

2011

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Recommended Citation

Amos N. Jones, *Defending Profiling While Combating Racism: A Companion to Ogletree's 'Presumption of Guilt'*, 33 N.C. Cent. L. Rev. 187 (2011).

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ESSAY

DEFENDING PROFILING WHILE COMBATING RACISM: A COMPANION TO OGLETREE'S 'PRESUMPTION OF GUILT'

AMOS N. JONES*

INTRODUCTION

In the United States of America, the presumption of innocence is an essential bulwark against the injustice of arbitrariness, a liberty safeguard entrenched in the common law.¹ “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement that lies at the foundation of the administration of our criminal law.”² Coexisting with this presumption, officially endorsed racial profiling has become

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1. Robert R. Rigg, 4 Ia. Prac., Criminal Law § 1:2 *note 7 (2010-11 ed.) (Exactly when this presumption was, in precise words, stated to be a part of the common law is involved in doubt. The writer of an able article in the North American Review (January, 1851), tracing the genesis of the principle, says that no express mention of the presumption of innocence can be found in the books of the common law earlier than the date of McNally's Evidence (1802). “How fully the presumption of innocence had been evolved as a principle and applied at common law is shown in McKinley's Case (1817) 33 State Tr. 275, 506, where Lord Gillies says: ‘It is impossible to look at it [a treasonable oath which it was alleged that McKinley had taken] without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been and is my impression. But the presumption in favor of innocence is not to be redargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly. He seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason and religion and humanity for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman, and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only of absolute certainty.’”)

2. *In re Winship*, 397 U.S. 358, 363 (1970). See also *Hankerson v. North Carolina*, 432 U.S. 233 (1977), *Coffin v. U.S.*, 156 U.S. 432, 453, (1985); *Commonwealth v. Maldonado*, 838 A.2d 710 (2003).

a hotly contested law-enforcement mechanism over the last three decades, identified by Cornel West in the 1990s as sociologically problematic,³ systematically attacked by the Rev. Al Sharpton as inherently racist,⁴ and litigated by a cadre of talented personal-injury lawyers as unconstitutional.⁵

In *The Presumption of Guilt: The Arrest of Henry Louis Gates Jr. and Race, Class, and Crime in America* (hereinafter “Presumption of Guilt”), the prolific legal theorist Charles J. Ogletree, Jr., contextualizes a perverse tendency on the part of law enforcement within the ever evolving contemporary framework of police affronts against African Americans, including racial profiling.⁶ Responding to the “need to examine our criminal justice system to ensure that fairness, not power, is the currency of our system,” the author takes as his unit of analysis his Harvard faculty colleague and client’s July 16, 2009, arrest by the Cambridge Police Department under the authority of Sgt. James Crowley.⁷

The salient facts from the incontrovertible record of that arrest are simply as follows:

On that day, Sgt. Crowley responded to a call about a possible break-in. The eyewitness informed a police dispatcher that one suspect might have been Hispanic but provided no information indicating that an African American was involved and even expressed some doubt as to whether a break-in was in fact occurring, speculating that perhaps a resident was simply struggling to open his own door. Professor Gates was approached by Sgt. Crowley shortly after entering his home. After informing the officer that he lived at 17 Ware Street and producing both his Harvard University identification and his Massachusetts driver’s license with his photo and address on it, Gates was arrested. He was, to put it simply, presumed to be guilty of a crime rather than presumed to be a resident in his own home telling the truth about who he was.”⁸

What Ogletree, who is a distinguished civil rights advocate and former public defender, provides in his book is a critically informed answer to the question “but why?”

3. See JOHN MORRISON AND JACK MORRISON, CORNEL WEST (AFRICAN AMERICAN LEADERS) 71 (2003).

4. See *Id.* Cf. Vasugi V. Ganeshanathan, *Sharpton Sounds Off on Racial Profiling*, THE (HARVARD) CRIMSON, Nov. 23, 1999 (“The Reverend Al Sharpton urged students to protest racial profiling in a speech last night at Lowell Lecture Hall . . . ‘This issue has cut across all racial lines,’ Sharpton said. ‘There is nothing more stressful than being black in America, where you are victimized by cops and robbers.’”).

5. See CHARLES J. OGLETREE, JR., *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA* 106-09 (2010).

6. See *Id.*

7. *Id.*

8. *Id.* at 10.

