

## I. INTRODUCTION

1.1. Although, or perhaps because, racial profiling is a matter of great concern in the United States and elsewhere, there is little philosophical reflection on this subject.<sup>1</sup> The goal of this article is to delineate the shape of the moral debate about profiling. Our discussion rests on two

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1. There are exceptions: There is a debate started by Michael Levin, "Responses to Race Differences in Crime," *Journal of Social Philosophy* 23 (1992): 5–29, and Laurence Thomas, "Statistical Badness," *Journal of Social Philosophy* 23 (1992): 30–41, which includes Jonathan Adler, "Crime Rates by Race and Causal Relevance: A Response to Levin," *Journal of Social Philosophy* 24 (1993): 176–84; J. Angelo Corlette, "Racism and Affirmative Action," *Journal of Social Philosophy* 24 (1993): 163–75; Chana B. Cox, "On Michael Levin's 'Response to Race Differences in Crime,'" *Journal of Social Philosophy* 24 (1993): 155–60; and Louis Pojman, "Race and Crime: A Response to Michael Levin and Lawrence Thomas," *Journal of Social Philosophy* 24 (1993): 152–54; and a reply by Michael Levin, "Reply to Adler, Cox, and Corlett," *Journal of Social Philosophy* 25 (1994): 5–20. This discussion addresses response to black crime, rather than profiling in particular. Second, there are the contributions by David Wasserman, "Racial Generalizations and Police Discretion," in *Handled with Discretion: Ethical Issues in Police Decision Making*, ed. John Kleinig (New York: Rowman and Littlefield, 1996); Howard McGary, "Police Discretion and Discrimination," in Kleinig, pp. 131–44; and Arthur Applbaum, "Racial Generalizations, Police Discretion, and Bayesian Contractualism," in Kleinig, pp. 145–57. Legal scholarship is more extensive. See Samuel Gross and Debra Livingston, "Racial Profiling Under Attack," *Columbia Law Review* 102 (2002): 1413–38; and Peter Schuck, "A Case for Profiling," *The American Lawyer* January (2002): 59–61, for law-oriented views on moral concerns about profiling.

assumptions about the productivity of profiling in curbing crime. First, we posit that there is a significant correlation between membership in certain racial groups and the tendency to commit certain crimes. Second, we assume that given this tendency, police can curb crime if they stop, search, or investigate members of such groups differentially. That is, we assume that such measures eliminate more crime than do other measures for equivalent disruption and expenditures of resources.<sup>2</sup> If either of these assumptions fails, the question addressed in this article no longer arises. The moral problem posed by profiling arises only *if* measures that appear morally problematic when seen from other angles (such as racial equality) contribute to the provision of a public good as basic as security. Otherwise, racial profiling would be *obviously* illegitimate.

Arguments for profiling tend to be utilitarian, but it also has been argued that if *all* costs of profiling were acknowledged, utilitarian considerations would speak against profiling. Nonconsequentialist arguments tend to enter the debate by way of rights- and fairness-based

2. (1) For an empirical discussion of the correlation between membership in certain racial groups and the tendency to commit certain crimes, cf. Janet Lauritsen and Robert Sampson, "Minorities, Crime, and Criminal Justice," pp. 30–56 in *Oxford Handbook on Crime and Punishment*, ed. Michael Tonry (Oxford: Oxford University Press, 1998) and references therein. See also the appendix of Glenn Loury, *The Anatomy of Racial Inequality* (Cambridge, Mass.: Harvard University Press, 2002); the homepage of the U.S. Department of Justice; and the homepage of the Racial Profiling Data Collection Resource Center at Northeastern University at <http://www.racialprofilinganalysis.neu.edu/index.php>. (2) Our assumptions are, of course, controversial. For instance, the *Boston Globe*, Metro/Region section, p. 1, reported on January 6, 2003, that police officers in Massachusetts are far more likely to search the car of a black or Hispanic driver pulled over for a traffic violation than the car of a white driver, but that whites are more likely to face drug charges following such searches. Are the police better able to identify white offenders, or white drivers more likely to possess drugs? If statistics showed that white drivers were more likely to possess drugs, then, if profiling is to reduce crime, it should target whites. (3) Our second assumption does not simply follow from the first. For example, stopping and searching individuals may not be effective in preventing crime. Or, while race is correlated with forms of crime, much of its predictive value may be carried by other factors. So in this case the second assumption fails although the first holds. If so, profiling is pointless, and there is no moral justification for it. Conversely, the second assumption may apply, although the first is violated. This happens if criminals in Group X are more easily detected though they are no more common than those in Group Y. Our argument must be reconsidered under such situations, which we believe will be empirical exceptions. Much of our argument will then at least be much weaker. So we will indeed assume that both conditions hold.

*objections* to profiling. Our approach illuminates moral aspects of profiling from several widely held moral standpoints without engaging in any foundational debates about them.<sup>3</sup> If the recommendations of these standpoints differ, however, foundational considerations will be required to reach a verdict.

In a nutshell, our central points are these: First, in a range of plausible cases, the utilitarian argument (which depends on circumstances and draws on empirical considerations that may be hard to verify) supports police and security measures that make race a consideration in deciding whom to stop, search, or investigate. We propose a way in which utilitarians should think about relevant costs and benefits that will lead to this conclusion. Second, under conditions to be specified, the use of race in police tactics is neither unfair nor does it violate any moral rights. This argument comes with qualifications and its validity varies across racial groups (and across individuals and communities, as circumstances vary). Our goal is to show under which conditions non-consequentialist objections to profiling are, and are not, telling. The question “Do you support racial profiling?” has no answer that is both unqualified and philosophically defensible. While assessments of specific acts of profiling must proceed community by community and context by context—which limits what philosophical inquiry at the general level can accomplish—we hope our article invites more philosophical reflection on this subject.

Three issues are commonly conflated in the discussion of “racial profiling.” The first is the use of race as an information-carrier for investigative purposes; the second is police abuse; and the third is the “disproportionate” use of race in profiling (though we shall see that it is often hard to spell out what that means). Many or most discussions of profiling address the second and third issues, but pay little or no attention to distinctions between them.<sup>4</sup> We discuss these three issues, but

3. To keep this approach manageable, we only discuss the utilitarian stance and several nonconsequentialist considerations. We do not consider a welfare-egalitarian approach, a consequentialist approach conceiving of the good in terms other than well-being, or other approaches. While this leaves our account subject to revisions, we believe we have included at least the most salient viewpoints in this debate.

4. (1) An example is David Harris, “Driving While African-American: Racial Profiling on Our Nation’s Highways,” *American Civil Liberties Union Special Report*, 1999. The report is about “racial profiling,” but it discusses the second and third issues only. Obviously, these two issues constitute enormous problems. (For instance, David Harris, “The Stories, the

central conclusions take racial profiling to be the use of race as an information-carrier for investigations.

ii.2. Even though our argument supports profiling in a range of circumstances, it is consistent with support for far-reaching measures to decrease racial inequities and inequality. This may be surprising: some think that arguments in support of profiling can speak only to those who callously disregard the disadvantaged status of racial minorities.<sup>5</sup> Showing why this supposition is false is one task of our analysis. We do not think that our discussion of profiling bears directly on the permissi-

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Statistics, and the Law: Why 'Driving While African-American' Matters," *Minnesota Law Review* 84 (1999): 265–326, concludes: "It is virtually impossible to find African-American people who do not feel that they have experienced racial profiling.") Nevertheless, it is important to keep the relevant discussions apart. (2) Note that we are not concerned with the practice of "profiling" in general. Both our conceptual analysis and normative inquiry move at the less abstract level of *racial* profiling. Frederick Schauer's *Profiles, Probabilities, and Stereotypes* addresses the broader issues. (3) A reader suggested the distinction between "racial profiling as we know it," which is characterized by the three features distinguished above, and "racial profiling as it might be," which uses race for police purposes in ways that strike us as justifiable.

5. (1) Ira Glasser, "Speech: American Drug Laws: The New Jim Crow. The 1999 Edward C. Sobota Lecture," *Albany Law Review* 63 (2000): 703–24, compares profiling with Jim Crow and the internment of Japanese Americans during World War II. Cornel West, *Race Matters* (New York City: Beacon Press, 2001), p. xv, lists examples of lingering white supremacy, mentioning profiling alongside drug convictions and executions. Bill Clinton described racial profiling as a "morally indefensible, deeply corrosive practice" ("Clinton Order Targets Racial Profiling," Associated Press, June 9, 1999). (2) The relevant (and much debated) *constitutional* questions turn on the Fourth Amendment (banning "unreasonable searches and seizures") and the Equal Protection Clause of the Fourteenth Amendment. However, our concern is with moral issues, not constitutional interpretation. For legal issues, cf. Richard Banks, "Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse," *UCLA Law Review* 48 (2001): 1075–124; Sheri Lynn Johnson, "Race and the Decision to Detain a Subject," *Yale Law Journal* 93 (1983): 214–58; Tracey Maclin, "Race and the Fourth Amendment," *Vanderbilt Law Review* 51 (1998): 333–93; Kathryn K. Russell, "Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature," *Rutgers Race and Law Review* 3 (2001): 61–81; D. J. Sifton, "U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle," *Law and Inequality Journal* 20 (2002): 53–90; William J. Stuntz, "Terry and Legal Theory: Terry's Impossibility," *St. John's Law Review* 72 (1998): 1213–29; Anthony C. Thompson, "Stopping the Usual Suspects: Race and the Fourth Amendment," *New York University Law Review* 74 (1999): 956–1013; see also Jerome H. Skolnick and Abigail Caplovitz, "Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling," *Arizona Law Review* 43 (2001): 413–37. Some believe that the debate about profiling is *really* about the truth of the assumptions we are making at the beginning of the introduction. Yet there are three significant debates: the first is about the correlation between race, crime, and the effectiveness of profiling; the second about legal aspects; and the third about the moral aspects.

bility of the use of race in other areas (e.g., employment discrimination). Racial profiling is particular in two ways that make it hard to draw such conclusions: first, and most importantly, we are here concerned with a public good (security), and second, situations in which profiling will be used are those in which investigators must make quick decisions about (say) whom to search, or in which large numbers of people are involved; in most other areas a strong case will be available for using (much) additional information about individuals.

