CHAPTER FIVE

The Ratchet Effect:
An Overlooked Social Cost

The use of actuarial methods does not withstand scrutiny on rational-theory grounds. Profiling may actually encourage, rather than deter, the overall commission of the targeted crime. But deterrence, naturally, is not the only argument for using instruments that predict criminality. A second and equally powerful argument relies on the incapacitative effect of group prediction: actuarial methods will increase the success rate of searches, audits, parole decision making, and other criminal justice decisions, and therefore enhance our ability to incarcerate criminal offenders. Put simply, if we search more high-offending motorists, we will detect more contraband; and if we deny parole to more likely recidivists, we will prevent them from reoffending. The use of actuarial measures will mean more tax evaders paying their fair share of national expenses, more drug traffickers behind bars, and more recidivists locked up in prison.

As noted in the introduction, the incapacitation argument is compelling, especially in light of the radical drop in crime experienced throughout the United States during the 1990s and 2000s. Many sociologists and economists attribute the sharp drop in crime—or at least, a significant portion of that drop—to the increase in the number of prison inmates in this country. Steven Levitt's research demonstrates that the massive investment in prisons contributed to the drop in crime:[1] the best evidence suggests that almost a fourth of the crime drop during the 1990s was attributable to prison expansion.[2]

In evaluating the argument from incapacitation, however, it is crucial to distinguish our recent experience with prison growth from the more ordinary amount of incapacitation that can be achieved by shifting fixed

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law enforcement resources in the direction of actuarial prediction. It is important to compare apples to apples and oranges to oranges. Any evaluation of the first—the massive, multibillion-dollar investment in prison expansion and incarceration—requires a full assessment and comparison of alternative crime-fighting measures. The investment in the first case is truly extraordinary: if we assume that it costs approximately $25,000 per year to imprison an adult,[3] given a prison population in excess of two million people, the cost exceeds $50 billion in one year. In order to properly evaluate this massive investment, we would need to explore other proven crime-fighting techniques—such as increased police presence or drug treatment programs—and to estimate their likely effect on crime at a similar investment. Such analysis is essentially orthogonal to the question at hand here, namely, whether shifting relatively fixed law enforcement resources toward actuarial measures is advantageous from a cost-benefit point of view.

With regard to the second issue—the more ordinary incapacitation effects associated with the use of actuarial methods in policing, parole, or sentencing—the incapacitation benefits are likely to be relatively small. For anyone who believes in rational-action theory, the benefits actually wash out completely: there is no incapacitation effect once the hit rates equalize—that is, once the offending rates become the same. If you believe in deterrence, there is no long-term incapacitation effect. There is no gain from imprisoning the recidivist longer than the ordinary citizen once their rates of offending are about the same. There is, in effect, no longer any distinction between the recidivist and the ordinary citizen.

This is an important point, and it is worth emphasizing: in the economic model of criminal profiling, there are no selective incapacitation gains to be had at the Time 2 equilibrium (e.g., in fig. 4.1) by incarcerating higher offenders or more likely recidivists, because, at that point, there is no longer a differential in offending between the different groups. If you believe in rational-action theory—if you believe in deterrence—then there is no argument for selective incapacitation of members of higher-offending groups.

But again, not everyone believes in rationality, especially in the field of crime and punishment. So let's do away with the theoretical premises of rational action theory. What if the offending rates do not equalize? What if the members of the higher-offending group continue to offend at higher rates despite the actuarial measures? Then there are benefits to be had from the selective incapacitation effects of investigating the higher offend-

ing-group, right? Yes. Naturally. But then the proper question is, at what cost? Any analysis here calls for cost-benefit weighing. And in answering this question, we tend to overlook one cost. I call it the "ratchet effect," and it takes center stage in this chapter.

By ratchet effect, I have in mind a very specific social phenomenon that occurs in multiple stages. In simple terms, it is a disproportionality that grows over time. The disproportionality in question is between the makeup of the offending population and the make-up of the carceral population—that is, the population that has criminal justice contacts such as arrest, conviction, fine, probation, imprisonment, parole, or other supervision. So, for instance, if drywall contractors comprise 10 percent of actual tax evaders but 40 percent of persons convicted of tax evasion, there is an imbalance between the offending population and the carceral population. If the IRS then uses the carceral proportion to allocate more resources to drywall contractors, that imbalance will increase. Over time, this process of increasing disproportionality represents what I call a ratchet.

Under ordinary conditions, assuming no rational-action feedback, the use of actuarial methods will have a distortive effect on the targeted population that will operate as a ratchet over time. The distortion occurs when profiling produces a supervised population that is disproportionate to the distribution of offending by racial group. I begin by illustrating this in the policing context.

Policing and Law Enforcement

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

An analogy may be useful here. Imagine that the fishing boats from a village in southern Spain troll at random two bodies of water—the Atlantic

ocean, where cod are relatively sparse, and the Mediterranean, where sea bass are plentiful. The waters are far more dense with fish in the Mediterranean, and an average day's catch nets twice as many bass as a day in the Atlantic nets cod. When the captains fish in an entirely uncoordinated and random manner, the catch of the day in the village includes both cod and sea bass. However, if the captains coordinate and decide to fish a lot more in the more dense Mediterranean, then, at the end of the day, the catch will be larger in overall quantity and will contain proportionally far more sea bass. By shifting more fishing to the higher-density Mediterranean, the captains both increase the overall catch and skew it toward sea bass.

In this illustration, the catch of the day no longer represents a random sampling of the fish population within a certain radius of that port town in southern Spain. To obtain such a random sampling, the captains would need to revert to their earlier practice of fishing at random in an uncoordinated manner (over many months). By targeting the Mediterranean, the catch of the day is now skewed toward sea bass. A tourist visiting the Spanish town, strolling down to the waterfront, and reading the restaurant menus along the port would be misled into thinking that there's nothing but sea bass in the adjacent waters.

The same is true in the policing context. The sea bass, imagine, are the more dense criminals in the higher-offending group; the cod are the more scarce criminals in the lower-offending group. If the police stop and search individuals randomly, regardless of their group membership, then they will dedicate resources evenly across the different groups in relation to their representation in the overall population—say 80 percent of searches of low-offending group members and 20 percent of searches of high-offending group members. The resulting carceral population— persons with correctional traces, whether arrest, conviction, fine, probation, incarceration, or parole—will be a random sampling of the offending population and, naturally, will depend on the rate of offending within each group. As a random sampling of the offending population, the carceral population will reflect perfectly the distribution of offenders between the two groups in society.