Ogletree's work suggests manifold reasons why so many innocent black Americans, particularly black men, have found themselves temporarily or permanently criminalized by law-enforcement officials, and this essay affirms all of Ogletree's findings as to the existence of the presumption of guilt with regard to blacks and how this presumption frustrates all efforts to achieve more respect between citizens and law enforcement.⁹ As a threshold matter, it accepts his characterization of what happened to Gates and why.¹⁰ However, while relying on Ogletree's excellent analyses, the essay goes beyond the book. Categorizing some of the most dramatic true stories and data adduced in the work, the essay identifies an important dynamic that is too often unaddressed though self-evident in conversations and thinking about the topic of racial profiling: the tension between the long-established necessity and value of affirming responsible profiling in general while continuing to combat the deadly racism that is endemic in American law enforcement from the traffic-cop level all the way through the ranks of our most esteemed federal prosecutors and courts.¹¹ The essay seeks to embolden the discourse around the issue to include a space for calling racism racism while also availing non-racist access to a powerful law-enforcement approach that can be appropriate and helpful to fighting crime in all communities.

Section I establishes the definitions of racial profiling and clarifies their relationships to a distinct problem with which profiling has been too extensively conflated in informal discussions, including many of the 100 vignettes in *Presumption of Guilt's* long Epilogue, "100 Ways to Look at Black Man," which comprises roughly one half of the book.¹² Invidious racial discrimination, also known as racism. Section II applies the definitions of racial profiling and racism to some of the more powerful testimonials and police records featured in *Presumption of Guilt*, categorizing various methods of law enforcement and aligning on policy and empirical grounds with the position that profiling, when undertaken properly, is a positive approach that even black political leaders have tacitly endorsed because of its positive impact on black communities in the aggregate.

In the final analysis, the essay declares profiling, where practiced appropriately, as a potential benefit for blacks and all other American

9. See *Id.* at 65 (explaining "there was no place in America where African Americans could receive what the law guarantees to its White citizens: a presumption of innocence.").

10. See *Id.* at 15-40 for Ogletree's characterization of the events.

11. For a comprehensive treatment of the effects of this pervasive bias, see ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 40 (2007) ("It's easier to simply go forward with the prosecution than engage in the thorny exercise of confronting the very police officers on whom they rely to successfully prosecute their cases.").

12. See OGLETREE, *supra* note 5, at 204-05 for my own encounter with racial prejudice at Lincoln Center.

groups, rather than as a kind of albatross preventing discrete minorities from attaining their hard-won civil rights and liberties. It suggests a policy of racially profiling white motorists in those areas where data indicate that they are disproportionately likely to be breaking the law. The essay thereby serves to augment the record underlying the continuous calls for an end to the never-defensible racism in American policing that has stubbornly endured since the founding of the Republic, the kind that has saddled black men in America with a damnable and unconstitutional presumption of guilt.

The essay closes with an affirmation of the possibilities that inhere in Ogletree's unique contribution in "Presumption of Guilt:" more than 100 individuated accounts. It is hoped that these stories can animate the discussion of when racial profiling is appropriate versus when racial profiling crosses the line and becomes racism, and how aggregate data must inform law-enforcement policy and policing practices in drawing that subtle but necessary distinction.

I. RACIAL PROFILING AND RACISM DEFINED

This essay need not break ground with regard to either the necessity of establishing definitions in this area of law or selecting the best definitions, for Professors Ramirez and her two co-authors already have done so in their ground-breaking 2003 American Criminal Law Review article *Defining Racial Profiling in a Post-September 11 World*:

It is evident that the definition one chooses will determine one's perception of the scope of the problem and the need for a response to it. Therefore, to better understand and address the issue of racial profiling, courts, law enforcement agencies, community groups, and scholars must clearly define "racial profiling" and determine what role race should play in law enforcement actions. Over the last decade, two very different definitions of "racial profiling" have emerged, one narrow and one broad, both attempting to define the law enforcement practice of using race as part of the calculus in determining whom to question, stop, or search.

