
RACIAL PROFILING

A NEW CHALLENGE IN PUBLIC POLICY

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"You look like this sketch of someone who's thinking about committing a crime."

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1. INTRODUCTION: DEFINING THE ISSUE

In the late 1990s, a new civil rights issue emerged in politics and across the country. Bruce Springsteen has written a hit song about it.¹ The ACLU launched a national advertising campaign about it.² Dozens of celebrities have complained they were victimized by it.³ Bill Clinton, Al Gore, Bill Bradley, and even George W. Bush, Dick Cheney and John Ashcroft have all publicly expressed their concern over it.⁴

What is it? It's called racial profiling.

In this paper, I examine racial profiling as a new challenge in public policy. In this introductory chapter, I hope to define racial profiling and set up a framework for

¹ Bruce Springsteen, "American Skin" (2000). See *The Boston Globe* 15 June 2000: A23. The song was written in response to the highly-publicized New York City police shooting of Amadou Diallo, an unarmed black man, in February 1999.

² American Civil Liberties Union, "In New Radio and Television PSA Campaign, ACLU Urges Victims of Racial Profiling to Fight Back," Press Release 21 Aug. 2000, online at < <http://www.aclu.org/features/f082900a.html> > . See also *infra* notes 47-54 and accompanying text.

³ See, e.g., Kathryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative and Empirical Literature* 3 Rutgers Race & L. Rev. 61, 62 (2001); Henry Louis Gates, Jr., "Thirteen Ways of Looking at a Black Man," *The New Yorker* 23 Oct. 1995: 56, 58-59; *Washington v. Lambert*, 98 F.3d 1181, 1182, n.2 (9th Cir. 1996). Testimonials have come from Johnny Cochran, Miles Davis, Christopher Darden, Al Joyner, Will Smith, Wesley Snipes, Blair Underwood, Cornel West and Jamaal Wilkes.

⁴ In his farewell address at the 2000 Democratic National Convention, then-President Clinton stated: "Now, we're more free because we are closer today to the one America of our dreams, celebrating our diversity, affirming our common humanity, opposing all forms of bigotry, from church burnings to racial profiling to murderous hate crimes." *The New York Times* 15 Aug. 2000: A17. In 1999, Clinton declared racial profiling "morally indefensible." Stephen A. Holmes, "Clinton Orders Investigation On Possible Racial Profiling," *The New York Times* 10 June 1999: A22. In the 2000 Democratic primary, Bill Bradley "challenged Vice President Al Gore to press President Clinton to issue an executive order banning racial profiling." Richard L. Berke, "Gore and Bradley Duel, Briefly, on Racial Issue," *The New York Times* 18 Jan. 2000: A20. Later, in a debate against George W. Bush, Gore pledged to make a racial profiling ban "the first civil rights act of the 21st century." Richard L. Berke, "This Time, More Accord Than Discord," *The New York Times* 12 Oct. 2000: A1. In a debate between the vice-presidential candidates, Joseph Lieberman said that he "would be outraged" if he were the victim of racial profiling, and Dick Cheney conceded that he could not "understand fully what it would be like." *The New York Times* 26 Oct. 2000: A28. When President Bush addressed Congress in February 2001, he declared that racial profiling is "wrong and we will end it in America." *The New York Times* 28 Feb. 2001: A12. John Ashcroft spoke out against racial profiling as a U.S. senator, holding the first Senate hearings on the matter while a subcommittee chair, and in his confirmation hearings for attorney general. *The New York Times* 17 Jan. 2001: A18.

further examination of this issue as a matter of public policy. In Chapter 2, I will review some of the events and trends that placed racial profiling on the public agenda. Chapter 3 will be a theoretical discussion of the costs and benefits of racial profiling as a public policy or public practice. I will analyze the relevant policy itself in the subsequent two chapters: policy-making by the judiciary in Chapter 4 and by legislatures in Chapter 5. Finally, a brief epilogue will address the effects of the September 11 terrorist attacks on this issue.

It is appropriate to begin with definition. In general terms, racial profiling is the discriminatory treatment of minorities by law enforcement officials based on the belief that skin color is a predictor of criminal activity.⁵ That is, the profile of a “typical” criminal may include race, and a police officer may be instructed, or may choose, to target her activities against persons who roughly match that profile – even persons who do not match the individualized description of a wanted suspect. Though it is normally considered appropriate to allow police officers some discretion in scrutinizing “suspicious” individuals, the question of whether their profiling criteria may include race is a good deal more controversial.⁶

In practice, racial profiling can take a number of forms – in scope and severity. In scope, racial profiling can be and is practiced in different kinds of places, against

⁵ A number of definitions have been suggested. See Russell, *supra* note 3, for a useful discussion on how to define racial profiling. See also Randall Kennedy, “Suspect Policy,” *The New Republic* 13-20 Sept. 1999 at 35: “Racial profiling occurs whenever police routinely use race as a negative signal that, along with an accumulation of other signals, causes an officer to react with suspicion.”

⁶ See generally John Kleinig, Ed., *Handled with Discretion: Ethical Issues in Police Decision Making* (New York: Rowman & Littlefield, 1996): 1-12, 115-158.

different kinds of people, and by different kinds of authorities.⁷ For example, it is not considered uncommon for private security guards in shopping malls to follow African-American youths because they believe that demographic is most likely to engage in shoplifting. Recent public attention, though, has focused on racial profiling as it is practiced on streets and highways, against African Americans and Latinos (primarily young black men), and by state and local police officers. Indeed, for the purposes of this paper I will limit discussion to that scope.⁸

I have decided to focus on that relatively narrow scope of racial profiling for several reasons. First, it involves “state action” – any activity by the government that is directly or indirectly a result of public policies or practices. Since this paper is a public policy thesis, state action seems most appropriate. Second, the events and trends that placed racial profiling on the public agenda also fall within that scope.⁹ Finally, most of the public policy pertaining to racial profiling, both judicial doctrine and legislation, falls roughly within that scope as well.¹⁰

⁷ See Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling Is Wrong* 18 St. Louis U. Pub. L. Rev. 371 (1999). Extending racial profiling’s nickname, “Driving While Black,” itself a pun on the real crime of Driving While Intoxicated, Shuford lists a number of situations in which racial profiling can occur: “Racial profiling happens to consumers and pedestrians, on planes, trains, and automobiles. There is driving while black (or brown), flying while black, walking while black, shopping while black, hailing (as in a cab) while black, swimming while black ...and dining while black ...to name a few. The most accurate term to describe the pervasiveness of the phenomenon is breathing while black, a reality underscored by the shooting deaths over a thirteen-month period - by the New York Police Department alone - of four unarmed black men, Amadou Diallo, Patrick Dorismond, Malcolm Ferguson and Richard Watson.” See also Kenneth Meeks, *Driving While Black: Highways, Shopping Malls, Taxicabs, Sidewalks* (New York: Broadway, 2000). Meeks’s variants on the phrase include Riding the Train While Black, Shopping While Black, Flying While Black and Living While Black.

⁸ One partial exception might be the epilogue, in which I offer some comments on racial profiling in the aftermath of the Sept. 11 terrorist attacks.

⁹ See *infra* notes 21-68 and accompanying text.

¹⁰ See *infra* notes 109-228 and accompanying text.

Now that the scope has been settled, let us move on to severity. In severity, racial profiling can also vary widely. In fact, I propose to identify severity of racial profiling in two different forms: severity with respect to *action*, and severity with respect to *motive*. (See Figure 1.) The motive/action distinction is important, for if the term “racial profiling” is to be interpreted literally, then a police officer’s action is generally the effect of the profiling while her motive is generally what compels the profiling.

MOTIVES	ACTIONS
Individual Discriminatory Intent	Violence
Institutional Policy	Vehicle Search
Partly, not Solely, Based on Race	Ticketing
Pretext Stops	Rude Behavior
Unconscious Racism	Harassment Stops

Figure 1. Racial Profiling: Motives and Actions

First consider severity of *action*. The most egregious racial profiling actions involve violence, such as the Rodney King beating or the Amadou Diallo shooting.¹¹ Short of violent behavior, police action can entail a thorough drug search of a

¹¹ For a brief overview of racial profiling as manifested by police brutality, see “Patterns of Police Violence,” Editorial, *The New York Times* 18 April 2001: A22.

motorist's car, a time-consuming and usually humiliating procedure.¹² Less severe though hardly innocuous acts include ticketing,¹³ abnormally rude behavior,¹⁴ and unprovoked harassment stops by police officers.¹⁵

The *motives* behind racial profiling can also be described in terms of severity. Some of the most severe incidents are motivated by discriminatory intent; in some cases a police officer practically concedes to a driver that a traffic stop is solely racially motivated.¹⁶ Another severe manifestation of racial profiling is an institutional, police department policy – in the form of explicit instructions or officer training – that minorities should be treated differently from whites.¹⁷ Less severe cases include profiling based partly but not wholly on race,¹⁸ using a real but minor traffic violation

¹² Many racial profiling anecdotes include racially motivated police searches. Among the most horrific is that of U.S. Army Sergeant First Class Rossano V. Gerald: "During the second stop, which lasted two-and-a-half hours, the troopers terrorized SFC Gerald's 12-year-old son with a police dog, placed both father and son in a closed car with the air conditioning off and fans blowing hot air, and warned that the dog would attack if they attempted to escape." American Civil Liberties Union, *Driving While Black: Racial Profiling on Our Nation's Highways* [hereafter ACLU Report] (June 1999): 1, online at < <http://www.aclu.org/profiling/report/index.html>> . The ACLU Report contains a number of other anecdotes detailing less severe actions and motives in racial profiling. For anecdotes, see also American Civil Liberties Union, "Driving While Black Horror Stories," online at < <http://www.aclu.org/congress/dwbstories.html>> ; and Richard Morin and Michael H. Cottman, "Discrimination's Lingering Sting," *The Washington Post* 22 June 2001: A1.

¹³ Amber Arellano, "Blacks are Ticketed More Often, Poll Says," *The Detroit Free Press* 7 Feb. 2000: A1; and Amber Arellano, "When Race Adds Up in Traffic," *The Detroit Free Press* 1 June 2000: A1.

¹⁴ David Kocieniewski, "Minority Drivers Tell of Troopers' Racial Profiling," *The New York Times* 14 April 1999: B1. See also ACLU, "Driving While Black Horror Stories," *supra* note 12.

¹⁵ Arellano, "When Race Adds Up in Traffic," *supra* note 13; Kocieniewski, *supra*; and ACLU, "Driving While Black Horror Stories," *supra*.

¹⁶ In Volusia County, Florida, an officer was being tape recorded when he pulled over a white driver. The officer "asked the man how he was doing. The driver replied, 'Not very good,' to which [the officer] countered, 'Could be worse. Could be black.'" Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling* 50 Duke L.J. 331, 337-38.

¹⁷ David Kocieniewski and Robert Hanley, "An Inside Story of Racial Bias and Denial: New Jersey Files Reveal Drama Behind Profiling," *The New York Times* 3 Dec. 2000: §1.53.

¹⁸ *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997).

as a pretext for a race-based stop,¹⁹ and “unconscious” racial profiling by police officers who are not fully aware of their racial prejudices.²⁰

Recall that motives can give rise to racial profiling, which in turn lead to police actions. It is important to note, however, that the point of thinking in terms of severity of motive and severity of action is not to assign each motive and each action to its own unique place on some severity continuum; this would be an arbitrary and pointless exercise. Rather, it helps clarify three important points about racial profiling. First, there exists a motive/action distinction that should be recognized. Second, some motives and actions are more or less severe than others. And third, there is no necessary relationship between particular motives and particular actions: non-severe motives can lead to severe actions, and vice-versa.

In summary, racial profiling, the police practice of singling out minorities for different treatment based on the belief that skin color predicts criminal activity, exists in many forms. The focus of this paper will be limited to the scope in which police officers on streets and highways target minorities, mostly young black males, based on skin color rather than individualized suspicion. Furthermore, racial profiling can be identified in terms of severity of *action* as well as severity of *motive*.

It will be best to keep these and other possible forms of racial profiling in mind when various policy-based responses to the racial profiling issue are considered, for policy-makers may wish specifically to target certain scopes, motives or actions. For

¹⁹ See generally David A. Harris, “*Driving While Black*” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops 87 J. Crim. L. & Criminology 544 (1997).

now, though, this extended definition of racial profiling, including scope and severity, should prove useful in examining major developments in this issue – including important events, statistical evidence and political thought – over the last several years.

²⁰ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism* 39 Stan. L. Rev. 317 (1987).

2. BACKGROUND: RACIAL PROFILING GOES PUBLIC

Due to the convergence of noteworthy events, compelling studies and interest group advocacy, the issue of racial profiling has, in just the last few years, become a major topic in American political discourse. As we shall see, it took some of the rarest but most severe forms of racial profiling to focus public attention on less severe but much more common practices in racial profiling. Singular horror stories have given rise to a public awareness of an endemic pattern.

First, let's examine the prevalence of racial profiling before that term, or its colloquial cousin "Driving While Black" (DWB), became popular in the media. In the black community, racial profiling has long been a widely recognized fact of life.²¹ Law professor Katheryn Russell, who has written several law review articles on the subject, notes that "stories of DWB are part of family lore. As a child, I heard stories about racially-motivated traffic stops."²²

Indeed, blacks have been subject to disparate treatment by police officers since colonial times, in the North and the South.²³ In the 1960s the police purposely targeted African-American civil rights activists, and the Kerner Commission warned against blacks' distrust of police generated by race-based targeting.²⁴

Later, the War on Drugs gave rise to the official use of "profiling" criminal behavior, which slowly came to involve racial characteristics. During the 1970s the

²¹ Trende, *supra* note 16 at 362.

²² Katheryn K. Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences 40 B.C. L. Rev. 717, 720 fn. 15.

²³ Tracey Maclin, *Race and the Fourth Amendment* 51 Vand. L. Rev. 333, 334.

²⁴ Trende, *supra* note 16 at 334-35.

Drug Enforcement Agency began issuing “drug courier profiles,” which listed a host of *non-racial* factors that police should look for in drug interdiction activities.²⁵ But in 1986, the DEA began Operation Pipeline, which specifically trained police officers to engage in “pretext stops” – using a minor traffic violation as a pretext for pulling over and searching motorists who fit the drug courier profile.²⁶ The profiles issued by the DEA as part of Operation Pipeline included skin color, national origin, and race-related cultural characteristics such as dreadlocks, air fresheners, and tinted windows.²⁷ As recently as 1998, the DEA office in Newark, New Jersey issued a “Heroin Trends” report which said: “Predominant wholesale traffickers are Colombian, followed by Dominicans, Chinese, West African/Nigerian, Pakistani, Hispanic and Indian. Midlevels are dominated by Dominicans, Colombians, Puerto Ricans, African-Americans and Nigerians.”²⁸ While the DEA claims that it never explicitly advocated the use of race as a proxy for criminal suspicion in drug interdiction efforts, their “drug courier profiles” and intelligence reports unambiguously imply a correlation between race and criminal activity.²⁹

Furthermore, litigation in New Jersey and Maryland in the early 1990s led to statistical studies indicating a racial profiling pattern in those states.³⁰ In a study

²⁵ ACLU Report, *supra* note 12.

²⁶ *Id.*

²⁷ *Trende, supra* note 16 at 334-36.

²⁸ David Kocieniewski, “New Jersey Argues That the U.S. Wrote the Book on Race Profiling,” *The New York Times* 29 Nov. 1999: A1.

²⁹ *Id.*

³⁰ The litigation and studies in both those states led to federal supervision from the Department of Justice. At least eight police agencies (state and local) across the country are now required to collect traffic stop data as a result of federal supervision over racial profiling, either by federal court order or by consent decree with the Justice Department. In addition, hundreds of local agencies now collect such

subsequent to *Wilkins v. Maryland State Police* (1996), expert witness Dr. John Lamberth determined that 72% of motorists stopped and searched along I-95 were black, even though only 18% of the cars had black drivers.³¹ In *State v. Soto* (1996), another Lamberth study revealed that 35% of motorists stopped and 73% of motorists arrested by state troopers on the New Jersey Turnpike were black, even though only 14% of the cars had black drivers.³² A judge in that case finally ruled in 1996 that New Jersey state troopers were engaged in an unconstitutional practice of racial profiling.³³

Yet despite years of anecdotal evidence, new data and a court ruling to back them up, racial profiling was not yet viewed by the American public as a significant civil rights issue. The term “racial profiling” and its variants appeared in major American newspapers in fewer than 30 articles per year through 1997. But it appeared in 90 articles in 1998, 972 articles in 1999, 2,349 articles in 2000 and 2,150 articles in the first eight months of 2001. In *The New York Times* alone, racial profiling was all but ignored through 1997, but it appeared in 23 articles in 1998, 268 articles in 1999, 307 articles in 2000, and 279 articles in the first eight months of 2001.³⁴ (See Figure 2.)

data voluntarily. Lori Montgomery, “New Police Policies Aim to Discourage Racial Profiling,” *The Washington Post* 28 June 2001: A1.

³¹ *Id.* See also John Lamberth, Expert Report in *Wilkins v. Maryland*, Civil Action 93-468 (D. Md. 1996), online at < <http://www.aclu.org/courts/lamberth.html> > ; and John Lamberth, “Driving While Black: A Statistician Proves That Prejudice Still Rules the Road,” *The Washington Post* 16 Aug. 1998: C1.

³² David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies* 6 Mich. J. Race & L. 237, 244-45, ctg. *State v. Soto*, 734 A.2d 350 (N.J. Super. 1996).

³³ Robert D. McFadden, “Police Singled Out Black Drivers in Drug Crackdown, Judge Says,” *The New York Times* 10 March 1996: §1.33. Barbara Gotthelf, “Appeal by State in Question In Racial-Profilng Case,” *New Jersey Law Journal* 18 March 1996: 4.

³⁴ Lexis-Nexis Academic Universe documents searches, 25 Sept. 2001 and 21 Jan. 2002. Searches were limited to the first eight months of 2001 in order to exclude discussions of racial profiling in the aftermath of the Sept. 11 terrorist attacks. I deal with that element of the racial profiling debate in the epilogue.

