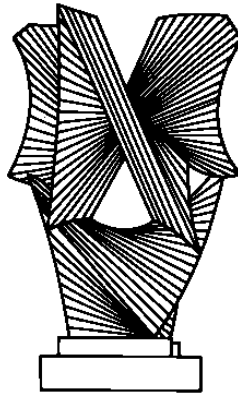


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HENRY LOUIS GATES AND RACIAL PROFILING: WHAT'S THE PROBLEM?

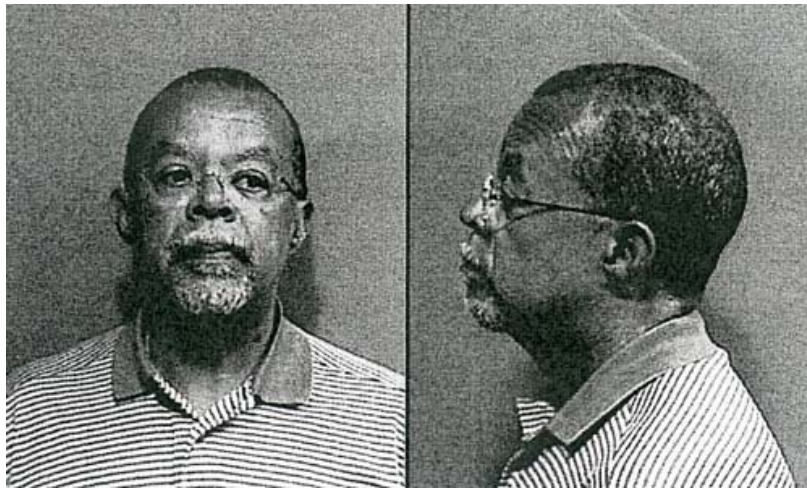
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Henry Louis Gates and Racial Profiling: What's the Problem?



Mug shot of Professor Henry Louis Gates, Jr., taken by the Cambridge Police Department on July 16, 2009.

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Henry Louis Gates and Racial Profiling: What's the Problem?

Bernard E. Harcourt

“I studied the history of racism. I know every incident in the history of racism from slavery to Jim Crow segregation. . . [But] I haven't even come close to being arrested. I would have said it was impossible.”

Henry Louis Gates, Jr., July 22, 2009.¹

“[T]here is a long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately. That's just a fact.”

President Barack Obama, July 22, 2009.²

“I want to be a figure for prison reform. I think that the criminal justice system is rotten.”

Henry Louis Gates, Jr., July 22, 2009.³

“At this point, I am hopeful that we can all move on, and that this experience will prove an occasion for education, not recrimination.”

Henry Louis Gates, Jr., July 30, 2009.⁴

I. Prologue

In August 2008, Professor Ian Ayres of Yale University—one of the leading law and economics scholars in the world—published a study on racial profiling by the Los Angeles Police Department (LAPD).⁵ Professor Ayres analyzed data obtained from over 810,000 “field data reports” collected by the LAPD from July 1, 2003 to June 30, 2004 (field data reports are completed whenever a police officer makes a pedestrian or motor vehicle stop). Professor Ayres found that there were more than 4,500 stops per 10,000 African-American residents, whereas there were only 1,750 stops per 10,000 white residents. In two neighborhoods, Central and Hollywood, Professor Ayres actually found that “there were more stops of African Americans in one year than there were African American residents, meaning that the average number of stops per resident was greater than one.”⁶ Professor Ayres controlled his findings for variables such as the rate of violent and property crime,

and found that the disparity was not the result of different crime rates in different areas—the stop rate per 10,000 residents was 3,400 stops higher for Blacks than Whites, and more than 350 stops higher for Hispanics than Whites. Once stopped, Blacks were 29% more likely to get arrested than Whites, and Hispanics were 32% more likely. Police were 127% more likely to frisk or pat down stopped Blacks than stopped Whites, and 43% more likely to do so for Hispanics. While minorities were more likely to be stopped and then searched once stopped, the results of these searches were less productive than comparable searches with white residents. Searched Blacks were 37% less likely to be found with weapons than searched Whites, 24% less likely to be found with drugs, and 25% less likely to be found with other contraband. Similarly, searched Hispanics were 33% less likely to be found with weapons, 34% less likely to be found with drugs, and 12% less likely to be found with other contraband. The race of the stopping officer also mattered—the disparities found decreased when the officer was of the same race as the person who was stopped.

In April 2008, the ACLU of Arizona released a study analyzing the first full year of data on highway traffic stops collected under a settlement agreement with the Arizona Department of Public Safety—the period spanned July 1, 2006 to June 30, 2007.⁷ The analysis revealed that patrol officers searched African-Americans, Hispanics, and Native Americans at a higher rate than Whites or other minorities. Blacks and Hispanics who were stopped by police were searched 10% of the time and Native Americans 13% of the time. In contrast, Whites, Asians, and Middle Easterners were searched around 3% to 5% of the time. The study found no evidence to support such differential treatment by race—on average, 34% of Whites searched were found with contraband, while only 22% of Hispanics searched were found with contraband. Blacks were found with contraband at similar rates as Whites (38%), but were twice as likely to be searched. Middle Easterners, who were searched at slightly higher rates than Whites (5%, compared to the 4% search rate of Whites), were found with contraband only 24% of the time. Additional evidence of differential racial treatment was found in the disparity of stop duration by race. Overall, minorities were held for longer periods during police stops, excluding stops that involved searches.

In a follow-up study commissioned by the Arizona Department of Public Safety using an additional six months of data, the researchers found that, conditional on being stopped, racial disparities existed in the outcome of the stop, even after controlling for other explanatory factors.⁸ Whites were more likely to receive warnings (44.6% of stops) than Blacks (41.3% of stops) and Hispanics (only 33.6% of stops). In contrast, Hispanics and Blacks were more likely to be cited than Whites (48.9% for Hispanics, 48.1% for Blacks, and 43.4% for Whites). Hispanics, Blacks, and Native Americans were all significantly more likely to get searched or arrested. Whites were arrested only 2.1% of the time, while Native Americans were arrested 5.4% of the time, Blacks 4.2% of the time, and Hispanics 3.9% of the time). Hispanics were searched at an 8.6% rate, Blacks at 7.5%, Native Americans at 6.9%, and Whites at 3.3%. All results were statistically significant at the .001 level.⁹ Analysis of the percentage of searches that successfully found contraband showed that for non-consent discretionary searches, searches of Hispanics had the lowest success rates (37.5%); in

comparison, the success rates were 52.9% for Native Americans, 50.4% for Whites, 50.0% for Blacks, and 46.4% for other races.

In February 2009, the state of West Virginia issued its “Traffic Stop Study” final report for 2008.¹⁰ The state found that on average, Blacks were 1.64 times more likely to be stopped by police than Whites, and Hispanics were 1.48 times more likely to be stopped than Whites. Blacks and Hispanics were also more likely to be searched than Whites, with the rate of being searched at 10.64% for Blacks, 10.24% for Hispanics, and 4.32% for Whites. While the rates of being stopped and searched were higher for minorities, the contraband “hit rates” (the rate at which contraband is found in a search) were lower. The hit rate for Blacks was 43.11%, 30.23% for Hispanics, and 47.17% for Whites. Finally, the rates of receiving a citation and/or getting arrested were higher for Blacks (57.34%) and Hispanics (60.92%) than for white drivers (46.52%). Similar results were found on data at the county and agency level.

In mid-2009, Alexander Weiss and Dennis P. Rosenbaum of the University of Illinois at Chicago Center for Research in Law and Justice issued the 2008 annual report on traffic stops for the state of Illinois—the fifth annual traffic stop report based on data collected annually starting in 2004 required under state law due to allegations of racial profiling.¹¹ Weiss and Rosenbaum found that minority drivers were around 13% more likely to get stopped than white drivers. Once stopped, minorities were around 10% more likely to receive a citation. Specifically, 64% of Blacks were cited, 69% of Hispanics, 65% of Asians, and 70% of Native Americans, compared to 58% of Whites. In terms of searches, Hispanic drivers were 2.4 times more likely to be subjected to a consented search than white drivers, and black drivers 3 times more likely. While minorities were about 2.5 times more likely to be searched than Whites, they were less likely to be found with contraband. Searches of white drivers turned up contraband 24.4% of the time, while searches of minorities did so only 15.1% of the time—in other words, police were searching minorities more even though searches of Whites found contraband 1.6 times more than searches of minorities.¹²

These reports extend a long and consistent history of studies documenting racial profiling in American policing across the country. Earlier in 2007, for instance, the RAND Corporation had issued a report on racial disparities in the stop, question, and frisk practices of the New York City Police Department.¹³ Using data on street encounters between NYPD officers and pedestrians in 2006, the RAND Corporation found that officers frisked whites less than they frisked similarly situated nonwhites (29% of stops, compared to 33% of stops). Although search rates were roughly the same across races, at 6% to 7% (the study notes that in Staten Island, the search rates of minorities was significantly greater), officers successfully recovered contraband less from minorities than similarly situated whites. Specifically, the success rate for Blacks was 5.7%, 5.4% for Hispanics, and 6.4% for whites.¹⁴ And a year earlier, in 2006, the Northeastern University Institute on Race and Justice had issued a report on traffic stop disparities in Rhode Island.¹⁵ The study found, *inter alia*, that minorities were subjected to searches at over twice the rate compared to whites (13.6% for

minorities, 6.3% for whites). Limiting the data to only discretionary searches (searches not incident to a lawful arrest) still found minorities being searched at twice the rate of whites, with minorities being searched at 5.9% and whites being searched at 2.9%.¹⁶ While minorities were searched at twice the rate as whites, the productivity of searches was less for minorities than whites. For discretionary searches, whites had a 26.5% hit rate, while minorities had a 22.3% hit rate.¹⁷

