

# CRIMINAL JUSTICE

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# ETHICS

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# What's Wrong with Racial Profiling? Another Look at the Problem

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According to Mathias Risse and Richard Zeckhauser, racial profiling can be justified in a society, such as the contemporary United States, where the legacy of slavery and segregation is found in lesser but, nonetheless, troubling forms of racial inequality.<sup>1</sup> Racial profiling, Risse and Zeckhauser recognize, is often marked by police abuse and the harassment of racial minorities and by the disproportionate use of race in profiling. These, on their view, are unjustified. But, they contend, this does not mean that all forms of racial profiling are unjustified; nor, they claim, need one be indifferent to the harms of racism in order to justify racial profiling. In fact, one of the aims of their paper is to show that racial profiling, suitably understood, "is consistent with support for far-reaching measures to decrease racial inequities and inequality."<sup>2</sup> Hence, one of their most striking claims, in an original and provocative paper, is that one can endorse racial profiling without being in any way indifferent to the disadvantaged status of racial minorities.

In an initial response to these claims, I argued that Risse and Zeckhauser tend to underestimate the harms

of racial profiling.<sup>3</sup> I suggested two main reasons why they did so. The first is that they tend to identify the more serious harms associated with profiling with background racism, and therefore to believe that these are not properly attributable to profiling itself. The second reason is that they ignore the ways in which background racism makes even relatively minor harms harder to bear and to justify than would otherwise be the case. Hence, I concluded, racial profiling cannot be a normal part of police practice in a society still struggling with racism, although under very special conditions and with special regulation and compensation in place, it might be justified as an extraordinary police measure.

I want to stand by those claims. However, Risse's response to my arguments persuades me that I misinterpreted his earlier position in one significant respect.<sup>4</sup> So I will start by explaining what interpretive mistake I believe that I made. I will then argue that despite Risse's patient and careful response to my arguments, my initial concerns with his justification of profiling remain valid.

## Some Terminology

Before getting under way, however, it might be helpful to recapitulate some terminology. The first is about racial profiling. I am happy to accept Risse and Zeckhauser's definition of it as "any police-initiated action that relies on the race, ethnicity, or national origin and not merely on the behavior of an individual."<sup>5</sup> As they say, there are several different forms of profiling, so described. The

two main ones are what I will call *post-crime profiling* and *prospective* or *preventive* profiling. It is the latter that is the most controversial, and that is the focus of both our papers. Whereas post-crime profiling departs from a witness's description, however vague, of a suspect who has actually committed a crime, preventive profiling creates a profile based on statistical evidence of who is likely to commit a crime, and then uses this to initiate police stops and searches. Its aims, therefore, are to prevent crime—if possible by catching criminals before they are actually able to carry out their nefarious plans.

This form of profiling is controversial because we generally suppose that the police are entitled to stop

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and search only people whose behavior supports the belief that they have committed, or are about to commit, a crime. The preemptive aspects of profiling seem to threaten that principle, and thus to justify what, in American constitutional jargon, would be called "a warrantless search."<sup>6</sup> In addition to these general worries about prospective profiling, however, there are worries specific to racial profiling. Those worries, quite simply, are that profiling based on racial characteristics (as popularly understood),<sup>7</sup> exacerbates racism in society, and is likely to lead to the abuse and harassment of racial minorities.

Risse and Zeckhauser note that there would be no controversy over racial profiling were it not a useful way to combat crime. Statistics suggest that black people commit a disproportionate number of crimes in our societies.<sup>8</sup> So, although there are reasons for supposing that racial profiling is unjustified—given general problems with profiling, and those specific to racial profiling itself—it is *not* clear that it is always unjustified, because it might reduce serious threats to people's lives, liberties, and property. At all events, as Risse and Zeckhauser note, though these assumptions are controversial, it is only *if* there are

significant race-based disparities in crime, and *if* there is some reason to think racial profiling an effective way to tackle these, that there is any reason to consider whether or not such profiling is justified.<sup>9</sup>

The second piece of terminology is the definition of an expressive harm. According to Risse and Zeckhauser, the harms of racial profiling are largely expressive. We can call this the Expressive Harm Thesis. Applied to racial profiling, the Expressive Harm Thesis holds that the bulk of the harms of racial profiling are not due to profiling *per se*, but to the context in which that profiling occurs: namely, a context in which racism and its legacy continue to disadvantage black people relative to white.<sup>10</sup> The harms of racial profiling, then, are largely attributable to background racism/racial inequality, according to the Expressive Harm Thesis, and *not* to racial profiling itself. The Expressive Harm Thesis is a causal thesis, which claims that the harms of profiling are generally caused by factors other than racial profiling. Its implication is that the harms peculiar to racial profiling are smaller than one might have supposed and, consequently, that it may be easier to justify racial profiling than one might have expected.<sup>11</sup>

