

2013

The Corrective Use of Lawsuit Data in Policing: Reconstructing the Vocabulary of Racial Profiling

Amos N. Jones

Campbell University School of Law, ajones@campbell.edu

Follow this and additional works at: http://scholarship.law.campbell.edu/fac_sw

Recommended Citation

Amos N. Jones, *The Corrective Use of Lawsuit Data in Policing: Reconstructing the Vocabulary of Racial Profiling*, 5 *Widener J. L., Econ. & Race* 1 (2013).

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Scholarly Repository @ Campbell University School of Law.

**THE CORRECTIVE USE OF LAWSUIT DATA IN POLICING:
RECONSTRUCTING THE VOCABULARY OF RACIAL PROFILING**

AMOS N. JONES *

“In order to get beyond racism, we must first take account of race. There is no other way.”¹

INTRODUCTION

A long-standing instrumentality in the quest for a more perfect American Union is the systematic governmental practice of collecting data to identify, diagnose, and resolve serious racial disparities.² Despite the growing attack on overtly corrective actions taken in light of lingering inequality, data collection has exposed actionable racial disparities.³ There appears to have emerged no serious argument at any point on the ideological spectrum that racial data should cease to be collected by public entities.⁴ Even in the most recent constitutional

* Assistant Professor, Campbell University School of Law. Fulbright Postgraduate Scholar in the Centre for Comparative Constitutional Studies and Visitor to the Faculty of Law, 2006-07, University of Melbourne (Australia). J.D., 2006, Harvard Law School; M.S., 2003, Columbia University Graduate School of Journalism; B.A., *cum laude*, Emory University, 2000. I thank the scholar-discussants at the University of Chicago Law School who vigorously engaged a variant of the argument presented herein and who, through Randall K. Johnson, provided critical feedback in the months that followed. I thank the editors of the North Carolina Central Law University Law Review for soliciting my authorship of the book note three years ago that originated this idea prior to its contemporary development in the recently arising discourse on crime and police accountability, *Defending Profiling While Combating Racism: A Companion to Ogletree's 'Presumption of Guilt'*, 33 N.C. CENT. L. REV. 187 (2011).

¹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

² See McGeorge Bundy, *The Issue Before the Court: Who Gets Ahead in America?*, ATLANTIC MONTHLY, Nov. 1977, at 41, 54 (“To get past racism, we must here take account of race.”).

³ See, e.g., *Bakke*, 438 U.S. 265, 287 (limiting affirmative action in education); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (striking down affirmative action in economic empowerment); *Ward's Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650-51 (1989) (curtailing the use of racial data that animated impact doctrine in employment-discrimination law).

⁴ See Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721, 722 (1996) (pointing out two widely supported mechanisms of civil rights enforcement that require consciousness of race:

First, the Civil Rights Act of 1991, which codifies the Supreme Court's unanimous decision in *Griggs v. Duke Power Co.*, requires the collection of racial data. The Act, overwhelmingly supported in Congress, steers a sensible course between requiring racial preference on the one

challenge to affirmative action in public education, the most extreme opponents of race-conscious admissions policies do not seem to want to end racial data collection.⁵ In fact, such advocates rely on the collection of such racial data to inform and bolster their arguments.⁶ Thus, the collection of racial data is assumed to embody sound public policy, which is capable of informing the advancement of constitutional rules of law regarding equal protection and preserving the rights set forth in the Fourteenth Amendment.⁷

In the decades following the Civil Rights Movement and the growth of American tort law, a volume of litigation has proliferated; particularly, against police departments accused of discriminating against Blacks in both employment and enforcement.⁸ Section 1983 of the Civil Rights Act of 1871 is now regarded as “[t]he primary vehicle for asserting federal claims against local public entities and public employees [in that the statute’s] broad language . . . led to its present status as the primary source of redress for a wide variety of governmental abuses.”⁹ To be sure, § 1983 published cases¹⁰ tripled between 1980 and 2000.¹¹

hand, and placing the entire burden of proving discrimination on victims on the other hand. Under the Act, when an employment practice produces a statistical racial imbalance, or ‘disparate impact,’ in the workplace, employers bear the burden of defending the practice with reference to a race-neutral justification of ‘business necessity.’ Abolish racial categories, and the Act becomes unenforceable. Likewise, old-style affirmative action guidelines, which require employers to cast a wider net to garner a diverse applicant pool (without providing preferences in decision-making), require race to be a definable category. This practice is widely supported, backed by conservatives and liberals alike.

(citations omitted)).

⁵ *Capitol Affairs: How Far Can UT Go in Mimicking Racial Makeup of Texas?*, VOICE OF RUSSIA RADIO AMERICAN EDITION (Oct. 10, 2012), http://voicerrussia.com/us/radio_broadcast/58461461/90751489 (follow Part 1 “Download audio file” hyperlink) (advocating against particular uses of race in affirmative-action programs at the University of Texas at Austin).

⁶ *Id.*

⁷ *See infra* notes 21-22.

