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The Law and Economics of Racial Profiling: New Jersey's Racial Profiling Statute of 2003

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ARTICLES

THE LAW AND ECONOMICS OF RACIAL PROFILING: NEW JERSEY'S RACIAL PROFILING STATUTE OF 2003

GEORGE STEVEN SWAN, S.J.D.*

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I. INTRODUCTION

This article reviews the recent execution into law of New Jersey's Racial Profiling Statute of March 14, 2003, by Governor James E. Mc-

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Greevey. That enactment was welcomed with a pomp befitting a landmark law. Senators, Assemblymen, civil rights dignitaries, and Acting Attorney General Peter C. Harvey participated in the august occasion. However, State Troopers Fraternal Association officials were less enthusiastic in their embrace of this legislation than were other New Jerseyites.

It will be seen that this 2003 legislation, *inter alia*, precludes New Jersey's law enforcement officers from applying racial features (even when in conjunction with supplementary composite characteristics, such as a vehicle's description) to vindicate an investigative stop. The debate over racial profiling focuses, foremost, upon highway stops.¹ In 2001, evidence relating to speeding on the New Jersey Turnpike, which was submitted to the Attorney General in Trenton by the Public Services Research Institute, threw the issue into some relief. High-level speeding on that Turnpike broke along racial lines.

Racial profiling has been defined as police activity reliant upon race, rather than upon an individual's behavior. Meanwhile, the economic theory of statistical discrimination acknowledges the reduction of costs via using generalizations about race to infer an individual's own characteristics. Is there a tradeoff between the protection of the civil rights of all Americans (as by barring racial profiling), and effective law enforcement (as through the efficiencies of statistical discrimination)?

The most recent major economic study of racial profiling, by economist Nicola Persico,² is hardly encouraging, i.e., fairness and effectiveness can prove inconsistent. Circumstances may show that a slight shift toward equalizing police search intensities across groups can impede effective law enforcement. Tradeoffs between fairness and effectiveness in policing can result from interracial income divergences.

The evidence submitted to the New Jersey Attorney General, and the economic logic weighing fairness versus police effectiveness, should be soberly understood by the citizens of every state. The Garden State's new legal environment in the post-Racial Profiling Statute

1. HEATHER MACDONALD, ARE COPS RACIST? 10 (2003).

The archetypal example of racial profiling is the practice that gave rise to the phrase "Driving While Black": racial profiling in traffic stops in general, and as an aspect of highway drug interdiction in particular.

Samuel R. Goss and Debra Livingston, *Racial Profiling Under Attack*, 102 COLUMBIA L. REV. 1413, 1431 (2002).

2. Professor Nicola Persico already had co-authored articles on this topic, e.g., John Knowles, *et al.*, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. OF POL. ECON. 203 (February 2001). The most recent book on racial profiling, MILTON HEUMANN AND LANCE CASSAK, *GOOD COP, BAD COP: RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE* (2003), entails a seven-page discussion headed "The Costs and Benefits of Racial Profiling." *Id.* at 155-62. But the index thereof omits Nicola Persico. *Id.* at 244.

era might not remain unique. At least in some respects, New Jersey represents racial profiling's wave of the future.³

II. A HIGH-PROFILE BILL IS EXECUTED INTO LAW

A. *The Celebration of March 14th*

On March 14, 2003, New Jersey Governor James E. McGreevey signed the New Jersey Racial Profiling Statute into law. The Governor did so in a bill-signing ceremony gilded with the high-blown oratory and pageantry ordinarily reserved for landmark legislation.⁴ Thereby, New Jersey became the first state to criminalize race-based arrests and police searches.⁵

Civil rights leaders joined Governor McGreevey to witness his signature in the august environment of the Governor's inner office.⁶ Civil rights activists had pushed for this law since 1998.⁷ The President of the New Jersey National Association for the Advancement of Colored People (NAACP), Reverend William Rutherford, offered: "I do leave the Capitol hopeful that the law will be implemented and troopers will think twice if they're thinking about racial profiling. It will curtail it, but it will not erase it or eradicate it."⁸

Senator Joseph Charles, Chairman of the New Jersey Legislature's Black, Latino and Asian Caucus concurred: "With the enactment of this bill into law, New Jersey has addressed a significant lapse in the protection of civil rights and criminalized the practice of racial profiling. Now, those who talk of colorblind government have an important tool in seeing that it becomes a reality."⁹ The Governor was also joined by New Jersey's Acting Attorney General Peter C. Harvey, Senator Wayne Bryant, Assemblyman William D. Payne, Assembly-

3. MACDONALD, *supra* note 1, at 22. See, e.g., John Corzine, *End Racial Profiling Speech by U.S. Senator John Corzine: Introducing S.989, the "End Racial Profiling Act,"* 26 SETON HALL LEGIS. J. 55 (2001); B. Tsamis, *House Bill 114: Eliminating Biased Policing*, 31 COLO. LAW. 27 (2002).

