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### Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally

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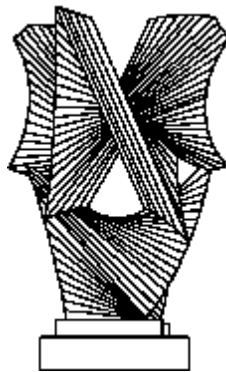
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**RETHINKING RACIAL PROFILING:**  
A CRITIQUE OF THE ECONOMICS, CIVIL LIBERTIES, AND CONSTITUTIONAL  
LITERATURE AND OF CRIMINAL PROFILING MORE GENERALLY

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THE UNIVERSITY OF CHICAGO**

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RETHINKING RACIAL PROFILING:  
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AND OF CRIMINAL PROFILING MORE GENERALLY

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ABSTRACT

*New data on highway stops and searches from across the country have spawned renewed debate over racial profiling on the roads. The new data reveal consistently disproportionate searches of minority motorists, but, very often, an equal or lower general success rate—or “hit rate”—associated with those searches. Economists are developing new models of racial profiling to test whether the data are consistent with policing efficiency or racial prejudice, and argue that equal hit rates reflect that the police are maximizing the success rate of their searches. Civil liberties advocates are scrutinizing the same data and, in most cases, reaching opposite conclusions. They argue that equal hit rates merely reflect similar offending patterns by race and thus that the disproportionate searches are racially biased. Meanwhile many constitutional commentators decry racial profiling on the highways as “plainly unconstitutional,” while courts draw technical legal distinctions to easily dispose of civil suits alleging racial profiling on the roads.*

*The debate over racial profiling on the highways is becoming increasingly empirical, technical, and engaged. It is also focusing increasingly on the issue of policing efficiency. The problem is, the debate is asking the wrong question and tracking the wrong statistic. The key question is not whether racial profiling maximizes the success rate of searches, and the key statistic is not the comparative hit rate by race associated with those searches. Instead, the key question for purposes of the empirical, policy, and constitutional analyses is: What are the conditions under which is it justifiable to use race in policing? The key statistics, it turns out, are the comparative elasticities of offending to policing and the relative offending rates of the different racial groups.*

*When we pose the right question properly, it becomes clear that both sides of the debate have it wrong: the use of race in police searches is neither plainly unconstitutional nor simply efficient. Racial profiling on the highways can be justified as an effective law enforcement tool or, from a constitutional perspective, as a narrowly tailored policing technique that promotes a compelling governmental interest in law enforcement if the following three conditions are satisfied: (1) racial profiling has a long-term negative effect on the profiled crime, (2) while increasing the efficient allocation of police resources, (3) without producing a ratchet effect on the profiled population. These three specific conditions will only be satisfied in certain identifiable situations of comparative elasticity and offending as between racial groups.*

*Under these narrow conditions, race can constitutionally be used in policing to advance a traditional law enforcement interest in combating crime. There may be other non-law enforcement interests that warrant using race in policing as well. There may be a compelling interest in having a prison population that reflects more accurately the demographic distribution of the offending population, or even of the population as a whole. There may be a compelling interest in combating crimes committed against historically disadvantaged groups. But with regard to the traditional law enforcement interest of fighting crime, race can only properly be used under these three narrow conditions.*

*Race in this criminal justice context should not be treated differently than in other contexts, such as education or employment. If racial profiling satisfies the three narrow conditions, then opposition to racial profiling should be based on the grounds of affirmative action: because of this country's institutional history of racism, or in order to achieve a more balanced carceral population, or for other compelling reasons, the police should endeavor to minimize the minority representation in prison by profiling white offenders. Conversely, if racial profiling does not satisfy any one of the three conditions, then racial profiling should be conditioned on compensating innocent minority motorists who are searched for wasting their time, for diminishing their dignity, and for inflicting emotional harm. If one of the conditions is not satisfied, innocent minority motorists are being used for other purposes—for example, to increase search success rates regardless of a ratchet effect—and they should be compensated for the taking.*

*As an empirical matter, it is fair to speculate, drawing reasonable inferences from other data sources, that minority motorists may have slightly lower elasticity of offending to policing because of diminished job opportunities and other market alternatives, and slightly higher offending rates because of drug trafficking patterns. As a result, racial profiling on the roadways may increase the overall costs to society, including the amount of profiled crime, and likely produces a ratchet effect on the profiled population, resulting in a greater disproportion of minority arrests or negative contacts with the police over and above any possibly higher offending rate. This is going to have significant repercussions on minority motorists: it is likely to more unevenly distribute criminal records, supervision, and post-punitive collateral consequences, and to significantly boost the public perception that minorities are drug users and drug dealers. Racial profiling on the highways, accordingly, is poor crime policy and, because of the ratchet effect, is not narrowly tailored to the governmental interest in law enforcement. Given that no federal or state agency has attempted to establish the three narrow conditions under which race could properly be considered in policing, the practice of racial profiling on the highways should be considered presently unconstitutional.*

*The important point is, however, that racial profiling on the highways is presently unacceptable not because of any per se constitutional bar on using race in police searches, but rather because of the mathematics of criminal profiling. The central problems with racial profiling—possible adverse long-term effects on the profiled crime and probable ratchet effect—are problems about criminal profiling in general, not about race. The same problems may infect any type of criminal profiling, whether of minorities for drug possession, of the wealthy for tax evasion, of single mothers for welfare fraud, or of white males for domestic terrorism or serial murder. To be sure, the ratchet effect is most disturbing when it plays on race, as well as gender, social or family status, class, or wealth. The ratchet effect violates a core principle of punishment theory, namely that anyone who is committing the same crime should face the same likelihood of being caught, and that race, gender, class, or status should not affect that equation. But both the ratchet effect and the long-term effect on the profiled crime are phenomena that may undermine any scheme of criminal profiling. In this sense, the debates over racial profiling on the highways should make us reexamine our views on the larger question of criminal profiling more generally.*

RETHINKING RACIAL PROFILING:  
A CRITIQUE OF THE ECONOMICS, CIVIL LIBERTIES AND CONSTITUTIONAL LITERATURE,  
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*Introduction*

New reporting requirements and data collection by over 400 law enforcement agencies across the country—including entire states such as Maryland, Missouri, and Washington<sup>1</sup>—are producing a continuous flow of new evidence on highway police searches. For the most part, the data are consistently showing disproportional searches of African-American and Hispanic motorists in relation to their estimated representation on the road. Economists, civil liberties advocates, legal and constitutional scholars, political scientists, lawyers, and judges are pouring over the new data and reaching, in many cases, quite opposite conclusions. The data have spawned a proliferation of new academic writing, lawsuits, and court decisions on the question of racial profiling on the highways.<sup>2</sup>

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<sup>1</sup> See Clayton J. Mosher, Terance D. Miethe, and Dretha M. Phillips, *The Mismeasure of Crime*, 186 (Thousand Oaks, UK: Sage Publications 2002); J. Mitchell Pickerill, Clayton Mosher, Michael Gaffney, and Nicholas Lovrich, “Search and Seizure, Racial Profiling and Traffic Stops on Washington State Highways,” paper prepared for and presented at the 2003 annual meeting of the Law & Society Association, Pittsburgh, PA, June 5–8, 2003, at page 11 [hereafter Pickerill et al. 2003] (reporting that “as of March 2001, more than 400 law enforcement agencies in the United States report collecting information on the race/ethnicity of those citizens stopped by police officers”); see also Katheryn K. Russell, “Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature,” 3 *Rutgers Race and the Law Review* 61, 68–71 (2001) [hereafter Russell 2001] (listing jurisdictions that have enacted data collection mandates); Brandon Garrett, “Remedying Racial Profiling,” 33 *Columb. Hum. Rights L. Rev.* 41, 81–83 (2001) (reviewing data collection efforts); Deborah Ramirez, Jack McDevitt, and Amy Farrell, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned* (U.S. Department of Justice Monograph, November 2000) (describing the data collection systems in place in California, New Jersey, North Carolina, and Great Britain). Northeastern University Center on Racial Profiling has an excellent web site that affords access to the most recent data, legislation, news, etc., at <http://www.racialprofilinganalysis.neu.edu> The web site of the Institute on Race & Poverty at the University of Minnesota is also an important data resource at <http://www1.umn.edu/irp/publications/racialprofiling.html>.

<sup>2</sup> The controversy over the definition of the term “racial profiling” has been rehearsed in several leading articles on racial profiling. In this article, “racial profiling” denotes the practice of stopping and searching minority motorists at a rate in excess of their representation on the road based on the assumption that members of their particular racial group are more likely to be transporting contraband. The term “racial profiling” is of recent vintage. See generally Jerome Skolnick and Abigail Caplovitz, “Guns, Drugs and Profiling: Ways to Target Guns and Minimize Racial Profiling,” in *Guns, Crime, and Punishment in America* (Bernard E. Harcourt, ed.), New York: New York University Press 2003 (discussing the history of the term). For discussions of the controversy over the definition of racial profiling, see, e.g., Russell 2001:65–68; Albert W. Alschuler, “Racial Profiling and the Constitution,” 2002 *University of Chicago Legal Forum* 163, 168 n.24 (2002) [hereafter Alschuler 2002]; Samuel R.

In one corner, economists, building on existing models from the area of optimal auditing, mortgage lending, and bail setting, are developing new econometric models of racial profiling to test whether the consistent findings of disproportional searches of minority motorists reflect efficiency of policing—i.e. the desire to maximize the number of successful searches of motorists for drug contraband or what is called “statistical discrimination”—or raw racial animus.<sup>3</sup> Among economists, the fact that minority motorists are being disproportionately searched is not, in itself, decisive of whether or not the police are acting in a racist manner. What matters instead is the rate of successful searches that discover drug contraband—what is called the “hit rate.” When the hit rates are the same across racial or ethnic lines, some economists argue, the police are not bigoted in their searches because they have no incentive to search *more or less* motorists of any particular race *based on race*. At equilibrium, the police have achieved a racial balance, with a racial imbalance at its heart, that they are unwilling to change on the basis of race—unless, of course, they are racist and have a taste for discrimination.

Accordingly, when the data reveal equal hit rates as between different racial groups—such as in Maryland between African-American and white motorists<sup>4</sup>—some economists conclude that the disproportionate searches of minority drivers do not reflect a taste for discrimination, but rather an attempt to maximize successful searches. When the data reveal lower hit rates for minority motorists—such as in Maryland between Hispanic and white motorists,<sup>5</sup> or in Missouri between African-American and Hispanic motorists on the one hand and white motorists on the other<sup>6</sup>—some economists conclude that there is racial bigotry against minority motorists. And when the data reveal higher hit rates for minority motorists—such as in Maryland regarding large hauls of drugs<sup>7</sup>—economists conclude that there is reverse racism at play—in other words, bigotry against white motorists.

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Gross and Katherine Y. Barnes, “Road Work: Racial Profiling and Drug Interdiction on the Highway,” *Michigan Law Review*, 101(3):\_\_\_\_ (2002) (available at [http://ssrn.com/abstract\\_id=331260](http://ssrn.com/abstract_id=331260)) [hereafter Gross and Barnes 2002 (all references to SSRN paper)], at 2–3, 100 and notes 257–261; Samuel R. Gross and Debra Livingston, “Racial Profiling Under Attack,” 102 *Columbia Law Review* 1413, 1415 (2002) [hereafter Gross and Livingston 2002].

<sup>3</sup> The leading studies include John Knowles, Nicola Persico, and Petra Todd, “Racial Bias in Motor Vehicle Searches: Theory and Evidence,” *Journal of Political Economy*, 109(1): 203–229 (2001) [hereafter KPT 2001]; Rubén Hernández-Murillo and John Knowles, “Racial Profiling or Racist Policing?: Testing in Aggregated Data,” working paper downloaded from <http://www.ssc.upenn.edu/~jknowles/HK.htm> on June 9, 2003 (April 18, 2003 version) [hereafter Hernández-Murillo and Knowles 2003]; Nicola Persico, “Racial Profiling, Fairness, and Effectiveness of Policing,” *The American Economic Review* 92(5):1472–1497 (2002); Vani K. Borooah, “Racial Bias in Police Stops and Searches: An Economic Analysis,” *European Journal of Political Economy* 17:17–37 (2001)[hereafter Borooah 2001]; *see also* Vani K. Borooah, “Economic Analysis of Police Stops and Searches: A Reply,” *European Journal of Political Economy* 18:607–608 (2002) [hereafter Borooah 2002] and Shanti P. Chakravarty, “Economic Analysis of Police Stops and Searches: A Critique,” *European Journal of Political Economy* 18:597–605 (2002).

<sup>4</sup> *See, e.g.*, KPT 2001:219.

<sup>5</sup> *See, e.g.*, KPT 2001:219.

<sup>6</sup> *See, e.g.*, Hernández-Murillo and Knowles 2003:5.

<sup>7</sup> *See, e.g.*, KPT 2001:226.

In another corner, civil liberties advocates and some legal scholars dispute the economists' assumptions and claims of policing efficiency.<sup>8</sup> Several commentators focus on the raw disparities in searches, and argue that the disparities themselves produce large numbers of innocent minority motorists subjected to negative police interaction and state surveillance, which, they suggest, is unacceptable on its own terms.<sup>9</sup> Other commentators focus on indicators of actual offending rates—such as drug consumption self-report surveys—and argue that there is no evidence that minority motorists offend at higher rates than whites.<sup>10</sup> From their perspective, the equal or lower hit rates do not reflect policing efficiency or elasticity of offending to policing, but rather constant rates of equal or lower offending among minorities. And if there are non-elastic similar rates of offending among minority motorists, they argue, the police should not use race in the decision to stop and search motorists. Building on this empirical foundation, many constitutional scholars argue that it is “plainly unconstitutional” to use race in the decision to search motorists.<sup>11</sup> The police, they contend, can no more use race to decide who to search than a prosecutor could use race to decide who to charge with a capital crime.<sup>12</sup> Race simply cannot be used to the detriment of innocent motorists.

In yet a third corner, judges and several constitutional commentators draw technical legal distinctions to more easily resolve legal challenges to racial profiling. First, judges distinguish between Fourth Amendment protection against unreasonable searches and the Fourteenth Amendment guarantee of equal treatment, and relegate the use of race in policing to the latter. In the Fourth Amendment context, judges and some commentators distinguish between using race exclusively or as one factor among others, and tend to disregard claims that fall in the latter category, which tends to capture most of the cases. In the Equal Protection context, judges and many commentators distinguish between profiling without individualized suspicion and using an eye-witness racial identification, and exclude the latter from Fourteenth Amendment scrutiny. Finally, in the Equal Protection context as well, judges distinguish between intentional discrimination established by evidence of specific discriminatory acts from statistical evidence of disparate treatment, and reject challenges that do not establish the former. The result is that practically all constitutional challenges to racial profiling have either failed through one or more of these technical legal distinctions<sup>13</sup> or been settled out of court primarily for injunctive relief.<sup>14</sup>

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<sup>8</sup> The leading articles and books include David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York: The New Press 2002) [hereafter Harris 2002]; Gross and Barnes 2002; Alschuler 2002; David Rudovsky, “Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause,” 3 *University of Pennsylvania Journal of Constitutional Law* 298–366 (2001) [hereafter Rudovsky 2001]; Gross and Livingston 2002; Tracey Maclin, “The Fourth Amendment On The Freeway,” 3 *Rutgers Race & The Law Review*, 117 (2001) [hereafter Maclin 2001].

<sup>9</sup> See, e.g., Harris 2002.

<sup>10</sup> See, e.g., Alschuler 2002; Gross and Barnes 2002; Rudovsky 2001.

<sup>11</sup> Gross and Barnes 2002:106; see also Rudovsky 2001; Maclin 2001:124 (arguing that “The Fourteenth Amendment’s Equal Protection Clause is intended to prevent government officials from relying upon a person’s race or ethnicity when allocating benefits or burdens”).

<sup>12</sup> See Gross and Barnes 2002:102; Rudovsky 2001.

<sup>13</sup> There is one notorious exception, which, naturally, has received overwhelming law review commentary.



The emerging debates are increasingly empirical, technical, engaged, and heated—which is all very positive. But they suffer from one fatal flaw: no one in the debates has properly identified in advance the narrow conditions under which racial profiling, as a form of criminal profiling, would be an effective law enforcement technique that is narrowly tailored to the traditional law enforcement interest of combating a profiled crime, here the transportation of illicit drugs on the highways. The failure to properly identify when race can legitimately and constitutionally be used in policing reflects in part the fact that for many people after September 11, 2001, there *is* no longer a clear-cut answer to the puzzle of race and policing. As William Stuntz suggests, expressing the views of many after 9/11, “solving the profiling problem is impossible.”<sup>15</sup>

This, however, cannot be right. The use of race in policing is not *that* different from the use of race in other policy contexts—whether in higher education, employment, or even restitution for slavery—that conditions cannot be stated for when race can legitimately and constitutionally be considered in policing, particularly when the government’s interest in using race relates to such as traditional compelling interest as the law enforcement goal of combating crime. To the contrary, the specific conditions must be specified in advance, and can be specified as follows: *Racial profiling for purposes of police searches is a narrowly tailored policing technique that promotes the traditional law enforcement interest in fighting crime if, first, racial profiling reduces the amount of profiled crime while, second, maintaining or increasing the efficient allocation of police resources, without, third, producing a ratchet effect*

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*See New Jersey v. Soto.* For commentary, *see* Alschuler 2002; Gross and Barnes 2002:85–87; Harris 2002; Rudovsky 2001; etc.

<sup>14</sup> *See* Gross and Barnes 2002:88-89 (discussing several settlements, such as the ones in Maryland and New Jersey); Brandon Garrett, “Remedying Racial Profiling,” 33 *Columb. Hum. Rights L. Rev.* 41, 75–81, 98–105 (2001) (discussing several decrees). This is not to suggest, though, that the litigation has not had significant effects in creating general awareness of the issue of racial profiling, in generating policy responses within police departments, and in promoting agreements between police departments and anti-racial profiling organizations. An example of one such agreement—between the St. Paul Police Department and the St. Paul Chapter of the NAACP—entered into as a result of voluntary mediation is reproduced as an appendix to the report, “Racially Biased Policing: A Principled Response,” written by Lorrie Fridell, Robert Lunney, Drew Diamond and Bruce Kubu of the Police Executive Research Forum (Washington, D.C.: Police Executive Research Forum 2001). The “Racially Biased Policing” report also details six key policy responses—including police department accountability and supervision, education and training, and minority community outreach—that are being implemented in a number of police departments. *See also* “Final Report of the State Police Review Team,” submitted by New Jersey Attorney General John J. Farmer, Jr. and First Assistant Attorney General Paul H. Zoubek (July 2, 1999) (detailing list of recommendations for reforms of the New Jersey State Police on the subject of racial profiling).

<sup>15</sup> William Stuntz, “Policing After the Terror,” 111 *Yale Law Journal* 2137, 2163 (2002). Stuntz places himself in the category of people who regard racial profiling as “occasionally tolerable,” *id.* at 2179; however, Stuntz does not elaborate in detail when racial profiling is proper, other than to suggest that “it all depends on the balance, on the benefits to law enforcement from using race or ethnicity as a proxy and the harm to the group that must pay [the racial] tax.” *Id.* at 2179. Overall, Stuntz writes that “racial and ethnic profiling is a fact of life that the legal system probably cannot change.” *Id.* at 2179. As a result, rather than addressing the problem head on, Stuntz suggests we implement changes in the regulation of police that will alleviate the problem—specifically, that we allow group searches not based on individualized suspicion and regulate the manner of searches. These reforms, Stuntz argues, will mitigate the problem of racial profiling.

*on the profiled population.* A ratchet effect occurs when racial profiling produces a supervised population that is disproportionate to the distribution of offending by racial group.<sup>16</sup>

The first condition—that racial profiling must minimize the profiled crime—is the core of the government’s law enforcement interest in fighting crime: if racial profiling of minority motorists causes white motorists to offend more and if this additional offending outweighs any gains from the reduction of minority motorist offending, then there is no advantage to racial profiling of minority motorists. There is no advantage to having an equal hit rate as between racial groups. There is no advantage to greater efficiency in policing. If, in contrast, racial profiling is effective at fighting the profiled crime, then, as between different policing techniques, racial profiling is preferable only if it represents a more efficient allocation of resources. Hence the second condition. As opposed to random highway searches, racial profiling would increase the efficiency of policing if, for example, it produces higher overall rates of detection of drug contraband, i.e. higher overall hit rates over the total motorist population. However, racial profiling is only narrowly tailored to these law enforcement goals if the policing practice does not create a ratchet effect on the profiled population—and this is the third condition. A policy of searching all members of a racial group—or for that matter, of incarcerating all members of a racial group—is likely going to satisfy the first requirement and significantly reduce the amount of profiled crime, but would clearly produce a ratchet effect on the members of the racial group. In order for the more effective and efficient policing policy to be acceptable, it must not have disproportional collateral consequences on the profiled population. It must not produce a racial imbalance in the supervised or carceral population that is disproportionate to the racial breakdown of offenders. In other words, it must be narrowly tailored to the traditional law enforcement goal of effectiveness and the social interest in efficiency.

Under these three narrow conditions, racial profiling would be a narrowly tailored, effective, and efficient law enforcement technique that promotes the compelling governmental interest in combating crime, here the highway transportation of illicit drugs, without producing a ratchet effect on the profiled population. This is not to say that it would have no costs. Like all other policies that use a category distinction—especially race—it would inflict costs on innocent members of the profiled group. More minority motorists—innocent and guilty—would be subjected to intrusive, unpleasant, and possibly humiliating searches on the side of the road. Nor is this to say that the benefits of drug interdiction outweigh these substantial costs. It is of course possible that the benefits of the War on Drugs are entirely overestimated or even are non-existent. As a policy matter, scholars and politicians could debate whether or not the law enforcement gains, if any, are worth the countervailing costs. But as a constitutional matter, if the three conditions are satisfied, racial profiling of police searches would be narrowly tailored to advance the traditional law enforcement interest in combating crime and would therefore survive judicial scrutiny.

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<sup>16</sup> The concept of a “ratchet effect” is defined and explained in detail in Part II.B.ii *infra*.

There may well be *other non-law enforcement interests* that warrant using race in policing. For instance, there may be a compelling interest in having a carceral population that reflects more accurately the demographic distribution of the offending population. In fact, there may be a compelling interest in having a prison or supervised population that reflects the demographic distribution of the general population. If so, it may be necessary to profile white motorists in order to balance the demographics of the prison population. It may be necessary to employ affirmative action in policing. Again, this would have costs—increased searches of innocent white motorists—and, as a policy matter, those costs may be equally troubling, but as a constitutional matter, if the reverse racial profiling is narrowly tailored to the compelling interest in reducing the minority representation in prison, then the policy would also survive judicial scrutiny. Alternatively, there may be a compelling interest in combating crimes committed against historically disadvantaged populations, such as African-Americans or Hispanics. If so, here too it may be necessary to be race-conscious in policing. But with regard to the specific law enforcement interest in fighting crime—here, interdicting the highway transportation of drug contraband—race can only properly be used in policing if the three narrow conditions specified above are satisfied.

Properly defining in advance these conditions greatly clarifies the racial profiling debates. As a preliminary matter, it becomes clear that the new economic models and the debates over “policing efficiency” are *maximizing on the wrong thing*: instead of maximizing the success rate of searches, the police should seek, first and foremost, to maximize the negative effect on the profiled crime and costs associated with police searches—in other words, to minimize the social costs associated with the profiled crime and profiling technique. As a result, the new economic models *track the wrong statistic*: rather than focusing on hit rates, the models should focus on the overall amount of profiled crime and costs to society of the searches. Moreover, the models need to address the additional question whether racial profiling produces a ratchet effect on the profiled population.

A second major implication is that the new data do not contain enough information to address these questions—neither the narrow question whether racial profiling maximizes the success rate of searches, nor the larger questions whether it reduces the amount of profiled crime or causes a ratchet effect. The three narrow conditions that would make racial profiling acceptable are only going to be satisfied under very specific circumstances of comparative elasticity of offending to policing and of comparative offending as between the two racial groups. The new data, however, do not include this information. The data contain only two of at least four necessary quantities of interest. The data include, first, the number and proportion of drivers searched by race and, second, the success rate of searches by race. (There is also more detailed information about types and amounts of drugs seized, location, type of searches, etc., which can produce more refined but not fundamentally different analyses). The data, however, are entirely silent with regard to the comparative elasticity of offending to policing and to the comparative natural offending rates by racial group. They also lack information on the selective use of other search criteria by race. Without this information, there is little that the data can say *empirically* about the narrow efficiency of racial profiling or about the impact of racial profiling on the profiled crime and the profiled population. For example, equal *official* hit rates may mask higher

*real* hit rates for minority motorists if the police rely less on other search criteria for minority motorists, or they could mask lower *real* hit rates for minority motorists if the police use additional sub-search processes for minority motorists—both of which would be consistent with racial bigotry. The official hit rates, it turns out, are extremely difficult to interpret.

When we correct for these deficiencies and make reasonably conservative assumptions from other available evidence, it becomes clear that racial profiling probably does not satisfy all three conditions. Minority motorists, in all likelihood, have slightly lower elasticity of offending to policing than white motorists because of reduced employment opportunities, and have slightly higher offending rates when drug trafficking is included. Under these conditions, racial profiling on the highways may well increase the amount of profiled crime and costs associated with police searches, resulting in numerically more white motorists offending because of a perceived sense of immunity. In addition, racial profiling on the highways is likely to have a ratchet effect on the profiled population, resulting in a greater disproportion of minority arrests or negative contacts with the police over and above the higher offending rate. This is going to have significant repercussions on African-American and Hispanic motorists. It will aggravate the disproportional representation of minorities in the correctional population, more unevenly distribute criminal records, supervision, and post-punitive collateral consequences, and significantly boost the public perception that minorities are drug users, traffickers, and couriers.

The central problems with racial profiling on the highways, then, are the likely ratchet effect on the profiled population and, possibly, an adverse long-term effect on the profiled crime and costs of police searches. These are not really problems about *racial* profiling, but problems about racial *profiling*. Or to put it another way, these are problems that might infect any profiling scheme, whether based on race, or gender, or wealth, or class, or physical demeanor. Although practically everyone in the criminal justice field endorses criminal profiling as a law enforcement technique outside the racial profiling context, the fact is that criminal profiling only advances the larger interest of crime reduction under very specific circumstances.

The ratchet effect is a problem about criminal profiling *more generally*. What the ratchet does is violate a core principle of punishment theory, namely that anyone who is committing the same crime should face the same likelihood of being caught, and that race, gender, social status, class, wealth, or other irrelevant categories simply should not matter in that equation. When profiling *works*—when it targets a higher offending population—it likely produces a ratchet effect that violates this fundamental idea that similarly situated persons should be treated alike. It distributes the costs of the penal system along troubling lines—race, gender, class, status, wealth, etc.<sup>17</sup> It runs against a basic ideal of our criminal justice system: that all people be treated fairly and equally. The best way to achieve that goal is to avoid criminal profiling

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<sup>17</sup> There may well be certain profiles that distribute the costs along lines that we are somewhat indifferent about. So, for instance, we might not care about the distributional consequences of profiling along the lines of out-of-state tags or rental cars if these are, in fact, profiles that *work* (though it is often easy to find associations between these seemingly innocent traits and traits that do bother us). But most of the profiles that we care about and debate involve those more sensitive traits, such as race, gender, physical attributes, wealth, class, etc.

entirely and to police color-blind, or gender-blind, or class-blind: rather than profile the wealthy for tax evasion, to select at random; rather than profile on race for automobile searches, to select color-blind.

Naturally, race is what makes racial profiling on the highways so controversial and, at least at the level of public rhetoric, so condemned. But it is important to rethink racial profiling through the lens of *criminal profiling*—to reduce race to the role that it is purportedly playing in racial profiling, namely a predictive factor; to treat race no differently than we would gender, class, age, or any other profile that works; to take the focus away from race and place it on criminal profiling more generally. Rethinking racial profiling through the lens of criminal profiling actually sheds light on, and raises important questions about the larger issue of criminal profiling.

The fact is, criminal profiling tends to accentuate the prejudices and biases that are built into the penal code and into criminal law enforcement. This is, naturally, all for the good when we come out on the winning side or when we punish the worse offenders—the serial pedophiles for example. But it is problematic in the grey area of the criminal law, in the mass of cases that engulf the criminal justice system—the drug users, the quality-of-life offenders, the tax cheats. There, matters are less clear. The prejudices and biases of the penal law are more questionable. There, in the mass of criminal cases, criminal profiling may have adverse effects on society by *aggravating* the correlations between status and crime. What criminal profiling does, in effect, is to leverage any structural tilt and exploit any associations between crimes and identifiable or profilable traits. To magnify crime associations into carceral distortions. Racial profiling on the highways is a good example of this, but it is by no means the only example. The same would hold true for other forms of profiling, whether profiling the wealthy for tax evasion, single mothers for welfare fraud, or even historians for plagiarism.

This article is an attempt at ground clearing. It seeks to clarify the empirical controversies surrounding racial profiling and thereby to shed light on the policy and constitutional law debates. The organization of the article is as follows. Part I reviews and evaluates the recent economics literature on racial profiling, and argues that the new economic models focus attention on the wrong question and track the wrong statistic. Part II reviews and assesses the civil liberties and legal scholarship on racial profiling, and contends that their response unwittingly embraces the logic of the economic models and perpetuates the problematic focus on hit rates. Part III reviews and assesses the constitutional framework that judges have constructed to resolve legal challenges to racial profiling and, based on the prior empirical analysis, offers an alternative approach. Part IV sets forth the type of empirical evidence that would be necessary to venture more informed speculation regarding the effects of racial profiling on the highways. Based on reasonably conservative assumptions from other available evidence, it concludes that racial profiling on the roads likely does not meet the three narrow conditions that would satisfy the basic policy threshold or constitutional review. A conclusion raises critical questions about the larger issue of criminal profiling.

## I. The Economics Literature

Drawing on Gary Becker's work on tastes for discrimination, several economists are developing econometric models of racial profiling in an effort to distinguish between efficiency and racial animus in policing. The economic models rest on a few core assumptions. The first is that police officers seek to maximize the success rate of automobile searches given the cost of searching cars. The second is that the motorists who might be transporting drug contraband seek to maximize the payoff of carrying contraband. If there is a negative payoff, they will not carry drugs. The third is that racist police officers experience a lower cost for searching minority motorists than for searching white motorists. The fourth is that minority motorists offend at higher rates than white motorists.

Given these assumptions, the models predict that police officers will target minority motorists for police searches in order to maximize their search hit rates. Searching minority motorists disproportionately, however, will reduce the rate of minority offending: as the search rate of minority motorists increases, the payoff of transporting drugs among minority motorists decreases, and fewer minority motorists will carry drug contraband. Police officers will continue to search minority motorists disproportionately until the point of equilibrium where minority and white motorists offend at the same level.

At that point, it will be possible to distinguish between the efficient non-racist police officer and the racist officer who has a taste for discrimination. The efficient, non-racist police officer will no longer care about race and will try to maintain the distribution of searches so as to maintain equal search success rates. In fact, maintaining that equilibrium will reflect the fact that the police officer is efficient rather than racist. Maintaining that particular equilibrium will maximize the likelihood that the next search will be successful: if the police, on the one hand, were to search proportionally more minority motorists, they would be dipping into a pool of motorists with a hit rate below the hit rate they could achieve by searching an additional white motorist; on the other hand, if the police were to search proportionally more white motorists, given elasticity here too, the hit rate of white motorists would fall below that of similarly situated minority motorists, thus reducing overall efficiency.

Given a relatively fixed level of law enforcement resources, there is only one equilibrium point that will maximize hit rates if the police officer is not racist, and it is the point at which the hit rates are the same across racial lines. At that equilibrium, the efficient police officer is engaged in maximally efficient searches. In contrast, the racist police officer will continue to search more minority motorists because his cost of searching minority motorists is lower. In other words, at the efficiency equilibrium, he will still be able to maximize his utility (search success rate minus cost) by searching more minority motorists. Depending on how tasteful discrimination is to this racist police officer, he will find his own point of equilibrium at some distribution where the hit rates of minority motorists is below the hit rates of white motorists.

The hit rate of searches, then, indicates whether the police officer is purely efficient and non-racist or is bigoted. John Knowles, Nicola Persico and Petra Todd, some of the leading economists working on racial profiling, explain:

The key implication of the model is that if a police officer has the same cost of searching two subgroups of the population and if these two subgroups are searched at equilibrium, then the returns from searching will be equal across the subgroups. For example, suppose that searching one subgroup of motorists yielded a higher return. Then police would always search these motorists, who would in turn react by carrying contraband less often, until the returns to searching are equalized across groups. If the returns to searching are equal across *all* subgroups distinguishable by police, they must also be equal across *aggregations* of these subgroups, which is what we can distinguish in the data. Thus equality of the returns to searching can be tested without knowing all the characteristics observed by the police.<sup>18</sup>

This economic model of racial profiling can be represented in a graph, making some basic assumptions about offending and elasticity that will be discussed in greater detail in Part I.B below.<sup>19</sup> The graph—Graph 1.A.1 below—shows the relationship between the internal rate of searches conducted within each racial group to the offending rate of the different racial groups. At Time 1, the police are engaged in color-blind policing: assuming a certain level of searches, the police are searching both groups at the same internal search rate of 10 percent. If minority motorists represented 20 percent of the total motorists on the road, then the police would be searching 20 percent minority motorists and 80 percent white motorists. Given that distribution of searches by race, minority motorists are offending at a higher rate than white motorists—6 percent versus 4.5 percent—resulting in higher hit rates for minority motorist searches. This reflects the assumption that minority motorists are offending at a higher rate than white motorists.

Given the higher marginal hit rate for minority motorists, the police begin to search minority motorists far more than their share of the motorist population: as the proportion of searches targeting minority motorists increases, the offending rate of minority motorists decreases. The police continue to marginally search minority motorists until Time 2 when the offending rates for white and minority motorists are the same—5 percent. Now the police are using race in the decision to search: the police are searching 20 percent of minority motorists on the road and 7.5 percent of white motorists on the road, resulting in a hypothetical total distribution of searches of, say, 60 percent minority and 40 percent white motorists. At that distribution of searches, the offending rates are similar—and, one can infer, so are the hit rates. At that distribution, the efficient police officer has no reason to change the racial distribution of

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<sup>18</sup> KPT 2001:206.

<sup>19</sup> I take full responsibility for this graphic representation. The economists developing the models of racial profiling have not attempted to translate their equations into graphs.

searches: the officer has no incentive to search more minority motorists than the 60/40 total distribution, which produce these different internal group search rates.

If the police officer is, in fact, searching more minority motorists and getting to Time 3, where the offending rate of minority motorists is lower than that of white motorists—4.8 percent versus 6 percent—then the officer must be racially bigoted. The only reason that the officer would search more minority motorists than at the Time 2 equilibrium—i.e. would search, say, 70 percent minority motorists and 30 percent white motorists, instead of the Time 2 distribution of 60 percent minority and 40 white motorists—would be if the officer had a *taste* for discrimination resulting in higher utility even though less minority motorists are offending.

