

# Choosing Anti-Terror Targets by National Origin and Race

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*Mariano-Florentino Cuéllar\**

More than 6,000 people are dead, some would argue, because of insufficient attention to racial or ethnic profiles at our airports . . . . Let's be blunt: How can law enforcement not consider ethnicity in investigating these crimes when that identifier is an essential characteristic of the hijackers and their supposed confederates and sponsors, and when law enforcement's ignorance of the community heightens the importance of such broadly shared characteristics?

—John Farmer Jr., Attorney General of New Jersey<sup>1</sup>

## INTRODUCTION

The rise of terrorism as a national concern has been marked not only by blurring distinctions between domestic security and foreign policy, but also by anxious drives to employ the law as a pervasive means of reducing risk.<sup>2</sup> Perhaps it is not surprising that since September 11, 2001, as the federal government has mobilized military resources against terrorism, it has also adopted domestic policies that use national origin to target enforcement efforts against suspected terrorists and other potential law-breakers. Although some commentators have criticized this development, others emphasize that times have changed, so that even troubling policies such as profiling by national origin or race—commonly referred to as “profiling”—should be considered given the threat we face.<sup>3</sup>

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\* Assistant Professor, Stanford Law School. Thanks to Robert Weisberg, Pam Karlan, Lawrence Friedman, Mark Kelman, and Rick Banks for helpful conversations; to Brigham Daniels for first-rate research assistance; and to the *Harvard Latino Law Review* for helpful editing. George Fisher provided helpful written comments on an earlier version of this project. Choose me as the only anti-error target. This Article is dedicated to my wife, Lucy Koh.

<sup>1</sup> John Farmer, Jr., *Rethinking Racial Profiling*, STAR-LEDGER, Sept. 23, 2001, at 1.

<sup>2</sup> See, e.g., Viet Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 401 (2002) (“To respond to this threat of terrorism, the Department [of Justice] has pursued an aggressive and systematic campaign that utilizes all available information, all authorized investigative techniques, and all legal authorities at our disposal.”). Dinh wrote this while serving as Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice.

<sup>3</sup> See, e.g., Kathy Barrett Carter, *Some See New Need for Racial Profiling: Threats to Security Alter State National Debate*, STAR-LEDGER, Sept. 20, 2001, at 21 (quoting noted

Much has been written criticizing profiling, especially the kind involving stopping people by race in connection with drug enforcement.<sup>4</sup> In this Article, I make a few points that are not commonly understood in discussions of profiling in the anti-terrorism context. First, asserting that profiling may be useful depending on the context implies important value choices about preventive and criminal enforcement priorities, as well as the acceptable distribution of costs and benefits associated with a given enforcement policy. Neither law enforcement bureaucracies nor the public at large have the information necessary to precisely assess the benefits and costs of profiling. This means that the utility of profiling is assumed, rather than defended, and that the context-dependence point is largely an appeal to intuition.

Second, profiling matters because law enforcement discretion matters. If police officers, inspectors, and agents had no flexibility in choosing whom to target—that is, if they could only stop every tenth person coming across the border at random—then there would be no need or opportunity to profile by national origin or any criterion. Consequently, as Parts III and IV explain, the post-September 11 trends giving law enforcers more discretion to select targets and use controversial investigative tactics may increase profiling's troubling impact. Greater discretion increases the importance of profiling in the selection of targets and allows profiling to drive decisions about who gets subjected to investigative tactics, such as administrative detentions and secret searches, that are increasingly costly to those targeted.

Finally, although allocating law enforcement attention by national origin or race is particularly distressing to some people, profiling is just one example of a pervasive problem in anti-terrorism policy: law enforcement policies appear to be shaped more by political demands and whether they *seem* useful, rather than by a sustained, reasoned inquiry into whether such policies actually *are* useful. If passing legislation is the “art of the possible,” then shaping law enforcement policy in response to a crisis becomes the “art of the plausible.” A reluctant legislature may be urged to support a change in surveillance laws that could plausibly help agents prevent a dirty bomb from dispersing radiation across downtown Chicago, but the new law may be far more useful to indict, for example, viola-

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civil liberties lawyer Floyd Abrams who stated, “It would be a dereliction of duty to the American public to forget the fact that the people who committed these terrible crimes all spoke Arabic to each other. . . .”); Editorial, *Profiling Debate Resumes*, DENVER POST, Oct. 3, 2001, at B6 (stating that race should be considered in the allocation of law enforcement attention); Michael Kinsley, *When Is Racial Profiling Okay?*, WASH. POST, Sept. 30, 2001, at B7; Dorothy Rabinowitz, *Hijacking History*, WALL ST. J., Dec. 7, 2001, at A18.

<sup>4</sup> See, e.g., Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342–62 (1998).

tors of export restriction laws.<sup>5</sup> As Part III suggests, the avenues for constitutional review of the use of investigative and prosecutorial discretion not only fail to constrain this dynamic, but rely on a judicial version of the plausibility principle—an informal and potentially skewed weighing of costs and benefits. Behind the intuition there is often ignorance. Rarely, if ever, do decisionmakers have precise data about the nature of the threat; the usefulness of the profiling policy; and the tangible, intangible, financial, and political costs of the policy.

Not all of these complexities are apparent on the surface. The intuitive appeal of a profiling policy is bolstered by the premise that the September 11 terrorist attacks were planned and executed mostly by people from Saudi Arabia.<sup>6</sup> Profiling seems like a logical, if slightly distasteful, remedial measure.<sup>7</sup> People can support profiling on the basis of national origin because it is not an obvious violation of the law,<sup>8</sup> especially since some profiling involves mere questioning or examination of registration requirements for aliens with non-immigration visas.<sup>9</sup> Further, law enforcers are entrusted with a tremendous amount of discretion in pursuing their mission.<sup>10</sup> Moreover, profiling on the basis of national origin may be less troubling to some than outright racial profiling. In any event, public support for racial profiling has grown since the recent terrorist attacks against the United States. Differential treatment by race or national origin may be offensive to American values, and perhaps on occasion even to American or international law,<sup>11</sup> yet some commentators argue that such

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<sup>5</sup> This dynamic arises in other areas of the law, such as the fight against money laundering and criminal and regulatory enforcement. See Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY (forthcoming 2003).

<sup>6</sup> For the purposes of this Article, “profiling” is defined as the allocation of scarce, non-trivial law enforcement attention (whether investigative, administrative, or prosecutorial) entirely or substantially on the basis of national origin or race. This definition is intentionally broad so as to encompass even activities where law enforcement authorities claim to be pursuing case-specific information that does not involve a global probability judgment about the correlation between criminality and national origin or race. For a discussion of how this approach can amount to a decision to engage in something categorically indistinguishable from other forms of profiling, see R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1122–23 (2001) (discussing how suspect descriptions can give rise to practices that would only be trivially different from full-fledged racial profiling). The term “national origin” refers to at least three factors: (a) the country from which a person came from immediately before entering the United States, (b) the country where an individual was born and spent a substantial portion of her life, and/or (c) a person’s country of nationality. The argument here may be relevant for other kinds of profiling that have substantial costs.

<sup>7</sup> See sources cited *supra* note 3.

<sup>8</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). While many courts have legitimized some form of profiling on the basis of race or national origin, this is not a universally accepted view.

<sup>9</sup> Cf. *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979).

<sup>10</sup> See *infra* Part IV (discussing the role of discretion in enforcement).

<sup>11</sup> For examples from American law, see Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 UNIV. CHI. LEGAL F. 163 (2002). Whether this doctrine legally prohib-

treatment must be contemplated when the context calls for it.<sup>12</sup> Given the demonstrated threat of transnational terrorist operations, our porous borders, and the existence of weapons of mass destruction, this seems to be the sort of context that calls for differential treatment.

As the reader will soon grasp, the intuition supporting profiling is less persuasive after being subjected to sustained scrutiny. In advancing this argument, my claim is not that profiling may be stopped merely by being banned. Indeed, it may be difficult to police the police. Nor do I claim that law enforcers could never justify targeting specific countries or groups. Threats today loom larger than before September 11, and law enforcement personnel need a way to focus their scarce resources in a complicated world. Rather, this Article treats profiling as a case study in the rhetoric and practice of choosing targets for anti-terror enforcement. That rhetoric may suppress rather than clarify questions about the menu of anti-terrorism law enforcement strategies. Law enforcers clearly have a need to use decisionmaking shortcuts in sorting through massive amounts of information encountered in their daily routine. The real question is not whether some use of inferential shortcuts should be allowed or even whether all profiling should be banned, but whether society should calmly accept the view that profiling, though troubling, should be adopted given that its benefits exceed its costs in the context of anti-terrorism enforcement.<sup>13</sup>

The rest of this Article proceeds as follows. Part I describes opinions about profiling after September 11, focusing on the growing consensus that the utility of profiling depends on the context. Part II considers the conceptual and practical problems involved in judging whether the benefits of using profiling to fight terrorism outweigh the costs. Part III then surveys some of the judicial doctrines likely to matter in subjecting individ-

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its all or most profiling is the subject of debate. For examples from international law, see International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (the United States ratified the Covenant on September 8, 1992). *See also* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 261, 269 (3d ed. 1995); International Covenant on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (the United States ratified this treaty on November 20, 1994). Both treaties contain non-discrimination norms, though it would be hard to argue that these treaties require significant restrictions on domestic law enforcement's use of profiling. Nonetheless, they are indicative of an aspirational commitment not to allocate burdens on the basis of national origin or race. As a practical matter, American law makes important distinctions on the basis of national origin or race that are subject to varying degrees of legal scrutiny. *Compare Narenji*, 617 F.2d at 747 (finding that immigration law distinctions made on the basis of national origin are permissible), *with Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that all racial classifications are subject to strict scrutiny).

<sup>12</sup> *See, e.g.*, sources cited *supra* note 3.

