

## Racial Profiling: They Said It Was Against the Law!

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THIS ARTICLE EXAMINES THE MEDIA FRAMES and legislative responses of eighteen states in the United States to the use of racial profiling and a technology of modern policing. Racial profiling is characterized as a troubled technology because of the way in which the use of racial identification as an index of criminality contributes to the cumulative disadvantage that shapes the life chances of African Americans.

An analysis of media coverage of legislative debates enables an assessment of the extent to which the technology of racial profiling is characterized as an immoral act of discrimination that should be made illegal across the United States.

The dominant policy frame is one of uncertainty and caution. The strategic use of quotation marks around references to racial profiling in some newspapers reflects unwillingness on the part of the news media to even acknowledge the existence of a problem or a basis for concern.

The analysis of statutes and newspaper discourse reveals the ways in which particular arguments and rationales are associated with readily identified group interests opposed to, or in support of, the use of racial profiling.

The article concludes that many in the public believe that race can be used as an index of criminality. The public does not understand that the use of race as a predictor of risk, ironically, tends to amplify the risks to the operation of the criminal justice system.

CET ARTICLE EXAMINE LES CADRAGES MÉDIATIQUES et la réponse législative de dix-huit États américains en matière de l'utilisation du profilage racial ainsi qu'une technologie moderne de maintien de l'ordre. La technologie du profilage racial est perçue comme problématique à cause de son utilisation de traits raciaux comme indices de criminalité, ce qui contribue à augmenter les obstacles que doivent surmonter les Afro-Américaines et Afro-Américains afin de réussir dans la vie.

Une analyse de la couverture médiatique des débats législatifs permet d'évaluer dans quelle mesure la technologie du profilage racial est considérée comme un acte discriminatoire immoral que l'on devrait déclarer illégal aux États-Unis.

La principale orientation politique en la matière est l'incertitude et la prudence. L'insertion entre guillemets des références au profilage racial dans certains quotidiens dénote le manque de volonté des médias d'information de même reconnaître qu'il y a là un problème dont il faut se préoccuper.

L'analyse de la législation et du discours médiatique révèle comment les arguments et les justifications relativement à l'utilisation du profilage racial sont articulés en tenant compte des groupes d'intérêts qui déjà prêtent à opposition ou qui reçoivent la faveur du public.

L'article conclut que bien des gens croient dans le bien-fondé de l'utilisation de la race comme un indice de criminalité. Le public ne comprend pas que l'utilisation de critères raciaux comme prédicateurs de risque, ironiquement, tend à multiplier les risques dans l'administration du système de justice pénale.

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# Racial Profiling: They Said It Was Against the Law!

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## 1. INTRODUCTION

POLICY SCHOLARS TEND TO DRAW a distinction between identity and identification in order to emphasize the role that the exercise of power and authority play in their formation.<sup>1</sup> Although no individual is truly the author of her identity, we assume that every person exercises greater control over decisions about the kinds of person she would like to become than she does over the categories to which she is assigned by public authorities, or even by strangers she encounters along her developmental path.<sup>2</sup> Although we recognize the truth in the claim that “to classify is human,”<sup>3</sup> we also recognize that the exercise of power that is inherent in the assignment of persons to categories and classes carries with it the potential for harm that is rarely afforded the attention due.

The harm that we are especially concerned to engage is that which accompanies the use of racial classification to identify an individual as a member of a suspect class that is likely to be subject to special attention by the police.<sup>4</sup> This is a form of identification usually referred to as racial profiling,<sup>5</sup> and it is an activity that we, among others,<sup>6</sup> believe should be against the law; or, at the very least, subject to strict scrutiny, and thereby limited in its use.

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1. Gary T. Marx, “Identity and Anonymity: Some Conceptual Distinctions and Issues for Research” in Jane Caplan & John Torpey, eds., *Documenting Individual Identity* (Princeton: Princeton University Press, 2001) 311-327, <<http://web.mit.edu/gtmarx/www/identity.html>> at pp. 322-327.
  2. Oscar H. Gandy, Jr, “Exploring Identity and Identification in Cyberspace” (2000) 14:2 *Notre Dame Journal of Law, Ethics & Public Policy* 1085 at pp. 1088-1093.
  3. Geoffrey C. Bowker & Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (Cambridge: MIT Press, 1999) at pp. 1-3.
  4. Richard V. Ericson & Kevin D. Haggerty, *Policing the Risk Society* (Toronto: University of Toronto Press, 1997) at pp. 282-291.
  5. Rebecca M. Blank, Marilyn Dabady & Constance F. Citro, eds., *Measuring Racial Discrimination* (Washington: National Academic Press, 2004), <<http://www.nap.edu/books/0309091268/html/>> at p. 187 [Blank, Dabady & Citro, *Measuring Racial Discrimination*].
  6. Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (Cambridge: Belknap Press, 2003) at p. 198 [Schauer, *Profiles, Probabilities*].

In this article, we explore the ways in which debate regarding the use of racial profiling has been engaged at the state level in the United States. This debate follows initiatives taken at the federal level to gather statistics on what former US President Clinton called a “morally indefensible, deeply corrosive practice.”<sup>7</sup>

In Part 2, we begin by identifying racial profiling as a strategic resource: a technology of identification believed by some to assist police in the targeting of persons engaged in, or likely to engage in, criminal activity. We discuss the nature of an ongoing technology assessment that has been, and still needs to be, applied to racial profiling. Next, we describe the evolution of racial profiling as an issue of public concern, including a focus on the policy debate at the federal level as reflected in the editorial pages of major newspapers in the United States. We note that while the debate at the federal level continued to unfold, a number of US states proceeded to develop their own policies on the use of this particular technology. An examination of the ways in which these policy debates have unfolded, and the issues have been framed, in the major newspapers in these states is identified as the primary focus of this article.

In Part 3, we characterize the statutes governing racial profiling that were passed in nineteen states between 1999 and 2004. In Part 4, we discuss the ways in which the primary frames or public perspectives on these statutes and the problem of racial profiling, more generally, were presented in the major newspaper in each of eighteen states.<sup>8</sup> In Part 5, we summarize and discuss the problems and tensions underlying the political response to racial profiling as a deeply flawed social technology.

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## 2. RACIAL PROFILING

RACIAL PROFILING IS JUST ONE among a number of different types of criminal profiling. In developing and using profiles in law enforcement, police may engage in a process of systematically pooling “collective police experience into information that is comprehensive, solid, and accurate” in order to facilitate the identification of potential criminals.<sup>9</sup> Profiles of serial killers, hijackers, and drug couriers have been developed over time and used prior to and following decisions in the courts that have determined them to be capable of sustaining

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7. Reference to Clinton’s statement made at a conference on Strengthening Police-Community Relationships on 9 June 1999. See Deborah Ramirez, Jack McDivitt & Amy Farrell, “A Resource Guide on Racial Profiling Data Collection Systems” (US Department of Justice: NCJ 184768 1, November 2000), <<http://www.ncjrs.org/pdffiles1/bja/184768.pdf>> [Ramirez, McDivitt & Farrell, “Resource Guide”] (providing guidance to jurisdictions that seek to develop and implement data collection systems as part of their efforts to assess and control the use of racial profiling).
  8. No qualifying articles were retrieved from *The Clarion Ledger* of Jackson Mississippi.
  9. David A. Harris, *Profiles in Injustice* (New York: New Press, 2003) at p. 16 [Harris, *Profiles*].

constitutional challenge.<sup>10</sup> The Internal Revenue Service (IRS) reportedly makes use of a complex profiling system in order to determine which tax returns will be subject to closer inspection.<sup>11</sup>

However, racial profiling differs from other forms of criminal profiling; the use of race as a rationale for differential treatment of suspects on the basis of predictions of criminality raises heightened constitutional concern due to the special status assigned to different forms of racial discrimination.<sup>12</sup>

It has become clear that the use of race as an input into decisions about whether to stop, search, or observe an individual or vehicle more closely is a common, if controversial, aspect of policing. Police and customs officials use race as an indicator of the probability that a driver or passenger is likely to be in possession of contraband drugs.<sup>13</sup> Following the use of aircraft as an instrument of terrorist violence,<sup>14</sup> police and air transport officials have increasingly made use of racial and ethnic classification as an indicator of heightened risk.<sup>15</sup>

The use of race as a factor in determining whether to stop or search some individual need not be based on racial *animus*, but instead may be based on the actual, estimated, or assumed statistical association of race with criminality. Those who support the use of such an association suggest that race can provide information that would increase the probability of a productive search.<sup>16</sup> On its face, the presence of a statistical association of race with particular crimes might be used in the same way as the presence of a statistical association between vacant and abandoned buildings and the risk of violent crime might be used as an input into a decision about where police should concentrate their resources. Critics of racial profiling suggest, however, that even in the absence of racial *animus*, institutionalized practices that generate racially disparate outcomes, such as higher rates of interdiction for African Americans, should be banned as incompatible with commitments to egalitarian principles.<sup>17</sup> Decisions about the use of racial profiling as a technology of identification by police are likely to depend on the quality of the technology assessments being made in different jurisdictions.

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10. *Ibid.* at p. 20. This is not to suggest, however, that all of the searches made by police are in fact constitutional. See Bernard E. Harcourt, "Unconstitutional Police Searches and Collective Responsibility" Public Law and Legal Theory Working Paper No. 66, June 2004, <<http://www.law.uchicago.edu/academics/publiclaw/resources/66-harcourt.pdf>> [Harcourt, "Unconstitutional Police Searches"].
  11. Schauer, *Profiles, Probabilities* *supra* note 6 at pp. 161–165.
  12. Reference is generally made to the *Equal Protection Clause*, 42 U.S.C. s. 1981 (2005), <<http://uscode.house.gov/download/pls/42C21.txt>> as well as Titles II and VI of the US, Bill H.R. 7152, *Civil Rights Act of 1964*, 88th Congress 1964, <<http://usinfo.state.gov/usa/infousa/laws/majorlaw/civilr19.htm>>. See Erik Lillquist & Charles A. Sullivan, "The Law and Genetics of Racial Profiling in Medicine" (2004) 39:2 *Harvard Civil Rights-Civil Liberties Law Review* 391 at p. 394.
  13. See Mark J. Kadish, "The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box" (1997) 46:3 *American University Law Review* 747 (references and relevant discussions in footnotes 1, 64, and 268).
  14. Kirstie Ball & Frank Webster, eds., *Intensification of Surveillance* (London: Pluto Press, 2003) at p. 3.
  15. Harris, *Profiles*, *supra* note 9 at pp. 223–227.
  16. John Knowles, Nicola Persico & Petra Todd, "Racial Bias in Motor Vehicle Searches: Theory and Evidence" (2001) 109:1 *Journal of Political Economy* 203 at p. 205 [Knowles, Persico & Todd, "Racial Bias"].
  17. Jeff Dominitz, "How Do the Laws of Probability Constrain Legislative and Judicial Efforts to Stop Racial Profiling?" (2003) 5:2 *American Law and Economics Review* 412 at p. 415 [Dominitz, "Laws of Probability"].

### 2.1. Racial Profiling as a Social Technology

Technology assessment involves the determination of the efficiency and effectiveness of a given technology.<sup>18</sup> This determination is complex.<sup>19</sup> It may involve a direct comparison with existing technologies,<sup>20</sup> or it may be compared against some empirical or theoretical standard of performance. The assessment of technologies may also take into account the extent to which there is a problem for which there is a need for a technological response.