The three hypothetical distributions of searches—20/80, 60/40, and 70/30—correspond to three different sets of internal group rates of searches within the different racial groups. These three scenarios also correspond to the three equilibrium points for the color-blind, efficient, and racist police officer. The three scenarios are represented in the following graph, Graph I.A.1. This graph makes many simplifying assumptions about the comparative elasticities among different racial groups, about the comparative offending rates between racial groups, about the selectiveness with which race is used in the searching process, and about several other complicating matters. Part I.B and II.B *infra* discuss these and other matters. But this is a simplifying preliminary graphic representation that captures the logic of the economic models with a few basic assumptions:

\*\*\* Insert Graph I.A.1: An Economic Model of Racial Profiling \*\*\*

The basic assumptions reflected in the graph include, first, elasticity among both citizen motorists and police officers. Motorists, whether minority or white, are assumed to reduce their drug transportation on the road when the police increase the proportion of searches conducted on members of their racial group. As Knowles and Hernández-Murillo explain, “The key assumption in the analysis is that while motorists differ in their propensity to carry contraband, those who face a high probability of being searched will tend to reduce their probability of carrying contraband in the vehicle.”<sup>20</sup> This is the assumption of elasticity of offending to policing—more technically, of transporting drug contraband to police searches. In this article, I will refer to this as “the elasticity of offending to policing” or sometimes by the shorthand “elasticity.” Police officers as well are assumed to respond to the likelihood of successful searches, targeting their searches at populations with higher hit rates.

Another key assumption reflected in the graph is that African-Americans have a higher rate of transporting drug contraband, all other things equal. If it takes such disproportionate searches of blacks and whites (for example, 63 percent versus 29 percent in Maryland) to achieve comparable success rates for searches (34 percent versus 32 percent respectively in Maryland),

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<sup>20</sup> Hernández-Murillo and Knowles 2003:3; *see also* KPT 2001:212 (“Our model assumes that motorists respond to the probability of being searched”).



this assumes that African-Americans would offend at a much higher rate than whites if they were being stopped in proportion to their representation on the road. As Knowles, Persico and Todd explain, “Our model implies that at equilibrium, both races should have the same probability of carrying drugs, but one race may be searched more often than another. In fact, searching some groups more often than others may be *necessary* to sustain equality in the proportions guilty across groups.”<sup>21</sup> This is the assumption of higher offending among African-Americans. Another economist who is also developing models of racial profiling, Vani Borooah, similarly assumes that minority offending is higher, holding policing constant. Borooah acknowledges that “If the likelihood of being stopped was the same for blacks and whites, then the likelihood of being arrested after a stop would be substantially higher for blacks.”<sup>22</sup>

A final key assumption reflected in the graph has to do with the way in which racism manifests itself—namely, through the lower cost associated with searching minority motorists among racist police officers. It is in this sense that the crux of the economic models is derived from Gary Becker’s work on discrimination, specifically on the central insight that “tastes for discrimination lead to lower profits for the discriminators.”<sup>23</sup> By assuming that all police officers seek to maximize the search success rate minus the cost of searching, and that racism enters the picture by means of the cost of conducting a search, the economic models are able to factor out of the analysis all the other traits that lead police officers to search motorists—such as, for instance, tinted windows, bumper stickers, age, car model, etc. As discussed *infra* in Part I.B.ii, this is both a strength and a weakness of the economic models.

One additional point. When the economists investigate data revealing disproportional searches of minority motorists, their models do not attempt to explain away the disproportionality by holding constant other search criteria. Instead, they essentially assume that the disproportionality is intentional and attempt to test the data to explain whether the disproportionality is due to statistical discrimination or racial bigotry. In this sense, the economists’ approach differs significantly from the more traditional multiple-regression approach of political scientists represented, for example, by the work of Mitchell Pickerill, Clayton Mosher, Michael Gaffney, and Nicholas Lovrich at Washington State University. These political scientists are focusing their research on identifying the other possible traits that may account for police searches in order to determine whether the contribution of race vanishes when other non-racial factors are held constant.<sup>24</sup>

In most cases, the economists’ approach seems more realistic given that the rates of disproportionality are consistent and often so high. In Maryland, for instance, between January 1995 and January 1999, 63 percent of the persons stopped and searched by the state police along Interstate I-95 were African-American, and 29 percent were white.<sup>25</sup> In Missouri in 2001,

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<sup>21</sup> KPT 2001:227.

<sup>22</sup> Borooah 2001:35.

<sup>23</sup> KPT 2001:208; *see generally*, Gary Becker, *Accounting for Tastes* (Harvard University Press 1996).

<sup>24</sup> Pickerill et al. 2003:11.

<sup>25</sup> KPT 2001.

African-American and Hispanics represented 74.8 percent of motorists stopped, while whites represented only 31.5 percent.<sup>26</sup> Other similar statistics have been rehearsed in the leading law review articles and books. In Volusia County, Florida, on a stretch of I-95 in the mid- to late-1980s, 70 percent of the persons stopped were minority motorists and 80 percent of the cars searched were of minority motorists, even though minorities represented only 5 percent of motorists.<sup>27</sup> In Illinois in the early 1990s, under “Operation Valkyrie,” the state police searches were comprised of approximately 30 percent Hispanic drivers even though Hispanics represented only about 8 percent of the state population.<sup>28</sup> In litigation in New Jersey, the state court credited defense experts’ findings that suggested absolute disparities of 32.7 percent (46.2 percent of stops were of blacks, 13.5 percent of drivers were black) and 22.1 percent (35.6 percent stops of blacks, 13.5 percent black drivers) based on stops at different intervals of the New Jersey Turnpike.<sup>29</sup> In other contexts as well, the racial disproportionalities are often very high.<sup>30</sup> Given these data, the economic models focus attention on the right issue—not whether the disproportionality can be explained away, but rather whether it reflects racial prejudice. This is clearly the right approach. Let’s turn now to the specific contributions.

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<sup>26</sup> Hernández-Murillo and Knowles 2003:Table 1.

<sup>27</sup> See generally Harris 2002:62–64; Rudovsky 2001:300; Russell 2001:73;

<sup>28</sup> See generally Harris 2002:64–66; Rudovsky 2001:301; *Peso Chavez v. Illinois State Police*, 251 F.3d 612 (7<sup>th</sup> Cir. 2001) (reviewing the empirical evidence and rejecting the equal protection claim).

<sup>29</sup> See *State of New Jersey v. Pedro Soto*, 324 N.J. Super. 66, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996). The court credits the defense expert’s findings at 361; the findings are reported at 353. See generally Harris 2002:53–60; Rudovsky 2001:299–300; Russell 2001:74–75. Civil liberties advocates also refer to Philadelphia, where the ACLU analyzed police stops of motorists and pedestrians in several districts in the late 1990s, and found significant disparities. See generally Rudovsky 2001:301; Russell 2001:74–75. According to Rudovsky, “For a one-week period in July, 1999, for car and pedestrian stops made in predominantly white police districts, the ratio of African-Americans who were stopped was up to ten times higher than one would expect from population data” Rudovsky 2001:301. Data from the Richmond, Virginia Police Department from 2000 reveals that the percentage of automobile stops that resulted in a search was most likely determined by location in a black neighborhood. See Matthew Petrocelli, Alex R. Piquero, Michael R. Smith, “Conflict theory and racial profiling: An empirical analysis of police traffic stop data,” 31 *Journal of Criminal Justice* 1, 7 (2003). Data from San Diego for the year 2001 reveal that “On average, Black/African American drivers had about a 60% greater chance of being stopped during the year than White drivers; the comparable figure for Hispanic drivers was about 37% greater than for White drivers.” Gary Cordner, Brian Williams, and Alfredo Velasco, “Vehicle Stops in San Diego: 2001,” November 2002, at 2. Data from the San Jose Police Department for the period July 1, 1999 to June 30, 2000, reveal that Hispanic and African-American motorists are stopped at a higher rate than their demographic representation. See *Vehicle Stop Demographic Study, San Jose, California Police Department*, Annual Report Issued December 1, 2000. See also *Racial Profiling: Limited Data Available on Motorist Stops*, U.S. General Accounting Office (March 2000) (reviewing five early racial profiling studies and finding that, although the studies contain methodological limitations, “the cumulative results of the analyses indicate that in relation to the populations to which they were compared, African American motorists in particular, and minority motorists in general, were proportionately more likely than whites to be stopped on the roadways studied,” *id.* at 1).

<sup>30</sup> See, e.g., Harcourt, *Illusion of Order* (New York City stops-and-frisks).

A. The Economic Models of Racial Profiling

i. *Knowles, Persico and Todd (2001)*

In *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, John Knowles, Nicola Persico, and Petra Todd develop a model of police officer and citizen motorist behavior to test whether recent empirical data concerning police searches of vehicles on Interstate 95 in Maryland reflect efficient policing—what they refer to as “statistical discrimination”—or racial animus.

Their model of citizen and police behavior assumes that both parties respond rationally to the different risks and likelihoods of finding drugs during a search. Among motorists who might be transporting drugs, the decision whether to have drugs in the car is a function of (a) the likelihood of being searched and the punishment or costs associated with being caught and (b) the likelihood of not being searched and the value to them if they are not searched. If this gives rise to a positive payoff, then a motorist who might be carrying drugs will choose to carry drugs. With regard to police officers, the basic assumption is that officers search based on the likelihood of finding contraband minus the cost of searching. Among non-prejudiced officers, the decision to pull someone over for a search will depend entirely on the probability of finding contraband since the costs are the same across races. Among prejudiced officers, the cost of searching minority motorists will be lower, leading to a different equilibrium point. The ultimate determination whether the police are racially prejudiced, then, turns on whether the hit rates are lower for minority motorists. “[I]f police are prejudiced,” Knowles, Persico and Todd explain, “the equilibrium returns to searching members of the group that is discriminated against will be below average.”<sup>31</sup>

PKT apply their model to the Maryland data.<sup>32</sup> The relevant data points from Maryland are relatively basic. The police in Maryland disproportionately target African-Americans for searches of their vehicles. Between January 1995 and January 1999, 63 percent of the persons stopped and searched by the state police along Interstate I-95 were African-American and 29 percent were white (of a total 1,590 observations). The assumed proportion of African-American drivers on the road was roughly 18 percent. In contrast, both groups have nearly equivalent offending rates based on those searches. With regard to African Americans, 34 percent of the searches turn up some evidence of drug carrying; with regard to whites, 32 percent of the searches turn up some evidence of drugs.

Based on data concerning total seizures of drugs—i.e. seizures involving any quantity of drugs—KPT conclude that there is no evidence of racial prejudice—no evidence that the police officers are displaying a taste for discrimination. They write that “Although African-American motorists are much more likely to be searched by police, the proportion of guilty motorists

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<sup>31</sup> KPT 2001:208.

<sup>32</sup> There are a number of other studies that have explored Maryland data. These include Gross and Barnes 2002 (discussed *infra*); John Lamberth, Report on Maryland stops, American Civil Liberties Union Freedom Network, <http://aclu.org/court/lamberth.html> (1996) (discussed in Russell 2001:71–72).

among whites and African-Americans whose cars are searched is nearly identical (0.32 vs. 0.34)—a result that is consistent with the hypothesis of no racial prejudice.”<sup>33</sup> In contrast, they do find racial prejudice against Hispanics because the success rates of searches is far lower—11 percent. In other words, far more Hispanics are being stopped than would be necessary to get them to offend less (assuming they had higher natural offending rates). “The lower guilty rates for Hispanics are suggestive of prejudice against this group.”<sup>34</sup>

Based on data concerning seizures of large quantities of drugs, however, PKT find that there is racial discrimination but that the prejudice works against whites. In this category, they focus on “only motorists in possession of sufficient amounts of drugs to constitute a felony under Maryland’s drug laws.”<sup>35</sup> Their results here are that African-Americans are significantly more likely to be found guilty than white motorists—0.13 versus 0.03. This, they suggest “would imply that police behavior is biased against whites and Hispanics in favor of African Americans.”<sup>36</sup> The authors conclude:

In our data, vehicles of African-American motorists are searched much more frequently than those of white motorists. However, the probability that a searched driver is found carrying any amount of contraband is very similar across races. Thus we cannot reject the hypothesis that the disparity in the probability of being searched is due purely to statistical discrimination and not to racial prejudice. When we look at the probability that a searched driver is carrying contraband in excess of a high threshold, this probability is higher for African Americans. Under our model, this would imply a bias against white motorists.<sup>37</sup>

ii. *Hernández-Murillo and Knowles (2003)*

John Knowles and Rubén Hernández-Murillo, in an article entitled *Racial Profiling or Racist Policing?: Testing in Aggregated Data*, apply the KPT model to aggregated Missouri data and make findings consistent with racial prejudice rather than statistical discrimination. The data set from Missouri consists of aggregated data by race and police force from an annual report published by the State of Missouri, the “2001 Annual Report on Missouri Traffic Stops,” mandated by the recently revised Traffic Regulation Laws.

The core data reveal the following. The proportion of each group stopped in Missouri is 31.5, 43.1, and 31.7 percent respectively for whites, African-Americans, and Hispanics. The proportion of stops that lead to a search is 6.5, 11.4, and 12.9 percent respectively for whites, African-Americans, and Hispanics. The hit rate for drugs is 19.7, 12.3, and 9.8 percent

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<sup>33</sup> KPT 2001:219.

<sup>34</sup> KPT 2001:222.

<sup>35</sup> KPT 2001:225–226.

<sup>36</sup> KPT 2001:226.

<sup>37</sup> KPT 2001:206–207.

respectively.<sup>38</sup> Based on this aggregated data, Hernández-Murillo and Knowles conclude: “we reject statistical discrimination as an explanation of the higher search rates of African-Americans and Hispanic motorists in Missouri.”<sup>39</sup> The reason is that searches of African-American and Hispanic motorists “are less likely to be successful, with significantly lower probability of turning up drugs or other contraband.”<sup>40</sup> Based on their calculations, they find that 18 percent of the excess search rate of African-Americans “would be eliminated” “if search rates were set so as to equalize success rates across racial groups.”<sup>41</sup>

Because the data are aggregated and not individual observations, Hernández-Murillo and Knowles are not able, strictly speaking, to hold other relevant variables—such as, for instance, type of search—constant. The State of Missouri in fact argues in the report that the lower hit rates for African-Americans and Hispanics are attributable to higher rates of arrest and mandatory search, and there is no way for the researchers to rigorously account for different types of searches.<sup>42</sup> Hernández-Murillo and Knowles use sophisticated (non-parametric) statistical methods in an effort to take account of this variable (given that they have the relative search arrests/searches rate), and contend that this factor does not account for the racial differentials. They conclude: “We found strong evidence in support of racial bias against African-American motorists, even when controlling for sex and age.”<sup>43</sup>

### iii. *Borooah (2001)*

Vani Borooah, in his 2001 article *Racial Bias in Police Stops and Searches: An Economic Analysis*, also develops a model of police behavior intended to distinguish between bigotry and efficiency, or what he calls “business necessity.” As an empirical matter, Borooah uses data from the British Home Office on stops and searches of citizens in ten police areas in England. He finds that there are wide disparities in the proportion of the racial groups searched, but far less disparities in the rates of success. “While in some Areas blacks were more likely than whites to be arrested, after a stop, there were other Areas where the black arrest-rate was the same, or less than, the white rate” (2001:23). He concludes from this—like Knowles, Persico and Todd (2001) on the Maryland data for total searches—that there is statistical, but not racial discrimination going on: “discrimination on grounds of business necessity.”<sup>44</sup> Borooah writes:

The conclusion of this paper was that the implementation of police stops in England, while undoubtedly discriminating against blacks, was largely free of bigotry. This is not to deny that racism exists among the police forces in England; but. . . it is more accurate to view the high stop rate for blacks as the consequence

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<sup>38</sup> Hernández-Murillo and Knowles 2003:Table 1.

<sup>39</sup> Hernández-Murillo and Knowles 2003:4.

<sup>40</sup> Hernández-Murillo and Knowles 2003:5.

<sup>41</sup> Hernández-Murillo and Knowles 2003:5.

<sup>42</sup> Hernández-Murillo and Knowles 2003:4.

<sup>43</sup> Hernández-Murillo and Knowles 2003:26.

<sup>44</sup> Borooah 2001:35.

of the police in England targeting their resources to achieve the maximum effect in terms of arrests.<sup>45</sup>

He concludes that “an assurance can be plausibly given for police stops and searches in England” that the racial disparities in stops are “untainted by racism” and have contributed positively to the efficiency of policing.<sup>46</sup>

Borooah’s enthusiasm rests, in part, on his belief that “statistical discrimination [business necessity], untainted by bigotry, is optimal from a policing perspective because it maximises the number of arrests consequent upon a given number of persons stopped.”<sup>47</sup> But he realizes that there is a trade-off between efficiency and the appearance of fairness with regard to the stops, and that the ultimate decision is a normative one. Borooah tries to be non-judgmental on questions of fairness. He recognizes that societies may prefer to equalize the likelihood of being stopped and searched, or may want to equalize the rate of success of searches. As he suggests, “the conflict between the two types of equality arises because they represent different perspectives to the welfare aspects of police stops.”<sup>48</sup> The welfare gains of stops are associated with apprehending offenders, the losses with searching innocent citizens.

Shanti Chakravarty, in a critique of Borooah (2001) entitled *Economic Analysis of Police Stops and Searches: A Critique*, takes Borooah to task for assuming that there is elasticity of crime to policing. Chakravarty argues that bigotry and business necessity may be commingled: “the data used in the model may be contaminated with a mixture of the two effects. . . making it advisable to exercise caution in accepting Borooah’s claim purely on the basis of the case he develops in his paper.”<sup>49</sup> He argues that the data may be contaminated because, if both groups have the same likelihood of offending, the bigotry in the selection of persons to stop and search is not wiped away by the similarity of the offending rates. He offers the hypothetical of two groups with identical offending rates, and shows that stopping a disproportionate number of minorities would be bigotry. He concludes: “Our purpose is to point out that he attempts to differentiate between bigotry and business necessity using data that are not sufficient for the purpose.”<sup>50</sup>

In reply, Borooah calls this a “fairly obvious” point. The “whole point of my paper,” he argues, is that under conditions of elasticity, the similar success rates show non-prejudice. The data suggest that “Blacks have a greater mean probability of offending than Whites.”<sup>51</sup> Because the rates of success are the same, the data show no bigotry. As a result, the argument against racial profiling, Borooah explains, does not go to the effectiveness of policing, but to the

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<sup>45</sup> Borooah 2001:36.

<sup>46</sup> Borooah 2001:36.

<sup>47</sup> Borooah 2001:19.

<sup>48</sup> Borooah 2001:27.

<sup>49</sup> Chakravarty 2002:598.

<sup>50</sup> Chakravarty 2002:605.

<sup>51</sup> Borooah 2002:607.

costs of stopping more blacks. It is about “the *consequences* of policing in terms of harassing the innocent and, as a corollary, in terms of the broader message that is issued to the Black community at large.”<sup>52</sup>

### B. *A Critique of the Economic Models of Racial Profiling*

The problem with the economic models of racial profiling is that they do 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 crime—in this case, to minimize the illicit transportation of drug contraband on the highways. The proper goal, in effect, is to minimize the social costs associated with the illicit transportation of drugs. 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. Under these conditions, racial profiling on the highways is socially counterproductive and should be avoided. The use of racial profiling under these circumstances would amount to a racist practice—whether intentionally or not—because it would disproportionately target minority motorists while increasing the overall costs to society: it would use a race classification without promoting a law enforcement interest.

#### i. *Rethinking Success*

The economic models focus the definition of policing efficiency exclusively on maximizing search success rates. Knowles, Persico and Todd, for instance, draw the line between efficiency and racial bigotry in the following terms: “Police may use race as a criterion in traffic stops *because they are trying to maximize successful searches* and race helps predict criminality or because they prefer stopping one racial group over another.”<sup>53</sup> The only other factor that the authors take into account—other than the success rate of searches—is “the cost of searching motorists” in terms of police time, effort, and taste for discrimination.<sup>54</sup>

What is absent from the models is the effect of racial profiling on the number of motorists transporting illicit drugs.<sup>55</sup> The long-term consequences on the amount of profiled crime are

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<sup>52</sup> Boroah 2002:608.

<sup>53</sup> KPT 2001:205 (emphasis added).

<sup>54</sup> See KPT 2001:205–206 (“Our model assumes that the police maximize the number of successful searches, net of the cost of searching motorists”)

<sup>55</sup> Many other commentators who discuss policing efficiency make the same error and draw on a similarly narrow definition of success. John Derbyshire, for instance, also focuses narrowly on the police officer trying to maximize his arrests: “A policeman who concentrates a disproportionate amount of his limited time and resources on young black men is going to uncover far more crimes—and therefore be far more successful in his career—than one who biases his attention to, say, middle-aged Asian women.” John Derbyshire, “In Defense of Racial Profiling,” *National Review* 53(3), February 19, 2001, at \*4–5 (emphasis added); see also George Will op-ed in the *Washington Post* dated April 19, 2001; Jackson Toby, *Wall Street Journal* op-ed in 1999; see generally Gene Callahan and

simply not factored into the economic models. This is problematic because the two objectives—maximizing search success rates and minimizing crime—are, under certain conditions, at odds with each other. If the police shift their allocation of resources away from white motorists and toward minority motorists, the offending rate among minority motorists may well decrease, but simultaneously the offending rate among white motorists may increase. The problem is, of course, that by definition *there are more white motorists*. Depending on the relationship between the comparative elasticity of offending to policing as between white and minority motorists and the comparative offending rates, the total increase in white motorist offending may or may not outweigh the total decrease in minority offending. It will all depend on the different elasticities and offending rates. Given the possibility of lower rates of elasticity for minority motorists, racial profiling may cause *more* persons to carry drug contraband on the road in the long term—more criminal activity overall—by encouraging white motorists to offend.

Assuming fixed law enforcement resources, racial profiling will only reduce total crime if the ratio of the minority to white motorist population is greater than the differential of the change in offending by race. Whether this condition is satisfied or not, however, will depend entirely on comparative elasticities and offending rates. Let me be more precise. In terms of notation, let  $r \in \{M, W\}$  denote the race of the motorists, either minority or white. Let  $Pop_r$  denote the representation of each racial group in the total population. Let  $O_r$  denote the offending rate of each racial group. Let  $\Delta O_r$  denote the *absolute value* of the change in the offending rate of the racial group from Time 1 to Time 2.

Racial profiling will only be beneficial from a long-term crime-fighting perspective if total crime at Time 1 (pre-racial profiling) is greater than total crime at Time 2 (with racial profiling). This happens if:

$$Pop_M O_M + Pop_W O_W > [Pop_M (O_M - \Delta O_M)] + [Pop_W (O_W + \Delta O_W)] \tag{1}$$

If we work through this equation long hand, we have:

$$Pop_M O_M + Pop_W O_W > Pop_M O_M - Pop_M \Delta O_M + Pop_W O_W + Pop_W \Delta O_W \tag{2}$$

$$0 > Pop_W \Delta O_W - Pop_M \Delta O_M \tag{3}$$

$$Pop_M \Delta O_M > Pop_W \Delta O_W \tag{4}$$

$$\frac{Pop_M}{Pop_W} > \frac{\Delta O_W}{\Delta O_M} \tag{5}$$

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William Anderson , “The Roots of Racial Profiling,” *Reason*, August-September 2001, at \*3 (available at [www.reason.com](http://www.reason.com)).



From equation (5), racial profiling will only *decrease* overall crime if the ratio of the minority to white motorist population—let’s call this “the population differential”—is greater than the ratio of the absolute value of the change in white motorist offending to the absolute value of the change in minority motorist offending—let’s call this “the differential of the change in offending by race.”

If we assume that minority motorists represent approximately 20 percent of the motorists on the road—in Maryland, for example, research reveals that African-American motorists represent 17 to 18 percent of the motorists—we can substitute estimated values for the population differential. What this suggests is that racial profiling is only effective as a long-term crime fighting strategy if:

$$0.25 > \frac{\Delta O_W}{\Delta O_M} \quad (6)$$

In other words, for racial profiling to work, it has to be the case that the change in the overall offending rate of white motorists is more than four times *smaller* than the change in the offending rate of minority motorists. Alternatively, the change in the offending rate of minority motorists has to be more than four times *greater* than the change in the overall offending rate of white motorists. If the minority representation is smaller than 20 percent, the required differential in the change of offending has to be even greater. By the same token, if the minority representation is larger, then the required differential in the change in offending need not be as large. To put some numbers on this, if the minority population represents 12 percent of the total population, then the change in the minority offending rate has to be at least 7.4 times greater than the change in the offending rate of white motorists. If the minority population represents 28 percent of the total population, then the change in the minority offending rate has to be at least 2.6 times greater. The smaller the minority population, the larger the required differential on change of offending rates.

Whether or not these conditions are satisfied will depend entirely on the relative elasticity of offending to policing and relative offending rates of the two racial groups. If minority motorists have the same elasticity of offending to policing than white motorists, then the conditions are satisfied if we assume, with the economic models, that the offending rate of minority motorists is greater than the offending rate of white motorists at Time 1 under conditions of no racial profiling. As I demonstrate in a more technical Appendix, the reason is that, by definition, if the elasticity is the same as between racial groups and there are resource constraints, the change in offending of the two racial groups is going to be related to the population differential. More technically, as shown in the Appendix, if elasticity is the same, then the following will also be true:

$$\frac{\Delta O_W}{\Delta O_M} = \frac{O_W}{4 O_M} \quad (7)$$

If we substitute this into equation (6), then racial profiling will only reduce crime if the offending rate of minority motorists ( $O_M$ ) is greater than the offending rate of white motorists ( $O_W$ ) under conditions of no racial profiling. The same is true if minority motorists have higher elasticity of offending to policing than white motorists. *See* Appendix.

However, if minority motorists have *lower* elasticity than white motorists, then racial profiling will only decrease the profiled crime if the offending rate differential at Time 1 is greater than the difference in elasticity. Again, I demonstrate this in the more technical Appendix. For more limited purposes here, though, let  $E_r$  denote the elasticity of each racial group. If  $E_M$  is less than  $E_W$ , we can denote the relationship in the following way:

$$x E_M = E_W, \text{ where } x > 1 \quad (8)$$

If we assume that minority motorists have lower elasticity by a differential  $x$ , then, by definition and substituting into equation (6), racial profiling will only decrease the profiled crime if the following condition holds true:

$$O_M > x O_W \quad (9)$$

In other words, if minority motorists have *lower* elasticity than white motorists, racial profiling will only decrease the amount of profiled crime if minority motorists offending is greater than white offending times the elasticity differential. If, for example, white motorist elasticity is two times greater than minority motorist elasticity, then racial profiling will only reduce crime if minority motorist offending is more than two times greater than white motorist offending.

As a result, the key statistics for purposes of determining the effect of racial profiling on the profiled crime are the elasticity and offending differentials. If minority motorists have lower elasticity, racial profiling may well increase overall profiled crime. In other words, if minority motorists have lower elasticity of offending to policing, racial profiling on the highways may not advance the law enforcement interest in reducing the profiled crime. Under definable conditions, racial profiling will be counterproductive to fighting crime. It will depend entirely on the comparative elasticity of offending to policing and offending rates of the two racial groups.

The problem with the narrow definition of efficiency—maximizing search success rates—is that it may effectively mask racial prejudice. If a police officer or police department engages in disproportional 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 policy makers 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 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, as well as on different cultural scripts and community norms. Economist Nicola Persico 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. As she explains, “the amount of criminal activity—and hence also the elasticity of crime to policing—depends on the distribution of legal earning opportunities.”<sup>56</sup> This may affect the transportation of illicit drugs for personal use as well as the substitutability of drug couriers. Under these conditions, the elasticity of minority motorists would be less than that of white motorists, and racial profiling could increase rather than decrease overall profiled crime.

A couple of additional observations. First, the analysis has assumed fixed law enforcement resources. This is, after all, the most realistic, reasonable and conservative assumption since the police budget is fixed by political processes that have little to do with hit rates or effects on profiled crime. Nevertheless, even if we relax the assumption of resource constraint, the same analysis would apply to the allocation of the additional police resources. Under conditions of lower elasticity, maximizing search success rates may possibly increase overall crime.

Second, it is important to emphasize that the problem with the economic models of racial profiling is *not* that the economists *overvalue* efficiency.<sup>57</sup> The problem is that they do not define efficiency properly in the policing and criminal justice context. A proper model of police behavior would assume that police departments and police officers seek first and foremost to minimize the number of persons carrying drug contraband on the highway. If searches are the most effective way to promote this objective—more effective, for instance, than advertisements or public announcements, etc.—then, and only then, should the police seek to efficiently allocate resources to maximize search success rates minus the cost of searching cars.

## ii. *An Alternative Model*

In order to properly model the police behavior from an econometric perspective, it would be necessary 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 (i.e. of the searches themselves).<sup>58</sup> Here, we need not assume fixed police

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<sup>56</sup> Persico 2002:1474.

<sup>57</sup> Most of the economists recognize fully that the goal of narrow efficiency may be offset by other social ends. As KPT acknowledge in the conclusion to their 2001 article, “Statistical discrimination, even if not due to prejudice, may be considered unfair because innocent drivers experience different probabilities of being searched depending on their race” (2001:228). Vani Borooah also recognizes that statistical discrimination “may be reprehensible to society” and that “society may prefer its police to implement a ‘colour-blind’ policy” (2001:19).

<sup>58</sup> Special thanks to Gary Becker for helping me think through this model.

budgetary resources, because the analysis would be the same whether there are resource constraints or not.<sup>59</sup> What we would seek to minimize, then, are two terms. First, the costs to society defined in terms of the profiled crime. For purposes of notation, let  $D$  denote the social loss associated with one instance of the profiled crime, namely the transportation of illicit drugs on the highway.<sup>60</sup> Let  $I_r$  denote the rate at which motorists are being searched.  $O_r$  (defined earlier as the internal rate of offending for each group) is a function of  $I_r$  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:

$$D [ O_M (I_M) Pop_M + O_W(I_W) Pop_W ] \quad (10)$$

Second, we need 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.<sup>61</sup> In more technical terms, the cost to society associated with the searches of automobiles can be captured by the following expression:

$$Q [ I_M Pop_M + I_W Pop_W ] \quad (11)$$

In order 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 expressions (10) and (11). The total cost function can be expressed as follows:

$$C_M(I_M) + C_W(I_W) = D [ O_M(I_M) Pop_M + O_W(I_W) Pop_W ] + Q [ I_M Pop_M + I_W Pop_W ] \quad (12)$$

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

$$C'_r(I_r) = D [ O'_r(I_r) Pop_r ] + Q Pop_r \quad (13)$$

If we solve for the case where cost is zero, we would obtain the following:

$$0 = D [ O'_r(I_r) Pop_r ] + Q Pop_r \quad (14)$$

$$- Q Pop_r = D [ O'_r(I_r) Pop_r ] \quad (15)$$

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<sup>59</sup> It does not matter, for purposes of resolving the model, whether we assume fixed or unlimited resources. I personally think it is more realistic to assume that there is a resource constraint on the number of searches the police can conduct—i.e. that there are fixed law enforcement resources—and that the police need to minimize the profiled crime holding constant the number of searches that the police can conduct. However, the result is the same either way, and so I will avoid making an additional assumption of fixed resources.

<sup>60</sup> It is assumed here that the social cost is the same for all incidents, regardless of the type of drugs, the quantity, or the race of the carrier. This is, naturally, a simplifying assumption given that the transportation of drugs for personal use or for drug trafficking have very different costs for society as a whole.

<sup>61</sup> Here too it is assumed that the social cost is the same for all searches, regardless of the type of car, search, or the race of the motorist.

$$- Q = D [ O'_r (I_r) ] \quad (16)$$

$$- [Q/D] = O'_r (I_r) \quad (17)$$

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:

$$O'_M (I_M) = O'_W (I_W) \quad (18)$$

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

$$\frac{\Delta O_M}{\Delta I_M} = \frac{\Delta O_W}{\Delta I_W} \quad (19)$$

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

$$\frac{\Delta O_M}{\Delta I_M} \frac{I_M}{O_M} \frac{O_M}{I_M} = \frac{\Delta O_W}{\Delta I_W} \frac{I_W}{O_W} \frac{O_W}{I_W} \quad (20)$$

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

$$E_M \frac{O_M}{I_M} = E_W \frac{O_W}{I_W} \quad (21)$$

This first-order condition must be satisfied in order to minimize the total social costs associated with the illicit transportation of drug contraband on the highways. 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:

Table I.B.1: Minimizing Total Social Costs

	$E_M = E_W$	$E_M < E_W$	$E_M > E_W$
$O_M = O_W$	$I_M = I_W$ (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 elasticity of offending to policing and higher natural offending rates, and similarly where minority motorists have higher elasticity but lower natural offending, racial profiling may increase overall social costs depending on the relationship between the relative offending and search rates. Under identifiable circumstances, then, racial profiling will result in overall higher costs to society in terms of the amount of profiled crime and cost of searches. And this result does not even take into account the ratchet effect discussed in Part II.B *infra*.

To put this another way, it is easy to come up with a counter-example to the argument that the police should seek to equalize the hit rates as between white and minority motorists—in other words, that minimizing the costs of drug carrying would imply equal hit rates as between racial groups.<sup>62</sup> If we assume equal elasticity of offending to policing as between white and minority motorists and higher search rates for minority motorists, then this implies from equation (21) that, at equilibrium, minimizing social costs will require *higher* offending rates for minority motorists—not equal hit rates, rather higher hit rates. So if in Maryland, for example, minority and white motorists have equal elasticity, the higher search rates for minority motorists would imply that, in order to minimize total social costs, there should be greater hit rates among minority motorists. The data showing higher search rates, but relatively equal hit rates in Maryland translate into *higher* social costs. If we assume lower elasticity among minority motorists in Maryland, it is also likely that the disproportional searches of minority motorists does not minimize social costs. If minority motorist elasticity is lower, then social costs are minimized if and only if the search rate of minority motorists is less than  $.34 / .32$  or 1.0625 times the search rate of white motorists. If hypothetically the search rate of white motorists is 5 percent, then the search rate of minority motorists could not be more than 5.3125 percent. Given that approximately 63 percent of searches are of minority motorists, it is likely that this condition does not obtain.

<sup>62</sup> Here too, I thank Gary Becker for working through this argument.

What is clear from this model is that minimizing the costs to society will entail a distribution of searches between white and minority motorists that will depend on the relative elasticities of offending to policing and on the relative natural offending rates.<sup>63</sup> In other words, *the equilibrium point is not defined by the equality of hit rates, but instead depends on elasticities and the relationship between offending and search rates.* As a result, the focus of the data collection should be on elasticities and offending rates, as well as search rates. And the focus of the analysis will 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. In this sense, the analysis will call not only for modeling skills and better data on overall elasticities and offending rates, but also for sociological and ethnographic studies of the groups of individuals who are most likely to respond to shifts in the allocation of policing resources.

The economic modelers may respond that they are merely trying to distinguish between the racist and the success-maximizing line police officer. And, to be sure, some police officers may measure success by the narrow metric of successful searches. This response, though, does not square with basic assumptions of rationality or police behavior. The broader notion of efficacy—associated with the long-term effects on the profiled crime—makes far more sense from the perspective of police officers and police departments. Preventing crime is the mission of the police, not maximizing hit rates. As we have seen throughout the country with the adoption of COMPSTAT first in New York City and then in most other jurisdictions, the bottom line for policing is crime rates. In fact, if the police focus exclusively on narrow efficiency, the economic models are completely irrelevant to the contemporary criminological and policing debates. A finding that the police conduct themselves in a narrowly efficient manner is orthogonal to the larger question whether racial profiling is or is not racist. It may point to a principal-agent problem in policing. But it does not resolve the key question of racial profiling. If targeting minority motorists *increases* long-term offending on the highways or the overall costs to society, then it is *in effect* racially prejudiced. It may be inadvertent and mistaken, but it is effectively racist. In sum, the economic models set the wrong objective and, as a result, are asking the wrong question and tracking the wrong statistic.

