Racial Profiling: They said it was against the law!

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Abstract

This article examines the media frames and legislative responses of 18 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. This view is apparently not widely shared. 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. A legislative emphasis on the collection of data to determine if racial profiling exists indicates that state legislatures are also uncertain.

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. Representatives of law enforcement agencies tend to deny the existence of a problem, or a need for additional safeguards. Social scientists, on the other hand, are relied upon to present statistical evidence that nearly always affirms the existence of racial profiling as a serious problem.

The article concludes that the public has yet to be convinced that race should not be used as an index of criminality. The public seems also not to understand that racial
profiling can be associated with the routine abuse of power, nor does it understand that the use of race as an indicator of risk ironically tends to amplify risks to the operation of the criminal justice system.
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. 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 the strangers she encounters along her developmental path. Although we recognize the truth in the claim that “to classify is human,” 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 that it is 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. This is a form of identification that goes by the name of racial profiling, and it is an activity that we, among others believe should be against the law, or at the very least subject to strict scrutiny, and thereby limited in its use.

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 following initiatives taken at the federal level to gather statistics on what President Clinton called a “morally indefensible, deeply corrosive practice.”

In Part I, 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 a issue of public concern, including a focus on the policy debate at the federal level as reflected in the editorial pages of the nation’s major newspapers. We note that while the debate at the federal level continued to unfold, a number of 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 II we characterize the statutes governing racial profiling that had been passed in 19 states between 1999 and 2004. In Part III 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 18 states.8 In Part IV we summarize and discuss the problems and tensions underlying the political response to racial profiling as a deeply flawed social technology.

Part I

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
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 constitutional challenge. 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.

Racial profiling differs from other forms of criminal profiling, however, because 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.

It has become clear that the use of race as an input into decisions about whether to stop, or 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. Following the use of aircraft as an instrument of terrorist violence, police and air transport officials have increasingly made use of racial and ethnic classification as an indicator of heightened risk.

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. On its face, the presence of a statistical association of race with particular crimes might be used in the same way that 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. 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 that being made in different jurisdictions.

**Racial Profiling as a Social Technology**

Technology assessment involves the determination of the efficiency and effectiveness of a given technology. This determination is complex. It may involve a direct comparison with existing technologies, 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. It is also important to consider their distribution. Concerns about distribution are associated with the consideration of fairness, in that we tend to favor equal, rather than disparate allocations of costs or benefits.

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
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disadvantage.\textsuperscript{23} 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.\textsuperscript{24}

Increasingly, technology assessments are expected to include unintended consequences,\textsuperscript{25} including those that economists refer to as externalities because of fact that they are consequences that affect the well-being of persons not part of a market transaction.\textsuperscript{26} Negative externalities or harms that spill over beyond the participants in a transaction are especially problematic,\textsuperscript{27} and invite regulatory intervention because the market does not provide ways to compensate victims, or to modify the actions of those responsible.\textsuperscript{28}

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.\textsuperscript{29} Police tend to respond more to African Americans as potential threats in primarily White neighborhoods than they do in more racially mixed communities.\textsuperscript{30}

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 users’ 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.\textsuperscript{31}

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.\textsuperscript{32}

**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.\textsuperscript{33} 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 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”\textsuperscript{34} was considered by many to be more than just another installment in the long term project of institutionalized racism\textsuperscript{35} that scholars and activists are still trying to identify, describe and to bring under legislative
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and administrative control. Armstrong believed that DWB was an outbreak of a particularly virulent form of a racist response that Jody Armour called “Negrophobia.”

Armour’s efforts to examine what he called “reasonable racism” and an increasingly influential group of actors that he identified as “Intelligent Bayesians” have brought us quite a long way toward understanding the links between racial statistics and the racial stereotypes they express and reinforce. Yet, there is still much work to be done to understand the ways in which racial statistics and self-confirming hypotheses contribute to the cumulative disadvantage that bias within the criminal justice system helps to produce.

Indeed, even though some of us were beginning to discuss privacy concerns in terms of the risk of discrimination in markets, the links between identification, classification and invidious distinction tended not to be associated with the abuse of power by men and women with guns. 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).