If, however, the police profile the higher-offending group members, the resulting carceral population will be skewed toward members of the higher-offending group: these profiled persons will represent a larger proportion of the carceral population than of the offending population. Jails and prisons will be populated by members of the higher-offending population in a manner that is disproportionate to their contribution to

the offending population: there will be far more members of the higher-offending population in jail and prison then there are even among the offending population. Just like the Spanish port town, a visitor walking through the criminal justice system will think that the only kind of offenders present are members of the higher-offending group—the only kind of fish in the offending population is the sea bass.

This disproportion produces a distortive effect on our carceral populations and has a tendency to perpetuate itself. When the disproportion increases, it produces a ratchet effect with potentially devastating consequences for members of the higher-offending group.

Before discussing those detrimental consequences—the hidden costs of using actuarial methods—let me first illustrate the ratchet effect itself with some simple, hypothetical numbers. My purpose is to demonstrate how actuarial measures, by necessity, create the potential for increasing disproportionality between carceral and offending populations. To make things easy, I will use the same hypothetical figures used in chapter 4 to discuss the rational-action model in the policing context. Assume, then, the same city population of 1 million residents, of which 20 percent, or 200,000, are minorities, and the other 80 percent, or 800,000, are majorities. Recall also that we assumed—in order to make any profiling nonspurious—that minorities offend at a higher rate, say 8 percent, versus majorities, who offend at a rate of 6 percent across the board. If the police engage in the same number of random stops and searches the first year, namely, 10,000, effectively searching 1 percent of the population, then under these assumptions we arrive at Time 1 (i.e., no racial profiling) at the same point as earlier: 8 percent of the 2,000 minority searches (or 160 minority searches) will prove successful, and 6 percent of 8,000 majority searches (or 480 majority searches) will prove successful. As for the total criminal population in the city, it would consist of 16,000 minorities (8 percent of the total 200,000 minority population) and 48,000 majorities (6 percent of the total 800,000 majority population)—or a total of 64,000 offenders overall. These simple assumptions and results are reflected in table 5.1.

Several important observations arise from these initial assumptions at Time 1: first, the higher-offending minority group represents 20 percent of the overall population, but 25 percent of the offending population. This makes sense: the higher-offending group makes up more of the offending population than it does the overall population. In fact, it is precisely this disparity that reflects the fact that the higher-offending minority group is offending at higher levels than the majority. Second, a random distribution

TABLE 5.1 **Results of police searches at Time 1**

	Minority	Majority	Aggregate (total)
Group population	200,000	800,000	1,000,000
Distribution of the population (%)	20	80	100
Group offending rate (%)	8	6	6.4
Number of offenders	16,000 (8% of 200,000)	48,000 (6% of 800,000)	64,000
Distribution of offenders (%)	25	75	100
Police searches	2,000	8,000	10,000
Searches (% of relevant population)	1	1	1
Successful searches leading to carceral contact	160 (8% of 2,000)	480 (6% of 8,000)	640
Distribution of carceral contacts (%)	25	75	100

of stops and searches yields a delinquent population—what I call a carceral population—that is 25 percent higher-offending minority and 75 percent lower-offending majority. Again, this makes intuitive sense: if the police engage in random stops and searches—as if they were sampling randomly from the population—then they will achieve a carceral population that reflects perfectly the offending population. Notice that, at this point, everyone in the general population who is offending has the same likelihood of being apprehended: here, a 1-in-100 chance of being caught by the police as a result of a random police search.

Visually representing all this requires some imagination, but it is helpful and useful. As noted earlier, we are assuming here no deterrent effect—no rational response to the change in policing—since we are addressing only the incapacitation argument; however, we can relax this assumption slightly here, for purposes of the graph, and assume a little elasticity—everyone, after all, believes in a least a modicum of rationality. For purposes of this visual representation, I measure the elasticity in terms of the distribution of total resources allocated to the different groups. In other words, instead of graphing offending rate by the internal search rate for the group, I use the comparative search rate for each group—that is, as compared to the other group. Depending on the size of the population and the overall percentage searched, it would be easy to convert this graph to one that measures elasticity by the internal search rate. For purposes of the ratchet discussion, however, it is more appropriate to use comparative group search rates. So, instead of plotting the internal group search rate (the rate of searches within each group) on the x-axis, the graph plots the
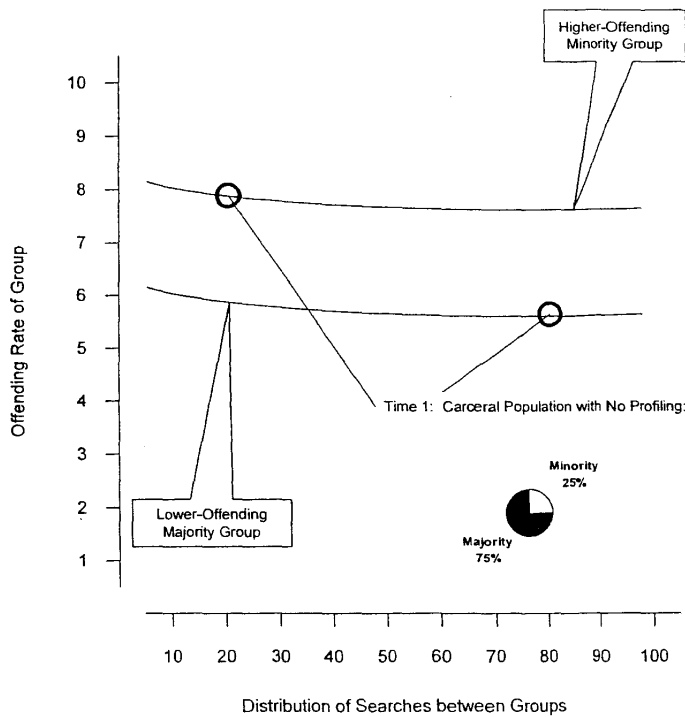
FIGURE 5.1 Basic model of profiling

total distribution of searches between the two groups. Let's also assume, naturally, that the higher-offending minority group is offending consistently at higher rates than the majority. On the basis of these assumptions, I can represent a simple model of policing at Time 1, with no criminal profiling, by the graph shown in figure 5.1.

