urgently the members of the targeted groups) should understand that being investigated for membership in a group correlated with crime does not mean being a suspect. Rather, there are clear statistical indications that one is a member of a group that merits greater than usual investigation. Such compensation and information in conjunction with appropriate education and supervision of police officers conducting the measures should go a long way toward alleviating the pain and frustration caused by racial profiling itself over and above the pain caused by underlying circumstances.

26 It may not be possible, without much bureaucratic effort, to make this compensation fair in each case, but the compensation system should work in such a way that compensation is fair on average. (A similar case would be an airline that gives people $100 if a plane is delayed a certain while; on average, this might be fair even if some people are damaged to a larger extent. A compensation system could be implemented in the airport context, though this would require an increased ticket price.)

27 At the same time, however, we believe that our argument shows that racial profiling is justified even if no compensatory measures are taken. Given the sizeable losses already imposed by racism, the importance of incremental losses is not clear. Prospect Theory finds empirical evidence that although individuals are risk averse with respect to gains, they are risk taking on losses. That is, although the utility curve for gains is concave, that for losses is convex. If true, that would suggest the incremental costs imposed by profiling are actually less given the severe losses imposed by other measures. Cf. Kahneman and Tversky (1979).
4.3 Let us consider one objection to our claim that the primary cause of frustration among minorities is underlying racism or underlying socio-economic disadvantage, rather than profiling as such. One might object that the harms of racism are caused by the composition of many practices, none of which is “fundamental” or “underlying.” Some of these practices have to do with economic opportunity and inequality. Others have to do with the subtle kinds of disrespect at work and in public that some have called “second generation discrimination.” A third kind of racism is discrimination by public institutions: an important example would be police profiling. The African-American “finds that the most prominent reminder of his second-class citizenship are the police.”

The thrust of the objection is to argue that we are mistaken in thinking of racial profiling merely as an epiphenomenon, that is, a practice above and beyond those practices that are constitutive of racial discrimination; instead, racial profiling is partly and perhaps even largely constitutive of the racist reality of the U.S.

In response, our argument seems to succeed regardless of whether one thinks of profiling as an epiphenomenon or takes it to be a practice that (partly) constitutes racial discrimination. The crucial point remains that racial profiling all by itself does not cause the preponderance of the harm and frustration many people think it causes. The same considerations apply to this description of the role of profiling. The difference is merely whether one talks about “the other practices constitutive of racial discrimination,” or “the underlying practices of racial discrimination.” Yet this objection makes it worthwhile to

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28 Quote taken from Kennedy (1997), p 152. Kennedy quotes here an essay written by African-American police officer Don Jackson, who moved about in Long Beach, California, after dark and without the protection of his uniform. A camera team followed him and filmed the ensuing rather unpleasant encounters with the police. He later wrote an essay about his experiences as a victim of racially selective police practices.
further develop our point. It would be all too easy to think about the removal of racial discrimination in terms of stopping racial profiling. Deeper-reaching measures are required to resolve such injustice. Plausibly, the disproportionate tendency of minorities to engage in criminal activity is itself, to some extent, a symptom of racial discrimination. But the appropriate response is to remove the causes of those symptoms, rather than to stop taking such symptoms seriously as the statistical indictors they happen to be.

In sum, we have seen that, on utilitarian grounds, racial profiling may well be justified. To obtain a full utilitarian argument in support of profiling we would have to look carefully at racial disparities in crime statistics and ponder the impact of racial profiling on crime reduction. Since the utilitarian argument turns on empirical questions, it might support racial profiling in some contexts but not in others. Even where profiling reduces crime, there may be a more palatable alternative to it that brings about (nearly) the same benefits without incurring the same costs. The crucial point remains that the benefits must outweigh the costs, and to a larger extent than available alternatives. Yet this section submits a way of thinking about the costs that renders it plausible that at least in some contexts where it would be controversial, profiling is justified on the basis of a utilitarian calculation. For instance, our reasoning might support focused searches for contraband in certain neighborhoods with the aid of profiling. It seems less plausible that drug searches on the New Jersey Turnpike will be supported by this reasoning. For the prospects of diminishing drug traffic by intercepting cars on major highways seem rather slim. The costs of Turnpike stops-and-searches may outweigh the benefits even on the
understanding of costs that we have submitted here. But the utilitarian verdict on what should be done must turn on empirical facts.