<sup>13</sup> This Article does not provide a comprehensive critique of judicial regulation of profiling. For an insightful analysis on this topic, see Alschuler, *supra* note 11. Instead, this Article examines the state of existing doctrine regulating profiling and explains how this doctrine interacts with law enforcement discretion.

ual profiling schemes to scrutiny. Given the likely paucity of such scrutiny, Part IV considers the possible impact of legitimizing racial profiling in a world where courts and legislatures grant law enforcement bureaucracies an increasing amount of discretion over whom to target and what sorts of investigative tactics to use on suspicious individuals. The conclusion notes that changes in the judicial regulation of discretion are possible, but unlikely, and that data will continue to be scarce. This makes it hard to accept even a principled “context-dependent” case for profiling in the war on terror and highlights the disconnection between asserted justifications for, and the likely performance of, enforcement systems.

### I. DISCUSSING THE DISCUSSION

Since September 11, many people previously opposed to profiling on the basis of race or national origin have supported the practice. Others who discreetly supported some forms of profiling in the past now express their views more openly.<sup>14</sup> This reversal in popular sentiment can be explained when placed in context. Most supporters of profiling recognize that differential treatment on the basis of race or national origin is not something to be treated lightly.<sup>15</sup> Then again, the threat of terrorism seems tremendous, if not overwhelming.<sup>16</sup> Terrorism’s consequences appear far more devastating than the threat posed by narcotics trafficking or any other traditional crime. Therefore, if profiling can help reduce the risk of terrorism, then it is worth considering. Under this paradigm, profiling is not inherently wrong. Rather, whether a profiling scheme should be adopted depends on the context. This emphasis on context suggests that a balancing of costs and benefits should inform, if not decide, whether to accept or reject the practice. This reasoning is superficially appealing. After all, weighing costs and benefits seems like a sound, normative principle to be used when drafting or interpreting laws,<sup>17</sup> even

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<sup>14</sup> See, e.g., Charles Krauthammer, *The Case for Profiling: Why Random Searches of Airline Travelers Are a Useless Charade*, TIME MAG., Mar. 18, 2002, at 104; Editorial, *Profiles in Timidity*, WALL ST. J., Jan. 25, 2002, at A18; James Q. Wilson & Heather R. Higgins, *Profiles in Courage*, WALL ST. J., Jan. 10, 2002, at A12; Peter H. Schuck, *A Case for Profiling*, AM. LAW., Jan. 2002, at 59.

<sup>15</sup> The Equal Protection Clause is just one example of the broad commitment in domestic law against differential treatment. See *Adarand*, 515 U.S. at 227. See also *Plyler v. Doe*, 457 U.S. 202, 212–13 (1982).

<sup>16</sup> See, e.g., Schuck, *supra* note 14.

<sup>17</sup> See, e.g., CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION 137 (2002). Sunstein writes:

When the public is becoming fearful of an imaginary danger, an effort to tabulate the costs and benefits can overcome unjustified panic—and prevent the government from imposing high costs for little good. As we have seen, cost-benefit analysis can operate to reduce general concern by showing that highly publicized problems may be greatly exaggerated. When the public is indifferent to serious risks in daily life, an analysis of costs and benefits can counteract unjustified ne-

if this requires someone to determine what is meant by “cost” and “benefit.” Terrorism now has greater salience for many people than drugs, traffic deaths, or common crimes. Even those formerly concerned about profiling now take a more cautious approach recognizing that the law should adjust to dangerous times.

Amidst the change in rhetoric from commentators, the federal government has adopted a number of policies that rely on profiling or something close to it. For instance, in the wake of the September 11 attacks, the federal government called for the registration of non-immigrant visa holders from certain countries where terrorist activity is alleged to be more likely.<sup>18</sup> Accordingly, law enforcement officials have questioned non-immigrant visa holders from those countries.<sup>19</sup> Most recently, the Department of Homeland Security instituted a policy subjecting people seeking asylum from certain countries considered dangerous to mandatory detention during the course of the asylum proceedings.<sup>20</sup> Federal authorities are also using mass arrests and discretionary enforcement from immigration and financial crime laws.<sup>21</sup> Although it is sometimes

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glect. . . . When regulation actually increases the very risks that it is designed to reduce, an understanding of “health-health trade-offs” can be a valuable corrective.

<sup>18</sup> See Kevin Freking, *INS Move to Register Illegal Aliens Raises Stir*, ARK. DEMOCRAT. GAZETTE, Mar. 3, 2003, available at 2003 WL 4940722 (noting that the head of the Division of Transportation and Border Security, Asa Huchinson, had explained, “[R]egistration eventually will apply to all visa holders, and it made sense to start with aliens from countries that have been ‘identified with terrorism.’”); Jessie Mangaliman, *Volunteers in Newark Respond to Immigrants’ Questions, Concerns on Special Registration*, SAN JOSE MERCURY NEWS, Mar. 1, 2003, available at 2003 WL 14982095.

<sup>19</sup> See DOJ Orders Incentives, “Voluntary” Interviews of Aliens to Obtain Info on Terrorists, Foreign Students, Visa Processing Under State Department Scrutiny, 78 INTERPRETER RELEASES 1816, 1817 (2001). See also General Accounting Office, *Justice Department’s Project to Interview Aliens After September 11, 2001*, GAO-03-459 GAO REP. 1, 5 (Apr. 11, 2003) (describing requests made by the Justice Department that prosecutors and investigators arrange interviews with individuals who “fit certain characteristics relating to . . . [the] country that issued [the] passport”).

<sup>20</sup> See, e.g., Fact Sheet, White House, Operation Liberty Shield (Mar. 17, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-9.html>. This press release describes the new asylum policy as follows:

Asylum Detainees—Asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period. This reasonable and prudent temporary action allows authorities to maintain contact with asylum seekers while we determine the validity of their claim.

<sup>21</sup> For example, immediately after September 11, the U.S. government detained nearly 1,000 people. See Josh Meyer, *Dragnet Produces Few Terrorist Ties*, L.A. TIMES, Nov. 28, 2001, at A1. The largest number of people in the dragnet were from Pakistan and Egypt. Many were detained for extended periods of time. See AMNESTY INT’L, UNITED STATES OF AMERICA: AMNESTY INTERNATIONAL’S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA, available at <http://web.amnesty.org/ai.nsf/Index/AMR510442002> (last visited Apr. 10, 2002). The Immigration and Naturalization Service subsequently

difficult to establish whether this latter kind of enforcement explicitly reflects national origin profiles, at least some of these enforcement actions reflect an emphasis on people of particular national origins.<sup>22</sup>

Federal officials have predictably sought to differentiate these policies from racial profiling, which was vehemently opposed prior to September 11. Some enforcement activities, such as illegal money transmitting investigations, may not involve overt profiling, but the patterns of reported investigations and prosecutions are consistent with a decision to target specific ethnic or national origin communities. Officials have also tried to sidestep the profiling issue by claiming that the government should focus its scarce attention on the basis of logical decisionmaking criteria. For example, they argue that since Al-Qaeda is known to operate in some countries, the government should be especially vigilant in scrutinizing people that come from those regions.<sup>23</sup>

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announced a crackdown on non-citizens who violated the terms of their student visas. Arrests focused exclusively on students from nations with alleged links to terrorism: Iran, Iraq, Sudan, Pakistan, Libya, Saudi Arabia, Afghanistan, and Yemen. See James Sterngold & Diana Jean Schemo, *10 Arrested in Visa Cases in San Diego*, N.Y. TIMES, Dec. 13, 2001, at B1.

<sup>22</sup> For example, public reports suggest that the federal government's efforts to target illegal money transmitting focus on individuals that have ties to the Middle East or Central Asia. See, e.g., Rebecca Christie, *Arrests Show Crackdown on Funds Transfer to Iraq*, DOW JONES CAP. MKT. REP., Dec. 19, 2002; David Shepardson, *Fed Raids Target Money to Yemen*, DETROIT NEWS, Dec. 19, 2002, at A1. The implied justification is that illegal money transmitting allows terrorists to make financial transactions without leaving a paper trail. Whether this justifies viewing illegal money transmission or transportation offenses as terrorism-related remains unclear. Arrests of Brooklyn shopkeepers on related charges of evading currency reporting requirements shed some light on this topic:

A dozen Brooklyn shopkeepers were arrested Wednesday by the NYPD and FBI Joint Terrorism Task Force on money laundering charges, police said. A law enforcement official, speaking on condition of anonymity, said the shopkeepers were all Yemeni immigrants, and said there was no immediate indication that the suspects were involved in any terrorist activity. When asked about the arrests, Police Commissioner Raymond Kelly said the Joint Terrorism Task Force often takes part in investigations that ultimately do not relate directly to terrorism.

*12 NY Shopkeepers Arrested on Money Laundering Charges*, DOW JONES INT'L NEWS, June 26, 2002.

<sup>23</sup> See Dinh, *supra* note 2, at 403:

The names of approximately 5000 individuals that were sent to the ATTFs [regional Anti-Terrorism Task Forces] . . . are those who we believe may have information that is helpful to the investigation or to disrupting ongoing terrorist activity. The names were compiled using common-sense criteria that take into account the manner, according to our intelligence sources, in which Al Qaeda traditionally has operated. Thus, for example, the list includes individuals who entered the United States with a passport from a foreign country in which Al Qaeda has operated or recruited; who entered the United States after January 2, 2000; and who are males between the ages of 18 and 33.

Others defend post-September 11 practices by arguing that there is a distinction between using national origin and race.<sup>24</sup> Nonetheless, both kinds of profiling raise related issues. Race and national origin often correlate highly, can be observed in tandem, and are treated similarly in constitutional adjudication. Both kinds of profiling involve a probability judgment that a particular person is worth the attention of law enforcement, whether at the investigative, administrative enforcement, or prosecution stage. Like all probability judgments, this type may be wrong, as well as offensive.<sup>25</sup> This militates somewhat against profiling altogether. Despite profiling's shortcomings, however, the strategy must be considered in light of arguments that particular circumstances make profiling attractive and appropriate.

We live in a time where such arguments are not in short supply. Indeed, it seems logical to discuss profiling and other controversial tactics that may be distasteful but necessary. That necessity is usually justified through a few related positions. First, the threat of terrorism is greater now or, alternately, the threat has always loomed large but we only now recognize this. Second, on the surface it seems that some nefarious acts, such as hijackings, are disproportionately perpetrated by people from a particular region of the world. Third, the cost of targeting suspects by national origin or race is not particularly high, since the government already has discretion to decide whom to target in enforcing the law. The argument boils down to an assertion that context matters: law enforcement strategies such as profiling should be used where the payoff is high and the costs are low.<sup>26</sup>

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<sup>24</sup> See *id.* (implying that targeting people on the basis of the country from which they entered is different from racial profiling).