Section II identifies the defining characteristics of racial profiling. Section III elaborates the distinctions between profiling, police abuse, and the disproportionate use of race in screening. Such “stage-setting” is essential: there are no useful distinctions in place that we can enlist. Readers who have thought a great deal about profiling may wish to skim these sections. Section IV explores the utilitarian argument. While many people tend to think that utilitarian arguments support profiling, we begin by exploring a utilitarian argument against profiling and explore its limitations. Section V takes up nonconsequentialist arguments. Section VI outlines the argument that profiling may be in the interest of the African American community. While we endorse that argument only with qualifications, it bears importantly on our discussion of one non-consequentialist objection in Section V. Section VII concludes.

## II. DEFINING RACIAL PROFILING

II.1. The term *racial profiling*, which was introduced to criticize abusive police practices, carries connotations of illegitimacy.<sup>6</sup> Thus, to explore profiling without definitional bias, we must assess how to understand the practice, and how to keep it distinct from other issues. In a typical approach, Ramirez et al. define profiling as “any police-initiated action that relies on the race, ethnicity, or national origin, rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.”<sup>7</sup> This definition captures a pre-theoretical

6. Cf. Samuel Gross and David Livingston, “Racial Profiling Under Attack,” *Columbia Law Review* 102 (2002): 1413–38, p. 1426 (in particular n. 53).

7. D. Ramirez, J. McDevitt, and A. Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, Report prepared by Northeastern University with support by the U.S. Department of Justice, 2000.

notion many people have, and so we start with it. Our definition will differ from this one in a manner that facilitates normative inquiry.

Crucially, this definition *contrasts* (a) the use of race, ethnicity, or national origin with (b) the use of an individual's behavior or information that helps apprehend someone who has been identified as being, or having been, engaged in criminal activity. So profiling relies on (a) *rather than* (b). Including this contrast in the definition raises two problems. First, (a) mentions a feature of investigative methods, namely, the use of race, ethnicity, and so forth, whereas (b) mentions both a feature of investigative methods ("rely on information pertaining to individuals") and the goal of such investigations, apprehending criminals. Thus contrasting (a) and (b) suggests that profiling serves purposes *other than* apprehending criminals, imparting an aura of illegitimacy to profiling *by definition*. Second, writing that contrast into the definition suggests that *either* one uses race, ethnicity, and so on, *or* one uses specific information on suspicious activity, namely information about an individual's behavior or information that leads to an individual. Yet we would still need to talk about profiling if a combination of the two criteria, (a) and (b), motivated action. It would still be profiling if, for example, police stopped 40 percent of blacks but only 20 percent of whites exceeding a speed limit by 10 mph.

To steer around such concerns, we define racial profiling as "any police-initiated action that relies on the race, ethnicity, or national origin and not merely on the behavior of an individual."<sup>8</sup> We ask: Are such

8. Compare another definition of profiling: Richard Banks, "Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse," *UCLA Law Review* 48 (2001): 1077, defines racial profiling as follows: "[R]acial profiling constitutes the intentional consideration of race in a manner that disparately impacts certain racial minority groups, contributing to the disproportionate investigation, detention, and mistreatment of innocent members of those groups." Just like Ramirez et al., Banks defines profiling in a manner meant to solicit moral condemnation. Would Banks approve a racial profiling measure that only involved disproportionate investigation of certain groups of citizens? There is no way to know. Gross and Livingston, p. 1415, submit that "'racial profiling' occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime that the officer is investigating." Defining profiling by drawing on individual officers' beliefs is peculiar. What if officers disagree with official policies, but happen to implement them? It might be useful to distinguish between "racial profiling at the policy level," and "an individual police officer's being engaged in racial profiling." There can be the one without the other; we are interested in profiling at the policy level.

actions justified under circumstances that might plausibly arise? We believe they are, but our definition alone does not suggest this.

11.2. We need to specify the focus of our discussion with our definition of profiling in mind. Three paradigmatic cases of profiling help us proceed. The first paradigmatic case consists of measures employing race and ethnicity that seek to apprehend individuals who have committed specific crimes.<sup>9</sup> One example is the search for the Washington, D.C.-area sniper in 2002. The second includes racial, ethnic, or nationality screening at airports, widely discussed in the wake of the Al Qaeda terrorist attacks of September 11, 2001, at the World Trade Center, in Pennsylvania, and the Pentagon (9/11). In this case, profiling is not used to apprehend individuals who have committed specific crimes or who are likely soon to do so. Rather, it is used because there exists a salient threat (hijacking), and it is deemed excessively expensive to search all passengers. Screening is used as a routine measure to apprehend or deter individuals who may be planning the relevant crimes, and to reassure legitimate passengers. This setting is rather confined: such profiling applies only to people about to board a plane, and they are in a position to expect such measures. The third case involves investigations on highways that rely (in part) on racial criteria, with the goal of intercepting drug traffic, and investigation on streets with the goal of finding illegal weapons. In such cases, the search is not meant to apprehend individuals wanted for specific crimes just committed, nor is it part of a routine that everyone engaged in certain activities can expect. In contrast, such searches are disruptive and troubling, and individuals cannot integrate them into their routine.

These three paradigmatic cases differ in the extent to which a crime or a threat is immediate, the extent to which security measures can be expected, and the magnitude of the imposition. Profiling is more controversial the less immediacy there is to the crime or threat that prompts it, the less one can reasonably expect to be subject to such a measure, and the greater the burden the measure imposes.<sup>10</sup> Our argument mostly

9. Ramirez et al. and Gross and Livingston do not count such police actions as profiling.

10. Also, profiling is more controversial the less obvious it is that everybody searched is affected by the goal of the investigation, and the greater the magnitude of the possible harm; our cases do not make this clear.

addresses cases of the third, most controversial sort of profiling, such as highway searches. We explore to what extent profiling can be justified under appropriate conditions *even* in such cases. To the extent that it can, it will be justified a fortiori in other cases. Someone claiming that profiling is justified in the first or second but not in the third would need to argue for that determination. This article addresses the routine use of profiling for the prosecution, identification, and prevention of crimes.

### III. RACIAL PROFILING, POLICE ABUSE, and DISPROPORTIONATE SCREENING

III.1. To focus the discussion further, we address two subjects commonly conflated with profiling as we define it: police abuse and disproportionate screening of minorities. Profiling makes headlines mostly when coupled with excessive and abusive police behavior: rude words, demeaning demands, physical force, or physical injury. As a result, when profiling is debated, abuse usually plays a prominent role. The following widely cited cases are typical of the sort of case at the “rude or demeaning” end of the spectrum:<sup>11</sup>

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

“*Traveling in the wrong neighborhood.*” Police stop African Americans traveling through predominately white areas because the police believe that they do not “belong” there and may be engaged in criminal activity. This type of profiling was reported by Alvin Penn, the African American deputy president of the Connecticut State Senate. In 1996, a Trumbull, Connecticut, police officer stopped Penn as he drove through this predominately white town. After reviewing Penn’s

11. We take these examples from Ramirez et al., but all three are widely quoted. Cf. also Harris, “Driving While African-American,” for a long list of such cases.

license and registration, the officer asked Penn if he knew which town he was in. (Bridgeport, where African Americans and Latinos comprise 75 percent of the population, borders Trumbull, which is 98 percent white.) Penn asked why he needed to know this. The officer told him he was not required to give Penn a reason for the stop and that, if Penn made an issue of it, he would cite him for speeding.

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

The officers in the Wilkins and Penn cases were abusive, while Randolph’s is clearly extreme as far as the number of stops is concerned. While it is hard to obtain data quantifying the frequency and severity of abuse, police abuse must be rectified independently. The problem is urgent. Possible measures include continued training, intensified supervision (e.g., videotaping police–civilian encounters), and stiff punishment for abusers. Yet while attitudes toward profiling depend on the perception of how much abuse occurs, police abuse and profiling as we define it *are different problems* that must be assessed independently and that have different remedies.<sup>12</sup>

12. Some may argue that abuse and profiling are not independent. The following claims seem to us to be true, and justify our thesis that police abuse and profiling are independent issues: (1) If police abuse ceased to occur, profiling would still be an effective means to reduce crime, but would also still be in need of justification. (2) If no profiling occurred, abuse would still persist. Claims (1) and (2) are consistent with the following claims: (3) Racial profiling plays some causal role in the occurrence of abuse. (For example, both minorities and police are “repeat players”; they encounter each other frequently and thus their interactions are shaped by sentiments acquired in past encounters.) (4) Police abuse may help stimulate some of the activities that profiling is intending to reduce. (The perception of the police as a hostile force may increase one’s willingness to commit certain crimes.) (5) Some police officers practice profiling as a form of harassment, and thus profiling brings about situations in which abuse becomes possible to begin with. We do not take a view on whether, or how often, (3), (4), and (5) are true.

III.2. The “disproportionate” investigation of minorities also tends to be conflated with profiling. Two ideas of proportionality are relevant: proportionality vis-à-vis the goals of the investigation, and proportionality as fairness. In the first, a group will be investigated disproportionately if its members are screened more (or less) than is useful for the investigation. In the second, investigation will be disproportionate if fairness, say, in the distribution of burdens, is violated. Profiling ignites indignation since it affects minorities “disproportionately,” but it is not always clear which sense of proportionality is meant.<sup>13</sup>

When discussing the disproportionate screening of minorities, we mean the sense of proportionality relative to the goal of the investigation. Individuals have a legitimate complaint if profiling occurs in a manner disproportionate to those goals. Yet it is often hard to say what counts as disproportionate in that sense. One reasonable goal is to pursue the strategy that catches the most criminals per individual screened. Say eyewitness testimony suggests that there is a 60 percent chance that a crime was committed by an African American man, and African American males make up 25 percent of the population; one should then inspect *only* African American males, and *mutatis mutandis* for other scenarios. The reason is that an African American male is  $2.4 = 60\% / 25\%$  times as likely to be guilty as a person selected at random.<sup>14</sup> Suppose we know that 10 percent of a group of individuals engages in an illegal activity, but only 5 percent of the population at large does so. Targeting all inspections to the high-risk group, as opposed to the general population, doubles the number of criminals caught per inspection made.<sup>15</sup>

13. Banks, for instance, introduces disproportionality into the definition of profiling, suggesting that “racial profiling constitutes the intentional consideration of race in a manner that disparately impacts certain racial minority groups, contributing to the disproportionate investigation, detention, and mistreatment of innocent members of those groups.” It is unclear which sense of “disproportionate” Banks has in mind.