While it is true that the very term *racial profiling* did not come into vogue until the late 1990s – the Oxford American Dictionary first included it in 1999³⁵ – that nevertheless reflects the fact that Americans did not develop a vocabulary for the phenomenon until they were interested in discussing it and had identified it as a trend. General racial bias by police officers was highly publicized after the Rodney King beating and during the O.J. Simpson trial, but patterns of a *systematic* practice and pattern of highway stops and drug searches went relatively unacknowledged.³⁶

	MAJOR NEWSPAPERS	THE NEW YORK TIMES
through 1997	fewer than 30 per year	0
1998	90	23
1999	972	268
2000	2,349	307
1/1/01 to 8/31/01	2,150	279

Figure 2. Racial Profiling in the News

This changed in 1998 and 1999 when New Jersey state troopers shot and wounded three unarmed black men on the New Jersey Turnpike³⁷ and New York City police officers fired 41 shots at Amadou Diallo, an unarmed black man in

³⁵ Shuford, *supra* note 7 at 372 fn. 7.

³⁶ See, e.g., Philip A. Serpico, “Simpson Trial Undoes Progress by Police,” Letter to the Editor, *The New York Times* 13 Oct. 1995: A32; and Solomon Moore, “Legacy of a Beating, Torn Between the Present and the Past: Was the King Incident a Discrete, Isolated Episode? Or An Event with a Thousand Links to Unseen Injustices?” *The Los Angeles Times Magazine* 4 March 2001: 10.

³⁷ “New Jersey Police Shoot 3 After Van Backs Into Trooper and Cars,” *The New York Times* 25 April 1998: B6.

Brooklyn, killing him.³⁸ In the wake of what seemed like two instances of racial profiling gone terribly wrong, national attention began to focus on the claims of minorities and advocacy groups that police officers routinely used race as a proxy for criminal suspicion. These two serious incidents, then, have served as an impetus for new studies, media attention, public advocacy, political jockeying and legislation.

In New Jersey, the shooting gave rise in 1999 and 2000 to new public scrutiny of police tactics. The U.S. Department of Justice announced that it was investigating the state police over racial profiling complaints, and then-Governor Christine Todd Whitman ordered the state attorney general, Peter Verniero, to review state police practices.³⁹ Verniero's report found that non-white drivers made up 41% of those stopped and 79% of those searched.⁴⁰ But the Justice Department said that racial profiling was an even more severe problem than Verniero's report had indicated, and New Jersey entered a consent decree with the federal government, agreeing to an outside monitor who would oversee reform within the state police agency.⁴¹ The controversy was renewed the following year when declassified police records revealed that state police, and possibly Verniero himself, possessed evidence of racial profiling

³⁸ Michael Cooper, "Officers in Bronx Fire 41 Shots, And an Unarmed Man Is Killed," *The New York Times* 5 Feb. 1999: A1.

³⁹ David Kocieniewski, "Racial Profiling Is the Subject Of U.S. Inquiry In New Jersey," *The New York Times* 18 Feb. 1999: B1.

⁴⁰ Iver Peterson, "Whitman Says Troopers Used Racial Profiling," *The New York Times* 21 April 1999: A1. Peter Verniero (Atty. Gen. of New Jersey), *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* 20 April 1999, online at < http://www.state.nj.us/lps/intm_419.pdf > .

⁴¹ David Kocieniewski, "U.S. Will Monitor New Jersey Police on Race Profiling," *The New York Times* 23 Dec. 1999: B1.

long before the 1998 shooting but had covered it up.⁴² The political damage suffered by some of New Jersey's top officials – including Verniero, the state police superintendent, and the governor – is testimony to the significance of these events.⁴³

In New York City, a 15-month study commissioned by the state attorney general in the aftermath of the Amadou Diallo shooting revealed that police in New York, too, were engaged in racial profiling. The study found that 51% of those stopped and frisked by the NYPD and 63% of those stopped and frisked by the NYPD's Street Crimes Unit (the unit involved in the Amadou Diallo shooting) were black, even though blacks made up only 26% of the population.⁴⁴ The study even took into account heavier police presence in high-crime neighborhoods, but still found that blacks were disproportionately stopped and frisked.⁴⁵

⁴² David Barstow and David Kocieniewski, "Records Show New Jersey Police Withheld Data on Race Profiling," *The New York Times* 12 Oct. 2000: A1. David Kocieniewski and Robert Hanley, "Racial Profiling Was the Routine, New Jersey Finds," *The New York Times* 28 Nov. 2000: A1.

⁴³ Colonel Carl Williams, then the state police superintendent, denied in 1999 that police were engaged in racial profiling, but publicly stated that "it is most likely a minority group that's involved with" cocaine or marijuana, and that "if you are looking at heroin and stuff like that, your involvement there is more or less Jamaican." Robert D. McFadden, "Whitman Dismisses State Police Chief for Race Remarks," *The New York Times* 1 March 1999: A1. Governor Whitman fired Williams for his comments, but later became the focus of attention herself after a 1996 photograph surfaced of her frisking a black man while looking back at the cameraman with a grin. *Id.* David Kocieniewski, "Frisking Photo Puts Whitman on Defensive," *The New York Times* 11 July 2000: B1. Verniero, too, found himself awash in controversy over the subject once he was nominated for the state supreme court, testified during his confirmation hearings that he was unaware of a racial profiling problem until 1998, and was subsequently accused of covering up evidence of racial profiling and lying during his confirmation hearings. The acting governor and the state senate called for his resignation from the state supreme court, but an impeachment motion failed and Verniero refused to step down. Iver Peterson, "Senate Votes for a Resolution Calling on Verniero to Resign," *The New York Times* 4 May 2001: B5. Laura Mansnerus, "DiFrancesco Urges Justice to Resign in Profiling Furor," *The New York Times* 6 April 2001: A1. Iver Peterson, "Verniero Impeachment Motion Turned Back in the Assembly," *The New York Times* 11 May 2001: B5.

⁴⁴ Harris, *When Success Breeds Attack*, *supra* note 32 at 256-57. Office of the New York Attorney General, *The New York City Police Department's "Stop and Frisk Practices"* (1999): iv-xvi, online at < http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html > . See Chapter 2 for a synopsis of the events and public reaction arising from the Diallo shooting and leading up to this study.

⁴⁵ *Id.*

Before long, statistical evidence from all over the country was being produced and released, indicating a pattern of racial profiling in major police departments. Studies conducted in Dallas, Los Angeles, and Philadelphia all reported similar evidence of a racial profiling pattern.⁴⁶

The heightened attention over racial profiling led the American Civil Liberties Union (ACLU) to launch a special campaign against it in June 1999.⁴⁷ The new campaign included the release of a “special report” on racial profiling,⁴⁸ a toll-free number people could call to report racial profiling incidents,⁴⁹ an online complaint form for the same purpose,⁵⁰ public service announcements to be broadcast on radio and television stations across the country,⁵¹ provocative advertisements in *Emerge Magazine*, *The New Yorker* and *The New York Times Magazine*,⁵² and a Web site with educational materials, news archives, racial profiling anecdotes and an opportunity to write to public officials.⁵³ The ACLU also filed a federal lawsuit on behalf of an African-American man who said he became the victim of racial profiling in Oklahoma,

⁴⁶ Gregory M. Lipper, *Recent Development: Racial Profiling* 38 Harv. J. on Legis. 551, 552.

⁴⁷ See generally American Civil Liberties Union, Arrest the Racism: Campaign Background Information, online at < <http://www.aclu.org/profiling/background/index.html> > .

⁴⁸ ACLU Report, *supra* note 12.

⁴⁹ The number is 1-877-6PROFILE. See ACLU, Campaign Background Information, *supra* note 47.

⁵⁰ Driver Profiling Complaint Form, online at < <http://forms.aclu.org/feedback//feedback.cfm?r=6&ia=1&ii=0> > .

⁵¹ ACLU, “In New Radio and Television PSA Campaign,” *supra* note 2.

⁵² Patricia Winters Lauro, “The A.C.L.U. Is Taking a Provocative Madison Avenue Route to Raise Support for Its Causes,” *The New York Times* 30 May 2000: C10. The ads are available online at < http://www.aclu.org/graphics/guilt_ad.jpg > and < http://www.aclu.org/graphics/man_on_left.gif > .

⁵³ “ACLU Launches Special Web Collection on Racial Profiling and Driving While Black,” *M2 Presswire* 10 June 1999. See generally American Civil Liberties Union, Arrest the Racism: Racial Profiling in America, online at < <http://www.aclu.org/profiling> > .

the first of many racial profiling lawsuits for which it sought publicity.⁵⁴ The ACLU's campaign launch received nationwide media attention, and that month racial profiling was the cover story in an issue of *The New York Times Magazine*⁵⁵ and the topic of Bob Herbert's widely-read column in *The New York Times*.⁵⁶ During a June 13 press conference, President Clinton declared racial profiling "morally indefensible."⁵⁷

One of the ACLU's goals in its campaign against racial profiling was to highlight the racial disparities that pervade the American criminal justice system and are reflected in, and perhaps partly caused by, profiling tactics by police officers. Racial profiling can operate as a self-fulfilling prophesy, the ACLU argued, because as long as minorities are disproportionately stopped, searched and arrested, the racial disparities in arrest and incarceration statistics such behavior creates will fuel the racial stereotypes which allow that behavior to continue.⁵⁸ African Americans make up 12% of the population but 38% of those arrested for drug offenses, 59% of those convicted of drug offenses, and 63% of those convicted of drug trafficking. Thirty-three percent of whites who are convicted of drug offenses are sent to prison, compared to 50% of blacks. For drug offenders sentenced under state laws, the average maximum sentence

⁵⁴ American Civil Liberties Union, "Black Army Sergeant Files Lawsuit After Terrifying Race Profiling Stop in Oklahoma," Press Release 18 May 1999, online at < <http://www.aclu.org/news/1999/n051899c.html> > .

⁵⁵ Jeffrey Goldberg, "The Color of Suspicion," *The New York Times Magazine* 20 June 1999: 51.

⁵⁶ Bob Herbert, "Hounding the Innocent," *The New York Times* 13 June 1999: §4.17.

⁵⁷ Holmes, *supra* note 4.

⁵⁸ Kary L. Moss and Daniel S. Korobkin, "Destination Justice," *Michigan Bar Journal* 80.1 (2001): 36, 39, online at < <http://www.michbar.org/journal/pdf/pdf4article210.pdf> > . See also David Harris, *Law Enforcement's Stake in Coming to Grips with Racial Profiling* 3 Rutgers Race & L. Rev. 9, 16 (2001); and Marc Mauer, *The Crisis of the Young African American Male and the Criminal Justice System*, prepared for the U.S. Commission on Civil Rights (15-16 April 1999). See generally Marc Mauer, *Race to Incarcerate* (New York: The New Press, 1999).

length for whites is 51 months, while for blacks it is 60 months.⁵⁹ As long as racial profiling continues, in other words, arrest and conviction records are sure both to reflect and to exacerbate these stereotypes. For this reason, an interest in ending racial profiling can be seen as inextricably linked to a more general interest in reducing inequalities in the criminal justice system and racial stereotypes in American culture.⁶⁰

After the New Jersey Turnpike and Amadou Diallo shootings, new public awareness was reflected in public opinion polls demonstrating that most Americans believed racial profiling was taking place and was unacceptable. In 1999, the Gallup Organization took a nation-wide poll on racial profiling in which that term was neutrally described as the practice by which “some police officers stop motorists of certain racial or ethnic groups because the officers believe that these groups are more likely than others to commit certain types of crimes.”⁶¹ Fifty-six percent of whites and 77% of blacks believed that racial profiling was widespread, and 80% of whites and 87% of blacks disapproved of the practice.⁶² Forty-two percent of blacks claimed to have been a victim of racial profiling, including 72% of young black men aged 18 to

⁵⁹ Moss and Korobkin, *supra*, ctg. *Data Collection: The First Step in Coming to Grips with Racial Profiling: Hearing on Racial Profiling Within Law Enforcement Agencies Before the Subcomm. On the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 106th Cong. 2nd Sess. 6-8 (March 30, 2000) (statement of David A. Harris, Balk Professor of Law and Values, University of Toledo College of Law), online at < <http://www.senate.gov/%7Ejudiciary/330200dah.htm> > .

⁶⁰ See, e.g., Russell, *supra* note 22.

⁶¹ Frank Newport, “Racial Profiling is Seen as Widespread, Particularly Among Young Black Men,” *Gallup News Service* 9 Dec. 1999.

⁶² *Id.*

34.⁶³ Similar results were reproduced in other polls, some of which indicated that police were being perceived as less fair than ever before.⁶⁴

Following shifts in public opinion, several law enforcement institutions also changed their views on racial profiling. Just a few years ago, most police agencies either denied that racial profiling was taking place or else sought to justify it. For example, in 1998 the National Association of Police Organizations (NAPO) and National Troopers Coalition publicly declared their opposition to collecting racial data on traffic stops because, according to NAPO, there was “no pressing need or justification.”⁶⁵ Los Angeles police chief Bernard Parks, who is black, defended racial profiling in 1999 as justified by statistically rational police behavior.⁶⁶ But by the end of 1999, such opinions were no longer acceptable in mainstream public discourse. The conservative International Association of Chiefs of Police (IACP), previously opposed to data collection, declared its support for data collection and opposition to racial profiling at its annual convention in November 1999.⁶⁷ When the PBS *NewsHour with Jim Lehrer* ran a segment on racial profiling in March 2001, panelists included the police chiefs of Rochester and Minneapolis, both of whom expressed concern about

⁶³ *Id.*

⁶⁴ See Jack Ludwig, “Gallup Social Audit On Black/White Relations in the U.S.,” *Gallup News Service* 11 July 2001; Richard Morin and Michael H. Cottman, “Discrimination’s Lingering Sting: Minorities Tell of Profiling, Other Bias,” *The Washington Post* 22 June 2001: A1; C. J. Chivers, “Approval and Wariness in Poll on Police,” *The New York Times* 15 Sept. 2000: B9; Michelle Gotthelf, “Poll: Minorities Fear Police More,” *APBnews.com* 6 April 1999; and Don Barry and Marjorie Connelly, “Poll in New York Find Many Think Police Are Biased,” *The New York Times* 16 March 1999: A1.

⁶⁵ Robert L. Jackson, “Push Against Bias in Traffic Stops Arrested,” *The Los Angeles Times* 1 June 1998: A5.

⁶⁶ Goldberg, *supra* note 55.

⁶⁷ Resolutions of the 106th Annual Conference of the International Association of Chiefs of Police, 29 Oct.-3 Nov. 1999, online at < http://www.theiacp.org/leg_policy/Resolutions/resolutions1999.htm#condprof> .

racial profiling and supported data collection.⁶⁸ Within a period of just two years, there was near-unanimous agreement among police officers, at least publicly, that racial profiling was unethical and inexcusable.

Return to the severity of motive/action model from Chapter 1 and consider the unprecedented public attention that racial profiling has received over the last few years. Between 1986 and 1997, one might assess racial profiling as a practice with severe motives but primarily non-severe actions that went unnoticed by most of the media and the general public. In 1998, however, severe actions – namely, police shootings – alerted the public to a long-standing but long-ignored racial profiling problem in law enforcement. The most severe actions led people to scrutinize the more common police practices, and then to demand an explanation of their motives.

As it turns out, police do have an explanation. But is it justified? I turn next to examine fully the argument in favor of racial profiling, as well as the case against it.

⁶⁸ “Racial Profiling,” Transcript, *NewsHour with Jim Lehrer* (PBS) 13 March 2001, online at < http://www.pbs.org/newshour/bb/race_relations/jan-june01/profiling_3-13.htm > .

3. THEORETICAL FRAMEWORK: EFFICIENCY AND FAIRNESS

It should be clear by now that the issue of racial profiling has undergone a major transformation since 1998: it has become almost a household term, it has attracted the attention of politicians and the media, and public opinion has rallied against it. But are the media attention and public opinion justified, and on what grounds? The practice of racial profiling as well as any policy-based efforts to eliminate it have moral implications and practical consequences, and it is important to develop a theoretical framework within which to analyze the issue.

In contrast to political advocacy and public opinion, a public policy analysis must be developed within a theoretical framework so as to establish a basis for approving or disapproving of certain policies or policy changes. While political participants may wish to declare that a given policy is “bad” and must be changed, or that it is “good” and must be protected, that type of highly-charged political rhetoric is an unhelpful conversation-stopper in the field of public policy analysis. A theoretical framework tends to give serious consideration to both sides of a policy debate, and then to provide a reasonable basis for reaching a policy recommendation or conclusion.

The most common tool applied to public policy questions is cost-benefit analysis, and a common framework developed is the cost-benefit trade-off of efficiency versus fairness. Not surprisingly, this is a powerful theoretical framework for racial profiling. The practice of racial profiling, it could be argued, improves the efficiency of police work, albeit at the significant price of fairness to (minority) individuals;

correspondingly, policies against racial profiling might improve fairness at the price of efficient law enforcement. This chapter will be devoted partly to whether these benefits and costs are real or fictitious, but it is not unreasonable to begin with these claims as a theoretical framework for a policy debate. Later, I will consider objections to a cost-benefit and fairness-efficiency framework.

This approach will give fair consideration to both sides of the racial profiling debate. Opponents of the practice generally argue that it is wrong for the police to treat people differently based on race. Meanwhile, those who defend racial profiling generally argue that police simply act rationally, so as to maximize arrests and do their jobs efficiently, by targeting individuals who are statistically more likely to engage in criminal behavior. In other words, one side would have you believe that if you care about racial fairness, you *must* be against racial profiling, whereas the other side would have you believe that if you care about efficient law enforcement, you *must* support it. What if you care about both, as most people almost certainly do? A cost-benefit analysis will seek to measure the extent to which police efficiency is traded for racial fairness, and will lead to a policy recommendation based on the relative strengths of the efficiency benefit and the fairness cost.

BENEFITS: THE EFFICIENCY ARGUMENT

The strongest and perhaps only reasonable defense of racial profiling is grounded in the principle of efficiency in law enforcement. The job of a police officer, it is argued, is to maximize the ratio of criminals arrested to individuals investigated; if

that goal is best accomplished by using race as a proxy for criminal behavior (since young black men are, it is argued, the most likely demographic to be involved in illegal drug activity), then it is both acceptable and desirable to profile criminals using race as well as other factors. One need only do basic research to confirm that the statistics are in the racial profiler's favor, or so the argument goes: African Americans make up 12% of the population but are the *majority* of those convicted for drug crimes.⁶⁹ Clearly, then, the rational way to maximize drug arrests is to search the cars of black motorists more often than those of white motorists. Indeed, many conservative writers insist that racial profiling is far from unthinkable; rather, it is the only rational means to efficient law enforcement.⁷⁰

Even prominent liberals who have examined the situation thoroughly concede that the racial discrepancies in the crime rate are relevant to the racial profiling debate.