Under the narrow definition, racial profiling occurs when a law enforcement action is based on the race of the suspect, so that race is the sole criterion for questioning, stopping, or searching a suspect. Relying on this narrow definition, virtually all law enforcement agencies can honestly say that, as a matter of policy, they do not engage in racial profiling and direct their officers not to engage in it. During the era of Jim Crow, there were police departments in this country that engaged in this form of racial profiling. While there may be some that still do, such a department would be the rare exception rather than the rule. Similarly, there certainly continue to be individual police officers who will stop a young black male solely because that person is young and black and either driving or walking in a white community, but few

of them would concede that the stop was based solely on the race of the suspect. In short, this narrow definition defines away the problem of racial profiling by limiting it to the relatively rare instance when race, by itself, is the sole basis for the stop or search. As Professor Randall Kennedy has often observed, even the most racist police officers do not act solely on the basis of race; other factors ordinarily also come into play. However, by allowing race to be one factor among many, courts have, in effect, adopted this narrow definition.

According to the broader definition, racial profiling occurs when a law enforcement officer relies upon race, ethnicity, national origin, or religion as one of several factors in determining whom to stop, search, or question. Under this definition, racial profiling occurs whenever race is part of the calculus of suspicion, which may include other factors such as gender, age, general appearance, and behavior. “Properly understood, . . . 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.” Under this definition, the use of race as one of many factors need not be conscious; it may be the unconscious product of racial stereotyping. Consequently, with this definition, racial profiling includes actions by law enforcement officers who are acting in good faith, and who believe sincerely that they are not using race as a factor but who in reality are unconsciously making inferences as to criminal behavior that rely on little more than generalized racial stereotypes.¹³

Ultimately, Ramirez and her co-authors propose – and I adapt for the purposes of this and future discussions on policing – a definition whose terms bridge the divide between the narrow and the broad definition.¹⁴ Generally, those authors assert, racial profiling is the inappropriate¹⁵ use of race, ethnicity, or national origin, rather than behavior or individualized suspicion, to focus on an individual for additional investigation; the use of race is not inappropriate if law enforcement has specific, concrete evidence linking race to a particular person or particular criminal incident.¹⁶

Ramirez articulates the functional benefits of using this definition:

13. Deborah A. Ramirez, Jennifer Hoopes, & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1203-05 (2003) (citations omitted).

14. *Id.* at 1205.

15. Footnoting the modifier “inappropriate,” Ramirez *et al* assert the particular importance of distinguishing between the “inappropriate” use of race and the “illegal” use of race. *Id.* at 1205 n.43. “Circumstances under which we argue the use of race is inappropriate and therefore constitutes racial profiling may very well be ‘legal’ according to the courts. See *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000) (“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.”), *amending and superseding* 195 F.3d 111 (2d Cir. 1999), *reh’g en banc denied*, 235 F.3d 769 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).” *Id.*

16. Ramirez, *supra* note 13, at 1205.

The first part of the definition prohibits law enforcement from using race, ethnicity, or stereotypes as factors in selecting whom to stop, search, or question. Instead, it focuses the police on the behavior of the individual and requires more specificity to stop and search. When law enforcement uses race as a signal for criminality in initiating law enforcement actions, it results in ineffective law enforcement, strained community relations, and violations of basic civil rights. By using multi-layered profiles based on intelligence information and behavioral factors, however, rather than simply casting the net broadly to include just members of one race, one ethnicity, or one religion, police can be more probative and can more effectively focus their criminal investigations on appropriate criminal suspects. Both in the pre-September 11 and post-September 11 contexts, the use of race alone, or even as a component in creating a criminal profile designed to prevent future crime, reduces the effectiveness of law enforcement.¹⁷

Aligning with the many subsequent commentators who have undertaken racially empirical studies of traffic stops, arrests, and convictions, I adopt these scholars' approach because in the eight years since the appearance of this ground-breaking, aftermath-of-9/11 article, their projections as to these definitions' utility have been validated.¹⁸

Like racial profiling, racism also has been defined in a variety of ways.¹⁹ For clarity of exposition, this essay adopts Phyllis A. Katz's widely accepted definition of racism: the differential treatment of individuals on the basis of their racial group membership.²⁰ Hereinafter, I

17. *Id.* at 1205-06.