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

15. Critics often do not think of disproportionately vis-à-vis the goals of the investigation when complaining that minorities are affected disproportionately by such measures. Proportionality *as fairness* appears in Section V, when we discuss nonconsequentialist objections to profiling. One idea of proportionality motivated by fairness is that, should members of a group G commit, say, 40 percent of the relevant crimes, 40 percent of the searches be targeted towards members of G. The discussion beginning in the next

However, even if we are concerned only with efficiency, this “target-the-most-likely” strategy fails. Deterrence is also a concern. If the police investigated only the most likely perpetrators, others (“unlikelies”) would get a “free crime.” For instance, in implementing antiterrorism measures, we cannot merely inspect the most likely group, since terrorists would redouble efforts to recruit people from untargeted groups. (Recall the “shoe-bomber.”) The efficient screening procedure—the optimal mix across groups, and thus the one that involves proportionate screening in the sense intended—takes into account deterrence, the likelihood that members of different groups have engaged or will engage in criminal activities, and the import of nondemographic indicators of criminal activity. (Some complications arise because people can be grouped in cross-cutting ways.) The screening of individuals from all groups, albeit with different probabilities, also indicates that we are not subjecting specific groups to actions we would not impose on others. Only the *frequency* of the actions differs.<sup>16</sup>

The considerations that determine the meaning of “disproportionate” are complex. Since security is a concern, resources are limited, and each disruption is a cost, search probabilities must attend to the relative risk ratio for different groups. The relative risk ratio is the likelihood that a random member of one group committed a (the) crime, as opposed to a random person in other groups. In looking at risk ratios, one must also consider the context and correct the rates. For example, black-on-black crime or victimless crime (using drugs) may be a significant component

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paragraph shows why this suggestion does not capture an idea of proportionality vis-à-vis the goals of the investigation. The same is true for the proposal that, if 40 percent of the inhabitants of a certain area belong to G, then 40 percent of the searches would have to be of them; the proposal that each perpetrator should have an equal likelihood of being apprehended; and the proposal that, for each racial group, each innocent person must have an equal likelihood of being left alone.

16. The dangers of over-reliance on race are illustrated by the recent experience with the Washington, D.C.-area sniper in fall 2002, where on the basis of past experience with serial killers, the authorities judged that the perpetrator was a white man working alone. The two African American perpetrators, who worked together, are believed to have passed through roadblocks despite incriminating evidence in their car. That is, excessive attention to demographic profiles led the police to discard useful information. In routine uses of profiling for intercepting drug traffic or seizing illegal weapons, for example, indicators beyond race and gender are telling. A Caucasian American talking to a Colombian drug dealer on the street at midnight is more likely to be involved in drug trade than a random Colombian immigrant engaged in the same activity.

of differential crime rates for blacks, but these crimes are irrelevant to the potential for profiling in predominantly white communities. Risk ratios there should be calculated using differential crime rates for blacks and whites who appear in those communities. (See VI.2 on this issue.) At any rate, this risk ratio should be but one of a number of considerations.<sup>17</sup>

One implication is that it is difficult to establish what constitutes proportionate search. Complaints that certain groups are investigated “disproportionately” are hard to assess. Yet such complaints cannot be brushed aside. Disproportionate screening must be condemned even if one endorses the use of race in investigations. What remains to be explored is the morally permissible use of race in police investigations.<sup>18</sup>

III.3. We conclude these conceptual sections with two remarks. First, it is sometimes said that many African Americans do time for crimes that should not be crimes to begin with, such as “victimless” drug offenses. Screening African Americans differentially compounds the error. However, the question of whether drugs should be legalized is a separate matter. We are interested in the legitimacy of profiling if certain minorities are more likely to commit certain crimes that society takes seriously. If certain drugs are legalized and membership in minorities

17. The evidence that is to be considered for assessing profiling is highly contextual: a black person cruising in a completely white area may give more reason for suspicion, other things being equal, than one in a mixed middle-income neighborhood, just as a white person cruising in a black ghetto is more likely than a black or white elsewhere to be up to no good. A helpful contribution in this context is J. N. Knowles, N. Persico, and P. Todd, “Racial Bias in Motor Vehicle Searches: Theory and Evidence,” *Journal of Political Economy* 109 (2001): 203–29.

18. One other fairness-related worry about profiling (that we endorse) is that it should be consistently practiced across the board, other things being equal. It is illegitimate for a jurisdiction to apply profiling when it targets only minorities, but not when the priority targets would be mostly whites. For instance, one practice that some jurisdictions find useful for crime reduction is to stop African American drivers in neighborhoods where few or no African Americans live. But that jurisdiction may also have good reason to stop whites in African American areas because (say) they are likely to be looking for drugs, or to keep an eye on any young people driving around in a retirement community. Police should be *seen* to apply profiling even-handedly. Even in cases in which some acts of profiling are acceptable by themselves (noncomparatively), there will be a legitimate complaint otherwise (from a comparative viewpoint). In addition, everybody must be informed about the reasoning behind profiling. In particular, everybody (most urgently members of the targeted groups) should understand that being investigated for membership in a group correlated with crime does not mean being a suspect.

is not correlated with other criminal activity, our question no longer arises.<sup>19</sup>

Second, it is sometimes argued that there is a moral difference between using race as one of many criteria for profiling and using it as the only criterion. At any rate, the use of race as one of several criteria strikes many as more innocuous than using it as the only criterion. It is tempting to dismiss this: for in both cases race is being used to narrow down a group, except that in the first case that group is “all individuals (say, within a certain jurisdiction),” whereas in the second case it is “all individuals who also meet other criteria.” However, this temptation must be resisted in light of what Shelly Kagan calls the *additive fallacy* and what Frances Kamm calls the *principle of contextual interaction*.<sup>20</sup> Kagan and Kamm warn us that moral factors may play different roles in different contexts, and may contribute to moral assessments in ways that turn on other factors respectively present. Thus they caution us to resist the inference from the claim that the use of some factor (race) is problematic in a context in which it appears by itself, to the claim that *therefore* the use of this factor is still problematic if other factors are present. Still, the use of race in conjunction with other factors requires justification; and this is so although it does not simply follow from the fact that the use of race in isolation poses a problem. Using race as the *only* criterion would be absurd. For it would mean investigating people who on different grounds are likely to be innocent while not investigating others whose characteristics make them much more likely to be guilty. Factors other than race will almost always be helpful.

#### IV. THE UTILITARIAN STANCE

iv.1. From now on, we will talk about racial profiling in the sense defined in II.1, and with the understanding that police abuse is a pressing problem that must be addressed on its own, and that screening of minorities beyond the level useful to the goals of the investigation is

19. Some believe the question of which crimes “society takes seriously” may be a racist matter: it is because of irrational fear of black violence and black-led moral decay that police spend so much effort on fighting “black” crimes. We find it hard to assess this claim, but if it is true it would complicate things.

20. Shelly Kagan, “The Additive Fallacy,” *Ethics* 99 (1988): 5–31. Frances Kamm, “Harming, Not Aiding, and Positive Rights,” *Philosophy & Public Affairs* 15 (1986): 3–32.

illegitimate. We now explore arguments in support of and against profiling. The case for profiling tends to be utilitarian (or otherwise consequentialist), whereas nonconsequentialist considerations enter mostly as objections. We deal with such objections in Section V, and explore the utilitarian case in this section.

The utilitarian argument for racial profiling assumes certain crimes are committed disproportionately by certain racial groups. Hence special efforts at crime reduction directed at members of such groups are justified, if not required. Randall Kennedy provides a useful starting point for exploring the utilitarian stance.<sup>21</sup> Kennedy embraces that stance, but disputes that it justifies profiling. He argues that a critical category of costs has been omitted: the feeling of resentment among minorities, the sense of hurt, and the increasing loss of trust in the police. Once these costs are incorporated, Kennedy claims, a utilitarian argument *against* profiling emerges. Yet Kennedy himself does not take into account an important feature of the calculation of welfare, one that complicates the utilitarian analysis. We agree that from a utilitarian viewpoint one must consider costs like the feeling of resentment, sense of hurt, and loss of trust among minority group members. But profiling seems to have such effects only against the background of a society that minorities *already* perceive as racist. While profiling causes inconvenience and other harm, sometimes considerable, the primary contributor to resentment, hurt, and loss of trust is likely to be underlying racism or underlying socioeconomic disadvantages, rather than profiling as such.

If so, utilitarian considerations must factor in the *incremental* harm inflicted by profiling as such. This will be small if most of the overall level of harm that seems to be caused by profiling is plausibly ascribed to underlying causes. We submit then, that in a range of plausible cases, utilitarian considerations support racial profiling. Spelling out that view is the goal of this section. We should point out, however, that this section can merely suggest a certain way of thinking about the utilitarian stance in this debate. Two facts will become clear as we go along: first, that the utilitarian case turns on factual and counterfactual claims that are hard

21. Randall Kennedy, "Suspect Policy: Racial Profiling Usually Isn't Racist. It Can Help Stop Crime. And It Should be Abolished," *The New Republic*: September 13 & 20, 1999, p. 30, in turn, is based on Randall Kennedy, *Race, Crime, and the Law* (New York: Vintage Books, 1997), in particular ch. 4, pp. 136–67.

to verify; and second, that utilitarian justifications in particular illustrate that investigations of profiling will have to proceed community by community and context by context.

In assessing the kinds of harm caused by profiling, we follow Kennedy: the damage done seems to us well captured in terms of a feeling of resentment, sense of hurt, and loss of trust in law enforcement. What kinds of resentment might be involved here? First, individuals may feel resentment because they are profiled on a characteristic that partly constitutes their identity. Resentment in such cases is motivated by emotions ranging from shame to indignation: reactions to the fact that part of what one is first and foremost has come under suspicion. Second, people may feel resentment because they are treated in terms of a group-membership at the exclusion of their other characteristics, thus not as they deserve. The extent to which one feels the first kind of resentment, and also its nature (whether it is based on shame or, say, moral indignation) depends on society's regard for the characteristic that caused one to become a target of profiling, and on why one thinks one "really" is targeted. For the core of this kind of resentment is that society as such, or its legal institutions, are perceived as questioning the worthiness of one's identity. The second form of resentment, however, depends not at all on why one is targeted, or on how society regards one's salient characteristics. All that matters is that one is not treated as an individual.