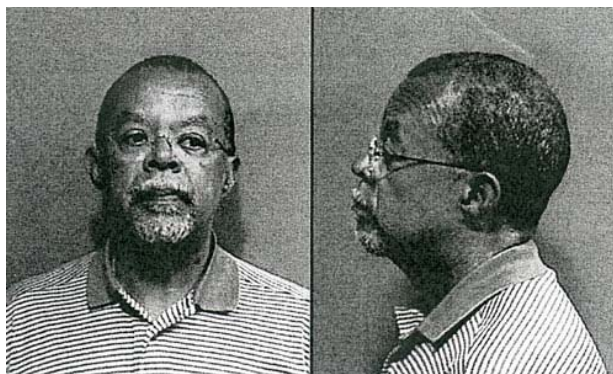
More recently, on June 30, 2009, the ACLU released its report to the U.N. Committee on the Elimination of Racial Discrimination: “The Persistence of Racial and Ethnic Profiling in the United States.”¹⁸ The report catalogued the independent and ACLU-based evidence of racial profiling in 22 states and the federal government, describing in an intricate and detailed 98-page report all the evidence for racial profiling by state and local law enforcement. The report concluded that both data and anecdotal evidence revealed that minorities in the United States are being subjected to racial profiling in spite of the numerous public statements by state and federal government officials that the practice of racial profiling should end. Anecdotal examples of racial profiling—such as the illegal deportation of a cognitively impaired U.S. citizen from Los Angeles because officials did not believe he could possibly be a citizen¹⁹ or Detroit police officers accused of conducting bare-hand searches of genitals on a number of young black males²⁰—were supported by analyses of state level data from Minnesota to California finding consistent patterns of racial minorities being over-stopped, over-searched, and over-frisked in comparison to Whites.²¹

Nevertheless, the problem of racial profiling did not make headline news.

Or rather, it did not make headline news until shortly after July 16, 2009, the day that Professor Henry Louis Gates, Jr., was arrested and handcuffed on the front porch of his home in Cambridge, Massachusetts, by Sergeant James Crowley of the Cambridge Police Department on a charge of disorderly conduct.²² Sergeant Crowley was responding to a 911 call reporting a possible break-in at Professor Gates’ home. Sergeant Crowley and Professor Gates had verbal exchanges. Professor Gates provided Sergeant Crowley with his Harvard University ID card. The two men continued to have verbal exchanges. Shortly thereafter, Sergeant Crowley arrested Professor Gates on the charge of creating a public disturbance. Professor Gates was handcuffed at his home and transported to a Cambridge police station, where he was booked and photographed, and detained for approximately four hours. Two images from that incident have been branded in our collective memory. The first is the photograph of Professor Gates being arrested:



The second is a haunting mug shot:



A few days later, on July 22, 2009, President Barack Obama commented on the arrest of Professor Gates during a prime-time news conference concerning health care reform. In response to a question about the incident, President Obama stated that “number one, any of us would be pretty angry; number two, that the Cambridge police acted stupidly in arresting somebody when there was already proof that they were in their own home. And number three, what I think we know separate and apart from this incident is that there is a long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately. That’s just a fact.”²³

Finally, on July 30, 2009, the arrest of Professor Gates and the issue of racial profiling received national attention when President Obama, Professor Gates, Sergeant Crowley, and Vice President Joseph Biden met in the White House gardens over beers.²⁴

II. The Persistence of Racial Profiling

This prologue raises three sets of questions. First, why is racial profiling so pervasive in American policing and patrolling? Why do practically all the analyses seem to reveal disproportionate enforcement on African-Americans and Hispanics, especially given the often lower hit rates on searches? Second, why does it take the wrongful arrest of a respected and dear member of an elite community to focus the attention of the country on such a deeply scarring and pervasive problem in policing and social relations? Why does racial profiling only matter and become a national issue when “one of us” or a renowned person is the victim? Third, did Sergeant Crowley engage in racial

profiling when he questioned and ultimately arrested Professor Gates? Did racial profiling infect the incident on July 16, 2009? Let me take these questions in reverse order.

Without doubt, the issue of racial profiling infected the encounter between Sergeant Crowley and Professor Gates. Professor Gates explicitly mentioned the topic of racial profiling during the encounter and accused Sergeant Crowley of treating him differently because of his race. Sergeant Crowley had been hand-picked by the former police commissioner, Ronny Watson, to teach a class on racial profiling and taught that class for five years at the Lowell Police Academy.²⁵ Unquestionably, Sergeant Crowley was aware of the racial dimensions of the encounter. Racial profiling was explicitly “on the table” in the incident.

It is, however, far more difficult to conclude without further investigation—and it may, ultimately, be impossible to resolve this to the satisfaction of a social scientific evidentiary standard—that Sergeant Crowley himself knowingly engaged in racial profiling. (Implicit bias *during that incident* would be equally, if not more difficult to prove *ex post* given the contested facts of the encounter).²⁶ Although race was inscribed throughout the encounter and although it is impossible to discuss the incident today without reference to contemporary race relations, it is difficult to ascribe explicit or intentional profiling to Sergeant Crowley without further evidence.²⁷

Using the “swap-the-race-of-the-suspect” approach that Richard Banks advocates in the Fourth Amendment context²⁸—and that seems entirely appropriate in this case—it is hard to imagine that Sergeant Crowley would have arrested a white Harvard professor of equal stature or status, such as Professor Harvey Mansfield of the Government Department. However, it is also hard to believe that Professor Mansfield would have protested the police presence and questioning so vehemently—and in that sense, again, it is impossible to extricate race from the encounter, on *both* sides of the incident. If one were to substitute race and racial relations with, for instance, anti-police or anti-authority sentiment (for example, with the anti-Vietnam or anti-Iraq War protest movements), it would not be inconceivable that a Cambridge police officer would have arrested a white Harvard professor who was vehemently confronting and challenging the officer’s authority. One can imagine other axes—other than race—that could possibly have triggered an excessive, perhaps even personal or overly-emotional reaction on the part of an arresting police officer in the heat of a confrontation.

It is, on the present record, hard to rule out the possibility that Sergeant Crowley may have arrested Professor Gates because he (Sergeant Crowley) irrationally lost his temper in response to the accusations and challenge to his authority, or, alternatively, that he made the arrest in order to minimize a likely police complaint. In other words, Sergeant Crowley may have believed that Professor Gates was going to file a police complaint against him and decided to make the arrest as a way to delegitimize any possible complaint—given that police complaints in cases where there has been an arrest are viewed as more dubious than those where there has been no criminal activity charged.

Now, would Sergeant Crowley have acted differently, in any respect whatsoever, if Professor Gates had been White? At each minute juncture of the encounter, might there have been a difference—say, in the way the sergeant introduced himself, asked for identification, responded to the challenge, positioned his body, or looked at Professor Gates? I cannot say for certain without further evidence, but I am left with the suspicion that racial stereotyping on the part of Sergeant Crowley—as well as police stereotyping on the part of Professor Gates—played a role in the encounter. That is my hunch—but, of course, that also says something about me. What is absolutely clear and uncontestable is that *race* played a dominant role in the encounter—on both sides of the encounter—and that it inextricably colors the way that all of us interpret the event. It is clear that Professor Gates *believed* that he was being profiled. It is also clear that Sergeant Crowley *understood* that he was being accused of racial profiling. The incident—and our interpretations of the incident—are laced with race.

But this, then, brings us to the other two questions. Why did it have to take the arrest of a well-respected member of an elite community like Harvard University to resuscitate the issue of racial profiling and to draw the attention of the national media. As President Obama said, correctly, during his first intervention in the affair, “there is a long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately. That’s just a fact.” An avalanche of studies over the past few years has documented racial profiling in practically all the states of the Union. Why is it that we pay so little attention to the flood of studies? And why have we not, by now, implemented proper legal remedies for racial profiling? Why is there no adequate legislation? And why, for heaven’s sakes, is racial profiling so pervasive?

III. What’s the Problem?

The reason is that racial profiling is just another form of statistical discrimination and that, today, we have all come to embrace statistical discrimination as efficient and entirely justified whenever there are, in fact, group-based differences in behavior or factual disparities. We all, today, play the odds. That’s how we have come to lead our lives. We have become statistical creatures and we live our lives daily based on statistical discrimination. Whether you call it stereotyping, generalizations, or profiling, that’s how we operate and that’s how we operate in all dimensions of our daily life. It makes life much more manageable, incredibly more efficient—in fact, it’s simply impossible to succeed in our competitive world without using forms of statistical discrimination. We do it *all the time* on exams, in our research, in our daily practices, and in every aspect of our working environment. When one adds to that the fact that most Americans and most criminologists believe that there are statistical differences in the rates of “street crime” offending along race lines, there is every reason to engage in racial profiling. It’s simply second nature—and tragically, truth is, most Americans do it, all the time, on the street.