The assessment of efficiency and effectiveness, perhaps by means of benefit-cost estimation, is especially complicated because of the need to include all relevant costs and benefits.<sup>21</sup> It is also important to consider their distribution. Concerns about distribution are associated with the consideration of fairness, in that we tend to favour equal, rather than disparate, allocations of costs or benefits.<sup>22</sup>

The assumption that the costs of being stopped by police should be equally, and thereby fairly, distributed does not take into account the fact that some of the costs, such as stigmatization, may be especially problematic because of the ways in which stigma, or pejorative identification, contributes to what has come to be recognized as cumulative disadvantage.<sup>23</sup> Such costs may also be excluded from technology assessments because there are no readily available policy tools to correct or compensate for the costs of stigmatization.<sup>24</sup>

Increasingly, technology assessments are expected to include unintended consequences,<sup>25</sup> including those that economists refer to as externalities, because of the fact that they are consequences that affect the well-

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18. See generally Samuel Nunn, "Seeking Tools for the War on Terror: A Critical Assessment of Emerging Technologies in Law Enforcement" (2003) 26:3 Policing 454 (discussing the criteria for evaluating the new technological systems that dramatically extend the "sensory capacities" of police, noting the potential for abuse of these resources).
  19. See generally Johan Schot & Arie Rip, "The Past and Future of Constructive Technology Assessment" (1996) 54:2-3 Technological Forecasting and Social Change 251 (reviews the history of technology assessment and developments of closer links between those concerned with assessment and those concerned with the development and implementation of technologies).
  20. See generally Roger A. Clarke, "Information Technology and Dataveillance" (1988) 31:5 Communications of the ACM 498 (discussing the ways in which "dataveillance," or database analysis is replacing traditional means of surveillance).
  21. Some argue that cost-benefit assessment of racial profiling should emphasize incremental increases in harm, rather than total harm associated with its use. This incremental increase may be the product of an interaction with the harms associated with being delayed multiplied by the harms associated with existence in a racist society. See Mathias Risse & Richard Zeckhauser, "Racial Profiling" (2004) 32:2 Philosophy & Public Affairs 149 [Risse & Zeckhauser, "Racial Profiling"] (discussing cost-benefit analysis).
  22. See Nicola Persico, "Racial Profiling, Fairness, and Effectiveness in Policing" (2002) 92:5 American Economic Review 1472 at p. 1475 [Persico, "Racial Profiling, Fairness"]. See generally Risse & Zeckhauser, "Racial Profiling," *ibid.* (provides an extended review of issues central to the moral debate about racial profiling).
  23. See Blank, Dabady & Citro, *Measuring Racial Discrimination*, *supra* note 5 at pp. 223–246.
  24. See Persico, "Racial Profiling, Fairness," *supra* note 22 at p. 1494.
  25. An unintended consequence of racial profiling in health might be seen in the tendency of physicians to avoid offering treatment to racial and ethnic minorities because they believe that they represent higher risks for negative outcomes, which in turn might affect the physician's ratings. See Rachel M. Werner, David A. Asch & Daniel Polsky, "Racial Profiling, the Unintended Consequences of Coronary Artery Bypass Graft Report Cards" (2005) 111:10 Circulation 1257 at p. 1262.

being of persons not part of a market transaction.<sup>26</sup> Negative externalities or harms that spill over beyond the participants in a transaction are especially problematic,<sup>27</sup> and invite regulatory intervention because the market does not provide ways to compensate victims, or to modify the actions of those responsible.<sup>28</sup>

It is also important to recognize that the consequences that flow from the use of a particular technology may vary with the environments, circumstances, or contexts of its use. The salience of race as a marker of identity varies with the racial composition of different settings. African Americans are far more aware of their racial status at work than at home or in their communities, in part because of the degree to which they are seen as different and are likely to be treated as different in those settings.<sup>29</sup> Police tend to respond more to African Americans as potential threats in primarily White neighbourhoods than they do in more racially mixed communities.<sup>30</sup>

Technology assessment should also, more often than it does, include consideration of the ways in which the effectiveness of some technology may vary with the user. The use of race as an index of criminality is more likely to generate unwanted negative consequences if the user's judgment is distorted by racism, or some other biasing condition. Evidence suggests that racially biased police officers are more likely to make race-based stops on a pretextual basis, rather than on the basis of a careful consideration of all the relevant information available.<sup>31</sup>

Assessment of the role that racial bias may play in the decision to stop and search motorists who may be in possession of drugs will undoubtedly be shaped by the evaluator's theories about the motivations of both police and criminals. Depending upon the assumptions that analysts make about the knowledge and motivations of relevant actors, evidence that police stop African Americans far more often than they stop Caucasians can be characterized as both rational and appropriate—even though there are no statistically significant differences in the rates at which those stopped are found to be in possession of illegal drugs.<sup>32</sup>

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26. See Melvin W. Reder, *Economics* (Chicago: University of Chicago Press, 1999) at pp. 219–222 [Reder, *Economics*] (discussing externalities and cost benefit analysis).

27. See Peter Grabosky, "Technology and Crime Control" (1998) *Trends & Issues in Crime and Criminal Justice* No. 78 <<http://www.aic.gov.au/publications/tandi/ti78.pdf>> (discussing unintended adverse consequences of police technologies, including harm to third parties).

28. See Reder, *Economics*, *supra* note 26 at p. 251.

29. See generally Charles Jaret & Donald C. Reitzes, "The Importance of Racial-Ethnic Identity and Social Settings for Blacks, Whites, and Multiracials" (1999) 42:4 *Sociological Perspectives* 711.

30. See Karen F. Parker *et al.*, "A Contextual Study of Racial Profiling" (2004) 47:7 *American Behavioral Scientist* 943 at p. 956 [Parker *et al.*, "Contextual Study"].

31. See Kenneth J. Novak, "Disparity and Racial Profiling in Traffic Enforcement" (2004) 7:1 *Police Quarterly* 65 at pp. 88–89.

32. See Knowles, Persico & Todd, "Racial Bias," *supra* note 16 at pp. 227–228, and generally, Dominitz, "Laws of Probability," *supra* note 17.

## 2.2. Racial Profiling as a Public Issue

Not all uses of race-based policing attract the same level of public concern. There is even compelling evidence to suggest that same-race policing, or matching police patrols to communities on the basis of race or ethnicity, may be effective, not only by reducing the number of arrests, but also by acting as a deterrent to crime.<sup>33</sup> Yet, considerable public concern has been expressed over the use of racial profiling in the so-called “war on drugs.” By emphasizing the risks faced by African Americans who have been subjected to insulting and even dangerous interactions with police, journalists and civil rights activists were successful in characterizing this heightened risk as a new pseudo crime: Driving While Black (DWB).

The “crime” of “Driving While Black”<sup>34</sup> was considered by many to be more than just another instalment in the long term project of institutionalized racism,<sup>35</sup> which scholars and activists are still trying to identify, to describe, and to bring under legislative and administrative control.<sup>36</sup> DWB was seen as an outbreak of a particularly virulent form of a racist response that Jody Armour called “Negrophobia.”<sup>37</sup> Armour’s efforts to examine what he called “reasonable racism” and its reproduction by an increasingly influential group of actors that he identified as “Intelligent Bayesians”<sup>38</sup> have brought us quite a long way toward understanding the links between racial statistics and the racial stereotypes they express and reinforce.<sup>39</sup> Yet, there is still much work to be done to understand the ways in which racial statistics and self-confirming hypotheses<sup>40</sup> contribute to the cumulative disadvantage<sup>41</sup> that bias within the criminal justice system helps to produce.<sup>42</sup>

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33. See John J. Donohue III & Steven D. Levitt, “The Impact of Race on Policing, Arrest Patterns, and Crime” (NBER Working Paper 6784, November 1998), <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=218908](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=218908)> at pp. 25–26.
34. See generally Kenneth Meeks, *Driving While Black (DWB)* (New York: Broadway Books, 2000) [Meeks, *DWB*]. See also Angela Anita Allen-Bell, “Comment, The Birth of the Crime: Driving While Black (DWB)” (1997) 25:1 *Southern University Law Review* 195.
35. See Stokely Carmichael & Charles V. Hamilton, *Black Power: The Politics of Liberation in America* (New York: Random House, 1967).
36. See Blank, Dabady & Citro, *Measuring Racial Discrimination*, *supra* note 5 at pp. 176–179.
37. Jody David Armour, *Negrophobia and Reasonable Racism: The Hidden Cost of Being Black in America* (New York: New York University Press, 1997).
38. *Ibid.* at pp. 35–60.
39. See generally Oscar H. Gandy, Jr, “Journalists and Academics and the Delivery of Racial Statistics: Being a Statistician Means Never Having to Say You’re Certain” (2001) 4:2 *Race & Society* 149.
40. See Glenn C. Loury, *The Anatomy of Racial Inequality* (Cambridge: Harvard University Press, 2002) at pp. 23–33 [Loury, *Anatomy*].
41. The concept of cumulative disadvantage in relation to criminal justice is explored in Blank, Dabady & Citro, *Measuring Racial Discrimination*, *supra* note 5 at pp. 233–234.
42. As noted with regard to the behavior of Maryland State Police whose own data indicated that African Americans were carrying contraband at the same rate as Whites, the fact that African Americans were being stopped at five times the rate of Whites meant that the total number of African Americans arrested and convicted of possession will rise quickly. Ironically, then, those same crime statistics will be used to justify increased attention being paid to African Americans by the police. See the quote attributed to Robert Wilkins in Meeks, *DWB*, *supra* note 34 at p. 26.

Indeed, even though some of us were beginning to discuss privacy concerns in terms of the risk of discrimination in markets,<sup>43</sup> the links between identification, classification, and invidious distinction tended not to be associated with the abuse of power by men and women with guns.<sup>44</sup> Nevertheless, opposition to the use of racial profiling began to build rapidly after a number of lawsuits had been filed by the American Civil Liberties Union (ACLU).<sup>45</sup>

Racial profiling soon emerged as a highly visible story within the nation's press as the experiences of the rich and famous were combined with those of dozens of ordinary African Americans,<sup>46</sup> and later enhanced by a number of compelling statistical analyses that worked to place DWB firmly on the public agenda.<sup>47</sup> We believe that the news media's framing<sup>48</sup> of the debate surrounding the use of race as a marker of criminal identity helped to shape,<sup>49</sup> as well as to reflect, the development of the nation's response to the problem of racial profiling.

Many of the discussions within the nation's media framed the policy problem as one of deciding whether racial profiling was a "sensible, statistically based tool" that could help police control crime, or whether it was a symbolic reminder of the abuse of authority by police that keeps a "pool of accumulated rage filled to the brim" among African Americans.<sup>50</sup>

An analysis of editorial page coverage of issues provided an identification of the primary frames and perspectives used to characterize DWB and racial profiling in the nation's press.<sup>51</sup> This analysis sought to identify the frames that were used most frequently in editorials and letters to the editor that were published between 1 January 1994 and 19 March 1999.

