

Homeland Security and Civil Liberties: A Pluralistic Approach

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I. Introduction

In this paper, I will argue that we need to develop a new, pluralistic framework for evaluating the use of force in homeland security activities, and show how such a framework might function, using ethnic profiling as an example.

In support of this claim, I will argue that Just War Theory, the main moral framework for evaluating the use of force, is not adequate for evaluating the use of force in homeland security activities, and that existing regulations governing the use of force by soldiers and police officers are also not adequate for this purpose. I will then briefly present a framework that is pluralistic, in that it is not based upon a single moral theory and in that it acknowledges multiple incommensurable criteria for evaluating the use of force in homeland security activities rather than seeking to evaluate all such activities using a single criterion or a single formula that tells how to prioritize these criteria. Finally, I will present an example of how such a pluralistic moral framework can provide guidance to homeland security professionals without preventing them from

exercising their own professional judgment, using the issue of ethnic profiling of persons of Arab descent or appearance at airport security checkpoints. While I will necessarily only scratch the surface of this complex issue, I hope to show, at a minimum, that a pluralistic moral framework is both more theoretically sound and more practically applicable than existing moral frameworks, or than any new monistic moral framework could be.

II. The Inadequacy of Existing Frameworks

The events of September 11th 2001 changed the world in many ways, not the least of which is the creation of a new class of activities and a new category of governmental professionals who are about to become part of a new Department of Homeland Security. (Parenthetically, I hate the phrase “homeland security”; it is too close to the “fatherland” of Naziism and smacks of xenophobia, but it is the accepted phrase, so I will use it throughout, reluctantly.) The U.S. Government has always engaged in homeland security activities, but it has done so under the assumption that these activities were defending against relatively low-level threats; they were thus rather small in scale and restricted in scope. Now, from numerous ad hoc activities which have generally not been well-coordinated, we are seeking to create a single homeland security system. From a patchwork quilt of Coast Guard Officers, Customs Agents, Immigration Officials, and the like, we

are now creating a new category of governmental employee: the homeland security professional. Many of these professionals will be armed and authorized to use force in specific circumstances, just as soldiers and police are.

Unfortunately, there is no widely accepted framework for making moral choices regarding the use of force in homeland security activities. While Just War Theory serves as a widely accepted framework for evaluating the use of force by soldiers, there is no equivalent framework for homeland security professionals. While police officers have codes of ethics and specific rules regarding the use of force in police activities, there is no equivalent code of ethics—the equivalent of military rules of engagement—for homeland security activities.

Just War Theory, the main framework for making moral choices in war, cannot adequately cover homeland security activities, for two main reasons. First, Just War Theory presupposes a distinction between “war” and “peace,” between periods of military conflict and periods of lack of military conflict. As I pointed out in a paper delivered at this conference five years ago, this makes it difficult to apply Just War Theory to military operations other than war. It makes it impossible, however, to apply Just War Theory to homeland security activities. Just War Theory demands that wars be fought for the sake of peace; homeland security operations are ongoing, and are not conducted for the sake of no longer having to conduct such operations.

Secondly, Just War Theory presupposes a distinction between combatants and non-combatants that is not present in homeland security operations. The rules of engagement used by soldiers start with a distinction between enemy combatants and non-combatants; distinguishing between terrorists and non-terrorists is the *goal* of homeland security activities, not the starting point.

If Just War Theory and military rules of engagement are inadequate for homeland security activities, the other leading candidate would be the principles governing the use of force that are used by police officers, which are best expressed in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990. These principles, however, are designed for the purpose of protecting citizens from each other, not from terrorists. They thus make four assumptions that cannot be applied to homeland security activities: First, that most suspects will respond to non-violent methods of apprehension; Second, that criminals are not willing to die in pursuit of their objectives; Third, that most criminals are not part of a larger organization that is directing their activities; Finally, that police officers can determine the seriousness of the crime that a suspect is attempting to commit, and adjust the level of force used accordingly. As we have seen both in the United States and in Israel, we cannot make any of these assumptions regarding terrorists. While it is reasonable to

demand that police officers continue to refrain from any use of force even after finding drugs in someone's pockets; it is not reasonable to demand that homeland security officers continue to use non-violent means after finding plastic explosives in a suspected terrorist's shoe. Similarly, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials require that when force is used against a suspected criminal, the relatives or close friends of the injured or affected person should be notified at the earliest possible moment. It would obviously be folly to notify a terrorist's relatives or close friends that we have forcibly apprehended him. Finally, these principles require that police officers "act in proportion to the seriousness of the offence," correctly noting that a level of force that would be justified in apprehending an armed robber would not be justified in apprehending a shoplifter. While the seriousness of an attempted crime is readily apparent, however, the seriousness of a specific terrorist threat is generally not evident until after the suspect has been apprehended. While homeland security professionals clearly need to use some principle of proportionality, this specific principle will not work.

Homeland security professionals are neither soldiers nor policemen. The regulations governing the use of force by soldiers are designed to apply to conflicts outside of the domestic United States; those designed for policemen are designed to apply only inside the United States. We need a new framework to

govern the use of force at the borders and coastlines that form the boundary between these two spheres of activity.