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## My Mistake

Now, my mistake was to suppose that the purpose of the Expressive Harm Thesis was not simply to help us to identify the harms specific to racial profiling—as we obviously have to do if we are to consider whether or not they are justified—but was also supposed to distance racial profiling from racism. In separating out the harms of profiling into those attributable to profiling itself, and those attributable to background racism, I had thought that Risse and Zeckhauser were implying, and meant to imply, that racial profiling was not itself racist. Consequently, I assumed that it would be an objection to their arguments if one could show that racial profiling was, quite plausibly, an example of racist ideas and habits. So, I set out to show why one might think that racial profiling was a form of racism, and how looking at it this way helped to explain why—as I also argued—such profiling was as likely to *exacerbate*, as to *reflect*, any background racism in society.<sup>12</sup>

As Risse says, I was wrong to suppose that their justification of profiling depended on drawing a sharp line between racial profiling on the one hand, and racism on the other.<sup>13</sup> Indeed, as Risse notes, I had unfortunately

overlooked the significance of a passage in which they had tried to make precisely this point.<sup>14</sup> Thus, according to Risse and Zeckhauser, *even if* racial profiling is itself a form of racism, indeed, even if it "partly, and perhaps even largely, constitutes the racist reality of the United States,"<sup>15</sup> it is possible that its harms are expressive—that is, due to forms of background racism unrelated to racial profiling itself.<sup>16</sup>

This, presumably, is how Risse and Zeckhauser want us to think about any problems of police abuse, on the one hand, or the disproportionate use of race in policing, on the other—although they never explicitly say that we should think of these as examples of expressive harm.<sup>17</sup> Both may well reflect background racism in society, rather than just the idiosyncratic proclivities of certain policemen. But even if there is a systemic quality to police abuse and to the use of race, Risse and Zeckhauser imply, it does not follow that racial profiling is unjustified, even though it will then be likely that police abuse and the misuse of race in policing will infect racial profiling. These systematic harms, if they were to occur, would be the result of background racism, and

not harms specific to profiling. One can, therefore, support racial profiling while deplored police abuse and supporting training, supervision, and punishment in order to combat the latter. My mistake, then, was to suppose that Risse and Zeckhauser's justification of profiling turned on the assumption that racial profiling is not, itself, an expression of racist habits of thought and police practice. It does not: because how far one divides up the different harms of profiling into expressive and profiling-specific categories is not resolved by deciding whether or not profiling itself is a form of racism.

Now, at the risk of compounding my error, I would like to say that this mistake was, in some ways, a natural one. That is, it is an easy mistake to make once you bear in mind Risse and Zeckhauser's ambition to justify racial profiling while showing due concern about racial inequalities and injustice. It is an important aspect of their argument that their justification of racial profiling is consistent with support for affirmative action and significant efforts to alleviate racial injustice. But if racial profiling is itself an example of racism, let alone a significant form of racism in a society, it is hard to see how this can be so. The Expressive Harm Thesis, if true, as they claim, means that most of the harms of racial profiling are attributable to background racism rather than to profiling itself. But why should that matter if one cares about racial justice? Indeed, why should the truth of the Expressive Harm Thesis, if it is true, outweigh the fact that racial profiling is a form of racism?

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*I remain skeptical about our ability to reconcile racial justice with the justification of a practice that might, itself, be an example—and even an exemplar—of racism.*

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As the U.S. Supreme Court says, repeatedly, the protection of basic rights and liberties places significant constraints on the ways in which we can promote security, and other legitimate government objectives.<sup>18</sup> It means, they emphasize, that we cannot always make use of the most efficient way to catch and punish crime. So, it seems fair to ask, if in other contexts racial equality prevents us choosing the most efficient way to prevent crime, why does it not prevent us choosing racial profil-

ing over other forms of policing, even if racial profiling is more efficient than the alternatives?

Risse has a response to that question which I will consider in a moment. The point, for now, is simply to highlight the incongruity of supposing *both* that racial profiling is a form of racism *and* that it is, nonetheless, justified—at least if one cares about racial equality. This incongruity, obviously, explains part of the appeal or challenge of Risse's ideas, and of the original paper by Risse and Zeckhauser. But it also explains, I think, why the mistake I made was a natural one: because justifying a practice that one considers an example of racism is a strange way to promote racial justice.