18. To be sure, a number of economic studies empiricize racial profiling. *See, e.g.,* Vani K. Borooah, *Racial Bias in Police Stops and Searches: An Economic Analysis*, 17 *EUR. J. OF POL. ECON.* 17, 32-33 (2001) (estimating a model using data on stops and searches in ten separate areas in England); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 *U. CHI. L. REV.* 1275, 1286-97, 1354-71 (2004) (dividing empirical racial profiling scholarship into "economics" and "civil liberties" strains and then providing a theoretical economic model of racial profiling that maps out whether racial profiling is rational, and which population should be profiled, using a series of potential elasticities and offending rate parameters); Rubin Hernandez-Murillo & John Knowles, *Racial Profiling or Racist Policing? Bounds Tests in Aggregate Data*, 45 *INT'L ECON. REV.* 959, 960 (2004) (analyzing situations in which aggregate, rather than individual-level, data is available); Nicola Persico & Petra Todd, *Using Hit Rates to Test for Racial Bias in Law Enforcement: Vehicle Searches in Wichita* (Nat'l Bureau of Econ. Research, Working Paper No. 10,947, 2004), available at <http://papers.nber.org/papers/W10947> (adopting a statistical approach to allow for heterogeneous police and motorists); Dhammika Dharmapala & Stephen L. Ross, *Racial Bias in Motor Vehicles Searches: Additional Theory and Evidence*, 3 *CONTRIBUTIONS TO ECON. ANALYSIS & POL'Y*, No. 1, art. 12 (2004), at 4-7, available at <http://www.bepress.com/bejeap/contributions/vol3/iss1/art12/> (accounting for the fact that potential offenders can bypass the highway altogether, thus avoiding detection).

19. *See* BENJAMIN P. BOWSER, *INTRODUCTION TO RACISM AND ANTI-RACISM IN WORLD PERSPECTIVE*, x-xii (1995).

20. *TOWARDS THE ELIMINATION OF RACISM* (Phyllis A. Katz ed., 1976). *See also* Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 *PSYCHOL. BULL.* 546, 546 (1980) ("Racism may be examined at two levels: One may measure discriminatory behavior, and one may infer prejudiced attitudes. Stereotyp-

refer to both the appropriate and inappropriate uses of race by police as “racial profiling;” however, I modify the term with either “appropriate” or “inappropriate,” depending on whether the use of race, ethnicity, or national origin, rather than behavior or individualized suspicion, is based upon specific, concrete evidence linking race to a particular person or particular criminal incident. I assert, moreover, that inappropriate racial profiling is racist.

II. APPLYING TERMS TO ACTUAL PRACTICES

“Presumption of Guilt” is replete with powerful contemporary accounts of blacks’ encounters with police officers, including traffic stops, searches, and all kinds of other apprehensions.²¹ The Los Angeles area alone, despite being the home of the 1992 riot over law-enforcement racism against blacks, provides fertile ground even today.²² There is the 2009 story of Voltaire Rico Sterling, a black actor, writer, attorney, and educator, who was followed for a long time and then stopped by two white police officers in his Beverly Hills community simply for “driving while [b]lack.”²³ And then there is the depiction of years of prominent Los Angeles attorney Michael Lawson’s being stopped and interrogated while traveling in cars with black-male friends or white or light-skinned black women because “the Los Angeles Police Department in particular . . . made a regular practice of profiling young Black men.”²⁴ Ogletree also notes the origin of the term “Driving While Black,” from none other than the late Johnnie L. Cochran, Jr., who in the early 1980s, while driving his Rolls Royce on the highway, was pulled over, his young son and daughter shattered to watch as their innocent father had guns drawn on him as white police officers asked him to step out of his car.²⁵

These episodes in the book are regarded as racial profiling, and in the broadest sense of the word, they are.²⁶ But fundamentally, what these stops were about was inappropriate racial profiling, or more precisely, racism.²⁷ Whites treated black men differently from the way they treated other whites simply because they were black. Such racism gives appropriate racial profiling, which appears to make black communities safer, a bad name. But what does appropriate racial pro-

ing, which involves the presumption of certain attributes in an individual solely on the basis of racial groups, is one form of prejudice.” (Citations omitted)).

21. See generally OGLETREE, *supra* note 5.

22. *Id.* at 12-13.

23. *Id.* at 149-51.

24. *Id.* at 136.

25. *Id.* at 140.

26. *Id.* at 131.