In *No Equal Justice*, David Cole writes:

Although one cannot simplistically equate prison demographics with the demographics of criminal behavior, most criminologists who have studied the matter have concluded that blacks (and men and young people) do in fact commit crime at a higher per capita rate than whites (and women and older people). Thus, all other things being equal, it is rational to be more suspicious of a young black man than an elderly white woman.⁷¹

⁶⁹ Moss and Korobkin, *supra* note 58, ctg. *Data Collection*, *supra* note 59 and accompanying text.

⁷⁰ See John Derbyshire, "The Case for Racial Profiling," *National Review* 19 Feb. 2001; Heather MacDonald, "The Myth of Racial Profiling," *City Journal* Spring 2001; Jackson Toby, "'Racial Profiling' Doesn't Prove Cops Are Racist," *Wall Street Journal* 11 March 1999: A22; and Joseph Wambaugh, "Trust Cops' Intuition," *Wall Street Journal* 19 March 1998: A22.

⁷¹ David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: The New Press, 1999) at 42.

Similarly, Randall Kennedy acknowledges in *Race, Crime, and the Law* that it is “a vexing question” whether police should be permitted to use racial profiles.⁷²

It does no good to pretend that blacks and whites are similarly situated with respect to either rates of perpetration or rates of victimization.... The familiar dismal statistics and the countless tragedies behind them are not figures of some Negrophobe’s imagination. The country would be better off if that were so. Instead, the statistics confirm what most careful criminologists (regardless of ideological perspective) conclude: In fact (and not only in media portrayal or as a function of police bias) blacks, particularly young black men, commit a percentage of the nation’s street crime that is strikingly disproportionate to their percentage in the nation’s population.⁷³

The efficiency argument, in other words, asserts that law enforcement officials must work in the world as it actually is, not how we would like it to be. Sadly, statistical probabilities require rational police officers to pull over more African-American men in order to arrest more drug traffickers – which, after all, is their job. Absent good reasons *not* to maximize drug arrests (some of which I shall consider later in this chapter), police officers interested solely in efficient law enforcement are perfectly justified in using race on the road.

Those who oppose racial profiling often counter the efficiency argument by claiming that statistical probabilities are not what they appear to be. First, they argue, African Americans may commit *violent* crimes more often than whites, but the most reliable surveys indicate that they are only slightly more likely than whites to use drugs.⁷⁴ Second, racial profiling can operate as a self-fulfilling prophecy: it can actually

⁷² Randall Kennedy, *Race, Crime, and the Law* (New York: Pantheon, 1997) at 136.

⁷³ *Id.* at 145. For similar views, see Trende, *supra* note 16 at 358-62.

⁷⁴ Mauer, *Race to Incarcerate*, *supra* note 58 at 147. See also Harris, *Law Enforcement’s Stake*, *supra* note 58 at 15; and *Data Collection*, *supra* note 59 and Moss and Korobkin, *supra* note 58 at 39. It is estimated that blacks are no more than 15% of the country’s drug users; they make up 12% of the population.

cause racial disparities in arrest and incarceration statistics, thereby exacerbating the racial stereotypes that encourage racial profiling in the first place.⁷⁵

There is a third claim which seems the most compelling counterargument to the efficiency argument. Statistics from drug searches *prove* that racial profiling is not an efficient police tactic, it is argued, because even though blacks are far more likely than whites to be searched, *they are no more likely to be found with drugs.*⁷⁶ Racially-biased drug searches yield the same proportion of drug interdictions from blacks as from whites. This was, in fact, the central argument of an op-ed article by two liberal experts in the field, David Cole and John Lamberth, which appeared in *The New York Times* in 2001: “If blacks are carrying drugs more often than whites, police should find drugs on the blacks they stop more often than on the whites they stop. But they don’t.”⁷⁷ The article cites statistics from Maryland, where 73% of motorists searched were black but an equal percentage of whites and blacks (28%) were found to be carrying drugs, as well as data from New Jersey, New York, and the U.S. Customs Service.⁷⁸ “The new news,” they claim, “is that racial profiling doesn’t work.”⁷⁹

But this analysis suffers from some conceptual confusion. If one were to examine “efficiency” from a microeconomic perspective, police searches would have a marginal cost (the cost of each search) and a marginal benefit (the probability of finding contraband). One would expect the marginal cost curve to have zero slope,

⁷⁵ See *supra* note 58 and accompanying text.

⁷⁶ Lamberth, Expert Report, *supra* note 31. Lamberth, “Driving While Black,” *supra* note 31. David Cole and John Lamberth, “The Fallacy of Racial Profiling,” *The New York Times* 13 May 2001: §4.13. See also Harris, *Law Enforcement’s Stake*, *supra* note 58 at 15.

⁷⁷ Cole and Lamberth, *supra* note 76.

⁷⁸ *Id.*

since the cost of each search remains constant no matter how many searches are conducted. The marginal benefit curve, however, would be downward-sloping, as one would expect the police to be more accurate in picking out drug traffickers if they only did a few searches as opposed to if they did many searches. If more blacks than whites are in fact carrying drugs, then at any given number of searches the marginal benefit of searching a black driver would exceed that of searching a white driver. Consequently, “efficiency-minded” police would conduct more searches of black drivers until marginal benefits equal marginal costs for both races – in other words, until the hit rates for both races are the same. (See Figure 3.) Therefore, Cole and Lamberth’s claim that unequal search rates and equal hit rates reflect inefficient policing is mistaken; on the contrary, efficiency *requires* that the hit rates be equal even when the search rates are not.

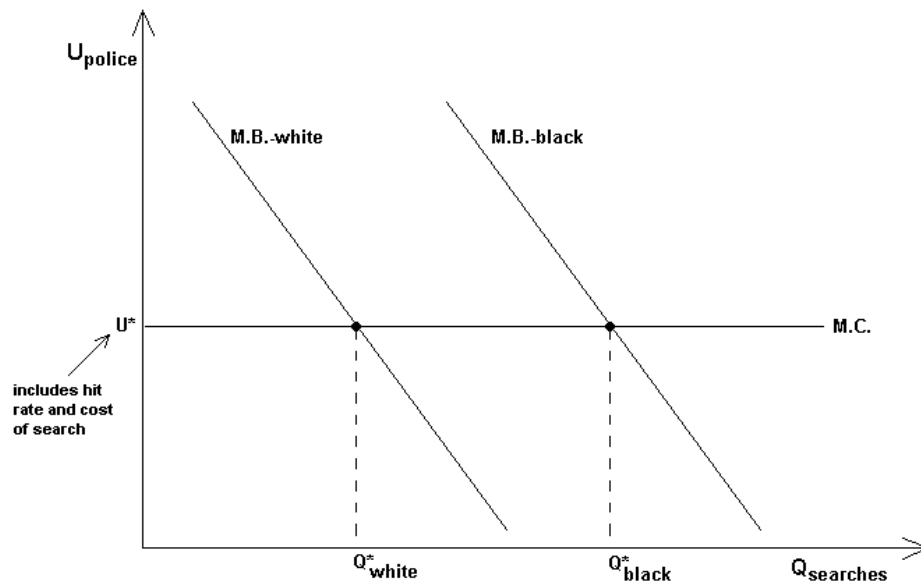


Figure 3. Efficiency in Law Enforcement I

⁷⁹ *Id.*

Admittedly, the microeconomic model I just described includes two important assumptions. The first is that police officers are able to rank-order suspected drug traffickers, such that the hit rate diminishes as more searches are conducted. If motorists, black or white, were searched randomly, then the hit rate would remain the same no matter how many people were searched because it would reflect the true probability that any individual were trafficking drugs. Instead, this model assumes that the hit rate will diminish because police are more likely to find a drug dealer in their eighth search than in their eightieth.

The second assumption is that the average marginal benefit of stopping an African-American driver is greater than the average marginal benefit of stopping a white driver. Under the model described, *efficient* police behavior requires that this be the case if the police are searching blacks more than they are searching whites and they are generating the same hit rates. But if the police are not behaving efficiently, then they might search blacks more regardless of the marginal benefit of each search. Thus, this model must either presuppose efficient behavior in order to prove differential marginal benefits, or else presuppose differential benefits in order to prove efficiency.

These two assumptions, however, are not problematic, because they are supported by data from the Cole-Lamberth article and the Maryland State Police. Recall the first assumption, diminishing hit rates. Cole and Lamberth report that when the U.S. Customs Service searched fewer people in 2000, its hit rates rose

dramatically.⁸⁰ Cole and Lamberth intend to show that conducting fewer searches improves efficiency, but the real conclusion to draw is that hit rates diminish as more searches are conducted – meaning that equal hit rates with unequal search rates reflect unequal drug-trafficking rates.

Now consider the second assumption, a higher marginal benefit of stopping black motorists. According to data from the Maryland State Police, even if the hit rates for blacks and whites were the same, the average *quantity of drugs* seized was not. On average, blacks carried far higher quantities of drugs than whites.⁸¹ (See Figure 4.) The inverse relationship between quantities and hit rates is clear: police were willing to incur larger total costs searching blacks than whites (that is, search more of them) because the payoff, in terms of quantities of drugs seized, was so much greater. Thus it would make sense, from an efficiency point of view, for the police to search more blacks than whites, even if the hit rates were the same.

	HIT RATE	AVG. QUANTITY SEIZED
Whites	26.3%	0.1 g
Blacks	25.3%	111 g
Hispanics	14.2%	265 g

Figure 4. Drugs Seized: Hit Rates and Quantity

⁸⁰ *Id.* “In 2000, it conducted 61 percent fewer searches than in 1999.... Hit rates for whites and blacks increased by about 125 percent ... while hit rates for Latinos increased more than fourfold.”

⁸¹ George C. Thomas III, *Blinded by the Light: How to Deter Racial Profiling: Thinking About Remedies* 3 Rutgers Race & L. Rev. 39, 41-42 (2001).

The model I described should only be taken for what it is: a theoretical model, and not a complex empirical study, or proof of what truly motivates police behavior. I do not intend to claim that every police officer represents *homo economicus*, committed to using her resources efficiently and conducting the exact number of searches that will yield the greatest marginal benefit at the lowest marginal cost. But the model does point to a conceptual distinction, highlighted in economics literature, between statistical discrimination, when an agent has no racial animus but treats races differently in order to maximize desired (non-racial) outcomes, and racial prejudice, when an agent treats races differently because discrimination itself is part of her utility function.⁸² It appears that equal hit rates reflect statistical discrimination, while hit rates that are *lower* for minorities than for whites reflect racial prejudice.⁸³ Furthermore, the model suggests that the Cole-Lamberth interpretation of the Maryland hit rates is not the correct one, and that an efficiency rationale does exist for the police to engage in racial profiling.

A second model to consider briefly assigns efficient utility-maximizing behavior to motorists in addition to the police. Just as in the previous model, the police will search both races at equilibrium levels of marginal costs and marginal benefits. But according to this model, presented in the *Journal of Political Economy*, if yields were higher for one race over another, then “police would always search these motorists,

⁸² John Knowles, Nicola Persico and Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence* 109 *J. Pol. Economy* 203, 205 (2001), ctd. Kenneth J. Arrow, “The Theory of Discrimination” in *Discrimination in Labor Markets*, ed. O. Ashenfelter and A. Rees (Princeton: Princeton Univ. Press, 1973) and Gary S. Becker, *The Economics of Discrimination* (Chicago: Univ. Chicago Press, 1957).

⁸³ According to Knowles, et al., *supra* at 208, this counterintuitive idea that “tastes for discrimination lead to lower profits for the discriminators originated with Becker.”

who would in turn react by carrying contraband less often, until the returns to searching are equalized across groups.”⁸⁴ According to this theory, then, motorists will consider the probability of being searched before they engage in drug trafficking, and they too will behave at equilibrium levels of marginal cost and marginal benefit. If African Americans derive a greater marginal benefit from drug trafficking than whites (this would be their higher preference or propensity for drug trafficking due to any number of reasons, such as fewer employment opportunities) *and* they are more likely to be searched by police, then they would respond to the higher search likelihood by choosing to engage in drug trafficking less often. (See Figure 5.) According to this model, both the police and drug traffickers would behave efficiently: the police by doing more searches on groups with a higher propensity to traffic in drugs, and the motorists by carrying drugs at equal rates. Equal hit rates in this model reflect the fact that the unequal search rates “cancel out” the higher propensity of one group to engage in drug trafficking.

This model is more problematic than the first, for it contains three related assumptions which are difficult to verify. The first is the assumption that drug traffickers are self-interested rational agents, capable of modifying their behavior in response to the probability of being searched. The second is the assumption that blacks have a higher preference for drug trafficking than whites, prior to modifying their behavior in response to police activity. The third is the assumption that equal hit rates reflect the true proportions of each sub-group population engaging in drug

⁸⁴ Knowles, et al., *supra* note 82 at 206.

trafficking, rather than a higher proportion due to the ability of police officers to rank-order drug trafficking suspects. Since it is so difficult to verify these controversial assumptions independently, the efficient-criminals model is less convincing than the efficient-police model.⁸⁵

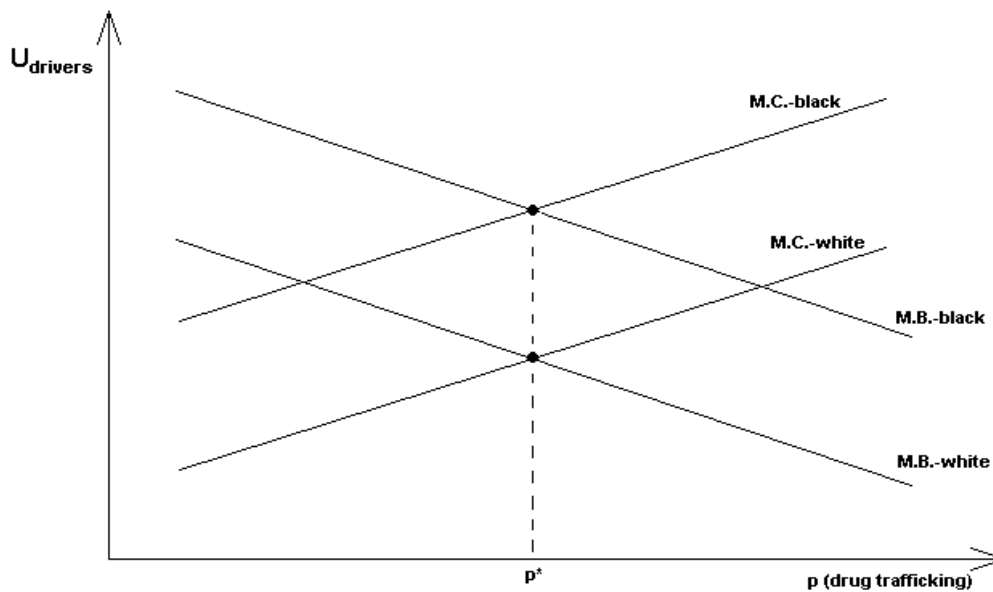


Figure 5. Efficiency in Law Enforcement II

In summary, the major benefit of racial profiling is its contribution to efficiency in law enforcement. While it is difficult to determine whether police are always acting efficiently, the first model demonstrates that an efficiency argument can

⁸⁵ For other objections to the Knowles study, see David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Seizure Without Cause* 3 U. Pa. J. Const. L. 296, 312 (2001): “The study is objectionable on both methodological and legal grounds.”

be made for racial profiling, in contrast to Cole and Lamberth's claim. There is a second model, which also attempts to justify racial profiling on efficiency grounds, but it is less plausible than the first.

COSTS: THE FAIRNESS ARGUMENT

I now turn to the costs of racial profiling, or the individual fairness argument. In some ways, this argument is a relatively simple one and needs little justification. After all, regardless of the extent to which racial profiling benefits efficiency in law enforcement, it is difficult to deny that a law-abiding individual who is treated with more suspicion by police officers because of the color of her skin has a legitimate complaint about the unfairness of her situation. One's basic expectation in a free society is to be treated fairly by one's own government, and being the victim of racial profiling cuts against that expectation. But it is also important to move beyond intuitive notions of fairness and basic expectations: to locate the concern for fairness within our political system and political theory, and to consider some of the social costs of unfairness which the efficiency argument neglects.

As the theme of this theoretical framework discussion might suggest, it is not inconsistent to concede some efficiency benefit to racial profiling but still believe the practice is unfair to (minority) individuals. In fact, many claim that it is so unfair as to outweigh very clearly its contribution to efficiency in law enforcement. Consider David Cole, quoted above as acknowledging that "all other things being equal, it is

rational to be more suspicious of a young black man than an elderly white woman.”⁸⁶ Cole goes on to argue, “But that it may be rational does not make it right,” citing historical and legal reasons for dismissing the efficiency argument.⁸⁷ Randall Kennedy, also quoted above as conceding the statistical rationality of racial profiling,⁸⁸ joins Cole in his condemnation of the practice overall. Why? “The heart of the answer lies in the special significance of racial distinctions in American life and law,” Kennedy writes. “*Race is different.*”⁸⁹ Like Cole, Kennedy points to legal distinctions, informed by history, that weigh against trade-offs of individual fairness for efficiency, especially when it comes to race.

I would highlight three related sources of this conception of racial fairness in American life. The first is historical: the ugly legacy of racism and unequal treatment under the law makes any policy compromising fairness for efficiency immediately suspect.⁹⁰ The second is the constitutional manifestation of this principle, the Equal Protection Clause of the Fourteenth Amendment, which requires that race-conscious policies serve a compelling state interest – a far higher standard than mere statistical efficiency – in order to pass constitutional muster.

The third is the theoretical concept, familiar in political philosophy and public economics, of a social welfare function.⁹¹ Consider a model of society with only two members, A and B, and their total utility (i.e. happiness) in society. (See Figure 6.)

⁸⁶ *Supra* note 71 and accompanying text.

⁸⁷ Cole, *supra* at 42.

⁸⁸ *Supra* notes 72-73 and accompanying text.

⁸⁹ Kennedy, *supra* at 146, original emphases.

⁹⁰ Trende, *supra* note 16 at 362-63.

