Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counter-terrorist Measure and Does It Violate the Right to be Free from Discrimination?

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INTRODUCTION

IN THE AFTERMATH of the London bombings in July 2005, Paul Sperry of the Hoover Institution, a respected public policy institute at Stanford University, defended the police profiling of young Muslim men in New York City subways as a matter of simple common sense. Writing in the pages of the New York Times, Sperry argued that any future terrorist offender is likely to be young, male and Muslim:

Young Muslim men bombed the London tube, and young Muslim men attacked New York with planes in 2001. From everything we know about the terrorists who may be taking aim at our transportation system, they are most likely to be young Muslim men.1

It makes no sense, Sperry contends, to search old ladies or children. Instead, the police should target the high-risk population. Profiling, Sperry writes, is 'based on statistics. Insurance companies profile policyholders based on probability of risk. That’s just smart business. Likewise, profiling passengers based on proven security risk is just smart law enforcement.'2 A similar column appeared in the Washington Post the next day, arguing that 'politically correct screenings won’t catch Jihadists':

It is a simple statistical fact. Yes, you have your shoe-bomber, a mixed-race Muslim convert, who would not fit the profile. But the overwhelming odds are that the guy bent on blowing up your train traces his origins to the Islamic belt stretching from Mauritania to Indonesia.3

2 Ibid.
Using random bag searches in the New York subways, the column concludes, is 'simply nuts'.

New York City Police Commissioner Raymond Kelly couldn’t disagree more:

Look at the 9/11 hijackers. They came here. They shaved. They went to topless bars. They wanted to blend in. They wanted to look like they were part of the American dream. These are not dumb people. Could a terrorist dress up as a Hasidic Jew and walk into the subway, and not be profiled? Yes. I think profiling is just nuts.4

Racial profiling is, in Kelly’s words, ‘ineffective’ because it assumes that terrorists are not going to adapt to changing circumstances and, as a result, puts the police one step behind the enemy. Racial profiling focuses on an ‘unstable’ trait—a trait that can easily be switched—which, as Malcolm Gladwell explains, is precisely ‘what the jihads seemed to have done in London, when they switched to East Africans because the scrutiny of young Arab and Pakistani men grew too intense’.5 Plus, Kelly adds, in New York City, profiling is simply impracticable:

If you look at the London bombings, you have three British citizens of Pakistani descent. You have Germaine Lindsay [the fourth London suicide bomber], who is Jamaican. You have the next crew [in London], on July 21st, who are East African. You have a Chechen woman in Moscow in early 2004 who blows herself up in the subway station. So whom do you profile? Look at New York City. Forty per cent of New Yorkers are born outside the country. Look at the diversity here. Who am I supposed to profile?6

So, is racial profiling post-9/11 ‘just smart law enforcement'? Or is it ‘just nuts'? Moreover, does profiling young Muslim men violate the principle of non-discrimination embedded in international human rights and domestic civil rights jurisprudence? These two questions, I argue, are inextricably linked, and the answer to the first resolves the second: there is no reliable empirical evidence that racial profiling is an effective counter-terrorism measure and no solid theoretical reason why it would be. The possibility of recruiting outside the profiled group and of substituting different modes of attack renders racial profiling in the counter-terrorism context suspect.

The fact is that defensive counter-terrorism measures are notoriously tricky. The spotty empirical evidence tends to show a strong potential for substitution effects. The installation of metal detectors in airports in 1973, for instance, produced a dramatic reduction in the number and rate of airplane hijackings across the globe7 but also resulted in a sharp and proportionally larger increase in bomb-

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5 Ibid.
6 Ibid.
ings, assassinations and hostage-taking incidents.\(^8\) Target hardening of US embassies and missions abroad produced a transitory reduction in attacks on those sites but an increase in assassinations.\(^9\) Retaliatory strikes produce a spike in short-term terrorist attacks that later level off to the earlier mean.\(^10\) In addition, anecdotal evidence suggests that suicide bombers in Israel tended to be young militant Muslim men at first but now include more secular Palestinians, women and teenage girls.\(^11\) A recent and thorough review of the empirical literature, using an approved Campbell Collaboration protocol,\(^12\) concludes that ‘some evaluated [defensive counter-terrorism] interventions either didn’t work or sometimes increased the likelihood of terrorism and terrorism-related harm’.\(^13\) In sum, counter-terrorism measures are potentially double-edged swords.

There is no empirical evidence whatsoever, nor a solid theoretical reason why racial profiling would be an effective measure—rather than a counter-productive step resulting in detrimental substitutions and increased terrorist attacks. As a result, racial profiling is neither ‘just’ smart law enforcement, nor ‘just’ nuts. It is an unknown quantity. And precisely for that reason, there is no justification for making the human rights and civil rights trade-offs associated with racial profiling.

An important point to emphasise is that the issue turns on an empirical and theoretical analysis of the effectiveness of racial profiling, not on a legal or doctrinal review of human rights or civil rights law. Naturally, this raises the larger issue of the relationship between, on the one hand, international human rights, civil rights or, more generally, formal legal discourse and, on the other hand, the empirical effectiveness of disciplinary practices—what is often referred to as the ‘effectiveness debate’, a debate that is at the very heart of this volume of essays on security and human rights. Many scholars—including many of the authors who have contributions in this book—eschew effectiveness arguments entirely, on the ground, primarily, that the evaluation of effectiveness undermines the validity and legitimacy of formal legal argument. ‘What if racial profiling were an effective means of


\(^9\) Enders and Sandler (1993) 842; see also Cauley and Im (1988) 30.

\(^10\) Enders and Sandler (1993) 835.


\(^13\) Ibid, 3.
combating terrorism?’ they may ask. Wouldn’t we then be forced to engage in the kind of cost–benefit analyses that may potentially result in outcomes that violate human rights norms or the ‘culture of justification?’ Why go down the path of effectiveness?

