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# Why Racial Profiling Is Hard to Justify: A Response to Risse and Zeckhauser

Annabelle Lever

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In their article, “Racial Profiling,” Risse and Zeckhauser offer a qualified defense of racial profiling in a racist society, such as the contemporary United States of America. It is a qualified defense, because they wish to distinguish racial profiling as it is, and as it might be, and to argue that while the former is not justified, the latter might be. Racial profiling as it is, they recognize, is marked by police abuse and the harassment of racial minorities, and by the disproportionate use of race in profiling<sup>1</sup>. These, on their view, are unjustified. But, they contend, this does not mean that all forms of racial profiling are unjustified, even in a racist society, or that one has to be indifferent to the harms of racism to believe that this is so. Indeed, one of the aims of their article is to show that racial profiling, suitably qualified, “is consistent with support for far-reaching measures to decrease racial inequities and inequality” (p. 134), and so to challenge the assumption that “arguments in support of profiling can speak only to those who callously disregard the disadvantaged status of racial minorities.”

In a long and provocative article there is, inevitably, a great deal to discuss. However, I will concentrate on two claims about the harms of racial profiling advanced on page 146, both because these merit careful discussion and because they are critical to Risse and Zeckhauser’s argumentative strategy. Those two claims are (1) that “the harm caused by profiling per se is largely due to underlying racism” and is, therefore, purely expressive; and (2) that “the incremental harm done by profiling often factors into utilitarian considerations in such a way as to support profiling.” We can call the first *the expressive harm thesis* and the second *the incremental harm thesis*. I am no expert on racial profiling, or on racism, however, I will suggest that these two theses are far more controversial than Risse and Zeckhauser assume, and point to serious difficulties with their justification of profiling. In particular, I will argue that the harms of racial profiling are not principally expressive; that some of

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<sup>1</sup> See Mathias Risse and Richard Zeckhauser, “Racial Profiling,” *Philosophy & Public Affairs* 32 (2004): 131–70, at p. 143, n. 4, for the contrast between “racial profiling as we know it” and “racial profiling as it might be.” For competing interpretations of the “disproportionate” use of race in policing see pp. 140–42, and their conclusion that “it is difficult to establish what constitutes proportionate search.”

the harms are quite large; and that even where the magnitude is not that great, background racism makes these additional harms harder to bear and to justify.

I will adopt Risse and Zeckhauser's definition of 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" (p. 136), which I will assume for the rest of the article. However, unlike them, I use the term "blacks" rather than "African Americans" to refer to the targets and victims of racial profiling. Police who are stopping cars on the motorway are unlikely to differentiate an African American from someone who is black and comes from Nigeria, from Jamaica, from Brazil or from England. Moreover, when we think of police abuse in the United States the cases that spring to mind from the recent past do not simply include Rodney King, the African American beaten by the Los Angeles Police Department, but Abdul Louima, who came from Haiti, spoke very little English, and was horribly brutalized by the members of the New York Police Department. So, while talking about "blacks" rather than "African Americans" may sound rude and disrespectful, it has the merit of catching what is likely to be at stake in many forms of racial profiling: viz. the difference between "whites" and "blacks."

### **Racial Profiling and Torture: The Expressive Harm Thesis**

According to Risse and Zeckhauser, feelings of resentment, hurt and distrust arise from racial profiling "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" (p. 144). No evidence is given for this assumption. Likewise, none is given for the claim that if the Supreme Court outlawed racial profiling "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" (p. 146, emphases in text).

On this picture, the harm of racial profiling is expressive, in that "it occurs primarily because of harm attached to *other* practices or events" (p. 146, emphasis in text). As Risse and Zeckhauser clarify their conception of expressive harm later in their article (pp. 154–55), it is "a form of harm that is itself parasitic on an underlying oppressive relationship that is independently present in society. And while indeed this sort of harm would not arise were it not for that underlying oppressive relationship... [the expressive harm] does not contribute to that oppressive relationship." On this picture, racial profiling is not itself a form of racism, nor are the harms of profiling themselves forms of racism. Instead they are expressions of (racist) harms that occur elsewhere in society, leaving the motives behind profiling, the manner in which profiling occurs, and the consequences of profiling themselves magically clean, innocent, and unscathed.