43. See Oscar H. Gandy Jr, "It's Discrimination Stupid!" in James Brooks & Ian A. Boals, eds., *Resisting the Virtual Life* (San Francisco: City Lights Books, 1995) 35-47 at p. 41.
44. See generally David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: New Press, 1999). See also the scathing indictment of our collective responsibility for the criminal actions of police who have been given an excess of discretionary authority by the courts in support of a war against drugs in Harcourt, "Unconstitutional Police Searches," *supra* note 10.
45. See Marcia Davis, "Roadside Racism: Unfair Traffic Stops" (June 1999) 10 *Emerge* at pp. 42-43.
46. See David A. Harris, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters" (1999) 84:2 *Minnesota Law Review* 265, at pp. 270-276.
47. Debra Lynn Vial, "Racial Profiling Debate Expanding along East Coast" *The Record* (14 March 1999) A01.
48. See generally Robert M. Entman, "Framing: Toward Clarification of a Fractured Paradigm" (1993) 43:4 *Journal of Communication* 51 at p. 51; Zhondang Pan & Gerald M. Kosicki, "Framing Analysis: An Approach to News Discourse" (1993) 10:1 *Political Communication* 55 at p. 55 [Pan & Kosicki, *Framing Analysis*].
49. See generally Zhondang Pan & Gerald M. Kosicki, "Framing as a Strategic Action in Public Deliberation" in Stephen D. Reese, Oscar H. Gandy Jr & August E. Grant, eds., *Framing Public Life: Perspectives on Media and Our Understanding of the Social World* (Mahwah, NJ: Lawrence Erlbaum Associates, 2003) 35-65 [Pan & Kosicki, *Strategic Action*] (discussing the ways in which interested policy actors seek to influence the ways in which the press frames policy issues in the belief that such framing influences the outcome of policy debates). See also Matthew C. Nisbet, Dominique Brossard & Adrienne Kroepsch, "Framing Science: The Stem Cell Controversy in an Age of Press/Politics" (2003) 8:2 *The Harvard International Journal of Press/Politics* 36 (exploring the rise and fall of media attention to a contentious political issue over time).
50. Randall Kennedy, "Suspect Policy" *The New Republic* (13 & 20 September 1999) at pp. 30, 33.
51. Jennifer Hannah & Oscar H. Gandy, Jr, "Editorial Opinion and Racial Profiling: Coming to Terms with DWB" (Paper presented to the Political Communication Division, Meeting of the International Communication, Acapulco, May 2000) [Hannah & Gandy, "Editorial Opinion"] (on file with authors).

Rather than relying on the “one bad apple” frame, by which institutional racism might be demoted to a problem involving a small number of rogue officers, 66 percent of all the items reviewed tended to frame the issue as an institutional problem, with 31 percent characterizing it as a problem for society as a whole. Only 7 percent of the items blamed individuals.<sup>52</sup>

An analysis of headlines and lead paragraphs indicated that the majority (42 percent) of these items framed the problem in terms of “Black loss” or hardship, with 35 percent including statistics about the number of drivers stopped, searched, or arrested as part of the thematic frame.<sup>53</sup> Only 7 percent wrote about police and, not surprisingly, 60 percent of the items that addressed the issue of police safety also denied that racial motives were a factor in police stops of motorists.

The majority (66 percent) of the items argued that profiling was wrong. Only 17 percent of the items suggested that profiling was not wrong, racist, or unfair, and two-thirds of these were letters to the editor. Letters to the editor were also least likely to make use of statistics or include references to probability in their attempts to build a case for or against racial profiling.

The analysis also explored the ways in which the presentation of these frames and perspectives varied across the United States. With the exception of items gathered from newspapers identified as national, published items were assigned to one of four regions. Articles from the Northeast were characterized as overwhelmingly negative toward the use of racial profiling (79 percent), while those from the South were primarily (53.3 percent) neutral in orientation, tending to call for more data in order to determine whether or not DWB was actually a problem.

In order to determine if the framing of these stories reflected the racial composition of the newspaper’s primary readers,<sup>54</sup> this analysis classified newspaper markets according to their racial character. Newspapers were assigned to one of four categories on the basis of the proportion of the metro population that was African American. The proportion of negative stories increased as the presence of African Americans in the newspaper’s market increased. In cities with the largest Black populations, all but one editorial was critical of racial profiling. While the media’s frames seemed to respond to what editors and managers perceived as the race-based expectations of their primary

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52. *Ibid.* at p. 14.

53. Scholars of media framing distinguish between episodic and thematic frames, where episodic frames tell the story of an individual, while thematic frames discuss the problem more generally, often using statistics. This distinction has emerged as important in the framing literature because of evidence which suggests that readers tend to “blame the victims” when episodic frames are used, while they are more likely to assign responsibility to social and political institutions when thematic frames are used. See generally Shanto Iyengar, *Is Anyone Responsible? How Television Frames Political Issues* (Chicago: University of Chicago Press, 1991) at pp. 7–10 [Iyengar, *Is Anyone Responsible*].

54. This approach is applied with notable success in Kent Goshorn & Oscar H. Gandy, Jr., “Race, Risk and Responsibility: Editorial Constraint in the Framing of Inequality” (1995) 45:2 *Journal of Communication* 133.

readers, the common conclusion seemed to be that racial profiling was a dangerous technology that had to be brought under control.<sup>55</sup>

Unfortunately, in the aftermath of the events of the attack on the World Trade Center on 11 September 2001, the nation's perspective on racial profiling took a somewhat different turn. An emphasis on safety in the air replaced a concern about drug traffic. However, because suspicions were focused on males from the Middle East, expressions of concern about racial and ethnic profiling once again emerged in the press.<sup>56</sup>

Public opinion, which had been strongly opposed to racial profiling, became divided, as it often does when the levels of threat and concern rise.<sup>57</sup> Still, policy makers at the federal level opposed the inclusion of race among the elements of profiling systems being developed to improve the safety of air transport.<sup>58</sup> In June 2003, in response to President Bush's determination that the use of racial profiling was wrong, the US Department of Justice issued a guidance<sup>59</sup> meant to ban the use of racial profiling by federal law enforcement officials.<sup>60</sup> The directive explicitly rejected the use of statistical indicators of differences in crime rates among racial groups as a basis for differential policing.<sup>61</sup> Despite the greater emphasis at the national level on the threat of terrorism that may have served to weaken opposition to blanket bans on the use of racial profiling, the guidance adopted a weaker constitutional standard in limiting the use of race and ethnicity in terrorist identification.<sup>62</sup>

Of course, a presidential directive, and an administrative guidance that applies to federal law enforcement officials still falls far short of the demands that had been made in response to what had become known as DWB.

55. This is not to suggest that all media coverage of racial profiling shared this assessment of its danger to the social fabric. Some sources felt that to restrict the use of this technique was to needlessly hamper the efforts of police to control crime. See Heather MacDonald, "The Myth of Racial Profiling" (2001) *City Journal* (Spring 2001) <[http://www.city-journal.org/html/11\\_2\\_the\\_myth.html](http://www.city-journal.org/html/11_2_the_myth.html)>.

56. Harris, *Profiles*, *supra* note 9 at pp. 223–240. See generally Siobhan Gorman, "National Security: Profiling Terror" *National Journal* (13 April 2002).

57. Alan Westin noted the way in which the public's willingness to accept government surveillance following 9/11 rose dramatically, and then declined with regard to some particularly invasive techniques in less than a year. See Alan F. Westin, "Social and Political Dimensions of Privacy" (2003) 59:2 *Journal of Social Issues* 431 at pp. 448–449.

58. Schauer, *Profiles, Probabilities*, *supra* note 6 at pp. 181–183. See the discussion of the recommendations of the Gore Commission regarding the CAPPs profile which opposed reliance on "stereotypes and generalizations" rather than "reliable predictions of risk." Opponents of racial and ethnic profiling suggest that even though "all 19 of the September 11 attackers were young Middle Eastern men, it is difficult to draw reliable conclusions from this fact regarding the propensity of any other young Middle Eastern men, let alone anyone else, to engage in future terrorist acts, given the many other factors involved and the rarity of terrorist actions." Blank, Dabady & Citro, *Measuring Racial Discrimination*, *supra* note 5 at p. 198. See also Bruce Schneier, *Beyond Fear: Thinking Sensibly About Security in an Uncertain World* (New York: Copernicus Books, 2003) at pp. 253–254.

59. US Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003) <[http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.htm](http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm)>.

60. US Department of Justice, *Racial Profiling Is Wrong and Will Not Be Tolerated* (17 June 2003) <[http://www.usdoj.gov/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf)> [use search terms "racial profiling"].

61. *Ibid.* at p. 3.

62. *Ibid.* at p. 5.

Prior to the federal initiative, hundreds of jurisdictions, including several states, had acted to declare the use of racial profiling a suspect technology, some barring its use, while many more sought to determine the extent to which it was being used.<sup>63</sup> We felt that it was important to investigate the extent to which a variety of policy responses had emerged at the state level where political action was more likely to reflect differences in local conditions,<sup>64</sup> including the power and influence of organizations traditionally concerned with civil rights and discrimination. This examination begins in the next section with an analysis of legislative actions taken at the state level.

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### 3. THE LEGISLATIVE RESPONSE

WE USED LEXISNEXIS AS OUR PRIMARY SOURCE in identifying all the statutes related to racial profiling that had been passed at the state level in the United States between 1999 and 2004. Within this period of time, nineteen states had passed or revised a total of twenty-four statutes or sections of statutes that we could assign unequivocally to a concern about, or a response to, racial profiling (See Appendix A).<sup>65</sup> In examining these statutes, we took note of what we saw as important distinctions between them, especially with regard to the ways in which they defined racial profiling.

#### 3.1. Defining Racial Profiling

There was considerable variation in the ways in which these jurisdictions defined racial profiling as an identifiable practice or technique used by members of police or law enforcement agencies.

The Resource Guide on Racial Profiling that had been distributed by the Department of Justice defined racial profiling as “any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.”<sup>66</sup> This is a fairly comprehensive definition that might be used as a standard of comparison. Only four states passed statutes that established what we considered to be extremely conservative or limited definitions of racial profiling where race, ethnicity, or nationality had to be identified as the *sole factor* used

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63. See the discussion of such initiatives in James D. Ward, “Race, Ethnicity, and Law Enforcement Profiling: Implications for Public Policy” (2002) 62:6 Public Administration Review 726 at p. 728.

64. Parker, *et al.*, “Contextual Study,” *supra* note 30.

65. LexisNexis Academic’s Legal Search function was used to search for state level legislation on racial profiling. Two separate search syntaxes were used for each state. First, we searched for “racial profiling” as a keyword. Then, we searched for “profiling” as a keyword and narrowed the search with “race” as an additional term. These search terms retrieved forty-five documents from nineteen states. For the final list of statutes selected for analysis, we deleted the duplications and combined adjacent sections of the same bill. This final list had twenty-four statutes (or groups of relevant sections of a statute) that are listed in Appendix A.

66. Ramirez, McDivitt & Farrell, “Resource Guide,” *supra* note 7 at p. 3.

in deciding whether to stop or detain an individual. In making such activities illegal, Connecticut's statute said, in part, that "the race or ethnicity of an individual shall not be the sole factor in determining the existence of probable cause ... or in constituting a reasonable and articulable suspicion ... so as to justify ... the investigatory stop of a motor vehicle."<sup>67</sup> The statutes in Montana and Oklahoma were quite similar.<sup>68</sup>

However, Kentucky's statute was even more strictly limited, in that persons could not be stopped, detained, or searched "when such action is solely activated by consideration of race, color, or ethnicity"; and, more critically in our view, the statute adds a further condition: a requirement that "the action would constitute a violation of the civil rights of the person."<sup>69</sup>

More liberal or comprehensive statutes defined racial profiling to include decisions that treated race as just one of the factors used to determine probable cause, or a reasonable suspicion. Eight statutes defined and sought to limit this kind of racial profiling in their states.<sup>70</sup>

The Arkansas statute was among the most explicit in its rejection of the use of race as a resource in policing. They defined racial profiling as "the practice of a law enforcement officer relying to any degree on race, ethnicity, national origin, or religion in selecting which individuals to subject to routine investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial routine investigatory activity."<sup>71</sup>

California's statute included a theory of consequence in its definition of racial profiling. For California, detention was defined as "based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped."<sup>72</sup> This statute is closely related to the statute in Minnesota which defines racial profiling to include "use of racial or ethnic stereotypes as factors in selecting whom to stop and search."<sup>73</sup> We assume that the legislators include the sorts of stereotypes that racial statistics about arrests and imprisonment for drug-related offences bring to mind.<sup>74</sup>

67. (2003) *Connecticut General Statutes* s. 54-11 d, <<http://www.cga.ct.gov/2005/pub/Chap959.htm>>.