This section aims to ascribe much of the harm ostensibly done by profiling to underlying systematic racism rather than the acts of profiling. Clearly, however, this view cannot hold true for the second type of resentment, in which one resents being treated in terms of membership in a group. That sort of harm must be attached to profiling *per se*. Yet this form of resentment can often be eased straightforwardly.<sup>22</sup> Once people understand why it makes sense to treat them in terms of one of their characteristics, acquiescence is likely, although perhaps with some

22. Consider the case of higher car insurance rights for young drivers. They could complain that it is not their fault that they are presently in a certain age range and that this fact should not mean that they pay high insurance rates. In response, one could point to the overall higher accident risk that young people carry, and in addition, that everybody goes through this age range and will later be in a position to benefit from lower rates. It seems that once this is explained, acquiescence can reasonably be expected. Gender presents an interesting case. In some jurisdictions, such as Massachusetts, rates are not permitted to be based on gender, although young males have much higher accident rates than young females.

residue of the original resentment. The more important form of resentment for our purposes is the first, in which one resents being profiled for a characteristic that partly constitutes one's identity. The accompanying sense of hurt and loss of trust in law enforcement are self-explanatory.

iv.2. We are making two claims: First, the harm caused by profiling per se is largely due to underlying racism. That is, acts of profiling are harmful because they make concrete and real the fact of some people's unjustly inferior social standing; they *express* the underlying injustice of racism. Second, the incremental harm done by profiling often factors into utilitarian considerations in such way as to support profiling.

To motivate the first claim, consider two thought experiments. In the first scenario, imagine the closest possible world to U.S. society except that there is no racism. Race-caused disparities in economic or educational attainment do not exist, and practices such as race-related police abuse are unknown. In such a society, we conjecture, using race for investigative purposes would not be considered offensive and would not trigger resentment, hurt, or loss of trust in law enforcement. Consider also a possible world that differs from ours in that racial profiling has been effectively banned. Ours could become such a world following, say, a sweeping Supreme Court ruling outlawing racial profiling. As a result, the levels of resentment, hurt, and loss of trust among minority group members, we conjecture, would *not* be significantly lowered. Simply stopping the practice of profiling would do little to change society's underlying racism and thus little to alter the *attitudes* that lead to police abuse and also promote various forms of racism in other segments of life.

These thought experiments suggest that acts of profiling viewed as encounters of a disadvantaged minority with representatives of institutions that are perceived to be responsible to a large degree for that disadvantaged status are harmful largely because they bring to the fore resentment connected to those institutions and their practices. Put differently, the harm attached to profiling per se is *expressive*. Since it is crucial for our purposes, we explore this notion of expressive harm in more detail. To fix ideas, we say that the harm attached to a practice or an event is "expressive" if it occurs primarily because of harm attached to *other* practices or events. We now illustrate that notion with some examples.

The harm caused by torture is not expressive: torture is painful regardless of other practices in place. The pain inflicted by torture is not expressive of anything; neither is the imposition of a prison term or a fine, or the dismissal of employees for misconduct. Even were a minority member tortured, the primary loss would likely be the torture, not the highlighting of racism in society. The harm done to women by pornography could be regarded as expressive—it is harmful because women are often regarded as mere sex objects, which leads to all sorts of practices constituting women's inferior status in society—although this is bound to be a controversial claim. The harm done to Holocaust survivors when Neo-Nazis march through their neighborhood is expressive. Such harm is caused even if the Nazis do nothing beyond march in uniform. There would be little harm caused by their marching anywhere had the Nazi movement been condemned to insignificance in the 1920s.

Or suppose a university is run largely by administrators sympathetic to professional school faculties. If during sessions of the faculty senate, raised hands of arts and sciences faculties get called on less frequently, the harm done would be expressive. To return to the racial context in the United States, expressive harm is sometimes incurred even if race plays no role in the relevant actions. Suppose a person is seeking credit in a poorly organized department store. It takes forty-five minutes to process an application. While a white person is likely to see incompetence, an African American, sensitive to disparate treatment, may conclude that the slow response was due to her race. Racism elsewhere makes the forty-five-minute wait, unrelated to race, an expressive harm.

As our illustrations show, harm may be expressive if an event or practice is a *reminder* of other painful events or practices, as with the Nazis marching through a Jewish community, or if one event or practice becomes a *focal point* for events or practices, a symbol of structural disadvantage or maltreatment. In addition to whatever harm the practice itself causes, the focal point becomes associated with harm attached to such disadvantage, and that harm plausibly accounts for the lion's share of the harm associated with that practice. When a harm is principally expressive, it may be unclear whether it is because it is a reminder or because it is a focal point (cf. pornography).

iv.3. Our first claim, then, is that profiling is harmful largely in an expressive manner, specifically, because it serves as a focal point for the racial

injustices of society. (It is not merely a reminder of racism.) The resentment it triggers can be traced largely to the underlying racism of which acts of profiling become the focal point. The same is true for the sense of hurt and the loss of trust in law enforcement.<sup>23</sup> This does not mean that the harm caused by racial profiling can be *disregarded*. However, it does affect how the harm caused by racial profiling should be integrated into utilitarian calculations (on which more shortly). We offered the thought experiments in IV.2 by way of giving one argument for this claim. Another way of arguing for our claim is by assessing parallel cases in which people are treated in terms of one of their characteristics.

For instance, men between the ages of fifteen and forty commit a disproportionate share of violent crimes. Thus screening them (at the expense of controls on elderly women) is often justifiable. Hardly anyone (including those men) finds such measures offensive. No hurt is connected to membership in that group. Similarly, the white community did not object to the disproportionate attention given to whites—mistakenly in retrospect—in the search for the Washington, D.C.-area sniper in 2002. As another example, Ben Gurion Airport employs strict screening mechanisms for visitors exiting Israel. Security personnel decide in interviews whom to search. One criterion that tends to trigger a search is the visitor's having spent time in Arab areas. Again, it seems that this measure is not offensive, given the security problems emerging from such areas. (This comparison is relevant only as long as we talk about tourists: if we are talking about Arabs, it becomes question-begging.)

Consider another case that makes our point. More crimes are committed in summer. Thus it is reasonable to have more police patrols in July and August, targeting people who are disproportionately out and about then. Examples of this sort abound. To be sure, these are not, strictly speaking, cases of profiling as defined in Section II. Still, they make the same point: treating people differently in accordance with some of their ostensible characteristics (in this case whether they are out disproportionately in July and August) often does no harm beyond the inconvenience. Harm is greater only if the characteristic for which a person is targeted is *independently associated* with (and thus makes such

23. If this claim is correct, it helps us understand why whites frequently have trouble understanding why in particular blacks object so vehemently to racial profiling; blacks grow up in a society that they perceive as racist, and profiling is a focal point of this racism; whites usually view profiling in isolation.

targeting a focal point of) the harm brought to the fore by the relevant action (say, a search). So indeed, such treatment itself, especially profiling, is not the primary cause of the feeling of resentment and sense of hurt among minorities and the loss of trust in the police that it triggers. This strikes us as true even when profiling serves as the single most important practice expressive of underlying racism.

iv.4. If we are correct, what must enter the cost–benefit assessment of racial profiling is the *incremental* increase in harm those acts impose, not the overall level of harm ostensibly associated with them. So what utilitarians must assess is whether the incremental increase in harm caused by profiling as such, rather than the overall amount that comes to the fore in acts of profiling but is largely caused by underlying racism, outweighs the advantages of crime reduction. We argue next that the harm done by profiling per se is comparatively modest, in that the costs may well be outweighed by its benefits in reducing crime and attendant benefits that it brings, such as economic activity in a community.

One kind of harm that must be integrated into the calculation of incremental damage is the second kind of resentment introduced in IV.1, that is, resentment caused by being treated as a member of a group, not as an individual. Generally, we must calculate this incremental damage taking as given current practices of society (such as racism and racial disparities). While this is difficult to do, our argument for the first claim provides by itself some basis to think that the incremental costs of profiling are not too great. The primary evidence in support of our second claim is parallel scenarios and thought experiments as suggested in IV.2 and IV.3. For instance, suppose we live in a world of racism, race disparities (often perceived as racism even if they are not due to that), and profiling. (This could be a description of our world.) Then imagine how much better-off, say, African Americans would be if we just got rid of profiling, *keeping everything else fixed*. We think that the answer is “only slightly so.”<sup>24</sup>

It should be clear that the utilitarian approach to profiling depends on empirical questions that are hard to answer (such as, “How precisely

24. We believe that the harms of racism and profiling may be subadditive, just as the harms of different forms of racism may be. In a world where blacks are discriminated against in schooling and jobs, are they made much better off if only one of the forms of discrimination is removed?

should one assess the incremental harm caused by profiling as such?). It is also complicated by the fact that many different considerations contribute to overall social welfare (e.g., “How does one compare gains in safety with the harm caused by profiling?”). We think that the incremental harm done by racial profiling is modest, whereas most harm is done by underlying racism. We have offered some considerations in support of this claim. At the same time, however, we find it hard to see how to provide conclusive evidence for this claim (or its negation), so our argument leaves an empirical gap.

Crucially, for utilitarians to support profiling, benefits must outweigh costs more than alternatives do.<sup>25</sup> To the extent that race is clearly useful to curb crime, the point of view developed in this section justifies the costs of profiling in at least some controversial contexts. However, we find it hard to assess how broad the range of cases is in which utilitarian considerations support profiling. As a rule of thumb (which applies only while remaining mindful of the *complications arising from assessing the harm involved*), these cases are those in which, plausibly, the use of race is sufficiently beneficial to curbing crime that the incremental effects of racial profiling, the incremental expressive harm caused by acts of profiling, are outweighed. For instance, our utilitarian argument might support searches for contraband in certain neighborhoods with the aid of profiling. It seems less plausible that drug searches on the New Jersey Turnpike will be supported. The prospects of diminishing drug traffic by intercepting cars on major highways seem slim—too slim to outweigh its incremental effects on minority sentiments.<sup>26</sup>

iv.5. We now consider objections. To begin, one may object that we need a more textured analysis recognizing heterogeneity among African Americans. We agree: depending on factors such as socioeconomic status, profiling affects different people differently. Like individuals,

25. We have not discussed any considerations of deterrence: but those will only support the utilitarian case. (On deterrence, cf. also Sec. VI.)