### iii. *The Problem of Selectivity*

Even setting this aside and adopting the narrow—and incorrect—definition of efficiency, there is a second problem with the economic models of racial profiling: the models do not properly address issues surrounding the selectiveness with which the police use race and other search criteria for purposes of searching and sub-searching members of different racial groups. As a result, the models place too much faith in their interpretation of hit rates—or, to say this slightly differently, the official hit rates do not necessarily mean what the economists claim.

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<sup>63</sup> As noted earlier, it would be important to add another condition, namely that the police should minimize the social costs while at the same time ensuring no ratchet effect. I discuss the ratchet effect in detail in Part II.B.ii *infra*.

There is good reason to believe that a police officer who is racist is going to use race differently in the decision to search a minority motorist than in the decision to search a white motorist. A racist police officer might decide, for instance, to search all available motorists when it comes to African-American motorists on the one hand, but only young drivers driving late-model cars with tinted windows and certain identifiable bumper stickers (marijuana leaf, Grateful Dead, graffiti logo) when it comes to white motorists. In other words, the racist police officer may use other search criteria more or less selectively depending on whether the motorist is white or a minority. If the police are more or less selective when it comes to minority motorists, then the equal *official* hit rates would mask different *actual* offending and hit rates among African-American drivers. If so, the fact that there are equal *official* hit rates would not signal narrowly efficient policing.

(a) *Selecting on Race*

The fact is that the police do not profile on race *alone*. They also profile on car models, vehicle attributes, rental cars, stickers, location, direction, motorist appearance, age, etc.<sup>64</sup> The police use these various attributes—as well as, possibly, race—to narrow down the pool of likely suspects. We know that they are doing this successfully. The pool of motorists who are being searched are carrying at high rates, far in excess of the population as a whole. In Maryland, for instance, about 34 percent of African-American and 32 percent of white motorists searched are carrying drugs.<sup>65</sup> That is far higher than rates of personal drug use among surveyed adults,<sup>66</sup> and far higher than success rates at nondiscretionary road blocks (about 4.7 percent in Indianapolis in 1998<sup>67</sup>). It is also higher than success rates in Missouri (12.3 percent for African-Americans and 19.7 percent for white motorists<sup>68</sup>). By not stopping elderly motorists on their way to church or the synagogue, the police can and are successfully narrowing down the pool of suspects. We see here that criminal profiling probably “works”: it can increase the success rates of searches.

What we do not know, however, is whether and to what extent the police are engaging in racial discrimination in the treatment of race as a *selection criterion*, and to what extent, if any, that is helping make the profiling work. We do not know whether the police use more factors to identify white suspects than African-American or Hispanic suspects. In other words, we do not know whether they discriminate more with regard to white motorists than with regard to minority motorists in their use of race as a determinant: we do not know whether and to what extent

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<sup>64</sup> KPT 2001 list these characteristics from a training manual of the Illinois State Police: “tinted windows, cell phones, leased vehicles, religious paraphernalia used to divert suspicion, and attorney business cards” (KPT 2001:204 n.2).

<sup>65</sup> Knowles, Persico and Todd 2001.

<sup>66</sup> See *infra* Part IV.A.i.(a).

<sup>67</sup> See *City of Indianapolis v. James Edmond*, 531 U.S. 32 (2000). The Indianapolis road block in 1998 involved random stops with no police discretion on the choice of cars or the policies to follow up stop. The car that was selected would be stopped, the driver would be asked to produce a license and registration, and a dog would sniff the outside of the car. A search was to be conducted upon consent or based on a specified amount of particularized suspicion. This technique netted drug possession in 4.7 percent of the total number of stops.

<sup>68</sup> See Hernández-Murillo and Knowles 2003:Table 1.



African-American motorists are being stopped because of race *alone*, while white motorists are being stopped because of a host of other characteristics. If the police are in fact searching any available minority motorist and are being more selective for white motorists, then the *official* hit rates compare apples and oranges. They compare all minority motorists on the one hand and a class of high risk white motorists on the other. If this is true, then the *actual* offending rate for all African-American motorists is probably higher than for all white motorists, despite the equal official hit rates. The equal hit rates would be deceptive: they would not signal narrowly efficient policing, but would instead mask a form of racism—selectively differential use of other search criteria—that would escape detection. To make matters worse, we do not know the direction of bias that would necessarily result if the police were using more characteristics for white motorists than for minority motorists. It would depend entirely on how predictive the other characteristics are and how they offset each other. It might be that several of the other characteristics actually retard the success rate. For instance, the fact that an automobile is swerving may be a very strong predictor of DUI, but a very poor predictor of—or perhaps inversely related to—the large-haul drug courier.

More technically, the economic models focus exclusively on the overall hit rates by race. That is, in part, their strength. As KPT contend, on their model the “equality of the returns to searching can be tested without knowing all the characteristics observed by the police.”<sup>69</sup> They explain: “A key advantage of [our] test is that it is feasible even when the data include only a subset of the variables used by the police in deciding whether to search a motorist. In fact, while more variables allow for a more powerful test, the test that we propose can be carried out when race is the only characteristic observed.”<sup>70</sup> Given that there is no reliable data on those other characteristics, this is indeed a strength of the KPT model. But it also presents a problem: it makes the hit rates unreliable as a test for racism because it does not take account of other characteristics when comparing hit rates.

The KPT model does include a variable for all the other characteristics that would lead the police to search a suspect. KPT label that variable “*c*” which denotes all other traits that raise suspicion to the police, and refer to race as “*r*”.<sup>71</sup> Their model, however, does not hold *c* constant. To the contrary, their model integrates *c* out of the final equation.

KPT begin, correctly, by asserting that the non-racist efficient police officer will be indifferent with regard to the race of the next motorist searched when, *for all c*, guilt probabilities are equal across all races. They express this in an equation which I reproduce below as equation (22).<sup>72</sup> For purposes of notation, *G* denotes that the search of the motorist comes up with drugs, *A* denotes minority motorists, *W* denotes white motorists, *t* denotes the marginal cost of searching a motorist,  $P^*(G|c, A)$  denotes the equilibrium probability that a minority motorist (*A*) of type *c* is guilty (*G*), and *c*, as we know, denotes all other traits that raise suspicion to the police.

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<sup>69</sup> KPT 2001:206.

<sup>70</sup> KPT 2001:205.

<sup>71</sup> KPT 2001:209.

<sup>72</sup> KPT 2001:211 (KPT’s equation (4)).

Their equation posits that, *for all c*, at the equilibrium, it must be the case that:

$$P^*(G|c, A) = t = P^*(G|c, W) \quad (22)$$

In other words, at equilibrium—i.e. at the point at which the non-racist police officer will be indifferent about race—the hit rate will be the same for minority and white motorists *holding c constant*, or, to put it slightly differently, *taking into account c and solving the equation for all c*. This is correct given that KPT have defined that the non-racist police officer does not have a different cost *t* for searching motorists of different races. Recall that racial prejudice is defined as a taste for discrimination reflected in the fact that the cost of searching a minority motorist ( $t_A$ ) is different from the cost of searching a white motorist ( $t_W$ ). Racial prejudice is defined as:

$$(t_A) \neq (t_W) \quad (23)$$

In the next step of their model, KPT integrate out *c*. Based on equation (22) above, they come up with the following test for racial prejudice—which they express in an equation that I reproduce below as equation (24).<sup>73</sup> In this equation, *D* represents “data on the frequency of guilt by race conditional on being searched”<sup>74</sup>:

$$D(W) = t = D(A) \quad (24)$$

The problem is that “the frequency of guilt by race conditional on being searched” is not different conceptually from the terms  $P^*(G|c, A)$  or  $P^*(G|c, W)$  from equation (22) above. The latter terms were defined as, at equilibrium, “the probability that a motorist of type *c*, [*A* or *W*] carries contraband.”<sup>75</sup> This is conceptually the same thing as “the frequency of guilt by race conditional on being searched.” In other words, the two equations are functionally equivalent. The only difference is that KPT have extracted the *c* term from the second equation, equation (24). The test for prejudice, then, is whether or not the frequency of guilt by race conditional on being searched is the same or different—whether the hit rates are the same or different—*regardless of c*. KPT have effectively eliminated any consideration of other characteristics *c* from their test. *But extracting c makes a difference. It is not a wash.*

The important difference is that it is *possible* for hit rates to be the same ignoring *c* and yet for guilt probabilities to be different *holding c constant*. It is *possible* where police officers are racist, use other search criteria less selectively for minority motorists, and are not entirely concerned about maximizing overall hit rates. In this sense, equation (22) is the right test for prejudice, but equation (24) is missing the key variable of other characteristics *c*. Because the hit rates that are classified by race do not hold *c* constant, the fact of equal hit rates could mean very different hit rates holding a particular characteristic constant. It could be, for instance, that

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<sup>73</sup> KPT 2001:212 (KPT’s equation (5)).

<sup>74</sup> KPT 2001:212.

<sup>75</sup> KPT 2001:210.

if we hold constant the characteristic that the automobile is swerving—or any other characteristic, such as late-model car, bumper sticker, etc.—the formerly equal hit rates are no longer equal. And there is no necessary bias as to the direction of the difference. By failing to hold  $c$  constant, the economic models do not account for the possibility that the police may use other search criteria differently for different races—that the  $c$ 's associated with white motorists may be more or less numerous than those associated with minority motorists. This problem of selectivity distorts the interpretation of the hit rates.<sup>76</sup>

The economic modelers might respond that the assumption of efficiency solves all the problems: if the police are actually being less selective with minority motorists and achieving the same hit rates, then they would have to know that minorities are actually offending at different rates than what is reflected in the parity of hit rates, and, if they are being perfectly efficient, they will seize the marginal difference by searching more or less minority motorists. This is, in a sense, what KPT mean when they write: “If the returns to searching are equal across *all* subgroups distinguishable by police, they must also be equal across *aggregations* of these subgroups, which is what we can distinguish in the data. Thus equality of the returns to searching can be tested without knowing all the characteristics observed by the police.”<sup>77</sup> In effect, the economic models do away with the need to collect data on  $c$  by assuming that police officers seek to maximize their success rates minus the cost of searching—by factoring racism into the equation by means of the cost analysis rather than the motivation.

This is Gary Becker's brilliant insight: to operationalize racism through the taste for discrimination. And it may work remarkably well, especially as a way to capture unconscious racism. The not-blatantly-racist police officer may not be fully aware of the differential costs of searching different motorists. But the more conscious racist may simply operate on an entirely different heuristic. It is possible—in fact, highly plausible—that the racism of the more blatantly racist police officer will express itself not—or not only—through the differential cost of searching motorists, but also through a more simplistic racist heuristic: “I'll search any minority motorist that I stop for speeding, and search any white ‘druggie’ motorist that I stop for speeding. By white ‘druggie’ motorist, I mean young white male with fancy car and drug stickers or other drug indicia.” If this is how the racist police officer operates, then the economic models cannot distinguish between the racist and narrowly efficient police officer on the basis of hit rates, because the hit rates do not have the meaning attributed to them by the economic models.

In essence, the economic modeler's response assumes away the most interesting question—namely *how racism expresses itself*. It places efficiency as a leading objective for *all* police officers. Yet there is no good reason to assume that the blatantly racist police officer is

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<sup>76</sup> This problem is mirrored by the model's failure to hold  $c$  constant for purposes of the definition of statistical discrimination. KPT explain: “An alternative definition of statistical discrimination would require that . . . blacks are searched at different rates than whites *with the same observable characteristics c*. This definition is more stringent than [our] definition 2. . . For our purposes, it is more convenient to use [our] definition 2.” KPT 2001:210.

<sup>77</sup> KPT 2001:206.

*also* maximally efficient in her racism. There is no reason to assume that she is seeking maximally efficient racism. Racism and narrow efficiency may be mutually exclusive. If this is true, then the equal hit rates do not reflect a narrow efficiency equilibrium. In fact, the police officer possibly could search more minority motorists and improve the overall hit rates—which is what the officer would do *if* she were perfectly efficient and knew that the other characteristics were accurate predictors across race. Yet the racist police officer may continue to select differentially on other search criteria out of racism. This is, possibly, the paradox of inefficient racism. Her racism may be masked *to us* by the equal hit rates and masks *to her* the fact that she could search more minorities. In any event, this form of racism would distort the interpretation of hit rates.

(b) *Sub-Search Processes*

One other related point. The police may also be engaging in more careful and deliberate sub-searches of stopped motorists depending on their race—and this too may skew the interpretation of hit rates. Samuel Gross and Katherine Barnes discuss this well in their analysis of the Maryland data, which I discuss in the next Part.<sup>78</sup> The police may be calling K-9 units more often or engaging in more intrusive visual inspection, closer scrutiny of documents, or more heavy-handed interrogation with certain categories of motorists. These sub-search techniques may also affect hit rates in a statistically invisible way. And they are not accounted for in the economic models of racial profiling. As KPT write:

[O]ur model abstracts from the issue of the thoroughness of searches. Suppose that it were the case that police search African-American motorists more thoroughly than whites, because of a lower “cost of thoroughness.” As a result, searches of African Americans would not necessarily be more successful, because of the equilibrium reaction of motorists. In fact, we may expect searches of African Americans to be less successful since in equilibrium police equate the (lower) cost of searching thoroughly to the expected benefit from searching. Testing a model that takes into account thoroughness requires data on effort spent searching. In the absence of such data, we leave this question for future research.<sup>79</sup>

The differential application of sub-search processes, however, may also distort the interpretation of hit rates.

(c) *Defining Racism*

It is important to note, in both these contexts, the difficulty of identifying what counts as “racist.” From one perspective, using more selection criteria (not just race, but also out-of-state

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<sup>78</sup> Gross and Barnes 2002.

<sup>79</sup> KPT 2001:215.

tags, fancy rims, etc.) and applying more sub-search techniques (K-9 sniffing, heavy-handed interrogation, closer visual inspections, etc.) to one set of motorists is *more* fair toward that set of motorists, because it decreases the number of innocent motorists in that category who are subjected to full-scale searches. If we are more careful in this manner with white motorists, fewer white motorists will be unnecessarily searched: this is *better* for white motorists as a whole, and discriminatory against African-American and Hispanic motorists who are subjected to comparatively more innocent unsuccessful searches. From another perspective, though, the sub-search techniques themselves are often intrusive, invasive, and, for ordinary motorists, may well feel like full-blown searches. Being forced to stop and wait by the side of the road for a K-9 sniff feels, to many people, like a search. On this view, the sub-search techniques count as searches, and their disproportionate application appears racist against the beneficiary—against the group subject to the practices. Moreover, the use of additional selection criteria and sub-search techniques create a perception that the beneficiary group is more crime prone. If we are being more careful with white motorists, their hit rates will be comparatively higher and they will appear to be more prone to drug offenses—and vice versa. In other words, the use of additional criteria has a symbolic effect that harms the beneficiary group: using more criteria on minority motorists will paint them as drug offenders in the public imagination, which is racist. From this second perspective, then, using more selection criteria and sub-search techniques is racist against the beneficiary of the actions.

One gaping normative question then is whether to label a police officer (call him Martin) who stops all African-American motorists because of their race alone, but who stops only white motorists with out-of-town tags and late-model cars and subjects these white motorists to a K-9 sniff, as racist against African-American motorists (because he is less careful and causing more unsuccessful searches of innocent minority motorists) or as racist against white motorists (because he is subjecting white motorists to intrusive K-9 searches and jacking up their collective hit rate, thus painting them as drug dealers).

The answer to this question may depend on political ideology. A liberal is more likely to conclude that police officer Martin is racist against African-Americans for producing more searches of innocent African-American motorists (but might *also* be more likely to conclude that another police officer, say Mary, was being racist against minority motorists if she subjected them to more K-9 searches, jacking up their hit rates and painting them as drug offenders). A conservative is more likely to conclude that police officer Martin is racist against white motorists because he is subjecting them to K-9 searches (but might *also* be more likely to conclude that police officer Mary was being racist against white motorists if she was being more careful with African-American motorists). In part, this has something to do with the symbolic dimension of the sub-searches. A K-9 sniff of an African-American person is inextricably loaded with meaning—especially the Civil Rights movement, Bull Connor and the Selma march. In part, it has to do with the techniques themselves—heavy-handed interrogation *is* heavy-handed. In part, it has to do with different racial sensitivities or, more exactly, different levels of sensitivity to actions in different racial contexts. In all fairness, there is probably an element of truth to both perspectives: the production of more unsuccessful searches of innocent motorists is a harm, and so are the sub-search techniques like K-9 sniffs and interrogation. For purposes of clarity, in the

ensuing discussion I will label police officer Martin as bigoted against minority (or white) motorists, and police officer Mary as bigoted against white (or minority) motorists.

The bottom line, then, is that, when the hit rates are 34 percent for African-American motorists and 32 percent for white motorists along Maryland I-95, we do not know if the police have searched African-American motorists simply based on their race, and white motorists because of five other suspicious traits. If that is the case, clearly, the African-American motorists have actually far higher average hit rates than the average white motorist. The actual comparative hit rate for African-American motorists is much higher than the official statistic. Lower or equal official hit rates would mask much higher real offending rates.

The only way to address this issue is to get the relevant data—offending or hit rates—holding *c* constant and holding constant sub-search processes. That would be difficult, but not impossible. It would require asking the police officer to report all grounds of suspicion and to report all sub-search processes administered. It would then be possible to hold *c* constant in the offending and hit rates. Political scientists at Washington State University—Mitchell Pickerill, Clayton Mosher, Michael Gaffney, and Nicholas Lovrich—are attempting to do this, but for slightly different purposes. Their research, which involves a more traditional multiple-regression approach, seeks to identify all factors that may contribute to searches in order to determine whether any of those factors neutralize the role of race.<sup>80</sup> “From a rigorous scientific research perspective,” they write, “any valid approach to testing for disproportionality must attempt to capture many (if not all) of the major factors leading up to and underlying individual contacts between citizens and police. This process of elimination should include both general contextual information (patrol patterns, the demographics of drivers on that roadway, and such other considerations as suspect alerts) and incident-specific information such as the time of day, the location, the officer, and the subject of the stop or other police contact.”<sup>81</sup>

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<sup>80</sup> Their data consist of every stop made by a Washington State Patrol officer from March 2002 through October 2002, which amounts to 677,514 cases (Pickerill 2003:17). Of those, 23,393 (or 3.5 percent) resulted in searches. Their findings are preliminary, but what they also find is that race plays an important role in the incidents of searches by the Washington State Police. “The major finding that must be acknowledged up front is that we see disparities in search rates among different races. Even when we control for other factors that influence whether or not searches are conducted after motorists are contacted by the WSP, we find that race still has an impact on the likelihood of a search” (Pickerill et al. 2003:26). Specifically, Native Americans are searched at much higher rates than whites, African-Americans and Hispanics are searched at moderately higher rates than whites, and Asians are searched at slightly lower rates than whites. Whereas 3 percent of white motorists who were stopped were searched, the search rates were 15 percent, 7.6 percent, 6.7 percent, and 2.5 percent respectively for Native Americans, African-Americans, Hispanics, and Asians (Pickerill 2003:21). Although Pickerill et al. do not develop an economic model of racial profiling focused on hit rates, they do nevertheless report the hit rates from the data. They find that, overall, white motorists are the most likely to be found with contraband. The disparities are greater with regard to discretionary searches—not surprisingly. Adding both types of searches, it turns out that the hit rates are 24.7 percent for whites, 18.8 percent for African-Americans, 21.5 percent for Native Americans, 16.7 for Hispanics, and 12.2 percent for Asians (Pickerill 2003:34 Table 4).

<sup>81</sup> Pickerill et al. 2003:10.

In their research, Pickerill et al. find that some of these other factors affect the racial disparities. The strongest predictor of a search is the seriousness of the violation associated with the stop. The influence of race is mitigated by other variables, including the age of the driver, geographical location, time of day, and the seriousness of the violation triggering the traffic stop. Most important, they find that the disparities in searches do not vary much between searches that are nondiscretionary (which they define as searches incident to arrest, “impound searches,” and “warrant searches”) and those that are discretionary (which they define as K9 searches, consent searches, and pat down searches).<sup>82</sup> Their primary purpose is to test whether the consistently disproportional searches of minority motorists are an artifact of some other *non-racial* factor—in other words, whether the race correlations would vanish if some other variable were held constant.<sup>83</sup> Nevertheless, it would be possible to use their data to examine hit rates holding *c* constant.

In the final analysis, the economic models of racial profiling are inadequate. The models, in essence, maximize the wrong thing: instead of maximizing hit rates, the models should maximize the crime-fighting punch of the searches. The models incorrectly assume that it is efficient and non-racist for the police to maximize the success rate of searches. As a result, the models adopt an incorrect definition of efficiency and focus on the wrong statistic.

## II. The Civil Liberties Literature

Civil liberties advocates and legal scholars are also scrutinizing the same new data. For the most part, these scholars point to evidence of similar drug consumption across racial groups, and assert that the equal or lower hit rates reflect nothing more than equal or lower offending rates. They conclude from this that the disproportional searches of minority motorists are racially discriminatory and do not reflect policing efficiency. In effect, these scholars refer to the same empirical evidence, rely on the same key statistic—hit rates—assume similar offending and no elasticity, and claim racial discrimination. As it should be clear from Part I, however, the focus on hit rates is misplaced. Let’s start, though, by exploring the specific contributions.

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<sup>82</sup> Pickerill 2003:18. They infer from this that “this is one indicator that while there may be racial disparities in search rates, those disparities do not appear to be the result of intentional discrimination by the officers” (Pickerill 2003:18; *see also id.* at 25).

<sup>83</sup> As they explain, “While virtually every extant study of such data indicate that racial profiling *may* be occurring, it is important to stress that these studies do not provide *proof* that biased policing exists. Without appropriate ‘denominator’ data keyed to specific racial and ethnic populations, and without the addition of appropriate contextual information concerning traffic stops to multivariate analyses, it is not possible to distinguish biased policing from entirely appropriate, but demographically disproportionate, enforcement outcomes with respect to racial and ethnic characteristics.” Pickerill et al. 2003:11 (emphasis in original).

A. The Civil Liberties Model of Racial Profiling

i. *Harris (2002)*

In *Profiles in Injustice: Why Racial Profiling Cannot Work* (2002), David Harris reviews extensively the data on police searches and argues against racial profiling on several grounds. His primary argument, though, is that it simply does not work.<sup>84</sup> Harris argues that the new data “offer an irrefutable statistical argument against the practice.”<sup>85</sup> Harris writes:

Despite the widespread belief that racial profiling, reprehensible though it may be, is an effective and efficient way of catching criminals—a “rational” approach to law enforcement—newly collected information about “hit rates” gives the lie to this assumption: the numbers just don’t add up. Data emerging from studies done over the last few years demonstrate conclusively that hit rates—the rates at which police actually find contraband on people they stop—run contrary to long-held “commonsense” beliefs about the effectiveness of racial profiling. The rate at which officers uncover contraband in stops and searches is *not* higher for blacks than for whites, as most people believe. Contrary to what the “rational” law enforcement justification for racial profiling would predict, *the hit rate for drugs and weapons in police searches of African Americans is the same as or lower than the rate for whites*. Comparing Latinos and whites yields even more surprising results. Police catch criminals among Latinos at *far lower rates* than among whites. These results hold true in studies done in New York, Maryland, New Jersey, and other places.<sup>86</sup>

Harris also emphasizes that the benefits in terms of drug interdiction are negligible. He points to the fact that, “while it is true that automobile stops sometimes result in large seizures of drugs, this rarely happens. In fact, police usually find nothing at all; when they do find drugs, it is almost always very small amounts. The quantities discovered seldom exceed enough for personal use and often amount to even less—so-called trace amounts that can be detected but not used. . . .”<sup>87</sup>

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<sup>84</sup> Harris correctly points out that racial profiling is a form of criminal profiling, that its supporters believe that it is an efficient and rational law enforcement technique because of offending differentials, and that it flourishes where the police use high-discretion methods. “If racial profiling is what directs police suspicion at minorities, it is high-discretion police tactics that put these suspicions into action, turning profiles into police investigations,” Harris explains. “These high-discretion methods allow police to detain, question, and search people who have exhibited no concrete evidence of wrongdoing. . . .” (Harris 2002:11–12).

<sup>85</sup> Harris 2002:13.

<sup>86</sup> Harris 2002:13. *See also id.* at 79–84; David Harris, “The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection,” 66 *Law & Contemporary Problems* 71, 81–82 (2003).

<sup>87</sup> Harris 2002:14; *see also* 84–87.



From this, Harris concludes that racial profiling “simply does not work as a law enforcement tactic.”<sup>88</sup> It does not help identify likely drug suspects and it does not result in significant drug interdiction. “[T]he evidence on hit rates could hardly be more striking,” Harris explains. “All reveal the same thing: racial profiling doesn’t help police catch criminals.”<sup>89</sup> There is, in his words, “no real payoff.”<sup>90</sup>

Sympathetic critics of David Harris have pointed out that his argument misses a step. As Samuel Gross writes, “hit rates alone do not provide enough information to distinguish discrimination from evenhanded treatment of groups with different behavior patterns.”<sup>91</sup> In order to distinguish, it is essential to know the comparative offending rates of the different racial groups. Al Alschuler similarly comments, “The data are also consistent. . . with the possibility that random stops would have yielded identical ‘hit rates.’ In short, these data say nothing at all about the empirical success or failure of racial profiling.”<sup>92</sup>

In all fairness to David Harris, Harris does infer from the new data that the basic assumption of higher minority offending is mistaken. Harris does infer from the empirical data that minority motorists have equal or lower offending rates. This step in his argument may not be articulated as well as it could be, but it is there. Harris writes, for instance, that: “All of this exposes the rational law enforcement argument as, at best, the product of *a set of mistaken assumptions*. If blacks and Latinos who are stopped as a result of racial profiling *are no more likely or are even less likely to be in possession of drugs or other contraband than whites*, it simply doesn’t make sense to enforce the law in this way.”<sup>93</sup> It should be clear from the notion of a *mistaken* assumption that Harris is in effect inferring from the evidence that minority motorists *do* have equal or lower offending rates. In this respect, Harris’ argument is not very different than the position advocated by Samuel Gross and Al Alschuler—which I discuss in detail below.<sup>94</sup> Harris’ argument, in sum, is that there is no offending differential and therefore that racial profiling will not work as a law enforcement tactic.

ii. *Rudovsky (2001)*

David Rudovsky, in *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause* (2001), argues against racial profiling primarily on the ground that there is no good evidence that minority motorists offend at higher rates than white motorists. Rudovsky reviews evidence regarding the relative offending rates in the context of

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<sup>88</sup> Harris 2002:14.

<sup>89</sup> Harris 2002:84.

<sup>90</sup> Harris 2002:14.

<sup>91</sup> Gross and Barnes 2002:44.

<sup>92</sup> Alschuler 2002:215 n.216.

<sup>93</sup> Harris 2002:14, emphasis added.

<sup>94</sup> Samuel Gross concludes that, based on available survey data, the offending rates are probably similar and therefore that the search differentials do reflect racial animus. Gross and Barnes 2002:44–47. Similarly, Alschuler notes that “Little evidence suggests that blacks and Latinos commit drug crimes at higher rates than whites, and whether racial profiling has even a rational basis is disputed.” Alshuler 2002:215; *see also* n.216.

both use and sale of illicit drugs, and concludes that there is no evidence to support the claim of differential offending. “The substantial racial disparities that have been documented in stop, frisk, and search practices cannot be fully explained or rationalized by crime patterns, police deployment, or police tactics,” Rudovsky concludes.<sup>95</sup> In effect, Rudovsky challenges the central assumptions of the economic models, namely that there is higher offending among minority motorists and elasticity. As a result, Rudovsky rejects the claims of narrow policing efficiency: “arguments of efficiency and rational discrimination flounder on empirical, constitutional, and moral principles.”<sup>96</sup>

Rudovsky specifically addresses the KPT study (an earlier draft version from February 2000) and argues that the study “is questionable on both methodological and legal grounds.”<sup>97</sup> He critiques the KPT study on three grounds. He argues first that there is no reason to assume elasticity: “as a statistical matter, the study assumes that the extremely small number of searches (compared to the motoring population and to the number of motorists actually stopped) was sufficient to deter African-American drivers from transporting drugs (there are no data to show the rate of transportation pre-racial profiling).”<sup>98</sup> This translates into a challenge to the assumption of elasticity. Second, Rudovsky challenges the validity of the underlying data: “The study also assumes that the police are accurately reporting searches where nothing is recovered even though there is evidence to suggest the contrary.”<sup>99</sup> This anticipates the more sustained critique of the reliability of the data and falsification or omission of data by Samuel Gross and Katherine Barnes discussed later. Third, Rudovsky offers a strictly legal challenge: “as a matter of constitutional law, the study proceeds on the theory that the police intentionally targeted African-American drivers for disproportionate stops and searches.”<sup>100</sup> This, Rudovsky argues, is unconstitutional. Rudovsky’s third point is somewhat orthogonal to the empirical debate and the economic model of racial profiling—and specifically the KPT study—since the empirical work does not address the constitutional issues. In addition, as noted above, Rudovsky reviews extensively evidence of offending rates and concludes there is no good evidence of a disparity by race.

In sum, Rudovsky challenges two key assumptions of the economic models—the assumptions regarding offending and elasticity—and the reliability of the data. These are both important contributions to the debate. The reliability of the data is, of course, central to drawing any inferences; and the assumptions of offending and elasticity are central to the economic models. Without them, the models simply cannot distinguish between efficiency and prejudice based on hit rates.

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<sup>95</sup> Rudovsky 2001:317.

<sup>96</sup> Rudovsky 2001:317.

<sup>97</sup> Rudovsky 2001:312.

<sup>98</sup> Rudovsky 2001:312.

<sup>99</sup> Rudovsky 2001:312.

<sup>100</sup> Rudovsky 2001:312.

iii. *Alschuler (2002)*

In *Racial Profiling and the Constitution* (2002), Albert Alschuler addresses primarily the constitutional dimensions of the debate and does not rest his constitutional analysis on the new empirical data. Nevertheless, he does make several comments about the empirical landscape that deserve attention.

At one point in his discussion of racial profiling, Alschuler notes that “In many jurisdictions in which the police stop blacks more frequently than whites they discover evidence of crime substantially less often when they stop blacks. In these jurisdictions, the police apparently overpredict on the basis of race.”<sup>101</sup> By using the term “overpredict,” Alschuler is implicitly assuming elasticity and higher offending rates among minority motorists. The term “overpredict” suggests that the police would be predicting accurately if they used race *less*. It suggests that race *is* predictive of criminality—in other words, that minority motorists offend at higher rates than white motorists and that there is elasticity.<sup>102</sup> In this passage, Alschuler seems to be endorsing the economic model of racial profiling.

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<sup>101</sup> Alschuler 2002:215.

<sup>102</sup> Alschuler drops a footnote (note 216 on page 215), elaborating on his comment and makes the following three empirical observations. The first is entirely correct, though it rehearses the central question in the racial profiling debates:

When, as in the Maryland highway study Harris mentions, the “hit rates” for blacks and whites are identical, these rates do not indicate a failure of racial profiling. They are consistent with the possibility that the police achieved the highest attainable rate of success by using a formula that included race as one indicator of criminality. One would in fact expect identical rates of success if racial profiling were working perfectly. The data are also consistent, however, with the possibility that random stops would have yielded identical “hit rates.” In short, these data say nothing at all about the empirical success or failure of racial profiling.

This states the principal controversy at the heart of the current debate over racial profiling—the debate between economists and civil liberties advocates over whether the evidence of racial profiling reflects statistical discrimination or racial bigotry.

Alschuler’s second claim is less correct. Alschuler writes:

In all of the other studies [David] Harris mentions, the “hit rate” for minorities was significantly lower than the rate for whites. These studies do indicate that the police overpredicted on the basis of race and that their racial profiles were inaccurate. . . . Establishing that the police overpredicted on the basis of race is important. It does not establish, however, that race lacks any predictive power or, in Harris’s words, that “racial profiling cannot work.”

Again, lower hit rates do not necessarily mean that the police “overpredict” on the basis of race. It could mean that they predict entirely incorrectly or that they are predicting entirely correctly, but that their selection of white motorists is increasing the official hit rate for white motorists.

The third claim is correct:

Race cannot have any predictive power—and racial profiling on the highway cannot work—if rates of drug possession and drug dealing do not differ by race. Contrary to common stereotypes and as best we can tell, whites do commit all sorts of drug offenses at roughly the same rates as blacks and Latinos.

If all motorists have the same offending rates, then race does not a good predictor of offending.

However, in the same paragraph, Alschuler also takes a slightly different position. He writes: “Little evidence suggests that blacks and Latinos commit drug crimes at higher rates than whites, and whether racial profiling has even a rational basis is disputed.”<sup>103</sup> For this argument, Alschuler relies primarily on the survey data about drug consumption and other evidence of drug trafficking compiled by Rudovsky 2001.<sup>104</sup> Here, Alschuler’s position is similar to that of Harris and Rudovsky: he suggests that there is probably no offending differential and therefore no reason to disproportionately stop minority motorists.<sup>105</sup>

iv. *Gross & Barnes (2002)*

Samuel Gross and Katherine Barnes reexamine the data from Maryland in their article, *Road Work: Racial Profiling and Drug Interdiction on the Highway* (2002). The data they use is from the same source as the KPT 2001 study. For all intents and purposes, their empirical findings regarding the data are very similar. Their conclusions, however, are very different.

Their data cover stops and searches conducted by the Maryland State Police on Interstate Highway 95 from 1995 through mid-2000—a total of 8,027 searches—with break downs for location, direction of travel, types of searches, quantities and type of drugs discovered, among other variables. These data reveal that 40 percent of motorists searched by the MSP were African-American and 4.4 percent were Hispanic.<sup>106</sup> On the specific corridor of I-95 that has been singled out in the racial profiling litigation, 60 percent of the persons searched were African-American and 6 percent were Hispanic.<sup>107</sup> The data did not include the number of persons stopped but not searched.<sup>108</sup> According to reliable evidence, blacks motorists represent about 17 percent of drivers and 17.5 percent of traffic violators.<sup>109</sup>

With regard to a more narrow corridor of I-95 from the Baltimore City limit to the Delaware border, there are more specific data about stops and searches between May 1997 and April 2000. African-Americans represented 27.8 percent of the motorists stopped and 51.3 percent of the motorists searched. Hispanics represented 1.3 percent of the motorists stopped and 6 percent of the motorists searched.<sup>110</sup> In effect, black drivers “were almost twice as likely to be stopped as white drivers; and more than five times as likely to be searched.”<sup>111</sup>

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<sup>103</sup> Alschuler 2002:215; *see also* 215 n.216..

<sup>104</sup> Alschuler 215–216 n.216.

<sup>105</sup> Clearly, Alschuler is being either internally inconsistent—if there is no evidence of different offending rates then the police cannot overpredict on the basis of race—or trying to have it both ways—there are no different offending rates *and* the police overpredict as well. The fact is, either there are no differentials, in which case the police do not overpredict, they predict entirely incorrectly; or there are differentials, in which case they are overpredicting. But both statements cannot both be right.

<sup>106</sup> Gross and Barnes 2002:11.

<sup>107</sup> Gross and Barnes 2002:12.

<sup>108</sup> Gross and Barnes 2002:14.

<sup>109</sup> Gross and Barnes 2002:14

<sup>110</sup> Gross and Barnes 2002:15.

<sup>111</sup> Gross and Barnes 2002:16.

