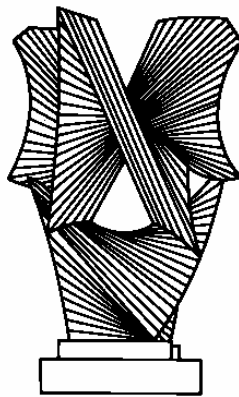


CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 288
(2D SERIES)



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

Bernard E. Harcourt

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

March 2006

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BERNARD E. HARCOURT
University of Chicago

Paper Presented at the
Oxford Colloquium on Security and Human Rights
at Oxford University
March 17, 2006

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ABSTRACT

Racial profiling as a defensive counterterrorism measure necessarily implicates a rights trade-off: if effective, racial profiling limits the right of young Muslim men to be free from discrimination in order to promote the security and well-being of others. Proponents of racial profiling argue that it is based on simple statistical fact and represents “just smart law enforcement.” Opponents of racial profiling, like New York City police commissioner Raymond Kelly, say that it is dangerous and “just nuts.”

As a theoretical matter, both sides are partly right. Racial profiling in the context of counterterrorism measures may increase the detection of terrorist attacks *in the short term*, but create the possibility of dangerous substitutions *in the long run*. Defensive counterterrorism measures are notoriously tricky and can easily backfire. The installation of metal detectors in airports in 1973, for instance, produced a dramatic reduction in the number of airplane hijackings, but also resulted in a proportionally larger increase in bombings, assassinations, and hostage-taking incidents. Target hardening of U.S. embassies and missions abroad produced a transitory reduction in attacks on those sites, but an increase in assassinations. The evidence shows that some defensive counterterrorism measures do not work and others increase the likelihood of terrorist acts.

As a practical matter, then, both sides are essentially wrong: racial profiling is neither “just” smart, nor “just” nuts. The truth is, we simply have no idea whether racial profiling would be an effective counterterrorism measure or would lead instead to *more* terrorist attacks. There is absolutely no empirical evidence on its effectiveness, nor any solid theoretical reason why it would be effective overall. As a result, there is no good reason to make the rights trade-off implicated by a policy of racial profiling in the counterterrorism context.

Muslim Profiles Post 9/11

Bernard E. Harcourt¹

INTRODUCTION

In the aftermath of the London bombings in July 2005, Paul Sperry of the Hoover Institution, a well-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.” 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.” Using random bag searches in the New York subways, the column concludes, “is simply nuts.”³

¹ Professor of Law, University of Chicago. Special thanks for excellent research assistance to Zac Callen and Ellen Fitzgerald.

² Paul Sperry, “When the Profile Fits the Crime,” *New York Times*, July 28, 2005 (available at <http://www.nytimes.com/2005/07/28/opinion/28sperry.html>).

³ Charles Krauthammer, “Give Grandma A Pass,” *Washington Post*, page A23, July 29, 2005 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/28/AR2005072801786.html>).

New York City police commissioner Raymond Kelly couldn't disagree more. "Look at the 9/11 hijackers," Kelly exclaims. "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 it's 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 counterterrorism 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 counterterrorism context suspect.

⁴ Malcolm Gladwell, "Troublemakers: What pit bulls can teach us about profiling," *The New Yorker*, February 6, 2006 (available at http://www.newyorker.com/fact/content/articles/060206fa_fact) (quoting NYPD Police Commissioner Raymond Kelly).

⁵ *Id.*

⁶ *Id.*

The fact is, defensive counterterrorism 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 globe,⁷ but also resulted in a sharp and proportionally larger increase in bombings, assassinations, and hostage-taking incidents.⁸ Target hardening of U.S. 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 counterterrorism] interventions either didn’t work or sometimes *increased* the likelihood of terrorism and terrorism-related harm.”¹³ In sum, counterterrorism 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 counterproductive step resulting in detrimental substitutions and increased terrorist attacks. As a result, racial profiling is neither “just” smart law enforcement, nor “just” nuts. It’s an unknown

⁷ William M. Landes, “An Economic Study of U.S. Aircraft Hijacking, 1961—1976,” *Journal of Law and Economics*, 21(1): 1—31 (April 1978).

⁸ Jon Cauley and Eric I. Im, “Intervention Policy Analysis of Skyjackings and Other Terrorist Incidents,” *American Economic Review* 78:27—31 (1988); Walter Enders and Todd Sandler, “The Effectiveness of Antiterrorism Policies: A Vector-Autoregression-Intervention Analysis,” *American Political Science Review* 87(4): 829—844 (December 1993).

⁹ Enders and Sandler 1993: 842; *see also* Cauley and Im 1988: 30.

¹⁰ Enders and Sandler 1993: 835.

¹¹ Jonathan B. Tucker, “Strategies for Countering Terrorism: Lessons from the Israeli Experience” (March 2003) (available at the U.S. Homeland Security Department Institute web site at <http://www.homelandsecurity.org/journal/Articles/tucker-israel.html>).

