MAKING SENSE OF THE ETHNIC PROFILING DEBATE

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INTRODUCTION

The debate over racial profiling, while appearing to have been settled at the close of the twentieth century, has been very much rekindled. Before the September 11, 2001 terrorist attacks, racial profiling was widely condemned in the United States. Public sentiment was decidedly against the practice, with up to 80% of Americans polled finding it unfair.[1] Remaining consistent with popular sentiment, American politicians supported this view and spoke out against the practice. President Bill Clinton described racial profiling as "morally indefensible," while Al Gore and George W. Bush both campaigned for the Presidency arguing that racial profiling should be abandoned.[2]

The events of September 11 changed everything. After September 11, the tide against the use of racial and ethnic profiling turned abruptly. According to polling data, nearly 60% of Americans, including racial and ethnic minorities who had most often been victims of the practice, believed that

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[1] According to a 1999 Gallup Poll, 81% of respondents disfavored racial profiling. *See* Frank Newport, *Racial Profiling is Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE (Dec. 9, 1999), *available at* http://www.gallup.com/poll/3421/racial-profiling-seen-widespread-particularly-amon g-young-black-men.aspx; *see also* David Rudovsky, Debate, *Racial Profiling and the War on Terror*, 155 U. PA. L. REV. PENNUMBRA 173, 174 (2007), *available at* http://www.pe nnumbra.com/debates/pdfs/racial_profiling.pdf. Others have listed the percentage much lower at 60% but still well over a majority of the public. *See* David Harris, *Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terror?*, 17 CRIM. JUST. 36, 36 (2002).

[2] Rudovsky, *supra* note 1, at 174.

profiling of Arabs and Muslims in the context of border and airport searches was appropriate.[3] The increased public tolerance for racial and ethnic profiling as a legitimate law enforcement and anti-terrorism strategy was remarkable.

The change in public sentiment coincided with a similar change in the official government stance on racial profiling. In November of 2000, less than a year before the 9/11 terrorist attacks, the United States Department of Justice issued a public statement decrying the use of racial profiling on the grounds that it violated important principles of democracy and equality:

> The guarantee to all persons of equal protection under the law is one of the most fundamental principles of our democratic society. Law enforcement officers should not endorse or act upon stereotypes, attitudes, or beliefs that a person's race, ethnicity, or national origin increases that person's general propensity to act unlawfully.[4]

Most notably, the Justice Department also called into question the necessity of profiling as a law enforcement tool, arguing that "[t]here is no tradeoff between effective law enforcement and protection of the civil rights of all Americans."[5] Perhaps these statements were more aspirational than they were descriptive or normative. In any event, the sentiment did not last. Less than a year following the Department of Justice statements, any aspiration of eliminating race as a factor in law enforcement investigations had vanished.

Days after 9/11, the Justice Department "launched the first large-scale detention of persons based on race and country

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[3] *See* Sam Howe Verhovek, *Americans Give in to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1 (noting that a CNN/USA Today/Gallup poll taken a few days following the September 11 attacks revealed that 58% supported targeting passengers of Middle Eastern descent); *see also* Henry Weinstein et al., *Racial Profiling Gains Support as Search Tactic*, L.A. TIMES, Sept. 24, 2001, at A22 (68% of polled respondents favored targeting passengers of Arab descent); Harris, *supra* note 1, at 36.

[4] DEBORAH RAMIREZ ET AL., U.S. DEP'T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED iii (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/184768.pdf.

[5] *Id.*

of origin since the internment of Japanese Americans in World War II,"[6] even after the U.S. Congress passed legislation officially apologizing for the internment policy and describing the policy as "racial prejudice, war hysteria, and a failure of political leadership."[7]

Although the detention of Arabs and Muslims following September 11 did not parallel the internment of the Japanese,[8] it was quite significant. Thousands of immigrants were secretly incarcerated, and over 700 Arab or Muslim foreign nationals were arrested for investigation by order of the Attorney General.[9] The Department of Justice instituted a "Special Registration" program resulting in the detention of several thousand Middle Easterners.[10] The Department ordered another 5000 Middle Eastern men to be questioned regarding their links to terrorist organizations.[11] The radical change between the pre- and post-September 11 approaches to profiling is notable.