27. *Id.* at 124-6.

filing look like? “Presumption of Guilt” contains what, according to the definitions offered in Section I, could serve as a textbook example of appropriate racial profiling.²⁸

However, this episode of Maryland State Police officers’ profiling that was challenged in the courts, and that is being re-examined judicially today because a settlement has not resulted in sufficiently reformed policing, is presented in the book as inappropriate racial profiling.²⁹ The stop involved Robert Wilkins, a Washington lawyer who had driven with relatives across the country for his maternal grandfather’s funeral in Chicago in 1992. While returning on a 12-hour journey to the Washington area in a rented Cadillac just before 6 a.m. on Interstate 68 in downtown Cumberland, Maryland, he and some relatives were pulled over by Officer V.W. Hughes.³⁰ The officer said he had paced the car at 60 m.p.h. in a 40 m.p.h. zone.³¹ After Wilkins’s cousin Scott, the driver, provided the usual credentials, the officer asked to search the car.³² Conferring with the driver’s father and Wilkins, the driver decided not to sign the “Consent to Search” form that Hughes had given Scott.³³ After some back and forth and Wilkins’s explanation that there could be no search without an arrest and that, furthermore, Scott had done nothing to create probable cause for an arrest, the officer told the family that they would have to wait until a dog came to sniff the car and he would not let them go, and after 30 minutes, the officer also told them that they would have to get out of the car for a search.³⁴ Despite Wilkins’s appeal not to have to get out in the rainy weather and his explanation that they had been at a funeral and driving all night, and despite his showing the officer an obituary, the officer persisted.³⁵ Two more officers appeared, and a German shepherd sniffed everything in and out of the car, finding no indication of any contraband, drugs, or anything else.³⁶ After this procedure ended, Sgt. Brown from the Alleghany County Sheriff’s Department, who had brought the dog, permitted the family to leave.³⁷

28. See Ramirez, *supra* note 13 (defining racial profiling).

29. See OGLETREE, *supra* note 5, at 102-07 for the facts of the Robert Wilkins case.

30. *Id.* at 102-03.

31. *Id.* at 103.

32. *Id.*

33. *Id.* at 104.

34. *Id.*

35. *Id.*

36. *Id.* at 105.

37. *Id.* Wilkins arrived in Washington too late for his court appearance. *Id.*

Wilkins, represented by the American Civil Liberties Union, sued the Maryland State Police for profiling.³⁸ In the heart of “Presumption of Guilt,” Ogletree explains the reasoning behind the lawsuit:

[T]he ACLU wanted to examine the legal basis for the stop and ways to keep it from happening to other innocent citizens. As a result of the filing of the lawsuit, Robert and his counsel ultimately received the criminal intelligence report for the Maryland state police. According to Robert, the report discussed the problem of crack cocaine in the Cumberland, Maryland, area and advised Maryland troopers that traffickers “were predominantly black males and black females.” The report indicated that “these dangerous armed traffickers generally traveled early in the morning or late at night along Interstate 68, and that they favored rental cars with Virginia registration.” Having traveled on I-68 early in the morning, in a Virginia rental car, Robert and his family fit this broad profile. The problem, of course, is that no one in the car was dangerous, and certainly no one had any drugs or weapons.³⁹

Though the account suggests that the criminal intelligence report supports a claim of inappropriate racial profiling, this report would appear to certify the actions of the police as not racist. As Professor Ramirez *et al* explained, the use of race is not inappropriate if law enforcement has specific, concrete evidence linking race to a particular person or particular criminal incident.⁴⁰ Moreover, the Maryland state police, in seeking to fight the crack-cocaine epidemic that was ravaging black communities in the early 1990s, was following public policy endorsed by the majority of the Congressional Black Caucus, who voted for draconian punishment for crack-cocaine possession and dealing.⁴¹

In 1986, when the federal law imposing extremely harsh sentences appeared, most of the Congressional Black Caucus favored federal sentencing disparities with respect to crimes involving crack on the one hand and powder cocaine on the other.⁴² Were the majority of the members of the Congressional Black Caucus engaged in inappropriate racial profiling? Were they racist? Of course not. They were

38. *Id.* at 106.

39. *Id.*

40. Ramirez, *supra* note 13, at 1205.

41. Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FL. ST. U. L. REV. 935, 943 n.59 (2001) (citing Stephen Breyer, *Federal Sentencing Guidelines Revisited, An Address Before the University of Nebraska College of Law* (Nov. 18, 1998)), in 11 FED. SENTENCING REP., February 1999, at 180 (noting that a majority of members of the Congressional Black Caucus supported mandatory minimum sentences for drug crimes in the 1980s).