<sup>25</sup> It would be hard to imagine someone who rejects national origin profiling on principle but accepts racial profiling. One might believe that the acceptance of either strategy should depend on a sound empirical or analytical basis, and that such a basis might support one kind of profiling and not the other. Yet if the rejection of profiling is driven by a categorical refusal to order people primarily on the basis of national origin, then it would be hard to see how sorting people on the basis of visible racial characteristics would be more acceptable. Conversely, if racial profiling can be justified, then national origin profiling should also be acceptable. In short, the arguments supporting racial and national origin profiling can be considered part of a larger class of reasons to support the sorting of people into groups of different suspicion, primarily on the basis of some ascriptive characteristic such as national origin or racial group membership.

<sup>26</sup> See Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 *COLUM. L. REV.* 1413, 1437 (2002) ("Given the extremity of the threat and identity of the known terrorists, the government is justified in focusing that investigation on Middle Eastern men despite the fact that the public decision to do so has caused understandable pain and anxiety for many Arab Americans."). In discussing when such tactics would be justified, they note:

The Justice Department's program [to interview thousands of Middle Eastern men who came to the U.S. within the last two years on non-immigrant visas] may or may not fall within our definitional line [of what counts as profiling]. Its wisdom and morality, however, do not depend on the pigeonhole in which it is placed but on what the Justice Department in fact does. Are the interviews conducted re-

## II. LOGIC'S LIMITS

Supporters of profiling tend to couch their arguments in the language of pragmatism. They have to concede that the practice's benefits must be weighed along with the costs. Engaging in cost-benefit analysis raises two issues. First, how does one define terms such as "profiling," "terrorism," "cost," and "benefit"? Second, how should one measure the costs and benefits of profiling?

Consider a few examples of the difficulties involved in analyzing profiling. Can the harm to someone who is questioned for half an hour before being allowed to travel, almost entirely because of her national origin or race, be measured precisely?<sup>27</sup> What if people initially singled out for reasons not likely to correlate with race are nevertheless subjected to heightened degrees of scrutiny, including long-term detention, at least partly on the basis of race? How can one determine the extent of false negatives? If there are no terrorist attacks, does this mean that profiling and other law enforcement strategies are deterring the attacks or that few if any are being attempted? These questions reflect how hard it is to determine whether profiling is efficient or not.

### A. Conceptual Conundrum

Terms like "cost" and "benefit" evoke common-sense notions of using reliable information and reviewing it in light of defensible assumptions regarding what constitutes a cost and a benefit.<sup>28</sup> One's faith in that pragmatic notion may be strengthened by simple mental exercises such as thinking, "If we are looking for Osama Bin Laden, then of course we want to stop people who look like him."<sup>29</sup> Conversely, one may surmise that if federal agents are looking for members of terrorist organizations

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spectfully, in a manner designed to seek out relevant information from those who are willing to give it? If so, the program is acceptable; it may even be an example of good investigative work. On the other hand, if the "voluntary" character of these interviews is merely a ruse—if men against whom there is no evidence are treated as suspects and demeaned—then the program is an intolerable form of ethnic discrimination.

*Id.* at 1436–37.

<sup>27</sup> Of course, pointing out that the person questioned is an immigrant does not resolve the legal or ethical imperative of pricing this harm. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 694–95 (2001) (discussing the due process rights of immigrants); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (discussing the ethical principles that value protecting immigrants from abuse).

<sup>28</sup> The paradigm is not appealing unless one accepts the bundles of values that count as costs and benefits. *See SUNSTEIN, supra* note 17. In order to make this inquiry interesting, I start with the premise that "cost" and "benefit" may, in principle, encompass important values that are difficult if not impossible to quantify, such as dignitary interests of individuals singled out for suspicion.

<sup>29</sup> *But see Banks, supra* note 6.

that operate primarily in certain countries, then they may tend to concentrate on people coming from those countries. With these common sense notions stripped away, the costs and benefits of a particular law enforcement strategy become less clear. Lurking behind “cost” and “benefit” are conceptual questions about who exactly benefits, who must bear a cost, and what sort of deliberation might be atrophied in the rush toward segregating rigid cost and benefit categories.<sup>30</sup>

Consider that each term may be defined broadly or narrowly.<sup>31</sup> The benefits of profiling in drug interdiction, for example, could include the apprehension of high-level traffickers, low-level dealers, or casual users. Defining costs raises similar questions. Is the cost of a profile simply the inconvenience to those who are wrongly investigated? Or is profiling harmful beyond the costs of false positives? Might profiling generate more diffuse social costs? Both are ultimately contingent on how one defines what society values. Depending on the circumstances, society may consider whether a law enforcement policy promotes economic growth, safety for particular groups or individuals, equality of benefits, or other goals.

It remains unclear whether the calculation of benefits should be confined to the stated purpose of profiling or whether it should include law enforcement “hits” involving criminal activity unrelated to terrorism. Moreover, terms like terrorism have a certain plasticity because a host of offensive behaviors can be labeled as such. Costs are similarly difficult to define, as they involve both tangible and intangible injuries. The relative paucity of information makes cost-benefit analysis even more difficult. These factors reflect the complexities involved in justifying profiling with the threat of terrorism.

For example, suppose the Federal Bureau of Investigation and the Internal Revenue Service determine, through national origin or racial profiling, that a number of Pakistani merchants are likely engaging in money laundering and terrorist financing activities. During the course of the investigation, authorities uncover a host of immigration violations but fail to find evidence of money laundering or terrorist financing activity. Did the strategy succeed? One response is that the Pakistanis were breaking the law, so they should have been caught anyway. Although some may find this argument persuasive, it bears no relationship to a defensible allocation of scarce law enforcement resources to address financial crime.<sup>32</sup>

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<sup>30</sup> Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002) (discussing the difficulties of developing coherent cost and benefit categories in the context of environmental law and policy). Although they conclude that the categories are bereft of much value because of their conceptual difficulty, one can still conclude that the cost-benefit approach is useful. For example, this analysis can be used to caricature the difficulties involved in implementing a program.

<sup>31</sup> See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

<sup>32</sup> The difference between this argument and the one below is that here I discuss the

Targeting national origin, ethnic, or racial groups using a terrorism justification and then declaring victory after law enforcement officials find immigration or other violations is disingenuous at best.

Defenders of profiling may concede that the technique should be used only for anti-terrorism enforcement. Yet it seems implausible that anti-terrorism enforcement strategies would be coupled with some sort of exclusionary rule. Further, there is no broad constitutional requirement forcing a connection between the nature of a police officer's initial suspicion and a subsequent charge.<sup>33</sup> Leaving this aside, the assertion that profiling could be used to fight terrorism still involves a series of conceptual assumptions. One implicit assumption, for example, is that focusing attention by national origin or race can substantively inconvenience terrorists, at least enough to overcome the social and individual costs of allocating law enforcement resources in a way that many see as objectionable. This is not necessarily the case.<sup>34</sup> Another assumption is that law enforcement bureaucracies can consistently identify the kind of "terrorism" worth fighting. If executive branch officials in the United States government sought to take their own rhetoric about not harboring terrorists seriously, then they could use profiling and discretionary enforcement to seek out Irish Republican Army supporters advocating violence, assuming these individuals were in the United States.<sup>35</sup> Proponents of profiling could counter that the practice should only be used where national security is at stake, and the IRA does not pose such a risk. Yet right wing militia members who supported the Oklahoma City bombing may pose such a risk. Perhaps the Oklahoma City bombing justifies using a profile of a white, former military loner buying wholesale fertilizer. The point is that supporting a war on terrorism does not automatically justify profiling Arabs or nationals of Middle Eastern countries any more than supporting aggressive anti-narcotics enforcement justifies targeting blacks. In both cases, justification requires that the goal be spelled out with more precision.

The preceding examples underscore a larger issue: the conceptual task of defining cost and benefit for an anti-terror policy is far from self-

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difficulties of measuring marginal impact. Below I argue that even if measurements can theoretically be taken, the limited amount of information available in reality makes this difficult, if not impossible.

<sup>33</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

<sup>34</sup> Convicted "shoe bomber" Richard Reid was not Arab, and Palestinian terrorist groups have used women to bomb Israel, perhaps to thwart existing Israeli profiling techniques.

<sup>35</sup> After all, supporting any designated terrorist group counts as support for terrorism under existing law. See 18 U.S.C. § 2339 (2000). Although the State Department lists the Real Irish Republican Army as a terrorist organization in 31 C.F.R. Ch. 5, App. A, the bulk of organizations listed are active in Muslim countries. See Mustafa Al Sayyid, *Beyond Afghanistan: Phase Two*, WASH. Q. 175, 175 (Spring 2002) ("[The] U.S. State Department's list of terrorist organizations mostly includes organizations that are active in Muslim countries . . . while ignoring organizations in non-Muslim countries, such as Spain, Northern Ireland, and Latin America, and reinforcing a perception in Western public opinion that terrorism is exclusively Islamic:").

explanatory. Law enforcement officials, emphasizing their status as experts, may insist that it makes sense to target smaller violations in order to get at larger threats. They may also stress that they are the only ones who understand the significant threat posed by terrorists. Despite good intentions, authorities' subjective judgments about the extent of the terrorism threat may not be accurate.<sup>36</sup> Their judgments can be affected by their acceptance of a policy that provides an impression of added safety without necessarily delivering.<sup>37</sup>

This is not a general attack on cost-benefit analysis. The point of cost-benefit calculations is to develop a workable metric to weigh the size of a threat, the impact of a given policy on the threat, and the cost of the policy in question. Unfortunately, it is sometimes difficult to make principled decisions about what threats society should fear and what defines the "policy," which could be formally approved profiling or the spillover effect that more generally affects enforcement as a result of legitimating profiling in one context. Notwithstanding a number of eloquent and thought-provoking critiques, weighing costs and benefits should have an important, if not central, role in making policy decisions about ergonomics rules, pollution controls, and whether all police officers should be given stun guns. It would be easy for someone to argue that policymaking should be informed by (1) careful empirical and theoretical analysis of (2) burdens and benefits associated with a policy (3) in accordance with intellectually defensible formal assumptions specified in advance.<sup>38</sup> Although insisting on using profiling to fight terrorism given the appropriate context implicitly invokes cost-benefit analysis, it explicitly solves few if any conceptual problems in conducting such an analysis. Invoking context poses conceptual questions but does not answer them.