Racial profiling soon emerged as 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, and later enhanced by a number of compelling statistical analyses that worked to place DWB firmly on the public agenda. We believe that the news media’s framing of the debate surrounding the use of race as a marker of criminal identity helped to shape, 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 between a “sensible, statistically based tool” that could help police
control crime, and a symbolic reminder of the abuse of authority by police that keeps a “pool of accumulated rage filled to the brim” among African Americans.\textsuperscript{50}

An analysis of editorial page coverage of issue provided an identification of the primary frames and perspectives used to characterize DWB and racial profiling in the nation’s press.\textsuperscript{51} This analysis sought to identify the frames that were used most frequently in editorials and letters to the editor that were published between January 1, 1994 and March 19, 1999.

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, sixty-six percent of all the items reviewed tended to frame the issue as an institutional problem, with thirty one percent characterizing it as a problem for society as a whole. Only seven percent of the items blamed individuals.\textsuperscript{52}

An analysis of headlines and lead paragraphs indicated that the majority (42\%) of these items framed the problem in terms of “Black loss” or hardship, with thirty-five percent including statistics about the number of drivers stopped, searched or arrested as part of the thematic frame.\textsuperscript{53} Only seven percent wrote about police, and not surprisingly, sixty 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\%) of the items argued that profiling was wrong. Only seventeen 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.
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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%), while those from the South were primarily (53.3%) 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 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 readers, the common conclusion seemed to be that racial profiling was a dangerous technology that had to be brought under control.

Unfortunately, in the aftermath of the events of the attack on the World Trade Center on September 11, 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, but because suspicions were focused on males from the Middle East, expressions of concern about racial and ethnic profiling once again emerged in the press.
Public opinion, which had been strongly opposed to racial profiling, became divided, as it often does when the levels of threat and concern rise. 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. In June, 2003, The U.S. Department of Justice issued a guidance meant to ban the use of racial profiling by federal law enforcement officials in response to President Bush’s determination that the use of racial profiling was wrong. The directive explicitly rejected the use of statistical indicators of differences in crime rates among racial groups as a basis for differential policing. Despite the greater emphasis at the national level on the treat 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.

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.

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. 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, 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.
Part II

The Legislative Response

We used Lexis-Nexis 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 24 statutes or sections of statutes that we could assign unequivocally to a concern about or a response to racial profiling (See Appendix A). 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.

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.” 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 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.”\textsuperscript{67} The statutes in Montana and Oklahoma were quite similar.\textsuperscript{68}

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.”\textsuperscript{69}

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.\textsuperscript{70}

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 of law enforcement activity following the initial routine investigatory activity.”\textsuperscript{71}

California’s statute included a theory of consequence in its definition of racial profiling. For California, detention “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.”\textsuperscript{72} This statute is closely related to the statute in
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Minnesota which defines racial profiling to include “use of racial or ethnic stereotypes as factors in selecting whom to stop and search.” We assume that the legislators include the sorts of stereotypes that racial statistics about arrests and imprisonment for drug related offenses bring to mind.

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.

**Data gathering and classification**

The extent to which racial profiling was or not being used by police officers appeared to be an important, but apparently an unanswered question in many of these jurisdictions. Thirteen of 24 statutes were written explicitly to require or to support the collection and analysis of data regarding the the ways in which police used race in the pursuit of their various missions.

Seventeen of the 24 statutes made racial profiling illegal. 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 24 statutes also established procedures for filing complaints regarding racial profiling. 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 commisions to
study the problem further. More than half \((n = 13)\) of the statutes included such programmatic responses.\(^79\)

### Part III

**Framing the legislative debate**

The literature on media framing we explored in Part I emphasizes the importance of media coverage of issues of public concern to the ways in which these issues are ultimately resolved within legislative bodies. The news media are recognized as critically important political institutions.\(^80\) Analysis of media coverage of legislative debates surrounding the nature of specific responses to the issue of racial profiling can provide a basis for understanding how different jurisdictions ultimately decide to act.\(^81\) What follows is our analysis of this kind of media coverage.