42. See, e.g., Randall Kennedy, *Is Everything Race?*, THE NEW REPUBLIC, Jan. 1, 1996, at A18 (noting that “eleven of the then twenty black members of the Congress supported” the 1986 Anti-Drug Abuse Act, which codified the 100-to-1 crack to powder cocaine sentencing disparity).

engaged in appropriate racial profiling designed to make communities safer for blacks and everybody else. This is an important point, notwithstanding that legislation's unintended consequence of criminalizing a considerable portion of a generation of black men.⁴³

Professor Randall Kennedy has argued that critics who claim the criminal justice system is racially discriminatory because it has incarcerated a disproportionate number of African-Americans are misguided to the extent that, while liberal criticism of the criminal justice system has traditionally focused on the disparate harms inflicted on black defendants or suspects by law enforcement officials, other black citizens—the “law-abiding”—are benefited by the incarceration of large numbers of black criminals, because most crime is intraracial.⁴⁴ Kennedy maintains that the racially disparate results of the criminal justice system do not harm black citizens as a class inasmuch as only a lawbreaking subset of that class is harmed, while a law-abiding subset is benefited; and because the system benefits some black citizens while burdening others, Kennedy argues, the system does not discriminate on the basis of race.⁴⁵

Nevertheless, the Wilkins matter made its way through the Maryland courts, and in 1993, Wilkins's case was settled, with his being awarded \$50,000 in damages plus \$46,000 in attorney's fees for the three years of litigation.⁴⁶ The state also agreed to no longer use race-based drug courier profiles as law-enforcement tools, and a new Maryland state police policy would prohibit race as a factor in determining whom to stop, detain, or search without further evidence, plus a host of other safeguards against racially discriminatory practices.⁴⁷ However, Ogletree reveals, “[m]ore than a decade after his encounter with the police, Wilkins again brought suit against the Maryland state police, asserting that the practices of racial profiling continued and that court intervention was warranted to change these persistent discriminatory practices.”⁴⁸

43. See Breyer, *supra* note 41.

44. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1260 n.20 (1994), summarized and critiqued in David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's 'Politics of Distinction,'* 83 GEO. L.J. 2547, 2571 (1995). But see Norm Parish, *Blacks Say Profiling of Arabs is Racism; Polls Show Many Favor Scrutiny After Hijackings*, ST. LOUIS POST-DISPATCH, Oct. 17, 2001, at C1. (“Troubled by polls showing support for racial profiling in the wake of Sept. 11, National Urban League president Hugh Price stated, ‘We should see in these polls’ findings more evidence of the perniciousness of racial profiling itself, no matter how it’s seemingly bolstered by glib or urgently declared rationalizations These polls show that whenever people speak up in favor of racial profiling, they always favor its use against some other group, not theirs.’”)

45. Cole, *supra* note 44.

46. *Id.* at 106-07.

47. *Id.* at 107.

48. *Id.* at 108.

On the other hand, Wilkins's litigation exposed clear racism on another interstate highway patrolled by Maryland state police.⁴⁹ In the state of Maryland, the police reports indicated that 70 to 75 percent of people searched on Interstate 95 – the busy highway linking Richmond, Va., Washington, D.C., Baltimore, Md., Wilmington, Del., Philadelphia, Pa., New York City, and other East Coast cities – were blacks, even though blacks represented only 17 percent of those driving on the highway and only 17 percent of traffic violators.⁵⁰ By the same token, Ogletree reports that the Maryland state police would search over 400 African Americans compared to 100 whites to find similar numbers of individuals with drugs or other contraband.⁵¹ Ogletree concludes, “It was clear that a disproportionate number of African Americans were stopped and searched without any valid basis.”⁵²

Notwithstanding the aim of the Wilkins litigation in ending racial profiling, one useful change in the “persistent discriminatory practices” could have been made as soon as this black-white enforcement disparity was found to be in dissonance with the reality of white criminality during his first lawsuit. If appropriate racial profiling is constitutionally permissible and appropriate public policy, then the increased likelihood of white lawlessness apparent on the examined stretch of Maryland roadway would appear to justify substantial increases in racial profiling of *white* motorists by the Maryland police – profiling that would be deemed appropriate according to the terminology set forth in this essay.⁵³

CONCLUSIONS

Since the debates of the 1990s over drugs, policing, and civil rights, a body of scholarship has drawn upon the data collected as a result of important challenges like Wilkins's.⁵⁴ Ogletree identifies the resultant findings as “provid[ing] documented instances of racial profiling . . .