Two ideas are essential to Risse and Zeckhauser's arguments for profiling, and figure in Risse's response to my criticisms. The first is that profiling by race may, in some circumstances, serve a genuinely important purpose better than the alternatives: namely, the reduction of serious crime.<sup>19</sup> Moreover, because most crime is intra-racial, rather than inter-racial, black people can be expected to benefit significantly from racial profiling, although white people, too, will probably benefit, but without directly bearing any of the costs of profiling. Secondly, it is possible, as the Expressive Harm Thesis claims, that the harms of profiling are largely attributable to factors other than profiling itself. So, even if racial profiling is a form of racism, even if it is a significant form of racism, sensitivity to the *victims of crime*, and not just to the *victims of profiling*, tells against dismissing racial profiling out of hand as racist and therefore unjustified. As Risse puts it: "Our argument that profiling might be justified requires that other people would have a complaint if we did not strive strongly to reduce crime."<sup>20</sup>

I have some sympathy for this response, because I do not want to close the door on the idea that there might be racially beneficial consequences to profiling. Still, I remain skeptical about our ability to reconcile racial justice with the justification of a practice that might, itself, be an example—and even an exemplar—of racism. In that sense, I am not persuaded that the Expressive Harm Thesis can reconcile support for racial profiling with support for affirmative action if racial profiling is, indeed, an example of racism. I do not ignore the fact (or what seems to be a fact) that black people are disproportionately likely to be victims of violent crime. On the contrary, if one is seriously concerned about this fact, one would want police efforts to focus on black people as *potential victims*, rather than *potential perpetrators* of crime—or so it seems to me.<sup>21</sup>

In short, though racial profiling, as usually practiced, may benefit black people by decreasing black-on-black

crime, this is not (usually) its purpose, and this beneficial effect may be incidental to goals that are, rather, likely to make the residents of white neighborhoods feel secure than to decrease the battles over drugs and turf that plague their black counterparts. So, racial profiling is unlikely to be an efficient use of police resources if one wants to reduce crime for those people who are most likely to

be its victims: namely, black people living in inner-city neighborhoods.<sup>22</sup> In any case, whether or not one supposes that police efforts should be concentrated in this way—and that, obviously, is not self-evident—it remains unclear that racial sensitivity and racial profiling can be reconciled if, as Risso and Zeckhauser allow, the latter can itself exemplify racial prejudice, suspicion, and injustice.

## The Expressive Harm Thesis

It is now time to look at the Expressive Harm Thesis directly. In my original article, I argued that Risso and Zeckhauser tended to focus on the ways that racial profiling might *reflect* social injustice at the expense of the ways in which it might *contribute* to that injustice. I want briefly to recapitulate those points which, I believe, remain valid, although their original expression may have been misleading.

If racism has a systemic quality, rather than being a series of somewhat random acts, encounters, and events, we should expect the harms of racial profiling to reflect the legacies of racism in society at large, as Risso and Zeckhauser suggest. But the reverse is also true: that we should expect racial profiling to exacerbate racism in society at large, even in apparently unrelated areas such as housing, transport, employment, and entertainment.

This seems to be the case. Racial profiling encourages us to see black people as perpetrators, rather than as victims of crime; and it encourages us to believe that "the face of crime" is black<sup>23</sup> although, for obvious reasons, white people are the majority of criminals in a society that is overwhelmingly white. It is likely that racial profiling discourages black people from living, traveling and working in white neighborhoods, especially at night, and so compounds residential and occupational segregation. It is likely that it discourages black people from joining the police, and so perpetuates a damaging public perception of the police as hostile to black people. It is likely that racial profiling obscures the fact that most violence is intra-racial, rather than inter-racial and committed by a minority of people, whatever their color. Indeed, Steve Holbert and Lisa Rose claim that only 2% of black people are arrested for committing any crime in a given year.<sup>24</sup>

This figure seems to be in line with other findings. For example, in their studies of violence in 180 Chicago neighborhoods from 1995-2002, Sampson et al. found that "although 3431 violent offenses were reported, personal violence is still relatively rare overall, with the preva-

lence of robbery (0.3%), purse snatching (0.3%), arson (0.4%), attacking with a weapon (2.3%), and gang fighting (3.9%) all less than 5% averaged across the 3 waves of data collection. Even the most common item, hitting someone (18.7%) is reported by fewer than 20% of subjects. Carrying a hidden weapon (7.6%) and throwing objects at another person (8.2%) are in the middle. These prevalence estimates comport with national norms."<sup>25</sup> In short, while there is undoubtedly a serious racial imbalance in violence—and crime more generally—it is important to remember that its perpetrators are a small minority of their respective racial and ethnic groups.

Moreover, it seems likely that racial profiling fosters white complacency about the causes of crime—as it encourages white people to suppose that it is not their problem and has nothing to do with the choices they make, personally or politically. Yet much violent crime in America is connected to the battle to supply and control the market for cocaine—a predominantly white, upper-class drug—and with struggles over the control of prostitution and of gambling. Furthermore, as Sampson and Wilson show, public policy has an important role to play in explaining the extraordinary explosion of crime amongst young black men in the 1980s. Thus, lax enforcement of city housing codes, and the withdrawal of municipal services for public health and fire safety, exacerbated inner-city decay, despair, and abandonment—or the structural determinants of crime.<sup>26</sup> So, there are good reasons to suspect that the choice of racial profiling, to prevent and control crime contributes to racism quite as much as it reflects it: by diverting attention from the structural, rather than the individual, causes of crime and from the differences these make to the crime rates of *all* groups, not just to the rates of black violence within the United States.<sup>27</sup>