This is a deeply implausible picture of the relationship between racism and racial profiling. It requires us to imagine a racist society in which racism has no role in

explaining the choice of racial profiling over other ways of responding to racial disparities in crime that are, quite likely, a legacy of racism.<sup>2</sup> Similarly, it asks us to suppose that the profiling of black people can be carried out fairly and respectfully in a society that can still be characterized as racist. Only on these assumptions could objections to racial profiling be understood as objections to racism *rather than* to profiling; and only on these assumptions could the harms of racial profiling be identified with racism *instead of* racial profiling. These assumptions are far-fetched. The expressive harm thesis, therefore, depends on an implausible picture of the relationship between racism and racial profiling. This makes it unlikely that racial profiling in a racist society can be “cleaned up” in the way that Risse and Zeckhauser suppose.

But even if we set the improbabilities aside, I worry that the expressive harm thesis makes profiling seem more peripheral to racist habits of thought and action than it is, and draws attention to the way that profiling *reflects* racist attitudes, institutions and habits while obscuring its *contribution* to them all. Racial profiling publicly links black people with a tendency to crime. For that reason alone, it is likely to exacerbate the harms of racism. However scrupulous the police, racial profiling is likely to remind blacks, all too painfully, that odious claims about their innate immorality and criminality justified their subordination in the past, and still resurface from time to time in contemporary public debate. So, too, racial profiling will likely perpetuate, as well as reflect, white tendencies to draw invidious and complacent racial distinctions, and exacerbate unmerited indifference and hostility to the legitimate interests of black people. Hence, the conjunction of racial profiling with racism should make us uneasy, even if we abstract from problems of police abuse, and the likelihood that racism will expose black people to unjustified forms of profiling that white people never suffer.

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 Risse 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. And that seems to be the case. Profiling increases the likelihood that whites will think of blacks as importing crime into their supposedly crime-free neighborhoods; it discourages black people from traveling and working in white neighborhoods, especially at night; and it provides a seemingly endless source of events, rumors and stereotypes for popular entertainment along “cops and robbers” lines, happily obscuring the fact that the ownership of all sorts of horrendous weapons is perfectly legal in the United States. Thus, the racial profiling of black people has the unfortunate effect of publicly associating blacks with criminality, while downplaying any responsibility of

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<sup>2</sup> As Randall Kennedy says, there is generally an alternative to profiling, and that is to spend more money on other means of enforcement, including the hiring of more minority officers (p. 161). See Randall Kennedy, “Race, Law and Suspicion” in *Race, Crime and the Law* (New York: Vintage Books, 1997), ch.4. All references to Kennedy are to this chapter. In a recent BBC program, William Bratton complained that Los Angeles is woefully under-policed, and he expressed his shock and frustration at the indifference of the media in Los Angeles to the multiple murders, often of very young children, that result from gang warfare in what is now the “murder capital” of the United States.

whites for that violence, or for the violence that they, themselves, commit. Hence, the expressive harm thesis seems likely to underestimate the damage that racial profiling can do in a society that is probably predisposed already to favor white people's perspectives on crime.

The problems with characterizing the harms of profiling as expressive harms, as defined by Risse and Zeckhauser, are compounded when we look at their claims about torture. By contrast with racial profiling, whose harm is expressive, they claim, "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" (p. 147).