One can safely assume that in a society with scarce resources, the utility possibility frontier slopes downward, such that if all resources are being used efficiently then making A more happy will necessarily make B less happy, and vice-versa. Moreover, from any point below the utility possibility frontier (point A) it is safe to say that a reallocation of utility northeast (quadrant I) is socially desirable (both parties are made better off) whereas a reallocation of utility southwest (quadrant III) is socially undesirable (both parties are made worse off). What cannot be known, without information about this society's social welfare function, is whether reallocations to quadrants II or IV are socially acceptable, as they will each make one member of society better off at the expense of the other.

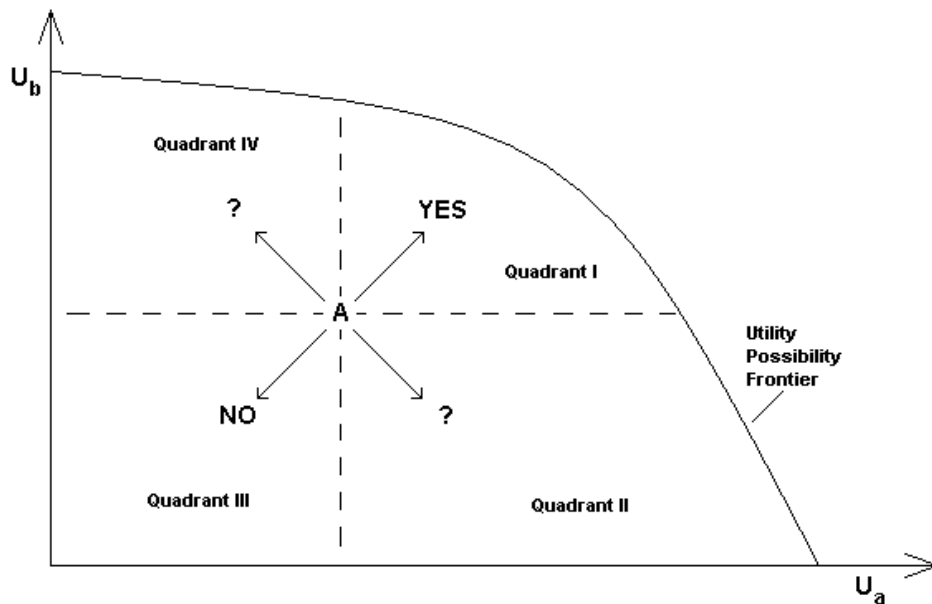


Figure 6. The Need for a Social Welfare Function

⁹¹ See Harvey S. Rosen, *Public Finance*, 5th ed. (Boston: McGraw-Hill, 1999): 44-49, 146-54; and Lee S. Friedman, *Microeconomic Policy Analysis* (New York: McGraw-Hill, 1984): 43-47.

To examine society's social welfare function, one must include indifference curves, which help indicate what types of utility reallocations make a society better or worse off overall. Any two points along the same indifference curve make no difference in the overall welfare of society, whereas all points above an indifference curve represent greater social welfare and all points below represent less social welfare. In a utilitarian social welfare function, social welfare is the sum of all utility, such that the indifference curves are 45-degree lines and a reallocation of utility is socially desirable if and only if one person is made *more* better off than the other person is made worse off. (See Figure 7a.) In a maximin (Rawlsian) social welfare function, in contrast, society is only as well off as its worst off member: indifference curves are 90-degree angles and a reallocation of utility is socially desirable if and only if one person is made better off without the other person being made worse off. (See Figure 7b.)

The social welfare function models can be used to analyze racial profiling in a fairness-based theoretical framework, because A and B can be made to represent groups of people in society, such as whites and African Americans, instead of individuals. In such a model, the combined utility of each group's members increases if they are subject to a lower proportion of stops/searches and decreases if they are subject to a greater proportion; thus, stopping/searching one group at a higher rate necessarily increases the utility of the other group, and vice-versa. In the context of racial profiling, any gain in utility by one group (whites) comes at the price of a loss in utility by another group (African Americans). A utilitarian social welfare function

would permit that as long as the gain were greater than the loss, but a maximin welfare function would not.⁹²

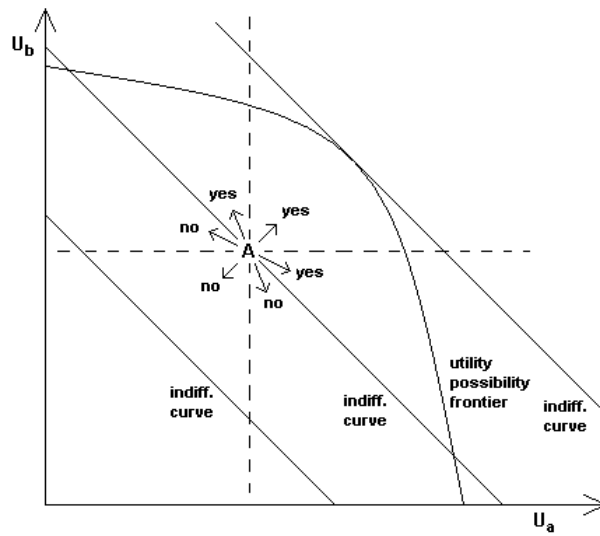


Figure 7a. Utilitarian Social Welfare Function

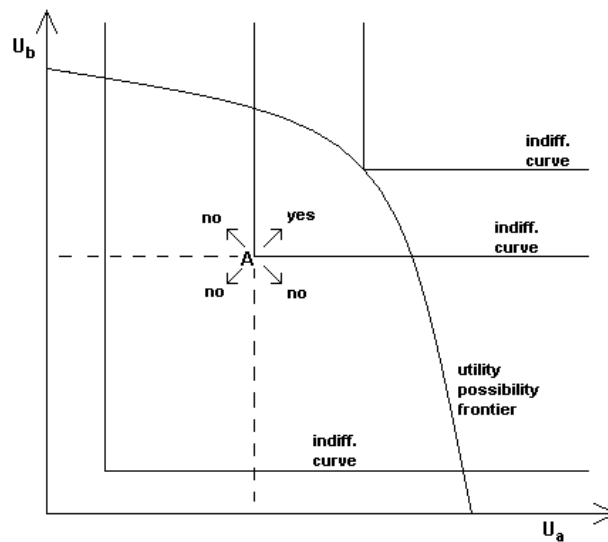


Figure 7b. Maximin (Rawlsian) Social Welfare Function

⁹² For a similar discussion contrasting Bayesian and contractarian approaches to racial profiling, see

What sort of social welfare function best represents our shared conception of fairness in liberal democratic society? It would have to be closer to the maximin function than the utilitarian function, since we would say, in general, that it is unfair to trade off any one individual's utility for that of someone else – even if the gainer of utility gained more than the loser lost.⁹³ The philosopher John Rawls has made a famously powerful argument (outside the context of racial profiling) in favor of the maximin social welfare function,⁹⁴ and his argument includes the distinction between the rational and the reasonable touched upon by Cole and Kennedy above. According to Rawls, if we could rationally choose a conception of justice from an “original position” – absent our knowledge of both our social position in life and our personal tastes and preferences – then we would choose a conception of justice that incorporates the maximin principle.⁹⁵ Any deviation from that principle subsequent to our departure from the original position (for selfish purposes, say, or for the sake of efficiency) might be *rational*, as Cole and Kennedy acknowledge, but, because we would not approve of it from the original position, it would not be *reasonable*. Seen from this perspective, efficiency in law enforcement makes racial profiling rational, but fairness makes it unreasonable. Simply put, we would never choose to live in a

Howard McGary, “Police Discretion and Discrimination” in Kleinig, *supra* note 6 at 134.

⁹³ An example involving racial justice is the set of regulations involving insurance premiums: “[S]tate and federal laws uniformly prohibit race from being used as a factor in making actuarial calculations, despite the fact that, from the insurance industry’s perspective, it would be a useful predictive criterion.”

Kennedy, *Race, Crime, and the Law*, *supra* note 72, at 147 fn.

⁹⁴ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard Univ. Press, 1971, rev. ed. 1999). See also Rawls, *Political Liberalism* (New York: Columbia Univ. Press, 1993) and Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, Mass.: Harvard Univ. Press, 2001).

⁹⁵ *Id.*

society whose conception of justice permitted racial profiling if we did not know in advance whether we would be victimized by it.

Like the efficiency model, it is important to keep the Rawlsian model in perspective. It is unrealistic to expect that all aspects of society be run strictly according to the maximin principle, just as it would be unrealistic to expect that police officers always operate with efficiency as their chief goal. But Rawls makes a convincing argument that the maximin principle is an essential component of justice in our society, a conception of justice he calls “justice as fairness.” And if we are to expect that the government aspire to treat racial issues *fairly* more than *efficiently*, as the historical and constitutional arguments suggest it should,⁹⁶ then it is incumbent upon police agencies to use something close to the Rawlsian social welfare function in their stop-and-search practices.

The fairness argument is only strengthened by the presence of additional costs, associated with loss of fairness in this context, that racial profiling entails. In addition to violating basic principles of fairness, racial profiling can have deleterious psychological, social and economic effects on its victims.⁹⁷ Racial profiling is likely to have a negative effect on community relations between minorities and the police, and members of those communities are less likely to have confidence that the police protect them rather than harass them.⁹⁸ Finally, racial profiling is subject to the

⁹⁶ See *supra* notes 87-88 and accompanying text.

⁹⁷ David Wasserman, “Racial Generalizations and Police Discretion” in Kleinig, *supra* note 6 at 119. See also David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters* 84 Minn. L. Rev. 265, 269 (1999).

⁹⁸ Cole, *supra* note 71 at 170; Harris, *The Stories, the Statistics, and the Law*, *supra* at 307-309; and Trendle, *supra* note 16 at 362-63.

“slippery slope” argument: even if police can justify some level of racial profiling on efficiency grounds, the likelihood that police will over-rely on racial profiling to conduct stops and searches, coupled with the likelihood that bigoted police officers will manifest their prejudice under the pretense of official duties, make racial profiling too dangerous a practice to endorse even to a limited extent and even given efficiency justifications.⁹⁹ In short, the efficiency benefits of racial profiling are outweighed by the fairness costs.

CAVEATS

Briefly, the cost-benefit breakdown constitutes more than simple efficiency benefits and fairness costs. While the theoretical framework I have discussed in this chapter can be generally summarized as such, there are exceptions to both arguments. Some have argued, for instance, that racial profiling hinders efficient law enforcement; others claim that it supports fairness. Additionally, there is the possibility that the cost-benefit framework itself may be inappropriate for this issue.

I will begin with the principal exception to the efficiency argument. As discussed above, the costs associated with a loss of fairness include a breakdown in trust between minority communities and the police. This is surely a cost borne by the members of those communities, as is the loss of fairness. But it is also a cost borne by the police in those communities who seek to maximize arrests and convictions. It has been suggested that this breakdown in trust can lead to race-based jury nullification, as

⁹⁹ Wasserman, *supra* note 97 at 119.

African-American jurors might not believe the testimony of police officers in criminal trials and might be inclined to compensate for unfair police practices by acquitting defendants they would otherwise convict.¹⁰⁰ In other words, police who think they are being efficient by stopping and searching minorities at higher rates may actually be contributing to an efficiency loss by harming their relationship with the communities they serve. Without the support of the public, law enforcement officers have a much tougher job.

On the other hand, some argue that racial profiling might actually benefit minority communities, not harm them. According to the “urban frustration” argument, many African Americans who are poor and live in the inner city would prefer that the police concentrate on their neighborhoods more, not less.¹⁰¹ Since criminals are most likely to affect individuals of their own racial group in their own communities, it would make sense for low-income minorities to be more frustrated by crime than whites.¹⁰² This throws a wrench in the utility model associating more racial profiling with less utility for African Americans; in fact, blacks as a group might *benefit* from the increased efficiency in law enforcement that racial profiling could bring about, and individuals within those communities might be willing to sacrifice some of their civil liberties in exchange for safer neighborhoods.¹⁰³ Thus, the racial

¹⁰⁰ Harris, *Law Enforcement's Stake*, *supra* note 58 at 19.

¹⁰¹ Richard R. W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities* 73 S. Cal. L. Rev. 1219, 1221 (2000).

¹⁰² *Id.* at 1220.

¹⁰³ *Id.* at 1230. But Brooks contends that public opinion surveys do not, in fact, support the argument that inner-city African Americans would prefer differential enforcement to high crime.

fairness “cost” of racial profiling might be seen as a cost to some individuals but a benefit to entire minority communities.¹⁰⁴

Lastly, two related arguments could be made against a cost-benefit analysis in general for this type of public policy issue. First, public policy costs and benefits are normally quantifiable, whereas this discussion has been almost entirely qualitative in nature. The advantage of a quantitative cost-benefit analysis is that the sum of the costs and benefits, if inclusive of all externalities, quite clearly determines the policy recommendation. But the qualitative method used in this chapter naturally relies on more subjective analyses of the relative strength of each cost and each benefit. Second, it could be argued that the very nature of a rights-based constitution forbids the use of cost-benefit analysis when constitutional rights are at stake, since rights are designed either to “trump”¹⁰⁵ other policy concerns or to act as “exclusionary reasons”¹⁰⁶ not to be weighed against other reasons.

Both these arguments can be supported by the historical example of *Korematsu v. United States*,¹⁰⁷ in which the Supreme Court upheld the segregation of Japanese Americans in detention camps during World War II on the grounds that Equal Protection violations were overcome by a compelling state interest during wartime.¹⁰⁸ In that case, the Court used an analysis similar to cost-benefit: constitutional rights could be overcome by other policy concerns, and their strength was to be determined

¹⁰⁴ See Arthur Isak Applbaum, “Response: Racial Generalization, Police Discretion, and Bayesian Contractualism” in Kleinig, *supra* note 6 at 157. Applbaum distinguishes a safety-respect trade-off from an efficiency-rights trade-off.

¹⁰⁵ See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard Univ. Press, 1977).

¹⁰⁶ See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986): 35.

¹⁰⁷ *Korematsu v. United States*, 323 U.S. 214 (1944).

by the subjective, qualitative evaluation of a nation overwhelmed by war. History, of course, has judged the *Korematsu* decision wrong-headed both in form and in substance, and its error serves as a warning to others who would apply cost-benefit logic to policies where constitutional rights are at stake.

These exceptions and objections to the cost-benefit, fairness-efficiency framework are legitimate concerns, though I do not believe they threaten the overall integrity of the theoretical framework. First, the efficiency loss experienced by police when they lose the trust of minority communities is a real phenomenon, but it is no more a problem now than it has been for decades; thus, the stop-and-search efficiency model should incorporate that drawback into its marginal benefits and costs. Second, the extent to which racial profiling may benefit the communities in which it occurs (by lowering crime in those areas) is part of a larger trade-off between respect and safety; it has no bearing on the costs of racial profiling to the notion of fairness to *individuals*. Lastly, the *Korematsu* decision may be an example of a cost-benefit analysis gone wrong, but in the context of most public policy it is difficult to refute the usefulness of the cost-benefit analysis tool itself. As this chapter has made clear, there are in fact real trade-offs in most policy debates, even those involving race, rights and fairness, and only a complete consideration of the trade-off between efficiency and fairness can justify a policy preference in favor of the latter.

Of course, any *change* in policy will have its own costs and benefits. Even if, as I have argued in this chapter, the costs of racial profiling outweigh the benefits, there is

¹⁰⁸ Kennedy, *Race, Crime, and the Law*, *supra* note 72 at 138-39.

no guarantee that the benefits of any proposed policy remedies will outweigh the costs. But before I turn to the quintessential policy-making bodies, the legislatures, I need to examine the role of the courts, which are also policy-makers, in sustaining this debate.

4. THE COURTS: PASSING THE BUCK

Legal challenges to racial profiling have looked primarily to the Fourth and Fourteenth Amendments to the Constitution, though state constitutions and federal civil rights laws have been invoked as well. The Fourth Amendment, which protects individuals from “unreasonable searches and seizures,” limits the discretion of police to stop, question, frisk and search citizens, and the Fourteenth Amendment, which guarantees the “equal protection of the laws,” limits the ability of law enforcement to discriminate based on race.¹⁰⁹ Racial profiling claims, however, encounter heavy burdens under the courts’ search-and-seizure and Equal Protection doctrine. In recent years, the Supreme Court has all but closed the books on claims based on the Fourth Amendment. Equal protection and state constitutional claims may still be open to consideration by some courts, but these claims face high hurdles and an uncertain future.¹¹⁰

Pertinent to current legal doctrine in this field is the distinction between *motive* and *action* I introduced in Chapter 1 and continued to discuss in Chapter 2. In Fourth Amendment cases, the Supreme Court has been unwilling to consider the *motive* (or “subjective intentions”) of police officers, as long as they act under objectively reasonable circumstances. But in Fourteenth Amendment cases, it is the *action* (or impact) of the police, which the courts are often unwilling to consider, as long as the

¹⁰⁹ U.S. Const., amends. IV, XIV.

¹¹⁰ See generally Patrik Jonsson, “Courts Balk at Limiting Racial Profiling,” *The Christian Science Monitor* 6 July 2001: 1; Rudovsky, *supra* note 85 at 296; David A. Harris, *The Stories, the Statistics, and the Law*, *supra* note 97; David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 *Geo. Wash. L. Rev.* 556 (1998); and Harris, “*Driving While Black*” and *All Other Traffic Offenses*, *supra* note 19.

officer’s intent is not proved particularly pernicious. At first glance, one might imagine that the court has covered all bases: the Fourth Amendment takes care of action and the Fourteenth Amendment takes care of intent. In fact, however, the opposite is true. Under the Fourth Amendment, the court demands evidence of wrong *action* where evidence for racial profiling is strongest for *motive*, while under the Fourteenth Amendment the court demands evidence of wrong *motive* where evidence for racial profiling is strongest for *action*. (See Figure 8.) As a result, even good evidence of racial profiling can prove ineffective in the courtroom. This will become clear as I review the case law below.