We relied primarily on Lexis Nexis to identify the stories and editorials dealing with policies toward racial profiling in the major newspaper in the 19 states with qualifying statutes (See Table One).\(^82\) This analysis focused primarily on those articles that offered comment on these legislative initiatives.\(^83\) Articles that discussed racial profiling but did not make reference to a statute or regulation were excluded from this initial analysis.\(^84\)

The analytical approach was similar to that used in the 1999 study,\(^85\) 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 51 qualified documents, followed closely by 2001, with 39.
The primary unit of analysis of newspaper articles and editorials was the paragraph. 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. An initial strategy for investigating unfamiliar documents that are assumed to reflect attention to common themes is to search for particular text “strings”—a word, or phrase that our review of the literature and our working hypotheses leads us to expect to find because they would be characteristic of particular speakers, 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 is 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. Adopting this perspective, we searched these articles for the appearance of racial profiling in quotes. Surprisingly, this form of distancing did not occur that often, only 29 times in 23 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 their resistance to granting racial profiling the status of an established fact, or a routine practice.

We were in fact quite surprised to discover that Rhode Island was the source of 72% 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
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particular issue, it appeared that this use of quotes in this way 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% of the uses of the term. However, its share of the uses in quotes far exceeds that proportion. In probability terms, the Rhode Island paper was far more likely than any other paper in our sample to use racial profiling in quotes; thus, their use of these quotation marks appeared to be strategic (distancing) use of quotation marks with regard to this controversial technology of policing.

*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.91

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 that “John Ascroft 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.” 92 Approximately 22% of the articles include such an assertion, conclusion, or claim. A far smaller proportion,
around 10% merely suggested that it was “against the law,” or that it was unconstitutional. Only 10 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.

Responses to statutes that were meant to respond to racial profiling as a problem were more numerous and more varied. The most frequent reason (appearing in 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 because, as some suggested, 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).

**Voice**

The analysis of policy frames traditionally seek to identify the sorts of persons who get to speak about problems of public concern. 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; ultimately, however, the decision about who gets quoted in the press is made by the journalist and her editor.

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 40 documents, while they were actually quoted in 58.

While law enforcement officials had views attributed to them in 33 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 22 articles, while they were actually quoted in 42.

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

There were two categories of arguments that were offered in support of statutes that were 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%), followed by legislators (31.7%) and law enforcement representatives (20.6%).

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 in the first category where civil rights advocates were cited/quoted most frequently, the majority of the comments of this nature were attributed to legislators (69%).

Finally, there were thirty-three comments that suggested that while the statute is 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% and 36.4% 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%). Law enforcement officials were followed by legislators (17%) and unidentified critics (17%) 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. Fully 75% 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%).

As for the claim that the statute would chill law enforcement capabilities, somewhat surprisingly, law enforcement officials (36.1%) were second to legislators (44.4%) 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%). Legislators were followed by civil rights advocates (23.3%) 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 to the problem of racial profiling, approximately 33% 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.
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, the 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% of the articles from Texas), and an equal number of references in this paper 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 that in Texas in questioning the quality of studies’ data in 20% of its items.

When we compared the states’s 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% of a very limited number of comments on its bill.
West Virginia’s newspaper relied very heavily on social scientists (52%) to provide the public with insights into the nature of racial profiling as a social problem.\textsuperscript{97} 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.\textsuperscript{98}

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

\textit{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 rationale. Indeed, references to illegality dominated (80%) 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 behavior 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.”\textsuperscript{100} 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.”

**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 of such comments (n = 65) suggested that the statute was not well crafted; it was overly broad or inclusive, that it would be insufficient to meet stated goals, or that it will 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. Such statements were most likely to be published in the Missouri papers (46%), and least likely to appear in the newspapers in Rhode Island (7%) or 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% of all the statements made in any of the papers in our analysis, their relative prominence was noteworthy in Rhode Island (24%), Oklahoma and Louisiana (29% of the statements in each paper).
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 \( (66\%) \) were assertions seeking to establish the existence of racial profiling as a fact, there was limited interest \( (11\%) \) 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 \( (46\%) \) were in order to find out whether the problem of racial profiling actually existed, and only 17% 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 pattern of association occurred 29 times in 12 different stories. Given that the existence of racial profiling was offered as a justification for supporting the statute only 41 times in 33 stories, this pattern suggests that this framing strategy was becoming popular among precision journalists\(^{103}\) as it had been used in 7 of 18 papers.
Media scholars have examined the role that different media frames have on public perceptions of the nature of social problems. These differences in frames are also believed to influence the assignment of responsibility for the hardships that may be described. 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 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 27 stories included 85 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. The greatest proportion of these were found in Oklahoma (30.5%), followed by Kentucky (20%). This domination of the use of episodic frames is especially noteworthy in that these two newspapers together accounted for less than ten 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’ decision 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
They said it was against the law…

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 profiling. 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). 