4. David Kocieniewski, *Amid Pomp, McGreevey Signs Racial-Profiles Bill*, N.Y. TIMES, March 15, 2003, at B5.

5. Reuters, *Racial Profiling Illegal for Officials and Police*, BOSTON GLOBE, March 15, 2003, at A2.

When used as part of a detailed description to identify a given individual, the person's race is not so much a category that embraces a large number of people as a distinguishing fact about the identity of a designated person.

RANDALL KENNEDY, RACE, CRIME, AND THE LAW 138 n. (1997).

6. Kocieniewski, *supra* note 4, at B5.

7. *Racial Profiling Illegal for Officials and Police*, *supra* note 5, at A2.

8. Kocieniewski, *supra* note 4, at B5.

9. Press Release, State of New Jersey Governor's Office, McGreevey Signs Racial Profiling Bill (March 14, 2003) (on file with author).

man Bonnie Watson Coleman, and Reverend Reginald Jackson of the Black Ministries Coalition.¹⁰

Attorney General Harvey noted at the ceremony¹¹, “[w]hile we need this tool in our arsenal, we hope we don’t have to use it. If we do, we will use it aggressively, assertively and fairly.”¹² In New Jersey, the Attorney General oversees the functioning of the New Jersey State Police.¹³ With some 2,800 troopers, the State Police represents New Jersey’s primary state law enforcement body.¹⁴ That the State Police, unlike municipal police agencies, are an extension of the executive branch of the state government, lays upon it heavy expectations from New Jersey’s law-abiding population.¹⁵

Pronounced the Attorney General:

We are committed to eradicating racial profiling in New Jersey. The Division of State Police has made tremendous strides in meeting the mandates of the Consent Decree, as affirmed by the independent monitors, and we are developing a comprehensive training program for use by local police departments that will target discriminatory policing. This new law is another safeguard to ensure that citizens will not face discriminatory law enforcement in New Jersey. We are committed to the principle of equal justice under law.¹⁶

Senator Bryant sounded correspondingly enthusiastic when he stated:

This new law will end the practice of knowingly intimidating or discriminating against individuals. Racial profiling by some of our law enforcement officers has pointed out the necessity to have a law to criminalize this practice. Now, every individual – regardless of race, color, religion, gender, handicap, sexual orientation or ethnicity – is guaranteed their [sic] basic constitutional rights under the law. This law will help change a culture of acceptance of civil rights infractions committed by police officers and other public servants upon minorities. With this new law, it is made very clear that no one is above the law and that protecting the civil rights of every citizen of the State is paramount.¹⁷

Comparable were the words of Assemblyman Payne:

10. *Id.*

11. Kocieniewski, *supra* note 4, at B5.

12. *Id.*

13. Deborah Ramirez, et al., *A Resource Guide on Racial Profiling Data Collection Systems* (Nov. 2000), available at http://www.usdoj.gov/cops/pdf/cp_resources/pubs_prod/police_practices_handout/Section6.pdf (on file with author).

14. *Id.* at 32.

15. JOHN J. FARMER AND PAUL H. ZOUBEK, FINAL REPORT OF THE STATE POLICE REVIEW TEAM 2 (July 2, 1999).

16. McGreevey Signs Racial Profiling Bill, *supra* note 9, at 1.

17. *Id.*

This is a significant first step in resolving the issue of racial profiling which has been prevalent in New Jersey and other states for some time. Enactment of this law is a signal to motorists that we intend to do everything possible to eradicate this unjust practice and hopefully other states will follow our lead.¹⁸

Agreed Senator Nia H. Gill:

Today New Jersey has taken a significant step forward in protecting the rights of equity and justice for all persons. More than thirty years have passed since the Civil Rights Movement in this country, and yet some public officials still choose to use their power for discrimination and intimidation. It is my sincere hope that this law will reinforce the messages of the Civil Rights Movement for these officials—that each individual is entitled to dignity, respect, and equitable treatment.¹⁹