	RACIAL PROFILING EVIDENCE	SUPREME COURT DOCTRINE
4TH AMEND.	Motive/Intent	Action/Impact
14TH AMEND.	Action/Impact	Motive/Intent

Figure 8. Supreme Court Doctrine: Motive and Action

FOURTH AMENDMENT ANALYSIS

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”¹¹¹ but the Supreme Court has long recognized an “automobile exception” to the normal Fourth Amendment requirement that law enforcement officials obtain a warrant

before conducting a search. In *California v. Carney* (1985), the court reviewed this long-standing exception: “In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of *probable cause* is met.”¹¹² Additionally, the court held in *Terry v. Ohio* (1968) that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person” within the meaning of the Fourth Amendment,¹¹³ and in *Delaware v. Prouse* (1979) the court declared that police officers cannot order drivers to stop their cars absent “probable cause” for believing they have violated the traffic code or “reasonable suspicion” that they are engaging in some other illegal activity.¹¹⁴ The *Carney-Terry-Prouse* framework balances a motorist’s interest in privacy with the state’s interest in effective law enforcement absent the opportunity to obtain a warrant for search and seizure.

Where do racial profiling “pretext stops” fit into this context? That is, what does the Fourth Amendment have to say about a police officer whose real reason for stopping a (black) driver is not based on reasonable suspicion, but who happens to have probable cause to make the stop for a minor traffic violation? The Supreme Court addressed that question in 1996 in *Whren v. United States*.¹¹⁵ In *Whren*, plain-clothed District of Columbia police officers were patrolling a “high drug area” in an

¹¹¹ U.S. Const., amend. IV.

¹¹² 471 U.S. 386, 392 (emphasis added), reviewing *Carroll v. United States*, 267 U.S. 132 (1925) and *South Dakota v. Opperman*, 428 U.S. 364 (1976). See Harris, *The Stories, the Statistics, and the Law*, *supra* note 97 at 310; and Harris, *Car Wars*, *supra* note 110 at 565-66.

¹¹³ 392 U.S. 1, 16.

¹¹⁴ 440 U.S. 648, 661.

unmarked car when they observed “a dark Pathfinder truck with temporary license plates and youthful occupants” wait too long at a stop sign and then abruptly turn away at a high speed and without signaling.¹¹⁶ The officers followed the truck, ordered the driver to stop, and observed crack cocaine through the windows in plain view.¹¹⁷ At their trial, the defendants, who were black, claimed that the evidence had been collected in violation of the Fourth Amendment, since the arresting officers had no reasonable suspicion that the defendants possessed drugs but were using the minor traffic violations, for which they had probable cause, as a pretext for a drug search.¹¹⁸ The defendants argued that the traffic code is so expansive that it is virtually impossible to drive without continually committing technical violations, and that given only the technical violations for which the officers in this case had probable cause, no reasonable officer in the same situation would have made the stop.¹¹⁹

The Supreme Court did not contest either of these claims when they heard *Whren*, but the defendants still lost their case. Writing for a unanimous court, Justice Scalia declared that the appropriate Fourth Amendment standard was whether reasonable officers *could* have made the stop, not whether they *would* have done so. The reasonableness standard did not depend on the “actual motivations of the individual officers involved.... Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”¹²⁰ Furthermore, if those subjective

¹¹⁵ 517 U.S. 806.

¹¹⁶ *Id.* at 808.

¹¹⁷ *Id.* at 809.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 810.

¹²⁰ *Id.* at 813.

intentions included race, then that point must be litigated under the Fourteenth Amendment, not the Fourth Amendment.¹²¹ In other words, there is nothing unconstitutional, in terms of the Fourth Amendment, with a pretext stop, because the only thing wrong with it is the police officer's personal motives, not her objective actions. *Whren* has thus effectively closed the books on Fourth Amendment challenges to racial profiling pretext stops, because the police can always name *some* traffic violation a driver has committed and use it as an excuse to stop any driver for any reason.¹²²

The Supreme Court has made a number of other decisions in the last few years which seem to hammer a few more nails into the Fourth Amendment coffin. In *Ohio v. Robinette* (1996),¹²³ the court ruled 8-1 that police officers who do not have probable cause but ask drivers for consent to conduct a search are not required to inform them that they are in fact free to go. Declaring that “the touchstone of the Fourth Amendment is reasonableness”¹²⁴ and that “[r]easonableness, in turn, is measured in objective terms by examining the totality of the circumstances,” the court concluded that, although the “Fourth Amendment test for a valid consent to search is that the consent be voluntary,” it would be “unrealistic to require police officers to always inform detainees that they are free to go before a consent search may be deemed voluntary.”¹²⁵ Just as the subjective intent of the police officer is irrelevant in *Whren*,

¹²¹ *Id.*

¹²² See Harris, “*Driving While Black*” and *All Other Traffic Offenses*, *supra* note 19 at 557-59.

¹²³ 519 U.S. 33, *affirming* *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

¹²⁴ 519 U.S. 33, 39, *ctg.* *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

¹²⁵ 519 U.S. 33, 40.

the subjective condition of the driver is irrelevant in *Robinette*; as long as the “totality of the circumstances,” objectively considered, meets a certain standard of “reasonableness,” then the Fourth Amendment has not been violated.

This line of reasoning seems to go against the spirit of constitutional guarantees the court has articulated in other significant cases. The conditions under which one may plead guilty, provide information under custodial interrogation, appear in a lineup, or even renounce one’s citizenship must be “knowing, intelligent and voluntary.”¹²⁶ In fact, the fundamental basis for the famous requirement that police inform suspects of their Miranda rights, a requirement reaffirmed by the Supreme Court in 2000,¹²⁷ is that citizens ought to know about the rights they have before they can surrender them.¹²⁸ As Justice Goldberg wrote in a 1964 right-to-counsel decision, “No system of criminal justice can, or should survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights.”¹²⁹ In *Robinette*, however, the Supreme Court has basically conceded that a waiver of one’s rights need not be “knowing and intelligent” in order to be voluntary. In *No Equal Justice*, David Cole captures the implications of this decision for racial profiling: “The current system creates two Fourth Amendments – one for people who are aware of their right to say no and confident enough to assert

¹²⁶ Cole, *supra* note 71 at 28, *ctg.* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *McCarthy v. United States*, 394 U.S. 459 (1969), *Boykin v. Alabama*, 395 U.S. 238 (1969), *Afroyim v. Rusk*, 387 U.S. 253 (1967), *Vance v. Terrazas*, 444 U.S. 252 (1980), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹²⁷ *Dickerson v. United States*, 530 U.S. 428 (2000).

¹²⁸ See *Miranda*, *supra* note 126 at 444: “Prior to any questioning, [a] person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.”

that right against a police officer, and another for those who do not know their rights or are afraid to assert them.”¹³⁰

Two Fourth Amendments, so to speak, were also affirmed by the court in *City of Indianapolis v. Edmond* (2000)¹³¹ and *Atwater v. City of Lago Vista* (2001).¹³² In *Edmond*, the Supreme Court held that a highway checkpoint program which indiscriminately stopped vehicles so that drug-sniffing dogs could inspect them for narcotics constituted an unreasonable search and seizure under the Fourth Amendment. But the court upheld its earlier decision in *United States v. Place* (1983)¹³³ that, given reasonable suspicion needed for a *Terry* stop, drug-sniffing by a narcotics dog did not constitute a search under the Fourth Amendment. *Edmond*, then, created another Fourth Amendment double standard: police cannot subject the population as a whole to drug-sniffing, but they can use their subjective intentions, consistent with the *Whren* “could have” standard, to subject a few unlucky individuals to the procedure.

Similarly, *Atwater* affirms the Fourth Amendment’s role in limiting the objective circumstances, but not the subjective intentions, under which police officers may act. The court in *Atwater* held 5-4 that a police officer could make a full custodial arrest for a minor traffic offense, such as failure to wear a seatbelt, without violating the Fourth Amendment. Significantly, Justice O’Connor, usually in the conservative camp of the court, dissented from *Atwater* in part because of its likely consequences

¹²⁹ *Escobedo v. Illinois*, 378 U.S. 478 (1964). See Cole, *supra* note 71 at 31.

¹³⁰ Cole, *supra* note 71 at 31.

¹³¹ 531 U.S. 32.

¹³² 532 U.S. 318.

¹³³ 462 U.S. 696.

for certain motorists: “Such unbounded discretion carries with it grave potential for abuse.... Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.”¹³⁴ The O’Connor dissent may signal a growing awareness by some of the justices that an intent-blind Fourth Amendment doctrine can, for certain citizens, undermine the very protection it was designed to provide. Still, the *Atwater* decision, coupled with *Edmond*, *Robinette* and *Whren*, leaves almost no room for racial profiling claims under the Fourth Amendment.

These cases do point to a role for the legislature in search-and-seizure issues. In *Atwater*, the majority decision acknowledges that many states

have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses.... It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle.¹³⁵

Significantly, Justice O’Connor, who wrote the dissent in *Atwater*, is the only justice to have served previously as a lawmaker.¹³⁶ It is likely that the majority wishes to defer to legislatures the task of restricting police activities when necessary, while O’Connor may recognize the difficulty a legislature might have, given electoral accountability, in restricting police activities without a constitutional mandate. Nevertheless, lawmakers have been invited to take action.

¹³⁴ *Atwater*, *supra* note 132 at 589 (O’Connor, J., dissenting).

¹³⁵ *Id.* at 576. The court cites laws in Alabama, California, Kentucky, Louisiana, Maryland, South Dakota, Tennessee and Virginia.

FOURTEENTH AMENDMENT ANALYSIS

The *Whren* decision directed concerns regarding racial bias in pretext stops to Fourteenth Amendment jurisprudence: the “constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”¹³⁷ That clause guarantees that “[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws.”¹³⁸ But the court took no notice of how difficult claims under the Equal Protection Clause have become. Racial profiling violates the Fourteenth Amendment in theory, but in practice the victim must carry a heavy burden of proof.

Relevant Equal Protection doctrine begins with *Washington v. Davis* (1976)¹³⁹ and *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977),¹⁴⁰ which held that in order for government action to be unconstitutional under the Equal Protection Clause, it must be discriminatory both in effect and in purpose. Disproportionate impact “is not irrelevant, but it is not the sole touchstone of invidious discrimination,” the court wrote.¹⁴¹ “Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”¹⁴² Only a successful showing of both disparate impact and discriminatory purpose will trigger what is known as strict scrutiny, which prohibits racial discrimination unless

¹³⁶ Justice O’Connor “was appointed to the Arizona State Senate in 1969 and was subsequently reelected to two two-year terms.” Supreme Court of the United States, Biographies of Current Members of the Supreme Court, online at < <http://www.supremecourtus.gov/about/biographiescurrent.pdf>> .

¹³⁷ *Whren*, *supra* note 115 at 813.

¹³⁸ U.S. Const., amend. XIV.

¹³⁹ 426 U.S. 229.

¹⁴⁰ 429 U.S. 252.

¹⁴¹ *Davis*, *supra* note 139 at 242.

“narrowly tailored to serve a compelling governmental interest.”¹⁴³ In general, a government policy or practice containing an “express racial classification” – an explicit statement of race-based treatment – may proceed directly to strict scrutiny analysis; otherwise, plaintiffs must normally rely on statistical evidence to establish disparate impact and then non-statistical evidence to prove intent.¹⁴⁴ Thus, a racial profiling complaint under the Fourteenth Amendment must prove intentional discrimination in addition to a racially disparate impact.¹⁴⁵ Thus, a study (such as those from New Jersey and Maryland¹⁴⁶) showing that minorities are statistically more likely to be stopped and searched than whites might be one way to establish a disparate *impact* claim, but it does not prove discriminatory intent.

In addition to *Davis* and *Arlington Heights*, racial profiling litigation follows four important Equal Protection cases of the 1980s and 90s, two of which established successful Equal Protection claims and two of which did not.¹⁴⁷ The successful cases were *Batson v. Kentucky* (1986),¹⁴⁸ in which a prosecutor’s exclusion of African

¹⁴² *Arlington Heights*, *supra* note 140 at 265.

¹⁴³ See Rudovsky, *supra* note 85 at 322, *ctg. Adarand v. Peña*, 515 U.S. 200, 227 (1995) and *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993).

¹⁴⁴ See Rudovsky, *supra* at 322. On rare occasions statistical evidence alone may serve to prove intent, though this has been recognized by the court only in jury selection and redistricting cases. See *Chavez v. Illinois State Police*, 251 F.3d 612, 647 (7th Cir. 2001), *ctg. McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) and *Hunt v. Cromartie*, 526 U.S. 541, 548-49 (1999).

¹⁴⁵ Until recently, individuals could file a federal statutory, rather than constitutional, civil rights lawsuit under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et. seq.*, of which the implementing regulations require only a showing of discriminatory impact, not intent. See Rudovsky, *supra* at 330. However, the Supreme Court recently overturned decades of precedent in 9 of 12 circuits by ruling that individuals do not have a private right of action under the implementing regulations to Title VI. *Alexander v. Sandoval*, 532 U.S. 275 (2001). See Linda Greenhouse, “Supreme Court Limits Scope of a Main Civil Rights Law,” *The New York Times*, 25 April 2001: A14.

¹⁴⁶ See *supra* notes 30-33 and accompanying text.

¹⁴⁷ See Rudovsky, *supra* at 322-29.

¹⁴⁸ 476 U.S. 79.

Americans from a jury through peremptory challenges was held to be unconstitutional, and *Hunter v. Underwood* (1985),¹⁴⁹ in which an Alabama state constitutional provision disenfranchising those convicted of crimes “involving moral turpitude” was struck down. The unsuccessful cases were *McCleskey v. Kemp* (1987),¹⁵⁰ in which the court rejected a death row prisoner’s claim that his capital sentence should be overturned on the basis of statistical evidence that there is a significant racial bias in death penalty sentences, and *United States v. Armstrong* (1996),¹⁵¹ in which the plaintiffs failed to convince the court that blacks were selectively prosecuted for federal crack-cocaine offenses even though every one of the 24 cases handled by the federal public defender in 1991 involved a black defendant.

While *Batson* and *Hunter* may at first appear to offer some hope to racial profiling litigants, *McCleskey* and *Armstrong* prove to be more like most racial profiling cases, and they have established difficult burdens. First, *Batson* and *Hunter* both deal with civic participation, whereas *McCleskey* and *Armstrong*, like racial profiling, deal with selective enforcement of the criminal law. Second, *McCleskey* was distinguished from *Batson* by the court in part because *Batson* relied on a racial pattern of peremptory challenges from only one prosecutor while *McCleskey* presented statistics involving many prosecutors and many defendants: “requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from

¹⁴⁹ 471 U.S. 222.

¹⁵⁰ *McCleskey*, *supra* note 144.

¹⁵¹ 517 U.S. 456.

requiring a prosecutor to rebut a contemporaneous challenge to his own acts.”¹⁵² Like *McCleskey*, any statistical study of racial profiling is likely to involve many different police officers and motorists, not just a few. Third, the *McCleskey* court additionally required that the defendant “prove that the decisionmakers in *his* case acted with discriminatory purpose,”¹⁵³ a difficult task both for *McCleskey* and for any black driver armed with solid racial profiling data but no proof of intent in his or her case. Fourth, the court in *Armstrong* stressed that the study presented by the defendants “failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted.”¹⁵⁴ This “similarly situated” standard was easily met in *Hunter*, since the plaintiffs were able to prove that blacks were 1.7 times more likely to be disenfranchised than whites;¹⁵⁵ in contrast, in *Armstrong* and any racial profiling case, similarly situated individuals would be hard to come by since they, presumably by virtue of being white, were not arrested or stopped in the first place. Fifth, even a fairly strong “similarly situated” claim may not suffice: the majority in *Armstrong* rejected the defendant’s affidavits that drug users in rehab centers were as likely to be whites as minorities, that a highly-experienced defender had never handled a crack case in federal court involving non-black defendants, and that state courts do prosecute whites for crack.¹⁵⁶ It is difficult,

¹⁵² Rudovsky, *supra* note 85 at 324, *ctg.* *McCleskey*, *supra* note 144 at 296.

¹⁵³ *McCleskey*, *supra* at 292 (original emphasis).

¹⁵⁴ *Armstrong*, *supra* note 151 at 470.

¹⁵⁵ *Id.* at 467, *ctg.* *Hunter*, *supra* note 149.

¹⁵⁶ *Armstrong*, *supra* note 151 at 481 (Stevens, J., dissenting).

then, to conceive of “similarly situated” evidence, let alone proof of discriminatory intent, that would meet the court’s high standards for Equal Protection.

To demonstrate how difficult an Equal Protection claim can be,¹⁵⁷ I turn now to *Chavez v. Illinois State Police* (7th Cir. 2001),¹⁵⁸ one of the few racial profiling cases to undergo comprehensive analysis in federal court. The case was originally filed in August 1994 by Peso Chavez, who is Hispanic, and Gregory Lee, who is African-American, against the Illinois State Police and its Operation Valkyrie, a drug interdiction program. *Chavez* was originally designed as an ACLU “test case” and was one of the first racial profiling lawsuits, but the plaintiffs ended up losing in district court, and then on appeal, on almost every claim.

The appeals court began its Equal Protection analysis by reviewing the plaintiffs’ evidence for discriminatory effect. Following *Armstrong*, the court demanded that the plaintiffs meet the “similarly situated” standard “by naming such [similarly situated] individuals or through the use of statistics.”¹⁵⁹ One plaintiff, Chavez, was able to name a similarly situated white individual, though the appeals court had to reverse the district court ruling that he had not. The other plaintiff, Lee, relied on statistics based on the records kept by some state troopers when they conducted vehicle searches. But these records, which were not representative of all the vehicles the Valkyrie officers stopped and did not include information about the

¹⁵⁷ And expensive. At one point, the plaintiffs subpoenaed “electronic data on licensed Illinois drivers” and were told they would have to pay “the statutory rate for provision of such information,” which amounted to \$160,200. The court upheld this fee. *Id.* at 627. Later, the plaintiffs gave up their case and were ordered by the court to pay the defendants their costs, which amounted to \$22,800.72. *Id.* Needless to say, few individuals are willing to risk these sort of expenses to challenge police practices.

¹⁵⁸ *Chavez*, *supra* note 144.

overall population that drove on the Illinois highways, were “simply insufficient as a matter of law.”¹⁶⁰ As it was impossible to determine, based on the statistics provided, that similarly situated white drivers were not being stopped and searched, Lee could not establish disparate impact. Thus, even a statistical study of racial profiling was not sufficient to show that there had been a discriminatory effect.