The plausibility of the Expressive Harm Thesis, according to Risso, rests on two things. First, that police abuse and the disproportionate use of race in policing would likely exist whether or not racial profiling was

legal, and so cannot be attributed to profiling *per se*.<sup>28</sup> By contrast, you could get rid of racial profiling tomorrow, but most forms of racism would still remain to be tackled. The second claim on behalf of the Expressive Harm Thesis, is that white people are unlikely to object to being profiled, and this shows that it is not profiling *per se*, but racism, that accounts for most of the harms attributed to racial profiling.<sup>29</sup>

It is undoubtedly true that both police abuse and racial injustice more generally would not vanish just because racial profiling was unequivocally judged to be illegal. Indeed, it is likely that racial profiling would continue tacitly and illegally. However, it does not follow from this that the harms of profiling are predominantly due to background racism. For instance, it seems just as likely that racial profiling exacerbates problems of police abuse, rather than merely reflecting whatever problems there already are with the police. Racial profiling conveys a message that black people are so dangerous that the police are justified in stopping and searching them at their own discretion. However, we generally believe that police discretion in these matters needs to be carefully circumscribed to protect the lives, liberties and rights of citizens, *however much we admire or trust our police*.<sup>30</sup> So, it would not surprise me if profiling itself exacerbates existing problems with police abuse and racism, and creates the circumstances in which mutual misunderstanding, unanticipated reactions, and nervousness on both sides lead to tragedy.<sup>31</sup>

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In short, one of the problems with profiling is that you do not need to suppose that the police are especially racist or brutish to worry about innocent civilian deaths: you simply have to suppose that if police believe that they are facing a potentially dangerous criminal, they are far more likely to anticipate the lethal use of force, and to respond in kind, than would otherwise be the case. Hence, I suspect that police abuse and the disproportionate use of race in profiling are not as readily classed as expressive harms of profiling as Risso believes.

Nor am I as confident as Risso that whites would find the profiling of whites unobjectionable, simply because

they do not suffer, and do not expect to suffer, from racism. Here, I think, Risso misstates the relevant question we should ask for his thought experiment. According to Risso, what we need to know is whether white people would object to being classed as white people, and so identified as a group, rather than as individuals, for police purposes: "in some cases people do mind being treated in terms of a group-membership and in others they do not, and which is which depends on the social esteem in which that membership is being held."<sup>32</sup> Hence, Risso believes that whites would *not* object to being classed as white people. I see no reason to disagree. But it does not follow from that that they would not object to the profiling of white people. The reason to profile white people, presumably, is that white people are thought to be more prone to crime—at least in some cases—than are non-white people. So, the relevant question is not "do you object to being classed as white?" but "do you mind being classed as a member of a group whom the police believe to be particularly prone to crime?"

This question, I suspect, would yield a very different response. Most of us do not like the idea of being mistaken for criminals, or incipient criminals, however remotely.<sup>33</sup> Nor do most people like the idea of being subject to stops and searches at the discretion of the police. Our dislike of being profiled might be alleviated by knowing that it serves a useful police purpose, but it might not. We might still detest and fear it, even if we have to put up with it—and, perhaps, even if we agree that we *should* put up with it.

So, unfortunately, I do not find that Risso's thought experiment has the effect on me that it has on him. This is partly because we disagree about the relevant question to ask in the thought experiment. But it may be, as well, that we simply have different intuitions here, as in other matters. Although we both agree that racial inequality and injustice remain a problem in America, and one that cannot be resolved overnight,<sup>34</sup> we disagree about what this implies for racial profiling. For Risso, it makes it likely that many of the harms attributed to racial profiling are properly blamed on background racism. This means, he thinks, that profiling might well be justified as a normal part of police practice. In my view, it means that whatever harms we attribute to racial profiling require more justification than would otherwise be the case, because of the risk of compounding injustice. Hence, I believe that racial profiling will generally be unjustified, because it is far from clear that its harms are trivial or that those harms, *whatever they are*, are outweighed by the benefits.

## Conclusion

How should the harms of racism figure in our evaluation of the harms of racial profiling? According to Risse and Zeckhauser, they figure as the background against which we determine what they call the *incremental harm* of racial profiling.<sup>35</sup> By incremental harm, they mean the harms specific to racial profiling that racial profiling will add to whatever harms already exist as a result of racism in society. Hence, Risse and Zeckhauser's disagreement with Kennedy: for from their perspective Kennedy fails to see that most of the harms that he attributes to racial profiling are really due to background racism.<sup>36</sup> Background racism figures in their justification of profiling, however, simply as the backdrop against which the incremental costs and benefits of profiling are to be identified, and has no distinctive role in assessing those harms and benefits. Thus, Risse and Zeckhauser's approach to the justification of racial profiling differs both from Kennedy's and from mine, because on their view the harms of racism—whether or not they occur via profiling—tell us nothing about the weight we should assign to the harms and benefits of profiling.<sup>37</sup>