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.

**Part IV**

**Making it against the law**

First we have to note that only 19 of 50 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.

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 explaind 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 37 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, it 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
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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.\textsuperscript{110}

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 favor 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”\textsuperscript{111} 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 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 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.\textsuperscript{112}

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 18 states. Our analysis would also have been enriched by additional information about the racial composition of neighborhoods 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 Towers, 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 neighborhood 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 is highest in areas in which Whites are the majority.\textsuperscript{113} 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
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profiling suggests that this particular use race as an index of identity ought to be seen as especially troubling.

Frederick Schauer’s 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.

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. This disadvantage adds momentum to the deviation amplifying loops that Glenn Loury associates with racial stigma. People who share this “spoiled collective identity” eventually come to be denied the “presumption of equal humanity” 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 18 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 behavior is necessary before observed correlations between race and a class of behaviors should be used as the basis for differential treatment of individuals.\textsuperscript{120} Far too many people still believe that a person’s race can be the cause of their behavior.\textsuperscript{121} 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.
Table One: List of Newspapers, Text Units and Articles

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

| Arguments against Statute | AR | CA | CT | CO | KY | LA | MO | MT | NV | NJ | NE | MN | OK | RI | TN | TX | WA | WV |
|---------------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| 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 Enforce.        | 100| 0  | 26 | 0  | n/a| 46 | n/a| 20 | 31 | 0  | 18 | 14 | 7  | 0  | 25 | 0  | 16 |

<table>
<thead>
<tr>
<th>Arguments Support Statute</th>
<th>AR</th>
<th>CA</th>
<th>CT</th>
<th>CO</th>
<th>KY</th>
<th>LA</th>
<th>MO</th>
<th>MT</th>
<th>NV</th>
<th>NJ</th>
<th>NE</th>
<th>MN</th>
<th>OK</th>
<th>RI</th>
<th>TN</th>
<th>TX</th>
<th>WA</th>
<th>WV</th>
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</thead>
<tbody>
<tr>
<td>Curtail profiling</td>
<td>0</td>
<td>20</td>
<td>17</td>
<td>33</td>
<td>0</td>
<td>0</td>
<td>24</td>
<td>0</td>
<td>50</td>
<td>33</td>
<td>0</td>
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<td>4</td>
<td>14</td>
<td>20</td>
<td>0</td>
<td>22</td>
</tr>
<tr>
<td>Build Trust in Gov</td>
<td>0</td>
<td>0</td>
<td>14</td>
<td>0</td>
<td>20</td>
<td>0</td>
<td>16</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>11</td>
<td>8</td>
<td>11</td>
<td>2</td>
<td>5</td>
<td>10</td>
<td>18</td>
<td>22</td>
</tr>
<tr>
<td>It is a beginning</td>
<td>0</td>
<td>80</td>
<td>21</td>
<td>33</td>
<td>20</td>
<td>17</td>
<td>12</td>
<td>0</td>
<td>0</td>
<td>67</td>
<td>28</td>
<td>31</td>
<td>0</td>
<td>8</td>
<td>5</td>
<td>10</td>
<td>36</td>
<td>11</td>
</tr>
<tr>
<td>Determine if exists</td>
<td>50</td>
<td>0</td>
<td>35</td>
<td>0</td>
<td>0</td>
<td>50</td>
<td>24</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>22</td>
<td>31</td>
<td>11</td>
<td>46</td>
<td>38</td>
<td>20</td>
<td>36</td>
<td>33</td>
</tr>
<tr>
<td>Profiling is real</td>
<td>0</td>
<td>0</td>
<td>14</td>
<td>33</td>
<td>60</td>
<td>0.0</td>
<td>24</td>
<td>0</td>
<td>25</td>
<td>0</td>
<td>17</td>
<td>0.0</td>
<td>67</td>
<td>17</td>
<td>24</td>
<td>20</td>
<td>9</td>
<td>0</td>
</tr>
</tbody>
</table>