The hit rates are the following: across the entire state, 37.4, 30.6 and 11.9 percent respectively for whites, blacks, and Hispanics; on the I-95 corridor, 40.3, 37.8 and 15.8 percent respectively for whites, blacks, and Hispanics.<sup>112</sup> Gross and Barnes break down the data by drug, location, type of search (consent search versus probable cause, with ground given for request, such as Grateful Dead stickers or nervousness). They find, for example, that “Cocaine and crack were found most often in cars with black drivers; heroin and ‘other’ drugs in cars driven by whites.”<sup>113</sup>

Gross and Barnes begin by casting doubt on the validity and reliability of the data. They argue that the data have been collected by the state police and are therefore likely to be tainted and misleading. The data, they suggest, are probably “distorted.”<sup>114</sup> They write:

The Maryland State Police did not volunteer to keep these records; that requirement was forced upon them. They knew that the information they collected would be used to judge and to criticize them, and they had every incentive to try to improve the picture. In other states officers in similar circumstances have been caught falsifying information about searches that were recorded. We don’t know if that happened in Maryland, but even if it did, that sort of fabrication is not the main problem. The easy, safe way to bias records is simply to skip some cases altogether. Under-reporting is inevitable in any effort of this sort; usually it’s caused by common laziness or forgetfulness. But cops, like everyone else, are least likely to omit the cases that make themselves look good. There is substantial evidence that this happened with the MSP data set, but we do not know to what extent.<sup>115</sup>

Despite concerns about the data, Gross and Barnes reach two firm conclusions that, they claim, are not vulnerable to police distortions. The first is that the Maryland state police do engage in racial profiling, in the sense that they use race as a factor in deciding to stop and search motorists. The MSP “stopped and searched cars with black and Hispanic drivers much more often than cars with white drivers.”<sup>116</sup> The disproportional stops of black and Hispanic motorists, they argue, is unlikely to be the product of randomness. Their second conclusion is, in their own words, more speculative. They argue from the data that the reason the police engage in this type of racial profiling is because they are trying to intercept large quantities of drugs. “Racial profiling,” they suggest, “seems to increase the probability of finding large hauls of drugs,”<sup>117</sup>

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<sup>112</sup> Gross and Barnes 2002:18.

<sup>113</sup> Gross and Barnes 2002:19.

<sup>114</sup> Gross and Barnes 2002:8.

<sup>115</sup> Gross and Barnes 2002:8. The evidence consists primarily of documents produced in discovery in the litigation against the Maryland State Police, showing that a regional commander ordered his officers to file reports on dozens of searches where the paperwork was missing but contraband had been found; as well as evidence of minority motorists who had been searched but who did not appear in the MSP database. *See id.* at 32. There is other anecdotal evidence from other jurisdictions, especially from the litigation in Illinois in the *Chavez* case and in New Jersey. *See id.* at 30–34.

<sup>116</sup> Gross and Barnes 2002:8.

<sup>117</sup> Gross and Barnes 2002:8.

because “among black and Hispanic drivers a larger minority of the searches uncovered substantial quantities of illegal drugs.”<sup>118</sup> This, Gross and Barnes suggest, is the underlying motivation behind racial profiling.

On the question whether the disproportional searches reflect statistical discrimination or racial prejudice, Gross and Barnes conclude that the practices of the Maryland state police reflect a taste for discrimination. As they say, “the disproportionate searching of black and Hispanic drivers was not a byproduct of a race-neutral effort by the Maryland State Police to maximize their hit rate.”<sup>119</sup> The reason, they argue, is that there is every reason to believe that blacks and white offend at the same rate. Here, they couch their argument as an argument against David Cole and David Harris. According to Gross and Barnes, the typical civil libertarian critique of racial profiling is too simple, or as they write, “is appealing, but incomplete.”<sup>120</sup> “Critics of the Maryland State Police argue that the roughly equal hit rates for blacks and whites demonstrate that the troopers discriminate against black drivers.”<sup>121</sup> But the raw fact of equal hit rates does not demonstrate racial animus, Gross and Barnes declare. “[H]it rates alone do not provide enough information to distinguish discrimination from evenhanded treatment of groups with different behavior patterns.”<sup>122</sup> In order to distinguish, it is necessary to know offending rates.

Based on the best evidence, Gross and Barnes conclude that natural offending rates are probably similar, and therefore that the differentials do reflect racial animus. “According to the 1999 National Household Survey on Drug Abuse, 6.6% of white Americans 12 years of age or older report that they have used an illicit drug in the previous month, compared to 7.7% of blacks and 6.8 % of Hispanics. There are no comparable data on drug dealers, but customers swamp sellers in any consumer market, and the market for illegal drugs is no exception.”<sup>123</sup> Of course, this says nothing about dealing, trafficking, and distribution. It is however relevant because, as they point out, “the great majority of the drug offenders arrested by the MSP were users rather than dealers.”<sup>124</sup> “Statewide, 84% of those found with drugs were carrying only trace or personal-use amounts, and 68% were found with trace or personal-use quantities of marijuana only.”<sup>125</sup>

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<sup>118</sup> Gross and Barnes 2002:9. Another explanation that has been offered is that the police are interested in seizing drug moneys, through asset forfeitures. According to Callahan and Anderson, “Collectively, local police departments received \$490 million worth of cash, goods, and property from drug asset forfeiture programs during fiscal 1997. Sheriffs’ departments had total receipts of \$158 million” (Callahan and Anderson 2001:\*8). They suggest: “The possibility of rich pickings through asset forfeiture, combined with the higher propensity for black motorists to carry drugs, provides police departments with a tremendous incentive to engage in racial profiling. It is hardly surprising, then, that police take the bait, even at the cost of racial bias accusations and investigations” (Callahan and Anderson 2001:\*9).

<sup>119</sup> Gross and Barnes 2002:41.

<sup>120</sup> Gross and Barnes 2002:44.

<sup>121</sup> Gross and Barnes 2002:43.

<sup>122</sup> Gross and Barnes 2002:44.

<sup>123</sup> Gross and Barnes 2002:45–46.

<sup>124</sup> Gross and Barnes 2002:46.

<sup>125</sup> Gross and Barnes 2002:52.

Their conclusion: “the vast over representation of blacks among those searched cannot be explained as a byproduct of an MSP plan to maximize their hit rate.”<sup>126</sup> Here, Gross and Barnes couch their position as a critique of KPT 2001. Gross and Barnes criticize KPT for wrongly assuming that there are different offending rates for whites and blacks. KPT’s model, Gross and Barnes write, “implies that blacks possess drugs on the highway far more often than whites, which is hard to square with what we know about drug use by race.”<sup>127</sup> Gross and Barnes do not, however, address the question of elasticities. They suggest that the assumption of elasticity is “debatable,”<sup>128</sup> but do not discuss how the assumption of elasticity would affect their argument, what evidence there is for elasticity, and whether they need to contest the assumption for purposes of their argument. Gross and Barnes also argue that the KPT model is simply implausible: “*Why* would the MSP want to maximize the number of drug busts, however small, rather than the number of dealers they arrest or the quantities of drugs they seize? And if they did want that, why wouldn’t they shift more heavily from consent searches (with a 22% hit rate) to probable cause searches (with a 53% hit rate)?”<sup>129</sup>

So how did the MSP get to similar hit rates even though they were pulling over so many more blacks? According to Gross and Barnes, by using more sub-search techniques on black motorists. Having a dog sniff the outside of a car does not qualify as a search. Asking for consent and detaining someone while a K-9 unit arrives also does not qualify as a search.<sup>130</sup> Other techniques include interrogation and comparisons to drug-courier profiles.<sup>131</sup> These are the type of sub-searches that can be administered in a racially discriminatory manner and yet may soften the impact of the purported race differences in searches. Gross and Barnes argue:

A more plausible explanation is that more black drivers than white drivers were subjected to extensive “pre-search” investigations that allowed the state troopers to limit their searches, in all racial categories, to cars that were comparatively likely to contain illegal drugs. That sort of pre-search screening would explain both the high number of black motorists found with drugs (given comparable rates of drug use for blacks and whites) and the high hit rate for all searches.<sup>132</sup>

Ultimately, what accounts for the racial profiling, Gross and Barnes speculate, is that blacks were more likely to be in possession of large hauls of drugs. Overall, “84% of the big dealers arrested on I-95 north of Baltimore were black.”<sup>133</sup> This is what the police are after, Gross and Barnes speculate. This is why they are pulling over so many more minority motorists.

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<sup>126</sup> Gross and Barnes 2002:46.

<sup>127</sup> Gross and Barnes 2002:46.

<sup>128</sup> Gross and Barnes 2002:46 n.131.

<sup>129</sup> Gross and Barnes 2002:46–47.

<sup>130</sup> Gross and Barnes 2002:35-36.

<sup>131</sup> Gross and Barnes 2002:37.

<sup>132</sup> Gross and Barnes 2002:49.

<sup>133</sup> Gross and Barnes 2002:60.

In addition, the authors also find that the police discriminate against Hispanics by all accounts. Hispanics had much lower hit rates, reflecting a taste for discrimination.<sup>134</sup>

In sum, Gross and Barnes focus our attention on the fact that so many of the successful searches merely reveal personal or trace amounts of drugs. By combining this observation with the evidence that drug use is relatively similar across races—a point that Rudovsky and other scholars, such as Tracey Maclin,<sup>135</sup> emphasized in earlier work—Gross and Barnes raise serious questions about racial profiling on the highway. These are, in effect, the central arguments that have made racial profiling on the highway such a “easy case,” as Samuel Gross suggests in other writings with co-author Debra Livingston.<sup>136</sup> This “easy case” argument emphasizes the high costs<sup>137</sup> and the small benefits<sup>138</sup> of racial profiling.

### B. *A Critique of the Civil Liberties Literature*

While making important contributions, civil liberties scholars nevertheless make several critical errors. First, they take at face value the narrow definition of efficiency proposed by the economists and fail to challenge how that definition of efficiency relates to the larger goal of fighting crime. Second, while Gross and Barnes are sensitive to sub-search processes, they seem to ignore the larger issue of the selective use of other search criteria in the decision to search.

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<sup>134</sup> Gross and Barnes 2002:47.

<sup>135</sup> Tracey Maclin similarly argues in his 2001 article, titled “The Fourth Amendment on the Freeway,” that “the empirical evidence that has surfaced does not necessarily support the notion that minority motorists are more likely to be transporting drugs in their cars.” Maclin 2001:123. Maclin observes, relying on the Maryland data, that “officers find illegal drugs in the cars of black motorists at the same rate they find drugs in the cars of white motorists.” *Id.*

<sup>136</sup> Gross and Livingston 2002:1431.

<sup>137</sup> They include, first and foremost, the costs imposed on innocent African-American motorists. Alschuler places this cost—“the extent to which a racial classification burdens the innocent members of one race more than the innocent members of another”—at the top of his list (Alschuler 2002:264). David Harris as well places this personal cost above all others. These practices, Harris writes, have a “profound impact on innocent people.” (Harris 2002:94). Another cost is the harm to the relationship between the African-American community and the police. As Harris writes, “Racial profiling also damages the relationship between police departments and the communities they serve. . . . [P]rofilng, which treats all citizens of particular racial and ethnic groups as potential criminals, can do nothing but alienate these same citizens from their police. It breaks down the trust that must be at the heart of any true partnership, and it threatens to defeat community policing’s best efforts to fight crime and disorder” (Harris 2002:12). Another cost involves the reputational harm to the profiled group—what Al Alschuler refers to as “the social meaning of the racial classification employed by the police” (Alschuler 2002:265). And then of course, there is the cost to society as a whole—to the legitimacy of the criminal justice system and the legal system more generally. “Beyond the costs to the individuals, racial profiling and other racially biased methods of law enforcement corrode the basic legitimacy of the entire American system of justice, from policing to the courts to the law itself” (Harris 2002:117).

<sup>138</sup> There may well be few benefits. Highway searches are intended to stop the flow of illicit drugs, and that often gets low marks across the political spectrum. As John Derbyshire suggests, “Many on the political Right feel that the war on drugs is at best misguided, at worst a moral and constitutional disaster” (2001:\*6). Had it not been for the fact that the racial profiling issue erupted in the context of highway drug interdiction, it is unlikely that it would have received so much popular and political opposition. (September 11<sup>th</sup> certainly changed that).



Third, they fail to focus on the possible ratchet effect which would disqualify racial profiling as a narrowly tailored policing strategy.

As a result, and somewhat ironically, civil liberties advocates embrace too willingly the *logic* of the economic models of racial profiling. To be sure, they reject the two key assumptions—higher offending of minority motorists and elasticity of offending to policing—but they endorse the theory. And more important—and most problematically—they maintain the focus on hit rates. The lower hit rates for Hispanic motorists, they argue, *proves* that there is racial discrimination against Hispanics. The equal hit rates for African-American motorists, they argue, *corroborates* the fact that drug consumption is equal among races and therefore *establishes* racial discrimination.<sup>139</sup> The civil libertarians have, in effect, bought into the economic models of crime but flipped the assumptions.

i. *The Difficulty of Interpreting Hit Rates*

The problem is, hit rates are simply the wrong statistic. It is necessary, instead, to focus on whether racial profiling has positive or negative long-term effects on the transportation of drug contraband and whether it causes a ratchet effect. But even putting this aside, the fact is that hit rates are far more difficult to interpret than these authors suggest given that we know little about the selectiveness with which other search criteria are used or, for that matter, about elasticities and offending rates. The new data from across the country do not contain *any* evidence concerning these key quantities of interest, and barring that, it is practically impossible to reliably interpret the hit rates. So even if we were interested only in narrow efficiency, the fact of lower, equal, or higher hit rates tells us very little. In each case, there are multiple possible interpretations.

A set of three two-by-three matrices help elucidate the different possible interpretations of hit rates from the emerging data. All of the matrices assume that there are disproportional searches of minority motorists.<sup>140</sup> Each of the three matrices address a different relationship between hit rates—equal, lower, or higher for minority motorists—given different basic assumptions about elasticity and offending. The six different assumptions (elastic/inelastic and lower/equal/higher offending) can be visualized in the following graphs, Graph II.B.i:

\*\*\* Insert Graph II.B.i \*\*\*

The following three matrices set forth the simplest and most likely explanation for the given hit rates, and then infer whether the interpretation is consistent with racism or narrow efficiency.<sup>141</sup> The first matrix involves situations where minority motorists are being

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<sup>139</sup> See, e.g., Gross and Barnes 2002:47.

<sup>140</sup> As a result, there is a lack of symmetry with regard to the three matrices. Symmetry would require creating the three matrices for disproportionate searches of white motorists.

<sup>141</sup> Given that all of the matrices assume that there are disproportional searches of minority motorists, it is possible to argue in each cell that the disproportionality reflects racial prejudice simply because it considers race in

disproportionately searched, but their hit rates are *equal* to those of white motorists. There are six possible interpretations depending on the other quantities of interest. The six possible scenarios are as follows:

Table II.B.i.1: Equal Hit Rates

	<b>If offending is elastic to policing. . .</b>	<b>If offending is inelastic to policing. . .</b>
<b>. . . and minority motorists have higher natural offending rates than white motorists. . .</b>	<p>this may mean that the minority real offending rate has decreased because of the disproportionate searches, which is reflected in the similar hit rates.</p> <p>Here [Graph (1)] it is narrowly efficient to police minority motorists at higher rates, because it is reducing their offending and creating an equilibrium. There is efficiency, equilibrium, and no racial bigotry.</p>	<p>this may mean the police are being more discriminate in their searches of white motorists (applying more successful profiling factors and sub-search techniques), increasing the overall white hit rates.</p> <p>Here [Graph (2)] it is bigoted against minorities (or whites, depending on how you see it) because of the more careful searches of whites, combined with bigotry against white motorists from a narrow efficiency perspective because they should not be searched at all since minorities have constant higher offending rates.</p>

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the administration of criminal justice to the detriment of minority motorists. Some commentators argue that *any* recourse to race in these circumstances—i.e. regardless of relative offending or elasticities—is morally and politically offensive. This is an argument for color-blind policing practice, and it comes in two different forms depending on political ideology. Randall Kennedy, for instance, argues against racial profiling on the ground that race should not be taken into consideration in discretionary preventative policing. Randall Kennedy, “Racial Profiling Usually Isn’t Racist. It Can Help Stop Crime. And It Should Be Abolished,” *The New Republic*, September 13, 1999. Kennedy assumes, for purposes of his argument, that African-Americans have higher natural offending rates, and that racial profiling is not only efficient policing but reduces the amount of crime. Despite this, Kennedy opposes racial profiling: “individuals should be judged by public authority on the basis of their own conduct and not on the basis—not even partly on the basis—of racial generalization. Race-dependent policing retards the development and spread of such thinking; indeed, it encourages the opposite tendency.” (Kennedy 1999:\*3, \*5) David Harris also makes the argument, suggesting that “It is clearly unconscionable to treat an individual as a criminal suspect simply because a small number of individuals from the same racial or ethnic group are criminals” (Harris 2002:12). This argument requires no empirical findings whatsoever. It is purely deontological, and involves no cost-benefit analysis, utilitarian weighing, or empirical evidence. I distinguish this absolutists argument from the more specific argument that it is improper to disproportionately search minority motorists where they are not offending at higher rates—where there is no efficiency argument. This specific argument I will include in the cells. However, because the more absolutist argument applies to every cell, I will put a place holder here and not make the argument in each cell.

<p><b>... and minority motorists have the same natural offending rates as white motorists. . .</b></p>	<p>this may mean either that the police are being more discriminate in their searches of minority motorists (applying more successful profiling factors or sub-search techniques), resulting in more successful minority searches, and/or less discriminate in their searches of white motorists, resulting in lower success rates for whites.</p> <p>Here [Graph (3)] the police are acting in a bigoted manner against white (or minority) motorists by not being as careful in the search selection process; but at the same time, the police are acting in a bigoted way against minorities because, given the equal offending rates, there is no narrow efficiency reason to search minorities disproportionately.</p>	<p>this may mean that the equal hit rates reflect the equal real offending rates.</p> <p>Here [Graph (4)] there is no narrow efficiency reason to search minorities disproportionately, and therefore the police are acting in a bigoted manner against minority motorists when they stop them disproportionately.</p>
<p><b>... and minority motorists have lower natural offending rates than white motorists. . .</b></p>	<p>this may mean either that the police are being more discriminate in their searches of minority motorists (applying more successful profiling factors or sub-search techniques), resulting in more successful minority searches, and/or less discriminate in their searches of white motorists, resulting in lower success rates for whites.</p> <p>Here [Graph (5)] the police are acting in a bigoted manner against white (or minority) motorists; but at the same time, the police are acting in a bigoted way against minorities because, given the lower offending rates, there is no efficiency reason to search minorities disproportionately.</p>	<p>this may mean either that the police are being more discriminate in their searches of minority motorists (applying more successful profiling factors or sub-search techniques), resulting in more successful minority searches, and/or less discriminate in their searches of white motorists, resulting in lower success rates for whites.</p> <p>Here [Graph (6)] the police are acting in a bigoted manner against white (or minority) motorists by being less careful toward white motorists; but at the same time, the police are acting in a bigoted way against minorities because, given the equal offending rates, there is no narrow efficiency reason to search minorities disproportionately.</p>

The second matrix corresponds to the situation where minority motorists are being disproportionately searched, but their hit rates are *lower* than those of white motorists. Again there are six possible interpretations depending on the other two quantities of interest (elasticity and offending). The six possible scenarios are as follows:

Table II.B.i.2: Lower Hit Rates among Minorities

	<b>If offending is elastic to policing. . .</b>	<b>If offending is inelastic to policing. . .</b>
<b>. . . and minority motorists have higher natural offending rates than white motorists. . .</b>	<p>this may mean that minority real offending has decreased too much because of the disproportionate searches, which is reflected in the lower hit rates.</p> <p>Here [Graph (1)] the police have exceeded the equilibrium and are now engaging in bigotry against minority motorists. The police are demonstrating a taste for discrimination against minorities.</p>	<p>this may mean that the police are being much more discriminate in their searches of white motorists (applying more successful profiling factors and more sub-search techniques), resulting in more successful searches of white motorists</p> <p>Here [Graph (2)] the police are demonstrating bigotry against minorities (or whites) because of the more careful searches of whites, combined with bigotry against white motorists from a narrow efficiency perspective because they should not be searched at all since the minority motorists have constant higher offending rates.</p>
<b>. . . and minority motorists have the same natural offending rates as white motorists. . .</b>	<p>this may mean that the lower hit rates for minority motorists reflects the reduced real offending rates of minorities caused by the elasticity.</p> <p>Here [Graph (3)] there is no narrow efficiency reason to police minorities disproportionately, and therefore the police are exhibiting bigotry against minorities.</p>	<p>this may mean either (1) that the police are being more discriminate in their searches of white motorists or (2) less discriminate in their searches of minority motorists, assuming they are using other successful predictive traits.</p> <p>Here [Graph (4)] there is no narrow efficiency reason to search more minorities, and the police are also demonstrating bigotry against minority (or white) motorists.</p>
<b>. . . and minority motorists have lower natural offending rates than white motorists. . .</b>	<p>this may mean that the lower minority hit rate reflects the lower minority offending rate and the reduced real offending from elasticity.</p> <p>Here [Graph (5)] there is no narrow efficiency reason to police minorities disproportionately, and therefore the police are exhibiting bigotry against minorities.</p>	<p>this may mean that the lower minority hit rate reflects the lower minority offending rate.</p> <p>Here [Graph (6)] there is no narrow efficiency reason to search minorities more, and therefore the police are exhibiting bigotry against minorities by disproportionately searching them.</p>

Finally, the third matrix corresponds to the situation where minority motorists are being disproportionately searched, but their hit rates are *higher* than those of white motorists. Again there are different possible interpretations depending elasticity and offending rates. The six possible scenarios are as follows:

Table II.B.i.3: Higher Hit Rates among Minorities

	<b>If offending is elastic to policing. . .</b>	<b>If offending is inelastic to policing. . .</b>
<b>. . . and minority motorists have higher natural offending rates than white motorists. . .</b>	<p>this may mean that minority real offending rates have not come down enough to reach the equilibrium and that the police could efficiently search more minority motorists.</p> <p>Here [Graph (1)], while it is efficient to search more minority motorists, the disproportionality is not sufficient to bring minority offending down to the same level as white offending, which is bigoted against white motorists.</p>	<p>this may mean that the higher minority hit rates reflect the higher offending among minority motorists.</p> <p>Here [Graph (2)] it is narrowly efficient to search only minority motorists because they are offending at constant higher rates. In fact, it is bigoted against white motorists from a narrow efficiency perspective to not search <i>only</i> minority motorists.</p>
<b>. . . and minority motorists have the same natural offending rates as white motorists. . .</b>	<p>this may mean either that the police are being much more discriminate in their searches of minority motorists (applying more successful profiling factors or sub-search techniques), resulting in more successful minority searches, and/or much less discriminate in their searches of white motorists, resulting in lower success rates for whites.</p> <p>Here [Graph (3)] the police are acting in a bigoted manner against white (or minority) motorists; but at the same time, the police are acting in a bigoted way against minorities because, given the equal offending rates, there is no efficiency reason to search minorities disproportionately.</p>	<p>this may mean that the police are either being more careful in their searches of minority motorists, resulting in higher hit rates for minorities, and/or less careful in their searches of white motorists, resulting in lower hit rates for white motorists.</p> <p>Here [Graph (4)] there is no efficiency reason for the disproportionate searches, so the police are acting in a bigoted manner against minority motorists; but at the same time, the police are also bigoted against white (or minority) motorists in the selection and sub-searching process.</p>

<p><b>. . . and minority motorists have lower natural offending rates than white motorists. . .</b></p>	<p>this may mean either that the police are being much more discriminate in their searches of minority motorists (applying more successful profiling factors or sub-search techniques), resulting in more successful minority searches, and/or much less discriminate in their searches of white motorists, resulting in lower success rates for whites.</p> <p>Here [Graph (5)] the police are acting in a bigoted manner against white (or minority) motorists; but at the same time, the police are acting in a bigoted way against minorities because, given the lower offending rates of minorities, there is no efficiency reason to search minorities disproportionately.</p>	<p>this may mean either that the police are being much more discriminate in their searches of minority motorists (applying more successful profiling factors or sub-search techniques), resulting in more successful minority searches, and/or much less discriminate in their searches of white motorists, resulting in lower success rates for whites.</p> <p>Here [Graph (6)] the police are acting in a bigoted manner against white (or minority) motorists by being so much less careful about which white motorist they search; but at the same time, the police are acting in a bigoted way against minorities because, given the lower offending rates, there is no efficiency reason to search minorities disproportionately.</p>
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Clearly, we need to know more about selectivity, elasticity and offending before we can use the new data to test whether the police are being narrowly efficient or racist. There are no solid interpretive rules that can be inferred from these tables. A summary of the tables reflects this well:

Summary of Table II.B.i.1: Equal Hit Rates

	Elastic	Inelastic
Higher minority offending	Narrowly efficient	Bigoted against minorities (or whites) <b>and</b> against whites.
Same offending	Bigoted against whites (or minorities) <b>and</b> against minorities.	Bigoted against minority motorists
Lower minority offending	Bigoted against whites (or minorities) <b>and</b> against minorities	Bigoted against whites (or minorities) <b>and</b> against minorities

Summary of Table II.B.i.2: Lower Hit Rates

	Elastic	Inelastic
Higher minority offending	Bigoted against minorities	Bigoted against minorities (or whites) <b>and</b> against whites.
Same offending	Bigoted against minorities	Bigoted against minorities (or whites)
Lower minority offending	Bigoted against minorities	Bigoted against minorities

Summary of Table II.B.i.3: Higher Hit Rates

	Elastic	Inelastic
Higher offending	Bigoted against whites	Bigoted against white motorists.
Same offending	Bigoted against whites (or minority) <b>and</b> against minorities	Bigoted against minority motorists <b>and</b> against white( or minority) motorists
Lower minority offending	Bigoted against whites (or minority) <b>and</b> against minorities	Bigoted against whites (or minorities) <b>and</b> against minority motorists

Given that the data include no information about offending or elasticity, and given the uncertainty regarding how the police are comparatively treating race and other search criteria as a factor in selection and in sub-search processes, it is extremely difficult to interpret the data on hit rates. Equal hit rates could mean narrow efficiency, but it could also signal racial discrimination against minorities or against whites.

The clincher is, the problem of selectivity renders it *impossible* to know how the official hit rates *really* compare. Even assuming elasticity and higher offending among minority motorists—even assuming sub-graph (1) in Graph II.B.i—the official hit rates do not hold *c* constant. As a result, if the data are showing disproportionate searches of minority motorists but equal hit rates, it could very well be that the equality in the hit rate is an artifact of being more or less selective with minority motorist stops or using more or less sub-searches of minority motorists. The *real* hit rate for minority motorists may be higher or lower than the *official* hit rate because of greater or lesser selectivity or sub-searching. As a result, the equal official hit rates might mask actually lower or higher hit rates among minorities which, under assumptions of elasticity and higher offending among minorities, translates into racial prejudice rather than narrow efficiency. And the masking effect applies across the board: *official* lower hit rates could

also mask actual equal hit rates if the police are engaging in different selectivity of searches. In other words, lower hit rates do not necessarily mean racial prejudice: they could reflect narrow policing efficiency (equal real hit rates) plus selectivity.

This seriously undermines our ability to make accurate inferences from the emerging data on hit rates. If we assume that the police are being racist, then they probably are searching blacks less discriminately. This will surely mask differences in offending rates, if there are any. Thus, lower hit rates among minorities could *still* be consistent with higher offending rates among minorities and, from a narrow efficiency perspective, would still militate in favor of racial profiling. The fact that we are seeing lower hit rates among minorities does not mean that the police are being inefficient. It could simply reflect other mechanisms that are effectively masking the narrow policing efficiency of racial profiling. Under this scenario, racial profiling would not be problematic from a narrowly efficiency perspective (even though the different selectivities would).

## ii. The Ratchet Effect

The civil liberties scholars also fail to focus on the likely ratchet effect associated with racial profiling. A ratchet effect occurs when profiling produces a supervised population that is disproportionate to the distribution of offending by racial group. To give an example: if minority motorists represent 20 percent of motorists on the road, but 30 percent of the offenders (persons carrying drug contraband on the highway), then minority motorists are offending at a higher proportion than their representation in the general motorist population. If the police achieve equal hit rates by deploying 60 percent of their searches on minority motorists, then minority motorists will represent 60 percent of the population with negative police contacts resulting, in all likelihood, in some form of correctional relationship, whether a ticket, a fine, an arrest, probation revocation, supervision, or incarceration. The difference between minority motorists representing 30 percent of the offenders and 60 percent of the correctional population represents a ratchet that has significant negative effects on the minority population, including the creation of criminal records, potential loss of employment, and the creation of criminal stigma associated with being a minority.

The existence of a ratchet effect turns on subtle variations in elasticity and offending. In order to grasp these effects, it makes sense to begin by graphing a basic model of racial profiling. Let us assume, first, that the elasticity of offending to policing is measured in terms of the distribution of total searches conducted by race. So on the x-axis, instead of having the internal group search rate (the rate of searches within each racial group), the graph plots instead the total distribution of searches as between white and minority motorists. Second, let us assume that elasticity is relatively constant and is the same for both racial groups. Third, let's assume that minority offending is consistently higher than white offending. Based on these assumptions, a simple model of racial profiling can be represented by the following graph, Graph II.B.ii.1.

\*\*\* Insert Graph II.B.ii.1: Basic Assumptions \*\*\*



By way of interpretation, if the police are engaging in race-neutral policing and are taking a random sample of the total motorist population (assume a distribution of 20 percent minority and 80 percent white motorists), then the police will search approximately 20 percent minority and 80 percent white motorists. The police searches will reflect offending rates of approximately 7.5 percent for minority and 3 percent for majority motorists (Time 1). If the police engage in racial profiling in a narrowly efficient manner, they will search additional minority motorists until the hit rates are the same. Based on this graph, they will need to search 60 percent minority and 40 percent white motorists, in which case they will achieve equal hit rates related to equal offending rates of approximately 4.5 percent.

This simple model reflects the likelihood of a significant ratchet effect. Even if minority motorists are committing more offenses than their representation in the general population—which they are under these assumptions—but far less than 50 percent of the offenses—which is likely since they are only 20 percent of the population—the police would nevertheless need to search minority drivers *more* than 50 percent of the time in order to achieve the goal of narrowly efficient racial profiling. The only way to achieve equal hit rates under these conditions is to search minority motorists more than white motorists disproportionately to their offending. Regardless of the level of higher offending—whether it is 25, 35, or 45 percent minority—the profiling equilibrium will require even greater disproportionate searches.

The difference between the offending differential on the one hand and the search differential necessary to achieve parity of hit rates on the other hand is precisely a ratchet effect. Based on the assumptions in Graph II.B.ii.1, if minorities comprise 20 percent of the motorists on the road, but 30 percent of the offenders on the road, a natural sample of offending would result in an apprehended population that is about 30 percent minority. However, in order to achieve similar hit rates—similar offending—by means of elasticity, the police would actually have to increase the proportion of apprehended minority motorists to 60 percent. The result is that the supervised population will be 60 percent minority even though the offending population may only be 30 percent minority. This difference—the difference between 30 and 60 percent—creates a ratchet: in order to maximize search success rates through racial profiling, the police subjects a disproportionate number of minority offenders to corrections.

The only way to avoid a ratchet effect is if white offending is *less* elastic than minority offending and the offending curves intersect each other at some point smaller than 50 percent—or, in other words, if minority offending is highly elastic as opposed to white offending with an intersection below the 50 percent mark. What this assumes, though, is that minority offending is *not* always higher than white offending—which represents a non-trivial assumption for anyone who is assuming higher offending among minority motorists. The model based on these assumptions is represented in Graph II..B.ii.2 that follows:

\*\*\* Insert Graph II.B.ii.2: Assumptions Necessary to Avoid a Ratchet Effect \*\*\*

On these narrow assumptions, it would be possible for the offending differential to be reflected perfectly by the policing differential. It would be possible, for instance, for minority motorists, who represent 20 percent of the population, to represent 40 percent of offenders under conditions of random sampling, and for the police to search 40 percent minority motorists in order to achieve similar hit rates. If that were the case, there would be no ratchet effect: 40 percent of the offending population would be minority motorists, and 40 percent of the population with negative police contacts (arrests or other negative contact) would also be minority motorists. The police would have increased the overall efficiency of the searches and the total number of successful searches, yet they would not have created a ratchet effect on the carceral population.

It is important to note, though, that it would not be possible to achieve similar hit rates without a ratchet effect if the point of intersection were at a point greater than 50 percent, as demonstrated in Graph II.B.ii.3 following. If the point of intersection is to the right of the 50 percent mark, then there is simply no way for the police to achieve equal hit rates.

\*\*\* Insert Graph II.B.ii.3: Different Elasticity and Offending, But No Equal Hit Rates \*\*\*

The bottom line is that there is likely a ratchet effect under the more common assumptions concerning offending and elasticity. In the model presented here, a ratchet is only avoided if there is lower elasticity for white motorists and the point of intersection is at less than 50 percent. These are not trivial assumptions: if minority motorists offend at higher rates than white motorists, there is no apparent reason why that would be the case less than 50 percent of the time. In other words, the assumption of higher offending would seem to go hand in hand with assuming higher offending more than 50 percent of the time. Moreover, although the elasticity as between racial groups may be different, there is little reason to believe that white motorists would have *lower* elasticity.

Racial profiling on the highways, then, probably produces a ratchet effect on the profiled population. The full effect is probably masked by the more discriminatory selection and sub-searches of whites which wipes out some of the effect on hit rates. This ratchet effect may not be reflected in the hit rates that we are observing in the new data, but that is probably because the police are being more selective in their use of other search criteria for white motorists. However, it is probably reflected in the arrest and conviction rates and in our prison population. The bottom line is that the only way to guarantee a carceral population that mirrors the offending population is to *not* engage in any profiling at all, but to police color-blind.

A ratchet effect has great costs to society. A ratchet produces a disproportionate distribution of criminal records and criminal justice contacts that has numerous secondary implications on employment, education, families, and communities. Disproportional criminal supervision and incarceration reduces work opportunities, break-down families and communities, and disrupt education. It creates an exaggerated general perception in the public imagination and among police officers that blacks are criminals—a conception of “black criminality,” as Dorothy Roberts suggests, that has significantly collateral consequences for African-American

communities.<sup>142</sup> This, in turn, further undermines the ability of African-Americans to get jobs or pursue educational opportunities. It has a delegitimizing effect on the criminal justice system that may effectively encourage disaffected youths to commit crime. It may also produce a lack of trust of the police that may hamper law enforcement efforts, as minority community members become less willing to report crime, to testify at trial, and to convict defendants at trial.<sup>143</sup> And, to make matters worse, there is a feed-back mechanism that only aggravates these tendencies. Given the paucity of reliable information on natural offending rates, the police may rely on their own prior arrest and supervision statistics in deciding how to allocate resources, thereby reinforcing the ratchet. As Attorney General Peter Verniero of New Jersey explains, “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.”<sup>144</sup> This, in turn, refuels the imbalance in the prison population and the growing correlation between race and prior criminal. A ratchet effect based on race is, in this sense, deeply corrosive to race relations and harmful to the economic and social advancement of minority communities.

In the final analysis, the civil liberties advocates err in embracing the logic of the economic models of racial profiling and the focus on hit rates. The hit rate is simply the wrong statistic. The proper question to ask, at the empirical level, is not whether racial profiling maximizes the success rate of searches, but whether it reduces the profiled crime—namely the illicit transportation of drug contraband on the highways—without creating a ratchet.

### III. The Constitutional Literature

This is also the key question for purposes of constitutional analysis since it ties most directly into the traditional law enforcement interest in combating crime. Unfortunately, the courts and many commentators fail to address the question directly. Instead, they deploy a set of four technical legal distinctions that insulate them from the hard question of race in policing. The trouble with the emerging jurisprudence is that none of the four distinctions are tenable. Let’s take them frame by frame.