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

communities will be heterogeneous in the benefits and costs profiling produces. For successful African Americans (like Randolph in III.1) profiling makes concrete their inferior standing on account of racism, despite their accomplishments. Yet lower class targets of profiling may find it one of many acts that demean them on a daily basis, and arguments could be made either way on which group incurs larger costs. This point reminds us that justifications of profiling must be local, but does not affect our account of the utilitarian stance.

Second, one may object that a utilitarian argument supports profiling only if its benefits outweigh its costs by more than available alternatives. This objection emphasizes the need to investigate our assumptions that profiling eliminates more crime than other measures for equivalent expenditures. Our assumption that profiling is effective only holds when profiling effectively utilizes readily accessible information about individuals, in particular their race, in circumstances when investigators must decide quickly, say, whom to search, or under which only fairly few of all possible “targets” can be searched. An alternative would use race to such a small extent that it makes no sense to speak of “profiling.” Such an alternative would, under the assumed conditions, have a considerable disadvantage vis-à-vis profiling for utilitarians. But again, utilitarians endorse any alternatives that do better. (This argument is unaffected by the fact that race and ethnicity will not in each case be *obvious*.)

Finally, we consider an objection to our claim that the primary cause of the damage done by profiling is underlying racism or race-related socioeconomic disadvantage. One might object that the harms of racism are caused by the accumulation of many practices, none of which is “fundamental” or “underlying.” Some practices have to do with economic opportunity and inequality. Others have to do with subtle kinds of disrespect at work and in public that have been called “second-generation discrimination.” A third kind of racism is discrimination by public institutions: an important example would be profiling. The African American “finds that the most prominent reminder of his second-class citizenship are the police.”<sup>27</sup> The thrust of this objection is to argue that

27. Quote taken from Kennedy, p. 152. Kennedy quotes here an essay written by African American police officer Don Jackson, who moved about in Long Beach, California, after dark and without the protection of his uniform. A camera team followed him and filmed the ensuing unpleasant encounters with the police. He later wrote an essay about his experiences as a victim of racially selective police practices.

we are mistaken in thinking of profiling merely as an epiphenomenon of those practices that constitute racial discrimination; instead, profiling partly, and perhaps even largely, constitutes the racist reality of the United States.

Yet our argument seems to succeed regardless of whether one thinks of profiling as an epiphenomenon or takes it to be a practice that (partly) constitutes racial discrimination. The crucial point remains that profiling *all by itself* does not cause the preponderance of the harm naïve calculation would lead people to think it causes. The same considerations apply to the description of the role of profiling urged by this objection. The difference is merely whether one talks about “the *other* practices that constitute racial discrimination,” or “the *underlying* practices of racial discrimination.” We submit that *it would be too easy to think about the removal of racial discrimination in terms of stopping racial profiling*. Deeper-reaching measures are needed to resolve such injustice. Plausibly, the disproportionate tendency of minorities to engage in criminal activity is, to some extent, a symptom of discrimination. But the appropriate response is to remove the causes of those symptoms, rather than to stop taking such symptoms as the statistical indicators they are.<sup>28</sup>

28. (1) Consider two other objections at this point: First, is this not a cynical view that does not find anything wrong with placing a certain burden on minorities and, by way of justifying this, actually appeals to the fact that minorities (here in particular African Americans) are burdened by racism already? Our response is that this objection makes a caricature of the view we defend. Our point is that racial profiling (again, minus police abuse and disproportionate use of race in police tactics) can in certain cases be justified on utilitarian grounds as a means in police tactics *even* in a racist society, and that it would be too easy to think that racism can be removed by depriving the police of a useful means of crime fighting (in those circumstances in which that is true). This view is consistent with any number of measures that try to make society as such less racist (many of which we support, but that is irrelevant to the argument). A second and related objection wonders whether one cannot justify any racist practice by arguing that it is merely expressive and that changes must occur elsewhere. Yet this objection overlooks that racial profiling (again, minus the two other phenomena) is not “just any racist practice,” but a practice that, under certain circumstances, plays a useful role in police tactics and thus has a certain value for society as a whole. A similar characterization will simply not be available for practices such as disproportionately screening African Americans for certain genetic diseases. (2) One reader has objected that the case of Arabs after 9/11 shows this reasoning to be problematic. For this group, although racism and cultural prejudice were evident before 9/11, the introduction of profiling of various sorts might, and, the objector suggests, did, have a huge incremental effect, transforming a latent and not very bothersome (because not much expressed) racism into something like full-blown social stigmatization. However, we find

## V. NONCONSEQUENTIALIST ARGUMENTS

v.1. Having completed our investigation of the utilitarian stance, we must now investigate whether objections to profiling can be made in terms of rights or fairness. If they can, then racial profiling may after all be illegitimate even when utilitarian considerations support it; or at least this will be so from the point of view of those who do not disregard rights- and fairness-based considerations. To begin with, we ask whether profiling is pejorative discrimination, and then whether it unfairly burdens minorities. Our investigation is not concerned with foundational questions about, say, rights, and thus will inevitably beg such questions, and we may not exhaust the spectrum of nonconsequentialist objections to profiling. Yet we believe that the arguments we explore are the central nonconsequentialist objections to profiling, and that our article offers resources to address additional objections. Our goal is to formulate conditions under which the use of race as such is unobjectionable on nonconsequentialist grounds.

If profiling violates moral rights, it is plausible to think that such violations occur because it is discriminatory in the pejorative sense. To fix ideas, we take pejorative discrimination to be differential treatment among groups (e.g., based on gender, race or sexual orientation) with either the intention or the effect of maintaining or establishing an *oppressive relationship* among such groups. Alternatively, it can be any other relationship that keeps some groups in disadvantaged status (or relegates them to such a status) by denying them access to offices, positions, public services, and so on, in accordance with criteria that are otherwise applied. In that sense, “separate but equal” facilities were discriminatory; so was a college admissions policy employing geographical criteria to restrict the number of Jews, and so was the exclusion of women from many occupations for which gender was irrelevant. Yet affirmative action in higher education is not pejorative discrimination, nor is denying positions of influence to uneducated or unintelligent people.

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it hard to assess that case relative to that of African Americans. It seems to us that the crucial difference is not so much that we have, say, African Americans in the one and Arabs in the other scenario, but that 9/11 was such a traumatic experience for the American public that invariably all subsequent developments connected to it will be hard to compare to other scenarios. We do not think that this comparison has implications that undermine our discussion above.

While we consider this a working definition rather than a fully considered account, it should do for our purposes.<sup>29</sup>

So is profiling pejorative discrimination? If profiling is indeed pejorative discrimination, it will plausibly be because it contributes to an oppressive relationship, rather than because it involves a relationship denying access, as described above. Hence we focus on the former. One might say that, even if one distinguishes among police abuse, the disproportionate use of race, and the use of race as such, and even if the policy maker's intent was innocuous, profiling negatively affects minorities and is thus discriminatory. This follows the argument that the use of race in police tactics maintains a social reality that should be overcome. Yet we do not agree that racial profiling constitutes pejorative discrimination. For a practice to count as such discrimination, it must either intend to or de facto contribute to an oppressive relationship, as stated by the definition. Therefore, profiling will not be pejorative discrimination if neither the relevant intent nor the factual contribution to oppression occurs. If indeed racial profiling is used only with the goal of curbing crime, we do not have the relevant sort of intent. Needless to say, individual officers might use profiling with the malicious purpose to harass or harm individuals or groups. Or policy makers may have legitimate (and publicly announced) reasons to adopt profiling, but their motivations to adopt the measure may differ nefariously from what they proclaim. Despite such possibilities, if the intent of the relevant policy makers or otherwise responsible agents is not to bring about or maintain an oppressive relationship, the intent-condition required for pejorative discrimination does not hold.

If in addition, if profiling does not de facto contribute to the maintenance of an oppressive relationship, we will have shown that racial profiling is not pejorative discrimination. For this we can now borrow from Section IV: the harm caused by the use of race as such, as we argue there, is most appropriately characterized as expressive harm, a form of harm that is itself parasitic on an underlying oppressive relationship that is

29. For more discussion of pejorative discrimination, cf. Lawrence Blum *"I'm Not a Racist, But . . ."* (Ithaca: Cornell University Press, 2002), ch. 4, pp. 78–97, and John Hasnas, "Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination," *Fordham Law Review* 71 (2002): 423–542. This definition compels us in some cases to say that, although pejorative discrimination was operative when certain policies were set up, they need not be changed if the policy's effects are not discriminatory. This seems acceptable.

independently present in society. And while indeed this sort of harm would not arise were it not for that underlying oppressive relationship, *the use of race as such, as opposed to abusive policing and disproportionate use of race*, crucially, does not contribute to that oppressive relationship.<sup>30</sup> (“Disproportionate use” meaning “more than is valuable in reducing crime.”) Thus, all by itself, the use of race does not amount to pejorative discrimination.<sup>31</sup>

v.2. The concept of discrimination is amorphous, and thus we must address someone who disagrees with our assessment. Suppose profiling *were* pejorative discrimination. Are there competing considerations that overturn the conclusion that profiling is wrong? It is tempting to argue that individuals have a right to security, but they also have a right not to be exposed to pejorative discrimination. If these rights conflict, they must be balanced against each other, and this can only be done on consequentialist grounds. If profiling helps to reduce crime, while contributing little to the harms of discrimination, profiling will be justified even if it is discrimination.

But this argument falsely assumes that neither right has priority. A core idea of many nonconsequentialist positions is that innocent, non-threatening persons have a right not to be attacked, and everyone has a duty to refrain from attacking them.<sup>32</sup> Yet that is different from saying

30. Note that the point about the kind of harm caused by racial profiling that we are using here is not that it is smaller than many think (“incremental harm”), but that its nature is expressive.