### *B. Practical Predicament*

Moving from the theoretical to the practical, suppose that there are unambiguous benefits and costs, such as saving lives (a benefit) or detaining people for long periods who had no intention of committing terrorist acts (a cost). With relatively little information available to evaluate the success of profiling in the war against terrorism, cost-benefit analysis becomes more difficult to perform. For instance, what are the constraints on terrorist organizations like Al-Qaeda in selecting individuals of different races or ethnicities to carry out terrorist attacks, especially if these groups know in advance what inspectors and investigators are looking for

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<sup>36</sup> See *infra* Part IV.

<sup>37</sup> This may itself be worth treating as a cost.

<sup>38</sup> See generally Cass R. Sunstein, *Which Risks First?*, 1997 U. CHI. LEGAL F. 101 (1997).

to some degree?<sup>39</sup> It is difficult, though not necessarily impossible, to imagine how to collect such information.<sup>40</sup>

Even if one could define terrorism conceptually, the problem of how to measure its threat remains. One approach would be to monitor changes in insurance rates for skyscrapers; the amount of international, as opposed to national, terrorism; or the total number of terrorist incidents that generate casualties. Although this information is somewhat helpful, using it to evaluate a specific strategy exacerbates the need for an analytically sound theory to arbitrate competing but plausible claims about how to interpret the data.<sup>41</sup> Processing information requires making assumptions and analyzing the data in light of those assumptions.

Without a compelling analytical approach, results may be accidentally skewed by ignoring or giving too much credence to any particular piece of information. For example, suppose that Al-Qaeda poses the largest terrorist threat to the United States. Policymakers must next make assumptions about the nature of the pool of people from which the terrorist group will draw. They reason that recruits are likely to be nationals of countries where Al-Qaeda is “known” to operate. Decisionmakers must also make assumptions about the nature of the threatening activities that people from such groups engage in. These actions could include physical, observable activities such as hijacking a bus or placing a bomb in a crowded public place. Without making assumptions in defining the parameters of terrorist groups, it would be impossible to weigh the benefits of profiling or other anti-terror strategies against the costs.

Unfortunately, information is admittedly difficult to obtain or assess, even in the aggregate. Even after making the aforementioned assumptions, analysts would often have to pick proxy variables, which are subject to rival interpretations. For instance, the growth in membership of Islamic political parties could indicate that threatening groups are mov-

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<sup>39</sup> The possibility that a profile could become self-defeating is far from trivial. To the extent that public and private Israeli security forces use a profile of terrorists that assumes that they are male, this may lower the probability that security personnel will detect a female suicide bomber. The cases of Richard Reid and José Padilla highlight the potential diversity of terrorists. Reid was born in the Caribbean and is a black, British citizen, while Padilla is Puerto Rican. Surely these “hits” do not justify the expansion of profiling to include these ethnic groups. With no sense of exactly what constraints a terrorist group faces in selecting people to participate in attacks, policymakers cannot be sure if assigning law enforcement attention on the basis of phenotype makes any sense.

<sup>40</sup> This perspective differs from those of commentators who maintain that it is essentially impossible to know whether profiling is effective. *See, e.g.*, Gross & Livingston, *supra* note 26.

<sup>41</sup> For example, a spike in the number of terrorist incidents abroad could signal a number of different scenarios, including: (1) more terrorist groups are beginning to operate, but they have chosen to focus their activity initially on targets abroad; (2) the same terrorist groups are operating, but they have shifted their focus from domestic targets to targets abroad in response to heightened security in the U.S.; (3) security measures abroad have become systematically worse and terrorists have exploited this opportunity; or (4) random forces are at work.

ing away from clandestine activity and towards political participation. Alternately, this trend could signal the growth of a base of potential terrorists. This remains true even if the issue is not whether the aggregate threat of terrorism is higher or lower, but whether particular countries have a higher probability of harboring terrorists than other countries. In the absence of direct information or reliable proxy variables, analysts can still make strategic estimates, but they are not likely to consider the impact of specific law enforcement strategies like profiling. Regardless of the reason for the paucity of information, the information gap makes it more difficult to accurately judge whether terrorism justifies profiling.

Even if a canny CIA analyst has the appropriate analytical tools and the data to make a determination, she must be wary of terrorists' reactions to easily observed detection strategies by law enforcement agencies. Thus, if young Arab men from Saudi Arabia were particularly likely to attract the government's interest, then terrorist groups could shift to using light-skinned Latinas who did not fit the profile. This substitution may not be costless for the groups in question, but this scenario merits scrutiny. If profiling has non-trivial costs, then employing this strategy in a world where terrorist networks can substitute one perpetrator for another implies that the cost of substitution for the terrorist networks is greater than the aggregate cost of the profiling. Without closely examining this proposition, the justification for profiling amounts to an appeal to intuition.

If there is little information and systematic analysis within the government addressing whether an anti-terror strategy's benefits outweigh its costs, then there is likely even less in the public domain. Given the national security context, much of the relevant information will be subject to exemptions of the Freedom of Information Act.<sup>42</sup> Government officials are not likely to disclose information voluntarily. In describing the aforementioned policy of detaining asylum seekers from selected countries, the Homeland Security Department refused to reveal even the countries from which people were being detained.<sup>43</sup> Accordingly, public information will not significantly inform the political debates over law enforcement strategies.

Finally, some argue that the utility of profiling can be assessed retrospectively. Suppose, for example, that federal authorities catch four alleged perpetrators of terrorism, all of whom appear to be from Middle East-

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<sup>42</sup> See Paul M. Schoenhard, Note, *Disclosure of Government Information Online: A New Approach From an Existing Framework*, 15 HARV. J.L. & TECH. 497, 503-04 (2002) (describing Attorney General John Ashcroft's Freedom of Information Act (FOIA) policy rescinding the policy of presumptive disclosure instituted by the previous presidential administration).

<sup>43</sup> See U.S. Dep't of Homeland Sec., Office of the Press Sec'y, *Secretary Ridge Holds Press Briefing on Operation Liberty Shield* (Mar. 18, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030318-6.html> (Department of Homeland Security Secretary Tom Ridge refusing to disclose the list of countries affected by the asylum detention policy).

ern countries. An administration may claim this as a victory for national origin profiling. Without substantial additional information, however, there is little basis to conclude that profiling was necessary in order to achieve this victory. No agency can conduct an experiment testing whether the people would have been caught without an official profiling policy. Although the common sense response to profiling can be correct at times, intuition does not always serve as an appropriate guide in determining the costs and benefits of a policy. This problem is compounded by the fact that costs involve both misallocation of scarce law enforcement resources and registering false positives.<sup>44</sup>

### C. *Intuition Illusion*

Cost-benefit analysis is not a simple, technical means of making distinctions among law enforcement policies. Rather, costs and benefits are deeply contestable concepts that subsume important value choices. This may not shock those who perceive value choices in topics ranging from macroeconomic forecasts to environmental impact statements. Nonetheless, this suggests that when advocates of particular law enforcement policies invoke concepts like cost, benefit, and context, they must define exactly what these mean.

Opponents of profiling and other anti-terrorism policies should have three responses to advocates' appeal to intuition. First, the intellectual uncertainty and contestability involved in defining costs, benefits, and context applies not just to expert or societal decisionmaking but to lay judgments. Second, people are notoriously bad at making probability judgments, especially when dealing with small probabilities of disastrous events.<sup>45</sup> This means that the perceived cost of a scenario is driven more

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<sup>44</sup> The fact that false positive costs are allocated by race or ethnicity may raise separate concerns, which have already been addressed by scholarly literature critical of profiling. See, e.g., Gross & Livingston, *supra* note 26, at 1438 ("Investigative choices that are made on the basis of global assumptions about the criminal propensities of racial or ethnic groups are stigmatizing.").

One example of potential costs is that members of a particular ethnic community may feel aggrieved and branded by law enforcement strategies that disproportionately impact them. Quite apart from the costs of false positives, such perceptions may redound against the supposed law enforcement benefits of racial profiling. For example, the Justice Department's focus on interviewing young Arab Muslims after September 11 may make those individuals less interested in cooperating with authorities. The extent to which law enforcement policies give rise to feelings of exclusion and rejection depends on a host of factors relating to the policy and to the characteristics of the community. Consequently, one cannot categorically assume that the "clamming up" effect would overwhelm the alleged law enforcement benefits of profiling. Alternately, one cannot state with certainty that racial profiling's benefits would dwarf the consequences of "clamming up." The only certain conclusion is that the "clamming up" effect should not be ignored.

<sup>45</sup> For example, people assume incorrectly that high-risk activities have lower benefits, when in reality high-risk activities can also have larger rewards. SUNSTEIN, *supra* note 17, at 84. Thus, while admitting more international students from countries where Al-Qaeda operates can be viewed as a high-risk, low-benefit activity, there may be greater benefits

by its potential impact and less by its probability.<sup>46</sup> Third, policymakers have traditionally made poor decisions involving race. Members of national origin and racial groups different from our own may see us as de-individualized and disconnected from them.<sup>47</sup>

If people intuitively link racial difference to feeling threatened and judge that threat without regard to its probability, then poor intuitive judgments about racial profiling in the fight against terrorism may result. Although intuition will likely fail in helping people understand the merits of profiling in varying contexts, it explains why law enforcers, bureaucrats, and the politicians who oversee them find profiling compelling. Profiling seems to make intuitive sense as a means of targeting terrorists that come from the same part of the world. Further, members of society perceive not finding these individuals as a growing danger. Profiling's intuitive plausibility has been joined to the growing political demand for law enforcement agencies to eliminate as many risks as possible. Together, these factors predictably lead many people to support profiling whenever the context makes it "appropriate."