68. (2003) *Montana Code Annotated* s. 44-2-117, <<http://data.opi.state.mt.us/bills/mca/44/2/44-2-117.htm>>; (2001) 22 *Oklahoma Statutes* ss. 34.3 to 34.5, <<http://www.lsb.state.ok.us/osStatuesTitle.html>>.

69. (2004) *Kentucky Revised Statutes* s. 15A(1), <<http://www.lrc.ky.gov/KRS/015A00/195.pdf>>.

70. (2003) *Arkansas Code Annotated* ss. 12-12-1401 to 12-12-1404; 2004 *Statutes of California* ch. 700, <<http://www.leginfo.ca.gov/statute.html>>; (2003) *Connecticut General Statutes* s. 54-1 (2003), *supra* note 67; (2003) *Minnesota Statutes* s. 626.8471, <<http://www.revisor.leg.state.mn.us/stats/626/951.html>>; (2001) *Nevada Revised Statutes* s. 289.820, <<http://www.leg.state.nv.us/NRS/NRS-289.html>>; *Racial Profiling Prevention Act of 2004*, 2004 *Rhode Island Public Laws* ch. 356, <<http://www.rilin.state.ri.us/PublicLaws/law04/law04356.htm>>; *Traffic Stops Statistics Act*, (2004) *Rhode Island General Laws* ss. 31-21.1-2, 31-21.1-4, 31-21.1-5, <<http://www.rilin.state.ri.us/Statutes/TITLE31/31-21.1/INDEX.HTM>>; (2002) *West Virginia Code* s. 30-29-10, <<http://www.legis.state.wv.us/WVCODE/30/WV%2030%20%20-%2029%20%20-%20%2010.htm#HD0>>.

71. (2003) *Arkansas Code Annotated* s. 12-12-1401(a).

72. *Statutes of California* ch. 700, *supra* note 70.

73. (2003) *Minnesota Statutes* s. 626.8471, subd. 2(2), <<http://www.revisor.leg.state.mn.us/stats/626/951.html>>.

74. See generally Jerry Kang, "Trojan Horses of Race" (2005) 118:5 *Harvard Law Review* 1490 at p. 1549.

Several statutes did include a special exception for permissible uses of race where racial or ethnic group membership is part of the description of a specific suspect being sought.<sup>75</sup>

### 3.2. Data Gathering and Classification

The extent to which racial profiling was, or was not, being used by police officers appeared to be an important, but apparently an unanswered, question in many of these jurisdictions. Thirteen of twenty-four statutes were written explicitly to require, or to support, the collection and analysis of data regarding the ways in which police used race in the pursuit of their various missions.<sup>76</sup>

Seventeen of the twenty-four statutes made racial profiling illegal.<sup>77</sup> Some states even established penalties that would be applied to local agencies that failed to comply with policies regarding racial profiling.

It is worth noting, however, that only eight of the twenty-four statutes also established procedures for filing complaints regarding racial profiling.<sup>78</sup> Other states were more likely to use statutes to introduce other strategies and techniques for controlling or limiting the extent and impact of racial profiling. These strategies included officer education, the installation of cameras in police vehicles, and special task forces and commissions to study the problem further. More than half (n=13) of the statutes included such programmatic responses.<sup>79</sup>

75. (2003) *Connecticut General Statutes* s. 54-1, <<http://www.cga.ct.gov/2005/pub/Chap959.htm>>; (2004) *Kentucky Revised Statutes* s. 15A(1), <<http://www.lrc.ky.gov/KRS/015A00/195.pdf>>; (2003) *Montana Code Annotated* s. 44-2-117, <<http://data.opi.state.mt.us/bills/mca/44/2/44-2-117.htm>>; (2001) 22 *Oklahoma Statutes* s. 34.3, *supra* note 68.
76. 2004 *Statutes of California* ch. 700, *supra* note 70; (2003) *Colorado Revised Statutes* s. 24-31-309, <<http://198.187.128.12/colorado/lpext.dll/Infobase4/375be?f=templates&fn=document-frame.htm&2.0>>; *Connecticut General Statutes*, *supra* note 67; (2001) *Louisiana Revised Statutes* s. 32:398.10, <<http://www.legis.state.la.us/lss/lss.asp?doc=88363>>; (2003) *Minnesota Statutes* s. 626.8471, *supra* note 70; (2001) *Missouri Revised Statutes* s. 590.650, <<http://www.moga.state.mo.us/statutes/c500-599/5900000650.htm>>; (2002) *Nebraska Revised Statutes* ss. 20-501 to 20-505, <<http://uniweb.legislature.ne.gov/LegalDocs/view.php?page=s20index>>; *Racial Profiling Prevention Act of 2004*, 2004 *Rhode Island Public Laws* ch. 356, *supra* note 70; *Traffic Stops Statistics Act*, (2004) *Rhode Island General Laws* s. 31-21.1-2, *supra* note 70; *Act Relating to the Prevention of Racial Profiling by Certain Peace Officers*, 2001 *Texas General Laws* ch. 947, (2006) *Code of Criminal Procedure* s. 2.131, <<http://tlo2.tlc.state.tx.us/statutes/docs/CR/content/htm/cr.001.00.000002.00.htm#2.131.00>>; (2002) *Washington Revised Code* ss. 43.101.410, 43.101.415, <<http://apps.leg.wa.gov/rcw/default.aspx?Cite=43>>; (2002) *West Virginia Code* s. 30-29-10, *supra* note 70.
77. (2003) *Arkansas Code Annotated* s. 12-12-1402; 2004 *Statutes of California* ch. 700, *supra* note 70; (2003) *Colorado Revised Statutes* s. 24-31-309, *ibid.*; (2003) *Connecticut General Statutes* s. 54-11, *supra* note 68; (2004) *Kentucky Revised Statutes* s. 15A(1), *supra* note 75; (2003) *Minnesota Statutes* s. 626.8471, *supra* note 70; (2003) *Montana Code Annotated* s. 44-2-117, *supra* note 68; (2002) *Nebraska Revised Statutes* ss. 20-501 to 20-505, *ibid.*; (2001) *Nevada Revised Statutes* s. 289.820, *supra* note 70; 2003 *New Jersey Public Laws* ch. 31, <[http://www.njleg.state.nj.us/2002/Bills/PL03/31\\_.HTM](http://www.njleg.state.nj.us/2002/Bills/PL03/31_.HTM)>; (2001) 22 *Oklahoma Statutes* ss. 34.3, *supra* note 68; *Racial Profiling Prevention Act of 2004*, 2004 *Rhode Island Public Laws* ch. 356, *supra* note 70; *Traffic Stops Statistics Act*, (2004) *Rhode Island General Laws* s. 31-21.1-2, *supra* note 70; *Pawnbrokers Act of 1988*, (2001) *Tennessee Code Annotated* s. 45-6-223, <[http://michie.lexisnexis.com/tennessee/lpext.dll/tncode/13229/13c45/13c45?f=templates&fn=document-frame.htm&2.0#JD\\_t45ch6p2](http://michie.lexisnexis.com/tennessee/lpext.dll/tncode/13229/13c45/13c45?f=templates&fn=document-frame.htm&2.0#JD_t45ch6p2)>; *Act Relating to the Prevention of Racial Profiling by Certain Peace Officers*, 2001 *Texas General Laws* ch. 947, *ibid.*; (2002) *West Virginia Code* s. 30-29-10, *supra* note 70.
78. (2003) *Colorado Revised Statutes* s. 24-31-309, *supra* note 76; (2003) *Connecticut General Statutes* s. 54-11, *supra* note 68; (2003) *Minnesota Statutes* s. 626.8471, *supra* note 70; (2003) *Montana Code Annotated* s. 44-2-117, *supra* note 68; (2001) 22 *Oklahoma Statutes* s. 34.3, *supra* note 68; *Racial Profiling Prevention Act of 2004*, 2004 *Rhode Island Public Laws* ch. 356, *supra* note 70; *Act Relating to the Prevention of Racial Profiling by Certain Peace Officers*, 2001 *Texas General Laws* ch. 947, *supra* note 76; (2002) *Washington Revised Code* ss. 43.101.410, 43.101.415, *supra* note 76.
79. (2003) *Arkansas Code Annotated* s. 12-12-1404; 2004 *Statutes of California* ch. 700, *supra* note 70; (2003) *Colorado Revised Statutes* s. 24-31-309, *supra* note 76; (2001) *Louisiana Revised Statutes* s. 32:398.10,

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#### 4. FRAMING THE LEGISLATIVE DEBATE

THE LITERATURE ON MEDIA FRAMING that we explored in Part 2 emphasizes the importance of media coverage of issues of public concern to how these issues are ultimately resolved within legislative bodies. The news media are recognized as critically important political institutions.<sup>80</sup> Analysis of media coverage of legislative debates can provide a basis for understanding how different jurisdictions ultimately decide to act in response to the problem before them.<sup>81</sup> What follows is our analysis of this kind of media coverage.

We relied primarily on LexisNexis to identify the stories and editorials dealing with racial profiling policies in the major newspapers in the nineteen states with qualifying statutes (see Table 1).<sup>82</sup> This analysis is focused primarily on those articles that offered comment on these legislative initiatives.<sup>83</sup> Articles that discussed racial profiling but did not make reference to a statute or regulation were excluded from this initial analysis.<sup>84</sup>

*supra* note 76; (2003) *Minnesota Statutes* s. 626.8471, *supra* note 70; (2004) *Mississippi Code Annotated* s. 45-4-9, <[http://michie.lexisnexis.com/mississippi/lpext.dll/mscode/ddb0/dec8?f= templates&fn=document-frame.htm&2.0#JD\\_t45ch4](http://michie.lexisnexis.com/mississippi/lpext.dll/mscode/ddb0/dec8?f=templates&fn=document-frame.htm&2.0#JD_t45ch4)>; (2001) *Missouri Revised Statutes* s. 590.650, *supra* note 76; *Montana Code Annotated* s. 44-2-117, *supra* note 68; *Racial Profiling Prevention Act of 2004*, 2004 *Rhode Island Public Laws* ch. 356, *supra* note 70; *Act Relating to the Prevention of Racial Profiling by Certain Peace Officers*, 2001 *Texas General Laws* ch. 947, *supra* note 76; (2002) *Washington Revised Code* ss. 43.101.410, 43.101.415, *supra* note 76; (2002) *West Virginia Code* s. 30-29-10, *supra* note 70.