One way to eliminate racial profiling, then, would be to eradicate the commonly held belief that young African-American males commit street offenses at a higher rate than others. In certain

contexts, there may be good evidence for that; so for instance, much of the profiling on the highways is aimed at uncovering illicit drugs, and the national statistics on drug use do not reveal significant differences as between races.²⁹ But there has been a long and controversial debate throughout the twentieth century on the question of the racial composition of “street crime” offenders.³⁰ And the real trouble here is that there is sticky and persistent evidence for statistical disparities in offending along race lines *because of the way that we define “crime.”* We tend to define crime as “street crime,” as the public acts associated with the drug trade, robbery and violence, and thus in a way that correlates with low-income, urban neighborhoods with certain identifiable demographics. The police do not focus on embezzlement or fraud, but on the types of crimes that take place on the street, in public—and as a result, the statistics, however faulty, continue to draw connections between race and “ordinary” crime. So that won’t work.

There is, however, a better way to address racial profiling, and that is to make people understand that statistical discrimination is entirely misguided in policing and criminal justice because of the feedback effects. To demonstrate that statistical discrimination is counter-productive even to the law enforcement objectives of reducing crime. That statistical discrimination leads us astray in policing. Two things in particular undermine statistical discrimination in the criminal justice context. First, if we assume rational choice assumptions, statistical discrimination is likely to be counter-productive to the ultimate objective of law enforcement and cause more crime. Under the conservative assumption that the targeted population (the population with higher offending) is less responsive to policing than the non-targeted population, statistical discrimination is likely to have perverse effects on the law enforcement objective. Second, if we do not assume rational action, statistical discrimination is going to lead to a ratchet effect on members of the profiled population with highly detrimental consequences on their employment, educational, familial, and social outcomes that is likely going to result in counter-productive effects on crime.

This may sound technical, and I do hope to make it a lot more clear in the next Part. But what it suggests, overall, is that the real problem with racial profiling is not only the racial harm. It is not only the fact that an innocent victim, such as Professor Gates, is deeply injured and harmed because of the color of his skin by wrongful targeting by the police. The problem extends beyond the issues surrounding race. The problem extends to all forms of profiling or statistical discrimination that involve a feedback loop. In other words, the heart of the problem in racial profiling is not only the racial or ethnic dimension. Like Lani Guinier and Gerald Torres’s metaphor of the miner’s canary, the racial dimension of profiling is what makes us *see* the problems with statistical discrimination more generally.

Let me borrow then from Lani Guinier and Gerald Torres’s book, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy*.³¹ Just like the canary, whose distress is a warning that the air in the mine is poisoned, the troubling aspect of race in the debate over racial profiling points to the larger problems of statistical discrimination. Race is the first place where we

see the poison, but it is a poison that affects everyone else. Like the canary in the coal mine, the trouble surrounding racial profiling alerts us to the problem with the use of statistical discrimination more generally. The mathematics of profiling and the overlooked detrimental costs to the profiled populations affect all profiling techniques, whether they focus on race or recidivism, gender or sexual orientation, national origin, or other classifications. We may, as a society, decide to apply less scrutiny to some of these classifications than to others, but the effects are the same. The problem, it turns out, is with statistical discrimination *tout court*.

IV. The Problems with Statistical Discrimination

For most of us, *racial* profiling is simply wrong.³² Practically none of us, though, believes that *statistical* discrimination is wrong. *That* is the key tension in the racial profiling debate that has allowed the issue to percolate without any end in sight.

The central problem is that, today, with the exception of racial profiling, the general public and most academics are entirely comfortable using the kind of generalizations, stereotypes, and profiles based on group traits that underlie racial profiling. The public *supports* the use of statistical discrimination across the policing and law enforcement spectrum in the United States—and I would argue, across all other domains. To most everyone, it is a matter of plain common sense. In fact, it is exactly what we are willing and happy to do in practically all other contexts, especially in the context of recidivism or other “known” differentials. As a result, statistical discrimination permeates policing and punishment in the United States today—from the use of the I.R.S. Discriminant Index Function to predict potential tax evasion, to the drug-courier and racial profiles to identify suspects to search at airports and on the highways, to risk-assessment instruments to tag violent sexual predators, prediction instruments increasingly determine individual outcomes in policing, enforcement, sentencing, and correctional practices.

A number of economists have begun working on econometric models of profiling, using racial profiling as their lead example, and reach the conclusion that disproportionate stops of racial minorities may not necessarily reflect invidious discrimination on the part of the police, but may be consistent instead with an honest and good faith effort to increase the success rate of searches—to engage in efficient policing on the basis of statistical discrimination. So long as the differences in offending rates between minorities and majorities are not spurious, these economists assert, searching a disproportionate number of minorities is only demonstrably problematic (racist) if the rate of successful searches of minority suspects is *lower* than the rate of successful searches of White suspects. Otherwise, disproportionate searches of minorities are consistent with policing efficiency and do not prove invidious bias.³³

If statistical discrimination is efficient, if it saves money and reduces crime, then what could possibly be wrong with it? The fact that there are innocent victims, such as Professor Gates, is in some sense inevitable. It is impossible to implement a policy without Type 1 and Type 2 errors.

There will always be innocent victims—persons who are suspected but not guilty—as well as persons who are guilty but not suspected. That is inevitable. And in fact, statistical discrimination seeks to minimize those errors by targeting the more likely suspects.

If there is a problem with racial profiling, then, it has to be with the fundamentals of statistical discrimination. Barring that, no one will ultimately change their behavior. And the thing is, there are *real* problems with statistical discrimination where the use of such methods have feedback effects on the interested parties. Let me turn, then, to the two greatest problems.

A. Statistical Discrimination is Likely Counterproductive to Law Enforcement

Let's first assume a rational choice framework and presume, with many economists, that individuals are responsive to the cost of policing. On the assumptions of rational action theory, statistical discrimination promotes efficiency through deterrence: assuming that potential offenders respond rationally to the probability of being apprehended and punished, then the use of statistical discrimination to target law enforcement on members of a higher-offending group will both (1) decrease the offending rates of those higher-offending group members because it will increase their cost of deviant behavior, and (2) increase the efficiency of the police in detecting crime and apprehending offenders—or increase the efficiency of the sentencing authorities in meting out punishment and deterring future offending. In its purest form, the economic model of crime suggests that the government should target members of higher-offending groups until the point where that group's offending rate has fallen to the same level as the general population. At that point, the government maximizes the effectiveness of its law enforcement practices by both detecting the maximum amount of crime and maximally reducing offending among the higher-offending group.

Drawing on the groundbreaking work on tastes for discrimination by the Nobel laureate economist Gary Becker,³⁴ a group of economists developed econometric models of profiling.³⁵ The models would apply to any form of profiling, but they are being developed in the specific context of racial profiling in large part because there is a lot of new data on police practices broken down by the race of the person stopped. The goal of the models is to test police behavior in order to distinguish between efficiency and racial animus in policing: the purpose is to test whether a situation involving potentially disproportionate searches of minority motorists reflects, on the one hand, efficient discrimination—or what is called statistical discrimination—that results from the police desire to maximize the number of successful searches of suspects or, on the other hand, raw racial prejudice.

The fact that police disproportionately search minority suspects is not, in itself, proof of racism, these economists contend. What matters instead is the rate of successful stops or searches—in other words, stops or searches that lead to arrest or that discover contraband. This is most frequently referred to as the “hit rate”—the rate at which police interventions are successful in detecting criminality. And the models of racial profiling suggest the following: When the hit rates

are the same across racial or ethnic lines, the police are not bigoted in their searches because they have no incentive to search more or fewer suspects of any particular race. At equilibrium, the police have achieved a racial balance, though perhaps one with a racial imbalance at its heart, that they are unwilling to change on the basis of race—unless, of course, they have a taste for discrimination.

Accordingly, when the data reveal equal hit rates as between different racial groups, these economists conclude that the disproportionate searches of minority suspects do not reflect a taste for discrimination, but rather an attempt to maximize successful searches. When the data reveal lower hit rates for minority suspects, these economists reason that bigotry against minority suspects explains the disparity. And when the data reveal higher hit rates for minority suspects, these economists conclude that reverse racism is at play—in other words, bigotry against White suspects.

The trouble is, this argument rests on a crucial assumption that is unfounded and likely wrong in many circumstances, namely, that the different groups react *similarly* to a change in policing. This is what I will call, in more technical jargon, the relative “elasticity of offending to policing”—or “comparative elasticity” for short—of the two groups. The elasticity of offending to policing is the degree to which changes in policing affect changes in offending. So for instance, if the IRS targets—to take a non-racial category—car dealers for audits of their tax returns, as they did in the mid-1990s, we expect that there will be less tax evasion by car dealers (assuming full information). We assume that their tax evasion is elastic to policing and will fall with the enhanced scrutiny. It is the elasticity that reduces the offending of the targeted group—those identified by the actuarial method. But even if we assume elasticity of offending to policing among car dealers, society as a whole will only benefit from their decrease in tax evasion if the *non-profiled groups* do not begin to evade their tax burden *more*, in absolute numbers, because they feel immune from scrutiny—in other words, because of *their* elasticity to reduced enforcement. Accountants and bankers, for instance, may realize that they are less likely to be audited, and may therefore cheat a bit more on their taxes. What matters, then, is the *comparative elasticity* of the two groups—profiled (car dealers) and non-profiled (accountants and bankers). If the targeted group members have *lower* elasticity of offending to policing—if their offending is *less* responsive to policing than other groups—then targeting them for enforcement efforts will likely *increase* the *overall* amount of crime in society as a whole because the increase in crime by accountants and bankers will exceed the decrease in crime by car dealers.