¹² The Campbell Collaboration is a non-profit organization that promotes evidence-based policy making by supporting empirical evaluations of the existing empirical literature in different policy arenas, including crime and security through its Crime and Justice Coordinating Group. The study in question here—Lum, Kennedy, and Sherley 2006: 5—had its review protocol approved by the Crime and Justice Coordinating Group. For information about the Campbell Collaboration, see <http://www.campbellcollaboration.org/index.asp>

¹³ Cynthia Lum, Leslie W. Kennedy, and Alison J. Sherley, “The Effectiveness of Counter-Terrorism Strategies: A Campbell Systematic Review,” working paper dated January 2006, at page 3.

quantity. And precisely for that reason, there is no justification for making the human rights and civil rights trade-offs associated with racial profiling.

Thorny Questions

Those potential trade-offs would raise a myriad of thorny issues. The first is whether the very use of race, color, 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 maximized the efficiency of their interventions—as evidenced, for instance, in the equalizing 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 suggests, for instance, in his article *Racial Bias in Police Stops and Searches: An Economic Analysis*, that “statistical discrimination [business necessity], 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 other words, the very definition of racial profiling is a hotly contested issue.¹⁶

¹⁴ For a detailed treatment of this, see Bernard E. Harcourt, “Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally,” 71 *The University of Chicago Law Review* 1275 (2004).

¹⁵ Vani K. Borooah, *Racial Bias in Police Stops and Searches: An Economic Analysis*, 17 *Eur J Pol Econ* 17, 19 (2001). For a fruitful discussion of the difference between statistical discrimination and naked bigotry, compare Vani K. Borooah, *Economic Analysis of Police Stops and Searches: A Reply*, 18 *Eur J Pol Econ* 607 (2002), with Shanti P. Chakravarty, *Economic Analysis of Police Stops and Searches: A Critique*, 18 *Eur J Pol Econ* 597 (2002). In the United States, the leading works in the area include John Knowles, Nicola Persico, and Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 *J Pol Econ* 203 (2001); Rubén Hernández-Murillo and John Knowles, *Racial Profiling or Racist Policing?: Testing in Aggregated Data* (working paper Apr 18, 2003), online at http://www.econ.upenn.edu/~jknowles/Research/HKRacProf_2003c.pdf (visited July 27, 2004); Nicola Persico, *Racial Profiling, Fairness, and Effectiveness of Policing*, 92 *Am Econ Rev* 1472 (2002); Charles Manski, “Search Profiling with Partial Knowledge of Deterrence,” unpublished paper (2005); Jeff Dominitz and John Knowles, “Crime Minimization and Racial Bias: What Can We Learn From Police Search Data?” PIER Working Paper 05-019 (February 18, 2005) (available at <http://ssrn.com/abstract=719981>).

¹⁶ See generally Harcourt, *Rethinking Racial Profiling* at 1276 n.2.

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 distinction in its notorious decision *Whren v. United States*¹⁷ in 1996—as well as in several earlier decisions involving U.S. Border Patrol searches at the Mexican-American border in the mid-1970s.¹⁸ 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, demeanor, and gender were also important traits in the profile. The result is that, in American 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 is practically always permitted.¹⁹ In international law as well there is ambiguity surrounding the distinction. The International Covenant on Civil and Political Rights, for instance, provides that in times of public emergency, states may derogate certain rights on condition that the measures “do not involve discrimination *solely* on the ground of race, colour, sex, language, religion or social origin.”²⁰ 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 thorny issue arises: is the nondiscrimination principle absolute or can it be limited in the case of counterterrorism? 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’ discussion of “the problem of

¹⁷ 517 US 806 (1996).

¹⁸ See Bernard E. Harcourt, “*United States v. Brignoni-Ponce* and *United States v. Martinez-Fuerte*: The Road to Racial Profiling,” in Carol Steiker, ed., *Criminal Procedure Stories* (Foundations Press 2006).

¹⁹ See R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L Rev 1075, 1086–87 n 47 (2001) (“The consensus view seems to be that 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, *Rethinking Racial Profiling* at 1338–1342.

²⁰ ICCPR, Article 4 (emphasis added).

justice between generations,”²¹ as well as Joel Feinberg’s discussion of the rights of unborn generations,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 the ticking time-bomb²³—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.”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 counterterrorism measures and human rights compliance,²⁵ Alex Conte and Boaz Ganor set forth in detail the doctrinal structure for an analysis of this question, marshalling the principle human rights texts that address racial discrimination and profiling—including recent reports on racial profiling and counterterrorism from the United Nations Committee on the Elimination of Racial Discrimination (CERD) and the Inter-American Commission on Human Rights.²⁶ The CERD has repeatedly maintained that counterterrorism 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

²¹ John Rawls, “The Problem of Justice between Generations,” 284—293, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

²² Joel Feinberg, “The Rights of Animals and Unborn Generations,” in *Philosophy and Environmental Crisis*, ed. William Blackstone (Athens, GA: University of Georgia Press, 1974).

²³ Eric Posner and Adrian Vermeule offer a useful review of the landscape here in discussing the moral limits on coercive interrogation in their article *Should Coercive Interrogation Be Legal?*, 104 *Michigan Law Review* 671, 676—682 (February 2006).

²⁴ See generally Jean-Paul Sartre, *Les Mains sales* (Paris: Gallimard 1948); Michael Walzer, “Political Action: The Problem of Dirty Hands,” *Philosophy and Public Affairs* 2(2): 160—180 (1973); Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge, UK: Cambridge University Press 1986)(especially chapters 2 and 3).