80. See generally Timothy E. Cook, *Governing with the News: The News Media as a Political Institution* (Chicago: University of Chicago Press, 1998). See also Frank R. Baumgartner & Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993) (examines the ways in which the extent of coverage and valence of media frames help to determine the shifts in public policies governing the use of a host of technologies).
81. Some critical perspectives on media framing emphasize the tendency of the press to focus more on the contest between proponents than on the issues being discussed. Interestingly, the media seem to focus less on the "game" frame in their coverage of state level debates than they do on debates at the federal level. See generally Regina G. Lawrence, "Game-Framing the Issues: Tracking the Strategy Frame in Public Policy News" (2000) 17:2 *Political Communication* 93.
82. The decision to limit our analysis to states which had passed or modified statutes on racial profiling means that the kinds of discussions that took place in states that considered, but rejected, legislative proposals have been excluded from our analysis. This necessarily limits the generality of our observations and conclusions regarding debate across the nation at the state level.
83. For the nineteen states for which we were able to find a statute or a section of a statute that could be unequivocally categorized as related to racial profiling, we developed a list of possible newspapers that could be used to retrieve newspaper articles. This list was developed using the Lexis Academic list of Major Newspapers, the Lexis Academic State by State list of Newspapers and the circulation rankings published by the Audit Bureau of Circulations. If the Lexis Academic list of Major Newspapers had a newspaper for a given state, that newspaper was used for that state. If a state did not have any newspapers included in the Lexis list of Major Newspapers, then the Lexis State by State list of Newspapers, followed by Newsbank (another news databank), was used to select the newspaper for a given state. For each state, newspapers that were published in the state capital were preferred over other newspapers and if none of the newspapers were published in the state capital (or if multiple newspapers were published in the state capital), the newspaper with the highest circulation was used to retrieve articles (see Appendix B for the list of newspapers that was used).
84. The following syntax was used to retrieve articles from each selected newspaper: <Racial Profiling> (fulltext) AND <Governor OR gov. OR senate OR house OR representative OR rep. OR senator OR sen. OR enact OR signed into law OR sign into law> (fulltext). The purpose of using this approach was to minimize the number of articles that were about racial profiling but were not about the statutes in question, while also minimizing the chances of excluding any article about the racial profiling statutes. We repeated this search procedure for each state and for each period during which there was an amendment to a state level statute that was on our list of statutes. The period that would be used to search for newspaper articles was determined using a two-tiered criterion. For those statutes with a bill tracking report, the search was made for the period starting two months before the bill was proposed and ending two months after the bill was signed into law. For those statutes without a bill tracking report and for

The analytical approach was similar to that used in the 1999 study,<sup>85</sup> except that the primary focus was on news items (n=133) rather than editorials or columns (n=10). Press coverage of racial profiling statutes was highest in 2000 with fifty-one qualified documents, followed closely by 2001 with thirty nine.

The primary unit of analysis of newspaper articles and editorials was the paragraph.<sup>86</sup> By using the paragraph in this way, it was possible for us to assign unique and multiple codes to as many as 3,300 paragraphs, or text units.<sup>87</sup> An initial strategy for investigating unfamiliar documents that are assumed to address certain themes is to search for particular text “strings”—a word, or phrase believed to be characteristic of particular speakers, and perhaps reflecting an underlying point of view. After each retrieved string is qualified as a legitimate case, the paragraph, or text unit, is marked or identified as having been coded at that particular “node.”

For example, we understand the use of quotation marks around a term as a particularly important way of conveying a sense of distance, or a suspension of belief. This practice is quite common in the context of what van Dijk has associated with the reporting of racism.<sup>88</sup> Adopting this perspective, we searched these articles for the appearance of the term *racial profiling* in quotation marks. Surprisingly, this form of distancing<sup>89</sup> did not occur that often, only twenty-nine times in twenty-three articles. However, we also searched for patterns of association between the use of this distancing strategy and the circumstances of its use.

We began our analysis at the level of states, and then sought to determine whether there were patterns in use which suggest that some states, perhaps those in the South, were more likely to use such a strategy to express

amendments to a statute, the search period started one calendar year before the statute was signed into law (or amended) and ended one calendar year after the statute was signed into law (or amended). Once the search syntax retrieved a list of articles, we excluded letters to the editor, style section news, film reviews, television guides and reviews.

85. See Hannah & Gandy, *supra* note 51. Analysis was accomplished with the use of QSR International's qualitative analysis software, N6. See also Oscar H. Gandy, Jr. & Zhan Li, "Framing Comparative Risk: A Preliminary Analysis" (2005) 16 *The Howard Journal of Communication* 71 [Gandy & Li, "Framing Comparative Risk"].
86. Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology*, 2d ed. (Thousand Oaks, California: Sage, 2004) at pp. 104–105; See also James W. Tankard, "The Empirical Approach to the Study of Media Framing" in Stephen Reese, Oscar H. Gandy, Jr. & August E. Grant, eds., *Framing Public Life: Perspectives on Media and Our Understanding of the Social World* (Mahwah, NJ: Lawrence Erlbaum Associates, 2001) 95 at pp. 100–101, and Pan & Kosicki, *Framing Analysis*, *supra* note 48.
87. N6 allows for the characterization of text units (defined as lines, sentences, or paragraphs) as having been coded at a Node, or a defined category. Nodes can be defined a priori on the basis of a fully specified instrument akin to a survey questionnaire, or through automated searches of text. Nodes can also be created as "freely defined" nodes while reading through the text online. Nodes are also established analytically as the product of Boolean searches and matrix manipulation of existing nodes. See generally Lyn Richards, *Using N6 in Qualitative Research* (Melbourne: QSR International Pty Ltd, 2002), <<http://download.qsrinternational.com/Document/N6/N6%20Workbook.pdf>>.
88. Tuen A. van Dijk, "New(s) Racism: A Discourse Analytical Approach" in Simon Cottle, ed., *Ethnic Minorities and the Media: Changing Cultural Boundaries* (Buckingham, PA: Open University Press, 2000) at p. 45.
89. See for example Mick Hinton, "Racial Profiling Bill Advances Senate to Consider Discipline Policy" *The Daily Oklahoman* (14 April 2000) 4A (discusses the statute by explaining that "the measure bans 'racial profiling' by a police officer, who could be charged with a misdemeanor criminal offense").

their resistance to granting racial profiling the status of an established fact, or a routine practice.<sup>90</sup>

We were, in fact, quite surprised to discover that Rhode Island was the source of 72 percent of the uses of racial profiling in quotes (n=21). While such usage might have reflected some kind of formal editorial policy, rather than an interpretive stance on a particular issue, it appeared that this use of quotes was rather unique in the newspaper serving Rhode Island. That is, the term racial profiling occurred some 474 times overall, and the Rhode Island paper, because it had the largest number of articles in our sample (n=37), also accounted for 109, or around 23 percent, of the uses of the term. However, its share of the uses in quotes far exceeds that proportion. The Rhode Island paper was far more likely than any other paper in our sample to use racial profiling in quotes. Their use of these quotation marks appeared to be a strategic distancing effort.

#### 4.1. Primary Descriptive Frames

In addition to coding paragraphs as the primary units of analysis, we also coded headlines and lead paragraphs in terms of whether they did, or did not, include explicit references to racial profiling. Our assumption was that articles that use racial profiling in the headline or lead paragraph were more likely to have focused on such matters as a central, rather than a peripheral, concern.<sup>91</sup>

We used theoretically and inductively derived labels for identifying statements that were made and reported in these articles. These include a set of reasons that we felt were likely to be offered in support of, or in opposition to, racial profiling as a practice.

The most often cited reason or justification was what we characterized as a moral or ethical stance, such as "it is not right, or just, or fair." One columnist in Missouri went so far as to say "John Ashcroft and I don't agree on much, but he's right on this one. Racial profiling is wrong, and steps must be taken to get rid of it."<sup>92</sup> Approximately 22 percent of the articles include such an assertion, conclusion, or claim. A far smaller proportion, around 10 percent, merely suggested that it was "against the law" or that it was unconstitutional. Only ten articles offered the more pragmatic response which emphasized unintended consequences, suggesting that such practices are likely to decrease public trust in law enforcement and the administration of justice.

90. Critical observers of media behaviour have a special regard for investigative journalists because of common assumptions about their commitment to what they see as a mission. See David L. Protess *et al.*, eds., *The Journalism of Outrage: Investigative Reporting and Agenda Building America* (New York: Guilford Press, 1991) at pp. 12–20 (discussing the mobilization model of investigative journalism). It seems unlikely that investigative journalists who see racial profiling as an injustice would use quotation marks around the term. Our discussion of the proportions of uses of a technique is common in studies of media framing. There is little additional value that would be gained by providing the reader with details or citations at the level of articles or paragraphs because it would needlessly duplicate the research process that produced the summary statistics. See David Deacon *et al.*, *Researching Communications* (London: Arnold, 1999) at pp. 132–184 (exploring approaches to the analysis of texts including the critical assessment of thematic structures that are common in news media coverage of issues).

91. Brant Houston *et al.*, eds., *The Investigative Reporter's Handbook*, 4th ed. (Boston: Bedford/St. Martin's, 2002) at pp. 529–530.

92. Greg Freeman "Racial Profiling" *St Louis Post-Dispatch* (8 April 2001) C3.

Responses to statutes that were meant to respond to racial profiling as a problem were more numerous and more varied. The most frequent reason (n=37 documents) given for not supporting a statute was that it was “not well crafted”; in some cases the statute was said to be overly broad, and in other cases critics said that it was bound to be ineffective, perhaps, as some suggested, because it was merely for show.

The most popular argument for supporting a statute was that it would facilitate the collection of data that would help to determine whether the problem existed in the first place (n=40).

Nearly as many urged support for a statute because there was a need for it; that is, supporters claimed that profiling was a real problem that had to be addressed (n=33).

#### 4.1.1. Voice

The analysis of policy frames traditionally seeks to identify the sorts of persons who get to speak about problems of public concern.<sup>93</sup> It is generally held that the prominence and visibility of some sources in the press is a reflection of the power and resources they command.<sup>94</sup> Ultimately, however, the decision of who gets quoted in the press is made by the journalist and her editor.<sup>95</sup>

We made a distinction between those who had comments or views attributed to them, and those who were actually quoted. As might be expected in the context of comments on legislative matters, citizens were rarely provided the opportunity to speak. Indeed, one of the two speakers that we identified as a citizen was actually a candidate for public office at the time. On the other hand, attributions were made to legislators in forty documents, while they were actually quoted in fifty eight.

While law enforcement officials had views attributed to them in thirty-three articles, they were quoted slightly less often (n=30).

Again, not surprisingly, because of the way in which the issue has been framed as a matter of civil rights, representatives of civil rights organizations had comments attributed to them in twenty-two articles, while they were actually quoted in forty two.

#### 4.2. Discursive Relationships

We were interested in discovering how often, and in which papers, the comments of civil rights leaders would be balanced against those of legislators.<sup>96</sup>

93. Pan & Kosicki, *Strategic Action*, *supra* note 49 at pp. 48–49.

94. Oscar H. Gandy, Jr, *Beyond Agenda Setting* (Norwood, NJ: Ablex Publishers, 1982) at pp. 9–14 [Gandy, *Agenda Setting*].

95. See generally Kevin M. Carragee & Wim Roefs, “The Neglect of Power in Recent Framing Research” (2004) 54:2 *Journal of Communication* 214.

96. Fairness and balance are supposed to be fundamental attributes of a responsible press. Thus, we would expect journalists to not only provide relatively equal access to speakers on different sides of an issue, but we also felt it likely that journalists would structure the comments of sources in ways that would approximate face-to-face confrontations. See Denis McQuail, *Media Performance: Mass Communication and the Public Interest* (London: Sage Publications, 1992) at pp. 224–232 [McQuail, *Media Performance*] (discussing the assessment of balance or bias in press coverage).

We were also interested in seeing how often the sponsors of these frames get to speak unchallenged.