How did the Department of Justice square its post-9/11 actions with its pre-9/11 directives? Without abandoning its statement that it was prohibited to treat certain races as having higher criminal propensities than others, the Department created a profiling exception for counter-terrorism efforts. By 2003, the Justice Department's position was that "efforts to defend and safeguard against threats to the national security or the integrity of the Nation's borders" were distinguishable from racial stereotyping in criminal investigations.[12] While some government officials rejected this distinction,[13] the Department of Justice's position that profiling

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[6] Rudovsky, *supra* note 1, at 175.

[7] H.R. 442, 100th Cong. (1988).

[8] President Roosevelt issued an executive order in 1942 calling for the incarceration of all Japanese descendants in internment camps. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

[9] Rudovsky, *supra* note 1, at 175.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] It should be noted that many in law enforcement publically decried this view. *See, e.g.,* Fox Butterfield, *Police are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1; Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism*, WASH. POST, Nov. 28, 2001, at A1.

in the context of terror was different from profiling in the war on crime—became the prevailing view. Hence the debate over racial and ethnic profiling was reignited in the United States and around the globe.

As with many heated and controversial issues, the opposing sides of this debate seem to converse past one another more than they appear to be engaging one another on related arguments. Nor is it easily predictable which constituents or communities support or oppose profiling in counter-terrorism efforts. Some members of minority groups who have previously been targeted for racial or ethnic profiling support it in counter-terrorism efforts.[14] Many members of the law enforcement community, who have been subjected to training and research regarding profiling practices, oppose its use in counter-terrorism.[15]

One reason for the vastly divergent and unpredictable responses to profiling is that the parties on both sides of the debate seem to be intermingling very different and sometimes unrelated arguments. In this paper, I seek to make sense of the debate rather than resolve it. I hope to bring the parties a bit closer together by exposing their true points of contention and clarifying areas where they may actually be closer to agreement than it appears. I examine four of the stickiest questions in the profiling debate that have gained little traction and thus remain the source of significant confusion or disagreement. What is racial profiling in counter-terrorism, and how does it differ from profiling in ordinary criminal cases? Is racial profiling an effective law enforcement tool? (And relatedly, what do we mean by effective?) Assuming it is a useful tool in counter-terrorism efforts, can it be properly implemented? Finally, is it a morally justifiable practice in a multicultural democracy given the grave security dangers we all face?

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[14] Rudovsky, *supra* note 1, at 175.
[15] McGee, *supra* note 13, at A1.

COMMON CONTENTIONS ON PROFILING

The first common point of contention in the racial profiling debate involves its definition. Defining racial profiling is a deceptively complex issue. Because profiling was first practiced in the traditional criminal law enforcement arena, there is great disagreement about what constitutes profiling in counter-terrorism. One distinction drawn by those who oppose profiling in domestic criminal law enforcement but not in counter-terrorism is that the former is profiling while the latter is not profiling at all. I consider this definitional issue in the first section below.

Beyond the definitional issue, the most critical question in the debate concerns the efficacy of racial profiling. Simply put, does racial profiling work? Is ethnic profiling effective? There is surprisingly little consensus on this straightforward empirical question despite the growing literature on profiling. The question regarding effectiveness highlights important differences regarding the presumed purpose of profiling. Depending on one's goals, it may be effective in some respects but not in others. Understanding what profiling is meant to accomplish—whether it is to deter terrorism generally, prevent particular known cases, capture and incapacitate attempted terrorists—is a critical precursor to determining its success.

Related to the efficacy question is a question regarding administrability. Some abolitionists may argue not only that profiling is ineffective against terror, but also that it has insurmountable problems of implementation. Put another way, it is ineffective in its current form and cannot be efficiently or pragmatically corrected. I consider the relatively little evidence to support this concern about the application of profiling policies.

Finally, because there are few clear answers regarding the effectiveness of profiling, many in the debate gravitate toward issues of law and morality in assessing the desirability of profiling. Whether ethnic profiling violates fundamental democratic principles or whether it is a critical tool in protecting democratic societies is another common sticking point in this controversy. I offer that this aspect of the profiling

debate mirrors the debate regarding torture and can benefit from the literature in that context.

Defining Profiling

In the law enforcement context, racial profiling has been defined as government "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."[16] One response to the question of profiling in the terrorism context is that it is not in fact profiling at all. This assertion is based in part on the understanding that there is a well-accepted caveat to the prohibition against using race and ethnicity as an investigative factor. If race or ethnicity is part of the description of the suspect, its use as an investigative factor is not profiling.[17] Some could argue that because organizations such as Al-Qaeda and the Taliban have been identified recruiting and training predominantly Muslim and Arab male terrorist attackers, the targeting of Arab Muslims does not actually qualify as ethnic profiling. They could claim that it fits squarely instead into the "suspect description" exception.