5. Non-Consequentialist Arguments

5.1 There are well-known worries about utilitarianism, in particular that it does not, in Rawls’ words, respect the separateness of persons, or, in Williams’s words, respect an individual’s integrity. Utilitarianism may recommend impinging upon the well-being of individuals or groups for the sake of the welfare of society. So it may seem unsurprising that utilitarianism does not effectively articulate objections to profiling. We now investigate whether objections to profiling can be based on rights- and fairness-based grounds. Such approaches emphasize the avoidance of wrong-doing, rather than the performance of good deeds. First, we ask whether profiling constitutes pejorative discrimination, and second, we ask whether profiling imposes unfair burdens on certain minorities. We emphasize two points from the start. First, we are not concerned with exploring foundational questions about, say, rights, and thus will inevitably beg many questions in that regard. Second, we do not claim that we exhaust the reasons why non-consequentialists may object to profiling. We do, however, think that the two arguments we explore in this section are the most important non-consequentialist objections to

29 The New York Times reports evidence to the contrary. According to an article by D. Kocieniewski and R. Hanley published on December 3, 2000 (Section 1, Page 53, Column 2), in the mid-1980s, the federal Drug Enforcement Administration started to enlist local police forces to catch smugglers who imported drugs from Latin America, often to Florida, and then moved them to major American cities by car. By 1989, “the New Jersey State Police had become such a successful part of ‘Operation Pipeline’ that D.E.A. officials hailed the troopers as exemplary models for most other states.”

profiling, and that our study (both the argumentative sections 4, 5, and 6, and the conceptual sections 2 and 3) provides resources to address other possible non-consequentialist objections.

If racial profiling violates any rights, it is plausible to think that such violations occur because profiling is discriminatory in the pejorative sense. To fix ideas, we take pejorative discrimination to be differential treatment among groups – e.g., based on gender, race or sexual orientation -- with either the intention or the effect of maintaining or establishing an oppressive relationship among such groups, or any other relationship that keeps some such groups at a socially disadvantaged status (or relegates them to such a status to begin with). So in that sense, “separate but equal” facilities were discriminatory; so was college admissions employing geographical criteria to keep the number of Jews low, and so was the exclusion of women from many occupations for which gender is irrelevant. Yet affirmative action in higher education is not pejorative discrimination. This definition tries to capture several aspects of pejorative discrimination: (a) whether or not a practice counts as discriminatory may turn on the intent of the agent as well as on its effects; (b) frequently, discrimination maintains or creates oppression, but sometimes it puts groups at a disadvantage without creating what one should call oppression (as, say, when a white person loses a position because of affirmative action); (c) in some cases in which individuals are prevented from access to

31 Keep in mind that we are interested in moral rights, rather than legal rights, and that we are asking whether the use of race as such violates any rights.
privileges this is not done to disadvantage gender, racial, religious, national, ethnic, or other groups, and if not, the concerns are different from what this definition captures.32

So is profiling pejorative discrimination? One might say that, even if one distinguishes among police abuse, disproportionate use of race for police tactics, and the use of race as such, profiling still has negative effects on minority communities and is discriminatory even if the intent of the relevant policy makers was innocuous. For by using race in police tactics, one maintains a social reality that should be overcome. However, this claim is insufficient to show that profiling is pejorative discrimination. To show this, we argue that (a) profiling can be justified on legitimate grounds, and that (b) profiling as such does not perpetuate a socially disadvantageous status. Both arguments are very straightforward at this stage.