Assemblyman John F. McKeon asserted that “[t]he reforms contained in this law will make all public servants more responsive and responsible. New Jersey will be a national leader in eradicating these despicable practices once and for all.”²⁰ Assemblyman Gordon M. Johnson offered: “The law ensures that minority motorists will no longer have to drive scared when traveling on the state’s roads. Now we can attempt to rebuild the minority community’s confidence in our public servants.”²¹ Assembly Deputy Majority Leader Neil M. Cohen opined that “[i]t is time to heal the wounds of past acts of bigotry, hate and bias. New Jersey is setting an example for the whole nation to follow that we won’t tolerate degrading and humiliating treatment of our citizens.”²² Moreover, a forthright Assemblyman Wilfredo Caraballo propounded, “This is a signal to all citizens, police officers and civil servants that New Jersey is taking a major step in eliminating discriminatory behavior based on race. We want this message taken across the nation.”²³

B. *The Rocky Road to March 14*

On the other hand, William Buckman, an attorney who for fifteen years advocated that the Garden State stop profiling by troopers, seemed considerably more skeptical:

It’s primarily symbolic, but it’s a good signal. But given the reluctance of the local prosecutors and attorney general’s office to ever challenge the state police, I don’t harbor much hope that the law will be used.

18. *Id.* at 2.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

And I worry that people will say it's time to move on because the problem is over.²⁴

State Troopers Fraternal Association officials asserted that the news media had exaggerated the scope of the racial profiling problem. They alleged that most of the complaints were not triggered by racism but by excessive zeal.²⁵ The politically potent troopers' union had delayed and diluted the statute of March 14.²⁶ More stringent measures geared to stop profiling had likewise been blocked by the union.²⁷

The gubernatorial proceedings followed three years of legislative dickering.²⁸ Progress on the bill was delayed as lawmakers in the state capital had attempted to reconcile differences between law enforcement organizations and civil rights proponents, who had insisted upon mandatory prison terms for offenders.²⁹ Each side announced its support for the final draft only after years of negotiations. On February 27, 2003, the state's Senate passed it unanimously.³⁰ The Assembly did so on March 13 by a 50-21 vote.³¹ Each of the opposing votes was cast by a Republican. It was feared that the law would handicap law enforcement.³²

III. NEW JERSEY'S RACIAL PROFILING STATUTE OF 2003

A. *The Commands of the Law*

The New Jersey Racial Profiling Statute Section 2C: 30-5 enunciates that New Jersey's law enforcement officers are barred from using racial characteristics or color (even if in conjunction with additional composite characteristics like a vehicle description) as foundation for triggering an investigative stop.³³ This section provides:

The Legislature finds and declares that:

- a. Public confidence in the institutions of government is undermined when an official engages in any form of misconduct involving the official's office.
- b. Such misconduct, and the corresponding damage to the public confidence, impairs the ability of government to function properly, fosters mistrust and engenders disrespect for government and public servants.

24. Kocieniewski, *supra* note 4, at B5.

25. *Id.*

26. *Id.*

27. *Id.*

28. Michael Booth, *N.J. Makes Racial Profiling by Public Officials a Crime*, MIAMI DAILY BUS. REV., March 19, 2003, at A7.

29. *Id.* at A9.

30. *Id.*

31. *Id.*

32. *Id.*

33. N.J. STAT. ANN. § 2C: 30-5(d) (West 2003).

c. A particular concern arises when a law enforcement official, duly entrusted to protect the public safety and impartially enforce the laws, abuses that trust by unlawfully depriving persons of their civil rights, especially in the context of racial profiling.

d. It is important to ensure that law enforcement officers are prohibited from using racial characteristics or color, either alone or in conjunction with other composite characteristics such as generalized vehicle description or the age of the driver or passengers, as the basis for initiating an investigative stop.

e. Existing laws must be amended to provide a greater deterrent to this type of conduct, as well as to enhance provisions of the law targeting official misconduct.

f. Accordingly, it is in the public interest to strengthen our laws that define and punish acts of official misconduct by members of law enforcement and other public servants.³⁴

Section 2C: 30-6, in relevant part, proscribes an official from knowingly discriminating unlawfully if, because of relying on one of the banned characteristics, the official subjects another to a motor vehicle investigative stop.³⁵ This section provides:

a. A public servant acting or purporting to act in an official capacity commits the crime of official deprivation of civil rights if, knowing that his conduct is unlawful, and acting with the purpose to intimidate or discriminate against an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity, the public servant: (1) subjects another to unlawful arrest or detention, including, but not limited to, motor vehicle investigative stops, search, seizure, dispossession, assessment, lien or other infringement of personal or property rights; or (2) denies or impedes another in the lawful exercise or enjoyment of any right, privilege, power or immunity.

b. (1) Except as provided in paragraphs (2) and (3) of this subsection, a public servant who violates the provisions of subsection a. of this section is guilty of a crime of the third degree.