This contention has arguable merit on both sides, depending on how profiling is defined. A routine airport search where there is no particularized suspicion or suspect is difficult to justify under the exception of ethnic description. The ethnic description exception makes great sense when the crime has already been committed and law enforcement is attempting to apprehend a suspect fitting the witness's description or some other photographic evidence. However, when officers are predicting or attempting to prevent the commission of a crime, reliance on race or ethnicity as a factor in narrowing their investigation is classic profiling. In other words, if predicting that someone of a certain description is likely to be committing a crime is classic profiling, then the airport search cases are

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[16]   RAMIREZ ET AL., *supra* note 4, at 3.

[17]   *Id.*

indeed profiling and cannot be exempted under the description exception.

But the inquiry does not end there. It is not to say that classic racial profiling is never useful or effective. That issue will be addressed in the following section but should be considered separately from the question of what constitutes profiling in the anti-terrorism context.

Debating the Effectiveness of Racial Profiling

When the effectiveness of racial profiling is examined, most people want to know whether it in fact helps in the apprehension of "bad guys" doing "bad things." In the 1980s and 1990s, those bad guys were drug dealers, and many of the studies regarding the effectiveness of profiling tend to evaluate its role in the War on Drugs. In the United States, the practice of racial profiling gained ascendancy in the law enforcement of drug laws. In the criminal law context of the drug war, federal agents created profiles of drug couriers carrying large quantities of drugs to smaller markets along the nation's highways. This effort, named Operation Pipeline, involved training state and local police officers in identifying drug couriers based in part on age and race. African and Latino drivers were stopped at alarming rates for minor traffic violations in an attempt to discern whether they were also violating drug laws. As police officers made more traffic stops, the public wondered how many detentions resulted in actual drug arrests. The answer to this question is complicated by the fact that officers rarely kept records of stops that did not result in arrests. So the arrests that were made, and the fact that the suspects were disproportionately black or brown, further supported the notion that profiling worked.[18] Opponents of profiling were at a disadvantage in arguing that the practice was ineffective or bad policing because they lacked the supporting data. Instead, as an interim measure, they called for more stringent data collection by officers of all stops and the results of those stops.

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[18] *Id.* at 11.

Much of the empirical information we have regarding the effectiveness of these profile-initiated searches emerges from the federal and state data collection efforts by police officers. Data from various states, including Maryland, New Jersey, California, and New York, revealed similar results about profiling.[19]   By way of example, a Maryland study, analyzed and conducted by Temple University professor John Lamberth, examined the number of African–Americans stopped on the highway for speeding.[20] Lamberth found that although 17.5% of speeders were black, nearly 72% of drivers stopped were black.[21] Blacks were evidently stopped at disproportionately high rates. While this may be lamentable for due process reasons, it doesn't reveal much about the effectiveness of the stops. The question of effectiveness is somewhat more complicated, and it depends in part on what the searches reveal.

A similar New Jersey study on productivity rates, found that the searches of whites differed only slightly from searches of white drivers. Searches of white drivers were 10.5% more likely to yield evidence of other criminal activity, while those of black drivers were 13.5% likely to yield such evidence.[22] This gives us more information regarding the effectiveness of these searches but not much more. To the extent that the searches produce useful evidence, they can be deemed effective regardless of the race of the motorist who is stopped.

From a "productivity" standpoint, one can argue that the black motorists were legitimately detained. Let's put aside for a moment whether productivity is the proper standard to evaluate effectiveness and consider the productivity argument on its own terms. Imagine that a police officer stops 100 out of 200 motorists for speeding. Imagine too that 24 of the 100 who are stopped are searched and found carrying drugs. Those 24 stops are legitimate and effective in curbing the drug trade

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[19] *See* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 280-81 (1999).

[20] *Id.*

[21] *Id.*

[22] PETER VERNIERO & PAUL H. ZOUBEK, N.J. ATT'Y GEN. OFFICE, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 28 (1999), *available at* http://www.state.nj.us/lps/intm_419.pdf.

even if 13.5 of them are minorities and only 10.5 of them are white. Those 24 might harbor claims of unfairness (but focusing on this here confuses the issue and therefore will be addressed below). These opponents of profiling do not necessarily have claims of ineffective policing. In order to make a case that the profiling practice is ineffective, or at least less effective than other investigative tools, we have to know something about the 100 motorists who were *not* stopped. If the productivity rate from stopping another group of 100 would be higher than 24%, then using race as a basis or a partial basis for detention is not an effective method. To further complicate matters, if police resources could be utilized in a way that would capture an even higher percentage of drug offenders than do traffic stops, that would also be an important indicator of the effectiveness of profiling.