Of course torture is painful. But the forms that pain takes, the reasons why it is inflicted, the way it is experienced and the people who inflict and suffer it are all inflected by social prejudices, distinctions and privileges. Jacobo Timerman, for instance, clearly believed that the Argentine military was particularly likely to torture Jews who fell foul of the junta, and that anti-Semitism was involved in the torture itself, as he made plain in his autobiographical *Prisoner Without a Name, Cell Without a Number*.<sup>3</sup> Nor is he likely to have been mistaken on this point: for torture is not contentless nor is it shapeless, or even unmotivated, even if its ostensible rationale has no obvious bearing on what happens.<sup>4</sup> So while you did not have to be Jewish to be tortured by the Argentine military it would be very surprising if, in an anti-Semitic society, the torture of Jews did not have anti-Semitic elements, just as in a racist society the brutalizing of black people by the police has racist ones, reflecting invidious beliefs about the powers and proclivities of black people as opposed to white people, or of Jews as distinct from Christians. How significant those anti-Semitic or racist elements are in torture as experienced by those who suffer it, or by those who inflict it, does not seem to me a matter for a priori judgment, but of empirical investigation. This is especially true for questions about the role of torture in reinforcing unjust forms of subordination and prejudice. Hence we should be wary of the claim that torture is not expressive, both because it seems to trade on a rather simple, Benthamite, idea of pain as distinguishable only by its duration and intensity, and because we simply do not know a priori how far the pain of torture for any particular person was, or was not, affected by sexism, racism, anti-Semitism and/or in turn, reinforced oppression.

A comparison, here, might be helpful. "Flashers," or men who display their penises to others, especially unsuspecting women and girls, are generally thought of as harmless, and their victims are encouraged to laugh off the behavior, and to see any shock, horror or fear on their part as quite disproportionate to the harm involved, and as itself a bit of a

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<sup>3</sup> Jacobo Timerman, *Prisoner Without a Name, Cell Without a Number* (Madison: University of Wisconsin Press, 2002). See, for instance, Timerman's Preface, p. x and, among others, pp. 30, 61, 67–69, 72.

<sup>4</sup> Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford: Oxford University Press, 1985), ch. 1, especially pp. 57–59 on what she calls *the false motive syndrome*, in this case, the claim that torture is necessary to get critical information.

joke. The point, of course, is that no physical injury occurred: this is not rape; it is not even a beating or a mugging. Moreover, it seems unlikely that flashers are violent—at least, stereotypically, they are wimps and cowards and rather pathetic physical specimens, not rapists, murderers or muggers. So, once the shock of surprise is past, there should be nothing particularly upsetting about being flashed, at least for sexually experienced women and girls. Insofar as it is felt to be more traumatic this might be, to use Risse and Zeckhauser’s framework, because it is an expression of the harm of living in a sexist society, in which women are raped and murdered by strangers, as well as by family members and acquaintances. Seeing the reaction this way would be nicer than seeing it simply as irrational behavior, just as the distress caused by marching Nazis, we may think, seems less irrational and excessive if we think of it as a response to past traumas and harms, rather than as a reaction to a relatively small and powerless, even comical, bunch of people in the present (p. 147).

But just because these stories seem nicer and less patronizing from the outside does not make them so. After all, we could put the matter another way: the harm caused by flashing, in a sexist society, is not an expression of some other harm, but one of the forms that sexism takes. It is often experienced as frightening and threatening, out of proportion to the harm caused by unexpectedly seeing a penis, because it *is* frightening and threatening, and *meant to be so*. Indeed, the fact that the flasher takes pleasure in the fear and consternation that he causes suggests a hostility and malevolence that rightly cause fear until one is assured that one is, in fact, safe from further harm; and the fact that the pleasure of the flasher arises from the fear and consternation that he can cause with his penis suggests that the harm he causes, and intends to cause, depends on women’s fear of rape. That fear is in large part the product of a sexist society, one that encourages women to fear rape by strangers, while downplaying and even justifying the violence they suffer from their families and acquaintances. So even if the harm of flashing has an expressive dimension, as this term is normally used, it does not follow that the harm is *merely* expressive of other harms, nor that the harms of contemporary anti-Semitism are simply the product of past anti-Semitism, however bad those harms may be.

Hence, I think we should be wary of the claim that the harms of racial profiling are *expressive* of racism, rather than *instances* of racist harm, and wary of the other examples that Risse and Zeckhauser use to make their point. These examples seem to confuse ideas of causation and importance in the evaluation of harm. Hence, the idea that torture is really bad, but racial profiling is not, seems to lie behind the idea that torture is obviously not expressive, but profiling is. Although the label “expressive” purports to judge the *causes* of a harm, rather than its *badness*, however measured, it presupposes what needs to be shown: namely, the badness of different harms.