This strikes me as odd, because Risse and Zeckhauser do not seem to think that racism is ethically neutral. On the contrary, they clearly believe we should do what we can (consistent with various ethical constraints) to remove it and to minimize or alleviate its harms. Yet on their view this belief has no relevance to the way in which we assess the harms specific to racial profiling. As Sally Haslanger has suggested, we often suppose that background conditions are relevant to the weight that we attach to different factors in a decision. Thus, if there are not enough sterile gloves in a hospital, she supposes that patients with compromised immune systems should be accorded special consideration when deciding when and where such gloves should be used. Such patients are particularly likely to become seriously ill and, even, to die from relatively minor infections. So, it would be strange—indeed, immoral—to ignore that fact, or to minimize its importance when deciding how to distribute a limited supply of sterile gloves in a hospital. Thus, even if we abstract from questions of racism, there is something puzzling about Risse and Zeckhauser's position here.<sup>38</sup>

That position is problematic as well as puzzling. However we describe the harms of profiling black people, it is clear that they fall largely on black people—predomi-

nantly, but not exclusively, young black men. But this is a group that is already likely to suffer the harms of living in a racist society. So, even if they share in some of the benefits of profiling, (because young black men are likely to harm each other, and not only other people), we need to know whether those benefits are able to justify the harms of profiling, given that the latter are likely to compound harms that they already suffer unjustifiably because of racism.<sup>39</sup>

My sense is that such benefits will not justify the harms of profiling and, in most circumstances, probably cannot: because we already find it hard enough to know how to combat racial inequalities and inequities without the risk that we might compound them and make them harder to address. Moreover, it is likely that background racism makes the harms of profiling—whatever they are—harder to bear than they otherwise would be. For both of these reasons, then, I think background racism affects the way that we assess the harms of profiling—and does so by raising the barrier to successful justification.<sup>40</sup>

Conceivably those barriers could be overcome. But I doubt that that will be true in most circumstances, both because of the difficulties in justifying prospective profiling in general and because of the difficulties specific to racial profiling itself.<sup>41</sup> Of course, a fair bit turns on how bad you think racism is in our societies and on what forms of profiling one is talking about. In my earlier paper, I argued that Risse and Zeckhauser underestimated the incremental harms of profiling, and Risse has conceded that that might have been true.<sup>42</sup> Whether or not it is, however, one does not have to be indifferent to the harms of crime to believe that racism makes most forms of racial profiling unjust. One merely needs to doubt that the benefits of racial profiling, compared to alternative police tactics and social policies, will generally offset its costs once we account for the burdens that racism unjustifiably places on black people.<sup>43</sup>

So, I conclude that racial profiling cannot be justified as a normal part of police practice, even if it might be allowed in exceptional circumstances. Concern for people's lives, liberties, and rights impinge on the means we may use to catch criminals and to prevent crime before it takes place. Racial profiling, I would argue, is merely one more example of this familiar principle.

Prohibitions on the general use of racial profiling do not imply that we should be indifferent to crime—to

the demands of efficiency or to the demands of deterrence. Nor do other familiar legal requirements, such as that police must inform those they arrest that they have rights to remain silent and to use a lawyer. Some of the people that these legal requirements are designed to protect are, themselves, a threat to the rights of others; and the rights that we safeguard for them may, on

occasion, enable them to evade arrest or conviction for their crimes. However, rights and civil liberties are designed to protect the interests of people who live in a world much like our own. This means that rights have to protect the guilty as well as the innocent and, on occasion, the line between the one and the other will be thin indeed.

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#### NOTES

[I would like to thank the Eastern Division of the American Philosophical Association for inviting me to participate on this panel. I would also like to thank my fellow panelists, Mathias Risse and Michael Levin, for their comments. They have forced me to think far more deeply about racial profiling than I could have anticipated in 2005, when a talk by Mathias first got me thinking about the subject. I am grateful to Shepley Orr, David Grusky and David Garland for suggestions about what to read on race and crime, and to Robert J. Sampson for pointing me to the relevant parts of his considerable *oeuvre*. Finally, I thank Sally Haslanger and Deborah Modrak for their presence and comments at the APA meeting, which now figure in this paper.]

1 Mathias Risse and Richard Zeckhauser, "Racial Profiling," *Philosophy & Public Affairs* 32, no. 2 (2004): 131-70.

2 Risse and Zeckhauser, "Racial Profiling," 134.

3 Annabelle Lever, "Why Racial Profiling is Hard to Justify: A Response to Risse and Zeckhauser," *Philosophy & Public Affairs* 33, no. 1 (2005): 94-110.

4 Mathias Risse, "Racial Profiling: A Reply to Two Critics," *Criminal Justice Ethics* 26, no.1 (2007): 4-19.

5 Risse and Zeckhauser, "Racial Profiling," 136.

6 Relevant Supreme Court decisions in this area include *Terry v. Ohio*, 392 U.S. 1 (1968); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873, (1975); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Brown v. Texas*, 443 U.S. 47 (1979).