As the graph shows, if the police engage in random policing and, as a result, are taking a random sample of the total population, then the police will stop and search approximately 20 percent minority and 80 percent majority members. Their searches will then reflect the offending rates of each group, so that the new carceral population—persons apprehended and touched by the criminal justice system—will be distributed 25 percent

TABLE 5.2   Results of police searches at Time 2

	Minority	Majority	Aggregate (total)
Group population	200,000	800,000	1,000,000
Distribution of the population (%)	20	80	100
Group offending rate (%)	8	6	6.4
Number of offenders	16,000	48,000	64,000
	(8% of 200,000)	(6% of 800,000)	
Distribution of offenders (%)	25	75	100
Police searches	4,000	6,000	10,000
Searches (% of relevant population)	2	0.75	1
Successful searches leading to carceral contact	320	360	680
	(8% of 4,000)	(6% of 6,000)	
Distribution of carceral contacts (%)	47	53	100

minority and 75 percent majority. This is a natural reflection of the of-
fender distribution.

Now, let's continue with our earlier assumptions. Assume at Time 2
that law enforcement decides to profile higher-offending minorities for
searches. The purpose of the profiling is not to decrease the offending rate
of higher-offending minorities, but to incapacitate more of the higher-
offending group. As we did earlier, we assume here, then, that the police
decide to search twice as many minorities, and that, since they have the
same amount of police resources, they still only search 1 percent of the
population. The police search four thousand minorities and six thousand
majorities. Table 5.2 shows the effect on successful searches and on total
crime, using the new values.

Table 5.2 reveals the ratchet in operation: notice that the distribution of
new carceral contacts has shot up from Time 1 — where it reflected perfectly
the offender breakdown of 25/75 — and now stands at 47 percent members
of the higher-offending minority and 53 percent members of the lower-
offending majority. The disparity between the distribution of offenders
(25/75) and the distribution of carceral contacts (47/53) is precisely the
distortion created by using actuarial methods. It is what begins the ratchet.

Continuing with our earlier analogy to the Spanish port town, notice
that the "catch of the day" is bigger: whereas at Time 1 the searches net-
ted 640 new carceral contacts, at Time 2 the same number of searches
nets 680. In addition, more of those catches, proportionally, are mem-
bers of the higher-offending minority group. Thus, if the police engage in
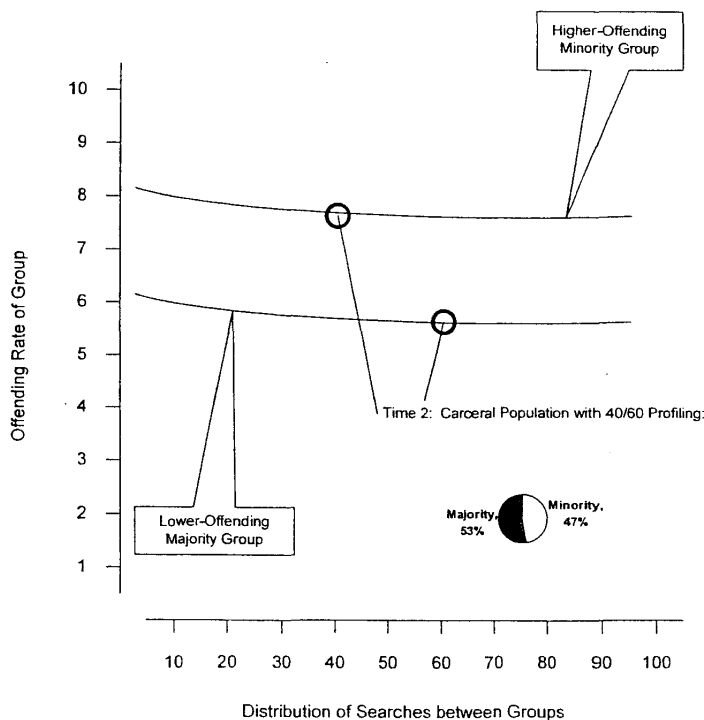criminal profiling based on the higher offending rates of the minority

FIGURE 5.2 Criminal profiling at Time 2

group members, the carceral distribution will become skewed. Figure 5.2 provides a visual representation of table 5.2.

Now, if the police then rely on these statistics to reflect the actual breakdown of the offending population and engage in more profiling of the minority group, the distortion will increase. This is illustrated in table 5.3, where the police distribute their stops and searches along the lines of the latest carceral distribution at Time 2 (fig. 5.2)—47 percent of stops and searches of the higher-offending minority group and 53 percent of the lower-offending majority. Notice in table 5.3 that at Time 3 the distribution of carceral contacts becomes even more disproportionate to the actual offending distribution.

TABLE 5.3   **Results of police searches at Time 3**

	Minority	Majority	Aggregate (total)
Group population	200,000	800,000	1,000,000
Distribution of the population (%)	20	80	100
Group offending rate (%)	8	6	6.4
Number of offenders	16,000 (8% of 200,000)	48,000 (6% of 800,000)	64,000
Distribution of offenders (%)	25	75	100
Police searches	4,700	5,300	10,000
Successful searches leading to carceral contact	376 (8% of 4,700)	318 (6% of 5,300)	694
Distribution of carceral contacts (%)	54	46	100

Again, the overall "catch" has increased—up from 680 at Time 2 to 694 at Time 3. In addition, again, the distribution of new carceral contacts has become more disproportionate to the distribution of offenders. At both times the offending distribution is at 25/75, but at Time 2 the carceral distribution was 47/53, and at Time 3 it is 54/46. Criminal profiling, under these assumptions of no or minimal rational action, leads ineluctably to a ratchet effect on the carceral population.[4]

If the police continue to use prior carceral data to update their resource allocation, chasing the new offending distributions, the disparity will simply continue to increase. So, for instance, at Time X, when police officers are stopping and searching 60 percent higher-offending minorities and 40 percent lower-offending majorities, the disparity in the new carceral population will increase to 66.66 percent minority and 33.33 percent majority, as shown in table 5.4, where the police distribute their stops and searches 60/40—60 percent of stops and searches of the higher-offending minority group and 40 percent of the lower-offending majority. Notice that the distribution of carceral contacts becomes even more disproportionate to the actual offending distribution. Figure 5.3 provides a visual representation of table 5.4.