The answer, very simply, is that the question of effectiveness is independent of the choice of law or of method of legal analysis. It does not bear, in any way, on the style of legal reasoning that we adopt to analyse security issues—whether consequentialist, deontological, critical or deconstructive—even assuming that the disciplinary practice in question promoted the government’s law enforcement interests. The effectiveness issue is a threshold question: if the measures are not credibly effective, there is nothing further to discuss. Naturally, if the debate over racial profiling as a counter-terrorism measure takes place in the context of actual litigation, then legal arguments will be necessary; but again, the discussion of effectiveness does not control the form of legal argument. In this sense, the issue of effectiveness is a separate question that, outside the narrow confines of the courtroom, is a threshold matter for any further discussion.

1. Academic Matters

As a theoretical matter, the potential trade-offs associated with racial profiling do indeed raise a myriad of thorny issues. The first is whether the very use of race, colour, nationality or ethnic identity is a form of impermissible discrimination in a situation where there is solid evidence of disparate offending between racial or ethnic groups. A number of economists in the United States and Great Britain draw a distinction between what they term ‘statistical discrimination’ and racial bigotry: the first uses group traits to promote more efficient policing and extends only to the point where law enforcement has maximised the efficiency of their interventions—as evidenced, for instance, in the equalising of search success rates between members of different racial groups.14 At that point, these economists suggest, law enforcement has achieved the best allocation of resources in a non-discriminatory manner. It is only when law enforcement uses group traits beyond the point of efficiency that their use of race or ethnicity becomes invidious. Economist Vani Borooah has suggested, for instance, that ‘statistical discrimination, untainted by bigotry, is optimal from a policing perspective because it maximizes the number of arrests consequent upon a given number of persons stopped’.15 In this sense, the very definition of ‘racial profiling’ is hotly contested.16

A second definitional controversy involves the judicial distinction between, on
the one hand, the use of race or ethnic origin as part of a multi-pronged profile
and, on the other hand, the use of race exclusively as the sole factor in a profile. In
the United States, for instance, the Supreme Court drew precisely this legal dis-
tinction in its notorious 1996 decision in *Whren v United States*—as well as in
several earlier decisions involving US Border Patrol searches at the Mexican–
American border in the mid-1970s. The Court in *Whren* expressly condoned the
use of race as one factor among others, as long as there exist other independent
justifications for police intervention. (In that case, youth, demeanour and gender
were also important traits in the profile.) The result is that, in US jurisprudence
today, there is an operative distinction between using race exclusively and using
race as one among other factors: the first is unanimously condemned, the second
practically always permitted.

In international law as well there is ambiguity surrounding this distinction. The
International Covenant on Civil and Political Rights, for instance, provides that,
in times of public emergency, states may derogate from certain rights on condition
that the measures ‘do not involve discrimination solely on the ground of race,
colour, sex, language, religion or social origin’. Here too, the reference is to the
exclusive use of race, not to the use of race as one among other factors.

Assuming that the use of race automatically violates the principle of non-
discrimination, a third issue arises: is the non-discrimination principle absolute,
or can it be limited in the case of counter-terrorism? This has both philosophical
and legal doctrinal dimensions. At the philosophical level, the question is whether
violations of rights in the present can be excused in order to prevent future rights
violations—especially where those future rights violations are assumed to be more
harmful in the aggregate. A significant body of literature explores the question of
intergenerational rights transfers and would be applicable here: John Rawls’ dis-

Economy 597–605. In the US, the leading works in the area include Knowles, J, Persico, N and Todd, P,
Fairness, and Effectiveness of Policing’ (2002) 92 American Economic Review 1472–97; Manski, C,
‘Search Profiling with Partial Knowledge of Deterrence’, unpublished paper, 2005; Dominitz, J and
Knowles, J, ‘Crime Minimization and Racial Bias: What can We Learn from Police Search Data?’ PIER

18 See Harcourt, BE, ‘United States v Brignoni-Ponce and United States v Martinez-Fuerte: The Road
[Harcourt (2006b)].
19 See Banks, RR, ‘Race-based Suspect Selection and Colorblind Equal Protection Doctrine and
race may be considered as one of many factors, but may not be the only factor in an officer’s decision
to stop an individual.’ For a lengthy treatment of this, see Harcourt (2004) 1338–42.
20 ICCPR, Art 4 (emphasis added).
discussion of the rights of unborn generations\textsuperscript{22} chart out some avenues of analysis and offer guidance. Another body of literature addresses shorter-term trade-offs. The leading hypothetical here is whether torture may be permitted in the extreme case of a ticking time bomb\textsuperscript{23}—but there are many others, some less hypothetical than others. The use of the atomic bomb at Hiroshima comes to mind. Many remarkable philosophical texts address these puzzles of moral reasoning under a variety of different rubrics, ranging from Jean-Paul Sartre’s and Michael Walzer’s discussion of ‘dirty hands’ to Martha Nussbaum’s writings on ‘tragic predicaments’\textsuperscript{24}.

At the legal doctrinal level, there are human rights and domestic civil rights issues to contend with as well. In the international context, the main question is whether the right to be free from discrimination is derogable. In their thorough paper on counter-terrorism measures and human rights compliance, Alex Conte and Boaz Ganor set forth in detail the doctrinal structure for an analysis of this question\textsuperscript{25}, marshalling the principal human rights texts that address racial discrimination and profiling—including recent reports on racial profiling and counter-terrorism from the United Nations Committee on the Elimination of Racial Discrimination (CERD) and the Inter-American Commission on Human Rights\textsuperscript{26}. The CERD has repeatedly maintained that counter-terrorism measures may not discriminate on the grounds of race or national or ethnic origin. For their part, Conte and Ganor point to disagreement within the human rights community and conclude that the principle of non-discrimination is indeed a derogable right.

Finally, in the civil rights context, there are difficult questions. Under equal protection jurisprudence in the United States, for instance, the anti-discrimination principle is violated only if there is intentional discrimination with proven malice. The Supreme Court’s decisions in \textit{McCleskey v Kemp}\textsuperscript{27} and \textit{United States v...
Armstrong\textsuperscript{28}—which extend the Washington v Davis\textsuperscript{29} requirement of intent to the
criminal justice sphere—provide that a successful equal protection challenge must
rest on evidence of intentional discrimination, rather than on inference from
unexplained disparate treatment. If the police are engaging in statistical discrimi-
nation to promote police efficiency, it is not clear whether invidious intent would
be present.