III. A Pluralistic Framework

This new framework must be pluralistic in order to be adequate for evaluating the range of homeland security activities and the issues they raise. In making this claim, I intend to contrast the new framework that I am proposing with both Just War Theory and police codes of ethics, which are generally monistic moral frameworks. Just War Theory is based on Natural Law Theory, and police codes of ethics, while generally lacking an explicit ethical foundation, presuppose an approach characteristic of Social Contract Theory; each is thus theoretically monistic, in that it is based on a single moral theory.

No single moral theory can support an adequate moral framework for evaluating homeland security activities, both because of the diversity of these activities and because of the plurality of considerations they involve. Instead, we need a pluralistic framework for assessing homeland security activities. A pluralistic framework would amount to a set of principles based on several different moral theories. These principles, in contrast to those of Just War Theory, may not be compatible with each other; they may, in some cases, be incommensurable, because they are not all derived from a single moral theory.

As I will show, a pluralistic framework provides a more adequate account of specific individual homeland security activities, such as ethnic profiling; in addition, a pluralistic framework is needed in order to evaluate all of the various activities involved in homeland security, and the diverse issues that these activities raise. For example, the main issues raised by the interrogation of foreign prisoners in Guantanamo Bay clearly concern human rights, which are generally based on a Kantian approach to ethics. Regarding intelligence-gathering activities and potential invasions of privacy, the main issues concern civil liberties, where Social Contract Theory is more relevant. Issues related to the effective deployment of homeland security personnel call for a broadly utilitarian approach, while the effective training of such personnel involves some sort of virtue ethics. Thus, one reason for adopting a pluralistic approach to homeland security ethics is that such an approach is more suited to the diversity of activities involved in homeland security than monistic approaches are.

In addition, a pluralistic approach can provide a more adequate evaluation of a specific kind of activity. Consider, for example, ethnic profiling. Subjecting males of Arab descent between the ages of 16 and 40 to increased scrutiny at airport checkpoints raises several moral issues. Robert Levy has proposed what he calls a “rational” approach to this issue, which consists of three criteria that must be met for ethnic profiling to be justified. First, he says that “the addition of

an ethnic factor must significantly improve the effectiveness of the profile in ferreting out the guilty.” Second, he says that “there must be reasonable suspicion to believe that a meaningful portion of the profiled ethnic class is guilty. Third, he says that the benefit of including ethnicity must exceed its cost. As Levy notes, the first two of these criteria are based on the idea of individual rights, coming out of the natural rights and social contract tradition, while the third is utilitarian.

Levy asserts that ethnic profiling cannot be justified unless *all three* criteria are satisfied; that is, these three criteria are individually necessary and only collectively sufficient to justify ethnic profiling. What he fails to consider, however, is that these criteria are not fully compatible, and can in some cases come into conflict with each other. This becomes clear from the weakness of Levy’s own examples. According to Levy,

“...it may be that Arabs are 10 times as likely to be terrorists as non-Arabs. But if only one tenth of one percent of hazardous materials truck drivers of Arabic descent are terrorists, the addition of ethnicity to the profile cannot be justified without violating the rights of 999 out of every 1,000 persons.”

This example shows the problem with Levy’s approach. Let’s say that ten percent of all hazardous materials truck drivers are Arabs. Using Levy’s numbers, this ten percent is likely to contain as many terrorists as the remaining

90 percent put together. In this situation, his first criterion and his third criterion are maximally satisfied; ethnic profiling would significantly improve the likelihood of ferreting out the guilty, and its benefits would exceed its costs. Arguably, using ethnic profiling in this situation would not be immoral; his utilitarian criteria work against his rights-based criteria. Criteria based on rights cannot necessarily be combined with criteria that have a utilitarian basis into a single, coherent set of necessary and sufficient conditions for ethnic profiling. They can, however, be two important parts of a pluralistic approach to the issue.

By also looking at other ethical approaches to ethnic profiling, we can better see what such a pluralistic approach would be like. An Aristotelian or virtue ethics approach would analyze ethnic profiling in two different ways, each of which produces important considerations. Applying Aristotle's doctrine of the mean to the issue of ethnic profiling in general shows that we should seek a mean between excessive ethnic profiling and none at all. This is consistent with our considered intuitions on this issue; after September 11th, it would be irrational for a homeland security professional not to pay more attention to 25 year old Arab males than to others. On the other hand, ethnic profiling can easily become excessive and serve as an excuse for racist harassment.

As Aristotle notes, the mean we are seeking is not a numeric mean, and is usually closer to either the excess or the deficiency, as courage is closer to rashness than

to cowardice. Furthermore, he notes that we are not seeking the mean relative to the object but relative to the individual. By applying the doctrine of the mean to the character traits of the homeland security personnel who are performing ethnic profiling, we can devise a more relevant method to help us, institutionally, avoid excessive ethnic profiling. we may not be able to determine exactly where the distinction between excessive and acceptable profiling lies, but by comparing the performance of different homeland security personnel, we may be able to determine whether a particular person tends to profile too much or too little, even if the exact point of demarcation is unclear.

A pluralistic approach suggests that we consider many different ethical approaches in evaluating homeland security activities. The fact that these approaches may be incommensurable merely implies that we cannot synthesize them into a single procedure or formula for morally assessing all these activities. This suggests that we view the goal as a rational choice informed by the considerations raised by multiple ethical approaches, rather than a choice that is determined by any one of them.