31. (1) One may suggest that an alternative way of arguing for the claim that racial profiling is not pejorative discrimination is to argue that it is justified independently, as a way of contributing to the provision of a very elementary public good (safety). Yet while we agree that such an argument is in principle possible, it would require a slightly different notion of pejorative discrimination. As we define it, a practice is not automatically exempt from being pejorative discrimination if it can be shown that that practice can be independently justified, not even if that independent justification involves reference to an elementary public good such as safety. (2) Recall that in Section IV, we said that the harm caused by racial profiling was “largely” expressive. The inconvenience imposed by the acts of profiling is the small complementary harm. That harm also is not pejorative discrimination, since it does not foster an oppressive relationship.

32. This claim comes with qualifications tied to well-known debates among nonconsequentialists: whether there is a moral difference between doing and letting happen, between intending and foreseeing, and how to allow any degree of aggregation in deontological accounts. Cf. Frances Kamm, “Non-Consequentialism,” in *The Blackwell Guide to Ethical Theory*, ed. Hugh LaFollette (Oxford: Blackwell, 2000), pp. 205–27, for an overview. What counts as an attack must be assessed, too. Our argument will not benefit from discussing such complexities.

that such persons have a right to government prevention from attack by others. If the government merely fails to protect its citizens, it does not violate their rights not to be attacked. But if it pejoratively discriminates against them, it attacks them, or does something relevantly similar, and thus violates their rights. Thus refraining from discrimination, as an instance of refraining from attacking innocents, is a constraint on promoting security, rather than a factor to be balanced against it. So if profiling is discrimination, the right not to be exposed to profiling will be stronger than the right to be protected from crime. Thus if profiling is discrimination in the pejorative sense (as we argue it is not), nonconsequentialists have a strong reason to reject it.

v.3. Yet nonconsequentialists may worry about profiling even if it is not discriminatory. For there are ways to harm people other than discriminating against them. In particular, even if profiling is not discrimination, it requires some to contribute more than others to the provision of security, a public good that all desire. Such disparities require a justification. By way of providing one, note first that it is not uncommon that public goods are provided in ways that burden people unequally. For example, it is in the public interest for airports to have adequate capacity, but the disruption, noise, and decrease in property value from new runways falls only on those who live nearby; securing adequate tax revenues is brought about by taxing higher incomes more and auditing people in some modes of employment more than others; students and the elderly are charged less for some activities; and those who drive on toll roads pay but not those who drive on byways (although all benefit from the fact that toll roads are available for quicker transportation).

Burdens are also distributed unequally in the provision of security. Where a draft is imposed, it is frequently imposed only on young men, although the whole population is protected; and for many nations, border regions bear more military burdens than interior areas. Not everyone is in a position to contribute as much to the realization of a public good as others. (The expression "to be in a position" covers many different cases.) Protecting health bears parallels to security. To stop venereal diseases from spreading, U.S. officials used to trace the contacts of infected people. Today, they impose severely on contagious tubercular patients because those individuals' self-interested behavior might promote the spread of the disease. If worst comes to worst, the patients

are quarantined. Behavior benefiting the public is imposed on the afflicted individuals because that is the only way to protect the population against tuberculosis.

Differential burdens in the production of public goods may be efficient and fairly common, but desirability and efficiency alone do not justify them. To mention an extreme example, if scientists can find a cure for cancer by killing someone with a distinctive genetic makeup, it would be wrong to do so. Similarly, it seems wrong to impose different punishments for the same offenses, other things being equal, depending on the culprit's neighborhood, thereby targeting neighborhoods where more deterrence would be desirable. Still, there are conditions under which it seems reasonable to impose differential burdens. To see this, consider a sketchy account of a society characterized by reasonable social harmony, or Functioning Reciprocity:

*Functioning Reciprocity:* Differential burdens are imposed if five conditions are met: (1) It is required by the nature of the public good. (2) The imposition occurs through a suitable democratic process that gives proper weight to the interests of all involved. (3) The social importance of the good is widely acknowledged. (4) State interference with individual lives entailed by the imposition of differential burdens is within the limits of what citizens can reasonably be expected to bear, in particular, the imposition of the good does not involve the violation of widely acknowledged rights of individuals. (5) It is widely acknowledged that, similarly, differential burdens are imposed on others for other public goods as well, and that this differential imposition of burdens for different goods works, by and large, to society's advantage, although it may not work to every individual's advantage.

In a society like this (with details to be filled in), a draft can be justified under suitable conditions, as could the differential imposition of burdens for health care, as could profiling.<sup>33</sup> If Functioning Reciprocity

33. At this stage, we encounter questions about the foundations of rights, the scope and limit of state power, and so on, questions that go beyond what we can address here. But even without filling in such details, it seems fair to say that this idea of a society characterized by Functioning Reciprocity, properly expanded, provides resources to justify the imposition of differential burdens in a broad range of cases without allowing for extreme cases such as the two just mentioned above, or aberrations such as police abuse.

holds, individuals have no reasonable complaints if they are affected by the imposition of differential burdens in the provision of public goods although they may never have explicitly agreed to that practice, and although they themselves may not prove to benefit overall. For instance, a drafted soldier in such a society seems to have no legitimate complaint even if the system does not benefit *him*. Such a society has done all it can be expected to do to distribute burdens and benefits fairly. At the same time, this society must remain functional and thus will be unable to distribute burdens according to individuals' circumstances, but instead must be organized around policies that often impose on individuals in terms of their characteristics.

Suppose now we live in a society characterized by less harmony than envisaged by Functioning Reciprocity. That is, suppose the following: First, it is not widely accepted that differential imposition of burdens works to society's advantage. Second, the supply of some good, whose significance is widely acknowledged, entails imposing differential burdens. The nature of the good may determine which groups are especially burdened,<sup>34</sup> or it might be extremely inefficient or impracticable to provide it in a manner that imposes equal burdens. Third, suppose that what requires justification is only the unequal imposition, whereas no (other) rights violations occur. Fourth, suppose a group that would carry an unequal burden is publicly (or can reasonably be supposed to be) opposed to carrying such a burden.<sup>35</sup>

We submit that a sufficient condition for imposing unequal burdens under these circumstances is that those burdened more are net beneficiaries from that public good. If the unequal imposition of a burden is counterbalanced by a net benefit that the relevant group gains, the *unequal* burden is not *undue*. Since we are now assuming a society in

34. The qualification in parentheses is important: if it does not lie in the nature of the good in question that some groups are particularly equipped to provide it, but for some reason we must still impose differential burdens, the first sufficient condition we are about to propose would decidedly not hold any more.

35. Once again we are omitting details and setting aside foundational questions. We ask the reader to complete the construction of this society in such a manner that what requires justification is indeed the unequal imposition of a burden in pursuit of a public good, and not anything else. We think this can be done, but filling in more details would be tedious. In particular, we are assuming that the relevant society is a broadly decent society, so that questions about how these considerations would fare under extreme circumstances (such as life and death cases) do not arise, or can be side-stepped.

which the unequal impositions of burdens is not commonly acknowledged to be advantageous across groups, the imposition of unequal burdens for one specific good should be justified in terms of *that* good alone. This is because we cannot now reason that the burdened group will “recover” by carrying lesser burdens for other goods. Hence, we require a sufficient condition, formulated in terms of that good alone, that justifies the imposition against the opposition of those affected. The net-benefit criterion fits the description under the assumptions.<sup>36</sup> We do not require that the unequally burdened group benefit *more than other groups*. Yet if not, that group may ask for additional benefits from those that benefit more, especially if we are talking about a minority carrying an unequal burden for a good benefiting the majority more than it itself benefits.

The use of race in police tactics has the potential to be justified along such lines, with the good in question being security. What remains to be shown is that the affected minorities are indeed net beneficiaries. We will so argue in Section VI, with important qualifications delineating the limits of this argument. To the extent that the argument succeeds, it refutes the objection from the unfair imposition of burdens.

There is, however, another sufficient condition that (under the same circumstances) may justify the imposition of an unequal burden for the

36. (1) To make more precise what does the work: We are claiming: (a) the fact that the more burdened group is a net beneficiary overrules (b) the opposition of that group to the imposition of that burden, given that (c) the good is a public good that one can reasonably expect is widely desired, that (d) providing the good in a manner that imposes equal burdens would be enormously inefficient or impracticable, that (e) the group that is especially burdened is also in an especially good position to provide that good, and that (f) only the unequal burden must be justified (no other issues arise). Obviously, each of these conditions is vague and thus leaves us open to such questions as “What if the opposition is really fierce?” or “What precisely is meant by ‘enormously inefficient’ or ‘impracticable?’” While disputes will remain, we believe that, for wide range of ways of filling in details, our reasoning goes through. (2) Suppose there is another, equally effective way of providing the good in question that is more expensive all things considered, but is less burdensome to the group asked to carry the extra burden. Our sense is that, in such a case, our criterion still works. This will be true in particular if the good in question is of a rather basic nature, such as security. In this case, the nature and importance of the good justifies the imposition in the first place, and it seems, then, that it is indeed sufficient for unilateral imposition that the party so affected is a net beneficiary. However, the magnitudes matter here, and so we are offering this answer with some reservation (“What if that other method is really much better for that group, but only slightly worse all things considered from the point of view of society as a whole?”). Like our discussion in VI.3, this point turns on general issues about nonconsequentialist aggregation.

provision of a public good although those affected object. This condition is to award everyone screened but not arrested appropriate compensation for the inconvenience. This mechanism seeks to spread the burden across all citizens (at least those in a certain area): some are burdened by being screened, others by paying funds to support the compensation fund. The provision of money allows individuals targeted by profiling to view the burdened as shared. Such payments cannot make up for police abuse, which attacks the dignity of citizens. Yet it seems that intrusion of the sort entailed by the use of race as such can be so treated. At any rate, pragmatic and other considerations affect the attractiveness of the compensation-solution, so our best hope is the first sufficient condition, and, again, we will complete the discussion of that condition in Section VI.<sup>37</sup>

v.4. We have investigated two nonconsequentialist objections (“profiling is discrimination” and “profiling imposes unfair burdens”), but there may be others. Our argument is subject to elaboration if other objections emerge. Yet our discussion (including Sections II and III) offers resources to address new objections, in particular claims that profiling violates other rights. At any rate, the two objections discussed here strike us as the strongest nonconsequentialist objections, and they can be addressed successfully. The use of race as such is not pejorative discrimination, and the unequal imposition of burdens is justifiable if the party so burdened benefits on net or is appropriately compensated.