⁸ VICTOR E. KAPPELER, *CRITICAL ISSUES IN POLICE CIVIL LIABILITY* 3-5 (3rd ed. 2001).

⁹ Robert W. Funk et al., *Civil Rights Liability*, ILLINOIS MUNICIPAL LAW: CONTRACTS, LITIGATION AND HOME RULE 5.2 (Stewart H. Diamond ed., Illinois Institute for Continuing Legal Education 2012).

¹⁰ Civil Rights Act of 1871, 42 U.S.C. § 1983 (2013) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

In recent years, a growing body of legal scholarship analyzed whether and to what extent police departments use lawsuit data as a means to correct discriminatory practices. Professor Joanna 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, focusing on the role of lawsuits in organizational decision-making.¹² Schwartz exposes serious informational failures that often prevent informed decision-making by showing that information from litigation is used only in rare instances by law enforcement agencies.¹³ She recently built on this work with a more informed analysis.¹⁴ Joining that conversation, Randall Johnson of the University of Chicago published his findings in October, 2012 based on a newly formed § 1983 dataset.¹⁵ Using this information, he asserted that lawsuit data collection does not positively correlate with greater deterrence of § 1983 cases; nevertheless, police departments are equipped to learn from third-party data if they so desire.¹⁶

Such scholarship plainly assumes that police officers are capable of being sensitized and empowered toward reform.¹⁷ That assumption certainly has foundation,¹⁸ support,¹⁹ and merit.²⁰

¹¹ KAPPELER, *supra* note 8, at 5–7.

¹² See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010).

¹³ *Id.* at 1066–67.

¹⁴ See Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012).

¹⁵ Randall K. Johnson, *Do Police Learn from Lawsuit Data?*, 40 RUTGERS L. REC. 30 (2012); accord Randall K. Johnson, *Why Police Learn From Third-Party Data*, 3 WAKE FOREST L. REV. ONLINE 1 (2013).

¹⁶ *Id.* at 31–33 (challenging Schwartz's methodology as to their shared research question: "When officials consider information from lawsuits, [do] they use [this data] to reduce the likelihood of future [police misconduct cases]?").

¹⁷ See David Cole, *Race, Policing, and the Future of the Criminal Law*, 26 HUM. RTS. 2, 2-3 (1999). "Absent race and class disparities, the privileged among us could not enjoy substantial constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass incarceration that we have pursued over the past two decades." See also Bernard Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMINOLOGY AND PUBLIC POLICY 363, 375 (2004) (discussing deliberate decisions not to know about the human costs of aggressive, discretionary policing strategies associated with the war on drugs, "[t]he most important thing in the public policy debates, then, is to decide with eyes wide open and brutal honesty, how much unconstitutionality we are prepared to live with—how many sexual batteries of black suspects we are willing to perform. We get to decide").

¹⁸ Jessica R. Manley, *A Common Field of Vision: Municipal Liability for State Law Enforcement and Principles of Federalism in Section 1983 Actions*, 100 NW. U.L. REV. 967, 971–78 (2006) (describing the history of municipal liability under § 1983).

¹⁹ See generally Craig B. Futterman, H. Melissa Mather & Melanie Miles, *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, 1 DEPAUL J. SOC. JUST. 251, 259 (2008) (demonstrating that the analysis indicates that if the Chicago Police Department had an effective disciplinary system, its officers would have been deterred from participating in racial misconduct).

²⁰ See Karen M. Blum, *Municipal Liability Under § 1983*, 15 Touro L. REV. 1535, 1540 (1999) (training police officers in certain areas may be necessary to avoid constitutional violations); see also City of New York

This article adopts that assumption and argues the reasoning it animates should extend into another critically important aspect of policing in the United States.

This article argues that the growing professionalism of law enforcement agencies,²¹ coupled with the advancements in data collection,²² justifies a re-categorization of racial profiling such that the practice reclaims its appropriate place in law enforcement. The article also assumes that if police departments are capable of self-reform along those lines, then they are capable of distinguishing racial profiling from its evil cousin, racism, and adopting better practices in light of this information using the very assumptions driving the proliferation of studies on the use of lawsuit data in deterring police misconduct.²³ Racial profiling derives from a police practice spanning more than thirty years of permissible general characteristic profiling,²⁴ while racism remains an illegal means of law enforcement.²⁵ This article calls for a clarification

Office of the Comptroller, *Claims Report Fiscal Years 2009 & 2010* (June 15, 2011) (on file with author), available at http://www.comptroller.nyc.gov/bureaus/bla/pdf/2011_Claims_Report.pdf.

²¹ This increased professionalism includes the ability to acknowledge wrongdoing and to correct course, if necessary. An example is the joint effort by the Federal Bureau of Investigation and U.S. Department of Justice decision to review thousands of cases that were handled by all FBI Laboratory hair and fiber examiners. This review will determine whether flawed forensics and inaccurate or exaggerates agent testimony led to numerous wrongful convictions in local and federal cases; see Spencer S. Hsu, *Justice Dept., FBI to review use of forensic evidence in thousands of cases*, WASH. POST, July 10, 2012, available at http://articles.washingtonpost.com/2012-07-10/local/35488079_1_new-review-fbi-laboratory-historical-cases.