We begin with (a). The use of race for police investigations can be motivated on legitimate grounds, namely its contribution to crime fighting. However, individual police officers might be involved in profiling with the malicious purpose to harm groups collectively, or individuals specifically, although the relevant policy may not be discriminatory. Or, there might be legitimate reasons for policy makers to adopt profiling, and they might well announce those reasons, but their motivations to adopt the measure may be different from (and more pernicious than) what they say they were. These cases would represent pejorative discrimination. Let us proceed to (b). For this point we can

32 This definition of pejorative discrimination will do for our purposes. For more discussion of this subject, cf. Blum (2002), chapter 4; Hasnas (2002), and Richards (1985). Note that this definition compels us in some cases to say that, even though pejorative discrimination was operative when certain policies were set up, they need not be changed. That is the case if the intent was discriminatory, but the effects are not. This seems acceptable to us.
borrow from section 4: the extent to which an oppressive or otherwise disadvantageous relationship among (in this case) racial groups stems from profiling as such is rather small. What is discriminatory is abusive policing and the disproportionate use of race in police tactics. (Recall that by “disproportionate use of race in police tactics we mean “more than is valuable in reducing crime.”) Yet profiling is not discriminatory once we distinguish among the relevant issues (abuse, disproportionality, use of race). The use of race as such does not amount to pejorative discrimination.

5.2 If racial profiling were pejorative discrimination, a follow-up question would arise: Are there competing considerations that overturn the conclusion that profiling is wrong? The concept of discrimination is difficult and open to disagreements, and thus we must address somebody who disagrees with our assessment. Suppose, then, profiling is pejorative discrimination. Might it still be justified? It is tempting to argue as follows: Individuals have a right to security, on the one hand, and a right not to be exposed to pejorative discrimination, on the other. These rights may conflict. If they do, they must be balanced against each other, and this balancing can only be done on consequentialist grounds. If profiling helps noticeably to reduce crime, while not contributing much to the perpetuation of pejorative discrimination overall, profiling will be justified even if it is such discrimination. Our argument in section 4 supports such reasoning.

But this argument falsely assumes that no priority is to be given to either right. A core idea of many non-consequentialist positions is that innocent, non-threatening persons have a right not to be attacked, and everybody has a duty to refrain from
attacking such persons. Yet that is different from saying that such persons have a right to government prevention from attacks by others. If the government does not protect its citizens from attacks, it does not violate their rights not to be attacked, as it does not attack them. But if it pejoratively discriminates against them, it does attack them, or does something relevantly similar, and thus violates their rights. Thus refraining from pejorative discrimination, as an instance of refraining from attacking innocent persons, is a constraint on promoting security, rather than a factor to be balanced against it. So if profiling is pejorative discrimination, then the right not to be exposed to profiling will be stronger than the right to be protected from crimes. Thus one must not reduce crime at the expense of violating rights. So if profiling is discrimination in the pejorative sense (as we argued it is not), non-consequentialists possess a very strong reason to reject it.

5.3 Non-consequentialists, however, may worry about profiling even if they grant that it is not discriminatory in the pejorative sense. For there are other ways of harming people than discriminating against them. In particular, even if profiling is not discrimination, some people are still asked to contribute more than others to the provision of security, a public good that all desire. Such disparities in contribution require a justification. By way of providing such a justification, note first that it is not uncommon that public goods are provided in ways that do not burden everybody equally. For example, it is in the public

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33 This claim comes with certain qualifications that are tied to certain well-known debates among non-consequentialists: whether or not there is a moral difference between doing and letting happen, between intending and merely foreseeing, and how to integrate aggregation into deontological accounts. (Cf. Kamm (2000) for an overview of these issues.) Also, what counts as an attack must be assessed as well. However, nothing is gained for our argument by discussing such complexities.
interest for airports to have adequate capacity, but the construction disruption, noise, and ultimate decrease in property value from new runways is imposed only on those who live nearby; securing adequate tax revenues is brought about by taxing higher incomes more and auditing people in some modes of employment more than others; students and the elderly are charged lower fees for participating in certain activities, and those who drive on toll roads must pay but not those driving on smaller byways.\textsuperscript{34}