²⁵ Alex Conte and Boaz Ganor, “Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism,” ICT Paper available at http://www.ict.org.il/pdf/Ganor_Conte_Nov05.pdf (2005).

²⁶ See Committee on the Elimination of Racial Discrimination, “Statement on Racial Discrimination and Measures to Combat Terrorism,” in *Report of the Committee on the Elimination of Racial Discrimination*, and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, both discussed in Conte and Ganor 2005: 37—38.

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 only violated if there is intentional discrimination with proven malice. The Supreme Court's decisions in *McCleskey v Kemp*²⁷ and *United States v Armstrong*²⁸—which extend the *Washington v Davis*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 discrimination to promote police efficiency, it is not clear whether individual 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 terrorist acts—would undoubtedly qualify as a compelling state interest.³⁰ The key question, for purposes of equal protection, then, is whether the use of race in profiling would be *narrowly tailored* to serve this interest, given that the intentional use of race as a factor in policing would trigger strict scrutiny.³¹ The requirement of narrow tailoring would preclude policing techniques that are ineffective, or that have unacceptable collateral consequences on the profiled population; but that determination, naturally, would fall on the courts.

No Need for a Trade-Off

These are all admittedly fascinating questions that deserve our attention. But they only arise *if* racial profiling is an effective defensive counterterrorism measure. And on that score, there is no reliable evidence, nor a good theoretical reason to believe that

²⁷ 481 US 279 (1987). In *McCleskey*, the Court rejected an Equal Protection claim for lack of a showing of actual discriminatory intent, where petitioner produced evidence that murderers of white victims are 4.3 times more likely to be sentenced to death than murderers of African-American victims. Id at 287, 291–99.

²⁸ 517 US 456 (1996). In *Armstrong*, the Court required evidence of discriminatory purpose in the context of a selective prosecution challenge. Id at 465.

²⁹ 426 US 229 (1976). In *Davis*, the Court articulated the principle that the Equal Protection Clause bars only intentional discrimination. Id at 239–41.

³⁰ Though some question this conclusion, I have no doubt that post-*Grutter v Bollinger*, 539 US 306 (2003), which deemed promoting a diverse student body a compelling state interest, see id at 332–33, fighting crime most probably would as well. See generally Harcourt, *Rethinking Racial Profiling* at 1349–1350.

³¹ See, for example, *Gratz v Bollinger*, 539 US 244, 268–75 (2003) (applying strict scrutiny to a University of Michigan admissions policy favoring minority applicants).

profiling would be 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 terrorism 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 applications, which were relatively static,³² profiling in the policing context involves a dynamic form of prediction: the profiling itself alters the behaviors of those persons who are both profiled and not profiled. As a result, the success of profiling will depend on two factors: first, in terms of detecting and preventing terrorist acts, it will depend 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 will depend on how responsive different groups are to the targeted policing and whether they engage in forms of substitution. Both of these turn on what we call the comparative *elasticity to policing* of the two groups—in other words, on how responsive the different groups are to increased police surveillance. 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 thus 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. But on this central question, we have absolutely no reliable data. As an empirical matter, we do not know whether profiling will work in the counterterrorism context or on the contrary cause more terrorist attacks. As a result, there is no need to address the difficult trade-offs that are presented by human rights conventions and civil rights laws intended to eliminate racial discrimination. The important point here, though,

³² It is fair to say that this is changing in the insurance area, and that the field is becoming increasingly dynamic insofar as actuarial prediction is becoming more and more individualized, to the point where the determination of individual insurance premiums will increasingly affect individual behavior. This wasn't true of early insurance practices.

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.

In this paper, I evaluate the empirical case for racial profiling. I explore both the short-term and long-term implications. Surprisingly, although international terrorism is by no means a new phenomenon, there is extremely little reliable empirical research on the effectiveness of defensive counterterrorist measures, and there is no reliable empirical research whatsoever on the use of racial profiling. I argue that this is problematic because, like any other police method, there is a strong potential that a defensive policing technique may backfire—that the use of profiling will actually *increase* rather than *decrease* the long-term incidence of the targeted offense. This potential arises from a phenomenon called “substitution”—from the possibility that, in response to profiling, terrorist organizations will either (1) recruit more individuals from non-profiled groups, thereby expanding the overall pool of potential terrorists, or (2) substitute different types of terrorist attacks that are more immune to profiling and yet more devastating in terms of deaths and injuries. And it raises a host of technical empirical questions that are at present entirely unresolved.

Before proceeding, though, it is important to identify precisely the type of measure in question. Broadly speaking, there are two types of counterterrorist initiatives.³³ The first are called defensive or deterrence-based counterterrorist policies. These are policies that 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 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 preemptive policies aim to dismantle terrorist organizations by means of infiltration, preemptive strikes, or invasion of supportive states. Profiling can be used in either case. The profiling of young Muslim men in the New York City subways exemplifies the former—a defensive counterterrorism measure. But profiling can also be used in preemptive or proactive strategies, as when, for

³³ See generally, Enders and Sandler 1993: 829-44; João Ricardo Faria, “Terrorist Innovations and Anti-Terrorist Policies,” *Terrorism and Political Violence* 18: 47-56 (2006); Tucker 2003.

example, the F.B.I. engages in targeted interviews of Muslim and Arab Americans in order to collect intelligence.³⁴ In this paper, I address only racial profiling by the police in defensive counterterrorism operations.