Naturally, the economists are right that profiling on a non-spurious group trait that predicts higher offending will maximize the law enforcement goal of detecting criminal activity and, if we buy the premises of rational action theory, will decrease crime among the higher-offending group. But this will only improve society and increase the general welfare of society if it has the effect of *decreasing* overall crime in society, and this will only happen *if* the members of the higher-offending targeted group have the same or greater elasticity of offending to policing. The overall effect on crime in society will depend entirely on the relative elasticity of the two groups to the profiling. *If*,

on the other hand, the targeted population is less responsive to the change in policing, then the profiling will increase overall crime in society.

In effect, the problem with the economic model of racial profiling is that it does not properly specify what counts as “success” for purposes of a highway drug interdiction program. The models assume that a non-racist police officer seeks to maximize the rate of successful searches that discover drug contraband. That, however, is simply the wrong objective. The proper goal for the police is to minimize the social cost of crime—in this case, to minimize the transportation of drug contraband on the highways and the social cost of policing. And the fact is, under certain identifiable conditions, minimizing the social costs of crime is at odds with maximizing search success rates. Under certain conditions, statistical discrimination leads to *higher* overall social costs associated with the profiled crime and the costs of searches.

In order to model police behavior properly, then, we have to focus not on maximizing search success rates, but on minimizing the costs associated with the profiled crime, including the social costs of the crime itself and of the policing technique. Let me then propose a model—one that is more rigorous and more accurately describes the goal of crime reduction. I present this model in greater detail in my book, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007), but let me sketch the outline here again.

The first objective of the model, naturally, is to minimize the costs to society that are produced by the profiled crime. For purposes of notation, let $\underline{r} \in \{\underline{M}, \underline{W}\}$ denote the race of the motorists, either Minority or White. Let $Pop_{\underline{r}}$ denote the representation of each racial group in the total population. Let $O_{\underline{r}}$ denote the offending rate of each racial group. Let D denote the social loss associated with one instance of the profiled crime, namely the transportation of illicit drugs on the highway. Let $I_{\underline{r}}$ denote the rate at which motorists are being searched. $O_{\underline{r}}$ (defined as the internal rate of offending for each group) is a function of $I_{\underline{r}}$ and so will be noted accordingly.

In more technical terms, then, the cost to society associated with the profiled crime can be captured by the following expression:

$$D [O_M(I_M) Pop_M + O_W(I_W) Pop_W] \quad (1)$$

The second objective component is to minimize the social costs associated with searching motor vehicles for contraband. For purposes of notation, let Q denote the cost associated with one instance of a police search. In more technical terms, the cost to society associated with the searches of automobiles can be captured by the following expression:

$$Q [I_M Pop_M + I_W Pop_W] \quad (2)$$

To minimize the total costs to society, we would need to take the derivative of the total cost function, denoted as C_r , which would be a function of I_r and would contain both equations (1) and (2). The total cost function can be expressed as follows:

$$C_M(I_M) + C_W(I_W) = D[O_M(I_M)Pop_M + O_W(I_W)Pop_W] + Q[I_M Pop_M + I_W Pop_W] \quad (3)$$

Using partial differentiation to resolve separately for the two racial groups, if we were to minimize the social costs, it would produce the following:

$$C'_r(I_r) = D[O'_r(I_r)Pop_r] + Q Pop_r \quad (4)$$

Rewriting the equation, we obtain the following:

$$- [Q/D] = O'_r(I_r) \quad (5)$$

Since we are assuming that Q and D are the same for white and minority motorists—that is, we are assuming non-racist police officers—minimizing total social costs produces the following first order condition:

$$O'_M(I_M) = O'_W(I_W) \quad (6)$$

Since $O'_r(I_r)$ is the slope of O_r at point I_r , or $[\partial O_r / \partial I_r]$, we can rewrite this first-order condition as follows:

$$\frac{\partial O_M}{\partial I_M} = \frac{\partial O_W}{\partial I_W} \quad (7)$$

We can rewrite this as follows, multiplying both sides by 1:

$$\frac{\partial O_M}{\partial I_M} \frac{I_M}{O_M} \frac{O_M}{I_M} = \frac{\partial O_W}{\partial I_W} \frac{I_W}{O_W} \frac{O_W}{I_W} \quad (8)$$

Given the definition of elasticity and using E_r to denote elasticity, the first-order condition can be expressed as follows:

$$E_M \frac{O_M}{I_M} = E_W \frac{O_W}{I_W} \quad (9)$$

This first-order condition must be satisfied to minimize the total social costs associated with the illicit transportation of drug contraband on the highways. As is clear from the equation, whether the condition is satisfied will depend on the comparative elasticities, natural offending rates, and search rates. It is possible to construct a three-by-three table to identify the conditions under which the police should search different racial groups at different rates. The following table summarizes the nine findings:

	$E_M = E_W$	$E_M < E_W$	$E_M > E_W$
$O_M = O_W$	$I_M = I_W$ (No Racial Profiling)	$I_M < I_W$ (Profile Whites)	$I_M > I_W$ (Profile Minorities)
$O_M > O_W$	$I_M > I_W$ (Profile Minorities)	$I_M < I_W [O_M / O_W]$ (Not Clear)	$I_M > I_W$ (Profile Minorities)
$O_M < O_W$	$I_M < I_W$ (Profile Whites)	$I_M < I_W$ (Profile Whites)	$I_M > I_W [O_M / O_W]$ (Not Clear)

The two shaded cells represent situations where racial profiling may *increase* total social costs. In the case where minority motorists have lower elasticities of offending to policing and higher natural offending rates, and similarly where minority motorists have higher elasticities but lower natural offending rates, racial profiling may increase overall social costs depending on the relationship between the relative offending and search rates.

The foregoing underscores the myopia of an efficiency analysis that looks solely for equal hit rates and elides elasticities and offending differentials. As the model makes clear, minimizing the costs to society will entail a distribution of searches between white and minority motorists that will depend on the comparative elasticities of offending to policing and on the relative natural offending rates. In other words, *the equilibrium point is not defined by the equality of hit rates, but instead depends on comparative elasticities and the relationship between offending and search rates.* As a result, the focus of the analysis should turn on the size and characteristics of the group of persons at the margins who are most likely to be influenced one way or the other to carry illicit drugs on the highway for personal or commercial purposes.

The bottom line is that criminal profiling may be entirely counterproductive to the crime fighting goal—and in fact, several economists, including Nicola Persico, John Knowles, Jeff

Dominitz, and Charles Manski are only now beginning to recognize this.³⁶ In a more recent paper, written four years after developing the original Knowles, Persico, and Todd model, John Knowles and his co-author, Jeff Dominitz, acknowledge that “policies that are optimal under [the hit-rate maximization hypothesis] can actually lead to maximization of crime.”³⁷ Knowles and Dominitz now specifically recognize that the traditional assumptions about offending rates “are not sufficient to allow inference of racial bias from observation of search rates and hit rates, when police are known to minimize crime.”³⁸ As a result, we need to know more about comparative elasticities and offending rates as between different groups in society before engaging in actuarial policing.

The bottom line is that the use of statistical discrimination may well increase crime in society. Racial profiling will only reduce total crime depending on the relationship between comparative elasticities and offending rates of the two groups. If minority motorists have lower elasticity, racial profiling may well increase overall profiled crime. The problem with the narrow definition of efficiency—maximizing search success rates—then is that it may effectively mask racial prejudice. If a police officer or police department engages in disproportionate searches of minority motorists in order to maximize the success rate of searches and pays no attention to the consequences on long-term trends in the transportation of drug contraband—or if we as modelers and policymakers focus on narrow efficiency—then the police may endorse a scheme of racial profiling that may in fact promote more crime in the long-term. The police may promote, whether intentionally or unwittingly, a policy that discriminates on the basis of race and increases overall crime. That would not be efficient. To the contrary, it would in effect be racially prejudiced.

What is most troubling in all this, of course, is that there are good reasons to suspect that minority and white motorists may have different elasticities of offending to policing and that the elasticity of minority motorists may be *less* than that of white motorists. Elasticity is going to depend in large part on the existence of legitimate work alternatives, and, as the work of Professor William Julius Wilson demonstrates, there is a deep and complex relation between work opportunities, race, and the inner city.³⁹ Even the economists developing the racial profiling models recognize this. Nicola Persico in fact suggests that, as a theoretical matter, the elasticity for African-Americans may be less than for Whites because they may have fewer job opportunities and therefore fewer alternatives to crime—which seems eminently right. As Persico explains, “the amount of criminal activity—and hence also the elasticity of crime to policing—depends on the distribution of legal earning opportunities.”⁴⁰ This may affect the transportation of illicit drugs and the substitutability of drug couriers.

In other words, there is no good reason to assume that the higher-offending group is as responsive to policing as the lower-offending group. The two groups do, after all, have different offending rates—otherwise the police would be profiling on a spurious trait. Whether the different offending rates are due to different socio-economic backgrounds, to different histories, cultures, or education, non-spurious profiling rests on the non-spurious assumption that one group of

individuals offends *more* than another, holding everything else constant. If their offending is different, then why would their elasticity be the same? If they are, for instance, offending more because they are socio-economically more disadvantaged, then it would follow logically that they may also have less elasticity of offending to policing because they have fewer alternative job opportunities. The bottom line, then, is that there is every reason to believe that non-spurious racial profiling would actually increase crime in society.