²² See Data Collection Resource Center, *Background and Current Data Collection Efforts*, <http://www.racialprofilinganalysis.neu.edu/background/#Jurisdictions%20Collecting> (last visited Feb. 19, 2013). For example, Northeastern University's Data Collection Resource Center tracks jurisdictions that actively collect "racial profiling" data. Participating jurisdictions collect this information for a number of reasons.

²³ FREDERICK SCHAUER, *PROFILES, PROBABILITIES AND STEREOTYPES* 1–19 (2003).

²⁴ See BRENT E. TURVEY, *CRIMINAL PROFILING: AN INTRODUCTION TO BEHAVIORAL EVIDENCE ANALYSIS* 692-93 (2008) (discussing profiling based on general characteristics).

²⁵ See *infra* notes 71 and 85; but see Lisa Bloom, *Zimmerman Prosecutors Duck the Race Issue*, N.Y. TIMES, July 15, 2013, available at <http://www.nytimes.com/2013/07/16/opinion/zimmerman-prosecutors-duck-the-race-issue.html?pagewanted=all> (legal analyst suggesting the potential error in attempts to segregate race from profiling by opining in the case the *State of Florida v. George Zimmerman*: "In an odd ruling, Judge Debra Nelson decided that the word 'profiling' — but not the phrase 'racial profiling' — could be used in opening statements. But what other kind of profiling could possibly have been involved here? Could jurors — and the public — seriously imagine that Mr. Zimmerman considered Mr. Martin a criminal solely because he was walking slowly in the rain as he chatted on the phone?"); accord Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-racial Society*, 91 N.C. L. REV. 1555, 1599-1600 (2013) (Reasserting a suggestion that a "race-switching jury instruction" is an appropriate way in which race can be made appropriately salient in trials:

In an interracial case involving a claim of self-defense, a party concerned with the influence of racial stereotypes could request, or the judge could sua sponte give, a race-switching jury instruction, one that suggests to jurors that they imagine the same facts and circumstances but simply switch the race of the defendant with the race of the victim. For example, if the defendant is a White man and the victim is a Black man, jurors would imagine the same facts with a Black male defendant and a White male victim. If jurors come to a different conclusion about the reasonableness of the defendant's belief that he needed to use deadly force in self-defense, this should alert jurors to the possibility that racial stereotypes and implicit racial bias may have

on the discourse of policing and constitutional law in order to clear the way for sensible, sound, race-conscious strategies that would properly empower police officers while leaving all communities – Black neighborhoods overburdened by the brunt of urban crime – safer and freer.²⁶

In re-imagining the discourse, the article concedes up front that racial profiling is rightfully contested as a law-enforcement mechanism,²⁷ having been identified by Cornel West in the 1990s as sociologically problematic,²⁸ attacked by the Rev. Al Sharpton as inherently racist,²⁹ and litigated by a cadre of talented personal injury lawyers as unconstitutional.³⁰ But the article identifies an important dynamic that is also often unaddressed. Self-evident in conversations and thoughts about the topic of racial profiling, is the tension between the long-established necessity and value of affirming responsible profiling in general and the necessity and value of continuing to combat deadly racism that is endemic in American law enforcement, from the traffic cop level all the way through the ranks of federal prosecutors and courts.³¹ The article seeks to inspire the discourse around the issue to include a space for identifying racism, while applying a non-racist method to a powerful law enforcement approach that can be appropriate and helpful to fight crime in all communities.

Part I establishes the definitions of racial profiling and clarifies their relationship to racism, a distinct problem, with which profiling has been too extensively conflated.³² Part II applies the definitions of racial profiling and racism to the kinds of fact patterns that resulted in lawsuits frequently found in the latest empirical studies; categorizing various methods of law enforcement profiling that, when undertaken properly, can be a positive approach that even Black political leaders should endorse because of its positive impact on Black communities in the aggregate.

influenced their decision-making and that they should deliberate anew about whether the defendant's use of deadly force was reasonable).

²⁶ See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 3–28 (1997).

²⁷ See MALCOLM GLADWELL, WHAT THE DOG SAW: AND OTHER ADVENTURES 394–412 (2009).

²⁸ See CORNEL WEST, RACE MATTERS 1-7 (1993).

²⁹ Cf. Vasugi V. Ganeshanathan, *Sharpton Sounds Off on Racial Profiling*, THE HARVARD CRIMSON, Nov. 23, 1999, available at <http://www.thecrimson.com/article/1999/11/23/sharpton-sounds-off-on-racial-profiling/>. “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.’”

³⁰ 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).

³¹ 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.”

³² See *infra*, note 37.

In the final analysis, this article declares racial profiling, where practiced appropriately, is an inherently beneficial policing practice, rather than an albatross that deprives disadvantaged minority groups of their hard-won civil rights and liberties. In fact, this article calls for a policy of racially profiling white motorists in those areas where data indicates they are disproportionately likely to break the law.³³ The article thereby serves to augment the record for the continuous calls to end the never-defensible racism in American policing that has stubbornly endured since the founding of the Republic.