Given the relatively large number of quotes and attributions from both police officials and civil rights advocates, we expected to find their comments in close proximity quite often. Indeed, we expected to see police officials being placed in the position of defending themselves from charges made by representatives of civil rights organizations. However, it was only in nine documents that we observed comments of police officials and civil rights advocates being published within five paragraphs of each other. We also noted that the quotes of the police were published following those of the civil rights advocate only twice. In addition, there were no consistent patterns in which these quotes directly contradicted or disagreed with the quotes that had gone before.

In general, legislators and civil rights advocates were the most frequently cited supporters of these statutes (47.7 percent and 27.7 percent respectively). The suggestion that the statute would curtail profiling was made most frequently by legislators (43.5 percent) and executive members of state and local governments (21.7 percent). The suggestion that the statute would enhance trust in government agencies was most frequently made by legislators (61.1 percent), followed by civil rights advocates (22.2 percent), and law enforcement officials (11.1 percent).

There were two categories of arguments that were offered in support of statutes related to uncertainty about the existence of racial profiling as a problem. The first of these categories was a suggestion that the statute would help to determine if racial profiling existed. In this category, civil rights advocates were the most frequently cited/quoted source (39.7 percent), followed by legislators (31.7 percent), and law enforcement representatives (20.6 percent).

Rather than questioning whether racial profiling was a problem, the second type of argument was a declaration that racial profiling was in fact a real problem (not a problem of perception) and that the statute was necessary to address it. Unlike the first category, in which civil rights advocates were cited/quoted most frequently, the majority of the comments of this nature were attributed to legislators (69 percent).

Finally, there were thirty-three comments that suggested that while the statute was not as good as it might otherwise be, it was far better than the alternative: not having any measures to address racial profiling. Again, legislators and civil rights advocates were the most frequently cited/quoted sources for this category of comment in support of the statutes (54.5 percent and 36.4 percent respectively).

Law enforcement officials were the sources that were most frequently cited as opposing the statute because it was too expensive and/or too difficult to implement (37.7 percent). Law enforcement officials were followed by legislators (17 percent) and unidentified critics (17 percent) in offering such arguments.

Another argument that was utilized more frequently by law enforcement officials than other sources was the claim that the statute was

unnecessary because racial profiling did not exist. Seventy-five percent of the presentations of these arguments came from law enforcement representatives. Law enforcement representatives were also the most frequently cited sources for the argument that measures to prevent racial profiling already existed (53.8 percent).

As for the claim that the statute would chill law enforcement capabilities, somewhat surprisingly law enforcement officials (36.1 percent) were second to legislators (44.4 percent), who suggested that law enforcement officials would refrain from performing their duties due to fear of being blamed for engaging in racial profiling.

Legislators were also the most frequently cited source of a criticism of a statute as not being well crafted (35 percent). Legislators were followed by civil rights advocates (23.3 percent) in making such a claim. However, further analysis reveals that the nature of the “not well-crafted” arguments that legislators and civil rights advocates used were actually quite different from each other. While civil rights advocates often presented arguments to suggest that actions required by the legislation would not be adequate as a response to the problem of racial profiling, approximately 33 percent of the “not well-crafted” arguments made by legislators suggested that the statute was too broad and would lead to unintended consequences such as too many lawsuits against the state.

#### *4.3. Comparing the States*

We also examined the patterns in frames and perspectives as they varied across the states. In half of the eighteen states for which we had qualified newspaper coverage, articles about the state’s racial profiling statute made references to some study which produced statistics that could lend support to, or challenge, the claim that racial profiling was being used by police.

The proportion of articles which include statistical evidence that supported the charge varied from state to state. While not all of the states that reported on such studies actually included statistics as evidence within the article, newspapers in only three states—Texas, Washington and West Virginia—reported any statistics that could be read as challenging the existence of racial profiling.

Articles from Texas were most likely to report these negative statistics (25 percent of the articles from Texas) and an equal number of references in this newspaper questioned the quality or the interpretation of the data in some report.

While Rhode Island did not report any statistics that argued against the existence of racial profiling, and its paper published only a relatively small proportion of all references made to statistical evidence in support of its existence, the Rhode Island newspaper was similar to the Texas newspaper in questioning the quality of studies’ data in 20 percent of its items.

When we compared the states’ newspapers in terms of their tendency to quote or to attribute comments to different kinds of sources, we observed some interesting patterns. Nevada relied upon its legislators for 71 percent of a

very limited number of comments on its bill.

West Virginia's newspaper relied very heavily on social scientists (52 percent) to provide the public with insights into the nature of racial profiling as a social problem.<sup>97</sup> Texas and Missouri were the only other states to depart from the traditional journalist's reliance on elected officials or law enforcement personnel in this way.<sup>98</sup>

Perhaps because it was one of the states in which the charge of racial profiling had generated a political crisis for its governor,<sup>99</sup> New Jersey papers allowed law enforcement voices to dominate the articles, with police officials accounting for nearly 60 percent of the references or quotations.

#### 4.3.1. Reasons for Opposing Profiling

Not many newspapers featured comments that expressed opposition to racial profiling because it was illegal. Stories in the newspapers sampled from Missouri, Connecticut, and West Virginia were least likely to include references that offered this specific claim. Among these, only West Virginia's paper was more likely to say that racial profiling was illegal, than to offer other rationales. Indeed, references to illegality dominated (80 percent) the small number ( $n = 5$ ) of justifications offered for taking legislative action in West Virginia.

Sources offering comments in Oklahoma and Rhode Island were most likely to speak of moral concerns (8 references each), while Rhode Island was among those least likely to say the behaviour was illegal. Of the two examples we noted, one actually involved a challenge to the Attorney General, who apparently did not feel that the racially linked techniques of his officers was a "violation of the law."<sup>100</sup> The views of Attorney General Lynch in 2003 were apparently quite different from those of Attorney General Whitehouse, who in 2000 had been the author of a proposal that would identify and punish "racial profiling, and all forms of unlawful discrimination."<sup>101</sup>

#### 4.4. *Opposition to the Statute*

We identified seven reasons that tended to be given most often as a basis for opposing a racial profiling statute. As we initially observed, the greatest number

97. Studies of race-based policing produced by academic researchers have come to play an increasingly important role in the assessment of racial profiling. Academics like John Lamberth of Temple University who serve as expert witnesses in civil and criminal actions taken against police officials have helped to establish standards for the interpretation of the data being gathered in response to anti-profiling statutes. See generally Blank, Dabady & Citro, *Measuring Racial Discrimination*, *supra* note 5 at pp. 189–196. See also Brian L. Withrow, "Driving While Different: A Potential Theoretical Explanation for Race-Based Policing" (2004) 15:3 *Criminal Justice Policy Review* 344 at pp. 345–349.

98. McQuail, *Media Performance*, *supra* note 96 at p. 131 (reviewing literature on media reliance on government sources).

99. Tom Avril & Douglas A. Campbell, "N.J. Troopers Indicted in Racial-Profiling Probe" *The Philadelphia Inquirer* (20 April 1999) 1.

100. Bruce Landis, "Profiling Study Confirms Drivers Treated Differently" *Providence Journal* (1 July 2003) A01.

101. Bruce Landis, "Whitehouse's Plan to Ease Police-minority Tensions" *Providence Journal* (28 January 2000) A01.

of such comments (n=65) suggested that the statute was not well crafted, was overly broad or inclusive, would be insufficient to meet stated goals, or would have unintended consequences. Items in the California and Nebraska newspapers were more likely than those in other states to criticize the ways the statutes were framed. Papers in Louisiana, West Virginia, and Connecticut were least likely to offer such a critique.

A considerably smaller number (n=35) of comments suggested that the statute would probably chill law enforcement. The assumption being made was that in order to avoid being investigated and charged with racial profiling, police officers would reduce the number of traffic stops and other routine investigations that might involve a substantial number of minority group members.<sup>102</sup> Such statements were most likely to be published in the Missouri papers (46 percent), and least likely to appear in the newspapers in Rhode Island (7 percent) and Tennessee, where there were none.

Only twenty-five statements suggested that a statute was not needed because racial profiling either did not exist, or was not a problem. Although such statements were relative rare—less than 30 percent of all the statements made in any of the papers in our analysis—their relative prominence was noteworthy in Rhode Island (24 percent), Oklahoma and Louisiana (29 percent of the statements in each paper).

#### 4.5. *Supporting the Statute*

We coded a similar number of reasons that had been given for supporting the statute. The most often cited rationale (n=70) was that the statute would provide the kinds of evidence that would allow communities to determine if racial profiling actually exists. The next most popular argument for supporting the statute was a claim that it was needed because profiling actually did exist (n=41).

Not surprisingly, in Nebraska, where the largest share of the published rationales in support of the statute (66 percent) were assertions seeking to establish the existence of racial profiling as a fact, there was limited interest (11 percent) in justifying a statute on the basis of its potential for validating what everybody apparently already knew.

The same pattern, but in reverse, was seen in Rhode Island, where nearly half of the reasons given for supporting the legislation (46 percent) were in order to find out whether the problem of racial profiling actually existed, and only 17 percent of the statements used the fact of its existence as a rationale.

In order to determine if these arguments were being used by the reporters in an effort to stage a “mock debate” between opponents, we identified the number of cases in which the rationale of discovery occurred within five paragraphs of a statement claiming that racial profiling exists. This

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102. While this was a widely echoed concern, available data on police productivity estimated on the basis of the number of tickets or citations issued revealed no patterns that would suggest changes in productivity in response to increased surveillance. See Marielle Schultz & Brian L. Withrow, “Racial Profiling and Organizational Change” (2004) 15:4 *Criminal Justice Policy Review* 462 at p. 477.

pattern of association occurred twenty-nine times in twelve different stories. Given that the existence of racial profiling was offered as a justification for supporting the statute only forty-one times in thirty-three stories, this pattern suggests that this framing strategy was becoming popular among precision journalists<sup>103</sup> as it had been used in seven of eighteen papers.

Media scholars have examined the role that different media frames have on public perceptions of the nature of social problems.<sup>104</sup> These differences in frames are also believed to influence the assignment of responsibility for the hardships that may be described.<sup>105</sup> In some cases, especially those related to poverty that might be explained by racial discrimination, the use of an episodic frame, rather than a thematic frame,<sup>106</sup> tends to be associated with a victim-blaming response on the part of the media audience. Thematic frames tend to rely upon statistics and generalizations. We noted, however, that twenty-seven stories included eighty-five paragraphs which focused on the specific cases of African Americans who had been victimized by what they felt was racial profiling. While we have no basis for claiming that this framing pattern actually influenced public attributions of responsibility, the literature does suggest that such a response is likely.<sup>107</sup> The greatest proportion of these were found in Oklahoma (30.5 percent), followed by Kentucky (20 percent). This domination of the use of episodic frames is especially noteworthy in that these two newspapers together accounted for less than 10 percent of the articles we examined.

We observed another pattern which raised some questions about the role that statistical evidence might ultimately play in states' decisions to limit the use of racial profiling. Note that more than half of the statutes included provisions for, or were justified on, the basis of their contribution to the gathering of data regarding the nature and extent of racial profiling within the state. We were interested in the extent to which articles in the press that discussed these statutes made use of statistics in arguing for or against the existence of racial profiling. We were also interested in the ways in which the conclusions, either drawn from statistics or from comments and assertions of police officers or victims, would be used to support or challenge claims about the existence of racial profiling.