In sum, this illustration reveals two important trends. First, the efficiency of the police stops is increasing: each year, the police detect more offenders based on the same number of stops. Second, the group distribution of the newly apprehended offenders becomes increasingly out of proportion with the offending ratio. Criminal profiling, when it works, is a self-confirming prophecy. It aggravates over time the perception of a correlation between the group trait and crime. What I call a ratchet effect

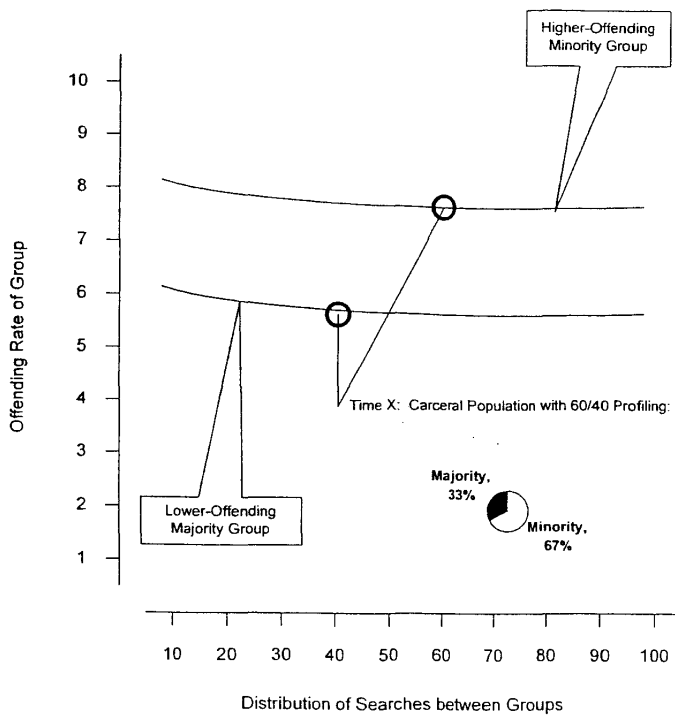FIGURE 5.3 Criminal profiling at Time X

TABLE 5.4 **Results of police searches at Time X**

	Minority	Majority	Aggregate (total)
Group population	200,000	800,000	1,000,000
Distribution of the population (%)	20	80	100
Group offending rate (%)	8	6	6.4
Number of offenders	16,000 (8% of 200,000)	48,000 (6% of 800,000)	64,000
Distribution of offenders (%)	25	75	100
Police searches	6,000	4,000	10,000
Successful searches leading to carceral contact	480 (8% of 6,000)	240 (6% of 4,000)	720
Distribution of carceral contacts (%)	66.66	33.33	100

could be called a "compound" or "multiplier" effect of criminal profiling: profiling may increase disparities in the carceral population.

The important point of this thought experiment is that criminal profiling accentuates the apparent correlation between the group trait and criminality by skewing the carceral population, which is what we all use to proxy criminality. And it does so even if all the underlying assumptions are correct—namely, that the higher-offending group is in fact offending at a higher rate, and that the practice of criminal profiling is entirely justifiable. Naturally, we would see the same effect if the assumptions were wrong and the profiled group did not in fact offend more. Criminal profiling would also create a ratchet under those conditions: the same result, namely, increased disproportionality in the balance of the incarcerated population, would obtain if all groups had the same offending rate, but we allocated *slightly more* of our law enforcement resources to one minority group than their representation in the general population would warrant. Others have underscored this point: if you spend more time looking for crime in a subgroup, you will find more crime there.[5] The point here, though, is that the same type of effect will likely occur even on the assumption of differential offending—even if we accept fully the assumptions offered to justify criminal profiling and, in many cases, racial profiling. This will be especially true for the more unreported types of crime such as drug possession, gun-carrying, or tax evasion.

The distortive effect of criminal profiling on the new carceral population will produce a ratchet whenever law enforcement relies on the evidence of correctional traces—arrests or convictions—in order to reallocate future law enforcement resources. And, given the paucity of reliable information on natural offending rates, law enforcement often does rely heavily on arrest, conviction, and supervision rates in deciding how to allocate resources. As Peter Verniero, Attorney General 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."[6] This accelerates the imbalance in the prison population and aggravates the secondary impact on the profiled population.

One other very important point: the same ratchet effect applies under assumptions of rational action. If, for instance, 60 percent of minority drivers on the highway must be searched to achieve equal hit rates for minority and majority drivers—which is apparently what is going on

in Maryland (see chapter 4) if we assume that the rational-actor model explains the equal hit rates—then there is undoubtedly a ratchet: given the exact same hit rates, minority drivers will comprise 60 percent of the new carceral population—persons with negative police contacts resulting in some correctional trace, whether simply an arrest or more serious carceral supervision. There is hardly any chance, however, that minority drivers comprise 60 percent of the offending population. No one suggests as much. The difference between targeted persons representing more than their share of actual offenders, yet 60 percent of persons with a correctional trace reflects a ratchet effect that will only be aggravated with time if law enforcement relies on that 60 percent metric.

The ratchet effect, in other words, operates just as much under conditions of elasticity—under the assumptions of rational choice. The extent of the ratchet, in fact, will depend on the amount of elasticity within each group and on the relative offending rates. This can be demonstrated, again, using the earlier illustration. Assume here that the criminal profiling has produced some deterrence among the higher-offending group. The Time 1 table (table 5.1) and graph (fig. 5.1), naturally, remain the same since, at Time 1, the police are not engaged in criminal profiling. However, at Time 2.1 (a modified Time 2 with racial profiling), the situation looks as shown in table 5.5.

Table 5.5 reveals, again, the ratchet in operation: notice that the distribution of new carceral contacts has increased from Time 1—where it

TABLE 5.5   **Results of police searches at Time 2.1**

	Minority	Majority	Aggregate (total)
Group population	200,000	800,000	1,000,000
Time 1 offending rates (%)	8	6	6.4
Time 1 distribution of offenders (%)	25	75	100
Police searches	4,000 (40%)	6,000 (60%)	10,000 (100%)
Time 2.1 offending rates (%)	7.5	6.5	6.7
Time 2.1 offending population	15,000 (7.5% of 200,000)	52,000 (6.5% of 800,000)	67,000
Time 2.1 distribution of offenders (%)	22.4	77.6	100
Successful searches leading to carceral contact	300 (7.5% of 4,000)	390 (6.5% of 6,000)	690
Distribution of carceral contacts (%)	43.5	56.5	100