The article concludes on a projected note of hope that can further the discussion surrounding appropriate racial profiling versus unacceptable racism, and how law enforcement policies and practices can benefit from aggregated data to draw that distinction.

I. UNTANGLING “RACIAL PROFILING” FROM RACISM

Professor Deborah A. Ramirez, Jennifer Hoopes, and Tara Lai Quinlan have carefully considered definitions in this area of law in their 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

³³ A number of reports indicate that law enforcement agencies should subject non-Hispanic whites to greater levels of scrutiny, and show greater deference to minority citizens, especially within the context of traffic stops. See, e.g., Sylvia Moreno, *Race a Factor in Texas Stops; Study Finds Police More Likely to Pull over Blacks, Latinos*, WASH. POST, Feb. 25, 2005, at A03, available at <http://www.washingtonpost.com/wp-dyn/articles/A51613-2005Feb24.html>; Christina Jewett, *Racial Report a Concern; Analysis Shows Blacks Are Pulled Over at Higher Rate*, SACRAMENTO BEE, June 11, 2006, at B1; James Kimberly, *Minorities Stopped at Higher Rate in DuPage*, CHI. TRIB. (April 29, 2006), available at <http://www.highbeam.com/doc/1g1-145106717.html>. On the other hand, a form of profiling that could be called “reverse-reverse profiling” has been noticed in so-called “re-gentrifying” sections of urban centers, where white residents who live among mostly black residents are stopped and questioned by police on the assumption that they are out of their places; for criminal reasons. Despite the fact that no studies or articles treating this phenomenon were found in the course of researching for this article, a former white police officer in North Carolina volunteered to the author that his force frequently engaged in this kind of profiling of whites. A white female attorney who moved into a largely black Crown Heights section of Brooklyn, N.Y., levied this allegation against the New York Police Department and cited her formal complaint to the former New York City Public Advocate for repeated illegal searches on her white boyfriend by police officers in Crown Heights, who assumed they were present in that black area to engage in criminality rather than to dwell.

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.³⁴

³⁴ 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).

I adapt, for the purposes of this and future discussions, the definition chosen by Ramirez and her co-authors, “whose terms bridge the divide between the narrow and the broad definition.”³⁵ Racial profiling, rather than focusing on individualized behavior or suspicion for additional investigation, is an inappropriate use of race, ethnicity, or national origin.³⁶ The authors continue, “[t]he use of race is not inappropriate if law enforcement has specific, concrete evidence linking race to a particular person or particular criminal incident.”³⁷

There are practical benefits to choosing this definition:

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.³⁸

I, like many subsequent authors who have undertaken empirical studies of the correlation between race and traffic stops, arrests, and convictions, adopt this approach because its utility has been validated throughout the last eight years since the appearance of Ramirez’s article.³⁹

³⁵ *Id.* at 1205.

³⁶ *Id.* 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.” 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).

³⁷ Ramirez, *supra* note 34, at 1205.

³⁸ *Id.* at 1205–06.

³⁹ 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*

In addition to racial profiling, racism is also defined in a variety of ways.⁴⁰ This article adopts Phyllis A. Katz's widely accepted definition of racism, which provides for the differential treatment of individuals on the basis of their racial group membership.⁴¹ This paper refers to both the appropriate and inappropriate uses of race by police through racial profiling; however, I modify the term with either "appropriate" or "inappropriate," depending on whether the use of race, ethnicity, or national origin 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. EXAMINING THE UTILITY OF THE CORRECTED TERMINOLOGY

The lawsuits, which form the basis of the data sets of Part I, contain a number of powerful contemporary accounts of Blacks' encounters with police officers, including traffic stops, searches, and various types of other apprehensions.⁴² According to legal theorist Charles J. Ogletree, Jr., "little evidence of racial reconciliation" can be found in Los Angeles, the site of the 1991 beating of Rodney King.⁴³ Ogletree discusses Voltaire Rico Sterling, a Black actor, writer, attorney, and educator, who was followed and subsequently stopped by two White police

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); Rubén 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 Rate Tests 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://www.nber.org/papers/w10947.pdf> (adopting a statistical approach to allow for heterogeneous police and motorists); Dhammika Dharmapala & Stephen L. Ross, *Racial Bias in Motor Vehicle Searches: Additional Theory and Evidence*, 3 CONTRIBUTIONS TO ECON. ANALYSIS & POL'Y 1, 4-7 (2004), 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).

⁴⁰ See BENJAMIN P. BOWSER, *Introduction: The Global Community, Racism, and Anti-Racism*, in RACISM AND ANTI-RACISM IN WORLD PERSPECTIVE, x-xii (Benjamin P. Bowser ed., 1995).

⁴¹ PHYLLIS A. KATZ, TOWARDS THE ELIMINATION OF RACISM 3 (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. Stereotyping, which involves the presumption of certain attributes in an individual solely on the basis of racial groups, is one form of prejudice.").