Let me make two final points regarding this first problem with statistical discrimination.

First, some economists will respond that this argument is technically accurate with regard to *existing* profiling techniques, but that the existing techniques are only error prone insofar as they do not incorporate a measure of the comparative responsiveness of the different populations. Though technically accurate, they suggest, this first problem should not undermine our faith in the efficiency of profiling techniques *when they are properly administered*. The correct use of statistical discrimination is “always efficient in theory.”⁴¹

This is entirely right *at the theoretical level*. There is no question that if we had perfect information on the comparative elasticities and offending rates of the two groups at the margin, then we could administer statistical discrimination efficiently and ensure that there are no negative effects on crime. The table above demonstrates that well: if we knew the *exact* comparative elasticities, offending, and internal search rates, then we could determine whether and whom to profile perfectly efficiently. In this sense, at the level of pure theory, the use of statistical discrimination is indeed always efficient.

Where I part ways, though, is on the importance to place on the theoretical versus the actual. The fact is, we do not have *any data* on comparative elasticities, and, until now, the social scientists who have been working on these actuarial instruments have never paid any attention to comparative elasticities. From the very first prediction tool onwards, researchers have based their instruments on *comparative offending rates* as the outcome measure. From Professor Ernest Burgess, who developed the very first prediction tables implemented in the twentieth century, to the DEA agents who developed the drug-courier profile in the 1970s to the most up-to-date sexual offender risk assessment instruments—all of the profiling instruments are based on *offending differentials only*. In other words, throughout the twentieth century and now into the twenty-first, statistical discrimination is tied to differences in offending rates. The research—practical and theoretical—has never measured comparative elasticities. The result is that, today, we know effectively nothing about comparative elasticities.⁴²

The pure theory of statistical discrimination is so divorced from our current state of knowledge and from our existing profiling techniques that the more meaningful conclusion to draw is that our use of statistical discrimination is likely inefficient in practice.

Second, it is important to emphasize that this critique of racial profiling plagues all instances of statistical discrimination in the criminal justice context, including the sentencing context. The case of parole prediction, it turns out, works in exactly the same way as racial profiling: overall crime in society would increase if the elasticity of the recidivists is lower than the elasticity of the first-time offenders—which we could easily assume if they do in fact have different offending rates. The intuition, again, is simple: recidivists are a small minority of the population and they may in fact be less responsive to punishment; if so, first-time and one-time offenders may engage in more criminal behavior overall due to the comparatively reduced cost of crime, and their offending may outpace any gains achieved with regard to the recidivists. Again, this assumes the rational action model. It assumes that individuals will commit more crime if the relative cost of crime declines. But the result is exactly the same and the consequences equally troubling: depending on comparative elasticities, the use of statistical discrimination whether at sentencing or in policing may increase overall crime in society.

B. Statistical Discrimination Likely Causes A Ratchet Effect

What if we do not believe in rational action theory and are not prepared to assume that individuals are elastic to policing? Surprisingly, the case is even stronger for racial profiling. If you have two inelastic groups with different offending, it will *always* be more efficient to profile on the higher offending group: you will always get more bang for your buck. This feeds into the incapacitation argument for profiling: if the police stop and search more motorists who are more likely to be transporting drug contraband, they will detect and punish more drug couriers. Incapacitation theory tells us that there will simply be *more* detection of crime—and, correlatively, *fewer* undetected drug-couriers on the highways. In short, statistical discrimination here helps incapacitate *more* offenders with the *same* resources; and *even more* offenders with *even more* resources. And this, of course, is a good thing.

But all good things come at a price, and the key question is, at what price? An evaluation along these lines, naturally, calls for cost-benefit analysis. Here, then, let us assume the cost-benefit approach and the goals of law enforcement—let's enter the utilitarian framework—and analyze the overall picture. When we do that, it turns, out, there is one particular cost that is generally overlooked—overlooked in large part because it focuses on the guilty more than on the innocent—and that likely outweighs the benefits of profiling. This is what I call the “ratchet effect.”

Under normal conditions, the use of *accurate* statistical discrimination (under conditions of no elasticity) will have a distortive effect on the targeted population, a distortion that ultimately operates as a ratchet. The distortion occurs when successful profiling produces a supervised population that is disproportionate to the distribution of offending by racial group. To give a rapid illustration, if the targeted population represents 25% of the overall population, but 45% of the offending population—in other words, targeted persons are offending at a higher proportion than their representation in the general population and the profiling is non-spurious—then if law

enforcement profiles the targeted population by allocating, say, 45% of its resources onto the targeted population, the resulting distribution of offenders will be approximately 67% targeted and 33% non-targeted individuals—this too can be demonstrate with equations, illustrations, and graphs.⁴³ The disparity between targeted persons representing 45% of actual offenders but 67% of detected offenders represents a distortion that has significant negative effects on the minority population. This distortion will produce a ratchet if law enforcement then relies on the evidence of the resulting correctional traces—arrests, convictions, supervision—in order to reallocate future law enforcement resources. How serious the distortion and ratchet effect will be depends, again, on subtle variations in offending rates. But some distortion is inevitable.

The reason, in essence, is that when we profile, we are essentially sampling *more* from a higher-offending population. Instead of sampling randomly—which would net a proportional representation of the offending population—we are sampling in greater numbers from the pool of higher offenders, and thereby skewing our sample results. Somewhat counter-intuitively, the only way to produce a prison population that mirrors the offending population is to sample randomly from the general population—to engage in essentially random searches, or random audits, or random policing. Barring that randomness, our results will be distorted.

The logic of the ratchet in the policing context is simple: if the police dedicate more resources to investigating, searching, and arresting members of a higher-offending group, the resulting distribution of arrests (as between profiled and non-profiled persons) will disproportionately represent members of that higher-offending group. The basic intuition is that policing is like sampling: when the police profile higher-offenders, they are essentially sampling *more* among members of the higher-offending group. Instead of sampling randomly, which would be the only way to achieve a proportional representation of the offending population, the police are sampling in greater numbers from within the higher offender group, thereby skewing the sampling results in favor of higher offenders.

The distortive effect of criminal profiling on the new carceral population will produce a ratchet whenever law enforcement relies on the evidence of correctional traces—arrests or convictions—in order to reallocate future law enforcement resources. And the fact is, given the paucity of reliable information on natural offending rates, law enforcement often does rely heavily on arrest, conviction, and supervision rates in deciding how to allocate resources. As Peter Verniero, former Attorney General of New Jersey, explained, “To a large extent, these statistics have been used to grease the wheels of a vicious cycle—a self-fulfilling prophecy where law enforcement agencies rely on arrest data that they themselves generated as a result of the discretionary allocation of resources and targeted drug enforcement efforts.”⁴⁴ This accelerates the imbalance in the prison population and aggravates the secondary impact on the profiled population.

The Costs of the Ratchet

What the ratchet effect does is to disproportionately distribute criminal records and criminal justice contacts, with numerous secondary implications for members of the profiled group, in terms of their education, employment, and family lives. Disproportionate criminal supervision and incarceration reduces work opportunities, breaks down families and communities, and disrupts education. The pernicious effects of overrepresentation of African-Americans in our prisons—especially among incarcerated felons—have been detailed and documented by many scholars, including David Cole, Tracey Meares, Dorothy Roberts, Michael Tonry, Bruce Western, and Loïc Wacquant, to name but a few.⁴⁵ Widespread conviction and incarceration affect not only the targeted individuals but also the communities from which they are drawn—producing feedback effects on them and others. Drawing on insights from the Chicago school of urban sociology—specifically, on the social disorganization theory of Clifford Shaw and Henry McKay⁴⁶—Tracey Meares describes well the devastating effects of high incarceration on the convict and on his community—on “the vitality of families, the life chances of children left behind, and the economic circumstances of African-American communities.”⁴⁷ Meares writes:

The status of “convict” severely compromises the released felon’s ability to make investments in human capital. A released convict may perceive further investment in human capital to be useless because he may understandably reason that sinking money and time into education and training will not overcome the stigma of a felony conviction on a job application. When he makes the decision to refrain from further investment, he weakens existing relationships he has with people who will be less likely to depend on him, because his ability to provide them with benefits through interaction is compromised. Additionally, the individual who decides not to make further investments in education, skills and training cuts himself off from potential useful relationships with others who have no incentive to form relationships with him. . . . The basic point is this: all unemployed populations are not equal, and any incremental increase in the proportion of convicts among the unemployed population of the ghetto portends incrementally worse consequences for the vitality of the community.⁴⁸

Lower employment opportunities not only harm the released prisoner on reentry, but also erode the social fabric of the community. The deadly combination of prison and unemployment that Professor Bruce Western details in his book, *Punishment and Inequality in America*, fuels a cycle of detrimental consequences for the community that then feedback on the community members.⁴⁹ These include “fewer adults to monitor and supervise children” resulting in “increased opportunities for children to become involved in delinquency and crime,” more broken families, and deepening poverty, all of which produce severe disruptions in African-American communities.⁵⁰

The ratchet also contributes to an exaggerated general perception in the public imagination and among police officers of an association between being African-American and being a criminal—between, in Dorothy Roberts’s words, “blackness and criminality.”⁵¹ Roberts discusses one extremely revealing symptom of the “black face” of crime, namely the strong tendency of white victims and

eyewitnesses to misidentify suspects in cross-racial situations. Studies show a disproportionate rate of false identifications when the person identifying is white and the person identified is black. In fact, according to Sheri Lynn Johnson, “this expectation is so strong that whites may observe an interracial scene in which a white person is the aggressor, yet remember the black person as the aggressor.”⁵² The black face has become the criminal in our collective subconscious. “The unconscious association between Blacks and crime is so powerful that it supersedes reality,” Roberts observes: “it predisposes whites to literally see Black people as criminals. Their skin color marks Blacks as visibly lawless.”⁵³

This, in turn, further undermines the ability of African-Americans to obtain employment or pursue educational opportunities. It has a delegitimizing effect on the criminal justice system that may encourage disaffected youths to commit crime. It may also erode community-police relations, hampering law enforcement efforts as minority community members become less willing to report crime, to testify, and to convict. The feedback mechanisms, in turn, accelerate the imbalance in the prison population and the growing correlation between race and criminality.