Torture is painful no matter the reasons why it is inflicted. Still, it does not follow that what we might call the “neutral” aspect of the pain of torture is the most significant thing about it. Hence, I am skeptical that we can use Risse and Zeckhauser’s idea of expressive harm to characterize and evaluate the harms of racial profiling, because the idea of an expressive harm seems, itself, to depend on our ability to make a variety of complicated causal and interpretive judgments.

But what, we might wonder, of the profiling of whites in a racist society? Surely that

shows that the harms of profiling are caused not by the profiling, but by the racism of the society in which it occurs? Indeed, Risse and Zeckhauser note, the assumption that the Washington, D.C., sniper of 2002 would be white, because serial killers tend to be white men, shaped the searches conducted by the police and hindered the investigation into what proved to be two black men. According to Risse and Zeckhauser “the white community did not object to the disproportionate attention given to whites.” Likewise, they suggest, screening men between the ages of fifteen and forty, because they commit a disproportionate share of violent crimes, is often justifiable and “Hardly anyone (including those men) finds such measures offensive” because “[n]o hurt is connected to membership in that group” (p. 148).

The issue is important. But these examples assume that white people are aware that they are the victims of racial profiling when they are, and ignore the difference between being questioned as a witness to a crime, and being profiled as its potential author. For example, the Washington, D.C., snipers targeted suburban Washington primarily, and most of their victims were white. It is possible, therefore, that the searches one saw on television were not targeting whites per se, so much as people in the area of the shootings, who reflected U.S. patterns of segregation in being predominantly white. One might, therefore, have been subject to racial profiling as a white man in the area without being aware of this at all, and might well have assumed that one was being questioned as a potential *witness* rather than a potential *suspect*. So, absent evidence on this point, it is hard to draw any conclusions about the attitudes of white people to the profiling of whites from the case of the Washington sniper.

Moreover, while some may agree with Risse and Zeckhauser’s hunch that white people would be unlikely to object to the profiling of whites in such cases, I am not so sure. We do not generally like to see ourselves as potential criminals, nor do we generally like the idea of other people identifying us that way. Indeed, the anger and distress caused by Catherine MacKinnon’s suggestion that male rapists are not obviously different from most men, and that much ordinary heterosexual sex is hard to distinguish from rape, seems partly due to the way she challenged common assumptions about the difference between criminals and “the rest of us.”<sup>5</sup> Likewise, the psychological experiments of Stanley Milgram were so disturbing to their participants, and to those who read about them, because they challenged a common picture of ourselves as well-meaning, if imperfect people, rather than potential torturers.<sup>6</sup> In short, I think it unlikely that people are indifferent to the implied shame and condemnation of being associated with

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<sup>5</sup> Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987), ch. 6, for example, pp. 86–89.

<sup>6</sup> For a useful summary and discussion of Milgram, see Elliott Aronson, Timothy D. Wilson and Robin M. Akert, *Social Psychology: The Heart and the Mind* (New York: HarperCollins, 1994), pp. 275–83. Something similar, I think, underlies some of the controversy over Christopher Browning’s *Ordinary Men*, with its implication that one did not have to be a passionate anti-Semite in order to mow down unarmed old men, women, and children because they were Jewish. Rather, it seemed, copious amounts of alcohol, habituation, and a sense that one should not offload an unpleasant duty onto one’s fellow reservists by shirking were enough to turn a bunch of “ordinary men” into hardened killers. See Christopher R. Browning, *Ordinary Men: Reserve Battalion 101 and the Final Solution in Poland* (New York: HarperCollins, 1992), especially chs. 7 and 8, and the concluding chapter, 18.

criminals, however remotely, and I suspect that the more ready we are to demonize criminals, and to favor retributive over other forms of punishment, the more affronted we will be by the idea that we are not self-evidently upright and respectable members of our society.