(2) If bodily injury results from depriving a person of a right or privilege in violation of subsection a. of this section, the public servant is guilty of a crime of the second degree.

(3) If, during the course of violating the provisions of this section, a public servant commits or attempts or conspires to commit murder, manslaughter, kidnapping or aggravated sexual assault against a person who is being deprived of a right or privilege in violation of subsection a. of this section, the public servant is guilty of a crime of the first degree.

c. Notwithstanding the provisions of . . . any law, a conviction of official deprivation of civil rights under this section shall not merge with a

34. *Id.* § 2C: 30-5.

35. *Id.* § 2C: 30-6(a).

conviction of any other criminal offense, nor shall such other conviction merge with a conviction under this section, and the court shall impose separate sentences upon each violation of this section and any other criminal offense.

d. Proof that a public servant made a false statement, prepared a false report, or, if the agency that employs the public servant, the Attorney General or the county prosecutor having supervisory authority over the agency required a report to be prepared, failed to prepare a report concerning the conduct that is the subject of the prosecution, shall give rise to an inference that the actor knew his conduct was unlawful.

e. For purposes of this section, an act is unlawful if it violates the Constitution of the United States or the Constitution of this State, or if it constitutes a criminal offense under the laws of this State.³⁶

B. *The Teeth of the Law*

Section 2C: 30-7 adds teeth to this 2003 enactment:

a. A person commits the crime of pattern of official misconduct if he commits two or more acts. . . . It shall not be a defense that the violations were not part of a common plan or scheme, or did not have similar methods of commission.

b. Pattern of official misconduct is a crime of the second degree if one of the acts committed by the defendant is a first or second degree crime; otherwise, it is a crime of the third degree, provided, however, that the presumption of nonimprisonment. . . .for persons who have not previously been convicted of an offense shall not apply. Notwithstanding . . .any other law, a conviction of pattern of official misconduct shall not merge with a conviction of official misconduct, official deprivation of civil rights, or any other criminal offense, nor shall such other conviction merge with a conviction under this section, and the court shall impose separate sentences upon each violation . . .³⁷

The law became effective at once.³⁸ An arm of the Attorney General's office, the Office of Public Integrity, is now responsible for reviewing complaints against police officers or other public officials.³⁹ The Office wields the authority to prosecute or dismiss complaints after a mandatory investigation.⁴⁰

IV. THE EVIDENCE: THE BALLAD OF THE NEW JERSEY TURNPIKE

A. *The Public Services Research Institute Study of 2001*

Authorities deny that there is a racial profiling concept invoked to intercept African Americans on highways, premised solely upon

36. *Id.* § 2C: 30-6.

37. *Id.* § 2C: 30-7.

38. Booth, *supra* note 28, at A9.

39. *Id.*

40. *Id.*

race.⁴¹ They argue that profiling draws upon a combination of factors, and affords a valuable tool in crime detection.⁴² Meanwhile, Professor Anthony C. Thompson of the New York University School of Law has noted that studies of racially-based traffic stops on the New Jersey Turnpike render this clear: Accumulating data on the race of parties halted by the police affords a useful basis for developing reforms.⁴³ Consistent with Professor Thompson's logic, New Jersey's troopers (smitten with constant detraction for their stop rates) requested their Attorney General to study speeding on the New Jersey Turnpike.⁴⁴

This 2001 study submitted to New Jersey's Office of the Attorney General by the Public Services Research Institute proves instructive.⁴⁵ Anyone concerned over differential enforcement of traffic violations needs to ascertain the violation rates of subpopulations among themselves, and not simply any subpopulation's general representation among all motorists.⁴⁶ The 2001 study recounted a survey to identify the racial/ethnic distribution of nonspeeders and speeders along the New Jersey Turnpike.⁴⁷ The study sought answers to two questions: (1) Do speeding violation rates along that Turnpike diverge along racial/ethnic lines? and (2) What is the racial/ethnic composition of the class of speeders along the Turnpike?⁴⁸

New Jersey enjoyed access to equipment for surveying Turnpike speeding violations.⁴⁹ The Transcore, Inc., TC-2000 digital camera system combines digital photography technology with AutoPatrol PR-100 radar speed measurement equipment.⁵⁰ This permits photographing motorists while recording their traveling velocity.⁵¹ The system can record the number of vehicles plus the vehicle velocity of those

41. John Gibeaut, *Marked for Humiliation*, 85 A.B.A. J. 46, *46 (February 1999).

42. *Id.*

43. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1010-11 (1999).