reflected perfectly the offender breakdown of 25/75—and now stands at
43.5 percent members of the higher-offending minority and 56.5 percent
members of the lower-offending majority. The disparity between this dis-
tribution of new carceral contacts (43.5 percent minority; 56.5 percent
majority) and the new distribution of offenders in the general population
(which is now 22.4 percent minority and 77.6 percent majority, reflecting
the change in offending rates associated with deterrence) is precisely the
ratchet. This is the distortion created by using actuarial methods. Thus,
even assuming rational action, if the police engage in criminal profiling
based on the higher offending rates of the minority group members, the
new carceral distribution will become skewed. Figure 5.4 provides a visual
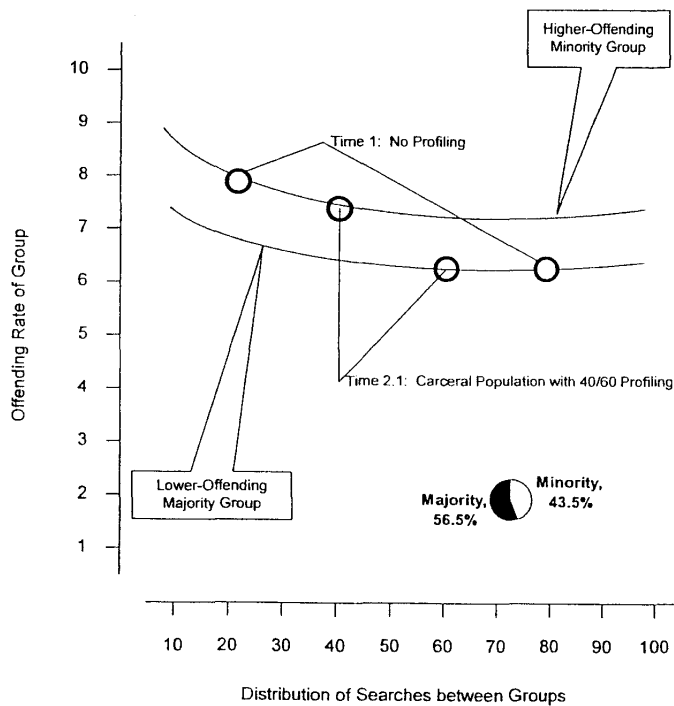representation of table 5.5.

FIGURE 5.4 Criminal profiling assuming elasticity

As noted earlier, the extent of the ratchet will depend on the comparative elasticities and offending rates of the two groups. One final illustration captures this well, making very different assumptions about offending and elasticities. Assume, then, an even larger differential in offending—making criminal profiling even more attractive to its proponents—and lower elasticity for the higher-offending group. And suppose that, at Time 2.2, the police engage in heavy profiling, searching 60 percent minority members. Table 5.6 reflects these assumptions.

Under these assumptions, the ratchet effect is gigantic. As table 5.6 demonstrates, the disparity between the distributions of offenders and carceral contacts is extremely large: at Time 2.2, members of the higher-offending group are 26.4 percent of the total offending population, they are 68.3 percent of the new carceral population. The exponential growth in the disparity is the result of the greater differential in offending and elasticity between the two groups. Figure 5.5 is a visual representation of table 5.6.

To be sure, at some point the ratchet will no longer operate. If the differential in offending becomes too big, and members of the profiled population are the only ones offending, then there will be no room for a ratchet. If the higher-offending group is committing 99 percent of the offenses, there is no real possibility of a ratchet. So, for instance, if men are perpetrating practically all traditional rape offenses, then profiling

TABLE 5.6   Results of police searches at Time 2.2

|	Minority	Majority	Aggregate (total)
Group population	200,000	800,000	1,000,000
Time 1 offending rates (%)	12	6	7.2
Time 1 offenders	24,000	48,000	72,000
Time 1 distribution of offenders (%)	33.33	66.66	100
Police searches	6,000 (60%)	4,000 (40%)	10,000 (100%)
Time 2.2 offending rates (%)	11.5	8	8.7
Time 2.2 offenders	23,000 (11.5% of 200,000)	64,000 (6.5% of 800,000)	87,000
Time 2.2 distribution of offenders (%)	26.4	73.6	100
Successful searches leading to carceral contact	690 (11.5% of 6,000)	320 (8% of 4,000)	1,010
Distribution of carceral contacts (%)	68.3	31.7	100
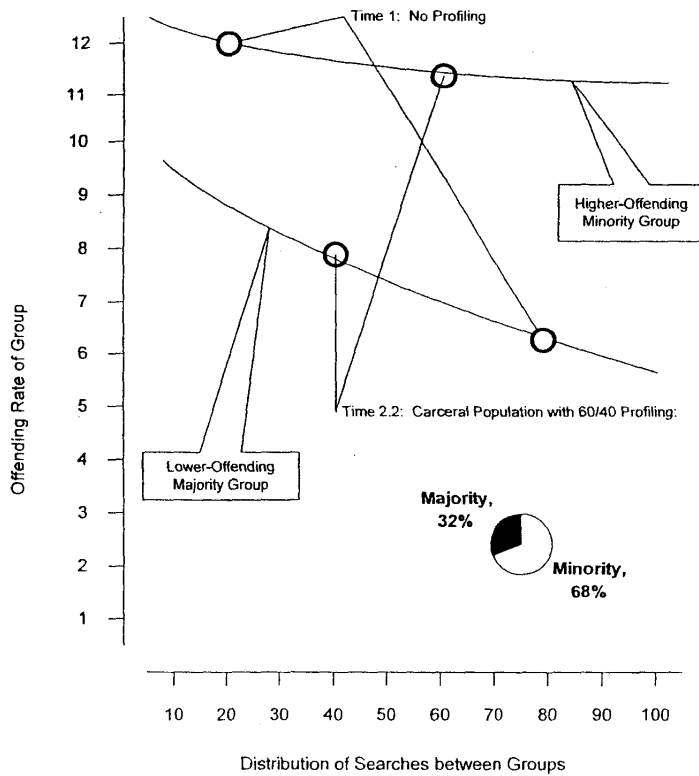
FIGURE 5.5 Criminal profiling assuming large differentials in offending and in elasticity

men in a rape case is unlikely to create any greater disproportionality. However, such cases are rare. In most cases where profiling is used, the offending disparities are less extreme, and, in combination with the elasticity differentials, they are more likely to produce significant ratchets.

The Ratchet and Its Cost

The distortion and eventual ratchet disproportionately distributes criminal records and criminal justice contacts, with numerous secondary im-

plications for members of the profiled group in terms of their education, employment, and family lives. Disproportionate criminal supervision and incarceration reduces work opportunities, breaks down families and communities, and disrupts education.