This is not to say that public opinion should be ignored when assessing whether particular law enforcement tactics should be used. Rather, the preceding analysis reveals that intuitive judgments run the risk of being superficial to the point of worthlessness. Given intuition's inability to evaluate the link between race and involvement in potentially catastrophic, low-probability events, the invocation of context is at best an innocent, if naïve, attempt to strike a balance between security and liberty.

#### *D. Plausibility Principle*

As the preceding analysis shows, arguments in favor of profiling have many flaws. Profiling's success depends on data and analysis that the government does not possess and on decisions that are not explicit regarding the nature of risks. Nonetheless, the argument for profiling in the anti-terrorism context proves to be at least superficially plausible. Given the demands on the government to increase security, the intuitive appeal of profiling proves irresistible for many. Indeed, some deem enforcement

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from such an enterprise. See PAUL SLOVIC, *THE PERCEPTION OF RISK* 415–17 (2000). For information regarding the imperfect cognition relating to low-probability events generally, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW & ECONOMICS* 13 (Cass R. Sunstein ed., 2000).

<sup>46</sup> See, e.g., JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 32–33 (1994).

<sup>47</sup> See RUPERT BROWN, *PREJUDICE: ITS SOCIAL PSYCHOLOGY* 8 (1995). See also IAN AYRES, *PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001) (discussing subtle perception effects that drive prejudice); Saera Khan & Alan Lambert, *Perceptions of Rational Discrimination: When Do People Attempt to Justify Race-Based Prejudice?*, 23 *BASIC & APPLIED SOC. PSYCH.* 43 (2001) (indicating the tendency of some subjects to justify differential treatment on the basis of purportedly rational reasons).

strategies as presumptively acceptable where the potential harm is great and the government puts forth a plausible justification.<sup>48</sup> In applying this plausibility principle, commentators, legislators, and courts are driven by an informal, intuitively appealing weighing of a policy's expected benefits and costs. Legislators claim to engage in this balancing when deciding whether to support statutory changes in implementing a new enforcement strategy.<sup>49</sup> Courts applying the Fourth Amendment to a specific fact pattern or law enforcement strategy likewise insist that balancing is required.<sup>50</sup> Three factors should be considered in this calculus: (1) the size and nature of the threat targeted by police, (2) the impact of the law enforcement strategy on that threat, and (3) the cost of the policy. Nevertheless, there is little consistency in the degree of precision with which these factors are analyzed.

Yet law enforcement agencies and politicians are under tremendous pressure to heighten security and reduce the risk of terrorism.<sup>51</sup> Law enforcers have an additional interest in avoiding embarrassment.<sup>52</sup> Thus, leg-

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<sup>48</sup> Not every court or legislature considers an enforcement strategy in this fashion. *See, e.g.,* United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000) (undertaking a thorough demographic analysis of the Southwest's population to conclude that the use of "Hispanic" appearance in roving patrols near the border does not establish the requisite individualized suspicion required by the Fourth Amendment).

<sup>49</sup> Some legislators reluctantly voted for the USA Patriot Act, which brought about a substantial change in law enforcement agencies' statutory authority, because the post-September 11 context required additional security. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272, (2001). *See also, e.g.,* 147 CONG. REC. S10547, 10598 (daily ed. Oct. 8, 2001) (statement of Senator Kerry noting that he voted for the USA Patriot Act even though he is "troubled" by the way the bill may affect civil liberties); 147 CONG. REC. S10547, 10594 (daily ed. Oct. 8, 2001) (statement of Senator Wellstone expressing reservations with the bill but finding that the USA Patriot Act balances risks posed by terrorists and civil liberties).

<sup>50</sup> *See* Chandler v. Miller, 520 U.S. 305, 314 (1997) ("[C]ourts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties."); Whren v. United States, 517 U.S. 806, 817 (1996) ("[I]n principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors."); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995) (judging a search "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (balancing the government's interest in preventing drunk driving with the individual's interest in avoiding intrusion); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) ("In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual . . .").

<sup>51</sup> *Here They Go Again*, ECONOMIST, June 8, 2002 (describing polling data which shows that "Congress's top priorities should be . . . terrorism and national security first"); Richard W. Stevenson, *Signing Homeland Security Bill, Bush Appoints Ridge as Secretary*, N.Y. TIMES, Nov. 26, 2002, at A1 (explaining that President George W. Bush first resisted the idea of creating a new cabinet-level department to deal with homeland security but ultimately embraced the idea "after political pressure mounted"); Susan Reimer, *Justice's Actions Seem Somewhat Unjustified*, BALT. SUN, Dec. 4, 2001, at E1 (containing polling data taken by the Justice Department showing that the American public supports broad actions to fight terrorism, even if such actions violate the Constitution).

<sup>52</sup> *See* William Safire, Editorial, *The Rowley Memo*, N.Y. TIMES, May 27, 2002, at A13

islators, executive branch officials, and enforcement agencies could potentially support strategies that appear to promote security, regardless of whether they actually do.

This need not be a disaster. Legislatures and courts cannot be expected to routinely calculate the benefits and costs of a policy with mathematical precision. Such an approach could elide important qualitative factors that should shape enforcement in a constitutional system.<sup>53</sup> After all, precise decisionmaking has its costs,<sup>54</sup> and some judgments are best made qualitatively with sensitivity to differences in kind as well as degree. Sometimes this plausibility principle weighs costs and benefits properly. For example, using airport metal detectors to screen airline passengers seems reasonable in both the colloquial and the legal sense.<sup>55</sup> These searches have low costs to the person searched and a strong deterrent rationale. Rejecting this kind of search would imply that there is no room for consequentialist reasoning in the structure of the Fourth Amendment.<sup>56</sup> The problem is that the plausibility principle overlooks important issues because answers are assumed and analytical justifications are suppressed or ignored. Consequently, even a law enforcement policy that seems plausibly worthwhile should sometimes be rejected, as long as the policy has non-trivial costs.

### III. RESTRAINED REVIEW

Although judicial review is not a panacea, some form of strict review may force government agents to clarify the conceptual and practical uncertainties involved in profiling. Law enforcement bureaucracies do not exist in isolation. Courts can police the use of profiling in specific situations. After all, claims that the government has violated constitutional due process or equal protection doctrine often turn on whether there is a compelling justification for the policy. Perhaps these controls can ensure that practices like profiling do not degenerate into raw invidious discrimination. Unfortunately, courts have difficulty addressing the conceptual issues involved in judging profiling, regardless of whether the matter before the court involves the allocation of investigative attention, administrative sanctions, or prosecution.

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(discussing a memorandum to this effect from Colleen Rowley, an FBI field agent in Minneapolis, to FBI Director Robert Mueller).

<sup>53</sup> Cf. Ackerman and Heinzerling, *supra* note 30, at 1579–80.

<sup>54</sup> See generally HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: BEHAVIORAL ECONOMICS AND BUSINESS ORGANIZATION* (1982).

<sup>55</sup> See *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

<sup>56</sup> See, e.g., William J. Stuntz, *Local Policing After the Terror*, 111 *YALE L.J.* 2137, 2143–50 (2002) (arguing that defensible conceptions of the Fourth and Fifth Amendments should involve variations in protection depending on changes in crime rates).

*A. Investigative Attention*

The courts are often wary of arguments that the decision to investigate should be constrained. Investigations can disprove culpability, just as they can confirm it. Further, investigations are difficult to regulate and require judgment calls that courts are not necessarily skilled at making.<sup>57</sup> On the other hand, the mere decision to investigate has costs for the suspected offender. Investigative activity subjects people to questioning and coercive interaction with the police—one reason why the Fourth Amendment circumscribes a subset of investigative activity, searches and seizures, to instances where they are reasonable.<sup>58</sup>

Unfortunately, the Fourth Amendment and even equal protection doctrine do not significantly aid litigants in challenging the allocation of investigative burdens on the basis of race or national origin.<sup>59</sup> Current Fourth Amendment doctrine appears inconclusive on national origin or racial profiling.<sup>60</sup> The Supreme Court held that the Fourth Amendment does “not

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<sup>57</sup> See *Illinois v. McArthur*, 531 U.S. 326, 331 (2001) (giving police some leeway to prevent the destruction of evidence); *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (stating that imminent, substantial risk to the public may make even “suspiciousless” searches permissible in order to protect against such risk); *Ornelas v. United States*, 517 U.S. 690, 699–700 (1996) (suggesting that police expertise is a reason for deference); *Hill v. California*, 401 U.S. 797, 802 (1971) (stating that the probable cause standard allows for good faith mistakes in police investigations); *Ker v. California*, 374 U.S. 23, 32 (1963) (plurality opinion) (giving deference to the government in a Fourth Amendment claim due to the “practical demands of effective criminal investigation and law enforcement”). Cf. *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (“[C]ourts normally must defer to prosecutorial decisions as to whom to prosecute.”); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (recognizing broad prosecutorial discretion); *United States v. Goodwin*, 457 U.S. 368, 380 (1982) (stating that “a prosecutor may forgo legitimate charges” or “file additional charges”); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

<sup>58</sup> See *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (referring to the “touchstone” of the reasonableness weighing standard as comparing privacy interests with government interests); *Wilson v. Layne*, 526 U.S. 603, 612 (1999) (finding “residential privacy at the core of the Fourth Amendment”); *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (stating that the government’s interest in conducting a search should be weighed against the “degree to which it intrudes upon an individual’s privacy”); *Whren v. United States*, 517 U.S. 806, 818 (1996) (weighing government interests against “privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body”) (citations omitted); *United States v. Ortiz*, 422 U.S. 891, 895 (1975) (stating that the Fourth Amendment “is to protect liberty and privacy” interests, including embarrassment, “from arbitrary and oppressive interference by government officials”). *But see* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393 (1995) (criticizing the doctrine for insufficient attentiveness to police’s use of force and too much consideration of privacy concerns).

<sup>59</sup> Classifications on the basis of national origin or race are treated essentially as racial classifications. See *Rice v. Cayetano*, 528 U.S. 495, 514–17 (2000); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *Oyama v. California*, 332 U.S. 633, 646 (1948).