7 For the argument that race, as popularly understood, has no scientific basis, see Kwame Anthony Appiah, "How to Decide if Races Exist," *Proceedings of the Aristotelian Society* 106 (May 2006): 363-80.

8 Steve Holbert and Lisa Rose, *The Color of Guilt and Innocence: Racial profiling and Police Practices in America*, (Page Marque Press, California, 2004). At p. 126 Holbert and Rose give these figures for arrest (though, obviously, not conviction) rates for 2000: Black people made up 12% of the population but 56% of those arrested for murder; 42% of those arrested for rape; 61% of those arrested for robbery; 39% of those arrested for aggravated assault; 31% of those arrested for burglary; 33% of those arrested for larceny; and 40% of those arrested for motor vehicle theft. However, they note that recent studies indicate that black people and Latinos are no more likely than whites to possess narcotics or contraband although, for reasons that

they discuss, they may be caught at a higher rate than white people.

9 Risse and Zeckhauser, "Racial Profiling," 132.

10 *Id.*, 144, 146.

11 Risse, "Racial Profiling: A Reply to Two Critics," 10.

12 Lever, "Why Racial Profiling is Hard to Justify," 96-97.

13 Risse, "Racial Profiling: A Reply to Two Critics," 13.

14 Risse and Zeckhauser, "Racial Profiling," 152.

15 Risse and Zeckhauser here state what they take to be an objection to their views, namely, that profiling is an important, perhaps a preeminent, form of racial discrimination and oppression in contemporary USA.

16 Considerations of space and clarity preclude dealing with Risse's response to my discussions of torture and flashing in the body of this paper ("Racial Profiling: A Reply to Two Critics," 11-13). Risse is sure that the harms of torture are not significantly expressive, that is, caused by other harms such as sexism, or anti-Semitism, operating via torture. I suppose I am not as confident about this as he, in part because torture is generally a rather lengthy, staged process, rather than a single event, and its harms are likely to be multiple, as well as cumulative. I think some of that complexity—and therefore the difficulty I see in too sharp a distinction between expressive and non-expressive harms—is brought out by an example that Jacobo Timerman mentions: that of a non-Jewish woman who was led to believe that she was being tortured partly because she was Jewish, and so was vainly protesting her non-Jewish status. As Timerman wondered, what could a Jewish woman say in those circumstances? And how, too, should we understand the harms if we consider the non-Jewish woman either to be anti-Semitic, or deeply opposed to anti-Semitism?

Clearly, background anti-Semitism is going to cause different harms, via torture, in these different cases; and the harms of torture are likely predicated both on the Jewish/non-Jewish status of the victim, and on the attitude of the victim toward that status prior to torture. So, I am genuinely unsure how far the expressive/non-expressive distinction is going to help us here, and suspect that it remains a difficult distinction to draw in many cases. See Jacobo Timerman, *Prisoner Without a Name, Cell Without a Number* (Madison, WI: University of Wisconsin Press, 1981), 77 for the particular example, and on antisemitism more generally, see chap. 6. For an illuminating philosophical account of the harms of torture, that discusses the interrogational situation in considerable depth, see David

Sussman, "What's Wrong with Torture?" *Philosophy & Public Affairs* 33, no. 1 (January, 2005): 1-33.

I am also skeptical about how far the idea of an expressive harm illuminates the (causes of the) fear that flashing so often creates. After all, even symbols of horrendous acts do not generally cause fear themselves, unless intended to do so; and fear is but one of a range of responses to the piling up of disadvantage, which include resentment, acquiescence, and rebellion. So, it is not altogether clear that treating flashing as a "focal point" for sexism illuminates (the causes of) the harm of flashing, as the Expressive Harm Thesis implies, *even if it is clear that the harms of flashing presuppose some specific forms of sexual oppression and subordination as background*. My worry, I suppose, is that the Expressive Harm Thesis does little to distinguish one harm from another, and therefore to clarify the causes specific to particular harms, or to illuminate the reasons why harms such as sexism or even flashing are likely to have various forms, whose differences are often of the utmost moral and political importance.

17 Risse and Zeckhauser, "Racial Profiling," 139, and n. 12 on 139 make the argument that "police abuse and profiling as we define it are different problems that must be assessed independently and that have different remedies."

18 For a classic, and much-quoted version of this theme see Part II of Justice Potter Stewart's majority opinion in *Almeida-Sanchez v. US*, 413 U.S. 266 (1973): "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.". It is, however, an open question how far that "resolute loyalty" can be discerned in more recent cases such as *Oliver v. United States*, 466 U.S. 170 (1984); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); and *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989).