Again, let me just add one further point here too. It is important to emphasize that the ratchet effect, while extremely troubling in the case of race, is not *only* troubling *because* of race. Again, race serves as the miner’s canary, but it is vital to see the fundamental problem (the lack of oxygen). The ratchet is an abstract mechanism that can be *equally* troubling in other contexts. The very same problem plagues the profiling of persons with prior criminal records, with a very similar, detrimental effect on recidivists who are reentering society—what I will call “recidivist criminality.” What the ratchet effect does here is to accentuate the symbolic meaning of prison and incarceration: it compounds the perception that being a former prisoner means that the convict is more likely to reoffend. To be sure, there may well be a correlation. Again, as in all the cases in this paper, I am assuming that the prediction is *correct*. The statistical correlation is presumably reliable, not spurious. What the ratchet does, though, is aggravate that precise correlation: whereas prior offenders may represent, hypothetically, 40% of the offending population, profiling prior offenders will result in their representing, again hypothetically, 65% of the prison population. This differential represents a ratchet with heavy symbolic meaning. It means that the general public will tend to think that prior offenders are even more prone to future criminality than they really are. And this will have devastating effects on the possibilities and the reality of reentry.

It is what makes reentry so terribly hard on prior felons: it is what reduces their employment opportunities and their ability to reintegrate into society. It is what renders them suspicious to us all. Less trustworthy. The first to investigate when a crime is committed—the first to suspect when something is missing. It is what makes it even harder for someone returning from prison to go back to school, to find a job, to make friends, to be trusted. And this too feeds a vicious cycle. As Robert Sampson and John Laub observe, imprisonment has “powerful negative effects on the prospects of future employment and job employment. In turn, low income, unemployment, and

underemployment are themselves linked to heightened risks of family disruption. Through its negative effects on male employment, imprisonment may thus lead indirectly through family disruption to increases in future rates of crime and violence.”⁵⁴

V. What Is Really Going On? Estimating the Impact of Racial Profiling.

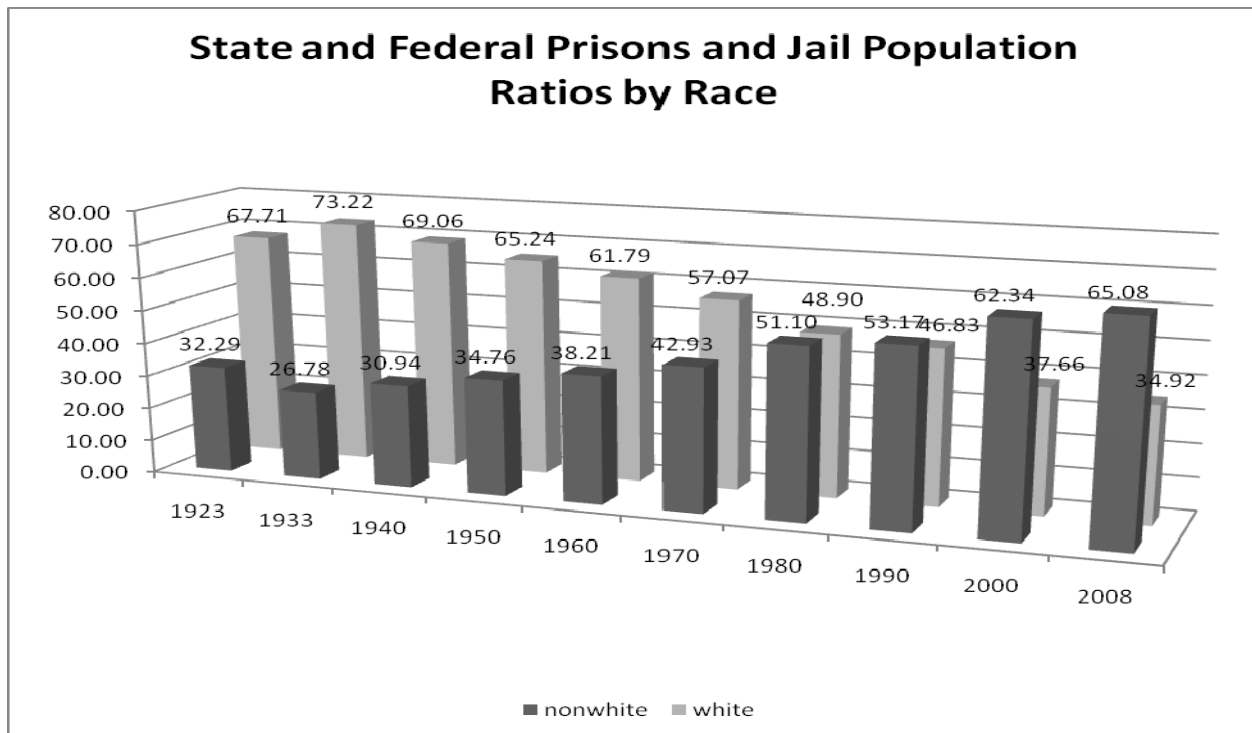
The problems of racial profiling, then, are problems of statistical discrimination *writ large*. To what extent do we think that these problems are being actualized? Is there a ratchet effect today? Are the different groups elastic to policing and if so, is the profiling increasing crime in society? What do we know about what is really going on, then? Unfortunately, the new data on police searches from across the country do not provide reliable observations on the key quantities of interest necessary to answer these questions precisely—specifically, the data do not contain measures of comparative offending or comparative elasticity. Nevertheless, it is possible to make reasonable conjectures based on both the best available evidence and conservative assumptions about comparative offending rates and elasticity.

As I demonstrate in Chapter 7 of *Against Prediction*, “A Case Study on racial Profiling,” based on reasonably conservative assumptions including, first, relatively low elasticity of offending to policing, second, slightly lower elasticity of offending to policing for minority motorists, and third, slightly higher drug-transportation rates among minority motorists, it is fair to infer that racial profiling on the highways may increase the total number of persons transporting drug contraband on the roads. From equation (9) above, we know that racial profiling will increase crime if the ratio of white elasticity to minority elasticity is greater than the ratio of minority offending to white offending—in other words if the elasticity differential is greater than the offending differential. Given the paucity of evidence on both relative elasticities and offending, any conclusion is tentative, but under conservative assumptions, racial profiling on the roads probably increases the profiled crime.

Racial profiling on the highways also probably has a significant distortion effect on the profiled population. From the earlier analysis of the basic racial profiling models, it is clear that the police may have to subject a disproportionate number of minority motorists to criminal justice supervision to equalize offending rates. In all likelihood, this is exactly what is happening in the extensive data from Maryland. It is hard to imagine, even if we assume that minority motorists are offending at a higher natural rate than white motorists, that minority offenders represent 60 percent of all offenders under natural conditions of offending (that is, if the police are engaged in color-blind policing). After all, 84 percent of motorists in Maryland found with drugs had trace or personal-use amounts, and 68 percent had trace or personal-use quantities of marijuana only; and the survey data seem to suggest that personal consumption of drugs is relatively even across racial lines. Even if we assume that all the other 16 percent of seizures—those seizures involving large hauls of drugs—consist *entirely* of minority motorists,⁵⁵ then minority offenders would still represent only approximately 31 percent of offenders.⁵⁶

The most likely explanation for the disjunction between this extreme hypothesized offending differential in Maryland (30/70) and the actual apprehension differential under present conditions of racial profiling (60/40) is that, if we assume elasticity, it takes a lot of profiling to bring the hit rates down to the same level. The result is a significant imbalance in negative contact with the police—whether the seizure of drug contraband results in a fine, an arrest, probation, or imprisonment. This represents a distortion effect that has a significant cost to minority families and communities.

In the end, if we make reasonably conservative assumptions from available evidence, it becomes clear that racial profiling on the highways probably does *not* reduce overall crime, but on the contrary increases it, and probably contributes significantly to a ratchet effect in society. And the available data from the criminal justice system is entirely consistent with this informed speculation. During the twentieth century, African-Americans represented a consistently increasing proportion of the new and overall supervised population. Since 1926, the year the federal government began collecting data on correctional populations, the proportion of African-Americans newly admitted to state prisons has increased steadily from 23.1% to 45.8% in 1982. It reached 51.8% in 1991, and stood at 47% in 1997.⁵⁷ The result has been a steadily increasing rate of incarceration for African-Americans: in 1997, 6.84% of African-American adult males were incarcerated in this country, up from a little over 3.5% in 1985 and in sharp contrast to less than 1% of white males.⁵⁸ The overall effect can be visualized in the following graph:



Naturally, I do not contend that these trends verify the ratchet effect. They are merely consistent with a ratchet effect operating in the United State criminal justice system against African-Americans.