Notes:

1. The annotation n/a represents states within which the analyzed 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

<table>
<thead>
<tr>
<th>State</th>
<th>Statute Identifying Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>Task Force on Racial Profiling (A.C.A. § 12-12-1401 to A.C.A. § 12-12-1404)*</td>
</tr>
<tr>
<td>California</td>
<td>2004 Cal. ALS 700</td>
</tr>
<tr>
<td>Colorado</td>
<td>Annual Report (C.R.S. 42-4-115)* &amp; Profiling Training (C.R.S. 24-31-309)</td>
</tr>
<tr>
<td>Connecticut</td>
<td>An Act Concerning the Alvin W. Penn Racial Profiling Act (2003 Ct. ALS 160)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Prohibition Against Racial Profiling (KRS § 15A.195)</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Reporting of Statistical Information Relating to Traffic Stops (La. R.S. 32:398.10)</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Criminal Procedure Peace Officer Training (Minn. Stat. § 626.8471)</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Criminal Procedure Racial Profiling (Minn. Stat. § 626.951)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Country Jail Officers Training Program (Miss. Code Ann. § 45-4-9)</td>
</tr>
<tr>
<td>Missouri</td>
<td>Peace Officers, Selection, Training &amp; Discipline (§ 590.050 R.S.Mo)</td>
</tr>
<tr>
<td>Missouri</td>
<td>Peace Officers, Selection, Training &amp; Discipline (§ 590.650 &amp; § 590.653 R.S.Mo.)*</td>
</tr>
<tr>
<td>Montana</td>
<td>Criminal Investigation (Mont. Code Anno., § 44-2-117)</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Racial Profiling (R.R.S. Neb. § 20-501 to R.R.S. Neb. § 20-505)*</td>
</tr>
<tr>
<td>Nevada</td>
<td>Peace Officers Miscellaneous Provisions (NRS § 289.820)</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Criminalizes Deprivation of Civil Rights, including Racial Profiling (2003 N.J. ALS 31)</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Prevention of Public Offenses: General Provisions (22 Okl. St. § 34.3 to 24 Okl. St. § 34.5)*</td>
</tr>
<tr>
<td>State</td>
<td>Law</td>
</tr>
<tr>
<td>------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Pawnbrokers Act (<a href="https://www.lexisnexis.com/hottopics/lexisnexis.html">Tenn. Code Ann. § 45-6-223</a>)</td>
</tr>
<tr>
<td>Texas</td>
<td>2001 Tex. ALS 947</td>
</tr>
<tr>
<td>W. Virginia</td>
<td>Racial Profiling Data Collection Act (<a href="https://www.lexisnexis.com/hottopics/lexisnexis.html">2004 W.V. ALS 206</a>)</td>
</tr>
</tbody>
</table>

**Notes:**

* Lexis/Nexis provided these sections of the statutes as separate documents which were later combined into a single document for content analysis.

† This section was repealed, effective January 2004
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3 GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT* 1-3 (1999)


5 MEASURING RACIAL DISCRIMINATION 187 (Rebecca M. Blank, Marilyn Dabady & Constance F. Citro eds., 2004) [hereinafter, MEASURING RACIAL DISCRIMINATION].


7 Reference to Clinton’s statement made at a conference on Strengthening Police-Community Relationships on June 9, 1999. *See DEBORAH RAMIREZ, JACK McDIVITT & AMY FARRELL A RESOURCE GUIDE ON Racial PROFILING DATA COLLECTION SYSTEMS*, NCJ 184768 1 (November 2000). (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.


10 *Id.* at 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 REPONSIBILITY* (Public Law and Legal Theory Working Paper No. 66, University of
Chicago, June 2004) available online at

11 SCHAUER PROFILES at 161-165.


13 See Mark J. Kadish, The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box, 46 AM. U. L. REV. 747 (1997)(references and relevant discussions in footnotes 1, 64, and 268).