The fruit of the investigation is the principal way in which scholars and law enforcement agents tend to assess the effectiveness of ethnic profiling in the terrorism context. However, the goal in counter-terrorist enforcement is arguably the prevention of harm through incapacitation. Assume for a moment that the population is divided into two groups: prospective terrorists who are without inhibitions and "will commit an act of terror regardless of the extent of enforcement" and others who would never commit a terrorist act regardless of law enforcement measures.[23] From this standpoint, terrorists are not deterrable, and so a government strategy such as racial profiling ought not to be judged on its ability to deter. Rather, its effectiveness ought to be measured on prevention grounds.

There are, of course, several problems with the questionable assumption that terrorists are not deterrable— even when the assumption is purposely exaggerated to make a point.[24] The world cannot possibly be divided between those who cannot be dissuaded from committing terrorist acts and those who cannot be persuaded to commit terrorist acts. No one

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[23] Tomer Blumkin & Yoram Margalioth, *On Terror, Drugs and Racial Profiling*, 28 INT'L REV. L. & ECON. 194, 198 (2008).

[24] *Id.* at 199 (explaining that "[o]ur analysis that exemplifies the two polar cases" between non-deterrable crimes like terrorism and deterrable ones like drug trafficking should not be taken in face value).

is born a terrorist. Before a terrorist decides to join terrorist ranks, by definition, she must have belonged to the unlikely group of people who would not engage in terroristic behavior. There must be a range of commitment among not only those who have become entrenched in terrorist organizations, but also among those who are susceptible to joining them. The effectiveness of ethnic profiling can be judged on the basis of prevention as well as on the basis of deterrence.

Some studies relying on a game theoretic approach support this view.[25] For instance, in developing a model of radical political violence, de Figueiredo and Weingast argue that certain acts of perceived injustice by the majority groups against radicals may actually engender sympathy and incite people from moderate groups to join ranks with radical extremist sub-groups based on perceptions of unfair treatment at the hands of the target group.[26] The point here is not that acts like racial profiling are in fact unjust or unfair. They may be, but questions of injustice are too often entangled with questions regarding effectiveness. But they are, in fact, distinct questions.

The perception of injustice against their more extremist compatriots may create feelings of sympathy toward extremists and maximize the likelihood that the moderates would engage in terroristic violence. If this is true, then those who argue for or against profiling on effectiveness grounds have to differentiate between effectiveness in deterrence and effectiveness in incapacitation. It appears that law enforcement communities who oppose profiling worry that the practice could incite greater opposition and violence at one extreme.[27] At the other extreme, there is the milder concern that while profiling might not move individuals to violence, the anger against profiling practices might make it more difficult to recruit informants or witnesses to cooperate in capturing and

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[25] *See* Rui J.P. de Figueiredo, Jr. & Barry R. Weingast, *Vicious Cycles: Endogenous Political Extremism and Political Violence* 4-5 (Inst. of Governmental Studies, U.C. Berkeley, Working Paper No. 2001-9, 2001), *available at* http://escholarship.org/uc/item/5j47x3jv.

[26] *Id.*

[27] *See* Butterfield, *supra* note 13, at A1; McGee, *supra* note 13 at A1.

punishing accused terrorists.[28] This, of course, would impact the effectiveness of profiling from an incapacitation grounds as well.

Debating the Feasibility of Implementation

Sometimes when scholars and practitioners argue that profiling doesn't work, I believe that they mean something entirely different from the effectiveness question addressed above. What they mean instead is that racial profiling, even if it produced the results it sought by those who employ it, is nearly impossible to implement adequately. There are two strains to this assertion. First is the claim that there is no single or constant ethnic profile for terrorists. Second is the claim that law enforcement officers would be incapable of implementing an ethnic or racial profile reliably. I consider each of these contentions below.

Who fits the Profile?