Burdens are also distributed unequally in the provision of security. If a draft is imposed, it is frequently imposed only on young men, although the whole population is protected; and for many nations, border regions bear more military burdens than interior areas. This is readily explained: Not everybody is in a position to contribute as much to the realization of a public good as others. (The expression “to be in a position” covers many different cases.) Protecting health bears parallels to security. In the U.S., to stop venereal diseases from spreading we used to trace the contacts of infected people. Today, we impose severely on tubercular patients, making them come to a clinic to complete their medicine regimen. Failing that we chase them. If worst comes to worst, they are quarantined. We impose public-good generating behavior on these afflicted individuals because that is virtually the only way to protect the population against tuberculosis.

Differential burdens for the realization of public goods may be efficient and fairly common, but their desirability alone cannot justify them, nor can efficiency. To mention

\textsuperscript{34} Economists would observe that such differential charging facilitates price discrimination, which is beneficial for all. The justification for tolls on turnpikes but not side streets may be transactions costs. Whatever the efficiency gains of such practices, they still impose uneven burdens.
an extreme example, if scientists can find a cure for cancer by killing somebody with a distinctive genetic makeup, it would be wrong to do so. Similarly, it seems wrong to impose different punishments for the same offenses, other things being equal, depending on the culprit’s neighborhood, in order to target neighborhoods where more deterrence would be desirable. Still, there are conditions under which it seems reasonable to impose differential burdens. To see this, consider a sketchy account of a society characterized by reasonable social harmony, or Functioning Reciprocity:

**Functioning Reciprocity:** Differential burdens are imposed if demanded by the nature of the public good; the imposition occurs through a suitable democratic process that gives proper weight to the interests of all involved; the social importance of the good is widely acknowledged; state interference with individual lives entailed by the imposition of differential burdens is within the limits of what citizens can reasonably be expected to bear – in particular the imposition of the good does not involve the violation of widely acknowledged rights of individuals; it is also widely acknowledged that, similarly, differential burdens are imposed for other public goods as well, and that this differential imposition of burdens for different goods works, by and large, to society’s advantage, although it may not work to every individual’s advantage.

In a society like this, the imposition of a draft could be justified under suitable conditions, as could the differential imposition of financial burdens in support of a health care system, and the imposition of racial profiling. At this stage, we encounter substantial questions about the foundations of rights, the scope and limit of state power, and so on, questions that go beyond what we can address here. But even without filling in such details, it seems fair to say that this idea of a society characterized by Functioning Reciprocity, properly expanded, provides resources to justify the imposition of differential burdens in a broad range of cases without allowing for extreme cases such as the two just mentioned above, or other aberrations such as police abuse. It seems that
under such circumstances individuals do not have reasonable complaints if they are
affected by the imposition of differential burdens in the provision of public goods
although they may never have explicitly agreed to it (or in fact may have explicitly
opposed the imposition of burdens that so affect them), and although they themselves
may not benefit from the system overall. For instance, an individual soldier drafted into
the army in such a society would not have a legitimate complaint against this measure
even if he could prove that *he* does not benefit from this system.

Now suppose we live in a society characterized by less harmony than envisaged
by Functioning Reciprocity. Suppose it is not widely acknowledged (perhaps because it is
not true) that this sort of differential imposition of burdens is maintained across public
goods and works, by and large, to society’s advantage. Suppose now we have a public
good that can only be supplied if burdens are imposed differentially, and that this good is
widely acknowledged across social groups to be of tremendous importance. Suppose also
that a group that would carry a substantial burden is publicly opposed to it. Given these
differences to Functioning Reciprocity, can we formulate a condition under which this
imposition would be justified? It seems we can. A sufficient condition for imposing
unequal burdens under these circumstances is that those who are burdened more than
others are net beneficiaries from the good. If the unequal imposition of a burden is
counterbalanced by the unequal benefit that the relevant group gains in this manner, the
unequal burden is not an undue burden. We think that a case can be made for justifying
the use of race in police tactics along such lines, with the good in question being security.