Next the court turned to discriminatory intent, for Chavez had been successful in his discriminatory effect claim by naming a similarly situated individual. Following *McCleskey*, the court required that Chavez prove that the police officers in his particular case acted with purposeful discrimination.¹⁶¹ The officer who had stopped Lee, the other plaintiff, had asked for consent to search because “one can never tell with you people.”¹⁶² However, that statement was not part of *Chavez’s* stop and could not serve, in his case, as evidence of intentional discrimination. Chavez did provide evidence from a deposition in which one of the troopers involved with his search acknowledged that “a motorist’s race is one ‘indicator’ that ‘you’ve got to keep in mind.’”¹⁶³ However, the court did not find that piece of evidence compelling enough to establish intent. In fact, the court noted that the officer who filled out Chavez’s citation marked him as white rather than Hispanic, suggesting that the officer did not even know Chavez was Hispanic – despite his surname and the recent publicity over state troopers in New Jersey purposely misreporting the race of the drivers they

¹⁵⁹ *Id.* at 636.

¹⁶⁰ *Id.* at 641.

¹⁶¹ *Id.* at 645.

¹⁶² *Id.*

¹⁶³ *Id.*

stopped.¹⁶⁴ Having found no convincing evidence of discriminatory intent, the court dismissed the plaintiffs' Equal Protection claim.¹⁶⁵

The *Chavez* case was unique in its duration – seven years – but not in its outcome.¹⁶⁶ Can discriminatory impact *plus intent* ever be proved in a racial profiling case? The answer is yes, though very rarely.¹⁶⁷ In *Wilkins v. Maryland State Police*,¹⁶⁸ a public defender and Harvard Law School graduate filed suit alleging Equal Protection violations after he had been pulled over and detained for no apparent reason by the Maryland State Police.¹⁶⁹ During the discovery phase of the case, a state police memo surfaced which had been issued just a few days before Wilkins was stopped and instructed police officers in that area to watch for drug traffickers, “predominantly black males and black females.”¹⁷⁰ Wilkins' lawyers had found the smoking gun of discriminatory intent, and the Maryland State Police settled the lawsuit out of court.¹⁷¹

¹⁶⁴ *Id.* at 646. See David Kocieniewski, “Trenton Charges 2 Troopers with Falsifying Drivers' Race,” *The New York Times* 20 April 1999: B1.

¹⁶⁵ *Chavez*, *supra* at 648.

¹⁶⁶ In *Brown v. City of Oneonta*, 221 F.3d 329 (2nd Cir. 1999), the police were sued, under the Equal Protection Clause, after sweeping a college campus for all African-American males at the school because the victim of a nearby crime had described her assailant as a young black male. *Id.* at 334. However, the court found that the police officers' policy “was race-neutral on its face” and “a legitimate classification within which potential suspects might be found,” and that the “plaintiffs do not sufficiently allege discriminatory intent.” *Id.* at 337-38. Plaintiffs in *National Congress for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154, 167 (S.D.N.Y. Oct. 20, 1999), the case challenging the NYPD's Street Crimes Unit (known for the Amadou Diallo shooting), ran into similar trouble: their Equal Protection claim was dismissed, following *Armstrong*, for failure to prove the existence of similarly situated individuals, though it has since been revived based on some of the court's holdings in *Oneonta*. 191 F.R.D. 52 (S.D.N.Y. Dec. 13, 1999).

¹⁶⁷ Harris, “*Driving While Black*” and *All Other Traffic Offenses*, *supra* note 19 at 551 fn. 44.

¹⁶⁸ Civil Action 93-468 (D. Md. 1996), *supra* note 31.

¹⁶⁹ Harris, *supra* at 564.

¹⁷⁰ *Id.* at 565.

¹⁷¹ *Id.* The settlement included damages and attorney's fees, as well as an agreement to end racial profiling and to collect data on traffic stops. The traffic stop data over the next few years proved what Wilkins accused: that the police were pulling over and searching minorities at far higher rates than whites. See *supra* note 31 and accompanying text.

The smoking gun, though, rarely exists and is almost impossible to find. If Equal Protection claims must rely on state police memos like the one in *Wilkins*, then the Fourteenth Amendment will do little to protect motorists from racial profiling.

There is evidence in the Equal Protection case law I reviewed that the courts are aware of the limited role they play in the racial profiling debate. In *Brown v. City of Oneonta*,¹⁷² in which the court dismissed an Equal Protection racial profiling claim, the 2nd Circuit stated:

We are also not unmindful of the impact of this police action on community relations. Law enforcement officials should always be cognizant of the impressions they leave on a community, lest distrust of law enforcement undermines its effectiveness.... Yet our role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause.¹⁷³

Just as the *Atwater* decision leaves room for state legislation stricter than the Fourth Amendment,¹⁷⁴ the *Oneonta* decision seems almost to welcome a policy response, either from the legislature or a police agency itself, to limit police activity in ways in which this court does not. The same courts that reject a constitutional basis for prohibiting racial profiling themselves provide the context for new public policies to that end.

¹⁷² *Oneonta*, *supra* note 166.

¹⁷³ *Id.* at 339.

¹⁷⁴ See *supra* note 135 and accompanying text.

STATE CONSTITUTIONS

It is important to give brief consideration to one further judicial avenue of combating racial profiling: claims filed in state courts under state constitutions. In *Whren*, the U.S. Supreme Court made it impossible to find relief for race-based pretext stops under the Fourth Amendment, ruling that “subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”¹⁷⁵ This ruling, however, placed no constraints on the ability of state courts to interpret state constitutional provisions as providing greater search-and-seizure protection. Many state constitutions have guarantees similar to that of the Fourth Amendment, but state courts are under no obligation to follow federal search-and-seizure doctrine when interpreting those provisions.

This was, in fact, the basis of the 1996 ruling in New Jersey that the state police had an unlawful *de facto* policy of racial profiling. In that case, *State v. Soto*, the trial judge suppressed evidence in the cases of 17 African-American motorists on the New Jersey Turnpike largely on the basis of statistical evidence in the Lamberth study.¹⁷⁶ In deciding to suppress evidence based on search-and-seizure analysis, the judge wrote:

Generally ... the inquiry for determining the constitutionality of a stop or a search and seizure is limited to “whether the conduct of the law enforcement officer who undertook the stop or search was objectively reasonable, without regard to his or her underlying motives or intent.” Thus, it has been said that the courts will not inquire into the motivation of a police officer whose stop of a vehicle was based upon a traffic violation committed in his presence. But where objective evidence establishes “that a police agency has embarked upon an officially sanctioned or *de facto* policy of targeting minorities for

¹⁷⁵ *Whren*, *supra* note 115 at 813.

¹⁷⁶ 734 A.2d 350 (N.J. Super. 1996). See *supra* notes 32-33 and accompanying text.

investigation and arrest,” any evidence seized will be suppressed to deter future insouciance in office by those charged with the enforcement of the law and to maintain judicial integrity.¹⁷⁷

This analysis is much more protective of Fourth Amendment-type liberties than *Whren*, as it permits courts to take the subjective intentions of police officers into account in search-and-seizure rulings. It effectively makes room for a “would have” standard – an examination of whether a reasonable officer would have made the stop based on the objective circumstances – in place of the “could have” standard adopted in *Whren*.

While the state-level case law and state constitutions do not permit stricter search-and-seizure limits than the federal constitution in all jurisdictions, several states have followed (or could follow) New Jersey in deviating from *Whren* and federal Fourth Amendment doctrine.¹⁷⁸ Note that this means state courts could rely on state statutes to limit police powers as well – statutes directly addressing racial profiling. These practices, much like the *dicta* in *Atwater* and *Oneonta* mentioned earlier, point to a role for police agencies and legislatures in limiting police powers beyond constitutional restrictions as interpreted by the Supreme Court. In other words, the federal courts have largely passed the buck to the states and their legislatures when it

¹⁷⁷ *Id.* at 360 (citations omitted).

¹⁷⁸ See Rudovsky, *supra* note 85 at 321 fn. 146, *ctg. Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999) and *State v. Donahue*, 742 A.2d 775 (Conn. 1999); and Harris, *The Stores, the Statistics, and the Law*, *supra* note 110 at 325, *ctg. People v. Dickson*, 690 N.Y.S.2d 390 (N.Y. App. Div. 1998) and *Whitehead v. State*, 698 A.2d 1115 (Md. Ct. Spec. App. 1997). For a thorough analysis of how the Pennsylvania Supreme Court might interpret the state constitution to decide *Whren*-like cases, see Phyllis W. Beck and Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns* 72 *Temple L. Rev.* 597 (1999): “...departures from Fourth Amendment jurisprudence have occurred, establishing Pennsylvania as a state that ‘guards individual privacy rights more zealously than the federal government.’ Clearly, the historical treatment of [the state constitution] militates in favor of divergence.” *Id.* at 607.

comes to racial profiling. The next chapter, then, will discuss the role of legislation in seeking solutions to racial profiling.

5. LEGISLATION: MANDATES AND MESSAGES

Legislative efforts to address racial profiling have largely mirrored the rise in public awareness and debate, beginning in the late 1990s and becoming more widespread in 2000 and 2001. As we shall see, racial profiling legislation, both as proposed and enacted, has also followed another pattern: it has often been more symbolic than substantive. Legislatures have, by and large, sent a strong message but a weak mandate.

FEDERAL LEGISLATION

The Traffic Stops Statistics Study Act (TSSSA), the first piece of legislation to deal directly with racial profiling, was introduced by Rep. John Conyers (D-Mich.) in 1997 and has been reintroduced in every session of Congress since then.¹⁷⁹ In 1998, the measure was passed by the House of Representatives but was not acted on by the Senate.¹⁸⁰ In the next Congress, the bill was passed by the House Judiciary Committee but not voted on by the full House, and an identical bill introduced in the U.S. Senate was the subject of subcommittee hearings but did not reach the floor for a vote.¹⁸¹ In the current Congress, the bill has been packaged as part of the Protecting Civil Rights for All Americans Act in the Senate but has not been acted on.¹⁸²

¹⁷⁹ H. R. 118, 105th Cong., 1st Sess. (1997); H.R. 1443, 106th Cong., 1st Sess. (1999); S. 821, 106th Cong., 1st Sess. (1999); S. 19, 107th Cong., 1st Sess. (2001).

¹⁸⁰ 144 Cong. Rec. H 1389 (March 24, 1998), 105 Bill Tracking H.R. 118.

¹⁸¹ 146 Cong. Rec. H 930 (March 13, 2000), 106 Bill Tracking H.R. 1443; 146 Cong. Rec. D 292 (March 30, 2000), 106 Bill Tracking S. 821.

¹⁸² 107 Bill Tracking S. 19.

Though TSSSA has undergone minor changes in its various forms, its central provisions call for the U.S. Attorney General to conduct a statistical study on traffic stops around the country, first by reviewing existing data and then by collecting data from a nationwide sample.¹⁸³ The list of data categories required is extensive; police officers must record:

- the alleged traffic violation;
- the driver's race, gender and age;
- whether the driver's immigration status is questioned;
- the number of occupants in the vehicle stopped;
- whether a search is conducted and whether consent was requested;
- the justification for the search;
- the result of the search;
- whether a citation or warning is issued;
- whether an arrest is made, and why; and
- the duration of the stop.¹⁸⁴

The Attorney General would have authority to grant police agencies funds to facilitate the data collection,¹⁸⁵ and a national report would be issued by the Justice Department.¹⁸⁶

Though it is difficult to imagine at first why one would oppose TSSSA, the bill in fact has several drawbacks. Its obvious benefit, or so proponents argue, would be to provide comprehensive statistics with consistent types of data so that the public could have a reliable way to determine if racial profiling exists. However, the bill does not require that the data collection include the location of the stops, the driving population demographics or crime rates of the surrounding area, or provisions for

¹⁸³ H.R. 1443, *supra* note 179, § 2.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*, § 3.

¹⁸⁶ *Id.*, § 2.

interpreting the data. Locally collected traffic stop data already exist in many jurisdictions around the United States, so TSSSA data may not add much valuable information to the existing pool. Furthermore, the bill does not provide for any action to be taken against police agencies and officers who do engage in racial profiling, and, as the previous chapter demonstrated, the courts are reluctant to acknowledge statistical information in civil rights litigation. Given these drawbacks, TSSSA may be a costly program that maintains controversy without doing much to attack the problem.

Some of these drawbacks have been addressed in more recent legislation under different title. For example, the End Racial Profiling Act of 2001,¹⁸⁷ in addition to mandating data collection,¹⁸⁸ prohibits racial profiling,¹⁸⁹ provides for a private right of legal action for those who are victimized by it,¹⁹⁰ and would deny federal funding to police agencies that do not end the practice.¹⁹¹ A separate bill, the Racial Profiling Prohibition Act of 2001, would deny federal highway funding to states whose police agencies engage in racial profiling.¹⁹² But these bills also have several points of weakness. They do not strictly define what constitutes racial profiling, either for the purpose of withholding funding or to sue law enforcement officials, and they garnered little support or action in Congress last year.

¹⁸⁷ H.R. 2074, 107th Cong., 1st Sess. (2001); S. 989, 107th Cong., 1st Sess. (2001).

¹⁸⁸ H.R. 2074, *supra*, § 401.

¹⁸⁹ *Id.* § 101.

¹⁹⁰ *Id.* § 102.

¹⁹¹ *Id.* § 301.

¹⁹² H.R. 965, 107th Cong., 1st Sess. (2001); H.R. 1907, 107th Cong., 1st Sess. (2001).

Surprisingly, TSSSA and its successors have not been ineffective – despite their substantive problems and the low probability that they will be enacted. Far from dying in committee time and again without anyone ever knowing about them, TSSSA has been the impetus for publicity, executive action, and similar statutes at the state level.¹⁹³ When TSSSA was introduced in 1997, there were virtually no police agencies collecting traffic stop data for the purpose of addressing racial profiling. But two states passed racial profiling legislation in 1999,¹⁹⁴ five states in 2000,¹⁹⁵ and 11 states in 2001.¹⁹⁶ The majority of those laws include data collection provisions modeled after Rep. Conyers’ TSSSA. In addition, President Clinton ordered all federal law enforcement agencies to collect race data on their stop and search practices beginning in 1999, and he specifically challenged state and local agencies to follow the federal example.¹⁹⁷

In addition to influencing directly the lives of Americans through legislation, Congress often reflects the attitudes of the public without taking direct action based on those attitudes. These secondary activities should not be regarded as ineffectual, however, because the articulation of a pressing concern on the national level can indirectly bring about action at other levels and in other venues of American politics.

¹⁹³ Harris, *Law Enforcement’s Stake*, *supra* note 58 at 31. Trende, *supra* note 16 at 341.

¹⁹⁴ Connecticut (1999 CT S.B. 1282) and North Carolina (1999 NC S.B. 76).

¹⁹⁵ Kansas (1999 KS H.B. 2683); Missouri (2000 MO S.B. 1053); Rhode Island (1999 RI H.B. 7164); Tennessee (1999 TN S.B. 2415); and Washington (1999 WA S.B. 6683).

¹⁹⁶ California (2000 CA S.B. 1102); Colorado (2001 CO H.B. 1114); Florida (2001 FL S.B. 84); Kentucky (2001 KY S.B. 76); Louisiana (2001 LA H.B. 1855); Maryland (2001 MD H.B. 303); Massachusetts (1999 MA S.B. 2238); Nebraska (2001 NE L.B. 593); Nevada (2001 NV A.B. 500); Oklahoma (1999 OK S.B. 1444); and Texas (2001 TX S.B. 1074).

¹⁹⁷ William J. Clinton, Memorandum on Fairness in Law Enforcement 35 *Weekly Comp. Pres. Doc.* 1067 (9 June 1999).

As a piece of legislation, Conyers' bill delivers no mandate – both in content and in having never been enacted. But by putting the issue of racial profiling on the American political agenda, it has both set an example and sent a powerful message to policy-makers everywhere and the public at large.

STATE LEGISLATION

Nineteen states have passed racial profiling legislation, all but one since 1999.¹⁹⁸ Most of the bills mirror parts, all, or combinations of the federal bills discussed above. To determine the strength of each law, six important questions must be asked (See Figure 9):

- Does the law include mandatory data collection?
- Does it explicitly prohibit the practice of racial profiling?
- How is racial profiling defined?
- Does it require police training about racial profiling?
- What sort of penalties are assessed for failure to comply with the act?
- Does it apply to all police within the state, or just state police?

Furthermore, as I survey the legislation, I would pose several questions that arose in Chapter 1 about motive and action and in Chapter 3 about costs and benefits, namely:

- Does the law aim to address institutional causes or individual motives?
- Does it focus on influencing motives or penalizing actions?
- What are the expected benefits of the law?
- What kinds of costs does it entail?

¹⁹⁸ Oregon's (1997 OR H.B. 2433) statute dates back to 1997. In addition, at least 16 other states have considered legislation without enacting it. They are Alabama (2001 AL S.B. 4, 22, 31); Georgia (2001 GA S.B. 41); Illinois (2001 IL H.B. 2860, S.B. 988); Indiana (2001 IN H.B. 1996); Michigan (2001 MI H.B. 4927); Minnesota (2001 MN S.F. 903, 982); Mississippi (2001 MS H.B. 1214); Montana (2001 MT H.B. 189); New Jersey (2000 NJ S.B. 856); New York (2001 NY A.B. 3674, S.B. 1512); Pennsylvania

STATE	BILL	DATA	PROHIBIT	DEFINITION	TRAINING	PENALTIES	ALL/STATE
Calif.	1999 CA S.B. 1102	no	yes	'broad set of criteria'	yes	no	all
Colo.	2001 CO H.B. 1114	yes	yes	'based on race'	yes	no	state+
Conn.	1999 CT S.B. 1282	yes	yes	'solely'	yes	withhold state funds	all
Fla.	2001 FL S.B. 84	no	yes	n/a	yes	no	all
Kan.	1999 KS H.B. 2683	yes	no	n/a	no	no	all
Ky.	2001 KY S.B. 76	no	yes	'solely'	no	yes	all
La.	2001 LA H.B. 1855	yes	no	n/a	yes	no	all
Md.	2001 MD H.B. 303	yes	yes	'solely'	no	no	all
Mass.	1999 MA S.B. 2238	yes	yes	'broad set of criteria'	yes	no	all
Mo.	2000 MO S.B. 1053	yes	yes	'pretext'	yes	withhold state funds	all
Neb.	2001 NE L.B. 593	yes	yes	'disparate treatment'	no	no	all
Nev.	2001 NV A.B. 500	yes	yes	'as a factor'	no	no	state+
N.C.	1999 NC S.B. 76	yes	no	n/a	no	no	state
Okla.	1999 OK S.B. 1444	no	yes	'solely'	no	criminal & discipline	all
Ore.	1997 OR H.B. 2433	no	yes	'motivated by'	no	discipline	all
Rd. Is.	1999 RI H.B. 7164	yes	yes	'solely'	no	private right of action	all
Tenn.	1999 TN S.B. 2415	yes	no	n/a	no	no	state
Tex.	2001 TX S.B. 1074	yes	yes	'based on race'	yes	discipline	all
Wash.	1999 WA S.B. 6683	yes	no	n/a	yes	no	state

Figure 9. State Legislation

I will begin with the first set of questions, which pertain to the characteristics of the statutes themselves. (See Figure 9.) Fourteen of the 19 laws explicitly require data collection by police officers, and most of them require the same data categories as called for in TSSSA.¹⁹⁹ The state attorney general or other figure is generally required to submit a regular report based on the statistics gathered. Some bills merely call for the data to be reported directly, whereas others call for statistical experts to interpret the results of the data collection.