14 KIRSTIE BALL & FRANK WEBSTER, INTENSIFICATION OF SURVEILLANCE 3(2003).

15 HARRIS supra note 9, 223-227.


18 See generally Samuel Nunn, Seeking Tools for the War on Terror: A Critical Assessment of Emerging Technologies in Law Enforcement, 26 POLICING 454 (2003) available online at http://www.emeraldinsight.com/1363-951X.htm. (This article discusses the criteria for evaluating the new technological systems that dramatically extend the “sensory capacities” of police, noting the potential for abuse of these resources).
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19 See generally Johan Schot & Arie Rip, *The Past and Future of Constructive Technology Assessment*, 54 TECHNOLOGICAL FORECASTING AND SOCIAL CHANGE 251 (1996) (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).


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 Zeckauser, *Racial Profiling*, 32 PHILOSOPHY & PUBLIC AFFAIRS 149 (2004) (discussing cost-benefit analysis.)


23 MEASURING RACIAL DISCRIMINATION at 223-246.

24 Persico, *supra* note 22 at 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
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Consequences of Coronary Artery Bypass Graft Report Cards, 111 CIRCULATION, 1257, 1262 (March 15 2005) available online at http://www.circulationaha.org.


27 See Peter Grabosky, Technology and Crime Control, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE, No. 78 (1998) available online at http://www.aic.gov.au. (Discussing unintended adverse consequences of police technologies, including harm to third parties.)

28 REDER supra note 26 at 251.


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35 STOKELEY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER 4 (1967).

36 MEASURING RACIAL DISCRIMINATION at 176-179.

37 JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM 4 (1997).

38 Id. at 35-60.


41 The concept of cumulative disadvantage in relation to criminal justice is explored in MEASURING RACIAL DISCRIMINATION, at 233-4.

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 KENNETH MEEKS, DRIVING WHILE BLACK 26 (2000).

43 Oscar H. Gandy, Jr. It’s Discrimination Stupid!, in RESISTING THE VIRTUAL LIFE 41 (James Brooks & Ian A. Boal, eds. 1995).

44 See generally DAVID COLE, NO EQUAL JUSTICE. RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (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
They said it was against the law…


49 See generally Zhondang Pan & Gerald M. Kosicki, Framing as a Strategic Action in Public Deliberation, in Framing in Public Life 35 (Stephen D. Reese, Oscar H. Gandy, Jr., & August E. Grant, eds., 2001) (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, 8 Press/Politics 36 (2003) (exploring the rise and fall of media attention to a contentious political issue over time).


52 Id. at 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 7-10 (1991).

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, 45 JOURNAL OF COMMUNICATION, 133 (1995).

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 for example, Heather Mac Donald, The Myth of Racial Profiling, CITY JOURNAL (Spring 2001) http://www.city-journal.org/html/11_2_the_myth.html.


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, 59 JOURNAL OF SOCIAL ISSUES 431, 448-9 (2003).
58 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.” SCHAUER, PROFILES, 181-3 (2003). Opponents of racial and ethnic profiling suggest that despite the fact 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.” MEASURING RACIAL DISCRIMINATION at 198. See also BRUCE SCHNEIER BEYOND FEAR, 253-254 (2003).


61 Id. at 3.

62 Id. at 5.

63 See the discussion of such initiatives in James D. Ward, Race, Ethnicity, and Law Enforcement Profiling: Implications for Public Policy, 62 PUBLIC ADMINISTRATION REVIEW 726, 728 (2002).

64 Karen F. Parker, et al. supra note 30.

65 Lexis/Nexis 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 45 documents from 19 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 24 statutes (or groups of relevant sections of a statute) that are listed in Appendix A.

66 Ramirez, et al., supra note 7 at 3.


68 MONT. CODE ANNO., § 44-2-117 (2003); 22 O.S. § § 34.3-5 (OSCN 2001).


70 ARK. STAT. ANN. §12-12-1401 (2003); 2004 CAL. ADV. LEGIS. SERV. 700; CONN. GEN. STAT. § 54-1 (2003); MINN. STAT. § 626.8471 (2003); NEV. REV. STAT. § 289.820 (2001); 2004 R.I. PUB. LAWS 256; R.I. GEN. LAWS § 31-21.1-2; W. VA. CODE § 30-29-10 (2002).

71 ARK. STAT. ANN. § 12-12-1401 (a) (2003).

72 2004 CAL. ADV. LEGIS. SERV. 700.