The pernicious effects of overrepresentation of African Americans in our prisons—especially among incarcerated felons—have been detailed and documented by many scholars, including Tracey Meares, Dorothy Roberts, David Cole, Michael Tonry, and Loïc Wacquant, to name but a few.[7] Widespread conviction and incarceration affect not only the targeted individuals but their communities—producing feedback effects on them and others. Drawing on insights from the Chicago School of urban sociology—specifically, on the social disorganization theory of Clifford Shaw and Henry McKay[8]—Tracey Meares describes well the devastating effects of high incarceration rates on the convicts and on their communities—on "the vitality of families, the life chances of children left behind, and the economic circumstances of African-American communities."[9] Meares writes,

> The status of "convict" severely compromises the released felon's ability to make investments in human capital. A released convict may perceive further investment in human capital to be useless because he may understandably reason that sinking money and time into education and training will not overcome the stigma of a felony conviction on a job application. When he makes the decision to refrain from further investment, he weakens existing relationships he has with people who will be less likely to depend on him, because his ability to provide them with benefits through interaction is compromised. Additionally, the individual who decides not to make further investments in education, skills and training cuts himself off from potential useful relationships with others who have no incentive to form relationships with him. . . . The basic point is this: all unemployed populations are not equal, and any incremental increase in the proportion of convicts among the unemployed population of the ghetto portends incrementally worse consequences for the vitality of the community.[10]

Lower employment opportunities not only harm the released prisoner on reentry, but also erode the social fabric of the community. The deadly combination of prison and unemployment fuels a cycle of detrimental consequences for the community that then feed back on the community members. These include "fewer adults to monitor and supervise children" resulting in "increased opportunities for children to become

involved in delinquency and crime," more broken families, and deepening poverty, all of which produce severe disruptions in African American communities.[11]

The ratchet also contributes to an exaggerated general perception in the public imagination and among police officers of an association between being African American and being a criminal—between, in Dorothy Roberts's words, "blackness and criminality."[12] As she explains,

> One of the main tests in American culture for distinguishing law-abiding from lawless people is their race. Many, if not most, Americans believe that Black people are "prone to violence" and make race-based assessments of the danger posed by strangers they encounter. The myth of Black criminality is part of a belief system deeply embedded in American culture that is premised on the superiority of whites and inferiority of Blacks. Stereotypes that originated in slavery are perpetuated today by the media and reinforced by the huge numbers of Blacks under criminal justice supervision. As Jody Armour puts it, "it is unrealistic to dispute the depressing conclusion that, for many Americans, crime has a black face."[13]

Roberts discusses one extremely revealing symptom of the "black face" of crime, namely, the strong tendency of white victims and eyewitnesses to misidentify suspects in cross-racial situations. Studies show a disproportionate rate of false identifications when the person identifying is white and the person identified is black. In fact, according to Sheri Lynn Johnson, "this expectation is so strong that whites may observe an interracial scene in which a white person is the aggressor, yet remember the black person as the aggressor."[14] The black face has become the criminal in our collective subconscious. "The unconscious association between Blacks and crime is so powerful that it supersedes reality," Roberts observes: "it predisposes whites to literally see Black people as criminals. Their skin color marks Blacks as visibly lawless."[15]

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

adapting slightly from Dorothy Roberts's work,[16] I can represent the negative impact of the ratchet effect in tabular form as follows:

Police Conduct	Social Meaning	Social Norm	Impact on Community
Racial profiling that produces a ratchet effect on the carceral population	Blacks are suspect, require police supervision, and are entitled to fewer liberties	Presumed black criminality.	Blacks are perceived as criminals and experience more discrimination.

And the costs are deeply personal as well. Dorothy Roberts discusses the personal harm poignantly in a more private voice in her brilliant essay, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing,* sharing with the reader a conversation that she had with her sixteen-year-old son, who is African American:

> In the middle of writing this Foreword, I had a revealing conversation with my sixteen-year-old son about police and loitering. I told my son that I was discussing the constitutionality of a city ordinance that allowed the police to disperse people talking on the sidewalk if any one of them looked as if he belonged to a gang. My son responded apathetically, "What's new about that? The police do it all the time, anyway. They don't like Black kids standing around stores where white people shop, so they tell us to move." He then casually recounted a couple instances when he and his friends were ordered by officers to move along when they gathered after school to shoot the breeze on the streets of our integrated community in New Jersey. He seemed resigned to this treatment as a fact of life, just another indignity of growing up Black in America. He was used to being viewed with suspicion: being hassled by police was similar to the way store owners followed him with hawk eyes as he walked through the aisles of neighborhood stores or women clutched their purses as he approached them on the street.
>
> Even my relatively privileged son had become acculturated to one of the salient social norms of contemporary America: Black children, as well as adults, are presumed to be lawless, and that status is enforced by the police. He has learned that as a Black person he cannot expect to be treated with the same dignity and respect accorded his white classmates. Of course, Black teens in inner-city communities are subjected to more routine and brutal forms of police harassment. Along with commanding them to move along, police officers

often make derogatory comments, push them around, or throw them against
the patrol car. As my son quickly noted, the Chicago ordinance simply codifies
a police practice that is already prevalent in Black communities across Amer-
ica. But . . . the power of the police to enforce their orders with arrest, convic-
tion, and incarceration powerfully validate[s] the harmful message of presumed
Black criminality.[17]

These harms, I suggest, can be traced directly to a ratchet effect—to
the disproportionality between the carceral population and the offending
population and the significant symbolic meaning of prison demograph-
ics. Note, however, that the ratchet effect, while extremely troubling in
the case of race, is not *only* troubling because of race. The ratchet is an
abstract mechanism that is equally troubling in other contexts. The same
problem plagues the actuarial profiling of persons with prior criminal re-
cords, with a similar, detrimental effect on recidivists who are reentering
society—what I will call "recidivist criminality." Here the ratchet effect ac-
centuates the symbolic meaning of prison and incarceration: it compounds
the perception that a prison record means that the convict is more likely
to reoffend. To be sure, there may well be a correlation. Again, as in all the
cases in this book, I am assuming that the prediction is *correct*. The sta-
tistical correlation is presumably reliable, not spurious. What the ratchet
does, though, is aggravate precisely that correlation: whereas prior offend-
ers may represent, hypothetically, 40 percent of the offending population,
profiling prior offenders will result in their representing, again hypotheti-
cally, 65 percent of the prison population. This differential represents a
ratchet effect with heavy symbolic meaning. It leads the general public to
think that prior offenders are even more prone to future criminality than
they really are. And this has devastating effects on the possibilities and
the reality of reentry.