What needs to be shown to that end is that, indeed, the affected minorities are net
beneficiaries. We will so argue in section 6. Once that argument is in place, we revisit this objection about the unfair imposition of burdens.

5.4 We have investigated two non-consequentialist objections to profiling ("racial profiling is discrimination in the pejorative sense," and "profiling imposes unfair burdens") but there may remain other non-consequentialist objections to profiling. This leaves our argument subject to revision if other objections should emerge, but our discussion should at least provide some resources to address additional objections; in particular, we think that our discussion (including the discussion of conceptual issues in sections 2 and 3) offers resources to address claims that other specific rights are being violated by racial profiling. At any rate, those two objections strike us as the strongest objections to profiling along non-consequentialist lines.

We conclude this section with two remarks. First, the fact that African-Americans remain disadvantaged in the U.S. provides strong reasons to adopt policies to change this situation. Possible measures range from race-blind programs that de facto differentially help African-Americans (e.g., Head Start), to race-regarding affirmative action programs, to reparations for African-Americans in the aftermath of slavery. Regardless of how these measures are assessed, any of them is consistent with our argument that racial profiling does not constitute pejorative discrimination and does not impose an unfair burden. This is worth emphasizing, since there seems to be a perception that no form of racial profiling can be justified from any other than a racist point of view, or from a point of view that is callous towards the subtleties of the issues raised by racial profiling.
Our second remark concerns an objection to our argument. One might argue that when concerns about security and concerns about pejorative discrimination conflict, measures must be taken to resolve the conflict. For instance, in the airport screening scenario, we should search everybody.\footnote{Kennedy (1997), p 161 makes this proposal, among others. Yet this proposal also leads to problems of its own. If we adopt this proposal because now some people carry an undue burden of the costs of security by virtue of their race, then this point will still hold true once the new proposal is implemented. For it would mean searching people whose race is a rather good indicator of innocence. Apart from raising fairness concerns of its own, such measures might also lead to their own sort of resentment. Consider how the two proposals would withstand the publicity test. Suppose (a) we announced that special search procedures applied to members of certain racial groups because of the predictive value that their race has for certain crimes. And suppose (b) we announce that universally strict search procedures applied to everybody so that no single group would have to be isolated due to the predictive role their race has for certain crimes. At the very least, it is far from obvious that (b) would pass such a (Kantian) publicity test better than (a).} That measure would be expensive in either the number of security agents required or the amount of time passengers would have to spend going through security measures. But this sort of measure is simply what it takes jointly to work toward a just society. In response, note first that the airport scenario is special in several ways. To begin with, there are comparatively few people who must be searched at an airport, as opposed to, say, all individuals traveling on a certain highway: searching everybody on a certain highway would be impossible, practically speaking. Moreover, one can announce these measures in advance and thus prepare passengers for the inconvenience. Even targeted groups of passengers can observe that many non-targeted passengers are subject to the same disruptive action. Finally, high security prior to boarding a plane is easy to justify to passengers since 9/11 and the Shoe-bomber incident. (There were no hijackings in the U.S. in many years prior to 9/11, so the inspections did not seem to make sense, or would have to be motivated by rather general security
concerns.) None of these ameliorating factors holds with respect to most searches and investigations on highways or on neighborhood streets. “Searching everybody” is not an option outside confined scenarios, and cannot be the guiding maxim of routine police and security measures aimed at crime reduction. So for such scenarios, all the objector can ask is a mitigation, rather than a resolution, of the relevant conflict.

At any rate, this proposal strikes us as wrongheaded. Since this objector is unwilling to be guided by racial, ethnic, and national indicators in her efforts to reduce crime, her proposal must allocate significantly more resources, say X more, to achieve the same level of security. Such resources, it seems to us, are much better spent if allocated to eradicate, say, underlying racism rather than for measures designed to ignore its symptoms. If only a portion of X were spent this way (and it seems unlikely at this time that more than a portion of X would be so spent), the outcome would still be superior for African-Americans. That is so in particular since, as we have argued in section 4, the incremental harm inflicted by racial profiling as such is comparatively low to begin with.