Since each of these reasons is sufficient, the use of race in police tactics is justifiable even if only one of them applies. So what emerges from our discussion in this section in combination with our discussion in Section VI is that the use of race in police tactics can be justified if:

37. Presumably the transaction costs (e.g., recording payment and preventing fraud) would not make this procedure too expensive. Some additional questions arise, however: should there be compensation unless someone is arrested, or unless someone is convicted? Could it lead to corruption? Could it provide incentives for people to try to get stopped? In addition, there is the objection that such compensation could be seen as insulting: if police work is done properly, subjecting oneself to police measures should be a civic duty. More discussion is needed. It may not be possible, without much bureaucratic effort, to make this compensation fair in each case, but the compensation system should work in such a way that compensation is fair *on average*. (A similar case would be an airline that gives people \$100 if a plane is delayed a certain while; on average, this might be fair even if some people are damaged to a larger extent. A compensation system could be implemented for air travel, although this would increase ticket prices.)

(a) the use of race is sufficiently beneficial for police purposes to justify the incremental imposition of negative consequences on those targeted; and if in addition (b) under the same circumstances a unilateral imposition of burdens can be justified because it is either nondiscriminatory or, on net, appropriately compensated. At least this is the picture that emerges if one is not committed to champion either utilitarian (or otherwise consequentialist) considerations or rights- or fairness-based considerations at the exclusion of the other. If consequentialist and nonconsequentialist considerations conflict, we are led to foundational questions about which considerations are more important morally, or for public policy. These issues transcend what we can do here, and also are not specific to profiling.

We conclude this section with two remarks. First, the fact that African Americans remain disadvantaged in the United States is a strong impetus to adopt policies to change this situation. Possible measures range from race-blind programs that de facto differentially help African Americans (e.g., Head Start), to affirmative action programs, to reparations for African Americans. Regardless of how one feels about these measures, *any* of them is consistent with our argument that profiling does not constitute discrimination and does not impose unfair burdens. This is worth emphasizing, since there is a perception that no form of profiling can be justified from any other than a racist (or callous) point of view.

Our second remark addresses an objection. One might argue that when concerns about security and concerns about imposing unequal burdens conflict, measures must be taken to *resolve* the conflict, instead of imposing the contested unequal burdens. For instance, in the airport scenario, we should search everyone.<sup>38</sup> That measure would be expensive; many agents would be required or passengers would spend substantial time through security, or both. But this sort of measure is what it takes to work toward a just society. In response, note that the airport scenario is special. To begin, targeted groups of passengers can observe that many nontargeted passengers are subject to the same action.

38. Kennedy, *Race, Crime, and the Law*, p. 161, makes this proposal. However, if we adopt this proposal because some carry an undue burden of the costs of security by virtue of their race, this point still holds true once the new proposal is implemented. For it would mean searching people whose race is a good indicator of innocence. Apart from raising fairness concerns of its own, such measures might also lead to resentment.

Practical considerations matter. There are comparatively few candidates for search at airports, as opposed to, say, all individuals traveling on a highway. Moreover, one can announce airport measures in advance and prepare passengers for the inconvenience. Finally, high security prior to boarding a plane is easy to justify to passengers since 9/11 and the “shoe-bomber” incident. (There were no hijackings in the United States in many years prior to 9/11, so inspections did not seem to make sense.) These ameliorating factors do not apply to investigations on highways or neighborhood streets. “Searching everyone” is not an option outside confined scenarios, and cannot be the guiding maxim of routine police and security measures aimed at crime reduction. For such scenarios, all the objector can ask is a mitigation, rather than a resolution, of the relevant conflict.

The search-everyone proposal strikes us as wrongheaded. One who is unwilling to be guided by racial or ethnic indicators in reducing crime must allocate significantly more resources, say,  $X$  more, to achieve the same level of security. Such resources, it seems to us, are better spent on eradicating underlying racism rather than on measures that ignore its symptoms. If only a portion of  $X$  were spent this way, the outcome would still be superior for African Americans.<sup>39</sup> That is so especially since, as we saw in Section IV, the harm inflicted by profiling as such is comparatively low.

## VI. THE SELF-INTEREST ARGUMENT

VI.1. We now explore the argument that profiling may be in the interest of the targeted community. We concentrate on the African American community, but similar arguments may apply to other cases. One may think that discussing this argument is in bad taste, yet historically, much police racism took the form of *under-enforcement*, ignoring black-on-black crime. At any rate, this argument is part of the debate, and is worthy of serious consideration, although we will endorse it only with considerable qualifications.

39. Consider a pragmatic consideration that is not part of the argument of this section: The extra expenditure may come about indirectly. If the African American crime rate is reduced, the majority population may be more sympathetic and generous to the disadvantaged.

The argument starts with two observations. First, most crimes committed *by* African Americans are committed *against* African Americans. Second, young male African Americans commit a disproportionate share of such crimes against older African Americans. These observations lead to a twofold argument in support of profiling. First, it is in the interest of the African American community that crime-reduction efforts concentrate on that community. Second, crime fighting targeted at primarily young African Americans can be viewed as a contract between generations. This contract imposes sacrifices on the innocent young primarily to benefit their elders, yielding lifetime benefits to all, at least statistically.<sup>40</sup> A thought experiment may be helpful. Suppose the whole world were African American, with the current U.S. crime statistics. Would profiling by age and gender be justified? If so, that suggests that profiling in the real world may be in the interest of the African American community.

The need for deterrence strengthens the argument. If individuals know they are targeted more than average by police measures, they will be disproportionately deterred from becoming criminals. This decreases the need for profiling in the future. African American communities would incur short-term costs while benefiting in the long run.<sup>41</sup> African American parents, looking to the welfare of their children, might support deterrents, particularly if they live in an environment where incentives to engage in criminal activity are high.<sup>42</sup> Parents may be of two minds, rejecting profiling in principle, but favoring it if it deters their child (and others) from crime.

Externalities in criminal behavior reinforce arguments for parents, or at-risk children, to welcome deterrence. A is more likely to engage in crime if his peer B does. Consider a game where individuals have two options: go “straight” or be “criminal.” Members of the peer group have

40. See crime reports for confirmation of these claims: <http://www.ojp.usdoj.gov/bjs/homicide/race.htm>. Such a generational contract burdens men more than women. Also, young men with a penchant for crime would not benefit from this arrangement. We do not think that these points undermine our argument. We assume that the amount to which African American crime affects African Americans is not so overwhelming that such crime is a problem internal to the their community.

41. That the majority community benefits alongside does not weaken this argument. It does suggest that in return for profiling, more might be extracted from the majority.

42. Reverse causality could apply: If society gives individuals strong signals that it thinks they are criminals, they might become inclined to act like criminals.

similar options. There are two equilibria in pure strategies: If one’s peer becomes criminal, one should follow suit. If he stays straight, one should be law abiding as well. The (straight, straight) equilibrium is superior, but we might end up at (criminal, criminal), with few prospects for escape from a crime-promoting environment. External enforcement mechanisms, such as profiling, could lower the payoffs for (criminal, criminal), making that equilibrium less attractive and less likely. If the mechanisms are sufficiently effective, (criminal, criminal) will cease to be an equilibrium: the deterrent effect of crime fighting becomes high enough to make it desirable for an individual to stay straight even if his peer does not.<sup>43</sup> Plausibly, in a neighborhood where, say, teenage boys tend to join gangs, *everyone* might prefer that no gangs existed. External enforcement, like profiling, may be needed to assure this result.

vi.2. This argument from self-interest encounters two problems. First, suppose that the best case that profiling is in the interest of blacks is that it would reduce crime in their own neighborhoods. Some such police activity, though disproportionately affecting blacks, would not be profiling, for example if neighborhood-specific information suffices to direct

43. Captured by game matrices, the situation looks as follows (where members of the peer group are treated as a single individual, for simplicity’s sake):

**Ineffective Crime Fighting**

		Other Player(s)	
		Straight	Criminal (Gang)
Individual	Straight	10,10	4,6
	Criminal (Gang)	6,4	8,8

**Effective Crime Fighting**

		Other Player(s)	
		Straight	Criminal (Gang)
Individual	Straight	10,10	4,1
	Criminal (Gang)	1,4	2,2

police activity, and if racial or ethnic information becomes entirely (or largely) superfluous.<sup>44</sup> Yet this will be the case only for racially homogeneous neighborhoods (or heterogeneous neighborhoods in which crime rates happen not to differ across races<sup>45</sup>) that are largely isolated from the outside world. In these cases profiling provides no benefit since race carries no information. But neighborhoods are rarely isolated to such an extent. Criminals are mobile, and many crimes (e.g., drug trafficking) derive from geographically expansive networks, implying that the neighborhood-safety argument still supports profiling outside racially homogeneous neighborhoods. Needless to say, it must be carefully pondered for precisely which purposes race or ethnicity does indeed carry useful information.

The second objection is that many African Americans have no enthusiasm for the self-interest argument. Profiling entails measures executed by an establishment that historically has been responsible for much of the African American plight. Also, it is directed at crimes African Americans are more likely to commit at least partly because of this history.<sup>46</sup> Since police abuse and profiling are often perceived as one problem, African Americans reject profiling. The officers' motivations are also suspect; few are strongly moved by the interests of the African American community.

So while an argument can be made that effective crime fighting measures imposing special burdens on African Americans are to their advantage, African American communities themselves have good reason to oppose such measures. The likelihood that their communities would reject the self-interest argument restricts its usefulness in support of profiling. To justify profiling because it helps African Americans, *despite their rejection*, we would have to enlist paternalistic arguments,

44. The targeting of a neighborhood could be profiling if race, not merely crime rates, influences targeting.

45. Suppose group X commits more crimes than Y, where neighborhoods vary in ethnic composition, but in each neighborhood the tendency to crime is the same across groups. Example: Neighborhood 1 has a 10 percent share of criminals across groups, 80 members of X, and 20 members of Y. Neighborhood 2 has a 50 percent share across groups, 20 members of X and 80 members of Y. So members of Y are more likely to be criminals (42 percent vs. 18 percent), but if the neighborhoods are isolated, group-based profiling will be pointless.