We observed that statistical claims were fairly evenly balanced with rhetorical arguments when both pointed toward the existence of racial

103. This is the name applied to journalists who make routine use of statistics in the presentation of investigative reports about public issues. See generally Philip Meyer, *The New Precision Journalism* (1991; 2001), <<http://www.unc.edu/~pmeyer/book/>>. The attempt to present coverage as balanced, by framing mock debates between opponents, is often observed more in theory than in practice. See Douglas McLeod & James K. Hertog, "Social Control, Social Change and the Mass Media's Role in the Regulation of Protest Groups" in David Demers & K. Viswanath, eds., *Mass Media, Social Control, and Social Change* (Ames: Iowa State University Press, 1999) 305 at p. 313–314.

104. See generally Dolf Zilmann & Hans-Bernd Brosius, *Exemplification in Communication* (Mahwah, NJ: L. Erlbaum Associates, 2000) at pp. 57–112 (exploring the impact of framing).

105. See generally Iyengar, *Is Anyone Responsible*, *supra* note 53 at pp. 11–16 (examines the impact of episodic and thematic frames on public assignment of blame and responsibility).

106. An episodic news frame "focuses on specific events or particular cases, while the thematic news frame places political issues and events in some general context." *Ibid.* at p. 2.

107. See generally Gandy & Li, "Framing Comparative Risk," *supra* note 85.

profiling.<sup>108</sup> However, when the purpose of the claim was to deny the existence of racial profiling, statistical references were outnumbered by the rhetorical at a ratio of nearly four to one (3.75).<sup>109</sup>

We interpret these patterns to suggest that the available data regarding disparities in risk are incredibly clear, but they are easily ignored by those who wish to deny the facts, or to minimize the scope of the injustice that the numbers represent.

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## 5. MAKING IT AGAINST THE LAW

FIRST, WE HAVE TO NOTE THAT ONLY nineteen of fifty states have managed to respond in any substantive way to the problem of racial profiling as a suspect technology of policing during the period under analysis. On its face, this is a basis for concluding that the general public and their representatives underestimate the seriousness of the problems being caused by the use of racial profiling by the police.

By the time of our study, seventeen statutes had formally declared racial profiling to be against the law, but we have noted that these states differ markedly in their identification of the specific practices that would be barred. Four states established relatively conservative definitions of racial profiling that exclude from consideration those forms of race-based policing that incorporate information in addition to race or ethnicity in their profiles. These definitions were so narrowly drawn as to effectively define much of what we understand as racial profiling out of existence. Only eight states established policies that would bar or limit the use of race as one among a number of factors that together might justify an encounter with police.

Uncertainty about the existence of racial profiling as a technique that was being used routinely by police was widespread. Thirteen of the statutes required the collection and analysis of statistical data, in part in order to guide an administrative response, but also in large part in order to determine the extent to which racial profiling was in fact a technology in use within a given state.

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108. Out of the 144 newspaper articles analysed, 27 documents included exemplars that provided anecdotal evidence supporting the claim that law enforcement agents engage in racial profiling. We identified 34 newspaper articles that included references to studies (including references to statistics derived from these studies as well as summaries of these studies that did not include any reference to the statistical analyses) that supported the argument that racial profiling existed. Only ten of these articles included both exemplars of racial profiling and references to the results of studies. In seven of these ten documents, the exemplar was provided before the reference to a study that supported the argument that racial profiling existed.

109. Of course, it is difficult to use statistics to demonstrate conclusively that some illegal activity does not exist, especially in the case of racial profiling where it is the would-be perpetrators who actually gather the data. Indeed, concerns about strategic misrepresentation of racial data were reflected in the guidelines on data gathering developed for the Department of Justice. One suggestion for ensuring data integrity was the use of cross-checks between the race of the licensee as indicated in Department of Motor Vehicle files against the race indicated in the police report of a motor vehicle stop. See Ramirez, McDivitt & Farrell, "Resource Guide," *supra* note 7 at p. 51.

We observed considerable variation in the ways in which the newspapers in different states framed the debate about racial profiling. We noted systematic differences in the ways that different newspapers attended to and presented competing perspectives on the problem and on related statutes being debated within the legislature. First, we note great variation in the amount of attention paid to the issue across the states. None of the articles ( $n=4$ ) retrieved from the Mississippi newspaper made any reference to a racial profiling statute. This inattention may be explained by the fact that the qualifying Mississippi statute referred only to the training of police officers who would work in the county jail. On the other hand, Rhode Island's main newspaper, *The Providence Journal*, published thirty-seven lengthy articles, accounting for more than one-third of all the paragraphs we examined in our study. The Journal's approach to the problem of racial profiling might generously be called cautious, in that it appeared to use quotation marks systematically in order to oppose a foregone conclusion that racial profiling was a serious problem in the state. We were thus not surprised that both of the statutes passed in Rhode Island included provisions for the collection of data related to the existence and extent of the problem of racial profiling. Despite this reserved posture, however, we note that the Journal did provide ample opportunity for representatives of civil rights organizations to be heard on the issue.<sup>110</sup>

Although we cannot make a causal claim, we do note that Oklahoma, one of the four states passing the most conservative statutes, also provided more opportunity than most for opponents of legislation to say that racial profiling did not exist, or was not a problem. Despite this fact, those offering comments in the Oklahoma paper were more likely than those in any other paper to suggest that racial profiling was a moral or ethical wrong.

Not surprisingly, we observed that representatives of civil rights organizations were likely to speak in favour of the statutes and that police or law enforcement officials were more likely to deny the existence of a problem, or that—if there was a problem—they felt it was already being addressed.

Finally, we note that the problems involved in demonstrating the existence of racial profiling are reflected primarily in the strategic use of statistics and "recent studies"<sup>111</sup> to lend support to, or to oppose, some aspect of proposed legislation. Statistics demonstrating the existence of substantial disparity in the stops, arrests, and sentences of Whites and African Americans are readily available and are frequently used in news stories about racial profiling. Those seeking to deny the existence of problems related to racial profiling tended to either question the validity of the measures, the

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110. We must note, however, that we have no way of knowing that the published quotes reflected what the activists would have preferred to see in print out of all the things they may have said to a given reporter.

111. Policy actors seeking to influence the policy debate frequently attempt to introduce self-serving information into the discussion. These "information subsidies" are most effective in shaping the views of the target audience when the source of the information is believed to be disinterested. This is why scholarly reports from academics and independent research centers are thought to be quite effective as information subsidies. See Gandy, *Agenda Setting*, *supra* note 94 at pp. 80–83. See also Pan & Kosicki, *Strategic Action*, *supra* note 49 at pp. 44–47.

appropriateness of the measures used in the analysis, or the conclusions drawn from existing studies. It was extremely rare for statistical data to be used as evidence of equal treatment.

We are not able to make a claim that the newspapers in these states actually shaped the debate and thereby influenced the character of the statutes that were ultimately passed. Such claims are rarely made because of the difficulty of establishing causal order, and more critically, excluding other equally compelling explanations for state action.<sup>112</sup> Far more information would have been required than we were able to collect. In addition, because our analysis did not include states that might have initiated discussion, but failed to pass legislation to control racial profiling, we have no way of knowing whether the relationships between proposed statutes and media representations were similar to those which we have observed in these eighteen states. Our analysis would also have been enriched by additional information about the racial composition of neighbourhoods and communities within these states, as well as some sense of the history of race relations civil rights debates in these states in recent years.

Our analysis has focused on the impact of racial profiling on African Americans. We have noted that following the assault on the World Trade Center ethnic profiling by transportation authorities has also increased. Clearly, African Americans are not the only victims of racial profiling. Recent studies of race-based policing indicate that the racial character of arrests vary as a function of the racial composition of the neighbourhood in which the arrests are made. The rates of arrest for Whites are highest in areas of Black concentration, while the rates of arrest for Blacks are highest in areas in which Whites are the majority.<sup>113</sup> This suggests that the use of race as an index of criminality is not restricted to people of color, as we might assume from the characterization of racial profiling as generating a crime known as "Driving While Black." However, we still wish to suggest that the cumulative disadvantage that accrues to African Americans from racial profiling suggests that this particular use of race as an index of identity ought to be seen as especially troubling.

Frederick Schauer's<sup>114</sup> examination of the use of group membership as a source of information that might improve the efficiency of administrative decisions, including those made by agencies of law enforcement, is quite detailed, well argued, and at times quite convincing. Yet Schauer leaves open the possibility that we might collectively decide that race and gender should never be used as a basis for making choices that limit the freedoms or options that women or people of color enjoy.<sup>115</sup>

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112. See generally Oscar H. Gandy, Jr, "Epilogue—Framing at the Horizon: A Retrospective Assessment" in Stephen Reese, Oscar H. Gandy, Jr & August E. Grant, eds., *Framing Public Life: Perspectives on Media and Our Understanding of the Social World* (Mahwah, NJ: Lawrence Erlbaum Associates, 2001) (reviewing the literature on media framing and its consequences).

113. Karen F. Parker et al., "A Contextual Study of Racial Profiling: Assessing the Theoretical Rationale for the Study of Racial Profiling at the Local Level" (2004) 47:7 *American Behavioral Scientist* 943 at p. 956.

114. Schauer, *Profiles, Probabilities, supra* note 6.

115. *Ibid.* at pp. 187, 299.

As he suggests, we might decide to be race or gender blind in this regard; not because the use of group membership has no value, or predictive utility, but because the accumulated harms that are likely to flow from such uses over time will almost certainly outweigh the gains.

The overuse of race as a basis for discrimination leads to a form of cumulative disadvantage that seems to guarantee additional discrimination in the future.<sup>116</sup> This disadvantage adds momentum to the deviation amplifying loops that Glenn Loury<sup>117</sup> associates with racial stigma. People who share this "spoiled collective identity"<sup>118</sup> eventually come to be denied the "presumption of equal humanity"<sup>119</sup> that we require in order to be concerned about their well being, and about the legitimacy of their claims for social justice.

Our study of the ways in which eighteen states struggled over the establishment and enforcement of limits on the use of race in the management of crime suggests that many people still believe that racial identification can be used as part of a predictive technology by police because it helps to control crime and enhance security. Many fail to understand that having a theoretical basis for establishing a causal link between race and behaviour is necessary before observed correlations between race and a class of behaviours should be used as the basis for differential treatment of individuals.<sup>120</sup> Far too many people still believe that a person's race can be the cause of their behaviour.<sup>121</sup> We believe the news media have been complicit in sustaining these irrational views.

Finally, we believe it is important for legal scholars to understand the ways in which the news media both reflect and influence the development of legislative responses to problems associated with the use of a broad range of technologies. We believe that comparative analysis across a large number of jurisdictions represents an approach with considerable potential to estimate the influence of historical and contextual factors on those decisions.

We hope this article serves to stimulate further work along these lines.

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116. Blank, Dabady & Citro, *Measuring Racial Discrimination*, *supra* note 5 at p. 225.

117. Loury, *Anatomy*, *supra* note 40 at pp. 26–29.

118. *Ibid.* at p. 67.

119. *Ibid.* at p. 88.

120. See generally Paul W. Holland, "The False Linking of Race and Causality: Lessons from Standardized Testing" (2001) 4:2 *Race and Society* 219.