Moreover, the intentional use of race may be permitted if there is a compelling
governmental interest. Fighting terrorism—actually reducing the incidence of ter-
rorist acts—would undoubtedly qualify as a compelling state interest.\textsuperscript{30} Stephen
Ellman at New York Law School argues that ‘in times of terrorist emergency’, strict
scrutiny would allow profiling that ‘is targeted carefully, and conducted with
restraint’.\textsuperscript{31} The key question for purposes of equal protection, however, is
whether the use of race would be \textit{narrowly tailored} to promote a compelling gov-
ernmental interest.\textsuperscript{32} The requirement of narrow tailoring precludes policing
techniques that are ineffective or that have unacceptable collateral consequences
on the profiled population. Although Ellman concedes that he does not know
whether racial profiling would help combat terrorism, he nevertheless suggests
that the constitutional balance favours the careful use of profiling. Other scholars,
such as Philip Heymann and Juliette Kayyem in their book \textit{Protecting Liberty in an
Age of Terror}, disagree.\textsuperscript{33} Naturally, the final determination would fall on the
courts.

2. No Need for a Trade-off

These are all admittedly fascinating questions that deserve our attention. But they
only arise \textit{if} racial profiling is an effective defensive counter-terrorism measure.
And on that score, there is no reliable evidence, nor a good theoretical reason to
believe that profiling is effective. As an empirical matter, we do not know whether
the profiling of young Muslim men in New York City, London, Paris or other
major cities would reduce the incidence of domestic acts of international terror-
ism or cause more and different attacks.

Profiling is a statistical method that draws, methodologically, on an actuarial
approach first developed in the insurance industry. But unlike early insurance
\textsuperscript{28} 517 US 456 (1996). In \textit{Armstrong}, the Court required evidence of discriminatory purpose in the
\textsuperscript{29} 426 US 229 (1976). In \textit{Davis}, the Court articulated the principle that the equal protection clause
bars only intentional discrimination: \textit{ibid}, 239–41.
\textsuperscript{30} Although some question this conclusion, I have no doubt that post-\textit{Grutter v Bollinger}, 539 US
306 (2003), which deemed promoting a diverse student body a compelling state interest (see \textit{ibid},
\textsuperscript{32} See, for example, \textit{Gratz v Bollinger}, 539 US 244, 268–75 (2003) (applying strict scrutiny to a
University of Michigan admissions policy favouring minority applicants).
\textsuperscript{33} See Heymann, PB and Kayyem, JN, \textit{Protecting Liberty in an Age of Terror} (Cambridge, MA, MIT
applications, which were relatively static, profiling in the policing context involves a dynamic form of prediction: the profiling itself alters the behaviours of both those persons who are profiled and those not profiled. As a result, the success of profiling depends on several factors. First, in terms of detecting and preventing terrorist acts, it depends on identifying a stable group trait that correlates with higher offending—or at least a group trait that is stable enough to serve as a predictive factor during the next period of profiling. And second, in terms of deterring and preventing terrorist acts, it depends on how responsive different groups are to the targeted policing and whether they engage in forms of substitution. Taking a long-term view, profiling will only succeed if young, male Muslims are more or equally responsive to the increased risk of detection associated with police profiling than the non-profiled group members and, as a result, are not able to recruit non-profiled persons nor substitute with more harmful terrorist acts.

The effectiveness of profiling thus turns on the relative elasticity of the different groups—the profiled group of young, male Muslims on the one hand, and the non-profiled groups of other persons who might be recruited to commit the terrorist acts in the face of profiling on the other hand. But on this central question, we have absolutely no reliable data. As a result, as an empirical matter, we do not know whether profiling works in the counter-terrorism context or on the contrary causes more terrorist attacks.

In this chapter, I evaluate the empirical case for racial profiling. Surprisingly, although international terrorism is by no means a new phenomenon, there is extremely little reliable empirical research on the effectiveness of defensive counter-terrorist measures, and there is no reliable empirical research whatsoever on the use of racial profiling in this context. The little evidence there is on counter-terrorism measures more generally suggests that such defensive policing techniques may backfire, largely due to a phenomenon called ‘substitution’. ‘Substitution’ encompasses two possible responses to profiling by terrorist organisations: (1) the recruitment of more individuals from non-profiled groups, which expands the overall pool of potential terrorists; and (2) the substitution of different types of terrorist attacks that are more immune to profiling and yet more devastating in terms of deaths and injuries. These potential responses raise a host of technical empirical questions that are at present entirely unresolved.

Before proceeding, it is important to identify precisely the type of measures in question. As most experts agree, there are two types of counter-terrorist initiatives. The first are called defensive or deterrence-based counter-terrorist policies. They aim to prevent or block the success of a terrorist attack and reduce the likelihood that an attack will cause injuries. This type of defensive policy includes

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34 This is changing in the insurance area, and the field is becoming increasingly dynamic insofar as actuarial prediction is becoming more and more individualised, to the point that the determination of individual insurance premiums increasingly affects individual behaviour. This was not true of early insurance practices.

the development and deployment of technology-based measures, such as metal or
explosives detectors at airports and the hardening of potential targets like
embassies and foreign missions. In contrast, proactive or pre-emptive policies aim
to dismantle terrorist organisations, for example, by means of infiltration, pre-
emptive strikes or invasion of supportive states.

Profiling can be used as part of both defensive and proactive counter-terrorist
measures. The profiling of young Muslim men in the New York City subways
exemplifies the former. But profiling can also be used in pre-emptive strategies, as
when, for example, the FBI engages in targeted interviews of Muslim and Arab
Americans in order to collect intelligence.36 In this chapter, I address only racial
profiling by the police in defensive counter-terrorism operations.