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<sup>142</sup> See generally Dorothy Roberts, “Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing,” 89 *Journal of Criminal Law and Criminology* 775 (1999).

<sup>143</sup> Leitzel, *Race and Policing* at 39.

<sup>144</sup> Peter Verniero, Attorney General of New Jersey, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 67–68 (April 20, 1999) available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf).

## A. The Constitutional Model of Racial Profiling

### i. The Fourth versus the Fourteenth Amendment

The Supreme Court's decision in *Whren v. United States*<sup>145</sup> set the stage for the first two legal distinctions. In *Whren*, the police used a minor traffic violation as a pretext to stop and investigate two motorists in a car. The police were suspicious of two young men, who were sitting in a Pathfinder with temporary plates, because they were stopped for a lengthier than usual amount of time—more than 20 seconds—at a stop sign and the driver was apparently looking down into the lap of his companion. The police were patrolling a high-drug area and they suspected a drug transaction. The two men, who were African-American, challenged the pretextual stop as unreasonable under the Fourth Amendment, and argued that permitted such practices would enable the police to stop motorists based on race—an impermissible factor, they argued. The Supreme Court rejected their argument. The Fourth Amendment, the court declared, does not concern itself with the subjective intentions of the police officer, including their possible reliance on race, so long as there is reasonable suspicion or probable cause to justify the seizure—in this case, the traffic violation. Race claims should be addressed to the Equal Protection clause, not the Fourth Amendment, the court declared. “We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”<sup>146</sup>

The court's ruling in *Whren* sent two signals: first, Fourth Amendment analysis differs in kind from Equal Protection analysis and claims of racial bias should be addressed to the latter, not the former. Second, and more indirectly, in the Fourth Amendment context race can legitimately be considered as a factor in the determination to stop an individual so long as there is separate independent reasonable suspicion necessary for a temporary stop and limited search. This doctrinal framework of separating Fourth and Fourteenth Amendment analysis has guided lawyers in presenting racial profiling claims and lower courts in assessing these claims. As a result, most legal discussions of racial profiling address both claims separately.

Most constitutional scholars have criticized this practice and argued that notions of equal protection should infuse our interpretation of the Fourth Amendment.<sup>147</sup> Carol Steiker argues in her essay *Second Thoughts About First Principles*, that “the deeply rooted problem of racially discriminatory treatment of black citizens by the police constitute the kind of circumstances that call for new constructions of the Fourth Amendment. . .”<sup>148</sup> Anthony Thompson argues in his article *Stopping the Usual Suspects* that the Supreme Court “took a wrong turn” in writing race

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<sup>145</sup> 517 U.S. 806 (1996).

<sup>146</sup> 517 U.S. at 813.

<sup>147</sup> Rudovsky 2001:348; Alschuler 2002:193; Carol Steiker, “Second Thoughts About First Principles,” 107 *Harvard Law Review* 820 (1994); look at all articles in Alschuler 2002:n.121.

<sup>148</sup> 107 Harv. L. Rev. 820, 844 (1994).

out of the Fourth Amendment.<sup>149</sup> Steiker, Thompson, and others have called for reexamination of Fourth Amendment jurisprudence informed by historical and institutional considerations of race relations. As Alschuler observes, “[b]oth before and after *Whren*, a flood of apparently unanimous commentary has opposed this bifurcation of the two constitutional provisions.”<sup>150</sup>

The unanimous commentary reaches the right result, though for slightly different reasons. The principal reason to reject bifurcation is that the Fourth and Fourteenth Amendment analyses rest on a similar factual starting point, namely whether race predicts criminality. Although the doctrinal analyses obviously are different—reasonable suspicion in one case, narrowly tailored to a compelling governmental interest in the other—they both trigger a threshold factual determination whether race is a valid predictor of the profiled crime. If there is a strong correlation between race and the profiled crime, then race may raise legitimate suspicion and may also represent a means to satisfy the government’s interest in combating crime. The analyses then turn on the *degree* of predictive power as compared to other factors that would satisfy the constitutional tests, as well as, for purposes of the Equal Protection analysis, whether the police technique is narrowly tailored to the law enforcement interest. To be sure, race triggers strict scrutiny rather than rational basis review under Fourteenth Amendment analysis—a higher standard of review. But for purposes of thinking through the analysis, race is no different than other crime prediction factors such as gender, age, education, family history, prior criminality, etc. It functions in the same way for purposes of criminological prediction and, thus, for purposes of reasonable suspicion or fighting crime. If race is not a good predictor of criminality, then race clearly does not raise articulable or other suspicion and, at the same time, does not promote the governmental interest in fighting crime.<sup>151</sup> It is effectively useless under both doctrinal analyses.

Valid prediction is the triggering mechanism for both doctrinal analyses. If there is a strong correlation between race and the profiled crime, then race is likely going to raise articulable suspicion and its use in policing, if narrowly tailored, will likely satisfy the law enforcement interest in combating crime. In both cases, the key determination will turn on the *degree* of predictive capability vis-a-vis other factors that traditionally satisfy the tests. This initial inquiry turns on similar social scientific evidence regarding prediction. The two analyses are linked because it is precisely the legitimate suspicion that would provide the state’s interest in using race in policing.

Tracey Meares and I make a similar point outside the race context with regard to the predictive factor of fleeing from the police in our Foreword to the 2000 Supreme Court Review of the *Journal of Criminal Law and Criminology*, entitled *Transparent Adjudication and Social*

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<sup>149</sup> Anthony C. Thompson, “Stopping the Usual Suspects: Race and the Fourth Amendment,” 74 *New York University Law Review* 956, 961 (1999).

<sup>150</sup> Alschuler 2002:193; look at all the articles cited in n.121.

<sup>151</sup> As discussed *infra*, the use of race could promote another governmental interest—for instance, remedying past discrimination or diversity in the prison population by targeting white suspects.

*Science Research in Constitutional Criminal Procedure*.<sup>152</sup> We discuss there the Supreme Court's decision in *Illinois v. Wardlow*,<sup>153</sup> where the court addressed the constitutionality of a police officer's stop of a suspect based on the fact that the suspect had fled upon seeing several police cruisers patrolling an area known for heavy narcotics trafficking. A majority of the court decided that flight from an identified police officer constituted reasonable suspicion—and therefore that the stop was constitutional—based on a common sense judgment that fleeing from the police was inherently suspicious. Tracey Meares and I argue that, rather than relying on common sense intuitions, the majority should instead have explored empirical data on prediction. “If we knew that crime was indeed afoot in the vast majority of cases in which police stopped individuals on the street after such individuals had run away from them,” we reasoned, “then we would likely be much less concerned about the intrusion on individual liberty that takes place during the stop. We would conclude that this category of information is a good reason *ex ante* for police action, not only because the category of information seems to reliably indicate guilt of crime, but also because the particular criterion satisfied by the category of information—how reliably the information indicates that crime is afoot—is a legitimate explanation for police action.”<sup>154</sup>

In the *Wardlow* case, data from New York City suggested that this particular factor—fleeing from the police—was not a good predictor of criminality. A report issued by Elliott Spitzer, the Attorney General of New York, collected information on a sample of stops based on facts that, as reported by the police, clearly met the constitutional standard of reasonable suspicion, as well as on stops based on facts that courts have decided clearly would not constitute reasonable suspicion.<sup>155</sup> With respect to the *Wardlow* factor, the data suggested that “[s]tops reported as undertaken because the suspect fled the scene result in a very high stop-to-arrest ratio—a ratio of 26:1. This ratio is quite close to that of stops based on factors generally understood to fail to satisfy reasonable suspicion under the Fourth Amendment. Note that even when flight in a high crime area is considered, the ratio between stops and arrests lowers, but it does not lower by much. It stands at 20.3:1.”<sup>156</sup> These data, Meares and I argued, supported the dissenters' view in *Wardlow* that flight was not an adequate predictor of criminal activity. We argued that the court should have explored this or other data in order to get a better sense of the predictive power of the factor allegedly raising suspicion. Our point was not that data would resolve the legal question—there is inevitably a normative question as to how predictive factors must be to meet the constitutional standard—but that data would allow the court to compare this factor to others that have passed constitutional review.

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<sup>152</sup> Tracey L. Meares and Bernard E. Harcourt, “Foreword to Supreme Court Review: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure,” 90 *Journal of Criminal Law and Criminology* 733–798 (2000).

<sup>153</sup> 120 S. Ct. 673 (2000).

<sup>154</sup> Meares and Harcourt 2000.

<sup>155</sup> Civil Rights Bureau, Off. of the Att’y Gen., *The New York City Police Department’s “Stop & Frisk” Practice: A Report from the Office of the Attorney General*, iv (December 1, 1999); see generally, Harcourt, *Illusion of Order* (discussing report).

<sup>156</sup> Meares and Harcourt 2000.

The same analysis should apply to race as a predictive factor. In order to address the Fourth Amendment question, a court should determine whether there is any evidence that race is a predictive factor, and, if so, to what degree. Only if it passes this test might it be a reasonable ground for suspicion, and therefore possibly promote a governmental interest—so long as the use of race is narrowly tailored to that interest. Both analyses—the Fourth and Fourteenth Amendments—are predicated on this initial question. As a result, it makes no sense to decouple the two analyses.

ii. *The Fourth Amendment: Race as Sole or Partial Factor*

The Supreme Court’s decision in *Whren*—along with several earlier border patrol cases from the mid-1970s<sup>157</sup>—also set the stage for the second legal distinction, namely the distinction between using race exclusively as the basis of suspicion or using race as one factor among other factors that establish justifiable cause. The court in *Whren* essentially condoned using race under the Fourth Amendment as long as there is independent justification for the search—in essence, as long as there are other factors that provide just cause. The net effect of *Whren* is to disregard the race issue under the Fourth Amendment because it is exceedingly rare that any police officer will confess to stopping a suspect based on race alone. In most cases, race is considered as one among numerous other factors and, thus, can be ignored under *Whren* so long as there are independent grounds for suspicion.

Although the lower courts are split on this, several important decisions—decisions that have received a lot of commentary—hold the line. *United States v. Arthur T. Weaver* is one such case, discussed by most of the commentators.<sup>158</sup> In *Weaver*, a DEA agent used a drug courier profile to engage a stop and frisk encounter with a passenger deplaning at the Kansas City airport.<sup>159</sup> One of the factors that the agent relied on was race: the suspect was an African-American man, and the DEA agent was on the look-out especially for “young roughly dressed black males from street gangs in Los Angeles.”<sup>160</sup> *Weaver* challenged his seizure on the ground that the police did not have reasonable suspicion for the encounter.

The Eighth Circuit rejected the Fourth Amendment challenge, finding that the non-racial factors gave the police articulable suspicion. In a dissenting opinion, Chief Judge Arnold raised the issue of race, and argued that, although race might be relevant, there is no evidence that race is a predictor of drug offenses. Arnold cautioned against using race, writing that it “simply reinforces the kind of stereotyping that lies behind drug-courier profiles. When public officials

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<sup>157</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); see generally Gross and Barnes 2002:94–95.

<sup>158</sup> Kennedy; Alschuler; Gross and Barnes 2002:94;

<sup>159</sup> 966 F.2d 391, 392–393 (8<sup>th</sup> Cir 1992) (the drug courier profile involved information that “a number of young roughly dressed black males from street gangs in Los Angeles frequently brought cocaine into the Kansas City area and that walking quickly towards a taxicab was a common characteristic of narcotics couriers at the airport”).

<sup>160</sup> *Id.*

begin to regard large groups of citizens as presumptively criminal, this country is in a perilous situation indeed.”<sup>161</sup> In footnote, the majority responded:

We agree with the dissent that large groups of our citizens should not be regarded by law enforcement officers as presumptively criminal based upon their race. We would not hesitate to hold that a solely race-based suspicion of drug courier status would not pass constitutional muster. Accordingly, had [DEA agent] Hicks relied solely upon the fact of Weaver’s race as a basis for his suspicions, we would have a different case before us. As it is, however, facts are not to be ignored simply because they may be unpleasant—and the unpleasant fact in this case is that Hicks had knowledge, based upon his own experience and upon the intelligence reports he had received from the Los Angeles authorities, that young male members of black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors Hicks relied upon, was a factor in the decision to approach and ultimately detain Weaver. We wish it were otherwise, but we take the facts as they are presented to us, not as we would like them to be.<sup>162</sup>

Ultimately, the majority delicately side-steps the issue of race. The majority finds reasonable suspicion on the basis of other non-racial factors—without mentioning the race issue—in a later portion of the decision declaring the articulable grounds for suspicion.<sup>163</sup>

Many courts have done the same thing, and relied on non-racial factors either to find or not find reasonable suspicion.<sup>164</sup> As Gross and Barnes explain, “In most cases lower courts dispose of such claims, one way or the other, on evidentiary grounds.”<sup>165</sup> There are, of course, other decisions from federal courts that have gone the other way and struck down the use of race under circumstances where race was one among several other factors used to stop or search a suspect.<sup>166</sup> State courts are also split on this question.<sup>167</sup> But the growing tendency is for courts

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<sup>161</sup> *Id.* at 397 (Arnold, C.J., dissenting).

<sup>162</sup> *Id.* at 394 n.2.

<sup>163</sup> *See id.* at 396.

<sup>164</sup> *See, generally*, Gross and Barnes 2002:96 (discussing *Derricott v. State*, 611 A.2d 592 (Md. Ct. App. 1992) and *United States v. Davis*, [get cite: 2001 U.S. App. Lexis 10997]). Some courts have also used the same logic—reliance on non-racial traits justifies the stop and vitiates the constitutional claim—in the Equal Protection context. Al Alschuler, for example, has identified several cases from the Sixth Circuit that do just this: where the police used other legitimate reasons to interview a suspect, the legitimacy of those other reasons cancels out the Equal Protection violation of improperly relying on race. *See* Alschuler 2002:178.

<sup>165</sup> Gross and Barnes 2002:96.

<sup>166</sup> These cases include *United States v. Nicholas*, 448 F.2d 622 (8<sup>th</sup> Cir. 1971) and *United States v. Laymon*, 730 F.Supp 332 (D.Colo. 1990) — discussed in Randall Kennedy, *Race, Crime, and the Law* (New York: Random House 1997); KPT 2001:207. And *United States v. Montero-Camargo*, 208 F.3d 1122 (9<sup>th</sup> Cir. 2000)—discussed in Gross and Barnes 2002:95.

<sup>167</sup> *See, generally*, Gross and Barnes 2002:95.



to wrangle over the question and to send a clear signal that they do not want to deal with the race issue under the Fourth Amendment.<sup>168</sup>

At the end of the day, there remains a loose legal distinction between using race exclusively and using race as one among other factors. The first use of race is practically unanimously condemned. In fact, if the police in *Whren* had argued that the legitimacy of the search rested entirely on the race of the two motorists, there is little doubt that the court would have struck down the search. The second use of race is more controversial, but can generally be avoided by focusing on the other factors that raise suspicion. As Richard Banks observes, “The consensus view seems to be that race may be considered as one of many factors, but may not be the only factor in an officer’s decision to stop an individual.”<sup>169</sup>

Both of these outcomes, however, are wrong. The first—exclusive use of race is impermissible—simply ignores or is willfully blind to the possibility that, under some rare or unique circumstances, race may be such a strong predictor of criminality that it raises justifiable suspicion. *If race alone* predicts a form of criminality to the satisfaction of a Fourth Amendment level of suspicion, there is no reason not to rely on it as a predictive factor. Race should not be excluded *per se* from consideration simply because it is race, but should be evaluated like other predictive factors.

Few, if any commentators take this position even though it is theoretically correct. As David Rudovsky suggests, “Virtually everybody agrees that it is impermissible to stop and search someone *solely* on the basis of race.”<sup>170</sup> Moreover Fourth Amendment law, as enshrined in *City of Indianapolis v. Edmonds*,<sup>171</sup> requires individualized suspicion in the case of searches where the

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<sup>168</sup> As Samuel Gross and Katherine Barnes suggest:

it seems that over time courts are becoming more hostile to the use of race as a basis for police action under the Fourth Amendment. . . . Twenty years ago race might be mentioned casually in a Fourth Amendment opinion as a factor among others; in the past few years it’s more likely to be the subject of a judicial attack. . . . *In short*, despite apparent approval from the Supreme Court, American judges are ambivalent and divided about the use of race as a basis for individualized suspicion under the Fourth Amendment. Lower court cases go both ways—some approve stops and searches based in part on race, some disapprove—but increasingly the tone is negative. There are comparatively few cases on point, and they will probably be fewer yet in the future since the general message from the courts to the police seems pretty clear: “We don’t want to hear that you relied on race.”

Gross and Barnes 2002:99.

<sup>169</sup> R. Richard Banks, “Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse,” 48 *UCLA L. Rev.* 1075, 1087 n.47 (2001); *see also* Gross and Barnes 2002:94 (suggesting that there is “a general view that the race of a suspect may constitutionally be considered as one factor among others in deciding who to stop or search, but that race may not be the sole basis for such a decision.”

<sup>170</sup> Rudovsky 2002:306.

<sup>171</sup> *City of Indianapolis v. James Edmond*, 531 U.S. 32, 44 n.1 (2000) (striking down the Indianapolis roadblock and declaring that “we are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.” *Id.* at

primary purpose of the police intervention is to advance a general interest in crime control. The few commentators who advocate lifting the ban on group searches—such as William Stuntz for example<sup>172</sup>—take pains to emphasize that “groups” do not include “racial groups.” As Stuntz emphasizes, for purposes of his argument, “groups are defined by time and place, not by demographic category”<sup>173</sup>: a group seizure includes “the temporary seizure of all cars passing through a given intersection on a given afternoon,” but *not* the “seizure of all young men of Middle Eastern origin.”<sup>174</sup>

The unanimous commentary and the *Edmonds* rule are, however, incoherent. They depend on a false distinction between probabilistic analysis by group trait versus probabilistic analysis by individual suspicion. In both cases, the police are making an odds calculation. For purposes of the Fourth Amendment—a constitutional provision grounded on a reasonableness standard that depends on a probabilistic analysis—there should be no difference between the two. The permissibility of a group search—including a group search of a racial or ethnic group—should depend on the predictive power of the group trait, in the same way that the permissibility of individualized suspicion depends on the predictive power of the individualized traits. If race predicts criminality to the degree that satisfies general Fourth Amendment standards, then there should be no constitutional barrier. The fact that there is no constitutional barrier does not necessarily make it a wise or socially beneficial policing policy. That is another matter. The boundaries of constitutional law do not necessarily overlap those of wise public policy.

The second outcome—partial use of race can be ignored if other factors justify the search—is equally wrong.<sup>175</sup> If race is used as part of a profile, then a court adjudicating the Fourth Amendment question should inquire whether race contributed in any way to the predictive capacity of the profile, regardless of whether the other profiled traits satisfy constitutional standards. Anthony Thompson, one of the few commentators who advocates a similar position, sets out how a reviewing court could do this: “a court would begin by providing guidelines regarding the types of situations in which race could be a factor in suspicion. Then, the court would be expected to scrutinize the officer’s motivations to determine if the circumstances in a given case warranted this reliance on race.”<sup>176</sup> Whether or not the courts set up guidelines, the

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<sup>172</sup> See, e.g., Stuntz, *Local Policing After the Terror*, 111 Yale L. J. at 2164–2165 (arguing that the *Edmonds* norm against group searches is “perverse”).

<sup>173</sup> *Id.* at 2141 n.9.

<sup>174</sup> *Id.* at 2141 n.9.

<sup>175</sup> Here, several legal commentators have criticized the outcome, but for different reasons. See, e.g., Alschuler 2002:175–179; Kennedy 1997:148–149. Randall Kennedy, for instance, has argued that partial consideration of race should be considered the same as exclusive consideration of race given that race, even when it is claimed to be used partially, really overtakes all other considerations. As a result, Kennedy object to *any* reliance on race in the decision to stop or search suspects. See Kennedy 1999. This, however, goes too far. As I argue in text, race is possibly a predictive factor, among others, and there should be no *per se* bar to its use if there is evidence that it is predictive of crime.

<sup>176</sup> Thomson, “Stopping the Usual Suspects,” 74 NYU L. Rev. at 1005.

focus should be on whether there is any evidence that race actually plays a predictive role that either includes or excludes persons of a racial group. If race does contribute and the overall profile satisfies the constitutional standard—i.e. the degree of suspicion necessary—then there is no Fourth Amendment problem using race as part of the profile. If it did *not* contribute, then there is a Fourth Amendment problem using race as part of the profile *regardless* of whether the overall profile satisfies the constitutional standard. We could then debate whether to impose the remedy of suppression or another remedy. But the fact that there should be a Fourth Amendment violation and remedy for race though not for other improper traits—such as, for instance, height—has to do with the constitutional scrutiny given to race as a protected category. Up until that point, race should not be considered differently than any other predictive trait in analyzing whether or not it contributed to the predictive power of the profile.

iii. *Equal Protection: Excluding Witness Identifications*

The third legal technicality draws a distinction between using race for purposes of high-discretion policing where there is no individualized suspicion about the particular suspect (e.g., stops and frisks, consent searches, etc.) versus using race for purposes of solving a crime where there is an eye-witness identification based on race. The first is generally associated with racial profiling: stopping someone on the road because they are minority and minority motorists are assumed to offend at higher rates. The second is what we generally associate with detective work: getting an identification from a witness and tracking down suspects who match that description. Most courts hold that the latter—i.e. relying on an eye-witness racial identification—is not “using race.” Often, the reason is that relying on an identification is a race-neutral policy: the content may be race-specific, but the policy itself is race neutral.<sup>177</sup>

Curiously, many constitutional commentators endorse this distinction. In fact, as Richard Banks correctly observes, “Even the harshest scholarly critics of racial profiling endorse police use of suspect descriptions.”<sup>178</sup> Samuel Gross and Debra Livingston write, for instance, that “[i]t is not racial profiling for an officer to question, stop, search, arrest, or otherwise investigate a person because his race or ethnicity matches information about a perpetrator of a specific crime that the officer is investigating. That use of race. . . does not entail a global judgment about a racial or ethnic group as a whole.”<sup>179</sup> David Rudovsky similarly defines racial profiling so as to exclude witness identification cases—“except where police are acting on a racial description of the perpetrator of a crime.”<sup>180</sup> And many commentators do not place the same type of limits on

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<sup>177</sup> See, e.g., *Oneonta*.

<sup>178</sup> R. Richard Banks, “Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse,” 48 *UCLA L. Rev.* 1075, 1078 (2001).

<sup>179</sup> Gross and Livingston 2002:1415. Similarly, Samuel Gross and Katherine Barnes write that “it is not racial profiling for an officer to stop, question, search or arrest a person because his race matches the description of the perpetrator of a specific crime that has been reported.” Gross and Barnes 2002:3 n.9 (citing to the *Oneonta* case). They note that “racial profiling is impossible once the police are looking for a particular person—the victim’s partner, the woman in the surveillance video, Osama bin Laden. . .” Gross and Barnes 2002:3.

<sup>180</sup> Rudovsky 2001:299 n.27

eye-witness racial identifications. So, for instance, Rudovsky observes: “Certainly police can consider race where a physical description is provided, but absent that factor, or other self-limiting factors, race cannot be considered in the decision to stop, detain, or search.”<sup>181</sup> It is fair to say, with Richard Banks, that the “consensus view of legal scholars casts. . . race-based suspect descriptions as innocuous and unquestionably legitimate.”<sup>182</sup>

As Banks and others recognize, the leading case discussed for this proposition is *Ricky Brown v. City of Oneonta*.<sup>183</sup> In that case, a victim identified a burglar as a young black male; according to the reported decision, the description included a knife wound to the hand, which was allegedly inflicted during a struggle with the victim.<sup>184</sup> In an effort to solve the reported crime, the police interrogated every black male student at the local college and conducted a sweep of the town “stopping and questioning non-white persons on the streets and inspecting their hands for cuts.”<sup>185</sup> The African-American population in Oneonta was in the neighborhood of 300 people, with another 150 black college students at the state university. Several black residents of Oneonta sued the police claiming violations of their civil rights. The court and the attorneys, naturally, addressed the Fourth Amendment and Equal Protection clause arguments separately.<sup>186</sup> With regard to the Equal Protection claim, the Second Circuit ruled that the police had not purposely classified by race or engaged in intentional discrimination based on race when it questioned black residents and students. Instead, the police had relied on a race-neutral technique focusing its attention on persons who matched the eye-witness identification. The policy itself—namely “to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description”<sup>187</sup>—was race-neutral on its

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<sup>181</sup> See e.g. Rudovsky 2001:328; see also *id.* at 308 n.79 (“Race is an appropriate factor in stops where the police have been provided with a description of a criminal suspect”). Rudovsky 2001 does give a more refined analysis of *Oneonta* at 348: where the race identification becomes the primary or predominant factor, then Rudovsky suggests strict scrutiny should apply; however, the application seems to turn on the form of the investigation, rather than on the probability analysis and three conditions discussed in this essay. Sheri Lynn Johnson similarly writes: “The use of race to identify a particular perpetrator, for example, does not disadvantage any racial group and thus does not require strict scrutiny. Although the suspect’s race is noted and weighed in the decision to detain, no generalizations about the characteristics, behavior, or appropriate treatment of the racial group are employed.” Sheri Lynn Johnson, “Race and the Decision to Detain a Suspect,” 93 *Yale L. J.* 214, 242–243 (1983).

<sup>182</sup> Banks 2001:1083. See generally Banks 2001:1083–1085 (compiling list of authoritative legal scholars who endorse the use of race-bases suspect descriptions); see also Alschuler 2002. The distinction is also incorporated in the June 2003 U.S. Department of Justice *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* which prohibits racial profiling in traditional federal law enforcement activities. See *Guidance* at 2 (“except that officers may rely on race and ethnicity in a specific suspect description”).

<sup>183</sup> 221 F.3d 329 (2<sup>nd</sup> Cir. 1999).

<sup>184</sup> *Id.* at 334. Purportedly based on this information, the police accosted suspects in order to look at their hands. According to some media accounts, however, the victim never made any statement about the knife wound.

<sup>185</sup> *Id.* at 334.

<sup>186</sup> With regard to the Fourth Amendment claim, the Second Circuit held that “a description of race and gender alone will rarely provide reasonable suspicion justifying a police search or seizure.” *Id.* at 334. The court remanded the case to the federal District Court to allow certain plaintiffs who had been seized to pursue their claim under a Fourth Amendment theory. As I argue *infra*, the court’s treatment of the Fourth Amendment claim is entirely correct, and in accordance with my argument.

<sup>187</sup> *Id.* at 337.

face, the court declared. And even though the policy as applied here had a disparate impact on blacks, there was no showing of intent to discriminate: “Without additional evidence of discriminatory animus, the disparate impact of an investigation such as the one in this case is insufficient to sustain an equal protection claim.”<sup>188</sup>

This distinction as well makes no sense. In this regard, the minority position advocated by a few commentators—Richard Banks<sup>189</sup> and Al Alschuler<sup>190</sup> especially—get it right. When the police are working from an eye-witness identification, they are using probabilities in exactly the same way as when they are relying on race correlations with crime. Ironically, they may be working off *less reliable* information. Eye-witness identification is notoriously unreliable.<sup>191</sup> But the eye-witness identification is a probabilistic determination just like statistical discrimination. Whether or not race may be considered does not depend on eye-witness versus statistical correlations, but on whether there is reliable evidence that race matters and whether it narrows down sufficiently the suspect pool. In most cases, eye-witness racial identification will likely satisfy this standard. As Richard Banks correctly observes, the fact that race-based suspect identification should be subject to equal protection review does not mean that they should be prohibited.<sup>192</sup> Nevertheless, courts should analyze the degree to which eye-witness racial identifications are reliable under different circumstances, and, naturally, should distinguish between intra- and cross-racial identifications given that they are differently reliable. Courts could then explore whether the racial category narrows down the pool of suspects sufficiently. Surely, there are going to be situations where race (either in whole or in part) is a valid predictor and, if properly incorporated in the criminal profile and used properly, can be expected to sufficiently narrow the pool of suspects. Under these conditions, the state will likely have a

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<sup>188</sup> *Id.* at 338.

<sup>189</sup> Richard Banks argues that the categorical distinction is wrong: “Suspect description reliance is not racially innocuous and, under equal protection doctrine, it should be treated as a racial classification.” Banks 2001:1080. Banks relies in part on the “functional similarities” between racial profiles and race-based suspect identifications, pointing out that both categories feed into each other. *Id.* at 1096. However, Banks does not go so far as to argue, as I do here, that the two are identical in the sense that they are both probabilistic determinations. The statement “I think he was X” is a statement of probabilities of the same type as “X persons commit crime statistically more often.”

<sup>190</sup> Alschuler also argues that the categorical distinction is wrong. Alschuler writes that the Oneonta police relied expressly on race: the *Oneonta* case involved an “express racial classification. When an officer, relying on a witness description, restricts the liberty of black men in green coats and not the liberty of white men in green coats, this officer differentiates by race. Of course the officer’s conduct may nevertheless be legitimate. Identifying a racial classification begins, not ends, the inquiry. . .” Alschuler 2002:183. Moreover, as Alschuler suggests, all eye-witness racial identifications *turn into* racial profiling: “the victim’s front-end particularity becomes the police officer’s demographic generality at the point of arrest or detention.” Alschuler 2002:200. Alschuler’s argument, however, should be made in these slightly stronger terms.

<sup>191</sup> *See, generally*, Elizabeth Loftus.

<sup>192</sup> Banks 2001:1081 (“I do *not* argue that suspect description reliance should be prohibited, as a matter of either policy or constitutional doctrine.”). Elsewhere in the article, Banks suggests, based on probabilities, that subjecting race based suspect identifications to strict scrutiny would likely be fatal, *see id.* at 1117. Under the analysis I propose, however, it would all depend on the probabilistic analysis of the effect on the profiled crime and on the ratchet effect, rather than on the probabilistic analysis of prior Supreme Court decisions.

compelling governmental interest to use race as a factor in identifying suspects. But not otherwise.

iv. *Equal Protection: Inferring Intent*

The Supreme Court's decisions in *McCleskey v. Kemp*<sup>193</sup> and *United States v. Armstrong*<sup>194</sup>—which extend the *Washington v. Davis*<sup>195</sup> requirement of intent to the criminal justice sphere—set up the final major legal distinction in the racial profiling context, namely the requirement that a successful constitutional challenge rest on evidence of intentional discrimination rather than on inference from unexplained disparate treatment.<sup>196</sup>

Many commentators have criticized the actual intent requirement in the racial profiling context—as well as in other criminal justice contexts.<sup>197</sup> Al Alschuler, for instance, suggests that courts should substitute social meaning for intent: “Targeting only black street gangs or only black drug dealers, for example, clearly conveys the message that blacks are more to be feared than whites. The Equal Protection Clause should require the government to justify its delivery of this message.”<sup>198</sup> Though appealing in certain respects, the turn to social meaning may not necessarily clarify or simplify this area of the law. The social meaning of governmental action is often in the eye of the beholder.

Samuel Gross and Katherine Barnes, in their discussion of the notorious New Jersey case *New Jersey v. Soto*, suggest a more promising solution. In the *Soto* case, the lower court in New Jersey, relying in part on New Jersey precedent, carved an exception to the *McCleskey* requirement on the grounds that there are fewer variables contained in the decision to stop and search—fewer factors that the police use—than there are in the decision to sentence someone to death. The fact that there are fewer variables narrows and simplifies the claim of racial discrimination and therefore, the court suggested, statistical evidence may be sufficient to prove intentional discrimination in the racial profiling context.<sup>199</sup> Similarly, there are fewer decision makers involved in the decision to search than there are in the decision to sentence to death. In the first case, the decision makers are all police officers, generally from the same patrol unit; in the second, they include prosecutors, grand jurors, petit jurors, judges, and defense attorneys. Although, as Gross and Barnes observe, the New Jersey court did not rely on this second distinction, it is important. In fact, it may be even more important than the first.

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<sup>193</sup> 481 U.S. 279 (1987) (finding no Equal Protection violation because no showing of intentional discrimination where petitioner produced evidence that murderers of white victims are 4.3 times more likely to be sentenced to death than murderers of black victims)..

<sup>194</sup> 517 U.S. 456 (1996) (requiring evidence on a selective prosecution challenge based on race of discriminatory effect and purpose).

<sup>195</sup> 426 U.S. 229 (1976) (holding that the Equal Protection clause bars only *intentional* discrimination).

<sup>196</sup> See generally Rudovsky 2001:324–329.

<sup>197</sup> See, e.g., Rudovsky 2001; Alschuler 2002; Gross and Barnes 2002; include as well critical commentary on *McCleskey* and *Armstrong*.

<sup>198</sup> Alschuler 2002:212.

<sup>199</sup> See *New Jersey v. Soto*; Gross and Barnes 2002:85–87.

The fact is, racial profiling on the highways as a potential form of discrimination is more analogous to the *Batson v. Kentucky* jurisprudence surrounding the prosecutor's use of peremptory challenges than it is to the *McCleskey v. Kemp* jurisprudence addressing the larger problem of racial discrimination infecting the death penalty or the criminal justice system more generally. In both racial profiling and the *Batson* context, the decision maker is one or more members of a discrete law enforcement agency—whether a state patrol unit or a district attorney's office. The decision to search and the decision to peremptorily strike a juror are based on a limited set of factors that identify suspects or biased jurors—bumper stickers and car models on the one hand, defense sympathies and orientations on the other. Moreover, the decision makers have the ability—and should have the opportunity—to explain exactly why they decided to search or strike an African-American or Hispanic person.

For these reasons, the racial profiling analysis under an Equal Protection challenge should follow the three-step model of *Batson*. This would not eliminate the intent requirement or reverse *Washington v. Davis* and thirty years of jurisprudence. Instead, it would merely extend the *Batson* method of inferring intent to the racial profiling context. Under a *Batson*-type approach, statistical discrepancies in the race of persons searched would satisfy the first prong of the analysis and set forth a *prima facie* case. This accords with the economic model of racial profiling, which essentially assumes that the disproportional searches of minority motorists are not accidental. Once the statistical burden has been satisfied, the police unit would then be required either to offer race-neutral reasons for the disparities—i.e. to offer other factors which, when held constant, eliminate the racial correlation with searches—or to present evidence that race is a statistically significant predictor of crime and that racial profiling satisfies the limited conditions that make it constitutionally acceptable—namely, that it maximizes search success without creating a ratchet effect and combats long-term crime.<sup>200</sup> If the state satisfies its burden, then the challenging party should have the opportunity to rebut the state's evidence.

The *McCleskey* requirement of proof of actual intent fails to recognize—as most observers do, and as the economic model of racial profiling correctly assumes—that the police are intentionally using race if they knowingly dedicate 60 percent of their searches to African-American motorists. The question should be whether or not the police have a constitutionally satisfactory reason for using race—for the disproportionality. Requiring proof of actual intentional discrimination by a police officer on the challenging party places the burden on the wrong party. If the police are going to engage in discrimination by searching a disproportionate number of minority motorists, then they should have the burden of proving that this will promote a compelling state interest. Barring that proof, the disproportional searches *are* intentionally discriminatory and should be held to violate the Equal Protection clause.

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<sup>200</sup> Here the analysis diverges somewhat from *Batson* given that no court has held that the state could satisfy its burden of proof at the second stage by demonstrating that minority jurors are statistically more defense-oriented.