121. Tukufu Zuberi, *Thicker Than Blood: How Racial Statistics Lie* (University of Minnesota Press, 2001) at p. 129.

Table 1: List of Newspapers, Text Units and Articles

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<b>State</b>	<b>Newspaper</b>	<b>City</b>	<b>Units/Articles</b>
Arkansas	Arkansas Democrat-Gazette	Little Rock	129/4
California	Los Angeles Times	Los Angeles	169/6
Colorado	Denver Post	Denver	76/3
Connecticut	Hartford Courant	Hartford	209/10
Kentucky	Louisville Courier Journal	Louisville	83/4
Louisiana	Times-Picayune, The	New Orleans	41/2
Minnesota	Minneapolis Star Tribune	Minneapolis	209/11
Mississippi	The Clarion Ledger	Jackson	
Missouri	St. Louis Post-Dispatch	St. Louis	185/11
Montana	Great Falls Tribune	Great Falls	39/1
Nebraska	Omaha World Herald	Omaha	83/5
Nevada	Las Vegas Review Journal	Las Vegas	56/3
New Jersey	Record	Hackensack	97/7
Oklahoma	The Daily Oklahoman	Oklahoma City	157/9
Rhode Island	Providence Journal	Providence	1083/37
Tennessee	Commercial Appeal	Memphis	118/6
Texas	Houston Chronicle	Houston	215/7
W. Virginia	Charleston Gazette	Charleston	269/13
Washington	Seattle Times	Seattle	77/4

Table 2: Percent of Paragraphs Expressing Views on Statutes

	AR	CA	CT	CO	KY	LA	MO	MT	NV	NJ	NE	MN	OK	RI	TN	TX	WA	WV	
<b>Arguments Against Statute</b>																			
Not Well Crafted	0	87	13	50	n/a	0	15	n/a	20	25	83	45	24	21	67	0	50	11	
Too Expensive	0	0	39	0	n/a	43	38	n/a	60	38	0	15	5	31	33	75	50	32	
There's No Profiling	0	0	9	0	n/a	29	0	n/a	0	0	17	5	29	24	0	0	0	5	
Chill Law Enforcement	100	0	26	0	n/a	0	46	n/a	20	31	0	18	14	7	0	25	0	16	
<b>Arguments Support Statute</b>																			
Curtail Profiling	0	20	17	33	0	0	24	0	50	33	0	8	11	4	14	20	0	22	
Build Trust in Government	0	0	14	0	20	0	16	0	0	0	11	8	11	2	5	10	18	22	
It is a Beginning	0	80	21	33	20	17	12	0	0	67	28	31	0	8	5	10	36	11	
Determine If Exists	50	0	35	0	0	50	24	0	0	0	22	31	11	46	38	20	36	33	
Profiling Is Real	0	0	14	33	60	0	24	0	25	0	17	0	67	17	24	20	9	0	

Notes:

1. The annotation n/a represents states within which the analysed newspaper did not cite or quote any arguments against the statutes.
2. The table does not provide an exhaustive list of arguments that were presented against the statutes.

## APPENDIX A: LIST OF STATUTES

State	Statute Identifying Information
Arkansas	Task Force on Racial Profiling, (2003) <i>Arkansas Code Annotated</i> ss. 12-12-1401 to 12-12-1404, < <a href="http://www.arkleg.state.ar.us/NXT/gateway.dll?f=templates&amp;fn=default.htm&amp;vid=blr:code">http://www.arkleg.state.ar.us/NXT/gateway.dll?f=templates&amp;fn=default.htm&amp;vid=blr:code</a> >*
California	2004 <i>Statutes of California</i> ch. 700, < <a href="http://www.leginfo.ca.gov/statute.html">http://www.leginfo.ca.gov/statute.html</a> >
Colorado	Annual Report, (2003) <i>Colorado Revised Statutes</i> s. 42-4-115, < <a href="http://198.187.128.12/colorado/lpext.dll/Infobase4/63d1b/64e90/64e92?f=templates&amp;fn=document-frame.htm&amp;2.0">http://198.187.128.12/colorado/lpext.dll/Infobase4/63d1b/64e90/64e92?f=templates&amp;fn=document-frame.htm&amp;2.0</a> > <sup>†</sup> and Profiling Training, (2003) <i>Colorado Revised Statutes</i> s. 24-31-309, < <a href="http://198.187.128.12/colorado/lpext.dll/Infobase4/375be?f=templates&amp;fn=document-frame.htm&amp;2.0">http://198.187.128.12/colorado/lpext.dll/Infobase4/375be?f=templates&amp;fn=document-frame.htm&amp;2.0</a> >
Connecticut	<i>An Act Concerning the Alvin W. Penn Racial Profiling Prohibition Act</i> , 2003 <i>Connecticut Public Acts</i> 03-160, < <a href="http://www.cga.ct.gov/2003/act/Pa/2003PA-00160-R00HB-05674-PA.htm">http://www.cga.ct.gov/2003/act/Pa/2003PA-00160-R00HB-05674-PA.htm</a> >
Kentucky	Prohibition Against Racial Profiling, (2004) <i>Kentucky Revised Statutes</i> s. 15A(1), < <a href="http://www.lrc.ky.gov/KRS/015A00/195.pdf">http://www.lrc.ky.gov/KRS/015A00/195.pdf</a> >
Louisiana	Reporting of Statistical Information Relating to Traffic Stops, (2001) <i>Louisiana Revised Statutes</i> s. 32:398.10, < <a href="http://www.legis.state.la.us/lss/lss.asp?doc=88363">http://www.legis.state.la.us/lss/lss.asp?doc=88363</a> >
Minnesota	Criminal Procedure Peace Officer Training, (2003) <i>Minnesota Statutes</i> s. 626.8471, < <a href="http://www.revisor.leg.state.mn.us/stats/626/8471.html">http://www.revisor.leg.state.mn.us/stats/626/8471.html</a> >
Minnesota	Criminal Procedure Racial Profiling, (2003) <i>Minnesota Statutes</i> s. 626.8471, subd. 2(2), < <a href="http://www.revisor.leg.state.mn.us/stats/626/951.html">http://www.revisor.leg.state.mn.us/stats/626/951.html</a> >
Mississippi	Country Jail Officers Training Program, (2004) <i>Mississippi Code Annotated</i> s. 45-4-9, < <a href="http://michie.lexisnexis.com/mississippi/lpext.dll/mscode/ddb0/dec8?f=templates&amp;fn=document-frame.htm&amp;2.0#JD_t45ch4">http://michie.lexisnexis.com/mississippi/lpext.dll/mscode/ddb0/dec8?f=templates&amp;fn=document-frame.htm&amp;2.0#JD_t45ch4</a> >
Missouri	Peace Officers, Selection, Training & Discipline, (2001) <i>Missouri Revised Statutes</i> s. 590.650, < <a href="http://www.moga.state.mo.us/statutes/c500-599/5900000650.htm">http://www.moga.state.mo.us/statutes/c500-599/5900000650.htm</a> >
Missouri	Peace Officers, Selection, Training & Discipline, (2001) <i>Missouri Revised Statutes</i> s. 590.650, < <a href="http://www.moga.state.mo.us/statutes/c500-599/5900000650.htm">http://www.moga.state.mo.us/statutes/c500-599/5900000650.htm</a> >, s. 590.653, < <a href="http://www.moga.state.mo.us/statutes/c500-599/5900000653.htm">http://www.moga.state.mo.us/statutes/c500-599/5900000653.htm</a> >*

## Notes:

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† This section was repealed, effective January 2004.

Montana	Criminal Investigation, (2003) <i>Montana Code Annotated</i> s. 44-2-117, < <a href="http://data.opi.state.mt.us/bills/mca/44/2/44-2-117.htm">http://data.opi.state.mt.us/bills/mca/44/2/44-2-117.htm</a> >
Nebraska	Racial Profiling, (2002) <i>Nebraska Revised Statutes</i> ss. 20-501 to 20-505, < <a href="http://uniweb.legislature.ne.gov/LegalDocs/view.php?page=s20index">http://uniweb.legislature.ne.gov/LegalDocs/view.php?page=s20index</a> >*
Nevada	Peace Officers Miscellaneous Provisions, (2001) <i>Nevada Revised Statutes</i> s. 289.820, < <a href="http://www.leg.state.nv.us/NRS/NRS-289.html">http://www.leg.state.nv.us/NRS/NRS-289.html</a> >
New Jersey	Criminalizes Deprivation of Civil Rights, including Racial Profiling, 2003 <i>New Jersey Public Laws</i> ch. 31, < <a href="http://www.njleg.state.nj.us/2002/Bills/PL03/31_.HTM">http://www.njleg.state.nj.us/2002/Bills/PL03/31_.HTM</a> >
Oklahoma	Prevention of Public Offenses: General Provisions, (2001) 22 <i>Oklahoma Statutes</i> ss. 34.3 to 34.5, < <a href="http://www.lsb.state.ok.us/osStatuesTitle.html">http://www.lsb.state.ok.us/osStatuesTitle.html</a> >
Rhode Island	<i>Traffic Stops Statistics Act</i> , (2004) <i>Rhode Island General Laws</i> ss. 31-21.1-2, 31-21.1-4, 31-21.1-5, < <a href="http://www.rilin.state.ri.us/Statutes/TITLE31/31-21.1/INDEX.HTM">http://www.rilin.state.ri.us/Statutes/TITLE31/31-21.1/INDEX.HTM</a> >*
Rhode Island	<i>Racial Profiling Prevention Act of 2004</i> , 2004 <i>Rhode Island Public Laws</i> ch. 356, < <a href="http://www.rilin.state.ri.us/PublicLaws/law04/law04356.htm">http://www.rilin.state.ri.us/PublicLaws/law04/law04356.htm</a> >
Tennessee	<i>Pawnbrokers Act of 1988</i> , (2001) <i>Tennessee Code Annotated</i> s. 45-6-223, < <a href="http://michie.lexisnexis.com/tennessee/lpext.dll/tncode/13229/13c45/13c4a?f=templates&amp;fn=document-frame.htm&amp;2.0#JD_t45ch6p2">http://michie.lexisnexis.com/tennessee/lpext.dll/tncode/13229/13c45/13c4a?f=templates&amp;fn=document-frame.htm&amp;2.0#JD_t45ch6p2</a> >
Texas	<i>Act Relating to the Prevention of Racial Profiling by Certain Peace Officers</i> , 2001 <i>Texas General Laws</i> ch. 947, (2006) <i>Code of Criminal Procedure</i> s. 2.131, < <a href="http://tlo2.tlc.state.tx.us/statutes/docs/CR/content/htm/cr.001.00.000002.00.htm#2.131.00">http://tlo2.tlc.state.tx.us/statutes/docs/CR/content/htm/cr.001.00.000002.00.htm#2.131.00</a> >
Washington	Washington State Patrol, (2002) <i>Washington Revised Code</i> ss. 43.101.410, 43.101.490, < <a href="http://apps.leg.wa.gov/rcw/default.aspx?Cite=43">http://apps.leg.wa.gov/rcw/default.aspx?Cite=43</a> >
Washington	Criminal Justice Training Commission, (2002) <i>Washington Revised Code</i> ss. 43.101.410, 43.101.415, < <a href="http://apps.leg.wa.gov/rcw/default.aspx?Cite=43">http://apps.leg.wa.gov/rcw/default.aspx?Cite=43</a> >*
West Virginia	<i>Racial Profiling Data Collection Act</i> , 2004 <i>Acts of the Legislature of West Virginia</i> ch. 206, < <a href="http://www.legis.state.wv.us/Bill_Text_HTML/2004_SESSIONS/RS/BILLS/SB271%20SUB1%20eng.htm">http://www.legis.state.wv.us/Bill_Text_HTML/2004_SESSIONS/RS/BILLS/SB271%20SUB1%20eng.htm</a> >
West Virginia	Prohibition of Racial Profiling, (2002) <i>West Virginia Code</i> s. 30-29-10, < <a href="http://www.legis.state.wv.us/WVCODE/30/WVC%2030%20-%2029%20-%20-%202010.htm#HDO">http://www.legis.state.wv.us/WVCODE/30/WVC%2030%20-%2029%20-%20-%202010.htm#HDO</a> >

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