49. OGLETREE, *supra* note 5, at 107.

50. *Id.*

51. *Id.*

52. *Id.*

53. Unfortunately, however, the seminal, and current, research analyzing discrimination lawsuits' effects on changing police conduct seems to confirm Wilkins's experience that even a settlement agreement containing monitoring can be flouted by policing agencies hell-bent on acting out their racial biases against blacks. See generally Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010). Focused on the role of lawsuits in organizational decisionmaking, Professor Schwartz's empirical research includes a detailed study of the ways in which law enforcement agencies gather and analyze information from lawsuits that have been brought against them. Schwartz exposes serious information failures that often prevent informed decisionmaking, showing that litigation information is used only in rare instances by law enforcement agencies.

54. See *Id.*

[and] paint[ing] a much darker, more troubling picture of a criminal justice system teeming with racial imbalance.”⁵⁵ Professor Barne, for example, in 2005 investigated the costs and benefits of racial profiling in the context of drug interdiction.⁵⁶ She reviewed the empirical economic and civil rights literature regarding the existence and rationality of racial profiling and then built an explicit model of a trooper’s decision to search a stopped vehicle.⁵⁷ Estimating the model using stop and search data from a portion of Interstate 95 in Maryland, she found that the Maryland state police use the motorist’s race as a factor in deciding which stopped vehicles to search.⁵⁸ This result persists even after controlling for many other descriptive variables that influence the trooper’s decision to search, she found.⁵⁹ She then introduced an additional model controlling for race’s role in the search decision and estimates the counterfactual: the change in the amount of drugs the police would find if they ignored race as a factor in the search decision.⁶⁰ Applying that model, she concluded that race is the strongest predictor of identifying drug traffickers, but that racial profiling comes at significant cost, as black motorists who are subject to search are also more likely to be innocent than their white counterparts.⁶¹ Clearly the discussion of when appropriate racial profiling crosses the line into racism, and how aggregate data is to inform law enforcement policy and policing practices, is complex, no matter how clearly the individual stories can be categorized as one or the other.⁶²

Throughout his career, Ogletree has distilled lessons from such complexity, addressing the topics of race, class, and justice with the view of proposing ways to generate more dialogue and understanding and less fear to instill more respect between citizens and law enforcement.⁶³ Presumption of Guilt is an invaluable, fresh contribution precisely because it catalogues not fewer than 102 instances of upstanding black men’s race-based run-ins with law enforcement.⁶⁴

Gates’s arrest requires such comparative analysis because his plight on that sunny summer day in Cambridge, Mass., is the plight of mil-

55. *Id.* at 110-11.

56. Katherine Y. Barne, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089 (2005).

57. *Id.* at 1089.

58. *Id.*

59. *Id.*

60. *Id.* at 1089-90.

61. *Id.* at 1090.

62. Charles H. Ramsey, Chief, Keynote Address at the 1998 New Jersey Law Enforcement Summit, *Overcoming Fear, Building Partnerships: Toward a New Paradigm in Police-Community Race Relations* (Dec. 11, 1998) (transcript available at <http://mpdc.dc.gov/mpdc/cwp/view,a,1247,a,549769.asp>).

63. OGLETREE, *supra* note 5, at 11.

64. OGLETREE, *supra* note 5.

lions of other black men in America subject to racist policing. Here was a uniquely 21st century tragedy occurring at the intersection of race, crime, class, and the law: an innocent black man of highest distinction, in his home, intentionally arrested, handcuffed, booked, and sanctioned by white law enforcement as a criminal.⁶⁵ As Ogletree ultimately argues, if we are to move forward as a nation, we must examine not only what happened to Professor Henry Louis Gates, Jr., on July 16, 2009, but we must also examine what we can and must do, individually and collectively, to develop a justice system that is truly committed to the presumption of innocence.⁶⁶

65. Black males on Harvard property have long endured such treatment at the hands of white officers. *E.g.*, Amos Jones, *How Does One Defend Charging a Black Resident of Harvard Housing with Trespassing in His Own House? Apparently, by Remaining Silent*, HARV. L. RECORD, Dec. 9, 2005, available at <http://www.hlrecord.org/2.4462/amos-s-sermon-how-does-one-defend-charging-a-black-resident-of-harvard-housing-with-trespassing-in-his-own-house-apparently-by-remaining-silent-1.578937>.

66. OGLETREE, *supra* note 5, at 13.