6. The Self-Interest Argument

6.1 We now explore the argument that profiling is in the interest of the targeted racial community. We focus on the African-American community, but similar arguments apply to other cases. One may think that discussing the argument from self-interest at all is in bad taste. Yet historically, a major component of police racism took the form of under-enforcement, ignoring black-on-black crime.
The argument starts with two observations. First, profiling disproportionately benefits the African-American community, because most crimes committed by African-Americans are also committed against African-Americans. Second, a disproportionate share of such crimes is committed by young African-Americans, overwhelmingly male, against older African-Americans. These observations lead to a twofold argument in support of profiling. First, it is in the interest of the African-American community that efforts at crime reduction focus on this community. Second, crime fighting targeting African-Americans, and presumably young African-Americans more than old ones, can be viewed as the subject of a contract between generations. This contract imposes sacrifices on the innocent young primarily to benefit their elders. Thus it is a contract that yields lifetime benefits to every individual, at least statistically.\textsuperscript{36} A thought experiment may be helpful. Assume that the whole world were African-American, with the same crime statistics that currently characterize that community. Would profiling by age and gender be justified, to differentially stop young males? If so, that suggests that profiling may be in the interest of the African-American community.

Considering possible deterrence strengthens the argument. If members of a racial group know that they are targeted by police measures more than average, they will be disproportionately deterred from becoming criminals. This will decrease the need to

\textsuperscript{36} See crime reports for empirical confirmation of these claims: \url{http://www.ojp.usdoj.gov/bjs/homicide/race.htm}. It should be noticed that such a generational contract burdens men more than women, but we neglect this aspect in the current discussion. We assume that the amount to which African-American crime affects African-American victims is not so overwhelming that African-American crime becomes a problem purely internal to the African-American community (in which case we would have to reconsider the utilitarian argument developed in section 3). We also disregard the fact that in particular young men with a penchant for crime would not benefit from this arrangement. We do not think that this fact undermines our argument.
conduct profiling in the future. The African-American community can be thought of as incurring short term costs but benefiting in the long run.\footnote{That the majority community benefits alongside does not weaken this argument. It does suggest that in return for profiling, more might be extracted from the majority.}

6.2 African-American parents, looking solely to the welfare of their children, might also support crime deterrents, particularly if their children live in an environment where group-internal incentives to engage in criminal activity are high.\footnote{Reverse causality could apply: If society gives individuals strong signals that it thinks they are criminals, they might get inclined to become criminals.} We suspect that many parents would be of two minds, objecting to profiling in principle, but favoring it if it deters their own child from crime. (Deterrence of others would be an additional benefit.) Indeed, some might welcome deterrence measures differentially aimed at their own child.

Externalities in criminal behavior reinforce arguments for parents, or indeed their at-risk children, to welcome deterrent measures. A is more likely to engage in crime if his peer B chooses to do so. Consider a game where individuals have two options: go “straight” or be “criminal,” say join a gang that often violates the law. Members of the peer group – treated for simplicity as a single individual -- have similar options. Logic suggests that there could be two equilibria in pure strategies: If one’s peer is becoming criminal, one should follow suit. But if the peer is staying straight, it makes sense for any individual to be law abiding as well. The (straight, straight) equilibrium could well be superior, but we might also end up at (criminal, criminal), with little prospects for escape.

Effective external enforcement mechanisms, which could include profiling, could lower the payoffs for (criminal, criminal), and make that equilibrium less attractive and
less likely. Indeed, if they are sufficiently effective, (criminal, criminal) will no longer be an equilibrium: the deterrent effect of crime fighting becomes high enough to make it desirable for an individual to stay straight even if his peer does not.\footnote{Captured by game matrices, the situation looks as follows:}

We are positing that in a neighborhood where, say, teenage boys tend to join a gang, everybody – the potential criminals as well as their parents and the community -- might prefer that no gangs existed. Moreover, to get this outcome or at least make it more likely, effective external enforcement mechanisms, including profiling, might be required.