EVALUATING THE EMPIRICAL CASE FOR RACIAL PROFILING

1. Profiling and Immediate Detection

As a theoretical matter, there is no doubt that the probability of detecting a ter-
rorist attack increases in the immediate aftermath of the implementation of a crim-
inal profiling method. This is simply an inexorable product of the laws of
probability: if the police dedicate more resources to investigating and searching
members of a higher-offending group, they will inevitably increase the detection
of terrorist activities within the profiled group and in society as a whole in the
immediate aftermath.

This reflects an iron law of probabilities—and it is precisely what gives rise to
the claim among proponents of profiling that it is ‘based on statistics’37 and is ‘a
simple statistical fact’.38 These claims are correct in the narrow time period
following the implementation of a profiling method. The basic intuition is that
policing is like sampling in the social sciences: when law enforcement agencies
profile members of a higher-offending group, they are essentially sampling more
from that higher-offending group. As such, they will detect more offenders with
the same resources because, by necessity, those searches are more likely to detect
offending.

Thus, profiling on a group trait that correlates with higher offending will neces-
sarily increase the likelihood of detection in the very first iteration. This will have
significant benefits along at least two dimensions: first, in preventing the specific
terrorist act that is detected, and second, in incapacitating apprehended terrorists
from committing any future acts of terrorism.

As a practical matter—and still within the context of the immediate aftermath
of implementing a profiling measure—the likelihood of realising any tangible

36 Sheridan, MB, ‘Interviews of Muslims to Broaden: FBI Hopes to Avert a Terrorist Attack’,
37 Sperry (2005).
38 Krauthammer (2005).
benefits from racial profiling depends entirely on the frequency of the profiled event. The higher the frequency of the event, the more likely that profiling will immediately detect more of those events. A good illustration is mandatory screening at airports—an initiative that, to be sure, does not involve profiling but does involve increased sampling. Implemented in 1973, mandatory screening in the United States detected 4,783 firearms and 46,318 knives in 1975, and, according to the Federal Aviation Administration (FAA), prevented approximately 35 potential hijackers that year. To put that number in perspective, that same year there were 6 domestic hijackings in the United States.39

Low base-rate events, however, are far more difficult to predict40 and as a result are much harder to detect for several reasons. First, it is extremely hard to predict where, when or how the low base-rate offence will occur. Second, low frequency affords more time to adjust to any counter-terrorism measure. A terrorist attack in the New York City subway qualifies as a low base-rate event—fortunately, there have not been any such attacks—but as a result, there is a lot of time between events and opportunity for terrorist organisations to adjust to the profiling. In the case of low frequency events, the central question is whether the increased likelihood of detection associated with the immediate implementation of a profiling measure will result in the actual detection of planned terrorist activity or instead in the rapid substitution of persons who do not meet the profile or alternative acts that are not as easily profiled.

2. Long-term Effects on the Frequency and Extent of Terrorist Attacks

Immediate detection is extremely important, especially to potential victims and their families, friends and communities who would suffer the greatest harm. Those potential benefits cannot be minimised. But they need to be considered in light of the long-term effects on terrorist attacks and the likelihood of future deaths, injuries and destruction. The central question here is whether racial profiling is likely to prevent future terrorist acts.

A. An Economic Model of Profiling

A number of able economists have turned their attention to racial profiling and argue that the use of profiling may amount to more efficient policing. They contend that profiling based on a group trait associated with higher offending rates—what they call ‘statistical discrimination’—may in fact be the most effective way to allocate police resources. Drawing on Gary Becker’s ground-breaking work on tastes for discrimination,41 a group of US economists—notably John Knowles,
Nicola Persico and Petra Todd at the University of Pennsylvania, and Jeff Dominitz at Carnegie Mellon University—have developed economic models of racial profiling. Similar analyses are taking place in Great Britain. Although these economic models are being developed in the specific context of racial profiling on highways and city streets, the models apply equally to profiling as a defensive counter-terrorist measure.

The logic of the racial profiling models rests on the central assumption of the economic theory of crime, namely that any rational individual is less likely to engage in an activity if the cost of the activity increases. This is what is called, in more technical jargon, the ‘elasticity of offending to policing’ or simply ‘elasticity’. The elasticity of offending to policing is the degree to which changes in policing affect changes in offending. Assuming that potential offenders respond rationally to the probability of detection and punishment, then targeting law enforcement on members of a higher-offending population will not only increase the amount of crime detected but more importantly decrease the offending rate among those members of the targeted group because of the increased cost. In its purest form, the economic model of crime suggests that law enforcement should target higher-offending populations until the point where their offending rates have fallen to the same level as the general population. At that point, the government has maximised the effectiveness of its law enforcement resources.

I have set forth elsewhere in great detail the logic of these economic models both in the broad context of criminal profiling and in the specific context of racial profiling on the highways. For present purposes, I offer a more streamlined description of the analysis and modify the models to address the specific context of counter-terrorist profiling.

The central assumption, of course, is that there are two different groups with different offending rates. The profiled group consists of young Muslim men, which, for purposes of the agent on the street, translates into young men of apparent Arab descent, young men who look Middle Eastern, Southeast Asian, North African or African—or, more generally, young men of colour (excluding young men from East Asia). The non-profiled group consists of all women, older men, and young men who are white or East Asian.

As a factual matter, this first assumption is probably correct, at least in the United States. Of the total US population, there are extremely few persons of European, American, African-American or East Asian descent who have engaged or are seemingly prepared to engage in suicide bombing or similar mass terrorist acts against Americans. Richard Reid, known as the ‘shoe bomber’, who was travelling to the United States on a British passport, and Jose Padilla, a Hispanic-American who was arrested at Chicago’s O’Hare airport and accused of plotting a terrorist attack, are the two people who immediately come to mind—out of a

42 See eg, Borooah (2001); Borooah (2002); Chakravarty (2002).
population of about 200 million (excluding children, the elderly and young men of colour). In contrast, the number of young men of Arab descent who have engaged in terrorist activities on US soil is larger and includes the 19 men who participated in the 9/11 terrorist attacks, as well as those who engaged in the earlier car bombing of the World Trade Center on 26 February 1993.