(1999 PA H.B. 2290); South Carolina (2001 SC H.B. 3963); Utah (2000 UT H.B. 106); Vermont (2001 VT H.B. 407); Virginia (2000 VA H.B. 2672); and Wisconsin (1999 WI A.B. 716).

¹⁹⁹ In addition to the 14 states in which data collection is required by statute, some police agencies are collecting data under federal supervision and many others do so voluntarily. See Montgomery, *supra* note 30.

Fourteen of the 19 laws also “prohibit” the practice of racial profiling, though they vary widely in their definitions of racial profiling. Several definitions seem to be in use. Certain laws define racial profiling as stopping motorists “solely” based on their race, which is a very narrow definition since a police officer would need only one additional reason, such as age or a broken taillight, in order to be excluded from the definition. Less narrow definitions include making stops “based on race” and “motivated by race.” The strongest, or most inclusive, definitions include “pretext” stops, “disparate treatment,” and using race “as a factor.” One puzzling definition, stopping motorists based on “a broad set of criteria which casts suspicion on an entire class of people,” is used in two states.

About half the statutes include some form of racial profiling training or retraining for officers, though these mandates vary widely. Some statutes require all police officers to attend a class or watch a video, while others only require the training for new officers.

Only seven states have penalties for non-compliance. They range from withholding state funds from police departments that either do not collect data or do not address racial profiling problems to individual penalties against police officers who are shown to practice racial profiling. Only one bill creates a private right of legal action, and that applies only to police agencies that fail to collect data. Overall, there seem to be few enforcement mechanisms in the laws.

Finally, five of the laws are weakened by their failure to require all police agencies in the state to comply; some are only directed at the state-level police force.

In two of the states, only large counties are required to collect data. In others, local data collection is voluntary, but if data is collected then it must be reported to the state attorney general.

Now that I have reviewed the contents of these statutes, I turn to evaluating them. This requires identifying which problems they address – which motives and which actions – as well as their costs and benefits. In Chapter 1, I discussed several motivating factors for racial profiling: institutional policies, individual racial animus, unconscious racism, pretext, and stops based partly but not wholly on race. I also listed a range of actions associated with profiling: violence, searches, ticketing, rudeness, and harassment.

A review of the legislation reveals that different bills target different aspects (motives, actions) of the racial profiling problem; none addresses *all* the relevant motives and actions. First, the various definitions of racial profiling in the state statutes reflect attempts to target motives and actions to different degrees: the “solely based on race” definition aims to stop the blatantly racist cop, the “pretext” definition recognizes the problem with pretext motives and the search action associated with it, and the laws which do not prohibit the practice at all seem to ignore the problem of institutionally generated racial profiling policies.

Which motives or actions do the police training provisions target? Training is designed both to prevent a *de facto* policy of profiling and to address officers’ unconscious biases by making them more aware of the need to avoid profiling. Penalties that withhold funding from agencies address the institutional motives,

whereas penalties against individual officers are designed for the “bad apples” on the police force and their more egregious actions.

Data collection requirements, the legacy of the Conyers bill, is also designed to address the actions associated with profiling. Statistical studies, as shown in the previous chapter, aim to uncover unjustified searching, ticketing, and non-ticketed harassment stops. While they do not reflect the intentions and motives of the police, they can provide a picture of what actions they take.

Like the federal legislation, the state laws have clear weaknesses when subjected to a cost-benefit analysis. It is difficult to know what sort of benefits the statutes might generate, but a review of the bills’ provisions yields mostly skepticism. “Bans” on racial profiling, for example, are sure to eliminate official, written policies endorsing the practice, but it is difficult to enforce such a ban against unwritten institutional practices, let alone individual activities. This is especially true of the bills in which (a) penalties are either light, vague or non-existent, and (b) the definition of racial profiling is so narrow as to permit all but the most blatant practices. Furthermore, data collection might highlight trouble spots where racial profiling is occurring, but data collection alone cannot prevent or remedy the problem. In fact, limited attempts at data collection so far have encountered a host of stumbling blocks, such as continual disagreement over the correct interpretation of the data.²⁰⁰

²⁰⁰ Deborah Ramirez, Jack McDevitt and Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned* (Washington: Dept. of Justice, 2000): 15, 22, 53-54. Justin Pritchard, “More Police Study Racial Profiling, But What Are They Looking For?” *Associated Press* 8 Jan. 2001. Harris, *When Success Breeds Attack*, *supra* note 32.

As for the costs involved, police officers have complained that taking the time to fill out long, detailed forms for every traffic stop they make compromises their ability to do their jobs effectively.²⁰¹ Establishing a data collection system can be financially burdensome as well, costing anywhere from \$10,000 to \$130,000 per department.²⁰² Training programs are even more expensive and can demand over \$1 million.²⁰³ Needless to say, these costs can be discouraging if there is no promise that racial profiling will actually diminish as a result of these reforms.

Consider the racial profiling law from one state, Missouri,²⁰⁴ to see precisely why legislation has been weak in this area. Missouri's Senate Bill 1053, enacted in June 2000, has been widely acclaimed as the strongest racial profiling law yet.²⁰⁵ Therefore, it is probably safe to say that the state racial profiling statutes in general will possess many of the weaknesses, if not more, that plague the Missouri bill. Bill 1053 requires all police officers in the state to collect traffic stop data similar to that required by the Conyers bill.²⁰⁶ The state attorney general must analyze the data and compile an annual report, which must include a "comparison of the percentage of stopped motor vehicles driven by each minority group and the percentage of the state's population that each minority group comprises."²⁰⁷ The bill also requires all police agencies to

²⁰¹ Ramirez, *supra* note 200 at 14.

²⁰² *Id.* at 20, 34.

²⁰³ *Id.* at 34-35.

²⁰⁴ §§ 590.650 R.S. Mo. (2000 MO S.B. 1053).

²⁰⁵ See American Civil Liberties Union, *Year in Civil Liberties 2000 57-58* (2001), online at < http://www.aclu.org/library/ycl_00.pdf > ; and Institute on Race and Poverty, Memorandum on Components of Racial Profiling Legislation (5 March 2001), online at < <http://www1.umn.edu/irp/publications/racialprofiling.html> > .

²⁰⁶ §§ 590.650 R.S. Mo. (2000 MO S.B. 1053).

²⁰⁷ *Id.*

develop policies prohibiting racial profiling, defined as “the practice of routinely stopping members of minority groups for violations of vehicle laws as a *pretext* for investigating other violations of criminal law.”²⁰⁸ Furthermore, police agencies must review the traffic stop records of individual officers for patterns of racially disproportionate traffic stops, determine if those officers are engaging in pretext-based racial profiling, and provide “appropriate counseling and training” to such officers.²⁰⁹ If a police department does not comply, then the governor is authorized by the law to withhold state funds from that agency.²¹⁰

Missouri bill 1053 contains all the “strong” provisions listed in Figure 9: it requires comprehensive data collection, it prohibits racial profiling, it uses a strong “pretext” definition, it requires some officer training, it penalizes non-compliant agencies by withholding funds, and it applies to all police officers in the state. Furthermore, it aims both to address institutional causes (by requiring all agencies to develop anti-racial profiling policies) and individual motives (by singling out individual officers based on patterns in their traffic stop data). The bill also works to eliminate motives (by using a pretext-based definition of racial profiling) as well as penalize actions (by withdrawing funds and requiring remedial officer training). Relative to the other state laws, most of which either include fewer provisions or weaker definitions and penalties, Missouri’s bill appears comprehensive and strong.

²⁰⁸ *Id.*, emphasis added.

²⁰⁹ *Id.*

²¹⁰ *Id.*

Its relative strength notwithstanding, however, bill 1053 is more symbolic than substantive. Even though it requires comprehensive data collection, it has weak provisions for analyzing and interpreting the data. The attorney general's report must compare the racial proportions of traffic stops to the racial proportions in overall state population, but this is a crude way to analyze racial data; it does not take into account racial proportions in local areas, car ownership, or driving patterns, to name a few problems.²¹¹ Furthermore, the bill requires remedial training for officers whose traffic stop data reveal a racially disproportionate pattern *and* who are found to engage in pretext stops, but it does not describe how pretext-stop profiling could be shown independent of racially disproportionate traffic stop data. Even if officers do receive remedial training, the statute does not provide for further disciplinary penalties if racial profiling continues. While the governor is authorized to withdraw state funds from police agencies that do not comply with the law, any police agency can still claim to be in compliance with the statute as long as it develops anti-racial profiling policies and provides training for problem officers – regardless of whether the racial profiling continues. More importantly, the withdrawal-of-funds provision leaves such action to the discretion of the governor, and defunding law enforcement is extremely rare and politically suicidal. So while the Missouri bill appears to be the strongest of all racial profiling legislation to date, one cannot help but be skeptical about its power to affect racial profiling in that state. Furthermore, most of the other state bills are even weaker.

²¹¹ See Ramirez, *supra* note 200; and Harris, *When Success Breeds Attack*, *supra* note 32.

Why has there been such a flurry of legislation if most of the laws are relatively weak and ineffective? I have already suggested that the Conyers bill at the federal level has served as a model and catalyst for similar bills at the level of state legislatures. But even these state laws seem primarily dedicated to making a statement against racial profiling rather than actually eliminating the problem. In *Congress: The Electoral Connection*, David R. Mayhew suggests that this is to be expected of legislation about high-profile issues. It is the chief goal of every legislator to be reelected, and so given the average voter's lack of interest in and knowledge of the details of public policy, much of the legislation comes out looking more symbolic than substantive:

The term *symbolic* can ... usefully be applied where [the legislature] prescribes policy effects but does not act (in legislating or overseeing or both) so as to achieve them.... The reason, of course, is that in a large class of legislative undertakings the electoral payment is for positions rather than for effects.²¹²

That way, legislators are able to return to their home districts as “credit claimers”²¹³ and “position takers”²¹⁴ with respect to the statute on racial profiling, even though the effects of the legislation may be negligible or even costly. Similarly, R. Kent Weaver argues in “The Politics of Blame Avoidance” that even if legislators cannot or do not wish to claim credit for certain activities, they will jump on the bandwagon of non-ideal legislation in order to avoid being blamed for inaction in future elections.²¹⁵ As self-interested politicians, then, policy-makers are bound to pass laws that speak out against racial profiling even if they do not take dramatic steps toward implementation.

²¹² David R. Mayhew, *Congress: The Electoral Connection* (New Haven: Yale Univ. Press, 1974): 132.

²¹³ *Id.* at 52-61.

²¹⁴ *Id.* at 61-73.

The importance of implementation should not be dismissed, but neither should it be overemphasized. The typical legislative analysis does not take into account all the effects, both direct and indirect, of legislation against racial profiling. Just as the Conyers bill (TSSSA) had no direct impact on racial profiling but indirectly generated public awareness, executive action, and legislation on the state level, state legislation can have an indirect effect on police activity even when its direct effects are difficult to measure.

Even when a state law is unable to send a powerful mandate, it can send a powerful message. Collecting and publishing traffic stop data sends the message that racially disproportionate traffic stops will be discovered and deemed unacceptable by the public, as well as embarrassing to law enforcement officials. Moreover, policies banning racial profiling, even if difficult to enforce on an individual basis, send the message that racial profiling cannot be justified in a moral sense, and that our political system values racial fairness over cold efficiency in law enforcement. While it is nearly impossible to force some people to change their mind about questions of race, fairness and justice, it is not meaningless to set a tone, publicly and collectively, in favor of certain principles.

²¹⁵ R. Kent Weaver, *The Politics of Blame Avoidance* 6 J. Pub. Pol'y 371 (1986).

POLICY ALTERNATIVES

A review of federal and state racial profiling legislation in this chapter has revealed a body of public policy more symbolic than substantive, sending strong messages but weak mandates, and more concerned with codification than implementation. Previously, I argued that the courts were even less willing to take action on racial profiling, all but excluding its victims from constitutional protection and by and large leaving the matter to Congress or the states. In the remainder of this chapter I will briefly consider some alternative policy proposals that may be more effective than the judicial doctrine and legislation that already exists.

Some believe that the best solution to racial profiling can still be found in the courts. One law review article states that the Supreme Court should revise its holding in *Whren v. United States* so as to employ Fourteenth Amendment protections in Fourth Amendment cases.²¹⁶ Others have urged the Supreme Court to reverse *Whren* altogether.²¹⁷ While these proposals may have some merit in theory, it is unreasonable to expect that the Supreme Court will overturn a 9-0 decision anytime soon. Even on matters not directly related to *Whren*, the Court has shown itself unwilling to become deeply involved in a debate over racial profiling.

A number of opponents of racial profiling have also claimed that the legislative activities reviewed in this chapter represent a solid step toward the elimination of racial profiling. The ACLU, for instance, has lobbied strongly in favor of TSSSA as

²¹⁶ Trende, *supra* note 16 at 367-71.

²¹⁷ Harris, *Car Wars*, *supra* note 110 at 585. Rudovsky, *supra* note 85 at 365.

well as state legislation requiring mandatory data collection on traffic stops.²¹⁸ When the Missouri legislature passed that state's Bill 1053 in May 2000, the executive director of the ACLU of Eastern Missouri proclaimed, "Data collection is the best way to document the problem of racial profiling and will ultimately allow us to work to end this practice."²¹⁹ Still, data collection and state legislation have thus far proved frustrating to civil liberties advocates. None of the statutes has demonstrated or led to any consensus on how traffic stop data are appropriately interpreted once collected, and the data alone are of dubious value in court. While I have argued that these laws have a symbolic component sending a message against racial profiling, it should also be clear that symbolism alone will not suffice to eliminate racial profiling. In fact, symbolic legislation may even have the unintended effect of creating the illusion that a problem is being addressed when in fact it is not. In short, it is difficult to find a correlation, in fact or in theory, between the collection of traffic stop data and a significant reduction in racial profiling activity.

I therefore offer two legislative proposals that merit strong consideration by those who would take action against racial profiling. The first is a ban or moratorium on consent searches during traffic stops, and the second is an exclusionary rule for the violation of standard operation procedures. Both policies would target the "motive" and "action" components of racial profiling discussed in Chapter 1. It is unclear how

²¹⁸ See ACLU Report, *supra* note 12.

²¹⁹ American Civil Liberties Union of Eastern Missouri, "ACLU Praises DWB Legislation Passed Overwhelmingly Today in Missouri," Press Release 12 May 2000, online at < http://www.aclu-em.org/PressReleases/2000PR/aclu_praises_dwb_legislation.htm > .

large the costs and benefits of these proposals would be, but each proposal could be subject to an experimental trial run in order to determine the trade-offs involved.

I will begin with the first proposal, a ban or moratorium on consent searches. Consent searches represent the majority of searches during traffic stops, because while a police officer needs “probable cause” to search a car without a warrant, the probable cause standard does not apply if a driver gives the officer permission to conduct a search.²²⁰ Furthermore, the Supreme Court has already ruled that drivers who consent to a search does not have to be informed by the police of their right to refuse.²²¹ As a result, police may make a pretext stop for a minor traffic violation, request consent for a vehicle search, and then arrest the driver if contraband is discovered during the search. Therefore, if police were stripped of the ability to conduct consent searches, then racial profiling could be significantly diminished. Police would need objective evidence (probable cause) of illegal activity in order to search a car; knowing this, they would not be so disposed to conduct pretext stops of minority drivers with the intention of carrying out a consent search.

The notion that putting an end to consent searches *could* seriously reduce racial profiling is not new, to legal experts or to policy-makers.²²² It has been officially recommended by the state senate committee investigating racial profiling in New Jersey, though neither the governor nor the legislature there has acted on the panel’s

²²⁰ Sherry F. Colb, “A Proposed Moratorium on Highway Consent Searches: One Way to Fight Racial Profiling,” *FindLaw’s Writ* 15 Aug. 2001, online at < <http://writ.news.findlaw.com/colb/20010815.html> > .

²²¹ *Ohio v. Robinette*, *supra* notes 123-125 and accompanying text.

²²² Colb, *supra* note 220.

recommendation.²²³ In California, though, a six month moratorium on consent searches was declared by the chief of the California Highway Patrol, though it was difficult to draw conclusions about the action's effectiveness over so short a time period.²²⁴ Still, California's action could serve as a model for other states. Governors can issue an executive order suspending consent searches by state police, and legislatures can mandate a consent search moratorium for all state and local police. If evidence of racial profiling diminishes but the police are still able to do their jobs effectively, then the moratorium could become a permanent ban; if not, other solutions must be sought.

The second proposal is an exclusionary rule for violations of standard operating procedures. An exclusionary rule is already standard doctrine in constitutional law for Fourth Amendment violations; if a police officer violates the Fourth Amendment then any contraband seized is inadmissible in court. In *Whren*, the Supreme Court ruled that pretext stops were not a violation of the Fourth Amendment.²²⁵ But in the *Whren* case the police officers involved were not conforming to standard operating procedures, as defined by their police department's guidelines, when they conducted

²²³ Iver Peterson, "Profiling Panel Urges End to Certain Car Searches," *The New York Times* 1 June 2001: B1. Though consent searches were not banned in New Jersey, in August 2001 the state police superintendent did institute a new policy requiring state troopers to get a sergeant's approval for consent searches, often requiring sergeants to drive to the scene personally. See Robert Hanley, "Search Rules Stricter for New Jersey Troopers," *The New York Times* 10 Aug. 2001: B5. While the policy was intended to prevent abuse of consent searches, requiring the driver to wait for a police sergeant could significantly lengthen the duration of police stops.