EVALUATING THE EMPIRICAL CASE FOR RACIAL PROFILING

I. Profiling and Immediate Detection

As a theoretical matter, there is no doubt whatsoever that the probability of detecting a terrorist attack increases in the *immediate* aftermath of the implementation of a criminal 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, theoretically speaking, 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”³⁵ and that “It is a simple statistical fact.”³⁶ 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 necessarily 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 the apprehended terrorist 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 realizing any tangible benefits from

³⁴ Mary Beth Sheridan, “Interviews of Muslims to Broaden: FBI Hopes to Avert a Terrorist Attack,” *Washington Post*, July 17, 2004, at p. A1.

³⁵ Sperry 2005.

³⁶ Krauthammer 2005.

racial profiling will depend 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 FAA, prevented approximately 35 potential hijackers that year. To put that number in perspective, that same year there were 6 domestic hijackings in the U.S.³⁷

Low base-rate events, however, are far more difficult to predict,³⁸ and as a result much harder to detect for several reasons. First, it is extremely hard to predict where, when, or how the low base-rate offense will occur. Second, low frequency affords more time to adjust to any counterterrorism 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 a terrorist organization 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.

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

Immediate detection is extremely important, especially to the potential victims and their families, friends, and communities who would suffer the greatest harm. Those potential benefits cannot be minimized. 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.

³⁷ Landes 1978: 24 (n.41) and 3 (Table 1).

³⁸ Albert Rosen, "Detection of Suicidal Patients: An Example of Some Limitations of the Prediction of Infrequent Events," *Journal of Consulting Psychology*, 18: 397—403 (1954).

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 on a group trait associated with higher offending rates—what they call “statistical discrimination”—may in fact be the most efficient way to allocate police resources. Drawing on Gary Becker’s groundbreaking work on tastes for discrimination,³⁹ a group of U.S. 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.⁴⁰ 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 counterterrorist 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 “elasticity” for short. 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 maximizes the effectiveness of its law enforcement resources.

I have set forth in great detail the logic of these economic models both in the broad context of criminal profiling in my book *Against Prediction*,⁴¹ and in the specific

³⁹ Gary Becker, *Accounting for Tastes* (Cambridge MA: Harvard University Press 1996).

⁴⁰ See, e.g. Borooh 2001; Borooh 2002; Chakravarty 2002.

⁴¹ Bernard E. Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (University of Chicago Press, forthcoming 2006).

context of racial profiling on the highways in my article *Rethinking Racial Profiling*,⁴² and I refer the technical reader to those more elaborate treatments. For present purposes, I offer a more streamlined description of the analysis and modify the models to address the specific context of counterterrorism 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, South-East Asian, North African or African, or, more generally, young men of color (excluding young men from East Asia). The non-profiled group consists of all women, older men, and young white or East Asian men.

As a factual matter, this first assumption is probably correct, at least in the United States. Of the total population in the U.S., there are extremely few persons of European, American, African-American or East Asian descent who have or are seemingly prepared to engage in suicide bombing or similar mass terrorist acts against Americans. Richard Reid, the “shoe bomber,” who was traveling to the United States on a British passport, and Jose Padilla, a Hispanic-American 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 population of about 200 million (excluding children, the elderly, and young men of color). In contrast, the number of young men of Arab descent who have engaged in terrorist activities on American soil is larger and includes the nineteen 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 February 26, 1993. In addition, the denominator is much smaller: according to the 2000 United States Census, there are 1,189,731 persons living in the United States who have one or more Arab ancestors and approximately 10 percent of those (or about 120,000) are young men between the ages of 15 and 30.⁴³ Naturally, the appearance of being of Arab descent encompasses many more young men of color, 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

⁴² Harcourt, “Rethinking Racial Profiling” (2004).

⁴³ Angela Brittingham and G. Patricia de la Cruz, *We the People of Arab Ancestry in the United States: Census 2000 Special Reports*, Washington DC: United States Department of Commerce, Economics and Statistics Administration (March 2005) (available at <http://www.census.gov/prod/2005pubs/censr-21.pdf>).

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.

I will incorporate here, for simplicity, one graph that visually explains the rational choice argument. The graph shows the relationship between the internal rate of searches conducted within each of the two groups and the offending rate of these different groups. At Time 1, the counterterrorism agents are not engaged in profiling of any sort: the police are searching both groups at the same internal search rate of 10 percent. 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 percent of the available young Muslim men and about 5 percent of the available white men and women, resulting in a hypothetical total distribution of searches of, say, 60 percent young males of color and 40 percent whites. At that distribution of searches, the offending rates are similar—and, one can infer, so are the hit rates. At that distribution, the efficient police officer has no reason to change the distribution of searches: the officer has no incentive to search more young Muslim men than the 60/40 total distribution, which produces these different internal group 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 1.⁴⁴