⁴² See generally OGLETREE, *supra* note 30, at 106–09. Accord Amy Goodman & Juan Gonzalez, *Harvard Law Professor Charles Ogletree on "The Presumption of Guilt: The Arrest of Henry Louis Gates, Jr. and Race, Class and Crime in America"*, DEMOCRACY NOW! (June 30, 2010), available at www.democracynow.org/2010/6/30/ogletree at 43:27.

⁴³ OGLETREE, *supra* note 30, at 12–13.

officers in his Beverly Hills community for “driving while [B]lack.”⁴⁴ Ogletree likewise discusses Michael Lawson, a prominent Los Angeles attorney, who was regularly 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.”⁴⁵ Ogletree also discusses the late attorney and advocate Johnnie L. Cochran, Jr., who in the early 1980s, while driving his Rolls Royce was pulled over for no apparent reason.⁴⁶ The experience of watching their innocent father have guns drawn at him as White police officers asked him to step out of his car left Cochran’s young son and daughter emotionally shattered.⁴⁷ Cochran labeled this experience as “Driving While Black.”⁴⁸

Ogletree’s concept of racial profiling discussed in *Defending Profiling While Combating Racism*, coincides with the definition offered by Ramirez.⁴⁹ Ogletree presents an episode of inappropriate profiling by Maryland State Police officers.⁵⁰ Robert Wilkins, a Washington, D.C. lawyer, drove “in a rented Cadillac with relatives across the country for his maternal grandfather’s funeral in Chicago in 1992.”⁵¹ Just before 6 a.m., Wilkins and his relatives were pulled over by police on Interstate 68 in downtown Cumberland, Maryland.⁵² The officer said he paced the car at 60 miles-per-hour in a 40 mile-per-hour zone.⁵³ After the driver provided his identification, the officer asked to search the car.⁵⁴ The driver ultimately decided not to sign the “Consent to Search” form that the officer had given him.⁵⁵ After some back and forth between the parties, Wilkins explained that there could be no search without an arrest and that, furthermore, the driver had done nothing to establish probable cause for an arrest.⁵⁶ Despite Wilkins’ explanation, the officer contained the family inside the car until a dog was brought to sniff the vehicle.⁵⁷ The officer then instructed them to exit the car so that a search could be

⁴⁴ *Id.* at 149–51.

⁴⁵ *Id.* at 136–37.

⁴⁶ *Id.* at 140.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Amos N. Jones, *Defending Profiling While Combating Racism: A Companion to Ogletree’s ‘Presumption of Guilt’*, 33 N.C. CENT. L. REV. 187, 194 (2011) (Jones referencing Ogletree in a previous article). See Ramirez, *supra* note 33, at 1205 (defining racial profiling).

⁵⁰ OGLETREE, *supra* note 29, at 102.

⁵¹ Jones, *supra* note 47, at 194 (summarizing the procedural history of the Robert Wilkins case).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

conducted.⁵⁸ Although Wilkins offered to show the officer an obituary to prove that they had attended a funeral, the officer persisted with his demands.⁵⁹ Eventually, two additional officers arrived with a german shepherd.⁶⁰ The german shepherd sniffed the vehicle, but found no indication of contraband or drugs.⁶¹ The officers then permitted the family to leave.⁶²

Represented by the American Civil Liberties Union, Wilkins sued the Maryland State Police for profiling under § 1983.⁶³ 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.⁶⁴

Although the account suggests that the criminal intelligence report supports inappropriate racial profiling, this report appears to characterize the actions of the police officers as non-racist. As Professor Ramirez et al. explain, using race is appropriate if law enforcement has specific, concrete evidence linking race to a particular person or particular criminal incident.⁶⁵ Moreover, the Maryland State Police, in seeking to fight against the crack-cocaine epidemic that ravaged Black communities in the early 1990s, followed public policy endorsed by the Congressional

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ OGLETREE, *supra* note 29, at 106.

⁶⁴ *Id.* at 195.

⁶⁵ Ramirez, *supra* note 34, at 1205.

Black Caucus.⁶⁶ The Congressional Black Caucus, at the time, voted for draconian punishment for crack-cocaine possession and dealing.⁶⁷

In 1986, a majority of the Congressional Black Caucus favored federal sentencing disparities with respect to crimes involving crack powder cocaine.⁶⁸ Were the majority of the Congressional Black Caucus members engaged in inappropriate racial profiling? Were they racist? The Caucus was neither engaged in racial profiling nor was it racist, but was merely engaged in appropriate racial profiling designed to make communities safer for all.⁶⁹ In spite of the legislation's unintended consequence of criminalizing a considerable portion of Black men, the Congressional Black Caucus sought to promote safer communities through the use of proper racial profiling.⁷⁰

Professor Randall Kennedy argues that critics are severely misguided when they claim, based on a disproportionate number of incarcerated Blacks, that the criminal justice system is racially discriminatory.⁷¹ Professor Kennedy contends "while liberal criticism of the criminal justice system has traditionally focused on the disparate harms inflicted on [B]lack defendants or suspects by law enforcement officials, . . . other [B]lack citizens – the 'law-abiding' – are benefited from the incarceration of large numbers of [B]lack criminals, because most crime is intraracial."⁷² Kennedy maintains that the racially disparate results of the criminal justice system do not harm Black citizens as a class because only a subset of the class is actually harmed, those that break the law, while a law-abiding subset is benefited.⁷³ Therefore, because the system

⁶⁶ Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 943 (2001).