19 Risse and Zeckhauser, "Racial Profiling," 152, n. 28.

20 Risse, "Racial Profiling: A Reply to Two Critics," 16.

21 Robert J. Sampson and William Julius Wilson cite the following figures on blacks as victims of violent crime: the leading cause of death among young black males is homicide; the lifetime risk of being murdered is as high as 1 in 21 for black males, compared to 1 in 131 for white males. Whereas the death rate from firearms amongst young black males more than doubled from 1984 – 1988, they remained stable for young white males. Hence, it has been estimated that a resident of rural Bangladesh has a greater chance of surviving to age 40 than does a black male in Harlem. Admittedly, these chilling statistics may now be a bit out of date, but they give some idea of the magnitude of the problem. See Robert J. Sampson and William Julius Wilson, "Toward a Theory of Race, Crime, and Urban Inequality," in *Crime and Inequality*, ed. J. Hagan and R. D. Peterson (Stanford: Stanford University Press, 1995), chap. 2: 37-54.

22 As Risse and Zeckhauser note, the situations where profiling seems useful are ones 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," "Racial Profiling," 135. In fact, a recent article on racial disparities in crime concludes that "generic in-

terventions to improve neighborhood conditions may reduce the racial gap in violence. Policies such as housing vouchers to aid the poor in securing residence in middle-class neighborhoods may achieve the most effective results... Policies to increase home ownership and hence stability of residence may also reduce disparities." So too, the authors suggest, would labor-market support for stable marriages among the poor. The reason is that their research showed that while "the odds of perpetrating violence were 85% higher for Blacks compared with Whites... the majority of the Black-White gap (over 60%) and the entire Latino-White gap [10% less violence among Latinos than Whites] were explained primarily by the marital status of parents, immigrant generation, and dimensions of neighborhood social context." See, Robert J. Sampson, Jeffrey D. Morenoff, and Stephen Raudenbush, "Social Anatomy of Racial and Ethnic Disparities in Violence," *American Journal of Public Health* 95, no. 2 (February, 2005).

23 David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York: New Press, 2003), on "the face of crime" (169).

24 Holbert and Rose, *The Color of Guilt and Innocence*, 126.

25 Sampson, Morenoff, and Raudenbush, "Social Anatomy of Racial and Ethnic Disparities in Violence," 227-28.

26 The figures on housing loss and destruction amongst black urban communities are astounding. "In Atlanta one in six residents were dislocated by urban renewal; the great majority of these were poor blacks. Nationwide, fully 20 percent of all central-city housing units occupied by blacks were lost in the period 1960-70 alone... this displacement does not even include that brought about by more routine market forces (evictions, rent increases, commercial development)." Moreover, "the negative consequences of deliberate policy decisions to concentrate minorities and the poor in public housing" have led to "massive, segregated housing projects that have become ghettos for the minorities and disadvantaged... public housing is a federally funded, physically permanent institution for the isolation of black families by race and class," Sampson and Wilson, "Toward a Theory of Race," 43. Thus, while one of every five poor blacks lived in ghettos or areas of extreme poverty in 1970, by 1980 nearly two out of every five did so. (*id.*, 42).

27 *Id.*, 41. Sampson and Wilson cite evidence that the black homicide rate is three times higher in New York than in Chicago and three times higher in San Francisco than in Baltimore. At state level, rates of black homicide in California are three times higher than those in Maryland—and rates of white homicide, too, are three times higher in California than Maryland. Hence, they conclude, "the sources of violent crime appear to be remarkably invariant across race and rooted instead in the structural differences amongst communities, cities and states in economic and family organization" (*id.*).

28 Risse, "Racial Profiling: A Reply to Two Critics," 13; Risse and Zeckhauser, "Racial Profiling," 139 n. 12.

29 Risse, "Racial Profiling: A Reply to Two Critics," 13-14; Risse and Zeckhauser, "Racial Profiling," 146, 148.

30 John Kleinig, "Introduction: Handling Discretion with Discretion," in *Handled With Discretion: Ethical Issues in Police Decision Making*, ed. John Kleinig (Lanham, MD: Rowman and Littlefield, 1996), 1-12.

31 For more details see Lever, "Why Racial Profiling is Hard to Justify," 103-04.

32 Risse, "Racial Profiling: A Reply to Two Critics," 14.

33 For some suggestive evidence see Lever, "Why Racial Profiling is Hard to Justify," 101-03.

34 Michael Levin clearly thinks that I overestimate the problems of racism in the contemporary U.S. (See his "Comments on Risso and Lever," in this volume.) However, Risso's argument is predicated on a similar assumption to mine, for which there is considerable evidence. It was only in the 1960s that many forms of legalized inferiority, such as anti-miscegenation laws, were struck down by the Supreme Court. Nor is it credible that the effects of legalized segregation, and the battles to retain it, ceased to affect people of both races in the 1970s and 1980s. For myself, I simply cannot understand how white indifference to the appalling poverty, lack of opportunity, violence, and ill-health suffered by black people can be explained without supposing some residues of racial prejudice; nor do I see how else to explain the astonishingly punitive attention to young black men and women, when indifference or denial are no longer options. As Bruce Western says, "despite the end of welfare as we knew it, government had not withdrawn from the lives of America's poor: its role had simply changed. More punitive than limited, government had reached deeply into poor urban communities by sending record numbers of young men to prison and jail at a time when crime rates were at their lowest levels in thirty years," *Punishment and Inequality in America*, (New York: Russell Sage Foundation, 2006), xi. For some of the story as regards black women, see Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (New York: Pantheon Books, 1997).