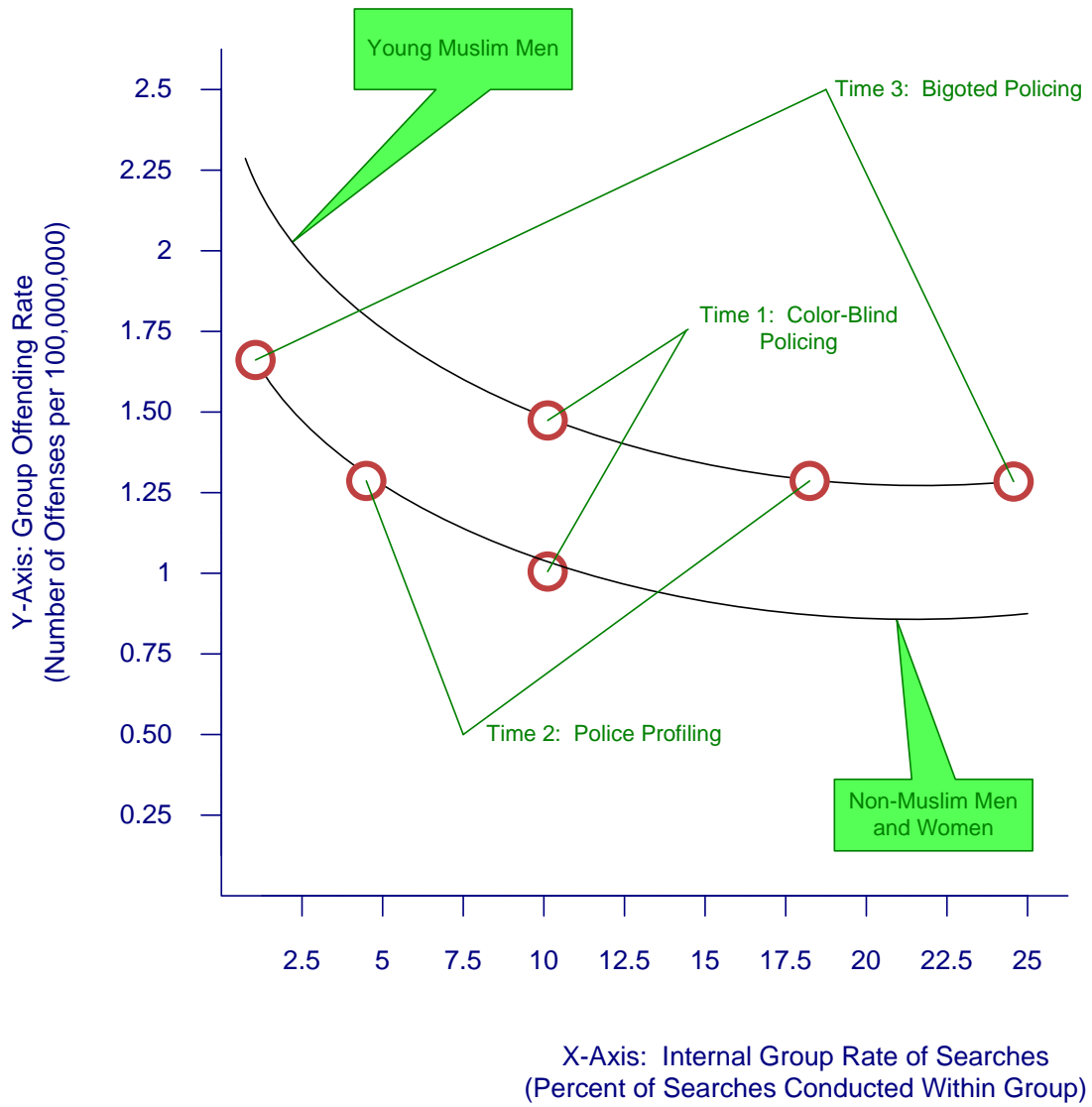
⁴⁴ This is a mathematical property of the model that I discuss in greater technical detail in Harcourt 2004 and 2006.

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 percent young Muslim men and 20 percent 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 *less* young Muslim men are offending and thus *less* searches are successful.⁴⁵

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 correspond to the three equilibrium points for the color-blind, efficient, and bigoted policing. The three time points are represented in the following graph:

⁴⁵ As evidenced here, the model relies principally on Gary Becker's seminal work on tastes for discrimination. *See generally* Becker 1996.

GRAPH: The Economic Model of Profiling



In sum, the economic model suggests that profiling will increase the success rate of police investigations and reduce 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, though one would expect that those costs would be offset by the harm that would have been prevented.

B. Elasticity Among the Non-Profiled and Possible Substitution Effects

According to the economic model, members of the profiled group are not the only ones who will respond to the change in policing. Members of the non-profiled group are also going to change their behavior as a result of the *decreased* cost of crime—but in their case, by *increasing* their offending. So, for instance, if the United States 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, say, accountants and bankers will realize that they are less likely to be audited, and may therefore cheat a bit more on their taxes. Similarly, if the highway patrol target African-American motorists for stops and searches—again, there is evidence for this in several 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.