In addition, the denominator is much smaller: according to the 2000 US Census, there are 1,189,731 persons living in the United States who have one or more Arab ancestors, and approximately 10 per cent of those (or about 120,000) are young men between the ages of 15 and 30. Naturally, the appearance of being of Arab descent encompasses many more young men of colour, so the denominator is probably higher. But even if we assume that it is one hundred or more times bigger, there is still an offending differential in the range of at least 1:100 for non-profiled versus profiled group members. It would be crucial to get a better handle on this first quantity of interest—but there is, in all likelihood, a significant offending differential.

In any event, assuming an offending differential, rational choice theory suggests that the use of statistical discrimination—here, racial profiling—improves the efficiency of policing. Figure 1 explains this by showing the relationship between the internal rate of searches conducted within each of the two groups—profiled and not profiled—and the offending rate of those different groups. At Time 1, counter-terrorism agents are not engaged in profiling of any sort: the police are searching both groups at the same internal search rate of 10 per cent. The graph reflects the basic assumption of non-spurious profiling, namely that young Muslim men are offending at a slightly higher rate than white men and all women—let’s suppose 1.5 versus 1 per 100 million—resulting in higher successful search rates for the searches of young Muslim men.

Given the higher marginal success rate for searches of young Muslim men, the police may begin to search that group more than their share of the available population, and, as the proportion of searches targeting young Muslim men increases, the offending rate of that group decreases. This is the fundamental assumption of rational choice, namely that as the cost of offending increases, the rate decreases. The police continue to search marginally more young Muslim men until Time 2, when their offending rate is equal to that of white men and women—1.3 per 100 million. Now the police are using the profile in their decision to search: the police are searching about 18 per cent of the available young Muslim men and about 5 per cent of the available white men and women, resulting in a hypothetical total distribution of searches of, say, 60 per cent young males of colour and 40 per cent whites. At that distribution of searches, the offending rates are similar—and, one can infer, so are the hit rates. At that distribution, an efficient police officer has no reason to change the distribution of searches: there is no incentive to search more young Muslim men than the 60/40 total distribution, which produces these different internal group

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search rates. At Time 2, even though the police are not allocating any more resources to the enterprise, the number of successful searches has increased, and the total societal level of offending has decreased from where it stood at Time 1.46

If the police are, in fact, searching more young Muslim men and getting to Time 3, where the offending rate of young Muslim men is lower than that of whites—1.3 versus 1.7 per 100 million—then the police must be bigoted: the only reason that a police officer would search more young Muslim men than at the Time 2 equilibrium—that is, would search, say, 80 per cent young Muslim men and 20 per cent whites, instead of the Time 2 distribution of 60/40—is if the officer had a taste for discrimination resulting in higher utility even though fewer young Muslim men are offending and thus fewer searches are successful.47

Figure 1. The Economic Model of Profiling

46 This is a mathematical property of the model that I discuss in greater technical detail in Harcourt (2004) and (2006a).
47 As evidenced here, the model relies principally on Gary Becker’s seminal work on tastes for discrimination. See generally Becker (1996).
The three hypothetical distributions of searches between young Muslim men and all others—at Times 1, 2, and 3—correspond to three different sets of internal group search rates. These three scenarios also represent three different types of policing: colour-blind policing at Time 1 where the police take no account of race and therefore do not seek greater efficiency by targeting higher offenders; efficient police profiling at Time 2 where the police have sought to improve their hit rates by targeting higher offenders to the point of equilibrium; and excessive profiling or bigoted policing at Time 3 where the police are now searching more (beyond the point of efficiency) members of the lower-offending group. The three time points are represented in Figure 1.

The economic model represented by Figure 1 suggests that profiling increases the success rate of police investigations and reduces the overall societal level of offending with the same police resources. Naturally, additional judicial resources would be needed to process the increased detection of terrorist activities, although one expects that those costs would be offset by the harm that is prevented.

B. Elasticity among the Non-profiled and Possible Substitution Effects

Rational choice theory entails, however, that members of a profiled group are not the only ones who will respond to changes in policing. Members of the non-profiled group also change their behaviour as a result of the decreased cost of crime—but in their case, by increasing their offending. So, for instance, if the US taxing authorities target drywall contractors and car dealers for audits of their tax returns—as they did in the mid-1990s—we can expect that there will be less tax evasion by drywall contractors and car dealers because their cost of tax evasion has increased. But at the same time, we can expect that some, say, accountants and bankers will realise that they are less likely to be audited and may therefore cheat a bit more on their taxes. Similarly, if the highway patrol targets African-American motorists for stops and searches—again, there is evidence for this in several states in the United States—then we can expect African-American motorists to respond by offending less. But by the same token, white motorists may begin to offend more as they begin to feel increasingly immune from investigation and prosecution.

Similar substitution effects hold true in the terrorism context as well. It happened in Israel, for instance, when young girls and women started becoming suicide bombers. As Jonathan Tucker, a counter-terrorism expert has explained:

At first, suicide terrorists [in Israel] were all religious, militant young men recruited from Palestinian universities or mosques. In early 2002, however, the profile began to change as secular Palestinians, women, and even teenage girls volunteered for suicide missions. On March 29 2002, Ayat Akhars, an 18-year-old Palestinian girl from Bethlehem who looked European and spoke Hebrew, blew herself up in a West Jerusalem supermarket, killing two Israelis. Suicide bombers have also sought to foil profiling efforts by shaving their beards, dyeing their hair blond, and wearing Israeli uniforms or even the traditional clothing of orthodox Jews.48

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In this sense, the opponents of racial profiling are also correct—and, also, as a matter of ‘statistical fact’. If we assume elasticity among rational actors, then profiling will increase offending among members of the non-profiled group. This has led many counter-terrorism experts to question or deny outright the effectiveness of profiling. As Bruce Hoffman has stated, ‘profiling of suicide bombers is no longer effective. Suicide attacks can be young or old, male or female, religious or secular’.\(^{49}\) It has led other counter-terrorism experts and practitioners, such as New York City Police Commissioner Raymond Kelly, to avoid profiling on traits that can substitute easily. As Malcolm Gladwell explains, ‘It doesn’t work to generalize about a relationship between a category and a trait when that relationship isn’t stable—or when the act of generalizing may itself change the basis of the generalization.’\(^{50}\) To avoid these ‘unstable’ traits, police chief Kelly does not rely on race but instead on traits like nervousness and inconsistency—traits that are more permanently associated with criminal offending and that do not lend themselves to substitution.