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

heightened risks of family disruption. Through its negative effects on male employment, imprisonment may thus lead indirectly through family disruption to increases in future rates of crime and violence."[18]

Even under ordinary conditions, reentry is extremely difficult. The statistics are striking. Offenders who are released from prison face a high likelihood of returning to a cell. Several studies by the Bureau of Justice Statistics (BJS) and by state authorities consistently document high rates of rearrest, reconviction, and reincarceration. One BJS study of prisoners released from eleven states in 1983 revealed that 63 percent were rearrested for a felony or serious misdemeanor within a three-year follow-up period.[19] Another BJS study of prisoners released from fifteen states in 1994 revealed that 69 percent were rearrested within three years, with a reconviction rate of 47 percent.[20] State studies in Illinois, Texas, Kentucky, and Pennsylvania document three-year reincarceration rates ranging from a high of 50 percent to a low of 31 percent.[21] Part of the problem, naturally, has been our failure to manage reentry properly. As Jeremy Travis, one of the nation's leading thinkers about reentry, notes, "our system of justice lacks the organizational capacity to manage the reintegration of released offenders."[22]

These problems are *compounded* by the existence of a ratchet, which further accentuates the symbolic dimension of prior criminality. These are the costs of "recidivist criminality"—and they are no different than the costs of "black criminality." To be sure, there is no "recidivist community" like the African American communities that bear the brunt of these policies. But the effects are similarly devastating to the individual: even greater difficulties with employment, housing, and family reintegration. These represent a tremendous cost. And notice that the problem is not race. It is the mechanics of profiling. It involves the mathematical dimension of profiling that is marked by race in one context but prior criminality in the other.

One natural question is, Have we experienced such a ratchet in our criminal justice system? Has the increased use of actuarial methods in criminal justice contributed, for instance, to the growing racial imbalance in our carceral populations? Clearly, a combination of practices closely associated with criminal profiling has contributed to these national trends. These practices include drug-interdiction programs at ports of entry and on interstate highways, order-maintenance crackdowns involving aggressive arrest policies for misdemeanors, gun-oriented policing in urban areas focusing on stop-and-frisk searches and increased police-civilian

contacts, as well as other instances of profiling, ranging from these drug-courier, street-dealer, gang-member, and disorderly profiles all the way to profiles of disgruntled former federal employees or outcast and bullied high school youths. The investigatory search-and-seizure jurisprudence that has grown out of *Terry v. Ohio,* especially cases such as *Whren v. United States*—where the Supreme Court upheld the use of a pretextual civil traffic violation as a basis for a stop-and-frisk procedure triggered by suspicion that the driver and passenger were engaged in drug trafficking—has likely facilitated the emergence of these practices.[23]

As to whether or to what extent the increased use of actuarial methods *itself* has contributed to any type of ratchet, it would be important to parse our criminal justice data to explore which portion of the national trends are attributable to offender differentials, to targeted law enforcement disproportionate to group representation, and to a possible ratchet effect, as well as to measure any possible feedback and incapacitation effects. The point of the previous thought experiment is that actuarial methods—including criminal and especially racial profiling—should logically contribute to a ratchet. How much is unclear. But it is clear that the criminal justice trends in the twentieth century were, at the very least, consistent with a ratchet effect.

The two largest criminal justice trends of the late twentieth century mirror the two lessons of the ratchet discussion. First, the United States witnessed a continuously increasing—in fact, exponential—rise in the prison population. As noted earlier, this was due largely to the massive social investment in prisons and incarceration. But the overall increase, or at least some small portion of that increase, is also entirely consistent with the first observation from the ratchet discussion: that criminal profiling increases the overall efficiency of police interventions. Criminal profiling means that the same number of stops and searches nets a larger number of
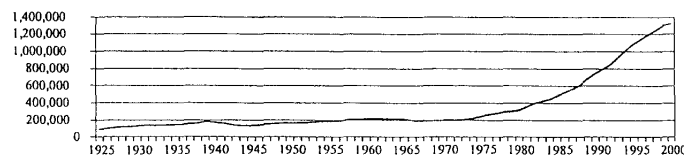

FIGURE 5.6 Sentenced prisoners under jurisdiction of state and federal correctional authorities on December 31 (U.S., 1925–2000)
Sources: U.S. Bureau of Justice Statistics 2001a, table 6.27, and 2002a, 2.

offenders: the "catch of the day" increases in overall size. This observation is consistent with the overall trend in prison population during the last third of the twentieth century, when criminal profiling began to flourish. Figure 5.6 traces the state and federal prison population growth discussed earlier: the prison population nationwide grew from less than 200,000 in 1970 to more than 1,300,000. This does not include the more than 630,000 persons held in local jails in 2001.

The second lesson from the ratchet discussion—namely, that criminal profiling likely produces an increasing imbalance between the offending and carceral populations—is also highly consistent with data from the criminal justice system. During the twentieth century, African Americans comprised a consistently increasing proportion of the new and overall supervised population. Since 1926, the year the federal government began collecting data on correctional populations, the proportion of African Americans newly admitted to state prisons has increased steadily from 23.1 percent to 45.8 percent in 1982. It reached 51.8 percent in 1991, and stood at 47 percent in 1997. Figure 5.7 illustrates this trend. In 1997, 9 percent of all adult African Americans were under correctional supervision in this country, in contrast to 2 percent of European Americans.[24] The trend from 1985 to 1997 is reflected in figure 5.8, which shows the percentage of the adult population in state and federal prisons and local jails by race and gender as a proportion of their representation in the general population.[25] Naturally, I do not contend that these trends verify the ratchet effect. They are merely consistent with a ratchet effect operating in the United State criminal justice system against African Americans.
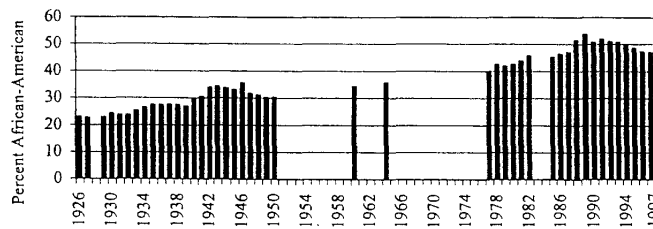

FIGURE 5.7 Percentage of new admissions to state prisons who were African American, 1926–1997

Sources: For statistics from 1926 to 1982, see Langan 1985, 666–67; for statistics from 1985 to 1989, see U.S. Bureau of Justice Statistics 1997, table 1.16; for statistics from 1990 to 1997, see U.S. Bureau of Justice Statistics 2000a, table 1.20.
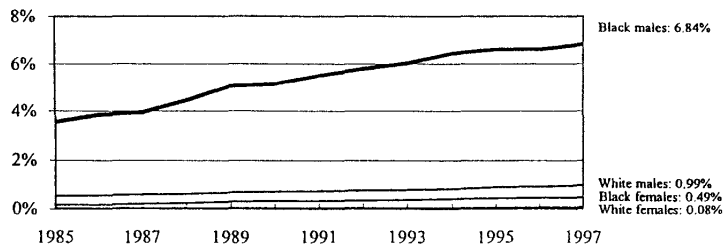
FIGURE 5.8 Percentage of U.S. adult population in state or federal prisons or in local jails, by race and gender, 1985–1997
Source: U.S. Bureau of Justice Statistics 2000a, fig. 1.