A self-interest argument for African-Americans could arise in a quite different fashion, revolving around the impact on whites confronting African-American crime. Assume, as posited, that profiling is effective in preventing crime, and that the benefits to whites exceed the losses to African-Americans. If society employed a social welfare function to choose its policies, prohibiting profiling would both shrink the pie and hurt whites. These losses would tilt against the redistributional tendencies normally posited

\begin{align*}
\text{Ineffective Crime Fighting} & \\
\begin{array}{cc}
\text{Individual} & \text{Other Player(s)} \\
\text{Straight} & \text{Straight} & 10,10 & 4,6 \\
\text{Criminal (Gang)} & 6,4 & 8,8
\end{array} \\
\text{Effective Crime Fighting} & \\
\begin{array}{cc}
\text{Individual} & \text{Other Player(s)} \\
\text{Straight} & \text{Straight} & 10,10 & 4,1 \\
\text{Criminal (Gang)} & 1,4 & 2,2
\end{array}
\end{align*}
for such welfare functions. If so, other policies would get tilted less favorably for African-Americans.

A parallel argument applies if either majority rule voting or pluralistic politics is employed to make decisions. With majority rule, the median voter along the ideological spectrum determines the outcome. In the U.S., that voter is white. Median voters are likely to be more disposed to policies that help African-Americans (e.g., spending on schools, or health for the poor) if they feel that African-Americans are supportive of the welfare of the polity. The world of pluralistic politics is messier; policies reflect the tug-and-haul among constituency groups as they seek to influence elected and appointed leaders. In the struggle and negotiation that ensues, whites play a major role. If they are not paying a big “tax” in the crime area, whites will be more sympathetic to outcomes favoring African-Americans.

6.3 Yet many African-Americans would have little enthusiasm for any strand of the self-interest argument. They reason that an unfair process cannot be to their advantage. Profiling entails measures executed by officials of an establishment that, historically, has been responsible for the African-American plight. Moreover, it is directed at crimes they are more likely to commit than others at least partly because of this background. Since police abuse and profiling are often perceived as one and the same problem, African-Americans understandably reject profiling. The motivations of the “profilers” are also

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41 However, in light of the sheer amount of black-on-black crime, it might not always be so clear what “the community” wants.
suspect; not many police officers are strongly moved by the interests of the African-American community.42

The situation is peculiar. Though an argument can be made that more effective crime fighting measures that impose special burdens on the African-American community are to their own advantage, it appears that African-American communities themselves oppose such measures. Moreover, given the connection between police abuse and racial profiling, they have good reasons to oppose. Given that African-American communities would likely reject the self-interest argument restricts its usefulness in support of racial profiling. To justify racial profiling because it helps African-Americans, despite their rejection, we would have to resort to paternalistic arguments, a course we do not wish to pursue. To make the argument from self-interest to support profiling, without raising worries about democratic legitimacy, measures must be taken to secure democratic endorsement of profiling by African-American communities. Such measures would include steps to reduce police abuse, but would also require a sustained dialogue to assess other concerns of the African-American community.43

Even if self-interest as a justification for racial profiling fails in its own right, an appeal to self-interest can still be used for at least two purposes. First, given the view that

42 One might say that the attitude of police officers involved in profiling is irrelevant for the assessment of the benefits the measures carry for African-American communities. By the same token, for instance, it might well be that some entrepreneurs have no other interest in building low-income housing in certain areas than sheer profit, but that by itself does not mean the neighborhood should not welcome it. Still, the fact to come to terms with in this context is that African-American communities do indeed resent racial profiling, whether or not they have good reason to.

43 Garrett (2001) reports on a number of cases where community groups got integrated into police work, which worked out to everybody’s advantage.
African-Americans are an oppressed minority, one could argue from there that they need not comply with the state and its police measures.\textsuperscript{44} This claim, even if entertained on other grounds, is defeated by the self-interest argument. That argument by itself justifies profiling only if paternalistic considerations are accepted, or policies and perceptions can be changed to win democratic endorsement. That argument in conjunction with concerns about how crimes committed by African-Americans affect other communities defeats arguments justifying non-compliance of the sort we just mentioned.