C. The Central Theoretical Puzzle

The fact that there may be elasticity and thus substitution among the non-profiled, however, does not end the debate about profiling. It does not mean that profiling is ineffective. Some substitution is inevitable. The real question is: how much substitution can we expect and will it outweigh the benefits of profiling? The central theoretical question is, in other words, \textit{how do the elasticities of the two groups compare?} How does the elasticity of the profiled group compare to that of the non-profiled group?

The trouble with the economic model is that it assumes both groups are equally elastic to policing. This is reflected in the earlier graph by the parallel shape of the two offending curves. But this assumes away the central theoretical question. What matters most for the effectiveness of racial profiling is precisely the \textit{comparative elasticity} of the two groups. If the targeted group members have lower elasticity of offending to policing—if their offending is less responsive to policing than other groups—then targeting them for enforcement efforts will increase the overall amount of crime in society because the increase in crime by members of the non-profiled group will exceed the decrease in crime by members of the profiled group. In raw numbers, the effect of the profiling will be greater on the more elastic non-profiled group and smaller on the less elastic profiled group.

Again, this is true as well in the terrorism context. The central question here is how responsive young Muslim men are to police profiling practices and whether they are less elastic than non-Muslim men and women. If they are less responsive overall, then targeted policing may actually increase total incidents of terrorism by encouraging the non-profiled group members to engage in terrorist acts—since

\(^{49}\) Hoffman, B, ‘Defending America against Suicide Terrorism’ in D Aaron (ed), \textit{Three Years After: Next Steps in the War on Terror} (Santa Monica, RAND Corporation, 2005) 22.

\(^{50}\) Gladwell (2006).
the price to them has decreased. This would enable and encourage terrorist organisations to recruit more heavily from outside the profiled group—women, white men and others who do not look like young Muslim men.

It is precisely the comparative elasticities of offending to policing that determine whether and to what extent there is substitution between members of the profiled and non-profiled groups. This is the central puzzle, but at this theoretical level, there is no good reason to assume that the higher-offending group is as responsive or more responsive to policing than members of the non-profiled groups. After all, we are assuming that the two groups have different offending rates. Whether it is due to different socio-economic backgrounds, to religious fanaticism, to education, culture, or upbringing, non-spurious profiling rests on the non-spurious assumption that one group of individuals offends more than the other, holding everything else constant. If their offending is different, then why would their elasticity be the same? If members of the profiled group are offending more because they are more religious, then might they also be less elastic to policing? There is no a priori reason why the group that offends more should be more or as elastic than the other.

The bottom line, then, is that if the profiled group has lower elasticity of offending to policing, profiling that group will probably increase the amount of terrorism in the long-term. I have demonstrated this elsewhere with mathematical equations, but the proof is captured well and more simply by modifying the earlier graph to reflect different elasticities (see Figure 2). In essence, as long as the equilibrium point in offending at Time 2 is achieved above the average offending rate at Time 1, the profiling will produce increased crime in society.

In the terrorism context, the elasticity of offending represents only one form of possible substitution. There are other forms that can also result in an increased long-term rate of attacks, including, for instance, the use of different terrorist modes of attack that are less susceptible to detection by profiling. The central empirical issues, then, are: (1) whether and to what extent the group of profiled individuals (young, Arab-looking males) are elastic to policing; (2) whether and to what extent the group of non-profiled individuals (non-Arab-looking young men and all other men and women) are elastic to policing; (3) more importantly, how those elasticities compare; and (4) whether there are different forms of substitution that might also occur.

E. Empirical Research on Counter-terrorism Measures

On these central questions, there is no reliable empirical evidence. There is no empirical research on elasticities, especially comparative elasticities, nor on substitution effects in the context of racial profiling. The only forms of substitution

52 The two closest empirical studies are both slightly off-point. The first is Paul Heaton’s 2006 working paper on the effect of eliminating racial profiling policies in New Jersey on the offending of minorities: Heaton, P, ‘Understanding the Effects of Anti-profiling Policies’, working paper, March 2006.
that have been studied empirically in the counter-terrorism context involve substitution as between different methods of attack and different timing of attacks.

Rigorous empirical research in the terrorism context traces its origins to a 1978 paper by William Landes that explores the effect of installing metal detectors in airports on the incidence of aircraft hijackings. Extending the rational choice framework to terrorist activities, Landes developed an economic model to test whether mandatory screening reduced the likelihood of a terrorist hijacking. Using a dataset of US FAA records of aircraft hijackings from 1961 to 1976, Landes available at http://home.uchicago.edu/~psheaton/workingpapers/racialprofiling.pdf. However, Heaton’s study does not address the issue of comparative elasticities. The other is Avner Bar-Ilan and Bruce Sacerdote’s 2001 study, which explores the comparative responsiveness to an increase in the fine for running a red light among Jews and non-Jews: Bar-Ilan, A and Sacerdote, B, ‘The Response to Fines and Probability of Detection in a Series of Experiments’, National Bureau of Economic Research (Cambridge, MA) Working Paper No 8638, December 2001. However, their study does not address the issue of racial profiling.

Figure 2. A Model of Profiling with Different Elasticities

analysed the time intervals between hijackings to measure the frequency of these events. Landes found that 'increases in the probability of apprehension, the conditional probability of incarceration, and the sentence are associated with significant reductions in aircraft hijackings in the 1961-to-1976 time period'. He estimated that between 41 and 67 fewer aircraft hijackings occurred on planes departing from the United States following mandatory screening and the installation of metal detectors in US airports.