This is true in the terrorism context where we have witnessed similar substitution effects. It happened in Israel, for instance, starting in 2002 when young girls and women became suicide bombers. As Jonathan Tucker, a counterterrorism expert explains, “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.”⁴⁶

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 member of the non-profiled group. This has led many counterterrorism experts to question or deny outright the effectiveness of profiling. As Bruce Hoffman suggests, “profiling of suicide bombers is no longer effective. Suicide attacks can be young or old, male or female, religious or secular.”⁴⁷ It has led other counterterrorism 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.”⁴⁸ 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. 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, *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

⁴⁶ Jonathan B. Tucker, “Strategies for Countering Terrorism: Lessons from the Israeli Experience” (March 2003) (available at the U.S. Homeland Security Department Institute web site at <http://www.homelandsecurity.org/journal/Articles/tucker-israel.html>).

⁴⁷ Bruce Hoffman, “Defending America Against Suicide Terrorism,” page 22, in David Aaron, ed., *Three Years After: Next Steps in the War on Terror*, RAND Corporation (2005).

⁴⁸ Gladwell 2006.

most for the effectiveness of racial profiling is precisely the *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.

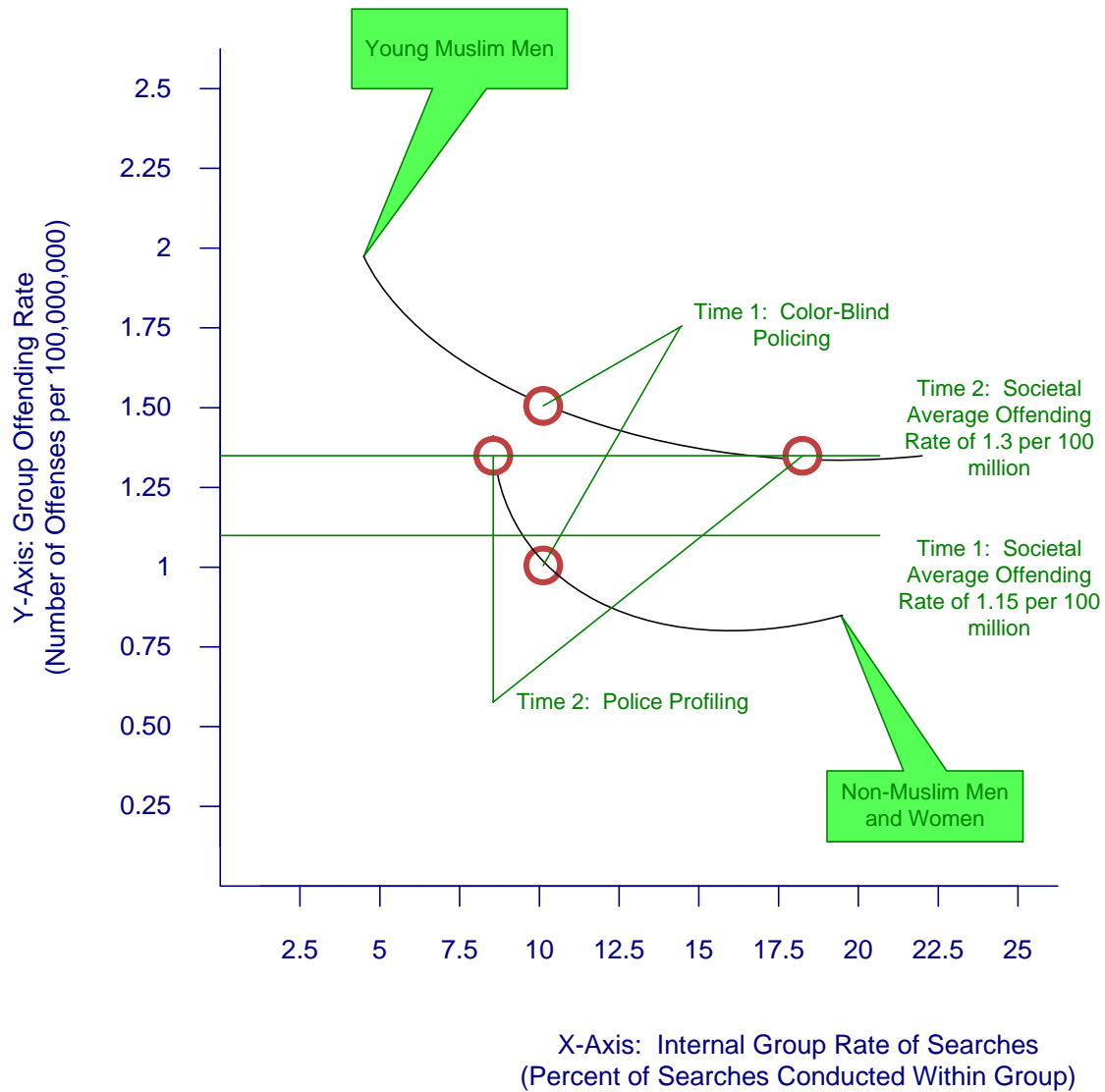
Again, this is true as well in the terrorism context. The central question here is how responsive young Muslim men are to policing and whether they are *less* elastic than non-Muslim men and women. If they are less responsive overall, then targeted policing may actually *increase* total incidents of terrorism by encouraging the non-profiled group members to engage in terrorist acts—since the price to them has *decreased*. This would enable terrorist organizations 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 determines whether and how much substitution there is 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 demonstrate this with mathematical equations in my article *Rethinking*