An important question to consider is what the terrorist profile would look like. Because all nineteen of the September 11 hijackers were Middle Eastern Muslim men, there is a sense in the United States that the group to be targeted for profiling should be Middle Eastern Muslims. Indeed, many of the measures taken or recommended by the Department of Justice immediately after the attacks targeted young male Muslims. Yet, even those who support ethnic or religious profiling in the context of counter-terrorism agree that terrorist groups are aware of the factors that raise suspicion among law enforcement agents and are responsive to those indicators.[29] Accordingly, Al-Qaeda can begin to change the demographics of its operatives in response to the use of ethnic profiling as a law enforcement strategy.[30] Those who argue that it is not within the criminal's control to alter his identity, contrary to other

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[28]   *Id.*

[29]   *See* Blumkin & Margalioth, *supra* note 23, at 199 (acknowledging that the use of race in profiling may be a temporary strategy that may change as terrorist groups diversify).

[30]   *Id.*

profile indicators, are right and wrong. They continue to see the terrorist as an individual with unchangeable characteristics rather than as an organization capable of enlisting individuals from various ethnic backgrounds to commit these brutal acts.

Indeed, if one examines many of the attempted terrorist acts in the United States, for example, they have been conducted by a fairly diverse group of individuals. Richard Reid, the "shoe bomber" who attempted to board a plane with explosives in his shoes, had a British mother and Jamaican father.[31] John Walker Lindh, the American-born Taliban soldier raised in Marin County, California, was convicted based on his activities with Al Qaeda.[32] Aafia Siddiqui, a mother of three with a degree from MIT, was on the FBI's most wanted terrorist list until her capture in 2008.[33] In 2009, a black Nigerian man named Umar Farouk Abdulmutallab was arrested for attempting to blow up a Detroit-bound transatlantic airliner.[34] More recently, Colleen LaRose, a white, blond American woman nicknamed JihadJane, was arrested for her involvement in a terrorist assassination plan.[35] Consider also local domestic terrorists such as the Atlanta Centennial Olympic bomber, the Oklahoma City Bomber, and the Unabomber. All of these are white American males whose combined terroristic acts have resulted in hundreds of deaths.

The stereotype of the terrorist on American soil can no longer be simplified as Muslim Middle Eastern males. Therefore, even if we could conclude that ethnic profiling "worked," its success as a law enforcement strategy would be short-lived. Terrorist organizations would recruit members

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[31]   Alan Cowell, *The Shadowy Trail and Shift to Islam of a Bomb Suspect*, N.Y. TIMES, Dec. 29, 2001, at A1.

[32] Adam Liptak, *A Case of Buyer's Remorse That Could Linger for Years*, N.Y. TIMES, Apr. 23, 2007, at A12.

[33] CBN News, *U.S. Captures Top Female Terrorist Suspect*, Aug. 13, 2008, http://www.CBN.com/cbnnews/427466.aspx.

[34] Dan Eggen et al., *Plane Suspect Was Listed in Terror Database*, WASH. POST, Dec. 27, 2009, at A1.

[35] Carrie Johnson, *With 'JihadJane', A New Kind of Threat*, WASH. POST, Mar. 10, 2010, at A1.

from demographic groups that did not align with the stereotypical profile.

Implementation Difficulties

Questions regarding the feasibility of profiling are raised in another context as well. Even if we could agree about the demographics of a profile, officer error would make it difficult to implement reliably. There is very little evidence in the research literature to assess the accuracy of officer perception of race and ethnicity in this context. There are unfortunate anecdotes that understandably cause concern. For instance, in one case, British officers killed a Brazilian electrician believing him to be Middle Eastern. While human error is present in all searches, there is no direct evidence to support that it would be greater with profiling than with other investigative strategies or search practices. One starting point for further research on this matter is the already significant body of evidence of the difficulties of cross-racial identification.[36] Of course, much of this past research occurred in a different context than racial profiling. Interested scholars will have to assess its applicability in this new situation.

The (Im)Morality of Racial Profiling

In the absence of empirical answers to many of the most important questions in profiling, the debate often returns to first principles.[37] That is to say, whatever its effectiveness and feasibility, it may be that the practice of subjecting members of a community for special investigation based solely on race or ethnicity is so abhorrent that it cannot be justified in a civilized democracy. The response to this claim is generally something like this: In the hierarchy of immoral acts, isn't it preferable to harm (or some would say inconvenience) a few if it would save

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[36] *See* Robert K. Bothwell et al., *Cross-Racial Identification*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 19 (1989) (concluding from meta-analysis review that own-race facial recognition bias is significant); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984) (analyzing lab studies finding significant handicaps in cross-racial identification).

[37] It is worth noting that this is different from a debate concerning what specific legal doctrines like due process or equal protection might allow.

the lives of many? In other words, this debate about rights and wrongs quickly becomes a debate about moral consequentialism.