⁶⁷ *Id.* at 943.

⁶⁸ See, e.g., Randall Kennedy, *Is Everything Race?* THE NEW REPUBLIC, Jan. 1, 1996, A18, at A20 (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).

⁶⁹ *Id.*

⁷⁰ See Mascharka, *supra* note 64.

⁷¹ Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1260 n.20 (1994); 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, at C1 (Oct. 17, 2001) (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.")

⁷² Cole, *supra* note 69 at 2547.

⁷³ Kennedy, *supra* note 66.

benefits some Black citizens while burdening others, Kennedy puts forth the argument that the system does not discriminate on the basis of race.⁷⁴

Nevertheless, the Wilkins matter made its way through the Maryland courts and in 1995 the case was settled.⁷⁵ Wilkins was awarded \$50,000 in damages plus \$46,000 in attorney's fees for the three years of litigation.⁷⁶ The state also agreed to no longer use race-based drug courier profiles as law-enforcement tools.⁷⁷ In addition, a new Maryland State Police policy was instituted to prohibit race as a factor in determining whom to stop, detain, or search without further evidence, as well as a host of other safeguards against racially discriminatory practices.⁷⁸ Although the court case was settled, Wilkins's litigation exposed numerous instances of racism on interstate highways patrolled by the Maryland State Police.⁷⁹ The police reports in Maryland indicated that 70 to 75 percent of people searched on the Interstate 95 – the corridor linking Richmond, Virginia, Washington, D.C., New York City, and other major East Coast cities – were Black, even though Blacks represented only 17 percent of those driving on the highway and only 17 percent of traffic violators.⁸⁰ By the same token, Ogletree reports that Maryland State Police searched over 400 Blacks in comparison to 100 Whites to find similar drugs or other contraband on individuals.⁸¹ Ogletree concludes, “[i]t was clear that a disproportionate number of African Americans were stopped and searched without any valid basis.”⁸² Finally, Ogletree reveals, “[m]ore than a decade after his encounter with the police, Robert Wilkins again brought suit against the Maryland [S]tate [P]olice, asserting that the practices of racial profiling continued and that court intervention was warranted to change these persistent discriminatory practices.”⁸³

⁷⁴ *Id.* But see K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 281 (2009) (summarizing a review of New York City arrest numbers and patterns demonstrates that the arrest resulting from so-called “zero-tolerance policing” “are in the hundreds of thousands, are for particularly minor offenses, disproportionately affect people of color, and do not result in more seizures of weapons.”) This realization, along with its unconstitutional implications, appears to form the basis for the August 2013 federal court order blocking the NYPD policing tactic known as “stop-and-frisk.” See Joseph Goldstein, *Judge Rejects New York's Stop and Frisk Policy*, N.Y. TIMES, Aug. 12, 2013, available at http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html?pagewanted=all&_r=1&.

⁷⁵ OGLETREE, *supra* note 30, at 106–07.

⁷⁶ *Id.*

⁷⁷ *Id.* at 107.

⁷⁸ *Id.* at 107-08.

⁷⁹ *Id.* at 107.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 108.

Aside from the aim of the Wilkins litigation to end racial profiling, a 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.⁸⁴ 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 concepts proposed in this article.⁸⁵ By making this connection, countless lives could be saved in at least one area of vital contemporary concern: the mass-shooting phenomenon that has rocked the United States. Over the last ten years, both the frequency and severity of mass shootings in the U.S. (and globally) has become larger and more acute.⁸⁶

In Newtown, Connecticut, a shooting spree on December 14, 2012, by a twenty year-old gunman at an elementary school left twenty-eight people dead.⁸⁷ This included twenty children, six adults at the scene, the shooter himself, and his mother.⁸⁸ On December 11, 2012 in Portland,

⁸⁴ See OGLETREE, *supra* note 29 at 107;

⁸⁵ Unfortunately, however, the seminal and current research analyzing discrimination lawsuits’ affects 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 Schwartz, *supra* note 12, at 1023, 1028.