Racial Profiling, but the proof is captured well and more simply by modifying the earlier graph to reflect different elasticities:

GRAPH: A Model of Profiling with Different Elasticities



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 others that can also result in an increased long-term rate of attacks, including, for instance, the use of different terrorist modes of attack that would be less susceptible to detection by profiling. The central empirical questions, then, are (1) whether and to what extent the group of profiled individuals (Arab-looking young 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 Counterterrorism Measures

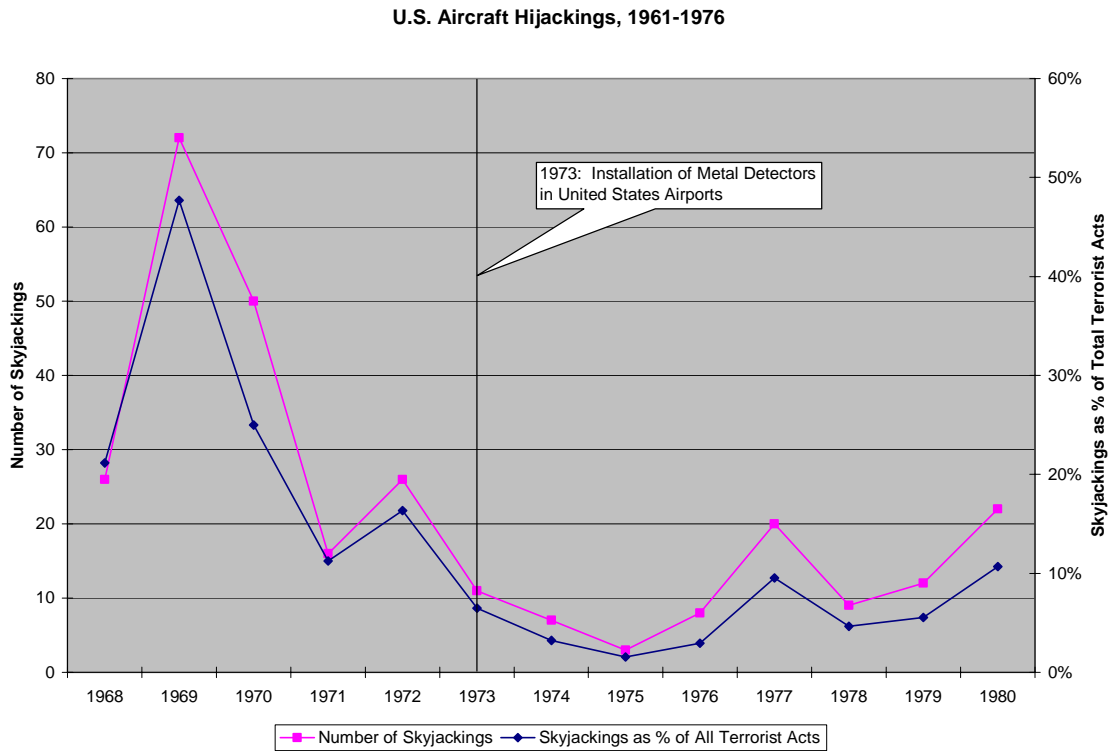
On these central questions, there is no reliable empirical evidence. There is no empirical research on elasticities—absolute or comparative—nor on substitution effects in the racial profiling context. The only forms of substitution that have been studied empirically in the counterterrorism context involve substitution as between different methods of attack and intertemporal substitution.

Rigorous empirical research in the terrorism context traces to a 1978 paper by my colleague at the University of Chicago, William Landes, that explores the effect of installing metal detectors in airports on the incidence of aircraft hijackings.⁴⁹ 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 United States Federal Aviation Administration (FAA) records of aircraft hijackings from 1961 to 1976, Landes analyzed the time interval 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

⁴⁹ William M. Landes, “An Economic Study of U.S. Aircraft Hijacking, 1961—1976,” *Journal of Law and Economics*, 21(1): 1—31 (April 1978).

period,”⁵⁰ and he estimates 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 U.S. airports.⁵¹

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, though, can be visualized here based on data from the RAND-MIPT Terrorism Incident Database Project.⁵² This graph charts both the number of aircraft hijackings between 1968 and 1980, as well as the proportion of terrorist acts that consisted of hijackings:



⁵⁰ Landes 1978: 28.

⁵¹ Landes 1978:28-29. 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 person 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).

⁵² The underlying data are also available in Charles H. Anderton and John R. Carter, “Applying Intermediate Microeconomics to Terrorism,” at 28 (Table 1), College of the Holy Cross, Department of Economics Faculty Research Series, Working Paper No. 04-12 (August 2004).

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 the terrorist's decision whether to engage in a terrorist act is a function of the probability and expected utility of different possible outcomes.