Were my hypothesis right, white and black people might object to the racial profiling of their group in ways that reflect the racism of their society. For example, white people, especially if they are comfortably off, tend to associate criminality with people who are quite unlike themselves, rather than seeing criminals as mostly people like themselves who were unlucky, foolish, weak-willed or imprudent. Hence Mothers Against Drunken Driving had great difficulty in persuading people that to drive when drunk is criminal, rather than foolish. In what looks like a vicious circle, the fact that so many people did it made it hard to see drunken driving as a crime; and because it was not seen as a crime, most people were unaware of the tragic toll drunken driving took, until MADD started its campaign. If the profiling of whites challenges the assumption that criminals are quite different from “us,” therefore, it might well be considered offensive and threatening. So it seems possible that white and black people might each find racial profiling offensive, and might do so in ways that reflect the favored social position of the former, and the subordinate status of the latter. But this is perfectly consistent with the thought that the harms of racial profiling to blacks are not purely, or even principally, expressive.

Assume, though, that Risse and Zeckhauser are right, and that white people do not object to the profiling of whites *because* no harm is attached to membership in the group “white.” What does that prove? It gives us some reason to suppose that the racial profiling of black people is harmful because of the racism of a racist society. What it does not show, and cannot show, is that the harm of such profiling is largely expressive.<sup>7</sup> Thus, even if they are right about the profiling of whites, Risse and Zeckhauser are too quick to treat the harms of profiling as expressive, and far too quick to suppose that black people are mistaken or confused when they object to racial profiling.

### **Racial Profiling and Racism: the Incremental Thesis**

We should, then, be skeptical of the claim that the harms of racial profiling are primarily expressive, or caused by racism unrelated to profiling itself. But what of the claim that the harms of profiling, as distinct from the harms of racism more generally, are relatively small and insignificant? Risse and Zeckhauser refer to these harms as the “incremental” harms of profiling. This captures the idea that we are concerned with identifying what is distinctive about the harms of profiling against a backdrop of racist harms occurring in society more generally. However, there is something tendentious about the term “incremental,” reinforcing as it does their assumption that the harms attributable to profiling alone are likely to be quite small and insignificant compared to the harms that black people will likely suffer simply because they live in a racist society. By contrast, I will argue that the harms of racial profiling are likely to be quite large, and that even

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<sup>7</sup> I would like to thank one of the Editors of *Philosophy & Public Affairs* for making this clear to me.

when they are not, background racism is likely to aggravate them, and thus make them particularly hard to justify.

The harms of profiling, as described by Risse and Zeckhauser, seem remarkably bland.<sup>8</sup> Perhaps being stopped and having one's papers examined when shopping, at an airport, or bus station does make one feel hurt, resentful, and distrustful of the police, especially if one suspects that this is happening because one is black rather than white. But I am inclined to think that being stopped on the motorway at night is likely to be a scarier experience. Police in the United States carry guns, and are known to use them. By the side of the motorway no one can really tell what is going on. A wrong move, the inability to hear or understand what is being said, a fit of coughing or a panic attack can all lead to violence and tragedy. Police have been known to mistake a black man gasping for air, or suffering from a heart attack or epilepsy, for someone trying to resist arrest or to attack them, and have then responded with what turned out to be deadly force. In those circumstances, I would surmise, fear would be an appropriate reaction to being stopped by police, however innocent one is. Thus, the outrage racial profiling causes black professionals is likely to be a reaction to the fear and stress that profiling provokes, and not merely a response to the inconvenience, stereotyping, or to any actual insults, bullying, and violence that accompanies it.<sup>9</sup>

In short, fear of violence and of death at the hands of the police—not just feelings of hurt, resentment and distrust—are likely to be among the harms of profiling in a racist society, and to occur even when the police officer one is dealing with appears to be polite and considerate. Thus, racial profiling has a high threshold to surmount in order to be justified, at least when it occurs in places, and in ways, that discourage bystanders from monitoring what is going on, or from intervening on behalf of its victims. Consequently, I agree with Randall Kennedy that considerations of efficiency are insufficient to justify profiling, although profiling may be justified in exceptional circumstances.