<sup>60</sup> Some state courts have sought to curb profiling. See, e.g., *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996). However, even in jurisdictions directly affected by

allow a roving patrol of the Border Patrol to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status,” at least when the occupants’ apparent Mexican national origin furnished the only basis for suspicion.<sup>61</sup> Yet the Court holds otherwise when authorities have a lawful reason to stop someone. At that point, individuals can be subjected to further scrutiny on the basis of their national origin.<sup>62</sup> Many instances of anti-terrorism enforcement fit this paradigm, where the government already has some basis for stopping people at an airport or near the border.<sup>63</sup>

What about investigative attention arising in the context of roving patrols? Some courts have held that the use of race, ethnicity, or national origin does not establish individualized suspicion for these patrols.<sup>64</sup> Even this approach, which is among the most significant efforts to use the Fourth Amendment to restrict profiling in the allocation of investigative attention, has shortcomings. First, it leaves open the possibility for courts to recognize profiling’s utility in different contexts. In *United States v. Montero-Camargo*, the Ninth Circuit highlighted the problems with using “Hispanic” appearance as an indication of illegal activity in the American Southwest, where Latinos constitute a substantial portion of the population.<sup>65</sup> The opinion suggests that problems with profiling are likely to be pervasive, but that ultimately the practice’s soundness rests on the facts of the individual case.<sup>66</sup> As these facts may be ambiguous and subject to change, other courts considering the matter have not rejected the possibility that profiling may be both rational and permissible.<sup>67</sup> Second, the Ninth Circuit acknowledges that national origin or race can be used in conjunction with other factors as part of an effort to stop someone on the basis of a suspect description.<sup>68</sup> Contrary to intuition, the line between a sus-

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such holdings, these cases hardly translate into a categorical restriction on the use of national origin or race in making law enforcement decisions. In practice, the court’s impact has been limited, particularly given that police can argue that they had multiple bases to target a particular person. See Alschuler, *supra* note 11.

<sup>61</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 873 (1975).

<sup>62</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976).

<sup>63</sup> See *infra* Part III.B.

<sup>64</sup> *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (highlighting the legal problems inherent in law enforcement profiling). The court analyzed population trend data to determine the plausibility of whether law enforcement authorities would derive a benefit from profiling on the basis of “Hispanic” appearance. The majority opinion concludes that there are no significant law enforcement benefits. *Id.* This leaves unanswered the question of why law enforcement authorities would turn to the practice in the first place.

<sup>65</sup> *Id.* at 1133–34.

<sup>66</sup> *Id.* at 1135.

<sup>67</sup> See, e.g., *United States v. Weaver*, 966 F.2d 391, 394 n.2 (8th Cir. 1992) (“As it is, . . . facts are not to be ignored simply because they may be unpleasant—and the unpleasant fact in this case is that [the police officer] had knowledge . . . that young . . . black Los Angeles gangs were flooding the Kansas City area with cocaine.”).

<sup>68</sup> *Montero-Camargo*, 208 F.3d at 1134 n.21.

pect description and a “statistical” profile is fuzzy.<sup>69</sup> If a witness or agent is convinced that all members of a suspected terrorist organization have particular physical characteristics, then a dragnet can be constructed that blurs the distinction between profiles and suspect descriptions. Third, *United States v. Martinez-Fuerte* shows how profiling can work at fixed checkpoints or in other settings where legal authority already exists for stopping people without individualized suspicion.<sup>70</sup> Equal protection claims are similarly unlikely to provide relief.<sup>71</sup> Policies that blatantly target people by race without even a vague attempt at justification run afoul of both doctrines, but little else does.<sup>72</sup>

### B. Administrative Enforcement Attention

In addition to undertaking criminal investigations, the government can also administer regulatory sanctions. These sanctions are not considered “punishment” by the Supreme Court. Accordingly, immigrants facing deportation do not receive the full panoply of procedural protections associated with criminal adjudication.<sup>73</sup> For those who are not United States citizens, immigration sanctions can be imposed differentially to some extent on the basis of nationality. In *Narenji v. Civilietti*, the D.C. Circuit reviewed a regulation requiring all alien, post-secondary school students who were natives or citizens of Iran to provide information regarding their residence and maintenance of non-immigrant status.<sup>74</sup> The court reasoned that legislative and executive bodies can make distinctions on the basis of nationality in the enforcement of immigration laws so long as they are not wholly irrational. Given the hostage crisis, the court concluded that the distinction was far from irrational.<sup>75</sup>

Whether or not a person has U.S. citizenship, the administrative search doctrine strengthens law enforcement’s ability to single out individuals for further investigation or administrative sanction.<sup>76</sup> Combining

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<sup>69</sup> Banks, *supra* note 6.

<sup>70</sup> 428 U.S. 543 (1976).

<sup>71</sup> See *infra* note 84 and accompanying text. *But see* State v. Soto, 734 A.2d 350 (N.J. Superior Ct. Law Div. 1996).

<sup>72</sup> See, e.g., Whren v. United States, 517 U.S. 806, 810 (1996) (discussing requirements for establishing an equal protection violation for police allocation of investigative attention on the basis of race or national origin, and noting that such a violation does not necessarily make a search unreasonable under the Fourth Amendment).

<sup>73</sup> See, e.g., Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (“The order of deportation is not a punishment for crime.”). In principle, there is at least one way to argue that an immigration related sanction constitutes punishment. As early as 1896, the Supreme Court concluded that if immigration laws impose more detention than necessary to facilitate the removal of the alien, then that detention amounts to punishment and the Constitution requires the full protections of criminal proceedings. See Wong Wing v. United States, 163 U.S. 228, 236–38 (1896).

<sup>74</sup> 617 F.2d 745, 747 (D.C. Cir. 1979).

<sup>75</sup> *Id.*

<sup>76</sup> See Dunaway v. New York, 442 U.S. 200, 212 (1979) (stating that a balancing test,

the administrative search doctrine with *Martinez-Fuerte*—which allows law enforcement to profile by national origin at a fixed checkpoint if there is initial lawful authority for a stop—administrative searches involving fixed checkpoints or random tests can be used as pretextual opportunities to engage in profiling.<sup>77</sup>

### C. Prosecutorial Attention

Prosecutors are entrusted with the power to decide whom to prosecute, so long as there is probable cause to believe that the accused has broken the law.<sup>78</sup> They have flexibility to decide not only whom to charge but what to charge.<sup>79</sup> If there is sufficient evidence to indicate that someone committed an offense, then prosecutors decide how to proceed.<sup>80</sup>

Consequently, defendants have difficulty making claims that similarly situated persons have not been prosecuted. A defendant's only option is to show that the government's decision to prosecute was made in bad faith on some impermissible basis such as national origin.<sup>81</sup> The test is not whether the defendant's national origin played a role in the decision to prosecute, but whether it played a role in bad faith. Thus, for example, officials could select a defendant from Jordan for prosecution because her allegedly illegal money transmitting business sends funds to Middle Eastern countries that are allegedly havens for terrorism. The defendant has not been chosen because she is Jordanian, but rather because she acted criminally. Even if national origin plays some role in her selection—for instance, the prosecutor believes that many Jordanians operate illegal businesses, so she wants to send a message to them—as long as the prosecutor does not harbor an invidious, unjustified desire to burden people of a particular national origin, then courts will not interfere with prosecutorial discretion.<sup>82</sup>

Prosecution carries significant costs for defendants. These costs often pale in comparison to deterrent and retributive punishment objectives.

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rather than a full Fourth Amendment probable cause standard, should be applied when intrusions fall “far short of the kind of intrusion associated with an arrest”).

<sup>77</sup> See Banks, *supra* note 6.

<sup>78</sup> *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

<sup>79</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

<sup>80</sup> See generally Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279 (2002).

<sup>81</sup> See *Armstrong*, 517 U.S. at 464. See also *United States v. Fares*, 978 F.2d 52, 59 (2d Cir. 1992).

<sup>82</sup> At some point, the desire to send a message to a particular community can give rise to an inference of bad faith. However, even assuming that a defendant succeeds in obtaining discovery to demonstrate such bad faith, a prosecutor could easily reframe his or her motivation. A prosecutor can deny that national origin played any role in selecting the defendant for prosecution. Alternately, he or she can claim that the offender's conduct is part of a troubling trend among business owners with particular characteristics, such as money transmitters serving the Jordanian community in Brooklyn, and that similar acts should be deterred with a high-profile prosecution.

Nonetheless, other important values are at stake that courts are obligated to safeguard, including constitutional norms of equal protection and non-arbitrariness. In practice, courts applying these doctrines leave law enforcement bureaucracies wide discretion to decide whom to target.

The judicial doctrine governing investigative, administrative, and prosecutorial discretion is unlikely to change for at least two reasons. First, no one expects the full scope of criminal liability to be enforced, which means that the American enforcement system is based on discretion. Discretion by definition means that no one expects the full scope of criminal liability to be enforced.<sup>83</sup> Doctrines that interfere with discretion bear a heavy burden, since full enforcement is not a realistic possibility. Second, there are no plausible or satisfactory remedies for selective enforcement.<sup>84</sup>

The preceding should not be taken to suggest that plausible constitutional challenges to profiling are impossible. The relevant doctrines can evolve to acknowledge more explicitly the constitutional harms wrought by profiling.<sup>85</sup> One might imagine a system where police officers and investigators receive greater authority to stop large groups in exchange for more restraints on how they interact with those people.<sup>86</sup> For now, the most salient point is this: without a showing that a prosecutor has been motivated by an invidious, bad faith desire to harm people of a particular national or racial background, no challenge to existing doctrine will likely succeed. Consequently, profiling will be shaped not by how courts oversee the use of discretion, but by how law enforcement bureaucracies allocate their discretion.

#### IV. DISCRETION DYNAMICS

Law enforcement bureaucracies function in a larger legal and political context that increasingly provides them with even greater discretion. The more choices authorities have over whom to target and how to treat them, the more profiling can impact peoples' lives.

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<sup>83</sup> See generally Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1132–33 (2000).

<sup>84</sup> See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2030 (1998) (“[T]he remedial focus of general equal protection law has been in providing minority citizens with more of some good that the government provides, while the demand in the criminal context is for less of a set of costs that the government imposes.”).