Subsequent research built on Landes' framework to explore possible substitution effects. In their 1988 article *Intervention Policy Analysis of Skyjackings and Other Terrorist Incidents*, 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.⁵³ In their 1993 article on *The Effectiveness of Antiterrorism Policies*, Walter Enders and Todd Sandler also revisit mandatory screening, and similarly show 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.⁵⁴ The introduction of metal detectors, they show, resulted in a steady increase in other kinds of hostage events—consistent with the idea that “terrorist groups substituted away from skyjackings and complementary events involving protected persons and into other kinds of hostage incidents.”⁵⁵

These researchers have also looked at other forms of substitution. Retaliatory strikes, like the United States strike on Libya on April 15, 1986, resulted in “increased bombings and related incidents,”⁵⁶ 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

⁵³ Jon Cauley and Eric I. Im, “Intervention Policy Analysis of Skyjackings and Other Terrorist Incidents,” *American Economic Review* 78:27—31 (1988).

⁵⁴ Walter Enders and Todd Sandler, “The Effectiveness of Antiterrorism Policies: A Vector-Autoregression-Intervention Analysis,” *American Political Science Review* 87(4): 829—844 (December 1993).

⁵⁵ Enders and Sandler 1993:835.

⁵⁶ Enders and Sandler 1993: 835.

number of events.”⁵⁷ Enders and Sandler also found that the fortification of U.S. embassies and missions in October of 1976 resulted in a reduction of terrorist attacks against U.S. interests, but produced a substitution toward assassinations.⁵⁸ Cauley and Im (1988) also analyze the effect of target hardening of U.S. embassies and find that they had an “abrupt but transitory influence on the number of barricade and hostage taking events.”⁵⁹ Their conclusion is that “the unintended consequences of an antiterrorism policy may be far more costly than intended consequences, and must be anticipated.”⁶⁰

But that’s all 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.”⁶¹

Moreover, there are no empirical studies on racial profiling in the terrorism context. I found only one article, and it is theoretical, not empirical.⁶² Concerned that this may have been an artifact of a U.S.-bias, I contacted Dr. Ganor Boaz (a leading researcher on terrorism in Israel) at the Institute for Counter-Terrorism at the Interdisciplinary Center Herzliya (a leading research center on terrorism in Israel), and

⁵⁷ Walter Enders and Todd Sandler, “What Do We Know About the Substitution Effect In Transnational Terrorism?” in *Researching Terrorism: Trends, Achievements, Failures*, eds. A. Silke and G. Ilardi (London: Frank Cass) (available as April 2002 paper at <http://www.rcf.usc.edu/~tsandler/substitution2ms.pdf>) at page *16.

⁵⁸ Enders and Sandler 1993: 842.

⁵⁹ Cauley and Im 1988: 30.

⁶⁰ 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 that, “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 Rajah) 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 at *18.

⁶¹ Lum, Kennedy, and Sherley 2006 at 3.

⁶² Yetman 2004.

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.”⁶³ The reason, in large part, is that ethnic appearance is a poor indicator of terrorism in Israel. As Dr. Ganor explains, “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 behavior, or all of the above together.”⁶⁴

F. Some Loose Ends

Naturally, there are a lot of other unanswered questions. First, in all likelihood terrorist organizations are *already* recruiting outside the profiled group *regardless* of whether the NYPD is 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 behavior?

Third, even if there is more substitution, might it lead to *less* harmful attacks? As Enders and Sandler suggest, “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.”⁶⁵

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

⁶³ Communication with Dr. Boaz Ganor, February 24, 2006.

⁶⁴ *Id.*

⁶⁵ Enders and Sandler 2002/4 at *18.

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 organizations. As Anderton and Carter suggest, “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 activities]. Hence, the prisoner abuse scandal can be seen as a form of ‘negative advertising’ that may have reshaped terrorist preferences toward more terrorism.”⁶⁶ In the same way, might the profiling of young Muslim men in New York City 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 counterterrorism 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. Tyler’s book *Why People Obey the Law* (1990), and his writings on procedural fairness and institutional legitimacy, including his essay *Trust and Democratic Governance* (1998), 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 Alone*—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.”⁶⁷ 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 of young Muslim men in the New York

⁶⁶ Anderton and Carter 2004:10.

⁶⁷ Tom Tyler, *Trust and Democratic Governance*, at page 289, in Braithwaite, Valerie and Margaret Levi (eds). *Trust and Governance*. New York: Russell Sage Foundation.

subways will likely 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 counterterrorism measures need to be evaluated closely. As Enders, Sandler, Faria, Tucker, and other counterterrorist experts emphasize, measures that raise the price of one and only one specific activity, such as airplane hijackings, are likely to produce troubling substitution effects; 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.⁶⁸ The optimal strategy to combat terrorism is to reduce terrorist resources across the board. It is for this reason that intelligence and proactive counterterrorism operations are generally viewed as a priority. As General Meir Dagan, former head of the Bureau for Counterterrorism in the Israeli prime minister's office, explains, "Investments in intelligence are invisible, whereas increased security is visible but often wasteful. The first priority must be placed on intelligence, then on counterterrorism operations, and finally on defense and protection."⁶⁹

Racial profiling as a defensive counterterrorism 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 New York City police department 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.

⁶⁸ Enders and Sandler 2002/4 at *10; Faria 2006; Tucker 2003.

⁶⁹ Tucker 2003: *2. Walter Enders and Todd Sandler seem to agree: "Governments must act to reduce the terrorists' resource endowments (i.e., 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 at *17.

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Readers with comments should address them to:

Professor Bernard E. Harcourt
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
harcourt@uchicago.edu

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