Another deficiency in the scholars’ data selections is their uniform inability to take into account the civilian complainants whose grievances to the police agencies go unaccepted or unprocessed, a reality supported by recent news reports. See Graham Rayman, *NYPD’s Reporting Problem: Reactions to our ‘NYPD Tapes’ confirmation came like a swift billy club to the skull*, THE VILLAGE VOICE, Mar. 14, 2012, <http://www.villagevoice.com/2012-03-14/news/nypd-blowback/>; see also Lou Chibbaro Jr., *5 lesbians attacked; police refuse to take report*, WASHINGTON BLADE, Aug. 5, 2011, <http://www.washingtonblade.com/2011/08/05/5-lesbians-attacked-police-refuse-to-take-report/> (reporting that, despite D.C.’s Human Rights Act of 1978, which protects lesbians, and the District’s hate-crime law that offers protection to lesbians, officers responding to the attack refused to take reports on the scene; “[a]n officer assigned to the D.C. police Gay & Lesbian Liaison Unit did make a report of the incident three days later, on Aug. 2”). In later work, this author argues for the creation of Civilian Preview Boards, analogous to Civilian Review Boards, to serve as safe, extra-agency spaces in which citizens would initially file complaints against offending police agencies to forestall agency obfuscation and cover-ups for which certain agencies have become famous.

Critiques of her methodology notwithstanding, Schwartz continues to uncover serious information failures that often prevent informed decision-making, showing that litigation information is used only in rare instances by law enforcement agencies.

⁸⁶ Ginger Adams Otis, *U.S. has long recent history of mass shootings: Massacres by gunmen have become all too common across the nation*, N.Y. DAILY NEWS, Dec. 14, 2012, available at <http://www.nydailynews.com/new-york/u-s-long-history-mass-shootings-article-1.1220382?localLinksEnabled=false>.

⁸⁷ Alexander Abad-Santos et al., *Newtown School Shooting: Live Updates*, ATLANTIC WIRE, Dec. 19, 2012, <http://www.theatlanticwire.com/national/2012/12/newtown-connecticut-school-shooting/59999/>.

⁸⁸ *Id.*

Oregon⁸⁹, a masked gunman opened fire in a crowded shopping mall.⁹⁰ The gunman killed two people and seriously injured a third before he turned the gun on himself.⁹¹ Authorities said the shooter's assault weapon jammed, which prevented further carnage.⁹² In Oak Creek, Wisconsin, a white supremacist shot six people and a policeman at a Sikh temple, and then shot himself in the head in August, 2012.⁹³ In Aurora, Colorado, a gunman killed twelve and injured fifty-eight at a screening of "The Dark Knight Rises" in July, 2012.⁹⁴ In Oakland, California, a former student at a Christian college fatally shot seven people and injured three in April, 2012.⁹⁵ In Copley Township, Ohio, a man in a family dispute shot and killed his girlfriend and six other people with a handgun in August, 2011.⁹⁶ In Geneva, Alabama, a lone gunman in a violent family feud killed eleven victims, ages eighteen months to seventy-four years old, in March, 2009.⁹⁷ In Omaha, Nebraska, police officers killed a nineteen-year-old man after he shot nine people at a department store in December 2007.⁹⁸ In Blacksburg, Virginia, a student at Virginia Tech killed thirty-two classmates and wounded twenty-five before he committed suicide in April, 2007.⁹⁹ In Red Lake, Minnesota, a sixteen year-old boy killed a total of eleven people in a shooting spree, including his grandfather and his grandfather's girlfriend in March, 2005.¹⁰⁰ In Columbus, Ohio, a fan shot a Pantera guitarist at a concert as he performed onstage, then fired at fans, killing four people in December, 2004.¹⁰¹

Gun manufacturers and gun-rights advocates have asserted over the years: "Guns don't kill people. People kill people."¹⁰² Regardless of one's acceptance or rejection of that

⁸⁹ Colleen Curry & Dean Schabner, *Oregon Mall Shooting: Man Kills 2, Self in Rampage*, ABC NEWS, Dec. 11, 2012, <http://abcnews.go.com/US/oregon-mall-shooting-man-kills-rampage/story?id=17939128>.

⁹⁰ Otis, *supra* note 83.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Otis, *supra* note 83.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Jill Filipovic, *The conservative philosophy of tragedy: guns don't kill people, people kill people*, THE GUARDIAN, (Dec. 21, 2012), <http://www.guardian.co.uk/commentisfree/2012/dec/21/guns-conservative-philosophy-tragedy> (last visited Feb. 19, 2013). *Accord* James Bacon, *TV's Big Bang Binge Booms Firearm Sale*, INDEP. STAR NEWS, May 31, 1959, at 62 (quoting Fred A. Roff Jr., president of the Colt Patent Fire Arms Co., as saying, "[o]ur big concern is to make sure that guns get into the hands of only those who know how to safely use them. Guns don't kill people. People kill people.").

aphorismic characterization of a vexing criminal problem with Second Amendment implications, a question remains in the emergent mass-shooting criminological phenomenon: *which* people kill? According to Professor Hugo Schwyzer, the overwhelming majority of the shooters in the mass-shooting cases were White men.¹⁰³ Should race be used as a factor in attempting to prevent or solve these kinds of crimes? It appears that various scholars' socio-historical empirical studies and careful data analysis suggest that racial profiling has a place in this context after all. For example, in light of the Aurora, Colorado, movie theater shooting, Professor Schwyzer asked (and answered):

[a]re [W]hite men particularly prone to carrying out the all-too-familiar mass killings of which last week's Aurora shooting is just the latest iteration? Is there something about the [W]hite, male, middle-class experience that makes it easier for troubled young men to turn schools and movie theaters into killing fields? In a word, yes.¹⁰⁴

Professor Schwyzer has entered the discussion just as complex questions on the permissible restraints on Second Amendment rights are moving to the forefront in political and judicial contexts.