In his 1978 study, Landes used sophisticated quantitative analyses to regress the quarterly totals of aircraft hijackings, as well as time and flight intervals between successive hijackings, on the probability of apprehension. The effect, however, can be visualised here based on data from the RAND-MIPT Terrorism Incident Database Project. Figure 3 charts both the number of aircraft hijackings between 1968 and 1980, as well as the proportion of terrorist acts that consisted of hijackings.

The graph clearly demonstrates that mandatory screening and the installation of metal detectors in 1973 coincided with a significant drop in both the absolute number and the proportion of international terrorist acts represented by hijackings. Landes’ research suggests that terrorists’ decisions about whether to engage in terrorist acts are a function of the probability and expected utility of different possible outcomes.

Subsequent research has built on Landes’ framework to explore possible substitution effects. In a 1988 article, Jon Cauley and Eric Im used interrupted time series analysis to explore the impact of the installation of metal detectors on different types of terrorist attacks. They found that, although the implementation resulted in a permanent decrease in the number of hijackings, it produced a proportionally larger increase in other types of terrorist attacks. In 1993, Walter Enders and Todd Sandler also revisited mandatory screening, showing similarly that, although mandatory screening coincided with a sharp decrease in hijackings, it also coincided with increased assassinations and other kinds of hostage attacks, including barricade missions and kidnappings. The introduction of metal detectors, they showed, resulted in a steady increase in other kinds of hostage events—consistent with the idea that ‘terrorist groups substituted away from skyjackings

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55 Ibid., 28–29. Landes also found that the cost of mandatory screening of all passengers was ‘enormous’: ‘The estimated net increase in security costs due to the screening program (which does not include the time and inconvenience costs to persons searched) . . . translates into a $3.24-to-$9.25 million expenditure to deter a single hijacking. Put differently, if the dollar equivalent to the loss to an individual hijacked passenger were in the range of $76,718 to $219,221, then the costs of screening would just offset the expected hijacking losses.’ Landes (1978) 29.
56 The underlying data are also available in Anderton, CH and Carter, JR, ‘Applying Intermediate Microeconomics to Terrorism’, College of the Holy Cross, Department of Economics Faculty Research Series, Working Paper No 04-12, August 2004.
57 Cauley and Im (1988).
58 Ibid.
and complementary events involving protected persons and into other kinds of hostage incidents’.60

Still other researchers have found that the implementation of counter-terrorism measures has had no impact on the risk of terrorism-related hijacking attempts. Laura Dugan, Gary LaFree and Alex R Piquero, in their 2005 article, ‘Testing A Rational Choice Model of Airline Hijackings’, have analysed a dataset that included 1,101 attempted aerial hijackings around the world from 1931 to 2003 and explored the effectiveness of a range of counter-terrorism measures—from the installation of metal detectors and tighter baggage and customer screening to increased law enforcement presence and punitive sanctions.61 When these researchers disaggregated their data into terrorist-related and non-terrorist related hijackings, they found that ‘none of the three policies examined were significantly related to the attempts of success of terrorist-related hijackings’.62 They concluded that ‘the counterhijacking policies examined had no impact on the hazard of terrorism-related hijacking attempts. By contrast, we found that metal detectors and increased police surveillance significantly reduced the hazard of nonterrorist-related hijackings.’63

Figure 3. US Aircraft Hijackings, 1961–76

60 Ibid, 835.
Researchers have also looked at other forms of possible substitution. Retaliatory strikes, like the ‘United States’ strike on Libya on 15 April 1986, resulted in ‘increased bombings and related incidents’; but they tended to level off later. As Enders and Sandler explain, ‘The evidence seems to be that retaliatory raids induce terrorists to intertemporally substitute attacks planned for the future into the present to protest the retaliation. Within a relatively few quarters, terrorist attacks resumed the same mean number of events.’ Enders and Sandler also found that the fortification of US embassies and missions in October 1976 resulted in a reduction of terrorist attacks against US interests but produced a substitution towards assassinations. Cauley and Im also analysed the effect of target hardening of US embassies and found that they had an ‘abrupt but transitory influence on the number of barricade and hostage taking events’. Their conclusion was that ‘the unintended consequences of an antiterrorism policy may be far more costly than intended consequences, and must be anticipated’.

However, that is the extent of the solid empirical evidence. The most recent and thorough review of the empirical literature, based on a Campbell Collaborative protocol, identified only seven rigorous empirical studies:

In the course of our review, we discovered that there is an almost complete absence of evaluation research on counter-terrorism strategies. From over 20,000 studies we located on terrorism, we found only seven which contained moderately rigorous evaluations of counter-terrorism programs. We conclude that there is little scientific knowledge about the effectiveness of most counter-terrorism interventions.

Moreover, there are no empirical studies on racial profiling in the terrorism context. I found only one article, and it is theoretical, not empirical. Concerned that this may have been an artefact of a US bias, I contacted Dr Boaz Ganor (a leading researcher on terrorism in Israel) at the Institute for Counter-terrorism at the Interdisciplinary Center Herzliya (a leading research centre on terrorism in Israel)

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64 Enders and Sandler (1993) 835.
68 Enders and Sandler (1993) 843. These substitution effects can also be aggravated by innovation effects—which include new modes of attack and new techniques and weapons. Enders and Sandler explain: ‘In the long term, terrorists will develop ingenious countermeasures to circumvent the technology. Immediately after airport vigilance was increased as a result of 9/11, Richard Reid (aka Tariq Rajab) was discovered on a flight from Paris to the United States with an explosive device in his shoes. Now that airport security routinely inspects shoes, plastic guns, electronic jamming equipment, bottles of flammable liquid or other explosive devices are predicted to be hidden on (or in) the terrorist or in carry-on luggage. Thus, there are dynamic strategic interactions; authorities must be vigilant to improve technology by anticipating ways of circumventing current technological barriers. This vigilance must lead to periodic upgrades in the technology prior to the terrorists exposing the technology’s weakness through a successful attack’: Enders and Sandler (2002/4) *18.
and asked him if there were any empirical studies on profiling in Israel. His response: ‘no’. He is unaware of ‘any empirical research that has been done in Israel on the efficiency of profiling’.\(^{71}\) The reason, in large part, is that ethnic appearance is a poor indicator of terrorism in Israel. As Dr Ganor explained, ‘There were many cases of public and security awareness that prevented or limited terrorist attacks in Israel based on the looks of the suspect, but it is sometimes difficult to define if this practice was based on national identity, ethnic profile or suspicious behaviour, or all of the above together.’\(^{72}\)