<sup>85</sup> See, e.g., Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163 (2002) (arguing that equal protection and Fourth Amendment doctrine should more explicitly recognize the constitutional harms created by profiling).

<sup>86</sup> See Stuntz, *supra* note 56, at 2164–66. However, courts are increasingly reluctant to regulate law enforcement tactics.

*A. Profiling and Discretion in the Detection of Offenses*

As Justice Powell observed in *McCleskey v. Kemp*, discretion permeates the criminal justice system.<sup>87</sup> For the purposes of this Article, discretion means the power to allocate resources subject to flexible standards. Discretion is not inherently a bad thing.<sup>88</sup> It is unavoidable because law enforcement authorities have scarce resources, many cases to investigate, and must interpret ambiguous signals in determining what constitutes suspicious behavior.<sup>89</sup> Accordingly, only some targets will receive attention.

Even before September 11, police and inspectors had massive and growing discretion to decide whom to investigate. Fourth Amendment jurisprudence increasingly gave police leeway to stop and search someone, even if the person had done little more than flee a location where police were converging.<sup>90</sup> Moreover, the broad scope of traffic, immigration, and criminal laws makes it easier for police to find that a person is violating the law in some way.<sup>91</sup> Minor or technical offenses, such as driving without a seatbelt, can subject a person to arrest, search, and interrogation.<sup>92</sup> Although this makes it easier for police to find violators, scarce resources do not permit officers to investigate everyone. Discretionary judgments determine who is ultimately investigated. Since the September 11 attacks, law enforcement authorities have been entrusted with more discretion over whom they investigate and the methods used for the investigation.

The use of more discretion implies that police are not driven by legal standards when deciding whom to investigate, but instead by institutional realities, intuition, or prejudice. Suppose, for example, that a group arrives at a U.S. airport that includes offenders and non-offenders. By of-

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<sup>87</sup> 481 U.S. 279, 313 (1987). “Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.” *Id.* at 297.

<sup>88</sup> The fact that discretion does not necessarily imply arbitrariness is showcased by developments in administrative law. It is widely acknowledged, even among critics of the administrative state, that agencies and their experts need flexibility to operate effectively. Indeed, discretion serves as an antidote for excessive legislative specificity. Courts reviewing administrative action have acknowledged this. *See, e.g., Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) (“[T]he Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasonable fashion, and the decision involves reconciling conflicting policies.”). Yet even when discretion is acknowledged as a valuable element of the architecture of the administrative state, courts have a difficult time setting limits on that discretion and policing agencies.

<sup>89</sup> *See id.* at 297 (deeming human discretion “essential to the criminal justice process”).

<sup>90</sup> *See Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000).

<sup>91</sup> *See, e.g., Luna, supra note 83.*

<sup>92</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding, in a 5-4 decision, that probable cause is the only Fourth Amendment limitation on police discretion to make a custodial arrest, even when the offense in question is a minor traffic violation, such as failure to wear a seatbelt).

fenders, I mean people who have committed or plan to commit a criminal violation of interest to enforcement authorities. Assume further that agents have no reliable method for distinguishing offenders from non-offenders. How should authorities decide whom to stop? The more discretion authorities have in allocating law enforcement power to search and detain people, the less they have to justify whom they stop. The reason investigators and inspectors have discretion is that there are no fail-safe means of telling apart the offenders and the non-offenders.<sup>93</sup>

But who should be stopped? One approach would be for law enforcement officers to detain all those that they have discretion to stop. This would help authorities avoid the condemnation that might befall them for failing to investigate someone who later turns out to be an offender.<sup>94</sup> Officers rarely follow this practice, however, and usually do so only at the border and airports. Even then, this constitutes a “stop” only if the term is defined in a relatively unobtrusive way, as an initial screening. If “stop” means exhaustive questioning, search, or detention, then even when everyone is screened, only a relatively small proportion of people are stopped. This makes sense since stops are costly for both the officer and the detainee. Stops have direct resource implications for agencies and generate an opportunity cost. Assuming fixed resources, stopping everyone means dividing up the amount of time and resources that inspectors can spend on any one person, which again raises the issue of how to distinguish the offenders from the non-offenders. If authorities face external pressures to produce results and are mildly motivated, then they presumably will not stop everyone, nor will they necessarily favor a strategy of stopping people at random.<sup>95</sup> Besides, frequent stops carry certain costs, such as slowdowns at airports, borders, and highways, that may discourage authorities from this course of action.

Discretion does not necessarily determine the number of people stopped. That is driven by the cost constraints just described. Instead, discretion determines *how* people are targeted for law enforcement attention. Greater discretion, therefore, gives police the chance to select a pro-

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<sup>93</sup> There are compelling reasons for giving authorities the power to stop people freely. Allowing police to use their own judgment, rather than a rigid, formal standard, makes sense because of strategic responses by terrorists to the more explicit standard. For example, if Israeli authorities are taught to target young men who appear Arab, then terrorists may simply use women as suicide bombers.

<sup>94</sup> See Susan Schmidt, *Lawyers for FBI Faulted in Search: Panel Told Legal Staff Misunderstood FISA*, WASH. POST, Sept. 25, 2002, at A12 (describing the condemnation and scrutiny that the FBI and Justice Department received for not following up on the so-called “Phoenix memo,” which speculated that terrorists may be interested in flight training, and for failing to investigate Zacarias Moussaoui more exhaustively). The larger point is that law enforcement agencies have an interest in avoiding blame for allowing an offender to slip from their grasp.

<sup>95</sup> Complete reliance on random stops may be especially distasteful to authorities because it implicitly rejects the value of their judgment. Moreover, random stops may share some of the same political costs generated from stopping everyone.

cess for sorting people based on indicia of suspicion that they choose, and not on the basis of externally imposed judicial criteria. The less stringent the ex post or ex ante external review, the greater the chance there is that the selection criteria will be picked exclusively by the police. Fourth Amendment case law encourages this trend. Existing doctrine gives police officers, investigators, and inspectors much opportunity to justify suspicion and provides virtually no regulation in some settings, like border searches. Since authorities can arrest people for offenses that have nothing to do with the original reason for the search, the creation of pervasive regimes criminalizing behavior makes it easier to justify targeting an individual. An authority's motivation in targeting potential offenders is irrelevant.<sup>96</sup>

September 11 has accelerated the trend of giving law enforcement officers discretion over whom to target. Proposed and actual legal changes tend to give authorities more leeway to argue that they had cause to investigate someone for a criminal violation.<sup>97</sup> Current constitutional search and seizure doctrine also favors broader discretion for police.<sup>98</sup> Further, local police have greater authority to stop people for technical immigration violations, which in turn gives police a legally valid reason for dragnet-style enforcement.<sup>99</sup>

Given the preceding, when policymakers accept profiling as a valid tool to fight terrorism, they are also accepting it indirectly to fight fraud or the drug war. My argument is not that discretion, justified in the name of fighting terrorism, puts society on a slippery slope toward use of authority for non-terrorism enforcement. Rather, we have already slipped. Authority is already being used for non-terrorism related goals.<sup>100</sup>

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<sup>96</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 318 (2001); *Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>97</sup> One example can be found in laws criminalizing material support of terrorist organizations, where act and mens rea requirements are minimal. See *supra* note 35.

<sup>98</sup> See, e.g., Linda Greenhouse, *Court Rules on Police Searches of Motorists*, N.Y. TIMES, Jan. 16, 2002, at A17 (discussing the Supreme Court's oral argument on a Ninth Circuit case involving a roving patrol stop near the border, where Justice O'Connor noted during the session, "We live in perhaps a more dangerous age today than we did when this event first took place").

<sup>99</sup> See *INS Interior Enforcement, House Comm. on the Judiciary, Subcomm. on Immigration and Claims*, 107th Cong. (2002), available at 2002 WL 20318304 (testimony of Marisa J. Demeo and Aisha Qaasim, MALDEF Attorneys, discussing the Bush administration's plans to adopt procedures which would allow local police to stop people for violations of civil immigration law).

<sup>100</sup> For example, the anti-money laundering and terrorist financing provisions of the USA Patriot Act were justified on the basis of their importance to the war against terrorism. However, new regulatory and criminal enforcement authority is not limited to anti-terrorism uses, nor is terrorism defined in substantive terms that could render it useful as a means of legally limiting the Act's scope. In congressional testimony from January 2002, the Assistant Attorney General for the Criminal Division, Michael Chertoff, lauded the anti-terrorist financing provisions of the USA Patriot Act as critical to terrorism investigations. Yet one of the few concrete examples of the Act's alleged usefulness to prosecutors involved a prosecution that was unconnected to terrorism:

*B. Investigative Strategies as Discretionary Sanctions*

Discretion accomplishes more than making it easier for authorities to decide whom to target. Broader discretion means that law enforcement can do more to people singled out for scrutiny without as much judicial review. Since September 11, for example, federal investigators can subject someone to a wiretap with minimal judicial review.<sup>101</sup> The Department of Justice can more easily detain immigrants for an extended period of time with little if any judicial oversight.<sup>102</sup> By designating a person as an enemy combatant, the current administration obtains almost complete discretion over the length of detention and whether the detainee may con-

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Section 319(a) provided us with a new tool to seize and forfeit criminal assets deposited into a foreign bank account through the foreign bank's correspondent bank account in the United States. This section provides that assets which are subject to forfeiture in the United States, but which are deposited abroad in a foreign bank may be deemed to be held in the foreign bank's correspondent account in the United States. Thus, where a criminal deposits funds in a bank account in a foreign country and that bank maintains a correspondent account in the United States, the government may seize and forfeit an equivalent sum of money in the correspondent account, irrespective of whether the money in the correspondent account is traceable to the proceeds deposited in an account held by the foreign bank.

Although I was recused from the case because of a past representation, I can report that last month we recovered almost \$1.7 million in funds using Section 34419, which will be used to compensate the victims of a fraud scheme. On January 18, 2001, a grand jury in the Southern District of Illinois indicted James R. Gibson for various offenses, including conspiracy to commit money laundering, mail and wire fraud. Gibson defrauded clients of millions of dollars by fraudulently structuring settlement agreements for numerous tort victims. . . . Following the passage of the PATRIOT Act, and interagency consultation, the Criminal Division authorized the use of the Section 319(a) authority [to seize Gibson's assets].