73 MINN. STAT § 626.8471 SUB. 2 (2) (2003).

74 See generally Jerry Kang, Trojan Horses of Race, 118 HARVARD LAW REVIEW 1549 (2005).

75 CONN. GEN. STAT. § 54-1 (2003); KY. REV. STAT. § 15A (1) (2004); MONT. CODE ANN., § 44-2-117 (2003); 22 O.S. § 34.3 (OSCN 2001).

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80 See generally TIMOTHY E. COOK, GOVERNING WITH THE NEWS (1998). See also FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (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).
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, 17 POL. COMM. 93 (2000).

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 which 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.

For the 19 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 Lexis Academic list of Major Newspapers, Lexis Academic State by State list of Newspapers and the circulation rankings that are published by Audit Bureau of Circulations. If 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 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 capitol were preferred over other newspapers and if none of the newspapers were published in the state capitol (or if multiple newspapers were published in the state capitol), the newspaper with the highest circulation was used to retrieve articles (see Appendix B for the list of newspapers that was used).
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 amendments to a statute, the search period started at 1 calendar year before the statute was signed into law (or amended) and ended 1 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.

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, 16 THE HOWARD JOURNAL OF COMMUNICATION 71 (2005).

Klaus Krippendorff, Content Analysis 104-5 (2004); See also James W. Tankard, The Empirical Approach to the Study of Media Framing, in Framing Public Life 100-101 (Stephen

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 they can be defined through automated searches of text; they can also be assigned a “freely defined” node, created while reading through the text on-line. 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* (2002).


89 *See for example* Mick Hinton, *Racial profiling bill advances Senate to consider discipline policy*, THE DAILY OKLAHOMAN, April 14, at 4-A (discusses the statute by explaining that “the measure bans "racial profiling" by a police officer, who could be charged with a misdemeanor criminal offense”).

90 Critical observers of media behavior 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, *THE JOURNALISM OF OUTRAGE* 12-20 (1991) (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, like our references to the proportion of the articles in which a particular framing approach is taken 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, MICHAEL PICKERING, PETER GOLDING & GRAHAM MURDOCK, RESEARCHING COMMUNICATIONS 132-184 (1999) (exploring approaches to the analysis of texts including the critical assessment of thematic structures that are common in news media coverage of issues.)


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


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 224-232 (1992) (discussing the assessment of balance or bias in press coverage.)

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, MEASURING RACIAL DISCRIMINATION, 189-196 (2004). See also, Brian L. Withrow, Driving While Different: A Potential Theoretical Explanation for Race-Based Policing, 15 CRIMINAL JUSTICE POLICY REVIEW 344, 345-349 (2004).

98 MCQUAIL, MEDIA PERFORMANCE supra note 96 at 131 (1992) (Reviewing literature on media reliance on government sources.)


100 Bruce Landis, Profiling Study Confirms Drivers Treated Differently PROVIDENCE JOURNAL-BULLETIN A11(July 1, 2003).


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, 15 CRIMINAL JUSTICE POLICY REVIEW 462, 477 (2004).

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 (2001). 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


105 See generally Shanto Iyengar, Is Anyone Responsible? 11-16 (1991) (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.” Id. at 2.

107 See generally, Oscar H. Gandy, Jr. & Zhan Li, Framing Comparative Risk: A Preliminary Analysis, 16 The Howard Journal of Communications 71 (2005).

108 Out of the 144 newspaper articles analyzed, 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 A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS 51 (Deborah Ramirez, et. al., November 2000).

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 OSCAR H. GANDY, JR., BEYOND AGENDA SETTING 80-83 (1982). See also, Zhongdang Pan & Gerald M. Kosicki, Framing as Strategic Action in Public Deliberation, in FRAMING PUBLIC LIFE 44-47 (Stephen D. Reese, et al., eds., 2001).

112 See generally Oscar H. Gandy, Jr. Epilogue—Framing at the Horizon: A Retrospective Assessment in FRAMING PUBLIC LIFE (Stephen Reese, Oscar H. Gandy, Jr., & August E. Grant, eds, 2001) (reviewing the literature on media framing and its consequences.)


114 SCHAUER, PROFILES.

115 Id., at 187, 299.

116 MEASURING RACIAL DISCRIMINATION at 225.


118 Id. At 67.

119 Id. At 88.
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121 TUKUFU ZUBERI, THICKER THAN BLOOD 129 (2001).