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<sup>8</sup> At p. 145 they imply that they are following Randall Kennedy in describing the harms of profiling as “the feelings of resentment among minorities, the sense of hurt, and the increasing loss of trust in the police” (p. 144) and refer us to an article, “Suspect Policy: Racial Profiling Usually Isn't Racist. It Can Help Stop Crime. And It Should Be Abolished,” in *The New Republic*, Sept. 13 and 20, 1999, p. 30. They state that the article is based on his book, *Race, Crime and the Law*, especially ch. 4. As we will see, whatever the case with the article, this is not an accurate picture of the harms of racial profiling as described by Kennedy in his book.

<sup>9</sup> See Kennedy, *Race, Crime and the Law*, pp. 152–53 for fear, as an example of the “powerful feelings of racial grievance against law enforcement authorities” (p. 151). Kennedy quotes from Don Wycliff, a journalist, that he feels “ambivalence tilting towards antipathy” for the police, and ascribes this to the way that “a dangerous, humiliating and sometimes fatal encounter with the police is almost a rite of passage for a black man in the United States.” Indeed, Kennedy stresses that even a hypothetical “Office Friendly” is not exempt from the downward spiral of misunderstandings, exaggerated fear of blacks, and recriminations that “lead to the sort of conflicts which have often vexed relations between police departments and black communities” (p. 154), and later, p. 157. It is important to remember that what is at issue, either in profiling by the police or by citizens, is a supposition of *criminality* (although, unfortunately, racial stereotyping is not limited to that, but typically includes assumptions about the defective intelligence, beauty, and manners of minority groups). Hence the rage racial profiling generates is particularly acute. For examples, see Kennedy, pp. 157–58, discussing the reactions of Anthony Walton and Patricia Williams. And because it is criminality, not intelligence, beauty, or good manners behind racial profiling by the police, there are obvious reasons why violence and police abuse cannot be divorced from the harms of profiling in the way that they probably could be divorced from other forms of racial stereotyping.

Moreover, even where the harms of racial profiling are less substantial, the racism of a racist society is likely to render them more acute. Risse and Zeckhauser imply that once one has set aside police abuse and the disproportionate use of race in crime detection, the principal harms of profiling are hurt feelings, inconvenience, and distrust of the police. Painful though these are, these harms are clearly less serious than being passed over for a job because of one's race, or subject to violence because of one's race, or subject to indifference, rudeness and second-class status because of one's race. But, as we have seen, this does not mean that the harms of racial profiling are unrelated to racist patterns in employment and housing, nor that profiling does not exacerbate racist patterns of thought and behavior.

For example, Randall Kennedy refers to residential segregation as "one of the most intractable and consequential problems in America" (p. 153). This supports the idea that abandoning profiling alone will not make the problem disappear, but it also highlights what seems so particularly obnoxious about racial profiling: that it uses the police to ram home the message that there are large and desirable neighborhoods where blacks are "out of place," do not "belong," and should not walk. Certainly, as Risse and Zeckhauser believe, if minorities are to be subject to police scrutiny because they are walking or driving in predominantly white neighborhoods, whites should be subject to such scrutiny when they walk or drive in areas where racial minorities predominate (p. 142, n. 18). But while this reminds us that racial profiling, as usually practiced, violates even the most basic canons of fairness, such a response fails to acknowledge the way that racism compounds the harms of profiling. Neighborhoods that are predominantly or wholly white are likely to be especially attractive areas to live and visit: prettier, more prestigious, wealthier, and less crowded than other places. Profiling means that blacks and other minorities can only enjoy the benefits of such areas at considerable risk to their pride, security, convenience and anonymity regardless of the attitudes and behavior of the residents. Whites, by contrast, typically suffer no such disabilities. Although minority areas are often lively, historically interesting, and culturally rich, police do not generally confuse white interest in such areas with a predilection for crime.