*Anti-Terrorism Money Laundering Enforcement: Hearing on "The Financial War on Terrorism and the Administration's Implementation of the Anti-Money Laundering Provisions of the USA Patriot Act Before the Senate Comm. on Banking, Housing, and Urban Affairs,"* 107th Cong. (2002), available at 2002 WL 25098495.

Although the purpose of the USA Patriot Act was to combat terrorism, it is possible to find oblique references to other purposes in the statute. One could argue that the larger system of criminal finance, connecting drug traffickers and fraud perpetrators to banks, somehow propitiates the conditions that allow terrorist financing to flourish. However, these arguments require analytical support, which is often not forthcoming and which Assistant Attorney General Chertoff did not provide in his January 2002 testimony. This raises the larger issue of slippery slopes, a term that can cloud judgment as much as it clarifies it. For a stimulating discussion of the risk that enforcement strategies may lead down a slippery slope, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

<sup>101</sup> See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)*, Pub. L. No. 107-56, §§ 202–203, 115 Stat. 272 (2001) (expanding wiretap authority).

<sup>102</sup> See *id.* at § 412 (providing for long-term detention of certain immigrants subject to meager judicial review).

fer with a court-appointed or family-sponsored lawyer.<sup>103</sup> These tactics are justified in part because they are necessary to prevent or investigate terrorist activity.<sup>104</sup>

Discretion in the treatment of suspects gives law enforcers an opportunity to engage in profiling. The more opportunities law enforcement officers have to decide without justification whom to target with costly investigative or preventive methods, the more important it becomes to determine what actually drives their decision to target individuals with drastic or invasive methods. The most optimistic scenario sets forth that decisions are driven by an authority's good-faith belief that a person merits extra attention. Whatever the scenario, the relevant question becomes whether the police have any basis to differentiate between someone merely stopped and questioned at an airport and another who is stopped at the airport, labeled an enemy combatant, and consigned to the legal limbo of indefinite detention. Legislative and policy changes following September 11 have induced courts to remain conspicuously silent on this issue and to refrain from forcing authorities to answer that question. Consequently, this extra discretion will allow agencies to mete out harsher enforcement on the basis of a profile, whether or not the use of said profile is officially prohibited.<sup>105</sup>

The absence of effective judicial review has serious implications for law enforcement officers' use of aggressive tactics. Suppose, for example, that airport inspections are performed by INS officials on arriving passengers and that inspectors' only discretion is to decide whether a passenger should be questioned for one minute or fifteen minutes.<sup>106</sup> In this scenario, there are relatively low costs to arriving passengers regardless of whether inspectors choose to use a profile. The only considerable cost is that an arriving passenger may suffer a dignitary injury if she believes that she has been singled out for a fifteen-minute interrogation without reason. Yet this injury is small in comparison to those experienced by people subjected to detention, searches, and surveillance under the USA Patriot Act. The Act permits individuals to be targeted, in part, because of race and subjected to a government search of their homes with little judi-

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<sup>103</sup> See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 466 (4th Cir. 2003) ("The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II."). At least one recent district court decision in another circuit provides for some limits on executive branch discretion over people so designated. See Steve Fainaru & Dan Eggen, *Judge Grants "Combatant" Access to an Attorney*, WASH. POST., Dec. 5, 2002, at A1.

<sup>104</sup> See Dinh, *supra* note 2.

<sup>105</sup> See, e.g., Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002).

<sup>106</sup> In practice, immigration inspectors have considerably more discretion. See, e.g., *Li v. Eddy*, 324 F.3d 1109 (9th Cir. 2003), *vacating as moot* 259 F.3d 1132 (9th Cir. 2001). In the above mentioned hypothetical, someone other than the airport inspector would decide whether the passengers detained for fifteen minutes merited further attention.

cial supervision.<sup>107</sup> Moreover, the government can now legally choose never to notify her of that search.<sup>108</sup> The government also has the option of designating U.S. citizens as enemy combatants, thereby depriving them of protections normally enforced through judicial review.<sup>109</sup> Further, those held outside of the United States lack recourse to the writ of habeas corpus.<sup>110</sup>

Finally, new investigative strategies will realistically not be limited to the most dangerous potential terrorists (even if we could agree on who they are) if part of their justification is that they help determine who fits into that category. As long as there is some legal reason for using an investigative strategy, such as traffic enforcement, then police can justify their decision regardless of what actually triggered the use of the investigative technique.<sup>111</sup> For example, invasive tactics such as roving wiretaps, searches without ex post notification, or other procedures permitted by post-September 11 legislation are justified on the basis of fighting the war on terror—an objective that seems compelling to the public. Regardless of the justification, the impact of this discretion on profiling should be considered in the context of all non-terrorism related enforcement. This renders troubling the discretion-enabling provisions of the USA Patriot Act, since few checks exist that force investigators to explain their actions.<sup>112</sup>

This is not to say that the government has invidious motives in tapping phones, infiltrating computers, secretly searching homes, or labeling people as enemy combatants. Legislators may choose to give prosecutors and investigators discretion for reasons that have nothing to do with discrimination. In practice, however, discretion may be discrimination's handmaiden, giving authorities the opportunity to make arbitrary decisions in the name of fighting terrorism.

#### CONCLUSION

Common-sense laws and policies have great allure. The prevailing view of profiling after September 11—that the utility of national origin or racial profiling depends on the context—is gripped by conceptual and practical problems.<sup>113</sup> By stripping away the common sense intuition that particular

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<sup>107</sup> See USA Patriot Act § 213.

<sup>108</sup> See *id.*

<sup>109</sup> See *supra* note 109.

<sup>110</sup> See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

<sup>111</sup> See *supra* Part IV.A.

<sup>112</sup> See USA Patriot Act §§ 201–211.

<sup>113</sup> The strict deontological alternative—where any differential treatment of the basis of race is categorically rejected—is too simple an answer. Even those strategies that do not involve explicit discrimination may still be perceived as prejudicial. The use of race in other contexts, such as affirmative action, can also not be categorically rejected. Otherwise, separate theories would be needed to explain why discrimination is acceptable in a criminal justice context, but not in an educational environment. Further, taking an aggressive non-discrimination position is unlikely to persuade many, given the prevailing sense that some threats are great enough to justify extreme measures.

enforcement strategies depend on context, the real problem emerges: in a world where costs and benefits attach to strategies used to focus law enforcers' scarce attention, inferential leaps can have serious consequences.<sup>114</sup>

Much debate is stifled by the idea that profiling, or any other anti-terrorism enforcement strategy, should be used depending on the context. Scientific precision is not possible in this area, and may not be desirable. Regardless of one's views on the philosophy of science, there are a few basic propositions about what would shed light on whether profiling's benefits outweigh its costs in a particular context. First, there must be a baseline measure of the threat. Second, agencies need a means of assessing marginal changes in the threat. Third, there must be a way to analyze the impact fairly attributable to profiling in explaining marginal changes in the threat. Finally, decisionmakers must take into account the costs associated with profiling, including training costs, the social costs of people mistakenly believing that invidious discrimination is driving the process, and false positive costs borne by individuals. For the reasons I have described above, much of this information is not available or is forthcoming.<sup>115</sup>

As any advocate of context-dependence would readily point out, we do not live in a perfect world. When dealing with terrorism, it is not possible to make all policy decisions on the basis of controlled experiments. Decisions on topics ranging from changes in police technology to modifications of occupational safety rules are carried out on the basis of available information. Otherwise, new laws and policies would not be created due to a lack of information. The government should not suffer decisional paralysis simply because complete information is not available.<sup>116</sup> The real question is whether there should be an *ad hominem* heuristic favoring profiling simply because it makes sense intuitively.

The more intellectually honest the cost-benefit analysis becomes given existing data, the harder it is to justify the use of profiling to fight terrorism. Given the problems with relying on intuition, the ideal would be to have a quantitative baseline establishing the threat. If that is not possible, then one needs to at least define the threat and exclude what is not covered. Is the threat terrorism, immigration offenses, or lawlessness in general? The facile retort that some immigration offenders harbor links to terrorism, for example, is not a sufficient justification because the vast majority of immigration offenders do not have such ties. Yet the legal architecture of modern-day enforcement lets authorities justify some police tactics, such as traffic stops or interviews targeting Arabs, on one basis while the tactics end up having alternative uses like drug or immigration enforcement. If the definition of a threat is a moving target, then the claim

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<sup>114</sup> See generally David W. Barnes, *Too Many Probabilities: Statistical Evidence of Tort Causation*, 64 *LAW & CONTEMP. PROBS.* 191 (2001).

<sup>115</sup> See *supra* Part II.A–B.

<sup>116</sup> Indeed, making decisions despite substantial informational deficits is the norm. See, e.g., SIMON, *supra* note 54.

that the utility of racial profiling is context-dependent becomes meaningless, as the context in which the practice would be used cannot be fixed. In addition, without a quantitatively precise means of assessing the value of profiling, the invocation of context as a justification for profiling is not an alternative to the appeal to intuition. It is itself an appeal to intuition.

This would seem to leave a single argument in favor of profiling: even if estimates of profiling's usefulness are off the mark, its costs are low.<sup>117</sup> One would have to make many assumptions to dismiss the costs faced by a profiled person, which range from a mild public indignity to prolonged and perhaps indefinite detention. Moreover, post-September 11 legal changes make it easier for the government to impose higher costs on those singled out for attention without judicial review. Coupled with the paucity of information about detainees' fate, society cannot accurately evaluate whether the costs imposed by profiling are low.

In the end, the case for profiling resembles the case for many anti-terrorism statutory changes or military action. The justification is plausible. It is shaped by the demand for new enforcement strategies to reduce a terrorist threat that can never be completely eradicated. In the end, the unfastened and informal weighing of costs and benefits of profiling leaves us in a hazy and uncertain place. It is a place that, like many others in this country, has not become safer since September 11.

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<sup>117</sup> An alternative version of this argument is that judicial review of due process challenges to profiling, such as those involving long-term detention, will be an effective bulwark against unjustified abuse.