The Ratchet Effect in the Sentencing Context

The idea of a ratchet effect operating in the context of criminal profiling, especially racial profiling, makes intuitive sense. Many of us are familiar with the consequences for the supervised population. The black face of the street suspect, the suit and tie of the insider-trader, the blue collar of the drywall contractor—these are all powerful symbols produced by the ratchet effect. But make no mistake: the ratchet effect applies with equal force in the sentencing and punishment contexts.

As I hinted in the introduction, the ratchet also applies to recidivists and to those sentenced under habitual-enhancement statutes. How and to what effect? In precisely a parallel manner: likely recidivists are disproportionately denied parole or sentenced under enhanced statutes and, as a result, are disproportionately represented in the prison population. If sentencing and parole authorities use an actuarial method to predict likely future offending, and thus focus on repeat offenders, the authorities will target habitual offenders for increased incarceration and supervision. Deliberately increasing the punishment for this group of habitual offenders means that its members will make up a larger proportion of the prison population—larger, proportionally, than their share of the offending population. The important symbolic message associated with their disproportionate incarceration will be that prisoners are likely to reoffend—a message resembling this: "If you offend once, you are likely to offend again; if you offend twice, you will definitely reoffend again and again." This powerful symbolic message will have a detrimental effect on

prisoners returning to their communities upon release, probably reducing their employment and educational opportunities, and further complicating their integration into family and neighborhood life.

Other Social Costs

The use of actuarial measures has other costs as well—aside from the ratchet effect. As I mentioned in the introduction, the perception that the criminal justice system is unfairly targeting certain groups—reflected, for instance, in expressions like "driving while black" or even "walking while black"—may have adverse effects on respect for the law. Tom Tyler's research demonstrates this link between perceptions of legitimacy and obedience to the law. Tyler's book *Why People Obey the Law* and his writings on procedural fairness and institutional legitimacy, including his essay "Trust and Democratic Governance," rest precisely on the idea that individuals derive a strong sense of identity from their relationship to legal authority. When the relationship is positive and respectful, a form of social trust—a concept closely linked to the idea of social capital made popular in Robert Putnam's book, *Bowling Alone,* as well as to the notion of collective efficacy in the work of Robert Sampson—develops and promotes obedience to the law. "[S]ocial trust," Tyler contends, "is linked to creating a commitment and loyalty to the group and to group rules and institutions."[26] This commitment and loyalty to the group translates into greater obedience to the law. When this loyalty is undermined, so too is obedience to the law.

In addition, aggressive targeting of higher-offending groups often goes hand in hand with increased complaints of police misconduct. This was the case in New York City in the late 1990s.[27] It is not always easy, however, to measure these costs or to weigh them against one another. Often, the result is one or more instances of police brutality that are difficult to quantify.

The work of Jon Gould and Stephen Mastrofski offers a troubling illustration in this regard.[28] Their research closely tracked the search practices of officers in a top-ranked police department during a period of targeted, aggressive policing. The searches were systematically observed by trained field observers and coded by Gould, Mastrofski, and a team of researchers—including a state appellate judge, a former federal prosecutor, and a government attorney—to determine whether there were any Fourth

Amendment violations. Their research documented astonishingly high rates of unconstitutional police searches. By their conservative estimate, 30 percent of the 115 police searches they studied violated the Fourth Amendment. The vast majority of the unconstitutional searches—31 out of 34—were invisible to the courts, having resulted in no arrest, charge, or citation. In fact, the rate of unconstitutional searches was highest for suspects who were released—44 percent versus 7 percent of arrested or cited suspects. Focusing exclusively on stop-and-frisk searches, an even higher proportion—46 percent—were unconstitutional.[29]

The data also suggest that the police officers were engaged in racial profiling. Fully eighty-four percent of their searches—96 of the searches studied—involved African American suspects. Although we do not know the exact demographic breakdown for Middleberg,[30] the fictitiously named, medium-size American city where the study was conducted, it is practically inconceivable that the police could reach 84 percent searches of black suspects without any racial profiling. The message is clear: targeted aggressive policing comes at a cost. It may be incidences of police misconduct. It may be the loss of legitimacy and, with it, less obedience to the law. These are hard to quantify. But given, in addition, the distortion and ratchet effect—costs that are so often ignored in the crime-and-punishment calculus—the burden should be on proponents of the actuarial to justify the costs and demonstrate that they do not in fact outweigh the benefits.

Costing Out the Benefits

All of these costs need to be quantified and weighed against any potential benefit of incapacitation on crime. As noted earlier, if you believe in rational-choice theory, the benefits from incapacitation are washed out by the deterrent effect: once the hit rates equalize, there is no incapacitation gain to be had. Under these circumstances, the calculus reverts to whether the deterrence gains are outweighed by the different elasticities of the groups—that is, whether the use of actuarial methods actually reduces overall crime, which turns on comparative offending and elasticities.

Even assuming no rational response, the benefits of incapacitation must be weighed against these costs. I have emphasized the ratchet effect here because others have discussed other costs. But they all must be considered. The fact is, the incapacitation argument has no internal limiting principle.

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It is typically boundless. It does not tell us *how much* incapacitation is socially optimal. It thus falls on us to perform the cost-benefit analysis.

In this cost-benefit analysis, the burden of proof and persuasion, I argue, must rest on those who would like to use actuarial methods. If the predictive factor behind the actuarial measure is indeed race—as in racial profiling—then the Equal Protection Clause requires that the proponents—in most cases government law enforcement and sentencing authorities—carry the burden of proving a compelling state interest. But I suggest, precisely because of the ratchet effect, that the same should be true in the case of classifications based on gender, class, wealth, and other troubling group traits. The ratchet effect is so problematic that it warrants shifting the burden of proof and persuasion to the proponents of the actuarial. The presumption should favor randomization; the default should be color-blind or, more generally, prediction-blind. And we should only move away from this presumption if the advocates of profiling can demonstrate that the distortion and possible ratchet effect will not be unduly burdensome.