35 Risso and Zeckhauser, "Racial Profiling," 149.

36 Risso, "Racial Profiling: A Reply to Two Critics," 10.

37 In Risso's latest version ("Racial Profiling: A Reply to Two Critics," 11) he says that "the harm caused by profiling should not be disregarded, that is, does not entail that the incremental harm added by profiling is zero," and adds that what is meant by "discounting" the harms of profiling due to background racism is "counting at less than it may appear" rather than "disregarding entirely." This is a helpful clarification. But it does not alter the point that I am making here.

38 Haslanger used this example to make her point in a question to Risso at the "Symposium on Racial Profiling" at which these essays were originally presented (Eastern Division of the APA Annual Meeting December 27, 2006).

39 For all racial and ethnic groups, "the probability of violence accelerates in early adolescence . . . reaching a peak between the ages of 17 and 18 and then declining precipitously thereafter." Such very young ages may be specific to the Chicago neighborhoods that are the focus of this study. Nevertheless, they highlight one especially troubling aspect of the crime wave in America—that many of its victims and perpetrators are children and teenagers, and too young legally to vote, drink, marry, or even to drive a car. Indeed, many of its victims and perpetrators ought, by law, to be attending school. See Sampson et al., "Social Anatomy," 229.

40 In response to Levin's comments, I should note that I do not believe that Risso and I are talking past each other, despite our disagreements. I believe, as Risso apparently does not, that for black people the intrinsic and incremental harms (or,

on Levin's terminology, the marginal harm) of profiling are inseparable because the profiling of black people inevitably takes place against a background of racial subordination and discrimination that Risso and I both assume exists. I am not sure if there is an incremental harm of profiling for white people in the sense that Risso and I both use the term, because it is not clear that there is any background prejudice or discrimination against white people that the profiling of whites might exacerbate. At all events, Risso's examples turn on our supposing that no such background discrimination exists; hence no increment of background harm can be produced by the intrinsic harm of profiling, whatever one takes that to be.

Moreover, though I agree with Levin that Risso overstates the problems created by counting expressive harms in the harms of profiling, as Kennedy does, I agree with Risso that it would be a gain in clarity if we could distinguish the expressive and non-expressive harms of profiling, and I agree that we might gain greater clarity if we focused our disagreements about the justification of profiling on the latter alone—at least in the first instance. However, I am skeptical that we will be able to make the relevant distinctions most of the time. More specifically, I have tried to show here, and in my original paper, that background racism must raise the bar that a successful justification of profiling must leap, even if we accept the Expressive Harm Thesis. This is because we have duties to remove unjustified inequalities and not to exacerbate those we cannot remove. These duties—which Risso also assumes to exist—affect the weight we should assign to the harms of profiling *whatever we take the relevant harms to be*.

41 Levin evidently believes that black people are particularly prone to violence, and that the reason for this is genetic. It is therefore important to note that though Sampson et al. agree that "high impulsivity increases the risk of violence," they find that this has little explanatory weight when considering racial and ethnic disparities in rates of violence: "Despite their significant associations with violence, the main finding is that verbal/reading ability and impulsivity explain a relatively small fraction of the gap between Blacks and Whites. . . . Also, verbal/reading ability and impulsivity have no bearing on the gap between Mexican Americans and Whites, which remains virtually unchanged. Therefore, constitutional factors are significant predictors of violence but weak explainers of racial/ethnic *disparities* in violence," Sampson et al., "Social Anatomy," 229 [emphasis in text]. Indeed, it seems that "one reason Whites have lower levels of violence than Blacks is that Whites are more likely to be recent immigrants," and though Mexican Americans in the first generation are less prone to violence than are Whites, by the third generation their risk is slightly higher.

42 Risso, "Racial Profiling: A Reply to Two Critics," 11 and to Lever, "Why Racial Profiling is Hard to Justify," 103-8.

43 At the APA Symposium, Deborah Modrak rightly pointed out that the external harm thesis ought to apply as much to the benefits of profiling, as to the harms. That is, on Risso's own view, the benefits as well as the harms of profiling need to be discounted—or counted at less than they appear—if they are the result of background racism, rather than of profiling alone. Risso agreed that this was the case. It is therefore possible that even within Risso's framework, racism makes profiling quite hard to justify successfully and not only if you adopt my view of the way in which background racism should affect our thinking about profiling.