## B. An Alternative Proposal

### i. *The Fourth Amendment*

If there is an offending differential between races, then membership in a racial group increases the probability of being an offender. It represents, therefore, an element of articulable suspicion. Does it amount to “reasonable suspicion” for purposes of a *Terry* stop or “probable cause” for purposes of a full-blown seizure? In most cases, race alone may not, and in this limited sense, the Second Circuit in *Oneonta* is right.<sup>201</sup> *But it all depends on how predictive it is.* Race would justify a stop or seizure if either (1) it alone is *so* predictive that it reaches the level of prediction that satisfies the standard of reasonable suspicion or probable cause, or (2) it alone is predictive and, along with other factors, it contributes to a level of prediction that satisfies the standard of reasonable suspicion or probable cause. The key is to calculate any relevant offending differentials in order to measure how prediction based on race compares to the predictive power of other factors that pass Fourth Amendment scrutiny. If there is no offending differential and race is not predictive of the type of crime under investigation, then clearly membership in a racial group should not be included in reasonable suspicion or probable cause. It should not be included as the sole reason, nor should it be included as one among a set of factors. Under either circumstance, the Fourth Amendment would be violated by its inclusion in the decision to search a suspect.

Take the *Oneonta* example. Let’s assume that the description of the perpetrator in that case was that he was a young black male.<sup>202</sup> The African-American population in Oneonta was in the neighborhood of 300 people, with another 150 black college students at the state university. If we assume that a quarter of the residents and half of the college students are young black men—about 150 total—then the odds of any one young black male being the perpetrator are 1 in 150. Clearly that is not the type of odds that a court would associate with reasonable suspicion.<sup>203</sup> As a result, it would be improper from a Fourth Amendment perspective to temporarily stop in order to question—or for that matter to more intrusively seize and arrest—young African-American men based on the witness identification. The police simply do not have enough narrowing identifying characteristics to begin fingering individuals on the basis of race. That does not mean that the police cannot continue to develop intelligence through informants and other operations; in fact, the police should continue to investigate in reasonable ways, including for instance checking hospital emergency rooms and trying to locate other witnesses. What it does mean, though, is that there simply is not enough information at that point to begin suspecting individuals of the crime.<sup>204</sup>

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<sup>201</sup> *Brown v. City of Oneonta, New York*, 221 F.3d 329 (2<sup>nd</sup> Cir 1999).

<sup>202</sup> The fact of the cut on the hand is in dispute. See media accounts.

<sup>203</sup> See Meares-Harcourt 2000.

<sup>204</sup> In this regard, Alschuler is right. He writes: “When a police department employs a racial classification found in a fortune cookie, its means are not adapted to this end. When, in an effort to find one burglar, the police question hundreds of suspects on the basis of a description consisting of race, age, and gender alone, they are barely a step from the fortune cookie. A claim that [the] police sweep in *Oneonta* was “narrowly tailored” to advance a



ii. *Equal Protection*

If race does not correlate with the specific crime under investigation and is therefore not a reliable predictor of crime that raises justifiable cause for investigation—in other words, if the use of race does not satisfy Fourth Amendment scrutiny—then the use of race by the police does not promote the traditional law enforcement interest of fighting crime. If it advances no predictive interest, the use of race cannot possibly serve the governmental interest of combating crime.<sup>205</sup>

If, on the other hand, race is a reliable predictor of the profiled crime, then further constitutional analysis under the Fourteenth Amendment is in order. Fighting crime—actually reducing crime—would qualify as a compelling state interest.<sup>206</sup> The key question, for purposes of equal protection, is whether the use of race is *narrowly tailored* to serve this compelling government interest of crime fighting, given that the intentional use of race as a factor in policing would trigger strict scrutiny under the Equal Protection clause.<sup>207</sup> As discussed earlier, the use of race in policing should satisfy this heightened standard of review if it does not create a ratchet effect on the profiled population. The requirement of narrow tailoring would preclude policing techniques that have unacceptable collateral consequences on the profiled population.

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compelling governmental interest could not survive the laugh test.” Alschuler 2002:184.

<sup>205</sup> Note that the use of race could promote other governmental interests, such as diversity of the prison population or an interest in proportionality in the prison population. It could be that the state develops an interest in having the prison population reflect the demographic distribution of the general population or of the offending population. If so, and there are no offending differentials, then the police might use race to proportionally distribute police contacts.

<sup>206</sup> Though there is some question as to whether fighting crime would qualify as a compelling governmental interest, I have no doubt that post-University of Michigan it most probably would. Richard Banks argues that it probably does not: “The recognition of ordinary law enforcement objectives as compelling would represent a departure from settled doctrine.” Banks 2001:1119. Banks argues that “The Court has never described ordinary law enforcement objectives as compelling, having on at least one occasion specifically declined to do so.” *Id.* at 1119. Banks is referring to *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), which involved the interdiction of illegal immigrants from Mexico. See also Sheri Lynn Johnson, “race and the Decision to Detain a Suspect,” 93 *Yale L. J.* 214, 247 (1983) (“The law enforcement interests at stake in detention decisions cannot meet *Korematsu*’s ‘pressing public necessity’ standard or its modern equivalent, the ‘compelling state interest’ requirement”). In contrast, Al Alschuler argues that fighting more traditional crimes, like burglary, would amount to a compelling interest and that the same should be extended to drug crimes: “Finding and prosecuting burglars surely qualifies as a compelling state interest, and although not everyone agrees that the interest in prosecuting drug offenders is compelling, appropriate deference to the judgments of legislatures and other respected authorities precludes courts from denying that it is.” Alschuler 2002:183–184. Alschuler relies on *United States v. Salerno*, 481 U.S. 739 (1987), the case involving preventative detention, where the court stated in dicta that “the government’s interest in preventing crime by arrestees is both legitimate and compelling.” *Id.* at 183 n.82. Alschuler concludes from this that “Textbook equal protection analysis therefore suggests that when the police employ racial classification in investigating crime, the critical question is simply whether this classification is ‘narrowly tailored’ to advancing the government’s crime-fighting goal.” Alschuler 2002:184. Alschuler has the better of the argument.

<sup>207</sup> *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995); University of Michigan affirmative action cases; see also Alschuler 2002:177; Rudovsky 2001:322;

Under this proposal, the Equal Protection analysis would logistically follow the three-step model used in the *Batson v. Kentucky* context. With regard to the first prong, proof of statistically disproportional searches of minority motorists would constitute a *prima facie* case and shift the burden of proof onto the government. At this second stage, the government would be required either to offer a race-neutral reason for the disparities, such as, for instance, the existence of other factors that eliminate the racial correlation, or to present evidence that race is a reliable predictor of crime and that racial profiling satisfies the three limited conditions. As in the *Batson* context, the denial of racial motivation would not be enough to defeat the *prima facie* evidence of statistical discrimination. If the government is able to sustain its burden, then the challenging party may attempt to rebut the showing. The challenging party may try to prove that other factors that explain away the disparities are not legitimate; or that there is in fact a likely ratchet effect on the profiled population and therefore that the policy is not narrowly tailored to the compelling governmental interest of fighting the profiled crime; or that there are negative long-term consequences on the amount of profiled crime; or that the profiled crime is not important enough to justify the racial policing.

The premise of this approach, naturally, is that the consideration of race in policing—whether it is used as the only factor or as part of a profile—should trigger strict scrutiny.<sup>208</sup> This is how race differs from other predictive factors: it receives heightened scrutiny in contrast to non-protected categories, but it is not treated differently from the perspective of prediction. The proposed analysis accepts the “compelling state interest” framework, and therefore turns the inquiry on whether the police strategy is narrowly tailored to the governmental interest of fighting crime—which, in turn, depends on whether the three narrow conditions are satisfied. This approach draws a sharp distinction between what is constitutionally permitted and what is, ultimately, the most optimal social policy. It may very well be the case that racial profiling satisfies the three narrow conditions and therefore passes constitutional scrutiny, and yet is a terrible idea for society.

This proposed approach contrasts with much of the critical commentary which either implicitly rejects the “narrowly tailored to a compelling state interest” framework in the context of racial profiling or argues that racial profiling could not possibly meet this standard—in other words, that racial profiling is *per se* a violation of the Fourteenth Amendment. Gross and Barnes, for instance, argue that the consideration of race—solely or in part—*plainly* violates the Equal Protection clause. They argue that “it is plainly unconstitutional to use race as a criterion for choosing who to stop or search.”<sup>209</sup> They analogize to the death penalty: “No American court would ever uphold a death sentence under the equal protection clause if the prosecutor admits that she asked for the death penalty in part because of the defendant’s race, regardless of any non-racial factors that entered into that decision. . . . *McCleskey*, however troublesome, merely made it difficult to *prove* discrimination in capital charging; it did not reach the absurd conclusion that equal protection is satisfied as long as a black defendant is not plucked at random from the

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<sup>208</sup> In this respect, I agree with Al Alschuler 2002:176–192 and, like Alschuler, disagree with Oneonta.

<sup>209</sup> Gross and Barnes 2002:106.

population and executed *solely* because of his race.”<sup>210</sup> Gross and Barnes suggest that the same is true in the racial profiling context. Thus, they argue, “A government decision to take action against a person because of her race is almost impossible to justify.”<sup>211</sup> Gross and Barnes also suggest that there is simply no compelling interest given that the drug interdiction programs on the highway are so ineffectual.<sup>212</sup>

David Rudovsky similarly argues that intentionally using race in the decision to search is a *per se* violation of Equal Protection. Like Gross and Barnes after him, Rudovsky argues: “it would be unconstitutional for the state to enact criminal laws that provide for harsher prison terms for African-Americans convicted of the same drug offenses as whites, even in the face of an econometric model that would suggest that this differentiation would ultimately reduce the disproportionate drug violations by African-Americans as a class. The same must be true for an official policy that targets African-Americans for a highly disproportionate rate of stops and searches based solely on their race and the alleged criminal propensities of very small numbers of African-Americans.”<sup>213</sup> Rudovsky also argues that there are so few successful searches that the state’s interests are outweighed by the harms: “given the fact that, on a relative scale, so few persons among the millions of drivers who use these transportation facilities each day are engaged in illegal drug activity—black or white—and so few stops or searches result in seizures of contraband, it is hard to justify the stops of large numbers of innocent blacks to enable the police to make the occasional seizure.”<sup>214</sup>

David Harris also suggests that racial profiling *per se* violates equal protection. Harris writes that “Enforcing the law on the basis of racial and ethnic calculations therefore also offends the Constitution. All American are guaranteed ‘the equal protection of the law’; there are few values closer to the core of our political culture. Enforcing the law in a racially or ethnically biased way violates this central principle.”<sup>215</sup> Similarly, Tracey Maclin argues that the Equal Protection clause dictates a “no use of race” policy concerning police searches of automobiles: “Put simply, a motorist’s race, ethnicity or national origin should be an irrelevant factor when an officer decides how to use his or her discretionary power.”<sup>216</sup>

Though appealing, these arguments are exaggerated. In the first place, racial profiling presents a very different situation than those hypothesized by Rudovsky or Gross and Barnes. The analogy to sentencing someone to death or to greater actual punishment does not hold. All considerations of race are going to be injurious to some members of a racial group. Affirmative action in higher education, for example, will injure some white applicants who will not be afforded the opportunity to attend the university of their choice or receive the benefits of the

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<sup>210</sup> Gross and Barnes 2002:102.

<sup>211</sup> Gross and Barnes 202:106.

<sup>212</sup> Gross and Barnes 2002:106.

<sup>213</sup> Rudovsky 2001:312–313.

<sup>214</sup> Rudovsky 2001:313.

<sup>215</sup> David Harris 2002:12.

<sup>216</sup> Maclin 2001:127.

diversity at that university. This represents an injury that is the by-product of taking race into account.<sup>217</sup> It does not mean, however, that there is no countervailing compelling interest or that a policy will never be narrowly tailored to that interest. The nature of the compelling interest and the analysis of narrow tailoring will depend on the amount of harm produced: sentencing someone to death or to harsher punishment would certainly violate the requirement that the policy be *narrowly tailored* to the law enforcement interest; searching more motorists may not, especially if there is no ratchet effect. Under certain limited conditions, racial profiling may be an effective tool to fight the profiled crime. If those narrow conditions are satisfied, then the problem with racial profiling is not that there is no compelling interest, that it is not necessary for a compelling interest, or that it is not narrowly tailored to that compelling interest. The problem is that it may exacerbate social distinctions that should not be made in the first place. In other words, the problem is neither constitutional nor criminological, it is social theoretic. Under the narrow three conditions, the reason to oppose racial profiling is not because it does not work or because it is unconstitutional, but because it is bad social policy. I address this issue in the Conclusion, Part V *infra*.

Al Alschuler advances a more nuanced argument, but one that also is ultimately unpersuasive. Alschuler argues that “the demand for a ‘compelling governmental interest’ in all cases of racial classification is misguided. This standard requires too little justification for some racial classifications and too much for others.”<sup>218</sup> As a result, Alschuler proposes that courts strengthen the standard in some cases with additional considerations, and relax it in others. Courts should relax the standard in cases of “unobtrusive investigations”: “For example, following an anonymous threat to avenge Vicki Weaver by bombing a specified federal building on the anniversary of Ruby Ridge, law enforcement officers near the building should be allowed to watch whites more closely than blacks. Recognizing the legitimacy of taking race into account in some investigations might indeed have a ‘spill-over’ effect, but this effect would not be regrettable.”<sup>219</sup> Courts should strengthen the standard in other cases. Here, the example is the young black male in Pothole, a hypothetical inner-city neighborhood, where there is reliable social science evidence establishing that an absolute majority of the young black men are carrying concealed knives, and that white youths are committing this crime at a considerably lower rate.<sup>220</sup> Alschuler suggests in the Pothole hypothetical that the constitutional standard should be strengthened. The stops of young black men, Alschuler contends, would not violate the Fourth Amendment standard since the odds are better than 50 percent, nor the Equal Protection clause since the stops are tightly fitted to the compelling interest of removing weapons

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<sup>217</sup> To be sure, the impact on the white students denied admission can be recast as no injury at all if we question the concept of merit, desert, and entitlement. But these are semantic issues. From the perspective of the denied white students, they have suffered an injury that they would not have experienced barring race-based admissions.

<sup>218</sup> Alschuler 2002:187; *see also id.* at 221 (“In the end, the talismans ‘compelling governmental interest’ and ‘narrowly tailored measure’ may not notably constrain decision. If the constraint provided by these words is not illusory, however, it is misguided.”)

<sup>219</sup> Alschuler 2002:187.

<sup>220</sup> Alschuler 2002:169.

from the streets. Yet, Alschuler argues, we should demand more. “Concern for distributive justice should not vanish altogether whenever an interest labeled ‘compelling’ and a suitable means-end fit appear.”<sup>221</sup> So, Alschuler concludes, “[p]roclaiming the government’s interest in fighting crime ‘compelling’ should not validate every crime-fighting measure likely to prove effective.”<sup>222</sup>

The problem is, how should a court decide when to relax or strengthen the constitutional scrutiny? Is it based on particular racial sensitivities? The Ruby Ridge hypothetical, for example, is provocative because it selects on whiteness in the context of a morally offensive crime, namely domestic terrorist activities that likely will result in the death of innocent babies and children in federal day care centers. But it involves a tightness of fit between race and offense that makes it unique. Randy Weaver—Vicki Weaver’s husband and the target of the F.B.I. operation—was a white supremacist. Though there may be some—here, I am speculating—there is surely not an abundance of African American white supremacists. Accordingly, it is fair to assume, the probability is high—very high—that an operation to avenge Vicki Weaver would be carried out by white persons. There is a significant difference between this Ruby Ridge hypothetical and the Oneonta case. Whereas in Oneonta, there was a fear of a possible eye-witness misidentification or, possibly, of racial fabrication (à la Charles Stuart and Susan Smith), in the Ruby Ridge hypothetical there is a far greater tightness of fit with race. In effect, there are significantly different probabilities associated with the racial classification. It is more sure that the potential offender in the Ruby Ridge hypothetical—if there is one—is going to be white. There is less room for prejudice infecting the eye-witness identification. So there is every reason to believe that the use of race here is more likely to satisfy the narrow conditions that make racial profiling acceptable.<sup>223</sup>

As for the Pothole hypothetical, if it is indeed true that more than 50 percent of black male youths are carrying concealed knives but that white male youths are carrying far less, then race is a significant predictor of knife carrying among young men holding constant youth and gender. If we, as a society, believe that knife carrying is a serious crime, and the three narrow conditions are satisfied—i.e. there is no ratchet effect—then using race may be narrowly tailored to a compelling governmental interest. Whether or not there is an equal protection problem may depend on the long-term consequences of profiling on weapons possession: how will it affect white youth carrying and will that outweigh the gains achieved in lower minority carrying? But if the three conditions are satisfied, there should be no constitutional objection.

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<sup>221</sup> Alschuler 2002:220.

<sup>222</sup> Alschuler 2002:221.

<sup>223</sup> One final point. The Ruby Ridge hypothetical also leaves a lot less room for liberal sympathy—an important moral dimension that makes Alschuler’s argument slightly more attractive to liberals. Domestic terrorism by white supremacists is, after all, not exactly a leftist cause. But what if the rumor were about a Black Panther attack on a Chicago courthouse? This is another perfect example of why the constitutional standard should be the same.

This is precisely the line that separates constitutional adjudication from social theory. The use of race in Pothole, if it satisfies all three conditions, may be narrowly tailored to combating crime—and therefore constitutional—and yet a terrible idea. From a social and political perspective, it may be completely destructive. In fact, from a social theoretic perspective, the traditional law enforcement interest in combating crime itself may be entirely suspect. Racial profiling—and criminal profiling more generally—may serve only to aggravate the problem. I discuss this in Part V. But so long as the courts accept, for constitutional analysis, that the traditional law enforcement interest in fighting crime is a compelling governmental interest, then there is no *constitutional* problem with racial profiling *if* the three narrow conditions obtain. This is the distinction between constitutional review and social theory.

In sum, the use of race in policing may be a constitutionally acceptable—though not necessarily socially desirable—practice under the three narrow conditions just discussed. If the police are disproportionately searching minority motorists, then the police must bear the burden of establishing that racial profiling advances these interests. The simple fact is that race is a protected category and using race requires an evidentiary showing. It requires that the government shoulder a responsibility. In order to satisfy its burden, the police would need to offer reliable measures of certain key quantities of interest—comparative elasticity, offending, and selectivity—and reliable proof concerning the three narrow conditions. Given that no state or federal agency has yet attempted to explain or successfully explained the disproportional searches of African-American and Hispanic motorists in the jurisdictions where the new data reveal disparities, a reviewing court should find the statistical evidence of racial profiling on the highways to be sufficient evidence of unconstitutional police practices.

#### IV. Assessing the Effects of Racial Profiling

The key questions, then, for purposes of *both* the empirical and constitutional analyses, revolve around the three narrow conditions. They are, to repeat, (1) whether racial profiling likely reduces the amount of profiled crime, (2) while maintaining or increasing the efficient allocation of police resources, (3) without producing a ratchet effect on the profiled population. Clearly, the new data on police searches from across the country do not provide reliable observations on the key quantities of interest necessary to resolve whether the three conditions obtain, specifically the comparative elasticities and natural offending rates within different racial groups. As a result, the new data need to be supplemented with other available evidence, further research, and additional data collection. Nevertheless, we can begin to make reasonable conjectures based on the best available evidence and conservative assumptions about elasticities and offending rates. Let's begin by exploring issues of elasticity.

##### A. The Elasticity of Offending to Policing

The elasticity of offending to policing is the product of at least two major mechanisms: the first is deterrence. Some motorists may decide not to carry drugs on their person or in their cars when they are on the road out of fear of being searched. The second is incapacitation. In the case of highway searches, incapacitation is most likely a cherry-picking phenomenon. If the

police select motorists based on multiple factors (race, late-model car, tinted windows, marijuana stickers, swerving vehicle, etc.), the hit rate will be high. As the police expands its searches to search more motorists, it will likely relax the number of other factors that it uses. As the pool of motorists expands, the hit rate will fall precisely due to the reduced selectivity. The lower offending is not the product of a rational response by motorists, but a cherry-picking effect.

The cherry-picking effect, however, is likely to be negligible. The data from the Indianapolis road-block searches—which netted drug possession in 4.7 percent of the total number of stops<sup>224</sup>—suggest that there is unlikely to be much incapacitation. The police in Washington State, for instance, are only searching 3.5 percent of the cars that they stop on the highway, for a total of only 23,393 searches for the period March 2002 through October 2002<sup>225</sup>—which is, one can only assume, infinitesimal as compared to the number of motorists on the Washington state highways during the period. As a result, most of the elasticity, if any, will relate to rational choice deterrence.

The deterrence effect is difficult to measure. Most research on deterrence has been conducted in areas where there is likely an incapacitation effect, and has been unable to properly distinguish deterrence from incapacitation. This problem has plagued research on deterrence for a long time. The National Academy of Sciences had a panel look into the question in 1978—the *Panel on Research on Deterrent and Incapacitative Effects* headed by Al Blumstein, Jacqueline Cohen and Daniel Nagin—and the results were inconclusive.<sup>226</sup> The panel reviewed all available studies and found that “because the potential sources of error in the estimates of the deterrent effect of these sanctions are so basic and the results sufficiently divergent, no sound, empirically based conclusions can be drawn about the existence of the effect, and certainly not about its magnitude”<sup>227</sup> Little progress has been made since then. As economist Steve Levitt wrote in

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<sup>224</sup> See *Indianapolis v. Edmond*, 531 U.S. 32 (2000).

<sup>225</sup> Pickerill et al. 2003:20.

<sup>226</sup> *Panel on Research on Deterrent and Incapacitative Effects of the National Academy of Sciences*, Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin editors (Washington DC: Printing and Publishing Office of the National Academy of Sciences, 1978).

<sup>227</sup> *Panel on Research on Deterrent and Incapacitative Effects*, at page 42 (1978). They concluded:

In summary, therefore, we cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence. We believe scientific caution must be exercised in interpreting the limited validity of the available evidence and the number of competing explanations for the results. Our reluctance to draw stronger conclusions does not imply support for a position that deterrence does not exist, since the evidence certainly favors a proposition supporting deterrence more than it favors one asserting that deterrence is absent. The major challenge for future research is to estimate the magnitude of the effects of different sanctions on various crime types, an issue on which none of the evidence available thus far provides very useful guidance. The research program developed in this report is intended to facilitate these efforts.

Panel 1978:7. See also Daniel Nagin, “General Deterrence: A Review of the Empirical Evidence,” in *Panel on Research on Deterrent and Incapacitative Effects of the National Academy of Sciences*, Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin editors (Washington DC: Printing and Publishing Office of the National Academy of Sciences, 1978); see generally William Spelman, “The Limited Importance of Prison Expansion,” 97, 123–125, in *The Crime Drop in America*, edited by Alfred Blumstein and Joel Wallman (Cambridge UK: Cambridge

1998, “few of the[] empirical studies [regarding deterrence of adults] have any power to distinguish deterrence from incapacitation and therefore provide only an indirect test of the economic model of crime.”<sup>228</sup>

At the more specific level, there is a paucity of studies specifically addressing the elasticity of drug consumption to price or policing. As Peter Reuter and Mark Kleiman observe in *Crime and Justice: An Annual Review of Research*, price elasticities have not been empirically estimated for marijuana, cocaine, or heroin.<sup>229</sup> As a result, the literature is all over the place on elasticities. Stephen Schulhofer, for example, writes that “available estimates nearly all find modest to substantial inelasticity in the overall demand for heroin and cocaine, especially in the short run;”<sup>230</sup> yet, the study that Schulhofer refers to—the Reuter and Kleiman review of literature—assumes that “the aggregate demand for heroin may have quite a high elasticity.”<sup>231</sup> Reuter and Kleiman argue that it is fair to assume that “the elasticity of demand is moderately high for heroin, a little lower for cocaine, and quite low for marijuana.”<sup>232</sup> This may explain why there is, in their words, an “apparent lack of response of cocaine and marijuana consumption to the increased federal enforcement effort.”<sup>233</sup> According to another study published in 1972—cited by Schulhofer—the demand for marijuana among full-time college students at UCLA is relatively elastic, in the order of a 1.5 percent consumption decrease per one percent price increase.<sup>234</sup> Schulhofer suggests, however, that “some estimates find that marijuana demand—largely derived from non-addict, recreational users—is also inelastic, possibly because marijuana expenditures, even at currently inflated prices, remain a small part of the user’s income.”<sup>235</sup> Given the lack of research in this area, it is hard to come to firm conclusions.

Another difficulty that plagues the area has to do with the *relative* or *comparative* elasticities as between different racial groups. Do minority and white motorists have similar or different elasticities of offending to policing? There are reasons to suspect that they may be different. As noted earlier, elasticity is going to depend on the existence of legitimate work alternatives and there may be cause to believe that minority motorists as a group have lower job opportunities.<sup>236</sup> Another issue relates to the perception among minority motorists of the police

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University Press 2000) (reviewing the literature on the incarceration-crime hypothesis).

<sup>228</sup> Steven D. Levitt, “Juvenile Crime and Punishment,” *Journal of Political Economy* 106:6 (December 1998):1156–1185, 1158 n.2.

<sup>229</sup> Peter Reuter and Mark Kleiman, “Risks and Prices: An Economic Analysis of Drug Enforcement,” 289–340, at p. 299, in 7 *Crime and Justice: An Annual Review of Research*, Michael Tonry and Norval Morris, eds. (University of Chicago Press 1986).

<sup>230</sup> Stephen Schulhofer, “Solving the Drug Enforcement Dilemma: Lessons from Economics,” 1994 *University of Chicago Legal Forum* 207, 222.

<sup>231</sup> Reuter and Kleiman 1986:300.

<sup>232</sup> Reuter and Kleiman 1986:300.

<sup>233</sup> *Id.* at 290.

<sup>234</sup> T.C. Misket and F. Vakil, “Some Estimates of Price and Expenditure Elasticities Among UCLA Students,” 54 *Review of Economics and Statistics* 474–75 (1972). Thanks to Schulhofer 1994:n.50 for this reference.

<sup>235</sup> Schulhofer 1994:222.

<sup>236</sup> Persico 2002:1474.



and the criminal justice system. Tom Tyler's research on legitimacy and obedience to the law<sup>237</sup> suggests that disproportional searches of minority motorists may take a toll on minorities' perception of the overall fairness of the system, which might in turn lead to *more* rather than less offending. If minorities believe that they are going to be harassed by the police or supervised regardless of what they do, minority motorists may lose faith in the system and ultimately become less law abiding. As Tracey Meares explains, "legitimacy matters more to compliance [with the law] than instrumental factors, such as sanctions imposed by authorities on individuals who fail to follow the law or private rules."<sup>238</sup> Jim Leitzel expresses this same insight:

When all young black males are thought to be and treated as criminals, a law-abiding black male cannot easily overcome this perception through his own virtuous behavior. Being thought a scoundrel in any event, the reward to virtue falls. The perception of criminality that is inherent in race-based policing prevents well behaving minority youths from distinguishing themselves from those who are criminals, reducing the incentive to be law-abiding.<sup>239</sup>

Overall, these perceptions among minority motorists could potentially result in an upward sloping offending curve at the tail end for minority motorists and, again, different rates of elasticity as between racial groups.

The bottom line, on the issue of comparative elasticities, is that there is simply no good evidence one way or the other. As Nicola Persico observes, there is practically no literature on the relative elasticity of different groups. "To our knowledge this literature [on the effect of penalties on the crime rate] does not address the different elasticity of different racial groups to crime. An exception is Bar-Ilan and Sacerdote (2001), who find that as the fine is increased for running a red light in Israel, the total decrease in tickets is much larger for Jews than for non-Jews" (Persico 2002:1476). On the U.S. domestic side, there are no empirical studies. Here, the paucity of existing research seriously hampers any effort to model racial profiling.

If forced to speculate, the most reasonable and conservative assumption would be relatively low elasticity across the board, with slightly lower elasticity for minority motorists. Given that most of the successful searches for drug contraband on the highway involve quantities of marijuana that reflect at most personal use—68 percent in Maryland, for example<sup>240</sup>—and that the elasticity of marijuana is either low or average, it seems fair to assume conservatively that overall elasticities are relatively low. As noted earlier, there are reasons to suspect that African-

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<sup>237</sup> See generally, Tom R. Tyler, *Why People Obey the Law* (1990); Tom R. Tyler, "Trust and Democratic Governance," in *Trust and Governance*, Valerie Braithwaite and Margaret Levi eds. (New York: Russell Sage Foundation 1998); Tom r. Tyler and Yuen J. Huo, *Trust and the Rule of Law* (2001); E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (1988).

<sup>238</sup> Tracey L. Meares, "Norms, Legitimacy and Law Enforcement," 79 *Oregon Law Review* 391, 400 (2000)

<sup>239</sup> Jim Leitzel, "Race and Policing," *Society* 38, 40 (March/April 2001).

<sup>240</sup> Gross and Barnes 2002:52.

American motorists may have lower elasticity than white motorists. African-Americans may have fewer job opportunities or other market alternatives, and as a result may have less of a choice about engaging in illegal activity.<sup>241</sup> There is no reliable evidence on the question, but a fair inference is that there is probably lower elasticity for minority motorists.

## B. The Offending Rate

There are several possible ways of defining the term “offending rate,” and it is crucial to distinguish between them and label them properly. First, the offending rate could refer to the rate of actual offending in the different racial groups given the present allocation of police resources. I will refer to this definition as the “real offending rate.” This first definition does not look at *discovered* offending—i.e. offending that has been discovered by the police through a successful search—but rather at *actual* offending—i.e. the actual number of people who are carrying drug contraband in their cars. And it measures actual offending at the *present* time, given the *existing* distribution of police searches as between racial groups. This first definition of offending rate is calculated by dividing the total number of members of a racial group on the road who are carrying contraband by the total number of persons of that racial group on the road. This is a quantity of interest for which we do not have a good measure. It is, as a result, hard to determine since it measures a phenomenon that is not even being randomly sampled.

Second, the offending rate could refer to the actual rate of offending in a racial group *when the police are sampling randomly*—i.e. when the police are engaged in color-blind policing and are not searching minority motorists disproportionately. I will refer to this second definition as the “natural offending rate.” Now, it is not entirely natural, because it will depend on the amount of searches that the police are conducting. But I call it natural in the sense that, *as between racial groups*, there is no effect of racial profiling. This definition of offending rate can only be measured under conditions of random sampling. It can only be computed when the police are searching motorists in proportion to their representation in the motorist population. It is equally, if not more hard to measure. But it represents the only proper way to obtain a metric that can be used to *compare* offending among different racial groups.

Under assumptions of elasticity, the “real offending rate” will fluctuate with policing. The “real offending rate,” by definition, will be the *same* as the “natural offending rate” when the police engage in random searches. If the police stop and search more minority motorists, then the “real offending rate” will be smaller than the “natural offending rate” for minority motorists—again, assuming elasticity. The only proper way to compare offending of minority and white motorists under conditions of elasticity is to compare their “natural offending rates.” Under assumptions of low or no elasticity, the “real offending rate” hardly or does not vary with policing. In this sense, it is going to equal the “natural offending rate,” no matter how disproportionate the policing. It is going to be the same regardless of how much policing we focus on minority motorists.

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<sup>241</sup> Persico 2002:1474.

In all of this, naturally, the offending rate must be distinguished from the “hit rate”—the rate of successful searches. The two are related since the offending rate feeds the search success rates. However, the hit rate is generally going to be much higher than the offending rate because the police are excluding certain motorists from their searches—for instance, a grandmother driving to church on Sunday morning.

With these definitions in mind, the question is: what does it mean, exactly, to assume that minority motorists offend at a higher rate than white motorists? Does it mean that they have higher real offending rates or natural offending rates? Also, does it mean that at *all* points along the distribution there is higher real or natural offending? In other words, do the offending rates intersect one another, or are they always at distance from each other?

As a preliminary matter, when someone says that “minority motorists have higher offending rates,” it must be the case that they are talking about higher *natural* offending rates. Certainly, this is true of economists. The whole idea behind the economic models is that disproportional searches of minority motorists will, as a result of elasticity, bring down their *real* offending rate to the same level as that of white motorists. When the hit rates are equal, the real offending rates should be equal as well. Yet even when the real rates of offending are the same, the assumption is that minority motorists have higher natural rates of offending. This is precisely what Vani Borroah means when he writes that “if the likelihood of being stopped was the same for blacks and whites, then the likelihood of being arrested after a stop would be substantially higher for blacks.”<sup>242</sup> In other words, if the police are stopping color-blind, then minority motorists would have a higher *natural* offending rate. This seems like the proper way to think about “higher offending.” At least, it is the proper way to think about the assumption of higher offending among minority motorists, and it is the only proper way to *compare* offending rates.

There is, however, no clear answer to the next question—whether the offending rates intersect at some point. When someone says that “minority motorists have higher offending rates,” it simply is not clear whether they mean “at each and every comparative degree of searching” or “for the most part.” In other words, the natural offending rates could possibly intersect at higher rates of searches. In effect, the natural offending rates could look like either of the following two graphs—or any permutation of these graphs—Graphs IV.B.i.1 and IV.B.i.2.

\*\*\* Insert Graph IV.B.i.1: Consistently Higher Offending among African-America Motorists\*\*\*

\*\*\* Insert Graph IV.B.i.2: Mostly Higher Offending among African-American Motorists \*\*\*

These two graphs reflect different elasticities of offending to policing as between members of different racial groups, and they affect whether the natural offending rates are consistently or mostly greater for minority motorists. This in turn will have important

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<sup>242</sup> Borroah 2001:35.

implications on whether racial profiling reduces the amount of profiled crime and whether it produces a ratchet effect on the profiled population.

In order to estimate natural offending rates, it is important to distinguish between different types of violators—the two main categories being persons carrying drugs for personal use and drug traffickers. It may also be necessary to explore offending rates by drug given that there may be significant racial differences depending on the specific type of drug being seized on the roads. The place to begin, then, is by estimating natural carrying rates for personal consumption by drug. Here, we can turn to data on personal consumption rates, including various self-report surveys of students and adults, such as the Monitoring the Future Project, the Youth Risk Behavior Surveillance System, and the National Household Survey on Drug Abuse, public health data on drug abuse hospitalizations, and, very carefully, some criminal justice data.

One caveat. The goal, naturally, is to measure natural offending rates. The concern is whether there already exists today, in the public imagination, a shared belief that the police engage in generalized racial profiling in law enforcement matters. Some survey data suggest a generalized perception among the public that drug laws are enforced more systematically and severely against members of minority groups, especially African-Americans and Hispanics. In a Gallup Poll conducted in late 1999, 59 percent of total respondents indicated that they believed that racial profiling by police officers is “widespread.”<sup>243</sup> This perception is even more pervasive among African-American respondents: 77 percent believe the practice is widespread.<sup>244</sup> Moreover, among African-American respondents more generally, 42 percent have felt that they were “stopped by the police just because of [their] race or ethnic background.”<sup>245</sup>

If there is a generalized perception of racial profiling, then the existing data on drug use and other crimes would already reflect possible elasticity, if any, resulting from racial profiling, and in this sense, would reflect *real* as opposed to *natural* offending rates. Recall the precise definitions of these terms: natural offending rates are the rates of offending holding policing constant, in other words policing color-blind; real offending rates reflect offending under real conditions of racial profiling. The only way to have comparable offending rates, naturally, is to use natural offending rates. If profiling is already incorporated in the existing offending rates, however, then the natural offending rates are not really comparable: they may already reflect some elasticity. This problem is particularly acute since there are few if any possibilities of natural experiments. It may be necessary, as a result, to discount existing drug use offending rates to take account of public perceptions of policing. How this survey data affects offending rates, naturally, depends on whether and to what extent offending is elastic to policing. Assuming elasticity, though, the survey data would suggest that the existing offending rates for

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<sup>243</sup> George Gallup, Jr. and Alec Gallup, *The Gallup Poll Monthly*, no. 411 (Princeton NJ: The Gallup Poll, December 1999), p. 23 (adapted in the 1999 Sourcebook of Criminal Justice Statistics, Table 2.33) (racial profiling is simply defined as “some police officers stop motorists of certain racial or ethnic groups because the officers believe that these groups are more likely than others to commit certain types of crimes”).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at pp.18, 19 (adapted in 1999 Sourcebook at Table 2.32).

members of minority groups may actually reflect slightly *higher* natural offending based on a deterrence model, or slightly *lower* natural offending based on a legitimacy model.