Of course, a fair bit turns on how one thinks about the racism of a racist society, and of the harms it generates. Thus, while it is natural to think of the racism of a racist society that no longer goes in for apartheid, or explicit prohibitions on interracial marriage and interracial sex, primarily in terms of discrimination in the competition for jobs, housing, healthcare, education and other scarce resources, overt discrimination may be relatively uncommon. Instead, racism may be experienced on a daily basis in feelings of discomfort, of being an outsider, of being watched suspiciously, of constant self-questioning about the motives and actions of others, or of unwarranted self-doubt and self-blame. Or it might take the form of a constant struggle against poverty, sickness, an inhospitable environment, with poor public services, poor public education, poor public protection, and the knowledge that one's struggles and difficulties find little echo in the lives of one's fellow citizens, and may seem so alien that they figure only as caricature, stereotype, or fiction in their thinking.

On any of these pictures, the harms of racial profiling will be hard to justify, even if we only consider the embarrassment, humiliation, inconvenience, and distrust that it

occasions. For what it is to suffer racism is, in part, to suffer such harms as an ordinary part of daily life, and to suffer them simply because one is black, rather than white. Racial profiling inevitably compounds these harms, and gives them an official seal. Indeed, some people clearly feel that the United States' promises of racial equality run particularly hollow when being a professional, or an obviously wealthy and established member of one's society, provides no protection from police suspicion and harassment. It emphasizes, if emphasis were needed, that it is on one's color, not one's accomplishments and behavior, that one will likely be judged by strangers, whether one is talking about the police, or about fellow pedestrians in the street.<sup>10</sup> Such a policy is likely only to exacerbate racism in the police force, and to discourage talented minorities from seeking a career within it. It is likely to exacerbate existing barriers to interracial friendship, employment and housing, as well as the detrimental effects of racism on the stress levels and general health of racial minorities. Its effects on the young are not promising either. Racial profiling, essentially, teaches blacks that they are more likely to be viewed as criminals than are whites; and it teaches whites that they have more to fear from black people than from other members of their society, although most crime is intraracial, rather than interracial. In short, racial profiling seems certain to exacerbate the harms of living in a racist society, not merely to reflect them and, therefore, to exacerbate the unmerited exclusion, humiliation, discrimination, poverty, and fear suffered by blacks because they are black.

To this Risse and Zeckhauser make two points. First, that "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" (p. 152, emphasis in text). Moreover, they emphasize, the cases of profiling they are concerned with are ones where it is a useful police practice, at least in certain circumstances. Thus, even if one thinks of racial profiling as racist, it is a mistake to think of it as just any old racist practice, and so to conclude that the utilitarian arguments for profiling justify any old racist practice on the grounds that it is merely expressive and that changes to society must occur elsewhere (p. 152, n. 28). The profiling they are concerned with "plays a useful role in police tactics and thus has a certain value for society as a whole" (Ibid.). It would be too easy, they insist, "*to think about the removal of racial discrimination in terms of stopping racial profiling*" (p. 152, emphasis in text); and if, as is plausible, "the disproportionate tendency of minorities to engage in criminal activity is, to some extent, a symptom of discrimination," then "the appropriate response is to remove the causes of those symptoms, rather than to stop taking such symptoms as the statistical indicators that they are" (p. 152).

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<sup>10</sup> See Kennedy, pp. 157–58, with its discussion of Anthony Walton's essay, "Willie Horton and Me." I would not want to endorse this thesis, in part because racial statistics on poverty, health, imprisonment and the death penalty strike me as at least as troubling indicators of the United States' commitment to racial equality. On the other hand, it is important to recognize that racial profiling at airports, rather than bus stops, or of blacks driving expensive cars, or traveling in white neighborhoods, are practices that are likely to catch professionals and members of the middle class who would otherwise be unlikely to be stopped by the police.

But no one thinks that we can end racial discrimination by ending racial profiling. Nor do those, like me, who worry that profiling is far from epiphenomenal, suppose that all by itself racial profiling is responsible for most of the harms that are experienced by the victims of a racist society. The point, rather, is this: that it is a complicated empirical question how serious are the harms that should be attributed to racial profiling in a racist society, and an empirical question how far these are, in fact, expressions of other harms, rather than distinct harms in their own right. There are good reasons to believe that Risse and Zeckhauser give unduly optimistic answers to these questions. This is partly because they suppose that opponents of racial profiling are confused about the causes and severity of the harms of profiling and partly because they too readily assume that their distinction between expressive and nonexpressive harm enables us to put torture, imprisonment and punishment as firmly to one side as does their opposition to police abuse and the disproportionate use of race in police investigations.