VI. The Real Solution: Axing Statistical Discrimination, Embracing Chance

The real solution to racial profiling, then, is not racial sensitivity training or classes on racial profiling at police academies. I do not mean to belittle these efforts, but they will have little effect if police officers and the general public still believe, as they mostly do today, that statistical discrimination is natural and right, and that young African-American and Hispanic males offend on the street at higher rates than others. No amount of counter-intuitive training is going to significantly reduce racial profiling, especially not in split-decision, emergency situations.

Instead, we need to start understanding that statistical discrimination, where there are feedback loops, is counter-productive and probably increases street crime over the long-term. That it undermines, rather than promotes, the law enforcement objective of reducing crime. Even on very conservative assumptions entirely consistent with rational choice theory, the use of profiling is probably self-defeating: given the reasonable possibility that offending differentials go hand-in-hand with different elasticity to policing, there is good reason to believe—again from a rational action perspective—that statistical discrimination will increase rather than decrease the overall amount of crime in society. And where there is uncertainty about offending and elasticity differentials, the use of statistical discrimination will aggravate social disparities. The problems set forth in this paper reflect problems with statistical discrimination *more generally*—not just with specific types of stereotyping or profiles.

What, then, should we do? Surprisingly, the answer is that we should randomize policing to a far greater extent.⁵⁹ Since the police cannot seek consent to search *every* car that speeds over the limit, it should use mechanisms that effectively randomize over the speeding population—for example, by seeking consent from every tenth driver stopped or, say, from every person driving between 85 and 90 miles per hour. Randomization may strike you as odd at first, but it is in fact simply a mechanism to extract discretion—and racial prejudice—from the process of selecting persons to search. It is merely a mechanical way to eliminate discretion. It is the best way to take discretion out of policing *without* undermining the goal of police efficiency and *while* promoting principles of justice. Randomization, it turns out, is the only way to achieve a carceral population that reflects the offending population, and it is the only way to avoid the counter-productive effect on crime rates.

Randomization in the policing context is simply a form of random sampling and has all the virtues of random sampling. On the highways, it is the *only way* that the police would obtain an accurate reflection of the offending population. What randomization achieves, in essence, is to neutralize the perverse effects of statistical discrimination, both in terms of the possible effects on overall crime and of the other social costs.

Randomization translates into different practices in policing and other criminal justice contexts. In the policing context, though, randomization is relatively straightforward: on the highway, the state patrol could deploy random numerical ordering to seek consent to search cars or to stop cars that are speeding. Randomization is already a feature of our law in a number of other areas. *It should become part of policing.*

Conclusion

Race has always played a key and disturbing role in the history of statistical tools and methods. The first parole prediction instrument, developed in 1927 by Professor Ernest Burgess at the University of Chicago, included the race/nationality of the father as one of twenty-one factors that predicted success or failure on parole.⁶⁰ Professor Burgess's model was implemented by the Illinois Board of Paroles in 1933 and, as a result, race was used expressly as one factor in the "prognosis" that served as the basis for the decision whether or not to parole an inmate. This continued for many decades. In fact, when California began using a parole prediction instrument *in the 1970s*, it used an actuarial device that relied on race. The first California "Base/Expectancy Score" narrowed in on race and only three other factors: prior commitments, offense type, and number of escapes.⁶¹

Race is also what motivates our disgust with racial profiling. It is, without doubt, the issues surrounding race and racial discrimination that bother us most in the incident leading to the arrest of Professor Gates—*not* the problems with any abstract notions of statistical discrimination. The mug shot of Professor Gates is *haunting* because it reminds us of our peculiar institutions, of Apartheid, of "Blackness and criminality"—*not* because of mathematics, partial differentiation, or comparative elasticities. It is racial discrimination that concerns us when we identify racial profiling.

And yet, the problem with racial profiling is precisely the misguided use of statistical discrimination in situations where there are potential feedback effects. The problem is that our customary and ordinary forms of rationality, our "odds reasoning," our daily uses of statistical discrimination are leading us astray. Race is the miner's canary that signals—or should signal—the larger problems of statistical discrimination and profiling. And until we properly understand the problems of statistical discrimination *writ large*, I fear that we will make little progress on racial profiling.

NOTES

Special thanks to Professors Bruce Western, and William Julius Wilson for the invitation to present this work at the Harvard Multidisciplinary Program in Inequality & Social Policy; and special thanks to Sam Lim at Duke University for excellent research assistance. Some of the material in this paper is drawn from my book, *Against Prediction: Profiling, Policing and Punishing in an Actuarial Age* (University of Chicago Press, 2007) and I would encourage anyone who remains skeptical, but interested, to seek further elaboration and details there, as well as in “A Reader's Companion to ‘Against Prediction’: A Reply to Ariela Gross, Yoram Margalioth, and Yoav Sapir on Economic Modeling, Selective Incapacitation, Governmentality, and Race,” *Law & Social Inquiry*, Vol. 33, p. 265-283 (2008) (available on-line here:

<http://bernardharcourt.com/documents/readers-companion.pdf>).

¹ Quoted in Krissah Thompson, “Scholar Says Arrest Will Lead Him To Explore Race in Criminal Justice,” *Washington Post*, July 22, 2009 (on-line here <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/21/AR2009072101771.html?hpid=artslot&sid=ST2009072301777>).

² President Obama, Press Conference dated July 22, 2009, available here <http://www.nytimes.com/2009/07/22/us/politics/22obama.transcript.html?ref=politics>.

³ Quoted in Krissah Thompson, *Washington Post*, July 22, 2009.

⁴ Henry Louis Gates, Jr., “An Accident of Time and Place,” *The Root*, July 30, 2009 (on-line at <http://www.theroot.com/views/accident-time-and-place>).

⁵ Ian Ayres, “Racial Profiling and the LAPD: A Study of Racially Disparate Outcomes in the Los Angeles Police Department,” 2008 (on-line at <http://www.aclu-sc.org/lapdracialprofiling>).

⁶ Ayres 2008:5.

⁷ ACLU of Arizona, “Driving While Black or Brown,” 2008 (on-line at <http://www.acluaz.org/DrivingWhileBlackorBrown.pdf>).

⁸ Robin Engel, Jennifer Calnon Cherkaskas, and Michael R. Smith, “Traffic Stop Data Analysis Study: Year 2 Final Report,” University of Cincinnati Policing Institute, 2008 (on-line at http://www.azdps.gov/agreement/pdf/DPS_Year_2_Stop_Data_Report_2008.pdf). The study was commissioned by the law enforcement agency and it emphasized that no department-wide conclusions could be made on any racial disparities in stopping behavior.

⁹ Engel et al 2008: 53-54.

¹⁰ Stephen M. Haas, Erica Turley, and Monika Sterling, “West Virginia Traffic Stop Study: Final Report,” Criminal Justice Statistical Analysis Center, 2009 (on-line at <http://www.wvdcjs.com/trafficstops/index.html>).

¹¹ Alexander Weiss and Dennis P. Rosenbaum, “Illinois Traffic Stops Statistics Study 2008 Annual Report,” University of Illinois at Chicago Center for Research in Law and Justice, 2009 (on-line at <http://www.dot.state.il.us/travelstats/ITSS%202008%20Annual%20Report.pdf>).

¹² Weiss and Rosenbaum 2008: 12-13.

¹³ Greg Ridgeway, “Analysis of Racial Disparities in the New York Police Department’s Stop, Question, and Frisk Practices,” The RAND Corp., 2007.

¹⁴ Ridgeway 2007: xii-xiv.

¹⁵ Amy Farrell and Jack McDevitt, “Rhode Island Traffic Stop Statistics Data Collection Study 2004-2005,” Northeastern University Institute on Race and Justice, 2006.

¹⁶ Farrell and McDevitt 2006: 68-70.

¹⁷ Farrell and McDevitt 2006: 78.

¹⁸ ACLU, “Persistence of Racial and Ethnic Profiling in the United States: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination,” 2009 (on-line at http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf).

¹⁹ ACLU 2009: 46.

²⁰ ACLU 2009: 56.

²¹ ACLU 2009: 41-68.

²² Louis Henry Gates’ narrative of the incident, communicated through his attorney, Charles Ogletree, is available at *The Root* here <http://www.theroot.com/views/lawyers-statement-arrest-henry-louis-gates-jr>. Officer Crowley’s narrative of the incident, as communicated in the arrest report concerning the incident, is available here <http://wikileaks.org/leak/henry-gates-arrest-report-2009.pdf>.

²³ The full transcript of the press conference from July 22, 2009, is available here

<http://www.nytimes.com/2009/07/22/us/politics/22obama.transcript.html?ref=politics>.

²⁴ Helene Cooper and Abby Goodnough, “Over Beers, No Apologies, but Plans to Have Lunch,” *New York Times*, July 30, 2009.

²⁵ Denise Lavoie, “Cop who arrested black scholar is profiling expert,” Associated Press, July 23, 2009.