More importantly for our argument, an appeal to self-interest also completes our response to the objection that profiling unfairly imposes burdens considered in 5.3. We suggested that (under the circumstances outlined in 5.3) it would be wrong to say that minority communities bear an unfair burden in the provision of the public good of security if they also benefited equivalently from such profiling more than other communities do. It seems fair to say now that that is indeed so.\textsuperscript{45}

7. Conclusion

A few lingering questions remain. For instance: what do we say to individual African-Americans who are reluctant to be on the streets after dark because they either do not want to be exposed to any measures of racial profiling, or are afraid of police abuse? In

\textsuperscript{44} Cf. Walzer (1970) on the subject of compliance of oppressed majorities; cf. chapter 10 of Boxill (1992) for discussion of civil disobedience in the context of racial justice.

\textsuperscript{45} This discussion neglects the possibility that the “minority community” might benefit even if the “majority community” benefits even more than they do. In such a case a related argument would still succeed, though it would obviously not turn on proportionality considerations any more; but then, the “minority community” could reasonably ask for additional benefits from the “majority community.”
addition to pointing out again that we insist on the importance of ending police abuse and disproportionate screening of minorities in the sense discussed in section 3 (and that, indeed, we believe that profiling without abuse is possible), we can take the beginnings of an answer from the observation that other people, or indeed the same people looking from a different perspective, would have a complaint if we did not take measures to reduce crime. It is easy to point to people who are subject to racial profiling. By contrast, people protected by measures that fight crime usually remain statistical figures, though their interests are no less legitimate for that, and they are no less real. But to the extent that such people exist, and to the extent that they are protected from serious harm, racial profiling seems justified. Cases like Randolph’s (the dentist who was stopped many times) are unfortunate, but not unjustifiable, to the extent that they are cases of racial profiling per se (given suitable assumptions on the effectiveness of such measures overall). But recall that this study also suggested compensation for the inconvenience caused by acts of profiling.

More creative techniques for dealing with the issues raised by profiling merit serious attention. In airport security, for example, trials are being made with retina-scanning identity cards that would whisk through individuals who acquired them, presumably mostly frequent travelers. If Elmo Randolph had the option of posting an electronic card on his vehicle, which would record that he had been checked previously, that information – which would make him low-priority for stopping -- could be scanned remotely by the police. Discussing such measures in detail would lead us too far afield.

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46 If the crime prevention works through deterrence, or because criminals are removed from the streets, we rarely learn who the victim would have been. We do know when criminals are caught in the act.
To sum up our findings, then: We began by investigating the utilitarian argument against racial profiling, and found it wanting. Instead, we suggested a way of thinking about the costs of racial profiling that will give support to racial profiling in a broad range of cases, including presumably many that are quite controversial. Needless to say, this argument does not support racial profiling in every circumstance; the final verdict at the policy level will depend on the relevant facts, that is, how much crime is reduced given any level of imposition. We then investigated deontological complaints against racial profiling and found those wanting as well. We found that the use of race in police tactics does not constitute pejorative discrimination, and we also found that racial profiling does not impose an unfair burden on minorities. This argument turned on the claim that minorities also benefit disproportionately from racial profiling and thus on the argument from self-interest, which we investigated last. This argument faces a problem of legitimacy as long as the relevant communities themselves do not endorse it, assuming that it is used as a complete justification of racial profiling. We did find, however, that this argument can be used to reject doubts about a duty of compliance on the side of the African-American community, and that it can be used to complete our rebuttal of concerns about the undue imposition of burdens on minority communities. This argument may sound alienating. That might be because the use of race in police tactics is often connected – in perception or reality -- with police abuse or the disproportionate use of race in such tactics. When they are connected, that blocks a clear ethical assessment of racial profiling. A main message of this essay is that these subjects must be discussed separately, at both the normative and policy levels.
Literature