²²⁴ Suzanne Herel, "CHP Chief Orders Ban on Consent Searches of Cars," *The San Francisco Chronicle* 20 April 2001: A1.

²²⁵ See *Whren v. United States*, *supra* notes 115-122 and accompanying text.

the traffic stop.²²⁶ The officers in *Whren* conducted the pretext stop even though they were plainclothes officers and District of Columbia police regulations do not permit traffic stops by officers not in uniform unless the traffic violation “is so grave as to pose an immediate threat to the safety of others.”²²⁷ The *Whren* court ruled that by itself, failure to conform to local standard operating procedures did not amount to a constitutional violation.²²⁸

Even if non-standard police activity is not in violation of the Constitution, state legislatures could mandate an exclusionary rule for evidence seized in this manner. Just as individualized protection under the Fourth Amendment would be severely weakened if illegally seized evidence were admissible in court, police officers would be much more likely to conform to standard procedures if they knew that any non-conforming activities would not yield successful stops, searches and arrests. While it seems unlikely, given the *Whren* decision, that courts will exclude such evidence on constitutional grounds, states may legislate an exclusionary rule for evidence seized under non-standard operating procedures. Again, such a law could begin as temporary and experimental. Given the circumstances of *Whren* and cases like it, a high probability exists that an exclusionary rule of this sort could cut down on racial profiling without placing serious burdens on police activity.

Not only do these proposals seem reasonable and modest in scope, they will impact both the “motive” and “action” elements of racial profiling I discussed in

²²⁶ *Whren, supra*, at 815-816.

²²⁷ *Id.* at 815.

²²⁸ *Id.* at 816.

Chapter 1. Suspending consent searches will target racial profiling actions, because officers are likely to make fewer unjustified stops, let alone searches, if they know probable cause is needed for a search. A consent search moratorium will also target motives, because insofar as institutional policies, explicit or implicit, currently support or encourage racial profiling, those policies will be curtailed by an official ban on consent searches. As for an exclusionary rule for violations of standard operating procedures, this will affect actions because the officers' behavior in the *Whren* case and others like it is highly unlikely if police know that their evidence will not stand up in court. The exclusionary rule would impact motives for the same institutional reasons justifying the consent search ban. While these are modest proposals, they can potentially have significant effects on the extent and severity of racial profiling.

SUMMARY

This paper has been an examination of the rise of racial profiling as a significant political issue, its place within a theoretical framework of cost-benefit analysis, and the activities of the courts and legislatures in addressing it. In Chapter 1, racial profiling was defined as the discriminatory treatment of minorities by law enforcement officials based on the belief that skin color is a predictor of criminal activity. In that chapter I set up a framework for discussion that included both a scope, limited to traffic stops by police on streets and highways, and a distinction between severity with respect to action and severity with respect to motive. I argued that racial profiling is a result of a number of possible motives, and leads to a number of possible actions.

Chapter 2 was an account of the recent history of racial profiling. While racial profiling has long been used by law enforcement officials, its current form can be traced to the so-called War on Drugs and its associated drug-interdiction efforts by federal, state and local police agencies. Racial profiling did not earn a significant place on the public agenda, however, until 1998 when two high-profile, race-related police shootings took place. Extending the severity of motive/action framework from the previous chapter, I argued that those severe actions led to a public examination of less severe actions and the motives behind them.

In Chapter 3, I set up a broader theoretical framework in order to justify a normative approach to the racial profiling issue. I proposed a cost-benefit analysis and examined the claims that there are legitimate benefits to racial profiling as well as significant costs. I concluded that efficiency in law enforcement is, in fact, a benefit of racial profiling, but that these benefits do not outweigh the need for individual fairness, the main cost of racial profiling.

Chapter 4 was a review and analysis of the role of the courts in this issue. Two constitutional provisions, the Fourth and Fourteenth Amendments, are most central to the legal debate; but the federal judiciary has been reluctant to offer constitutional protection from racial profiling under these amendments. In fact, I argued, the motive/action distinction was illustrative in this area: where racial profiling evidence is strongest for motives and intent, the courts demand proof of bad actions; but where racial profiling evidence is strongest for actions and impact, the courts demand proof of bad motives and intent. The courts have indicated that it is up to lawmakers to take

action against racial profiling. As interpreters of the Constitution, federal courts have limited the extent to which racial profiling litigation can be successful; as policy-makers, they have passed the buck to states and legislatures.

Legislative activities, then, were the topic of Chapter 5. Legislation against racial profiling has been introduced on the federal and state levels, but, I argued, the bills at both levels have been stronger as messages than as mandates. However, their symbolic value should not be dismissed: the federal bills, though never passed, have served as models for racial profiling legislation in the states; and the state bills, though lacking key enforcement and implementation mechanisms, condemn racial profiling in ways the judiciary chose not to. Still, symbolic legislation alone cannot put an end to racial profiling. Therefore, I proposed two policy alternatives at the end of Chapter 5: an end to consent searches, and an exclusionary rule for the violation of standard operating procedures. Drawing on the motive/action framework from Chapter 1, I argued that these proposals address both these components; and drawing on the theoretical framework from Chapter 3, I argued that the benefits to fairness of these proposals outweigh their costs to police efficiency.

It is most regrettable that the story cannot end here. The September 11 terrorist attacks significantly altered the context of the racial profiling debate. In the final chapter, an epilogue, I shall discuss racial profiling in the aftermath of September 11.

6. EPILOGUE: RACIAL PROFILING AFTER SEPTEMBER 11

On the morning of September 11, 2001, opponents of racial profiling seemed to be making some progress. President Bush was scheduled to meet with the president of the American Muslim Council that afternoon to discuss racial profiling of Muslims and Arabs.²²⁹ In New Jersey, a two-day summit on racial profiling was just beginning, bringing together political, police and community leaders from that state.²³⁰ Of course, that summit abruptly ended, and the meeting with the President was cancelled, when terrorists flew hijacked aircraft into the World Trade Center and the Pentagon.

The meeting and summit were cancelled out of respect for the gravity of that day's events and because the political and law enforcement officials involved had a developing crisis on their hands. But the cancellation of these events was also deeply symbolic of the effect of September 11 on racial profiling, for the issue took on a new meaning after the terrorist attacks.

In this final chapter, an epilogue, I will briefly discuss the impact of the September 11 attacks on the racial profiling debate. The momentum behind new legislation has been lost, and the public has abandoned its moral certainty on the issue. Using the theoretical framework from Chapter 3, I will argue that there are important distinctions between racially profiling terrorists and racially profiling drug traffickers, but that a cost-benefit approach to post-September 11 security is still the most reasonable.

²²⁹ Niraj Warikoo, "Racial Profiling: Muslims and Arab Americans See Their Civil Rights Eroded," *The Detroit Free Press* 24 Oct. 2001.

In the immediate aftermath of the September 11 attacks, a number of events suggested that racial profiling would play a prominent role in increased security. Because all 19 of the September 11 hijackers were men of Middle Eastern descent, officials investigating the attacks and guarding against future terrorism focused their energies on Middle Eastern men. The U.S. Justice Department asked local police departments to interview about 5,000 Middle Eastern men about any knowledge they might have of terrorist activities, and several police departments expressed concern over racial profiling.²³¹ Several men from the Middle East complained they were kicked off airplanes solely because of their appearance.²³² Even one of President Bush's Secret Service agents, who is Arab-American, said he was removed from an airplane because of racial profiling.²³³ Rep. Conyers and Sen. Russ Feingold (D-Wisc.), both of whom have sponsored federal legislation against racial profiling, wrote an open letter to several airlines asking them not to racially profile their customers in the wake of the terrorist attacks.²³⁴

Many other political figures, though, were not interested in taking a stand against racial profiling. In New Jersey, where racial profiling has been in the headlines on a regular basis, the attorney general warned in September that the police may stop

²³⁰ "Trade Center Attack Forces Adjournment of Racial Profiling Summit," *Associated Press* 11 Sept. 2001.

²³¹ Fox Butterfield, "Police Are Split On Questioning Of Mideast Men," *The New York Times* 22 Nov. 2001: A1. "Third City in Oregon Balks at Assisting Federal Interviews," *The New York Times* 29 Nov. 2001: B6.

²³² Blane Harden and Somini Sengupta, "Some Passengers Singled Out For Exclusion by Flight Crew," *The New York Times* 22 Sept. 2001: B5.

²³³ Edward Walsh, "Abusive Behavior, Or Racial Profiling? Airline, Attorneys Dispute Incident," *The Washington Post* 24 Jan. 2002: A25.

people who appear to be Middle Eastern so that they can be questioned about terrorism.²³⁵ His comments were met with opposition from the Arab-American community and the ACLU, but few others complained.²³⁶

The New Jersey attorney general was not alone; others' comments suggested that it was now politically acceptable to support racial profiling. In October, a candidate for Congress announced that he would support racial profiling of Arabs in the fight against terrorism.²³⁷ In February, the governor of Oklahoma said that airlines should react suspiciously to passengers "speaking Arabic or reading the Koran or praying."²³⁸ Recall that before September 11, the New Jersey state police superintendent was fired for comments supportive of racial profiling, and political leaders in both parties condemned it. But after the terrorist attacks, the political climate had changed: such comments could again be uttered with political impunity.

The September 11 attacks put the brakes on the trend toward legislation against racial profiling. Bills in several states were defeated or not brought to a vote, mostly because the momentum and public support for such legislation had been lost. In Washington, Rep. Marge Roukema (R-N.J.) said that "it's certainly not appropriate to

²³⁴ Frederic J. Frommer, "Feingold, Conyers Urge Airlines to End Racial Profiling," *Associated Press* 1 Oct. 2001.

²³⁵ "N.J. Atty General Says Police May Return to Racial Profiling," *Associated Press* 25 Sept. 2001.

²³⁶ Susan Sachs, "In Search for Suspects, Sensitivities About Profiling," *The New York Times* 26 Sept. 2001: D7.

²³⁷ Kevin O'Hanlon, "Democrats Criticize Bruning Over Racial Profiling Remarks," *Associated Press* 22 Oct. 2001.

²³⁸ "Okla. Governor: Racial Profiling Has Role in Terror War," *St. Petersburg Times* 3 Feb. 2002: 11A.

be taking it under consideration” because “you’re going to be putting unnecessary obstacles in the way of [police officers’] enforcement of the law.”²³⁹

In the courts, too, September 11 has weakened opposition to racial profiling.²⁴⁰ The New Jersey troopers accused of shooting unarmed black men on the New Jersey Turnpike in 1998, “the case that got the nation talking about racial profiling,” were awaiting trial at the time of the terrorist attacks.²⁴¹ When they struck an extremely favorable plea bargain in January 2002 – they each paid a \$280 fine and retired from the police force – they were widely thought to have benefited from the new political environment in which racial profiling was no longer forbidden.²⁴²

Public opinion polls indicate that a significant proportion of the public has done an about-face on this issue. Recall that after the New Jersey Turnpike and Amadou Diallo shootings, a majority of the public thought that racial profiling was widespread, and over 80% believed it was wrong.²⁴³ But after the terrorist attacks, a Gallup poll showed that 58% of Americans supported “more intensive security checks for Arabs”²⁴⁴ and in a *Los Angeles Times* poll 68% said they would support police “randomly stopping people who may fit the profile of suspected terrorists.”²⁴⁵ According to a *Washington Post*/ABC News poll, 73% said that the government was

²³⁹ Raymond Hernandez, “New Racial Profiling Debate Puts Legislators to the Test,” *The New York Times* 30 Sept. 2001: §14NJ.2.

²⁴⁰ William Glaberson, “Racial Profiling May Get Wider Approval by Courts,” *The New York Times* 21 Sept. 2001: A16.

²⁴¹ Ronald Smothers, “Troopers’ Case Ends, But the Talk Goes On,” *The New York Times* 16 Jan. 2002: B5. See *supra* note 37.

²⁴² *Id.*

²⁴³ See *supra* notes 61-64 and accompanying text.

²⁴⁴ Sam Howe Verhovek, “Once Appalled by Race Profiling, Many Find Themselves Doing It,” *The New York Times* 23 Sept. 2001: A1.

doing enough to protect the rights of Arab Americans, and 66% said they would be willing to give up some liberties for the sake of the war on terrorism.²⁴⁶ When asked generally about racial profiling, only 43% of Americans were willing to condemn it; 45% supported the statement, “Law enforcement officials must use whatever actions necessary to stop crime and protect American citizens.”²⁴⁷

Even African Americans, long the victims of racial profiling, said they supported the practice after September 11. In a recent Gallup poll, 71% of African Americans supported racial profiling of Arabs.²⁴⁸ Over 60% of African Americans said the government was doing enough to protect the rights of Arab Americans, and 71% said they would give up some civil liberties for the war on terrorism.²⁴⁹

The polls, however, do not fully capture the mindset of those who reconsidered racial profiling after September 11. When they were asked open-ended questions about their views, ordinary Americans would say things like, “It’s not right ... but it’s justified,”²⁵⁰ and “It might be wrong, but they’ve got to do it.”²⁵¹ In reconsidering their moral certainty about racial profiling, these individuals encountered some moral confusion: on the one hand, they think racial profiling is wrong, because they would have said as much a year ago; while on the other hand, it seems to make more sense to

²⁴⁵ Henry Weinstein, Michael Finnegan and Teresa Watanabe, “Racial Profiling Gains Support as Search Tactic,” *The Los Angeles Times* 24 Sept. 2001: A1.

²⁴⁶ *Washington Post*/ABC News poll, conducted Sept. 11, 2001 and Nov. 27, 2001, online at < <http://www.washingtonpost.com/wp-srv/politics/polls/vault/vault.htm> > .

²⁴⁷ Democratic Leadership Council poll, conducted Nov. 21, 2001, Lexis-Nexis Question ID USPENN.02DLCJF.

²⁴⁸ Robert A. Levy, “Blacks for Profiling,” *National Review Online* 6 Feb. 2002.

²⁴⁹ *Washington Post*/ABC News poll, *supra* note 246.

²⁵⁰ Howe Verhovek, *supra* note 244.

them now that there is a terrorist threat. But they are somehow able to reconcile these conflicting opinions, because they believe that sometimes actions are justified even when they are morally wrong.

Though I would not choose to express these feelings in those terms, I believe these responses are on to something. They reflect a true sense of moral conflict between freedom and security during crisis in a liberal democracy. But the moral conflict is nothing more than an exacerbation of the theoretical framework discussed in Chapter 3. That framework consisted of a cost-benefit analysis in which police efficiency was the benefit of racial profiling and fairness to individuals the cost; in that case, I argued, the cost outweighed the benefit. After September 11, however, many Americans seem to be reconsidering that, and understandably so. Before, the benefit of racial profiling was *no greater than* a slight reduction in crime or a slightly higher yield in drug interdiction. In the aftermath of September 11, though, the potential benefit is viewed as far greater: the prevention of terrorism, saving hundreds or even thousands of lives. So it is no wonder that people have changed their opinions about racial profiling. That they are using the same framework can be inferred from their confusing quotes like “It’s not right, but it’s justified.” Now, instead of the costs of racial profiling outweighing the benefits, they believe that the benefits outweigh the costs.

This point of view is also reflected in much of the political commentary about racial profiling since September 11. One writer in *The National Review* suggests that it

²⁵¹ Robin Toner, “Civil Liberty vs. Security: Finding a Wartime Balance,” *The New York Times* 18 Nov.

is not hypocritical of African Americans to condemn racial profiling in the war on drugs but support it in the war on terrorism because we should consider three questions: “How important is the objective that the profile seeks to accomplish? How effective is the profile in advancing that objective? What is the potential for abuse?”²⁵² Since, in the writer’s judgment, all three answers come out favorably for profiling terrorists and unfavorably for profiling drug traffickers, it is no contradiction to support the former but condemn the latter.²⁵³ In *The Los Angeles Times*, a Yale law professor, noting that “context is everything,” proposed a similar set of questions:

How serious is the crime risk? How do we assess the relative costs of false positives and false negatives? How accurate is the stereotype? How practicable is it to pursue the facts through an individualized inquiry rather than through stereotypes? If we must use stereotypes, do some rely on less incendiary and objectionable factors?²⁵⁴

Lastly, in another *National Review* article, a constitutional lawyer noted that even in cases of racial discrimination by the government, Fourteenth Amendment doctrine permits “narrowly tailored” discrimination to further “a compelling governmental interest.”²⁵⁵ He then goes on to state: “If stopping terrorism is not a compelling interest, then nothing is.”²⁵⁶ All of these writers have somewhat different points, but they reach similar conclusions based on a cost-benefit mechanism like the one discussed in Chapter 3.

2001: A1.

²⁵² Levy, *supra* note 248.

²⁵³ *Id.*

²⁵⁴ Peter H. Schuck, “Context Is Everything with Racial Profiling,” *The Los Angeles Times* 27 Jan. 2002: M6.

²⁵⁵ Roger Clegg, “Profiling Terrorists,” *National Review Online* 18 Sept. 2001.

²⁵⁶ *Id.*

These writers are correct to use a cost-benefit framework to analyze racial profiling in the aftermath of September 11, and they are correct that racially profiling terrorists is not the same as racially profiling drug traffickers. However, they are too quick to conclude that the benefits of profiling necessarily outweigh the costs. They mistakenly assume that racially profiling Arab Americans does, in fact, significantly increase the chances of stopping a terrorist; and they err in assessing the possibility of terrorism so great an evil that virtually any benefit to law enforcement, no matter how slight, outweighs the significant fairness costs of racial profiling.

I do not wish to reach a definitive conclusion about this question here, but I do propose that these costs and benefits be deliberated, not assumed. There is no evidence to date that racially profiling Middle Easterners has actually resulted in the capture of any terrorists or the prevention of any terrorism, nor is there any evidence that racial profiling will yield this sort of benefit in the future. Unlike the argument for efficiency in law enforcement, which seems to have some merit, racial profiling for terrorism seems to rely solely on the intuitive notion that singling out Arabs for suspicion will somehow diminish the chances that terrorism will recur. In fact, racial profiling can lead to deterioration between law enforcement and the Arab-American community, which in turn could lessen the chance that a law-abiding member of that community would tip off police to suspicious behavior. Over a long period of time, culturally embedded racial profiling can have the effect of creating second-class citizens. Can we risk doing that, and still declare victory in a war on terrorism? The

competing demands of national security and liberal democracy in the aftermath of September 11 leave us with few easy answers.

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