44. MACDONALD, *supra* note 1, at 31. See, e.g., New Jersey Black and Latino Caucus, *A Report on Discriminatory Practices Within the New Jersey State Police*, 26 SETON HALL LEGIS. J. 273 (2002). "For those unfamiliar with New Jersey, the Turnpike is the name given to that stretch of I-95 that traverses the state." HEUMANN AND CASSAK, *supra* note 2, at 226 n.32.

45. PUBLIC SERVICES RESEARCH INSTITUTE, *SPEED VIOLATION SURVEY OF THE NEW JERSEY TURNPIKE: FINAL REPORT* (December 13, 2001). This 2001 document invokes the terms "Black" and "White." (Note the two capitalizations.) The instant text utilizes the terms "African-American" and "black" interchangeably, for purposes of the current discussion of law and economics.

46. *Id.* at 1.

47. *Id.*

48. *Id.* at 2.

49. *Id.* at 1.

50. *Id.*

51. *Id.*

not sampled. This delivers data crucial toward a projection of a sample to an entire universe of motorists.⁵²

Because speed limits are not enforced precisely, it was unreasonable to invoke only the posted speed limit as the criterion for speeding.⁵³ Therefore, "speeder" was defined as a vehicle traveling at fifteen miles per hour or more above the posted speed limit.⁵⁴ The study depended upon visual cues from the head and visage of each motorist to determine race/ethnicity.⁵⁵ Those raters who classified each driver were blind to the measured speed of her vehicle.⁵⁶ Raters sat before computers displaying images on a large window of the screen.⁵⁷ Raters could control the zoom of the image, allowing enlargement of a motorist's face.⁵⁸

The camera and radar system was established at fourteen sites on the Turnpike. It operated at each site during both one weekend and one weekday.⁵⁹ Excluding setup time and occasional technical problems, the system operated around the clock.⁶⁰ Camera equipment was set to capture the image of each vehicle traveling at faster than 70 miles per hour in areas with a 55 mile per hour speed limit, and at faster than 79 miles per hour in areas with a 65 mile per hour maximum.⁶¹ However, utilizing 80 miles per hour as the speeding trigger in areas with a 65 mile per hour speed limit presented adequate data, so all speed-triggered cases traveling at 79 miles per hour were dropped.⁶² An adequate benchmark must capture the type of motorist likely to attract police attention. Someone sedately gliding at fifty-six miles per hour in a fifty-five mile per hour zone runs a profoundly different risk of being pulled over than does anyone barreling along at eighty miles per hour.⁶³

Some 48 hours of data images were amassed at each of these fourteen positions between March 31 and June 30, 2001.⁶⁴ No sampling occurred on Mother's Day or other holidays.⁶⁵ In total, 38,747 images conforming to the sampling structure were transmitted.⁶⁶

52. *Id.*

53. *Id.* at 2.

54. *Id.*

55. *Id.*

56. *Id.* at 3.

57. *Id.* at 5.

58. *Id.*

59. *Id.* at 4.

60. *Id.*

61. *Id.* at 5.

62. *Id.* at 5 n. 4.

63. MACDONALD, *supra* note 1, at 15.

64. PUBLIC SERVICE RESEARCH INSTITUTE, *supra* note 45, at 6.

65. *Id.*

66. *Id.*

B. *Benchmarking the New Jersey Turnpike*

Until law enforcement wields a benchmark accounting of population patterns on the roads, degrees of lawbreaking, police deployments, and police decision-making regarding stop data will be both meaningless and politically combustible.⁶⁷ The vast bulk of motorists was not exposed as speeding at or above the criterion utilized to define a speeder.⁶⁸ This proved true for every racial/ethnic group.⁶⁹ In addition, the mean speed for each racial/ethnic category of driver closely resembles those of all of the others.⁷⁰ In the 55 miles per hour speed limit zones, no statistically reliable difference emerged between white and African American motorists.⁷¹ In these zones, 13 percent of vehicles overall were categorized as speeding.⁷²