46. Yet in light of the amount of black-on-black crime, it might not be clear what the African American community wants.

a course we do not wish to pursue.<sup>47</sup> To draw on self-interest to support profiling without raising such worries, measures must be taken to secure democratic endorsement of profiling by the affected communities. This would include steps to reduce police abuse, and would require a sustained dialogue to assess other community concerns.<sup>48</sup>

However, even if self-interest alone does not justify profiling, appeals to self-interest are useful for two purposes. First, holding the view that African Americans are an oppressed minority, one might argue that they need not comply with the state's police measures.<sup>49</sup> This claim is defeated by the self-interest argument. The self-interest argument, in conjunction with concerns about how crimes committed by African Americans affect other communities, defeats arguments justifying noncompliance. Second, and more importantly for our purposes, the self-interest argument completes our response to the objection that profiling unfairly imposes burdens (cf. V.3). We suggested that it would be wrong to say that minorities bear an unfair burden in the provision of security *if* they benefited on net from such profiling. The argument developed here suggests that this is so, at least for the African American community.

VI.3. However, there are two complications with this suggestion, and these complications delineate the limits of our response to the objection from the unequal imposition of burden. To express the first, let us revisit Elmo Randolph, the frequently stopped dentist from III.1. Suppose no abuse had been involved in his case, so that his only complaint is against the sheer frequency of stops. It seems the self-interest argument cannot justify this imposition on him. For conceivably, there is no plausible story to tell according to which these stops are to *his* benefit (or to the

47. Expressed views may not be the predominant attitudes in the community. African Americans supporting profiling are likely to be criticized, given that costs of profiling are seen directly but benefits can only be inferred. Self-censoring may be the result.

48. Brandon Garrett, "Remedying Racial Profiling," *Columbia Human Rights Law Review* 33 (2001): 41–148, reports on cases where community groups were successfully integrated into police work.

49. Cf. Michael Walzer, "The Obligations of Oppressed Minorities," in *Obligations: Essays on Disobedience, War, and Citizenship*, ed. Michael Walzer (Cambridge, Mass.: Harvard University Press, 1970), pp. 46–70, on compliance of oppressed majorities; cf. ch. 10 of Bernard Boxill, *African-Americans and Social Justice* (Lanham: Rowman and Littlefield, 1992), pp. 205–25, for civil disobedience and racial justice.

benefit of blacks living in *his* neighborhood).<sup>50</sup> More generally, we have developed the argument as if the relevant minorities were homogenous groups such that self-interest considerations apply to each individual with equal strength; they do not.

Are there conditions under which unequal burdens can be justified to people who do not plausibly benefit on net? It seems there are. Recall that, in V.3, we merely required that the group carrying such a burden actually gain a net benefit from that imposition. Under such circumstances, self-interest justifies the imposition. However, to justify the unequal burden to people like Randolph, the benchmark must be higher. We must require a *strong urgency* of imposing crime-fighting measures that include racial profiling.

To illustrate a situation of strong urgency, suppose we have a highly crime-ridden black neighborhood, where young men are enticed into a life in crime and where legitimate economic activity has withered. Moreover, the neighborhood's criminals spill their activities to other locales. Suppose also, as we do throughout, that profiling in those out-of-neighborhood locales would be a more effective crime-fighting tactic than alternatives entailing the same expenditures. It would then seem reasonable to ask African Americans just passing through those locales (e.g., predominantly white areas) such as Randolph, to bear the extra burden. People like him would be in an unfortunate situation (his own situation being both *unusual* and *unusually unfortunate*, since *ex post*, after stops are made, he happens to be affected strongly by measures whose justification will be *ex ante*, based on expectations of numbers of stops), but they would not be treated unfairly. Under specific circumstances, it will require a judgment call to assess what benchmark to apply. Yet these considerations suggest that there are indeed plausible

50. We said in V.3 that under Functioning Reciprocity, a drafted soldier would have no complaint against the draft even if he personally did not (by and large) benefit from social arrangements. For such a society does just about all it can to make sure assignments of burdens and benefits are fair. Under such circumstances, a complaint would be about the fact that burdens and benefits are assigned according to general principles whose enforcement must remain feasible (since society must remain functional) rather than by considering each individual's circumstances. Such a complaint could not be reasonable, given the sheer pragmatic constraints on the organization of society. However, we live in a society characterized by less harmony than envisaged by Functioning Reciprocity. Under such circumstances, Randolph does have a complaint against the uneven imposition of burdens, even if other members of the African American community do not.

circumstances in which the imposition of the extra burden on people like Randolph can be justified.<sup>51</sup>

The second concern is that our discussion in V.3 was at the general level whereas Section VI spoke about the African American community. So the discussion in V.3 has been completed *only* for that community. The differential screening of Arabs for security purposes cannot be justified along the same lines: it is hard to see how exposing them to special

51. (1) To further illustrate the notion of strong urgency, suppose we had information that a terrorist group had smuggled a nuclear bomb into some relatively small area of upper Manhattan. It seems that under such circumstances we would find it morally acceptable to set aside usual constraints on what counts as a reasonable search, and the criteria (e.g., ethnic identity) on which we might prioritize the search. While there are obviously important differences between this scenario and the profiling scenario, such examples should suggest that this notion operates quite intuitively in a broad range of cases. (2) The background to this discussion in VI.3 is the discussion about how nonconsequentialists can acknowledge aggregation. Being a nonconsequentialist means being committed to *not merely* evaluating actions in terms of their consequences, but it does not mean that one must refrain from including aggregation of any sort. For discussion of this point, see Kamm, "Non-Consequentialism," sec. VIII, and Thomas Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), ch. 5.9; but see also David Wasserman and Alan Strudler, "Can a Nonconsequentialist Count Lives?" *Philosophy & Public Affairs* 31 (2003): 71–94, for the view that attempts to integrate aggregation into nonconsequentialist frameworks have so far failed. Note that, if a condition of sufficiently strong urgency is acknowledged as making impositions reasonable that otherwise would not be, then it seems that otherwise unreasonable impositions might also be justified if a few are burdened to benefit the many significantly; the nature of the imposition must not be too severe. (Recall that we have argued in Section IV that the imposition of profiling as such would in many cases not be "too severe.") Note also that endorsing the view that nonconsequentialists need to make room for some forms of aggregation does not imply that just any kind of harm can be weighed against any other kind. In particular, suggesting that conditions of strong urgency (or sufficiently small numbers of people who are negatively affected by the measure) justify profiling as a crime-fighting measure under conditions where it otherwise would not be justified does not require that we endorse any measures that jeopardize some people's lives for the aggregatively greater benefit of a larger number of people, each of whom benefits only marginally. Note finally that we are in no position to offer a full-fledged theory of nonconsequentialist aggregation that would give appropriate theoretical grounding to our claims here. Exploring possibilities for the creation of such a theory is an ongoing challenge, particularly since many, if not most, nonconsequentialists acknowledge the need for some modes of aggregation. (3) To address cases like Randolph's specifically, one might also consider less intrusive procedures, such as the introduction of devices that keep track of whether somebody has already been "checked" (cf. end of Section VII). (4) One may also object to the argument of this section as follows: It seems that the fact that a person benefits is discounted when we consider imposing a burden *for his own benefit* (i.e., this benefit is dismissed by paternalism considerations). However, the fact that a person benefits is not discounted when we need to justify a burden that also benefits others. Such a distinction seems unjustifiable. However, this objection

scrutiny would benefit them disproportionately.<sup>52</sup> Different considerations apply to different communities. Some will have a legitimate complaint about unequal burdens, whereas others will not.

## VII. CONCLUSION

We live in an imperfect world, where police abuse and the disproportionate use of race in police tactics persist. This analysis sought to delineate the shape of the moral debate in such a world. We consider both utilitarian and nonconsequentialist stances, and identify the circumstances where profiling is and is not permissible under either. The thrust of our utilitarian argument is that profiling is an expressive harm in a race-conscious society, but the incremental injury profiling imposes beyond such wrongs as police abuse and racial discrimination is small. Our nonconsequentialist results, which are more intricate, are summarized in the first paragraph of V.4. We subsequently develop the argument that profiling may be in the self-interest of African Americans.

Important lingering questions remain. Might there be less objectionable alternatives to profiling, which accomplish the same ends? If Elmo Randolph could post an electronic card on his vehicle that showed he had been checked previously, that information, which would make him low priority for stopping, could be scanned remotely by the police. Thus, even where profiling might be justified, less harmful measures should be sought.

Someday, when police abuse is ended and disproportionate screening of minorities has ceased, profiling will be moot as a moral issue. But

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rests on a wrong premise: In both cases we count the imposition as a problem that requires justification, and in both cases we count the fact that somebody benefits as a point in favor of the imposition. In this respect, the situations are symmetrical. However, the symmetry is broken because in the one case other people's benefits are at stake, and it would be a "sufficiently large" benefit for them that justifies the imposition (as explained in the text). By contrast, if only the imposed-upon individual benefits, a nonpaternalistic stance keeps us from making the unwanted imposition. There are no other people whose benefits could overrule the individual's wishes.

52. Absent other considerations we are unaware of, Arabs still have the complaint that the reference to self-interest, which in our view could justify profiling for African Americans, does not work for them. A roundabout self-interest argument could be made, assuming Arabs were more prone to hijacking. By accepting screening, they reduce the likelihood of a future Arab-hijacking incident, which would bring great pain to the Arab community.

for today, we must recognize that profiling disrupts the lives of African Americans. Our argument that profiling might be justified, in both utilitarian and nonconsequentialist approaches, requires that other people would have a complaint if we did not strive strongly to reduce crime, including its lure to children. These harms are perceived on an uneven scale. Those hurt by profiling are readily identified; those protected by measures that fight crime are statistical figures. But to the extent that such people are protected, and numerous, arguments in support of profiling gain strength.