²⁶ We are all familiar with the most recent research on “implicit bias” and with the IAT—the “Implicit Association Test” (<https://implicit.harvard.edu/implicit/demo/>); well described for those who are less familiar here

<http://www.washingtonpost.com/ac2/wp-dyn/A27067-2005Jan21?language=printer>). Several researchers, including Thierry Devos and also Mahzarin Banaji at Harvard have recently done fascinating work on implicit bias in relation to the recent election of President Obama (see “[Is Barack Obama American Enough to Be the Next President?](http://www-rohan.sdsu.edu/~tdevos/thd/Devos_spsp2008.pdf)” on-line at http://www-rohan.sdsu.edu/~tdevos/thd/Devos_spsp2008.pdf). They conclude that “Ethnicity and national identity may play a larger role than often realized in how political candidates are perceived and, more broadly, in American politics. The present findings have intriguing implications for the role that the media and political campaigns may have on the outcome of presidential elections.”)

²⁷ This is, incidentally, another problem with the constitutional treatment of racial profiling, which requires evidence of intentional discrimination.

²⁸ See R. Richard Banks, “Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse,” 48 *UCLA Law Review* 1075-1124 (2001).

²⁹ See Harcourt, *Against Prediction*, 2007:199-209 (documenting similar illicit drug consumption rates as between Whites, Blacks, and Hispanics).

³⁰ For a window into that larger debate, see Patrick A. Langan, “Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States,” 76 *J. Crim. L. & Criminology* 666, 666-667 (1985); Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* (New York: Oxford University Press 1995). Given that criminal justice data are predominantly generated by policing, law enforcement, and corrections agencies, there is a natural skew in the evidence—it is itself, in all likelihood, infected by racial profiling.

³¹ Lani Guinier and Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy*. Cambridge, MA: Harvard University Press, 2005.

³² In fact, prior to 9/11, there was near unanimity among politicians, at least at the level of public statements, that racial profiling was wrong. You may recall that President George W. Bush denounced racial profiling on the grounds that “[a]ll of our citizens are created equal and must be treated equally” (quoted in Mosher, Miethe, and Phillips, *Mismeasure of Crime* at 183(Statement to Joint Session of Congress on February 27, 2001)); and former President Bush’s FBI Director, Robert Mueller, similarly declared that “[r]acial profiling is abhorrent to the Constitution” (see Albert Alschuler, 2002 *University of Chicago Legal Forum* at 163 n 3, citing 147 *Cong Rec S 8683* (Aug 2, 2001)).

³³ Others defend the rise of the actuarial in more general terms—while carving out specific exceptions for generalizations based on race, gender or sexual orientation. Frederick Schauer, in his book *Profiles, Probabilities, and Stereotypes* (2003), offers a generalized, but nuanced, defense of actuarial reasoning. “In this book,” Schauer explains, “I defend the morality of decision by categories and by generalizations, even with its consequent apparent disregard for the fact that decision-making by generalization often seems to produce an unjust result in particular cases” (Schauer 2003:ix). Schauer defends the type of non-spurious generalizations that form the basis of many stereotypes and profiles on the ground that they tend to be prudent and efficient, and, in many cases morally appropriate.

³⁴ Gary Becker, *Accounting for Tastes* (Cambridge MA: Harvard University Press 1996).

³⁵ The leading studies include John Knowles, Nicola Persico, and Petra Todd, "Racial Bias in Motor Vehicle Searches: Theory and Evidence," 109 *J Pol Econ* 203 (2001); Rubén Hernández-Murillo and John Knowles, "Racial Profiling or Racist Policing?: Testing in Aggregated Data" (working paper Apr 18, 2003), online at http://www.econ.upenn.edu/~jknowles/Research/HKRacProf_2003c.pdf (visited June 5, 2004); Nicola Persico, "Racial Profiling, Fairness, and Effectiveness of Policing," 92 *Am Econ Rev* 1472 (2002); Jeff Dominitz and John Knowles, "Crime Minimization and Racial Bias: What Can We Learn From Police Search Data?" PIER Working Paper 05-019 (February 18, 2005) (available at <http://ssrn.com/abstract=719981>); Charles Manski, "Search Profiling with Partial Knowledge of Deterrence," (unpublished paper, 2005); Vani K. Borooah, "Racial Bias in Police Stops and Searches: An Economic Analysis," 17 *Eur J Pol Econ* 17 (2001).

³⁶ Nicola Persico, for instance, recognizes that maximizing the search success rates may lead to maximizing crime in his essay "Racial Profiling, Fairness, and Effectiveness of Policing," *American Economic Review* 92(5):1472—1497 (2002). John Knowles and his co-author, Jeff Dominitz, also recognize this in their more recent paper, "Crime Minimization and Racial Bias: What Can We Learn From Police Search Data?" PIER Working Paper 05-019 (February 18, 2005) (available at <http://ssrn.com/abstract=719981>). Charles Manski also recognizes the conflict between crime minimization and hit rate maximization in his paper, "Search Profiling with Partial Knowledge of Deterrence," (unpublished paper, 2005).

³⁷ Dominitz and Knowles 2005:4.

³⁸ Dominitz and Knowles 2005:16.

³⁹ William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987); William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (1996).

⁴⁰ Persico 2002: 1474.

⁴¹ Margalioth, "Looking at Prediction from an Economics Perspective," *Law & Social Inquiry* 2008.

⁴² It is only very recently that researchers have even begun to consider the implication of comparative elasticities to profiling. At the theoretical level, Nicola Persico raised the possibility of inefficiency in an article in 2002, but only recently have comparative elasticities begun to be included in the mathematical models (see Harcourt 2004; Dominitz and Knowles 2005; Blumkin and Margalioth 2006; Bjerk 2007). At the empirical level, Avner Bar-Ilan and Bruce Sacerdote have a working paper from 2001 that explores the comparative responsiveness to an increase in the fine for running a red light along several dimensions—finding that the elasticity of red light running with respect to the fine is larger for younger drivers and drivers with older cars, equivalent for drivers "convicted of violent offenses or property offenses," and smallest, within Israel, for "members of ethnic minority groups" (2001, 1-2). In addition, Paul Heaton has a 2006 working paper on the effect of eliminating racial profiling policies in New Jersey on the offending of minorities; however, the policing intervention in New Jersey involved no de-policing of whites, so there is no proper way to assess how the elasticity of black offenders compared to that of whites. The bottom line is that we still do not know anything about real comparative elasticities in the United States.

⁴³ See generally Harcourt, *Against Prediction*, Chapter 5 (2007).

⁴⁴ See Peter Verniero, Attorney General of New Jersey, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* 68 (Apr 1999), online at http://www.state.nj.us/lps/intm_419.pdf (visited June 5, 2004).

⁴⁵ Cole 1999 ; Meares 1998; Roberts 1999; Tonry 1995; Western 2006 ; Wacquant 2005.

⁴⁶ Clifford R. Shaw and Henry D. McKay, *Juvenile Delinquency and Urban Areas: A Study of Rates of Delinquency in Relation to Differential Characteristics of Local Communities in American Cities* (Chicago, IL: The University of Chicago Press, 1969).

⁴⁷ Meares 1998:206.

⁴⁸ Meares 1998:209—210.

⁴⁹ Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation 2006).

⁵⁰ Meares 1998: 206—208.

⁵¹ Roberts 1999: 805.

⁵² Sheri Lynn Johnson, "Cross-Racial Identification Errors in Criminal Cases," 69 *Cornell Law Review* 934, 949 (1984) (quoted in Roberts 1999: 806).

⁵³ Roberts 1999: 806.

⁵⁴ Robert J. Sampson and John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 255 (Cambridge, MA: Harvard University Press 1993).

⁵⁵ Note that this would be an unreasonably conservative assumption. A more reasonable assumption from the Maryland data is that approximately 84 percent of the dealer population is African-American. See Gross and Barnes 2002: 703.

⁵⁶ Assuming that 18 percent of the motorists are minorities, if minorities and whites offend at the same rate with regard to 84 percent of the offenses (personal use seizures) and minorities comprise all of the other 16 percent of the offenders, then minority motorists represent 31.12 percent of all offenders. (The equation is $(18/100 * 84/100) + (16/100 * 1) = .1512 + .16 = .3112$).

⁵⁷ The data are drawn from several sources. For statistics from 1926 to 1982, see Patrick A. Langan, "Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States," 76 *Journal of Criminal Law and Criminology* 666, 666–67 (1985); for statistics from 1985 to 1989, see U.S. Bureau of Justice Statistics, *Correctional Populations in the United States*, 1995 Table 1.16 (June 1997); for statistics from 1990 to 1997, see U.S. Bureau of Justice Statistics, *Correctional Populations in the United States*, 1997, Table 1.20 (Nov 2000).

⁵⁸ U.S. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2000* Table 6.2; U.S. Bureau of Justice Statistics, *Correctional Populations in the United States*, 1997, Figure 1. For excellent discussions of these trends, see Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* 28–31, 56–68 (New York: Oxford University Press, 1995). See also Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and Its Impact on African American Men* (2002), online at <http://www.justicepolicy.org/coc1/corc.htm>.

⁵⁹ I develop this argument at greater length in two essays: *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization (A Polemic and Manifesto for the Twenty-First Century)*, 74 *J. Soc. Res.* 307 (2007); and "Randomization in Criminal Justice: A Criminal Law Conversation," (with Alon Harel, Ken Levy, Michael O'Hear, and Alice Ristroph), in *Criminal Law Conversations*, Robinson, Ferzan and Garvey, eds., Oxford University Press, 2009 (also available at SSRN at <http://ssrn.com/abstract=1428464>).

⁶⁰ Harcourt, *Against Prediction*, 2007: 57.

⁶¹ Jonathan Simon, *Poor Discipline*, 1993: 173.