**F. Some Loose Ends**

Naturally, there are a lot of other unanswered questions. Firstly, in all likelihood terrorist organisations are *already* recruiting outside the profiled group *regardless* of whether the New York City Police Department (NYPD) or other law enforcement agencies are engaged in racial profiling. What difference, then, would racial profiling make? Does the incremental cost of profiling in the subways really change the equation? And how sensitive are terrorists to such an incremental cost? Second, the decision to have police officers search bags and monitor subway entrances—*regardless* of whether they profile—already increases the cost of such an attack. What is the incremental difference achieved by racial profiling, and will it have any effect on behaviour?

Third, even if there is more substitution, might it lead to less harmful attacks? Enders and Sandler have written:

> Even some piecemeal policies that cause substitutions by focusing on only part of the overall terrorism problem may have some net positive impacts. To the extent that the National Defense Authorization Act leads to a reduction in the likelihood of biological terrorism, substitutions into other attack modes will occur. The desirability of such policies is that they may force terrorists to substitute into *less harmful* events. Anti-terrorist policies can be most effective when the government simultaneously targets a wide range of terrorist attack modes, so that the *overall* rise in the prices of terrorist attacks becomes analogous to a decrease in resources.\(^{73}\)

Fourth, might racial profiling itself affect comparative elasticities? Is it possible that racial profiling might soften the elasticity of the non-profiled group, or harden that of the profiled group, by reinforcing a perception that the United States and European countries are anti-Muslim? There is good reason to believe, for instance, that the torture at Abu Ghraib in 2004 may serve as a future recruitment tool for terrorist organisations. Anderton and Carter have suggested:

> It is likely that the degrading images of Iraqi prisoners hardened the preferences of terrorists against the United States. It may have also created terrorist preferences among some individuals who previously had flat indifference curves [as to terrorist

\(^{71}\) Communication with Dr Boaz Ganor, 24 February 2006.

\(^{72}\) *Ibid.*

\(^{73}\) *Enders and Sandler (2002/4)* *18.*
activities). Hence, the prisoner abuse scandal can be seen as a form of ‘negative advertising’ that may have reshaped terrorist preferences toward more terrorism.74

In the same way, might the profiling of young Muslim men in London, New York City or other Western cities serve as a form of ‘negative advertising’ that may undermine efforts to eradicate terrorism?

Finally, might racial profiling produce a loss of political legitimacy at home or abroad, possibly increasing the responsiveness of non-profiled group members to recruitment efforts? The perception that our counter-terrorism measures are illegitimate may affect obedience to the law. Psychologist Tom Tyler has demonstrated how perceptions of the legitimacy of criminal justice procedures affect the willingness of citizens to abide by the law.75 Tyler’s writings on procedural fairness and institutional legitimacy rest precisely on the idea that individuals derive a strong sense of identity from their relationship with legal authority. When the relationship is positive and respectful, a form of social trust—a concept closely linked to the idea of social capital made popular in Robert Putnam’s book, Bowling Alone76—develops and promotes obedience to the law. ‘[S]ocial trust,’ Tyler contends, ‘is linked to creating a commitment and loyalty to the group and to group rules and institutions.’77 This commitment and loyalty to the group translates into greater obedience to the law. When this loyalty is undermined, so too is obedience to the law. Will this affect the responsiveness of members of non-profiled groups?

These are all fascinating questions but all relatively minor compared to the central question: whether racial profiling such as that of young Muslim men in the New York subways will be likely to detect a terrorist attack or instead lead to the recruitment of non-profiled persons and the substitution of other acts for subway attacks—in other words, whether profiling will detect or increase terrorist attacks. The answer to this question is pure speculation. In the end, then, there is no need or reason to engage in a rights trade-off.

CONCLUSION

There is a lesson here. Defensive counter-terrorism measures need to be evaluated closely. As Enders and Sandler, Faria, Tucker and other counter-terrorism experts have emphasised, measures that raise the price of one and only one specific activity, such as airplane hijackings, are likely to produce troubling substitution effects; and measures that raise the price of all terrorist acts or conversely reduce the resources of terrorists are less problematic and less likely to produce unanticipated

substitution. The optimal strategy to combat terrorism is to reduce terrorist resources across the board. It is for this reason that intelligence and proactive counter-terrorism operations are generally viewed as a priority. As General Meir Dagan, former head of the Bureau for Counter-terrorism in the Israeli prime minister’s office, has explained, ‘Investments in intelligence are invisible, whereas increased security is visible but often wasteful. The first priority must be placed on intelligence, then on counter-terrorism operations, and finally on defence and protection.’

Racial profiling as a defensive counter-terrorism measure is suspect for precisely this reason: it may well encourage the recruitment of terrorists from outside the core profile and the substitution of other terrorist acts. Does this mean that the NYPD should not harden targets like the subway system—targets that are attractive to terrorists because of the number of potential victims? No. It is probably better to divert terrorist attacks away from large groups of people, wherever and whenever possible. But it does mean that the police should harden those types of targets without deploying a racial profile. There is no point triggering the potential substitution effects associated with racial profiling.

REFERENCES


79 Quoted in Tucker (2003) *2. Walter Enders and Todd Sandler seem to agree: ‘Governments must act to reduce the terrorists’ resource endowments (ie, their finances, leadership, and membership) if an overall decrease in terrorism is to follow. Efforts to infiltrate and undermine terrorist groups and to freeze their assets have the consequence of reducing the overall amount of terrorism:’ Enders and Sandler (2002/4) *17.


Hoffman, B, ‘Defending America against Suicide Terrorism’ in D Aaron (ed), Three Years After: Next Steps in the War on Terror (Santa Monica, RAND Corporation, 2005).