(1) *Carrying Drug Contraband for Personal Drug Use*

i. *Self-Report Studies*

The Monitoring the Future Project (“MFP”) is a cohort self-report study of high school seniors that is conducted by the University of Michigan’s Institute for Social Research. The survey data has been collected since 1975 based on a sample of 120 to 146 public and private high schools intended to be representative of the entire United States high school population. Since 1991, the survey has been extended to include 8<sup>th</sup> and 10<sup>th</sup> graders, and includes racial and ethnic comparisons. The MFP data reveal that, for almost all drugs, African-American students report lower use than their white and Hispanic cohorts. This is true for high school seniors, as well as for 8<sup>th</sup> and 10<sup>th</sup> graders, suggesting that the effect is not due to different drop-out rates as between users and non-users. By 12<sup>th</sup> grade, white students have the highest lifetime, annual and 30-day reported use of marijuana, inhalants, hallucinogens, LSD, heroin, amphetamines, methamphetamines, sedatives, tranquilizers, and steroids in relation to their African-American and Hispanic counterparts. White 12<sup>th</sup> graders also report higher lifetime, annual and 30-day use of cocaine, including crack cocaine, than their African-American counterparts.<sup>246</sup> The following table reflects the 2002 MFP data for total drug use (which is a combination of 2002 and 2001 cohort responses):

Table IV.B.ii.1: MFP Data for 2002: Any Illicit Drug

Grade	Any Illicit Drug		
	8th	10th	12 <sup>th</sup>
Lifetime:			
White	24	45.1	55.2
Black	24.7	41.5	45.1
Hispanic	34.7	48.2	53
Annual:			
White	18.3	37.6	43.6
Black	15.1	28.5	30.4
Hispanic	24.8	36.2	39
30-Day:			
White	10.6	22.9	27.2
Black	9.1	16.2	18.2
Hispanic	15.3	21.4	23.4

<sup>246</sup> L. D. Johnston, P.M. O’Malley, and J.G. Bachman (2003) *Monitoring the Future National Survey Results on Drug Use, 1975–2002. Volume I: Secondary School Students*. NIH Publication No. 03-5375. Bethesda, MD: National Institute on Drug Abuse.

The Youth Risk Behavior Surveillance System (YRBS) is a national survey of high school students (grades 9 through 12) conducted by the Center for Disease Control which tracks high risk behavior for purposes of studying youth mortality rates. The study includes reported lifetime (having ever tried) and current (used once or more in the last 30 days) use of several drugs, including marijuana, cocaine, inhalants, heroin, methamphetamine, and IV drug use. For 2001, white high school students, in contrast to African-American students, report higher use in all available categories. Hispanic students report higher use than white or African-American students of cocaine and lifetime IV drug use.<sup>247</sup> The following table reflects the 2001 YRBS data, including the percentage of students reporting a given behavior and a 95 percent confidence interval:

Table IV.B.ii.2: YRBS Data for 2001<sup>248</sup>

Race	Lifetime Marijuana Use	Current Marijuana Use	Lifetime Cocaine Use	Current Cocaine Use
White	42.8 (±2.2)	24.2 (±2.0)	9.9 (±1.4)	4.2 (±0.9)
Black	40.2 (±5.8)	21.8 (±4.1)	2.1 (±0.7)	1.3 (±0.5)
Hispanic	44.7 (±2.3)	24.6 (±1.6)	14.9 (±3.0)	7.1 (±1.5)

Race	Lifetime Inhalant Use	Current Inhalant Use	Lifetime Heroin Use	Lifetime Methamphetamine Use	Lifetime IV Drug Use
White	16.3 (±2.2)	4.9 (±1.1)	3.3 (±0.5)	11.4 (±2.1)	2.4 (±0.5)
Black	5.8 (±0.9)	2.6 (±0.7)	1.7 (±0.6)	2.1 (±0.6)	1.6 (±0.7)
Hispanic	15.2 (±1.8)	5.5 (±1.1)	3.1 (±0.6)	9.1 (±1.9)	2.5 (±0.7)

The National Household Survey on Drug Abuse (“NHSDA”) is issued by the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration. The survey has been conducted since 1991 and samples household residents and persons in noninstitutionalized group quarters over the age of 12 (excluding only homeless persons who do not use shelters, active military personnel, and residents of institutional group quarters, such as jails and hospitals). The survey is often cited by the DEA and ONDCP. The NHSDA data place drug use by minorities at approximately the same level or lower than by whites, although usage varies by drug. For 2001, overall 30 day drug use stood at 7.2, 7.4 and 6.4 percent for whites, African-Americans and Hispanics, respectively.<sup>249</sup> The following table summarizes yearly data regarding the major drugs for the period 1997–2001:

<sup>247</sup> Center for Disease Control and Prevention (2002). *Surveillance Summaries*, June 28, 2002. MMWR 2002:51 (No. SS-4).

<sup>248</sup> SOURCE: adapted from Center for Disease Control and Prevention. *Surveillance Summaries*, June 28, 2002. MMWR 2002: 51 (No. SS-4).

<sup>249</sup> U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Detailed Tables from the 2001, 2000, 1999, 1998, 1997 National Household Surveys on Drug Abuse*. Available at <http://www.samhsa.gov/oas/NHSDAtabs> [August 1, 2003].

Table IV.B.ii.3: NHSDA Data for 2001<sup>250</sup>

	Any Illicit Drug					Marijuana				
	1997	1998	1999	2000	2001	1997	1998	1999	2000	2001
Lifetime										
% White	38.17	38.17	42	41.5	44.5	35.55	35.51	37.1	37	40.1
% Black	31.14	33.16	37.7	35.5	38.6	28.53	30.25	32.1	30.8	33.1
% Hispanic	25.9	26.56	31.2	29.9	31.9	22.33	23.16	25.3	24.2	25.6
Annual										
% White	11.28	10.43	11.4	11.2	12.9	9.09	8.45	8.7	8.6	9.8
% Black	12.12	12.99	13.2	10.9	12.2	9.9	10.61	10	8.6	9.4
% Hispanic	9.87	10.51	11	10.1	11.9	7.46	8.19	7.7	6.6	7.3
past 30 days										
% Wwhite	6.41	6.09	6.2	6.4	7.2	5.17	4.98	4.7	4.9	5.6
% Black	7.48	8.23	7.5	6.4	7.4	6.1	6.57	5.9	5.2	5.6
% Hispanic	5.86	6.12	6.1	5.3	6.4	4.04	4.47	4.2	3.6	4.2

	Cocaine					Crack				
	1997	1998	1999	2000	2001	1997	1998	1999	2000	2001
Lifetime										
% White	11.84	11.44	12.5	12.4	13.5	1.87	1.77	—	—	—
% Black	6.48	8.45	9.5	7.4	8.5	3.11	4.2	—	—	—
% Hispanic	7.33	8.86	9.2	8.8	10.8	1.58	1.86	—	—	—
Annual										
% White	1.89	1.7	1.7	1.5	1.9	0.56	0.29	—	—	—
% Black	2.43	1.87	1.5	1.3	1.5	1.41	1.31	—	—	—
% Hispanic	2.01	2.26	2.3	1.7	2.4	0.39	0.7	—	—	—
past 30 days										
% White	0.59	0.69	0.7	0.5	0.7	0.22	0.09	—	—	—
% Black	1.36	1.26	0.9	0.7	0.8	0.77	0.86	—	—	—
% Hispanic	0.82	1.31	0.8	0.8	1	0.17	0.25	—	—	—

<sup>250</sup> SOURCE: adapted from the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *Detailed Tables from the 2001 National Household Survey on Drug Abuse; Tables from the 2000 National Household Survey on Drug Abuse; Tables from the 1999 National Household Survey on Drug Abuse; Tables from the 1998 National Household Survey on Drug Abuse* [Online]. Available: <http://www.samhsa.gov/oas/NHSDATabs> [August 1, 2003].

	Hallucinogens					Heroin				
	1997	1998	1999	2000	2001	1997	1998	1999	2000	2001
Lifetime										
% White	11.33	11.49	13.1	13.7	14.7	0.88	1.01	—	—	—
% Black	2.78	4.84	4.9	5	5.1	1.01	1.91	—	—	—
% Hispanic	5.66	5.31	7.8	6.9	8.1	1.36	0.7	—	—	—
Annual										
%Wwhite	2.08	1.82	1.6	1.8	2.3	0.2	0.1	—	—	—
% Black	0.74	0.44	0.4	0.6	0.9	0.55	0.24	—	—	—
% Hispanic	1.67	1.55	1.4	1.2	1.6	0.57	0.14	—	—	—
past 30 days										
% White	0.87	0.77	0.5	0.5	0.6	0.1	0.05	—	—	—
% Black	0.37	0.15	0.1	0.2	0.3	0.43	0.14	—	—	—
% Hispanic	0.48	0.72	0.5	0.3	0.5	0.21	0.08	—	—	—

Overall, these surveys consistently reflect lower or equal drug use among African-Americans as compared to whites, and practically equal—though in the case of cocaine higher—use among Hispanics as compares to whites.<sup>251</sup>

Although these general survey studies are widely considered a better measure of the nature and extent of drug use than arrest statistics or ethnographies,<sup>252</sup> there are naturally questions about their reliability. Researchers have tested the validity of survey data by comparing self-reported drug use habits with other, presumably more accurate measures of drug use. The three primary tests are internal validity tests,<sup>253</sup> external validation tests,<sup>254</sup> and

<sup>251</sup> These statistics only concern illegal drugs. If we were to include prescription mood-altering drugs, like Prozac or Valium, the disproportionality may be far greater. The use of legal mood-altering drugs exploded in the 1990s. As Joseph Kennedy reports, “Between 1987 and 1997, the percentages of outpatient psychotherapy patients using prescribed antidepressant medications, mood stabilizers, and stimulants tripled.” Joseph E. Kennedy, “Drug Wars in Black and White,” 66 *Law & Contemporary Problems* 153, 173 (2003). The consumption of these types of drugs tends to correlate with higher-income white consumers, which suggests that, in reality, whites may consume drugs at a far higher rate than minorities. I thank Richard Posner for this insight.

<sup>252</sup> Lana Harrison, “The Validity of Self-Reported Drug Use in Survey Research: An Overview and Critique of Research Methods” in *The Validity of Self-reported Drug Use: Improving Accuracy of Survey Estimates*. Harrison, Lana, and Arthur Hughes (eds) 1997: 17-36, at page 18; Royer F. Cook, Alan D. Bernstein, and Christine M. Andrews. “Assessing Drug Use in the Workplace: A Comparison of Self-Report, Urinalysis, and Hair Analysis” in *The Validity of Self-reported Drug Use: Improving Accuracy of Survey Estimates*. Harrison, Lana, and Arthur Hughes (eds) 1997: 247-272, at page 248.

<sup>253</sup> Internal validity is determined by looking at a respondent’s answers to related items on a survey. For instance, a survey response would be internally inconsistent if the respondent claimed to have smoked marijuana in the last 30 days in response to one question and in a later question denied ever having used any illicit drugs over the course of his lifetime. On the other hand, researchers interpret the high correlation between estimates of friends’ drug use and aggregate self-reported drug use as evidence of the Monitoring the Future Project’s high internal validity. Both the National Household Survey on Drug Abuse and the Monitoring the Future Study demonstrate a high degree of internal consistency. See Harrison 1997: 19; see also Lloyd D. Johnston and Patrick M. O’Malley. “The Recanting of Earlier Reported Drug Use by Young Adults” in *The Validity of Self-reported Drug Use: Improving Accuracy of Survey Estimates*. Harrison, Lana, and Arthur Hughes (eds) 1997: 59-80.

<sup>254</sup> External validity is demonstrated through consistency between self-reports and an official record,



biological testing.<sup>255</sup> For our purposes here, the relevant question is whether there is any evidence that self-reporting by members of minority groups is *less* reliable than by whites.

On the racial comparison question, one recent study found that, while self-reporting grossly under represents the prevalence of drug use in a population, underreporting does not correlate with race. The researchers there used respondent demographics to create a logistic regression and mined the data for demographic factors correlated with honest self-reporting—i.e. a self-report of recent drug use by those arrestees whose urine tests positive for drug metabolites. The researchers found that black arrestee crack users were significantly more likely to make a truthful self-report as to use than either white or Hispanic arrestee crack users.<sup>256</sup> On the other hand, Hispanic opiate users were significantly more likely to make an accurate self-report about use than black arrestee opiate users. No statistically significant race effects were found in the validity of self-reporting on marijuana and amphetamine use. Another study found no race effect when comparing the reliability of self-reported drug use by a former drug treatment sample with their treatment admission charges.<sup>257</sup> Other research, however, has reached the opposite conclusion—namely, that blacks are in fact less likely than whites to make true and accurate self reports about drug use.<sup>258</sup> One such study found, for example, that although the total rate of recanting on previous self-reports of drug use is quite low, African-Americans recant at a significantly higher rate than whites when reporting lifetime use of marijuana and cocaine for the MFP.<sup>259</sup> Clearly, this would be the kind of empirical evidence that we need to explore further when dealing with evidence of offending differentials.<sup>260</sup>

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polygraph test or confirmation from interviews of friends or family. Researchers have found that the external validity of self-reported drug use varies with the type of drug involved, but not with the race of the respondents. See Adele Harrel (1997) “The Validity of Self-Reported Drug Use Data: The Accuracy of Responses on Confidential Self-Administered Answered Sheets” in The Validity of Self-reported Drug Use: Improving Accuracy of Survey Estimates. Harrison, Lana, and Arthur Hughes (eds) 1997: 37-58, at pages 46-48, 52.

<sup>255</sup> In biological testing, Urine and hair samples are taken and analyzed for evidence of drug metabolites and used to impeach or confirm self-reports. Several of these studies, especially the Drug Use Forecasting Study (DUF) and DUF replica studies, suggest lower than hoped for validity for self-reporting. Validity varies for different population groups (arrested offenders versus office workers) and also for different types of drugs. See, generally, Harrison 1997: 28-30. Research in the field suggests, for example, that self reports are most accurate for the least stigmatized drugs and least accurate for the most stigmatized drugs, most accurate for reports of lifetime use and least accurate for reports of recent use, most accurate when self administered and least accurate when responses are requested aloud.

<sup>256</sup> Natalie Lu, Bruce Taylor and Jack Riley. 2001. “The Validity of Adult Arrestee Self-reports of Crack Cocaine Use” American Journal of Drug and Alcohol Abuse, 27(3): 399.

<sup>257</sup> Harrel (1997: 51-52)

<sup>258</sup> See, e.g., M. Frederich, and Y. Xu. 1994. “The Validity of Drug Use Reports from Juvenile Arrestees” International Journal of Addiction, 29(8): 971-985; T.A. Gray, and E.D. Wish. 1999. “Correlates of Underreporting Recent Drug Use by Female Arrestees” Journal of Drug Issues, 29(1): 91-106; R. Falck, H.A. Siegal, M.A. Forney, J. Wang, and R.G. Carlson. 1992. “The Validity of Injection Drug Users Self-Reported Use of Opiates and Cocaine” Journal of Drug Issues, 22: 823-832; W.F. Page, J.E. Davies, R.A. Ladner, J. Alfassa, and H. Tennis. 1977. “Urinalysis Screened versus Verbally Reported Drug Use: The Identification of Discrepant Groups” International Journal of Addiction, 12: 439-450.

<sup>259</sup> See Johnston, et al 1997: 72-76.

<sup>260</sup> There is also the question whether school and home survey data on drug consumption are reliable given

ii. *Public Health Data*

Given the difficulty of self-report data, another approach is to look at public health data. The Drug Abuse Warning Network (“DAWN”), for instance, is a voluntary program run by the Substance Abuse and Mental Health Administration that collects data on drug-related visits to non-federal hospital emergency rooms across the nation. The information is provided by an assigned DAWN reporter, usually an emergency room physician, who reviews the medical charts of all patients and reports information where the reason for the hospitalization appears to be drug related, including the visit episode as well as drug mentions (the different drugs used). The following table represents 2001 DAWN data, with additional percentage calculations:

Table IV.B.ii.4: 2001 DAWN Data for Selected Drugs

		2001	Percent
ED Drug Episode	White	351,245	55.01%
	Black	139,375	21.83%
	Hispanic	79,517	12.45%
	N/T	5,209	
	Race Unknown	63,138	
ED Marijuana Mention	White	57,836	52.33%
	Black	29,455	26.65%
	Hispanic	12,877	11.65%
	N/T	875	
	Race Unknown	9,470	
ED Cocaine Mention	White	71,531	37.06%
	Black	80,022	41.45%
	Hispanic	25,117	13.01%
	N/T	720	
	Race Unknown	15,644	
ED Heroin Mention	White	40,104	48.39%
	Black	28,706	34.63%
	Hispanic	14,075	16.98%
	N/T	381	
	Race Unknown	9,798	
ED Amphetamines Mention	White	11,720	63.17%
	Black	1,271	6.85%
	Hispanic	2,495	13.45%
	N/T	194	
	Race Unknown	2,874	

These data suggest overall higher offending among African-Americans and Hispanics for most drugs than their share of the population. Here again, though, there are important differences by drug, and so it would be important to specify offending rate by drug type for the particular

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that they may overlook homeless drug users and school drop-outs. However, roadway searches probably target persons with cars and more than subsistence income. Thanks to John Pfaff for this point.

drugs that are being interdicted on the highway in the specific geographic locations where racial profiling is taking place. And here too, there are questions about the validity of any inferences concerning real drug use. Drug-related emergency room visits may correlate with socio-economic status more directly than race. African-American and Hispanic users may have less access to private doctors and individualized health care, and therefore may rely more on emergency room medical assistance. Naturally, this would skew the data.

### iii. *Search Data*

There are significant questions about the reliability of search, arrest and other criminal justice data given that they are the product of racially disproportionate policing. David Harris argues correctly in *Profiles in Injustice* that we should not rely on arrest and conviction data to measure offending differentials. These are good measures of law enforcement activity, but not of offending rates. As Harris recognizes, numerous established criminologists have pointed this out. Aaron Cicourel and John Kitsuse, in their 1963 article on official statistics, emphasize that criminal justice measure often tell us something about law enforcement activity, but not necessarily about offending or offenders.<sup>261</sup> It is important, in this sense, to be very careful with any of this data.

Although the search data are skewed because of the disproportional searches of minority motorists, the *internal* rate (within each racial group) of persons carrying drugs can be compared and may represent another data point. Given the large number of searches, the pool of searches represents a sample of the different racial groups. The Maryland data may be useful here. In the I-95 corridor, there were 2,146 searches conducted during the period 1995–2000. Of the total 2,146 searches, 33.3 percent involved white motorists (about 715), 59.7 percent involved African-American motorists (about 1,281), and 5.9 percent involved Hispanic motorists (about 127). In other words, setting aside the small number of Hispanic motorists searched because the sample is too little and underrepresentative, the police practices provide a sample of about 715 white motorists and about 1,281 African-American motorists. Gross and Barnes break-down those searches in tables that reveals the relative proportion of drug users by race. What their tables reveal is that the searches netted a greater proportion of persons carrying drugs for personal use among white motorists. Among African-American motorists, there was a lower internal rate of carrying for personal use, but a higher rate of carrying evincing drug trafficking or dealing (which I discuss in greater length in the next section). Their tables reveal the following internal rates of offending:

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<sup>261</sup> Harris 2002:77–78 (“in his 1995 Sutherland Prize Presentation to the American Society of Criminology, Dr. Delbert Elliot of the Center for the Study and Prevention of Violence at the University of Colorado made much the same point. ‘We have fallen into bad habits,’ Elliot said, referring to the continuing use of arrest data to support conclusions about offender characteristics and behavior. Using arrest statistics this way will ‘lead to incorrect conclusions, ineffective policies and practices and ultimately undermine our efforts to understand, prevent, and control criminal behavior’” *id.* Harris 2002:77–78).

Table IV.B.ii.5: Internal Rates of Offending from Maryland Search Data<sup>262</sup>

	White Motorists	African-American Motorists	All Searches
Total Searches	100%	100%	100%
No Drugs	59.7%	62.2%	62.7%
Any Drugs	40.3%	37.8%	37.3%
Trace or Personal Use Quantities of Drugs	36.2%	22.4%	26.1%
Small, Medium or Large Dealer Quantities of Drugs	4.2%	15.4%	11.2%

Again, it is important to be careful with these data because they are biased not only by the fact of being police searches, but also because of the racial disproportionality and because of the possible differences in the selective use of other search criteria. Nevertheless, these data tend to corroborate the self-report surveys in revealing evidence of slightly lower personal drug use among African-Americans than among white motorists.

(2) *Drug Trafficking and Drug Couriers*

The racial break-down of drug traffickers, drug sellers, and drug couriers is harder to gauge. Practically all of the data are produced through law enforcement operations and therefore potentially biased by disproportional attention to minority trafficking. In addition, there is every reason here to be even more skeptical of self-report data—the little that there is.

Human Rights Watch reports that the National Household Survey on Drug Abuse, discussed earlier, contained questions about drug selling during the period 1991–1993. According to Human Rights Watch, “On average over the three year period, blacks were 16 percent of admitted sellers and whites were 82 percent.”<sup>263</sup> Given that African-Americans represented 11.5 of the United States civilian, non-institutionalized population in 1992,<sup>264</sup> the NHSDA reflects higher drug selling among African-Americans. Naturally, all the same questions about the reliability of self-report studies apply, if anything even more saliently. The reliability of self-report studies is inversely related to the seriousness of the activity surveyed, so

<sup>262</sup> Adapted from Gross and Barnes 2002:60 (Table 17).

<sup>263</sup> Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs* (May 2000), Chapter 7, \*2 of 7 from <http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm>. Thanks to Rudovsky 2001:310 for this reference. I have not been able to locate the data in the relevant NHSDA volumes.

<sup>264</sup> U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, *National Household Survey on Drug Abuse: Main Findings 1992*, p. 17 Table 1.3 (1995).

these data are even less reliable;<sup>265</sup> however, there is debate, again, over the comparative unreliability by race.<sup>266</sup>

One of the very few other data points, then, is the search data itself. As the Gross and Barnes table above suggests, the internal rate of drug trafficking is higher within the sample of African-American motorist searches: 15.4 percent of African-American motorists searched are transporting quantities of drugs that suggest dealing, in contrast to 4.2 percent of white motorists. The difference is actually most pronounced among medium and large dealer quantities, where 12.2 percent of African-American versus 2.4 percent of white motorists are transporting contraband.<sup>267</sup> As Gross and Barnes explain, “Black motorists who were searched on I-95 north of Baltimore were more than three-and-a-half times as likely as whites to be dealers, and five times as likely to be medium or large dealers. . . . Of the whites who were found with any drugs on I-95, 10% were dealers and 6% were medium or large dealers; of the blacks with any drugs, 40% were dealers and 32% were medium and large dealers. . . .”<sup>268</sup>

Clearly, this is an area for more sustained research. A tentative conclusion, from the few data points available, is that African-Americans have a higher offending rate than whites for drug selling and dealing—but how much higher is not clear—but similar offending for personal use, resulting in a slightly higher offending rate overall.

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<sup>265</sup> See Harrison 1997:28–30 (reporting that self-report studies are more accurate for the least stigmatized drugs and least accurate for the most stigmatized drugs).

<sup>266</sup> The rest of the Human Rights Watch report from 2000 is not particularly illuminating:

There are no comparable annual statistics on the estimated number and race of drug sellers nationwide. Nevertheless, such data as exists indicates whites constitute a far greater share of the drug selling population than of the population arrested for drug selling. . . . According to research on patterns of drug purchase and use in selected major cities, drug users reported that their main drug sources were sellers of the same racial or ethnic background as they were. A large study conducted in the Miami, Florida metropolitan area of 699 cocaine users (powder and crack) revealed that over 96 percent of the users in each ethnic/racial category were involved in street-level drug dealing, which again would suggest a racial profile of sellers that is comparable to that of users. General Barry McCaffrey has stated that drug transactions between youth are generally intra-racial, that is, youth tend to buy from sellers of the same race. ONDCP’s former periodic report on drug trends, *Pulse Check*, also indicated a high frequency of intra-racial drug transactions, that is, that whites tended to buy from white sellers and minorities from minority sellers.

Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs* (May 2000), Chapter 7, \*2 of 7 from <http://www.hrw.org/reports/2000/usa/Rcedrg00-05.htm>. This is, however, entirely vague and does not help gauge the *relative* offending. Even if there is a high frequency of intra-racial drug transactions, the offending rates could be significantly different than the demographic break-down of the population by race.

<sup>267</sup> Gross and Barnes 2002:60.

<sup>268</sup> Gross and Barnes 2002:60.

### C. The Likely Implications of Racial Profiling

#### i. *The Long-Term Effect on the Profiled Crime*

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 natural total offending 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 expression (9) earlier, we know that, assuming minority motorists represent 20 percent of the motorist population and have lower elasticity, 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, it is impossible to know for sure whether racial profiling does or does not increase the profiled crime. It is, however, certain that under these assumptions, racial profiling may well increase the profiled crime. Naturally, it would be crucial to do a more nuanced analysis with better data, exploring the different types of drugs being transported in the particular geographic location. It would also be important to develop better data on elasticity, comparative elasticity, and offending. However, based on these simple and reasonable assumptions, it appears that racial profiling on the highways may be affirmatively counter-productive from the perspective of fighting crime. This certainly seems to be the case in Maryland based on the little data we have.<sup>269</sup>

#### ii. *The Narrow Efficiency of Searches*

Given that the police in most jurisdictions are stopping and searching minority motorists disproportionately in relation to their representation in the general population, it is fair to suspect that the police are more discriminating in their stops and searches of white than minority motorists. They likely use additional factors to narrow down which white motorists they stop or search. In effect, they may pay closer attention to the suspiciousness of white motorists as opposed to the race of minority motorists. If so, and if the police are successful in properly narrowing down white motorists, then the selectiveness differential is likely to mask higher real hit rates among minorities. In other words, if there are similar *official* hit rates among white and minority motorists, the selection and sub-search bias may mask comparatively higher offending rates among minorities. Thus, the consistent findings of equal to lower hit rates for minority motorists may mean equal to higher hit rates for comparably situated minority motorists. It is, as a result, impossible to properly interpret the hit rates and reach any reliable conclusion as to the narrow efficiency of highway searches. Again, this is an area for further research.

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<sup>269</sup> See Part I.B.ii *supra*.

iii. *The Ratchet Effect*

Racial profiling on the highways likely has a significant ratchet effect on the profiled population. From the earlier analysis of the basic racial profiling models represented in Graphs II.B.ii.1, 2 and 3, it is clear that the police may have to subject a disproportionate number of minority motorists to criminal justice supervision in order to achieve equal offending rates. In all likelihood, this is exactly what is happening in Maryland. It is hard to imagine, even if we assume that minority motorists are offending at a higher natural rate of offending than white motorists, that minority offenders represent 60 percent of all offenders under natural conditions of offending (i.e. if the police are engaged in color-blind policing). It is hard to imagine that the offending population breaks down 40 percent white and 60 percent minority. After all, eighty-four 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 the other 16 percent of seizures—those seizures involving large hauls of drugs—consist *entirely* of minority motorists,<sup>270</sup> then minority offenders would still only represent approximately 31 percent of offenders and white motorists would represent the other 69 percent.<sup>271</sup>

The most likely explanation for the disjunction between this hypothesized natural offending differential in Maryland (30/70) and the actual apprehension differential under conditions of racial profiling (60/40) is that, continuing to assume elasticity, it takes a lot of profiling to bring the hit rates down to the same level. In other words, the police need a lot of volume to get their message out—probably more volume than is appropriate. This may be due to poor dissemination of information or more generally to low elasticity. Whatever the cause, 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.<sup>272</sup> This represents a ratchet effect that has a significant cost to minority families and communities.

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<sup>270</sup> 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 minority. *See* Gross and Barnes 2002:59–61.

<sup>271</sup> 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 the entire other 16 percent of the offenders, then minority motorists represent 31.12 percent of all offenders. (The equation is  $(18/100 * 84/100) + (16/100 * 1) = .1512 + .16 = .3112$ ).

<sup>272</sup> There is, of course, an important and unanswered question surrounding the “hit” rate and its consequences: What do the police do to the motorist when they discover evidence of drug contraband, especially when it is evidence of trace amounts or amounts suitable for personal use only? This is going to have a significant effect on how we evaluate the police practice. If the police do not impose any additional burdens for the possession of small quantities of drugs, then there would be no collateral consequences to the 84 percent of motorists discovered with drugs carrying small quantities, and the interdiction program would in fact be targeting only drug dealers. The ratchet effect, as a result, would not be significant. Another way of thinking about this is that one remedy for racial profiling on the highways could be to prohibit the police from filing charges or imposing burdens on drivers carrying personal use quantities of drugs. This remedy would eliminate some of the collateral consequences of profiling.

## V. Conclusion

Racial profiling on the highways may increase the overall number of persons transporting drugs on the highways and likely produces a ratchet effect on the minority motorist population. The real problems with racial profiling, then, are not so much problems about *race*, as they are about *criminal profiling*. They are problems that may plague profiling schemes in general, whether based on race or on gender, wealth, class, status, physical demeanor, etc. In this sense, the fact that racial profiling on the highway is “almost uniformly condemned”<sup>273</sup> is probably the right result, but for the wrong reasons. The idea that “it is plainly unconstitutional to use race as a criterion for choosing who to stop or search”<sup>274</sup> is simply an exaggeration. And so is the political rhetoric surrounding the use of race in policing—whether from the right or from the left. This includes President George W. Bush’s statement denouncing racial profiling on the grounds that “All of our citizens are created equal and must be treated equally,”<sup>275</sup> and F.B.I. Director Robert Mueller’s statement that “Racial profiling is abhorrent to the Constitution, it is abhorrent in any way, shape or form,”<sup>276</sup> as well as Justices William Brennan and Thurgood Marshall’s declaration, dissenting in *Martinez-Fuerte*: “That law in this country should tolerate use of one’s ancestry as probative of possible criminal conduct is repugnant under any circumstances.”<sup>277</sup>

Though noble, these rhetorical statements are simply wrong. If we accept that the government has a compelling interest in combating crime and that the legislature has properly set forth prohibited conduct in the penal code, there is no valid *constitutional* barrier to using race in policing if the three narrow conditions are satisfied—if the policing technique is narrowly tailored to the traditional law enforcement interest in fighting crime. Race in the policing context should not be treated differently than race in other constitutional contexts. If racial profiling satisfies the three narrow conditions, then opposition to racial profiling should be based on the grounds of *affirmative action*. Note that, although there may be a compelling law enforcement reason to engage in racial profiling, there may also be a compelling governmental interest in reducing the minority representation in the carceral population. The law enforcement interest is not the only possible compelling interest. Because of this country’s history of institutional racism—or for other articulable compelling reasons—it could be argued that the police should minimize the minority carceral population by profiling white offenders. Here too the argument should be framed in terms of affirmative action, not in terms of barring the consideration of race in the criminal justice context. Conversely, if racial profiling does not satisfy any one of the three conditions, then racial profiling should be conditioned on *compensating* innocent minority motorists who are searched for wasting their time, for diminishing their dignity, and for instilling fear. If one of the conditions is not satisfied, innocent minority motorists are being used for other purposes—for example, to increase search success rates regardless of a ratchet effect—and they should be compensated for the taking.

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<sup>273</sup> Gross and Livingston 2002:1431.

<sup>274</sup> Gross and Barnes 2002:106.

<sup>275</sup> Quoted in Mosher, Miethe, and Phillips, *The Mismeasure of Crime* at 183.

<sup>276</sup> Quoted in Alschuler 2002:163 n.3.

<sup>277</sup> 428 U.S. at 571 n.1 (BRENNAN, J., dissenting).



In the end, the overwhelming opposition to racial profiling is a beacon that sheds light on the larger issue of criminal profiling more generally. This is counter-intuitive because most people in the criminal justice system endorse criminal profiling as a law enforcement tool. Practically no one questions the practice. In fact, even those most adamantly opposed to *racial profiling* support the larger practice of criminal profiling. David Harris, for instance, writes about criminal profiling in glowing terms:

In practical terms, there simply aren't enough police officers or resources to keep every person and every place under surveillance. . . so officers welcome any tool to help them identify the most likely lawbreakers. Profiles enable the police to create portraits of criminals using facts instead of gut instinct or wishful thinking. Profiles can systematically pool collective police experience into information that is comprehensive, solid, and accurate—something much better than the selectively remembered war stories of individual officers. Compiling this information into a real picture of criminal activity on the street should offer a better basis for suspicion than simple intuition.<sup>278</sup>

Harris argues that certain kinds of profiling are dangerous—namely the informal, “less rigorous and less structured” types of profiling (Harris 2002:26)—but not that *criminal profiling* itself raises any problems.<sup>279</sup>

The trouble is, criminal profiling tends to aggravate the prejudices and biases that are built into the penal law and criminal law enforcement. The criminal law is by no means a neutral set of rules. It is a moral and political set of rules that codifies social norms, ethical values, political preferences, and class hierarchies. Criminal enforcement priorities exploit these values and preferences. They help promote the interests of some and hinder the interests of others. Every decision to deploy law enforcement resources in one particular direction privileges the security of some over the security of others. The decision to expend a lot of law enforcement resources on gun-oriented policing, for instance, involves a trade-off. It may mean less police presence on university campuses, which may result in higher incidences of sexual assault. It may mean less investment in enforcement of securities regulations and more insider trading. It may

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<sup>278</sup> Harris 2002:16.

<sup>279</sup> Harris argues that the danger of informal profiling is that the profiles are most often *wrong*. “Drawing on only a small, unrepresentative sample of events,” Harris explains, “these less formal profiles can easily become dangerously inaccurate” (Harris 2002:27). He contrasts these inaccurate, informal profiles based on hunches to formal profiles “based on hard data accumulated methodically over time.” (Harris 2002:26). The problem, according to Harris, is the increased reliance on the informal and inaccurate profiles. “When informal profiling is the norm, evidence that supports a view other than the prevailing wisdom will not change what an officer thinks, even if, in any fair and objective sense, it strongly contradicts these beliefs. Thus the use of informal profiling presents a stark and real danger” (Harris 2002:27–28). This dichotomy between accurate and inaccurate profiles, however, is off the mark. An inaccurate profile is, obviously, useless and dangerous. The question is whether an accurate profile also has consequences. In this essay, I argue, there are two important and troublesome consequences: first, the use of the profile may in fact increase long-term crime trends. Second, the use of profiles *per se* create social distortions. These apply to profiling especially when the profiles *are* reliable.

mean less attention to identity theft and more cases of credit card fraud. Where the state allocates law enforcement resources reflects not only a moral evaluation of harm and, too often, a pragmatic assessment of where it is easiest to detect crime, but also importantly an ideological dimension that has a lot to do with class, power, and politics. The decision to enforce and penalize robberies more severely than, for example, corporate malfeasance—even though the financial consequences of the latter may dwarf the former—reflects not only a moral assessment of harm, but also importantly an ideological dimension. As sociologist Jack Katz provocatively suggests in *Seductions of Crime*, any group that is the target of criminal law enforcement is, at that point in time, either no longer an elite or in battle with the established powers.<sup>280</sup>

Most of the time, our criminal law definitions and law enforcement priorities emphasize the frailties of some and ignore the frailties of others. We do this, in part, to protect ourselves—hiding our own frailties at the expense of others. This too is human. It is, itself, a way of privileging oneself or ones own—a normal tendency born of ambition, self-preservation, and compassion for our kind, mixed with a desire for power and social standing, politics and ideology. But the reality is, human frailty is pretty well distributed across race, class, and social distinctions. If we look carefully, it is even well distributed across gender lines. Domestic murders, for instance, are almost even male-female.<sup>281</sup> Criminal profiling serves only to accentuate the ideological dimension of the criminal law. It aggravates the structural prejudices and biases built into the law. It hardens the purported race, class, and power relations between certain offenses and certain groups. In this sense, it serves to polarize social and political divisions rather than defuse them. This is, naturally, a good thing for those of us who are on the winning side. It is also a good thing if we think that we have developed a criminal law scheme that actually does identify and isolate the truly terrible crimes. It is great when we pursue child molesters, terrorists, and serial killers. But the problem is, the criminal law is by no means limited to these heinous and egregious crimes. Instead, the criminal law preoccupies itself with the grey area—drug use, delinquency, quality-of-life offenses.