CONCLUSION

Rather than hewing to “naïve non-judgmentalism [that] masquerades as moral humility,”¹⁰⁵ sensible scholars, politicians, and policy-makers ought to, at this turning point in America's constitutional dialogue over crime prevention and restraints on liberty, enter the thicket of reality by embracing racial profiling for the good that it can accomplish in some dangerous criminal contexts.

Unfortunately, in spite of the emerging sophistication in the empirical approach to correcting and preventing unlawful police practices, racial profiling continues to persist. As recently as August, 2012, the United States Transportation Security Administration (“TSA”) responded to 30 complaints filed by officers administering security screenings at Logan

¹⁰³ Hugo Schwyzer, *Why Most Mass Murderers are Privileged White Men*, ROLE/REBOOT MAGAZINE (July 23, 2012), <http://www.rolereboot.org/culture-and-politics/details/2012-07-why-most-mass-murderers-are-privileged-white-men> (last visited Feb. 19, 2013).

¹⁰⁴ *Id.*

¹⁰⁵ I apply this construction from R. Albert Mohler, Jr.'s original usage of the phrase. See R. ALBERT MOHLER, JR., *CULTURE SHIFT: ENGAGING CURRENT ISSUES WITH TIMELESS TRUTH* 48 (Multnomah Books 2008) (“Moral cowardice has denied the inherent evil of immoral acts. Moral relativism has denied any objective judgment of right and wrong. A naïve non-judgmentalism often masquerades as moral humility.”).

International Airport.¹⁰⁶ The officers accused colleagues of “targeting minorities” at checkpoints.¹⁰⁷ TSA declared in a statement “racial profiling is not tolerated within the ranks of TSA. Profiling is not only discriminatory, but it is also an ineffective way to identify someone intent on doing harm.”¹⁰⁸ Yet, the complaints against fellow officers included allegations that “[B]lack, Hispanic, and Middle Eastern passengers had been routinely pulled aside for searches and questioning in screenings designed to scan for suspicious behavioral cues such as sweating, fidgeting, or avoiding eye contact” amid “mounting pressure from program managers to tally high numbers of stops and searches.”¹⁰⁹ That very day, a headline in the Boston Globe stated, “Rep. William Keating calls for Congressional hearing on alleged racial profiling by TSA at Logan airport.”¹¹⁰ It would be far more constructive to hold hearings focused on the actual problem of racism.

Had police agencies embarked upon a project so properly framed after the Civil Rights Movement and tort law revolution at the end of the last century, perhaps, the documented and persistent racial discrimination problem in new data scholars are examining would not remain. In order to identify and isolate the salient issues, to embark upon a project targeted in solving the problem of police misconduct against minorities, contemporary scholars will have to address the nagging problem of improper terminology identified in *Defending Profiling*¹¹¹ but deconstructed and properly contextualized in this article.¹¹²

¹⁰⁶ Jenna Russell & Wesley Lowery, *Profiling reports spur call for action: Logan travelers see practice as routine*, BOSTON GLOBE, (Aug. 13, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/08/13/federal_investigation_launched_on_alleged_racial_profiling_at_logan_airport/.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Katie Johnston, *Rep. William Keating Calls for Congressional Hearing on Alleged Racial Profiling by TSA at Logan Airport*, BOSTON GLOBE, (Aug. 13, 2012, 12:31 PM), <http://www.boston.com/businessupdates/2012/08/13/rep-keating-calls-for-hearing-racial-profiling-logan-airport/6QPD9K1QEF0DjZS7LJGI/story.html>.

¹¹⁰ *Id.*

¹¹¹ There, the author called attention to one datum obtained during litigation that would support the contention that “white motorists” should be profiled by Maryland police on a stretch of Interstate 95 in Maryland for drug-possession offenses. Amos N. Jones, *Defending Profiling While Combating Racism: A Companion to Ogletree’s ‘Presumption of Guilt,’* 33 N.C. CENT. L. REV 187, 197 (2011).

¹¹² Future work on racism as opposed to racial profiling should focus on the effectively deputized civilian marketplace, especially as found among security personnel and other functionaries who serve airports, where individuals frequently justify their purely race-based targeting of innocent consumers on presumed threats to the safety of guilty whites. *Accord* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 47 (2003) (“By January 2002 ... the Council on American-Islamic Relations had already received 1,658 reports of discrimination, profiling, harassment, and physical assaults against persons appearing Arab or Muslim, a three-fold increase over the prior year. The reports included beatings, death threats, abusive police practices, and employment and airline-related discrimination.”); *cf.* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 223-25 (emphasizing “the racial tax [that] profiling imposes on the innocent” and devoting a section to airport security).