In this respect, the controversy over racial profiling in counter-terrorism is similar to the controversy over the use of torture in counter-terrorism. The prohibitionists argue that profiling violates fundamental civil or human rights while the advocates contend that those rights must bend in the face of public safety and the prevention of a catastrophic loss of lives. There are other similarities about the arguments used in these debates and the rhetoric they employ.

The famous "ticking time-bomb" hypothetical is the favored trope used to consider the moral justifiability of torture. In its latest post-9/11 version, the hypothetical supposes that on September 11, 2001, law enforcement officials made a planeside arrest at one of the planes and learned that other planes were heading for unknown skyscrapers. In that instance, would the law enforcement officers have been justified in torturing the arrested terrorist in order to stop the attack or evacuate the targeted buildings?[38] There is a wide range of responses to the ticking time bomb hypothetical in the case of torture.

Supporters of the (limited) use of torture embrace the hypothetical as a way to divest the abolitionists of the moral high ground they claim to possess. The abolitionist who fails to concede that torture is permissible in this limited instance raises some skepticism about the nature of her moral principles. What, after all, is moral about permitting thousands of innocent people to be killed? However, if the abolitionist concedes to torture in this unique circumstance, she finds herself skidding along on a slippery slope. As David Luban has noted, the abolitionist's response to the ticking time bomb scenario provides a "gotcha" moment much like "getting the vegetarian to eat just one little oyster because it has no nervous system."[39] Critics of the hypothetical contend that it

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[38] Alan Dershowitz, *Tortured Reasoning*, *in* TORTURE: A COLLECTION 257-77 (Sanford Levinson ed., 2004).

[39] David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1441 (2005).

unfairly posits a highly unrealistic torture scenario in which authorities are omniscient about the existence of a threat and about the reliability of the information known to their suspect.[40] The sine qua non of the ticking time bomb scenario is that "we are sure that the detainee we are proposing to torture has information that will save thousands of lives and will give it up only if subjected to excruciating pain."[41] The ticking time bomb hypothetical doesn't exist, argue its critics, and reliance on it in making important decisions is a tremendous mistake.[42]

What differs in the racial profiling case is that there is not yet a ticking time bomb scenario. While the ticking time bomb scenario is not commonly applied to racial profiling, it may be a useful tool in sharpening the issues raised on both sides. What would be the ticking time bomb equivalent of the racial profiling case?

Imagine that law enforcement agents obtain reliable information that an individual boarding a bus is a suicide bomber wearing a bomb that will detonate in minutes. Officials only have the time and resources to search a handful of passengers before the bomb will explode. Where should they begin? Should they conduct searches at random? Should they begin with passengers of a particular racial or ethnic group? Or focus on one gender?

The critiques raised by the ticking time bomb question in terrorism can also be applied to profiling. The hypothetical itself makes important assumptions that nearly never exist in real life. For one, it assumes a level of certainty by law enforcement that there is in fact a bomb and that a search of certain individuals will in fact produce it. It is almost never the case that officers know with absolute certainty that a terroristic act is about to take place. And if they do discover a plot in the making and have the description of the perpetrator or conspirator, then relying on that description is not racial profiling.

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[40] *Id.*

[41] Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1714 (2005).

[42] *Id.* at 1714-15.

Much like in the case of torture, the ticking time bomb hypothetical is too far-fetched to take seriously in the implementation of commonplace searches. Why permit this exaggerated scenario to guide policy in the everyday search scenario?

That said, torture is not comparable to a search. A misguided search does not have the same consequences as torture. Not surprisingly, most American courts would justify any reasonable search under a ticking time bomb scenario under the doctrine of exigent circumstances. The profiling debate is really only relevant in cases where there are no ticking time bombs or exigencies.

CONCLUSION

This paper is a theoretical contribution to the debate over racial and ethnic profiling in counter-terrorism. It seeks to carefully distinguish and categorize the arguments most commonly made on both sides with the purpose of providing clarity and adding linearity to existing arguments. I have shown that some of the stumbling blocks in the debate regarding questions of implementation and definition are not insurmountable. I have discussed briefly why the issue of effectiveness is extraordinarily complex as an empirical and a policy question. I also suggested that the utilitarian arguments used in the similar debate surrounding torture do not work in this context to justify profiling. While this analysis will not resolve the debate, it highlights material differences between the two sides of the debate and identifies critical research questions that may lead to resolution.