Criminal profiling is problematic precisely because it exacerbates the correlation between the profiled crime and the profiled trait, reinforcing the public perception that certain groups are more prone to crime than others. It may be efficient to target resources this way, but it also makes matters seem worse than they really are. If law enforcers profile for nepotism among politicians, they are likely to give politicians a bad reputation. If regulators profile for crimes of financial greed among industry leaders, they are likely to aggravate perceptions of capitalist greed. If administrators profile for plagiarism among historians, they likely are going to ruin the reputation of history as a discipline. Assuming that these profiles are accurate—that the enforcers are focusing on correct predictive traits—there is every reason to perceive politicians as nepotistic, industrialists as greedy, and historians as plagiarists. However, profiling will make matters seem worse than they really are. Profiling will accentuate these associations. And this

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<sup>280</sup> Jack Katz, *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* 43 (New York: Basic Books 1988).

<sup>281</sup> See Katz 1988:47.

becomes particularly problematic when only certain offenses are criminalized, targeted, and enforced.

Because of the ratchet effect, racial profiling is likely to significantly boost the general perception that minorities are drug users and drug couriers and unevenly distribute criminal records, corrections, and post-punitive collateral consequences. In this sense, racial profiling is an excellent example of how criminal profiling accentuates embedded prejudices in the criminal law. But the same problem would attach to any other form of profiling, whether of the wealthy for tax evasion or of single mothers for welfare fraud. The goal of our law enforcement should not be to aggravate our distorted prejudices about human frailty by optimizing on specific traits, but to respond evenly to incidences of crime and thereby distribute the coercive force of the law more evenly across society.

There is an idea shared by most in civil society that the criminal law merely polices the civil boundaries between individuals and is, in this sense, neutral. This is a liberal political theoretic idea that goes back to Thomas Hobbes and John Locke. The idea is that the civil laws serve as “hedges” that keep citizens from interfering with each other and that the criminal law merely polices these “hedges”—that individuals should be allowed to pursue their own conception of the good freely, unhindered by the actions of others, within these neutral boundaries. The liberal tradition in the 19<sup>th</sup> century expanded on this insight, helping to define the hedges in terms of “harm.” The harm principle, in this sense, represented a sustained effort to locate the hedges in a neutral way, acceptable to all. In the 20<sup>th</sup> century, conceptions such as the veil of ignorance or neutral principles were introduced to shore up the tattered neutrality of those hedges.

The criminal law, however, does not merely police the civil hedges. The criminal law locates where those hedges are. It places the hedges, and in the process, distributes wealth, power, and social status. The criminal law and criminal law enforcement are, in this sense, instruments that are deployed by some and experienced by others. It may be hard to avoid this. What can more easily be avoided, though, is allowing a few of us to use criminal profiling as a leveraging mechanism to magnify and accentuate those distortions.

## Appendix

### I. Under Conditions of Equal and Constant Elasticity of Offending to Policing:

Assuming resource constraint, racial profiling will decrease the profiled crime under conditions of equal and constant elasticity of offending to policing if the minority motorist offending rate is greater than the white motorist offending rate. This can be derived from the definition of elasticity.

For purposes of notation, let  $r \in \{M, W\}$  denote the race of the motorists, either minority or white. Let  $Pop_r$  denote the representation of each racial group in the total population. Let  $O_r$  denote the offending rate of each racial group. Let  $\Delta O_r$  denote the *absolute value* of the change in the offending rate of the racial group from Time 1 (no racial profiling) to Time 2 (racial profiling). Let  $I_r$  denote the internal search group rate for each racial group. Let  $\Delta I_r$  denote the *absolute value* of the change in the internal search rate for each racial group from Time 1 to Time 2. Let  $S$  denote the search rate for the total population.

From the definition of elasticity, if minority and white motorists have the same and constant elasticity, then the following is true:

$$\frac{(\Delta O_M / O_M)}{(\Delta I_M / I_M)} = \frac{(\Delta O_W / O_W)}{(\Delta I_W / I_W)} \quad (A1)$$

Given that, at Time 1, the police are engaged in color-blind policing, the internal group search rates are going to be the same for both racial groups. In other words, we know that:

$$S = I_M = I_W \quad (A2)$$

We also know that the change in internal search rates as between the different racial groups will offset each other since, as noted in text, we are assuming a resource constraint such that there are fixed law enforcement resources. This implies that  $S$  is a constant: the total number of searches does not vary, what the police need to do is distribute their searches between white and minority motorists. Since the total number of searches does not vary, the overall rate of searches for the total population remains constant. By definition, then, the search rate of minority motorists is related to the search rate of white motorists. We can determine the relationship between the change in the internal search rate for each racial group as follows, given that the Time 1 total search rate will be the same as the Time 2 total search rate:

$$S = Pop_M I_M + Pop_W I_W = Pop_M (I_M + \Delta I_M) + Pop_W (I_W - \Delta I_W) \quad (A3)$$

If we work this through the same way we worked through equation (1) in text, this implies that:

$$\Delta I_M = \frac{Pop_w}{Pop_M} \Delta I_W \quad (A4)$$

Given that we are assuming a minority motorist representation of 20 percent, equation (A4) is the same as:

$$\Delta I_M = 4 \Delta I_W \quad (A5)$$

Using equation (A2) and (A5), we can substitute values for the denominator in equation (A1). From the definition of elasticity, if minority and white motorists have the same and constant elasticity, then the following is true:

$$(\Delta O_M / O_M) = 4 (\Delta O_W / O_W) \quad (A6)$$

If we work this through, equation (A6) is the same as the following:

$$(\Delta O_W / \Delta O_M) = 0.25 (O_W / O_M) \quad (A7)$$

We know from equation (6) in text that racial profiling only decreases crime if:

$$0.25 > \frac{\Delta O_W}{\Delta O_M} \quad (A8)$$

If we substitute from equation (A7), this holds true only if:

$$0.25 > 0.25 \frac{O_W}{O_M} \quad (A9)$$

This is only true if:

$$O_M > O_W \quad (A10)$$

In other words, racial profiling will only decrease crime under these conditions if the offending rate of minority motorists is higher than that of white motorists.

## II. Under Conditions of Lower Elasticity of Offending to Policing for Minority Motorists:

Assuming resource constraint and lower elasticity of offending to policing for minority motorists, racial profiling will only decrease the profiled crime under very specific conditions concerning the relationship between elasticities and offending. This can be derived, again, from the definition of elasticity.

From the definition of elasticity, if minority motorists have lower elasticity than white motorists, then the following is true:

$$x \frac{(\Delta O_M / O_M)}{(\Delta I_M / I_M)} = \frac{(\Delta O_W / O_W)}{(\Delta I_W / I_W)} \quad \text{where } x > 1 \quad (\text{A11})$$

If we let  $E_r$  denote the elasticity of offending to policing for each racial group, this is equivalent to saying that:

$$x = E_W / E_M \quad (\text{A12})$$

Using equation (A2) and (A5), again we can substitute values for the denominator in equation (A11). From the definition of elasticity, then, the following is true:

$$x (\Delta O_M / O_M) = 4 (\Delta O_W / O_W) \quad (\text{A13})$$

If we work this through, equation (A13) is the same as the following:

$$(\Delta O_W / \Delta O_M) = 0.25 x (O_W / O_M) \quad (\text{A14})$$

We know from equation (6) in text that racial profiling only decreases crime if:

$$0.25 > \frac{\Delta O_W}{\Delta O_M} \quad (\text{A15})$$

If we substitute from equation (A14), this holds true only if:

$$0.25 > 0.25 x \frac{O_W}{O_M} \quad (\text{A16})$$

This is only true if:

$$O_M > x O_W \quad (\text{A17})$$

In other words, racial profiling will only decrease crime under these conditions if minority motorists offending is greater than white times their elasticity differential  $x$ , which from equation (A12) we know is  $E_W / E_M$ .

### III. Under Conditions of Lower Elasticity of Offending to Policing for White Motorists:

Assuming resource constraint and lower elasticity of offending to policing for white motorists, racial profiling will decrease the profiled crime if minority motorist offending is higher than white motorist offending. This can be derived, again, from the definition of elasticity.

From the definition of elasticity, if white motorists have lower elasticity, then the following is true:

$$\frac{(\Delta O_M / O_M)}{(\Delta I_M / I_M)} = x \frac{(\Delta O_W / O_W)}{(\Delta I_W / I_W)} \quad \text{where } x > 1 \quad (\text{A18})$$

Using equation (A2) and (A5), again we can substitute values for the denominator in equation (A18). From the definition of elasticity, then, the following is true:

$$(\Delta O_M / O_M) = 4 x (\Delta O_W / O_W) \quad (\text{A19})$$

If we work this through, equation (A19) is the same as the following:

$$(\Delta O_W / \Delta O_M) = \frac{O_W}{4 x O_M} \quad (\text{A20})$$

We know from equation (6) in text that racial profiling only decreases crime if:

$$0.25 > \frac{\Delta O_W}{\Delta O_M} \quad (\text{A21})$$

If we substitute from equation (A20), this holds true only if:

$$0.25 > \frac{O_W}{4x O_M} \quad (\text{A22})$$

This is only true if:

$$O_M > \frac{O_W}{x} \quad (\text{A23})$$

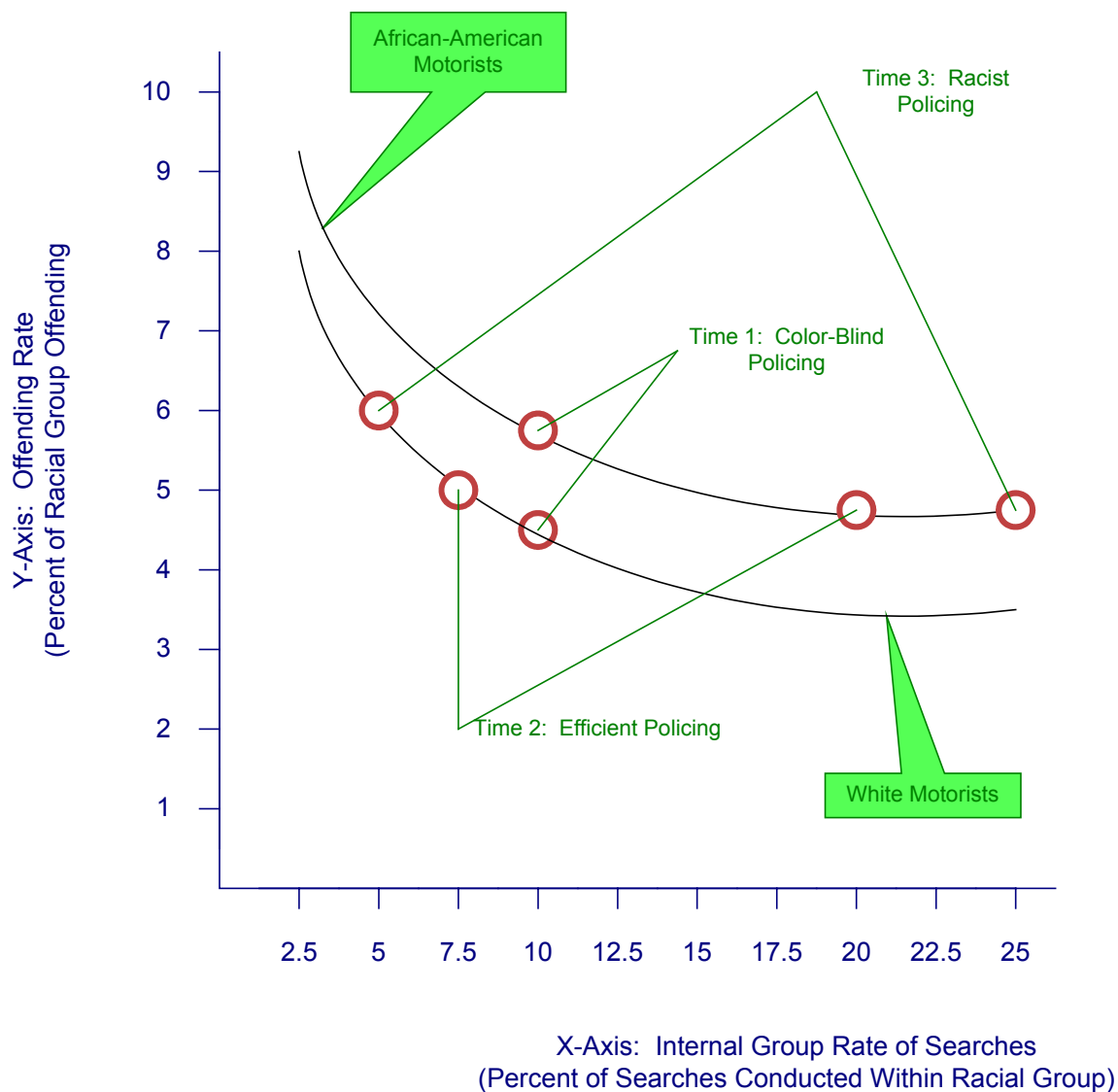
But since  $x$  is greater than 1, this is going to be true whenever minority motorist offending is greater than white motorist offending. In other words, racial profiling will decrease crime under these conditions if minority motorists offending is greater than white offending.

Readers with comments may address them to:

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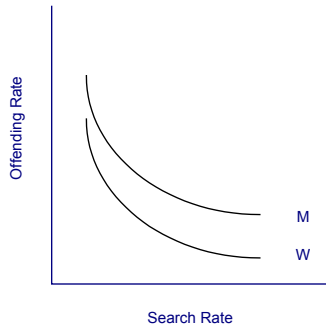


GRAPH I.A.1: An Economic Model of Racial Profiling

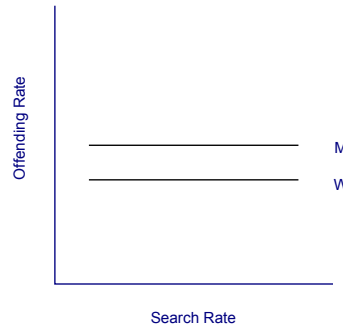


# Graph II.B.i.1

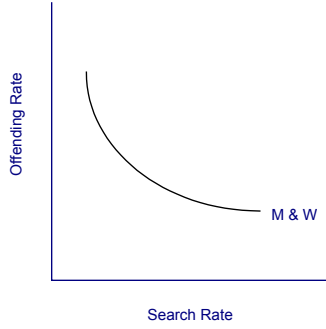
(1) Minority Higher Offending and Elastic



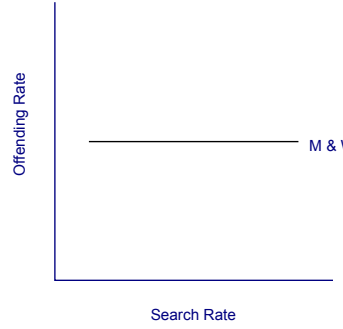
(2) Minority Higher Offending and Inelastic



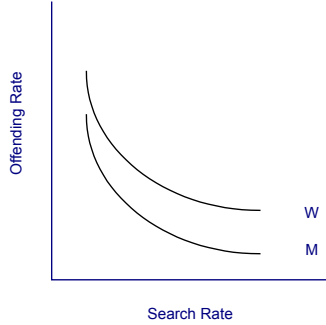
(3) Same Offending and Elastic



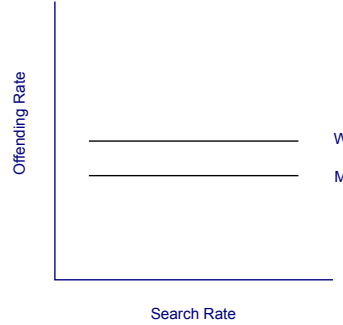
(4) Same Offending and Inelastic



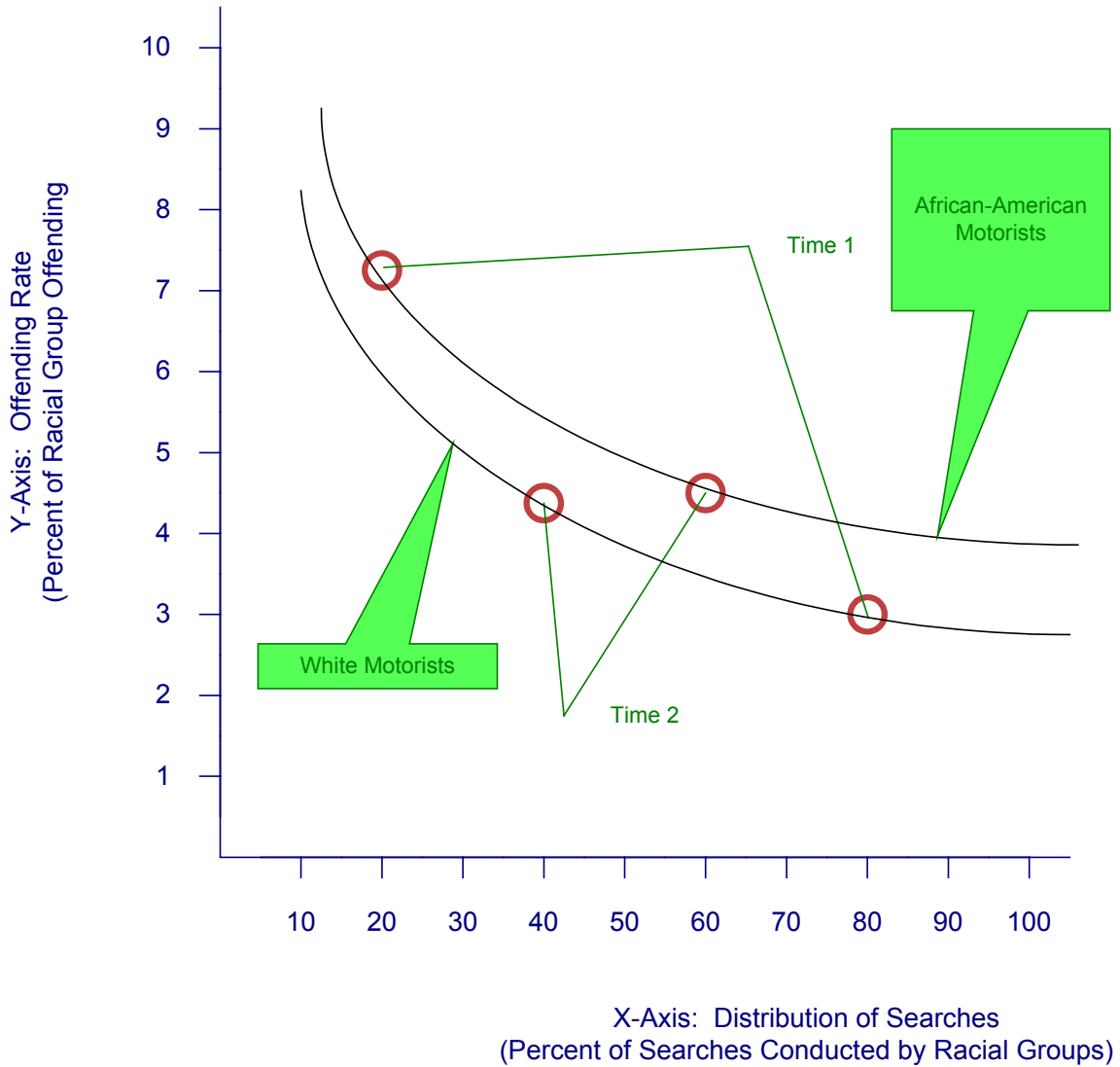
(5) White Higher Offending and Elastic



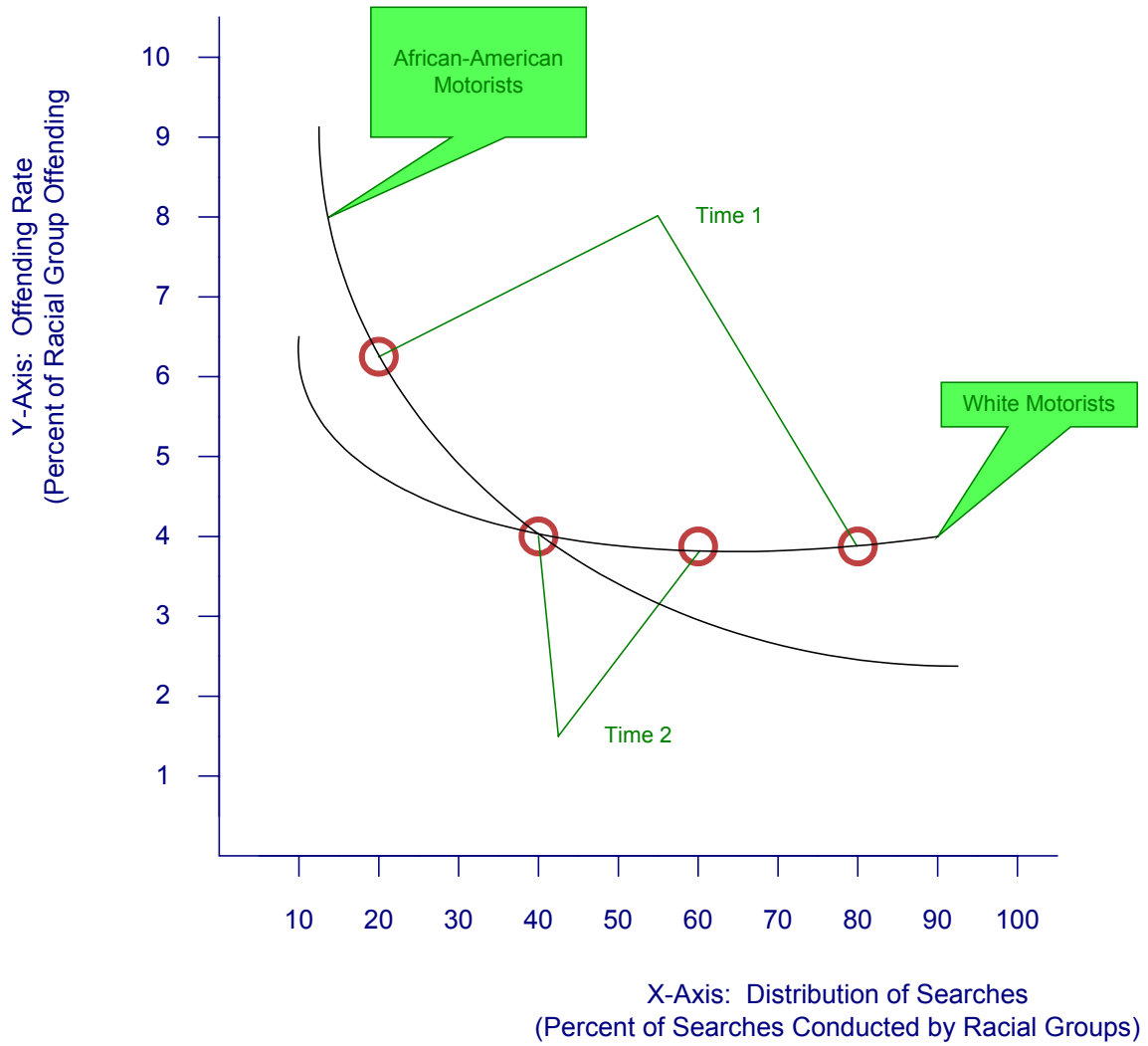
(6) White Higher Offending and Inelastic



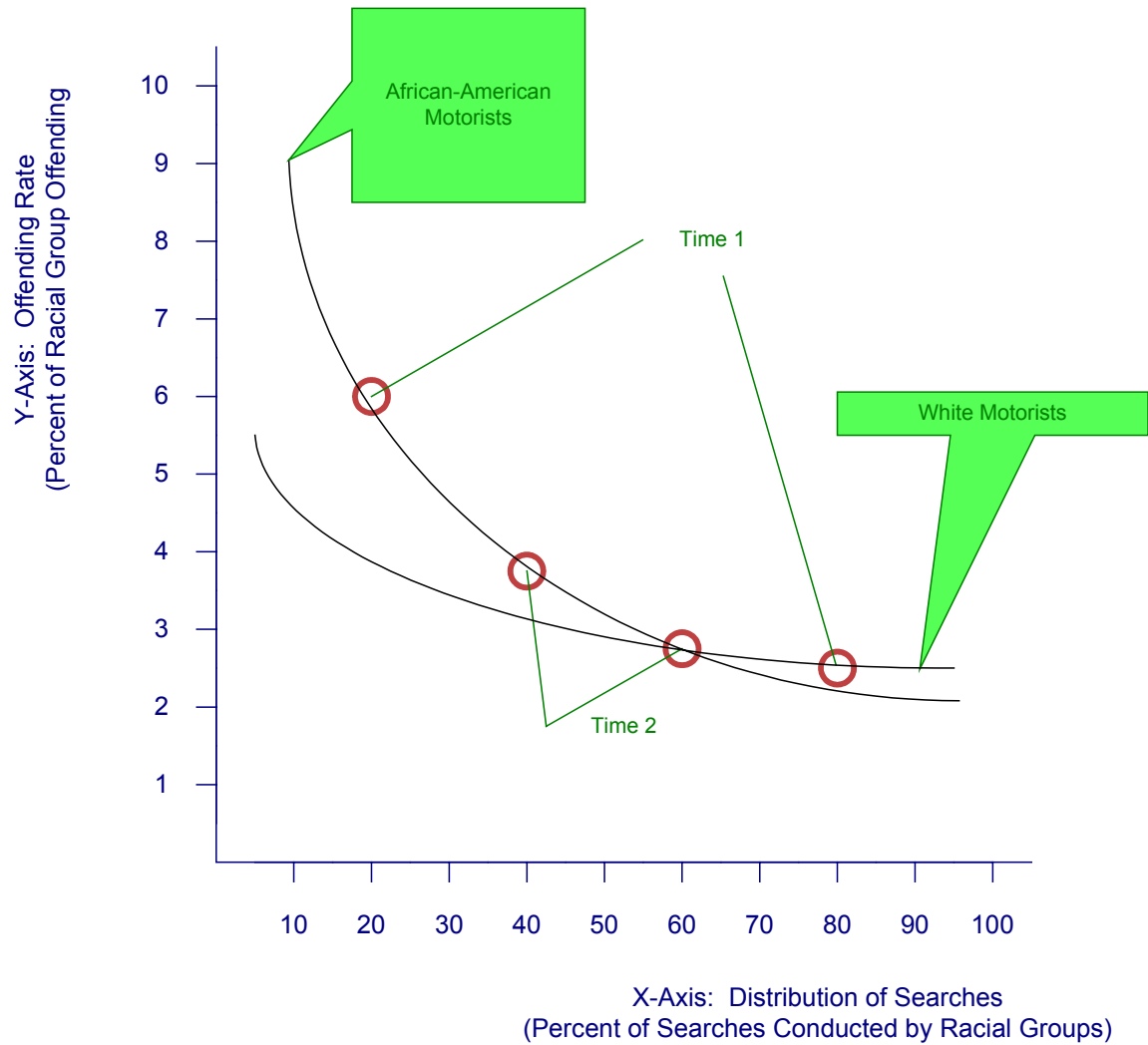
GRAPH II.B.ii.1: Basic Assumptions



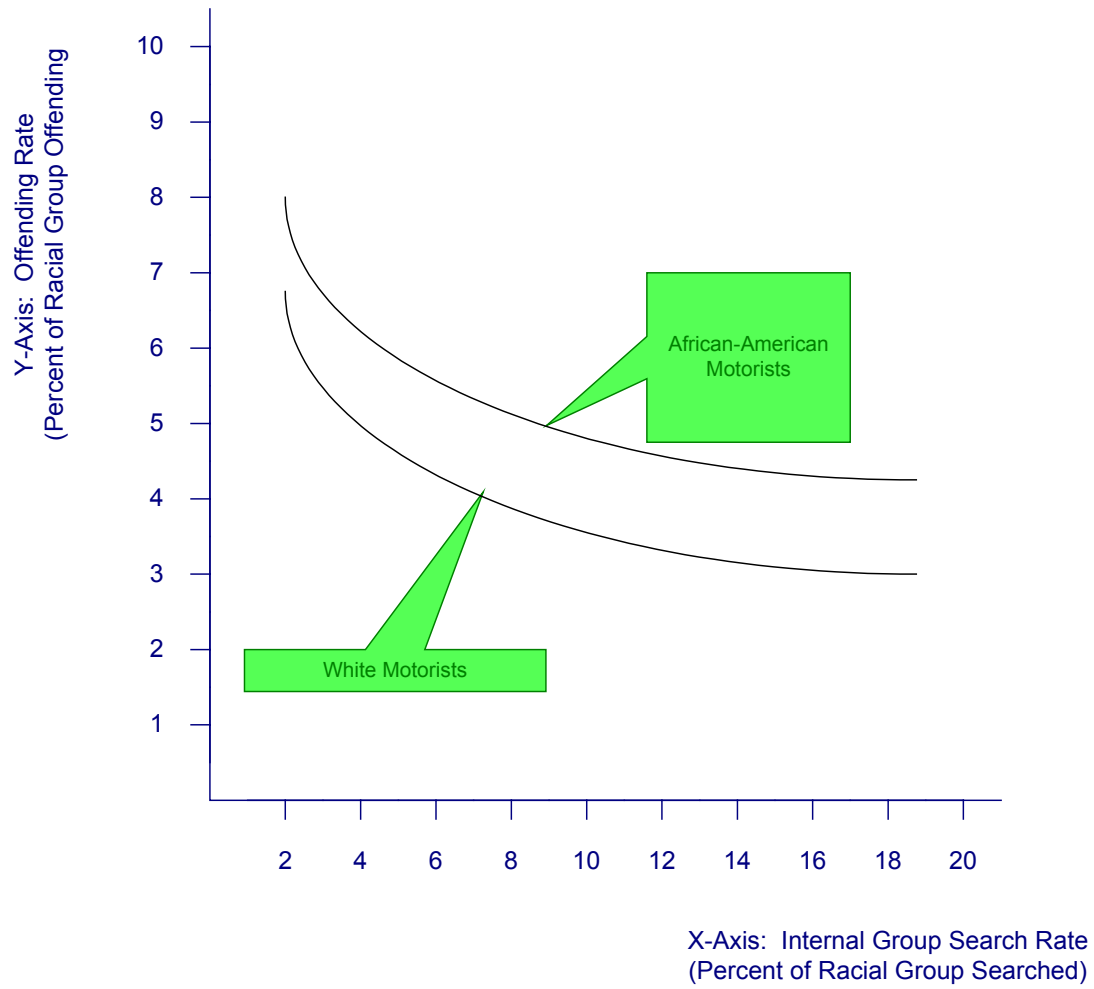
GRAPH II.B.ii.2: Assumptions Necessary to Avoid a Ratchet Effect



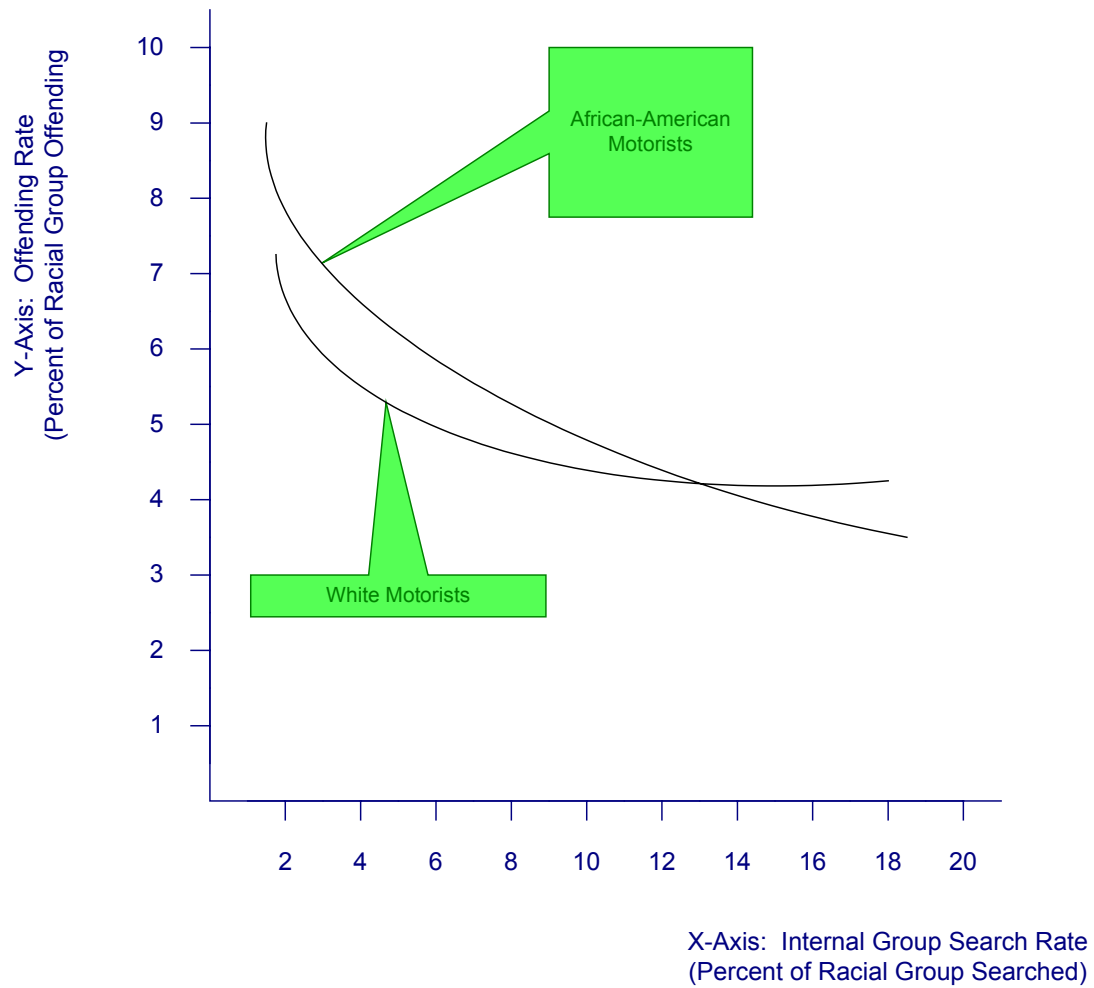
GRAPH II.B.ii.3: Different Elasticity and Offending, But No Equal Hit Rates



GRAPH IV.B.i.1: CONSISTENTLY HIGHER OFFENDING AMONG AFRICAN-AMERICAN MOTORISTS



GRAPH IV.B.i.2: MOSTLY HIGHER OFFENDING AMONG AFRICAN-AMERICAN MOTORISTS



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