Perhaps the appropriate response to any disproportionate tendency by minorities to engage in criminal activity is, in the words of an infamous Blairite slogan, to be “tough on crime; tough on the causes of crime,” and so to try and combine antiracist measures with racial profiling. But that is not self-evident. It seems just as “appropriate” to suppose that the penalties of living in a racist society should, so far as possible, be born by those who benefit from it. Thus, if the choice really is between sacrificing some measure of effectiveness in the discovery and punishment of crime and adopting racial profiling, then the former is what one should choose so as not to exacerbate what is, already, a blight on our societies; and to help motivate those of us who worry about police effectiveness to recognize the urgency of combating racism. Of course, one might want to ensure that blacks do not then suffer disproportionately from any loss of effectiveness in policing. To ensure this, we might want to shift police resources from white to black neighborhoods, and encourage black neighborhoods and black victims of crime to participate in determining the best ways to deter crime in their areas, and the best ways to use the police. So what is an “appropriate” response to the trade offs between police efficacy and racial sensitivity in a racist society is scarcely as self-evident as Risse and Zeckhauser imply.

## **Conclusion**

I have argued that neither the expressive harm thesis nor the incremental harm thesis is plausible as they stand. In so doing, I have stressed the difficult causal and interpretive judgments necessary to describe and evaluate the harms of racial profiling. I do not, however, suppose that it is any easier to show that profiling is really harmful than that it is not, and this obviously begs the question of what one should conclude about the justification for racial profiling. The answer, I think, is this: that a heavier burden of proof lies on those who would justify racial profiling than on those who would reject it. It is not simply that the coercive uses of state power need justification, although they do. Rather, it is because racial profiling will likely exacerbate the racism of a racist society and, at all events, will place particularly onerous burdens on those who are already burdened by racism. In short, the dangers of compounding injustices that are, already, grave and

persistent, means that more is required by way of evidence and argument to justify racial profiling than to oppose it.

This does not mean that racial profiling is never justified, but that it should never be treated as an ordinary part of police practice, rather than as an exceptional measure, requiring special forms of approval, supervision, and accountability. This conclusion does not depend on some generalized distaste for racial classifications, or on doubts about the legitimacy of affirmative action, although Randall Kennedy shows that “many of the same arguments against race-based affirmative action are applicable as well in the context of race-based police stops” (p. 160). Instead it rests on the thought that any social policy that is likely to disadvantage black people relative to white people requires exceptionally good justification in a society, like our own, where unfair burdens already accrue to black people because they are black, and unfair advantages accrue to white people because they are white. Consequently we should not be too troubled by the thought that alternatives to racial profiling, such as randomized searches, “would mean searching people whose race is a good indicator of innocence” (p. 161, n. 38) or risking the resentment that this might cause.<sup>11</sup> All searches, including race-based ones, will mean searching people who, for one reason or another, are statistically unlikely to be engaged in crime. So, unless you are fixated on racial distinctions, there is no reason to complain if you are not excluded from a general security search because “your race is a good indicator of innocence.” Instead, one can recognize, more or less cheerfully, that a common ideal of fairness requires those who benefit from a public good to share in the cost of maintaining and preserving it. Fortunately, this seems to be the attitude of most people caught up in generalized security checks at cinemas, department stores or, even, at university libraries.

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<sup>11</sup> I am uncertain why Risse and Zeckhauser think that randomized searches would lead to resentment when they believe that the deliberate profiling of whites would not. The implications of the expressive thesis are, precisely, that it is racism not profiling that is mainly responsible for resentment. Thus, it seems hard to square this rejoinder to Kennedy with the expressive thesis, and the assumptions about profiling that underpin it. I owe this point to Shahar Ali.