In the 65 miles per hour zones, a mere 1.7 percent of vehicles were found to be speeders.⁷³ It does not take a large racial/ethnic difference in speeding rates to elicit a vivid overrepresentation in so small a fraction of motorists.⁷⁴ Of critical import for assessing trooper behavior, a clear relationship obtrudes between motorist race and speeder classification in these zones, with speeder characteristics sharply diverging from those of motorists generally.⁷⁵

African American motorists are 96 percent more likely to speed (as defined by traveling at fifteen miles per hour above the posted maximum) than are white motorists in 65 miles per hour zones.⁷⁶ In such zones, blacks are 64 percent more likely to be speeders than are white motorists even after controlling for age and gender.⁷⁷ Controlling for race/ethnicity and gender, motorists younger than 45 years of age are three times as likely to speed than motorists older than 45.⁷⁸ Controlling for race/ethnicity and age, men are 20 percent more likely than women to speed.⁷⁹

67. MACDONALD, *supra* note 1, at 22.

68. PUBLIC SERVICE RESEARCH INSTITUTE, *supra* note 45, at 13.

69. *Id.*

70. *Id.*

71. *Id.* at 14.

72. *Id.* at 15.

73. *Id.*

74. *Id.*

75. *Id.* at 13.

76. *Id.* at 14.

77. *Id.*

78. *Id.*

79. *Id.*

V. WHAT IS RACIAL PROFILING?

A. *The Citizenry's Outlook on Traffic Stops*

According to U.S. Department of Justice Bureau of Justice Assistance Director Nancy E. Gist,⁸⁰ "[t]here is no tradeoff between effective law enforcement and protection of the civil rights of all Americans; we can and must have both."⁸¹ By gathering facts on the demographics of law enforcement procedures, Americans enhance their capacity to appraise the proper application of the authority of, and broad discretion entrusted to, law enforcement officers.⁸² The Department of Justice consequently developed *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*,⁸³ prepared by the staff of Northeastern University.⁸⁴ It embraces, *inter alia*, an overview of the nature of racial profiling.⁸⁵

Racial profiling can be defined as:

[a]ny police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.⁸⁶

Police departments frequently exploit traffic stops as their method to ferret out illegal drugs and weapons.⁸⁷ Hence, some officers utilize traffic stops routinely as a tactic to track drug or gun couriers.⁸⁸ Many traffic officers submit that by tailing any vehicle for a minute (or two), they can observe a basis upon which to stop it.⁸⁹

There exists a powerful link between perceptions of race-based stops by police, and animosity against local and state law enforcement.⁹⁰ Common in racial profiling complaints is the concern that po-

80. Ramirez, et al., *supra* note 13, at iv.

81. *Id.* at iii.

82. *Id.*

83. *Supra* note 13.

84. *Id.* at iii and v.

85. *Id.* at iii.

86. *Id.* at 3.

As we use the term, "racial profiling" occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating. The essence of racial profiling is a global judgment that the targeted group—before September 11, usually African-Americans or Hispanics—is more prone to commit crime in general, or to commit a particular type of crime, than other racial or ethnic groups. If the officer's conduct is based at least in part on such a general racial or ethnic judgment, it does not matter if she uses other criteria as well in deciding on her course of action.

Goss and Livingston, *supra* note 1, at 1431.

87. Ramirez, et al., *supra* note 13, at 9.

88. *Id.*

89. *Id.*

90. *Id.* at 4.

lice halt drivers because either they or their passengers seemingly fail to match the kind of vehicle they occupy.⁹¹ Another complaint is that police stop persons of color traveling through predominantly white areas because police suppose that persons of color do not belong in certain neighborhoods, and may be engaged in criminal activity.⁹² And the most common complaint of members of communities of color is, by far, this one: They are intercepted for petty traffic violations, e.g., under-inflated tires, vehicle equipment failures, having an illegible license plate, speeding less than two miles above the speed limit, or failure to properly signal prior to changing lanes.⁹³ Concededly, anecdotal evidence does not establish that the police engage energetically in racial profiling.⁹⁴

B. *The Economic Insight into Statistical Discrimination*

Legal scholars well might choose to acquire an economic outlook upon even such a values-impregnated topic as racial profiling in law enforcement. A survey published in 2003 of 565 political scientists⁹⁵ solicited respondents to assess journals in terms of the general quality of the articles which each publishes.⁹⁶ The surveying investigators revealed that the leading journal, as ranked by political scientists, is the *American Economic Review*.⁹⁷ These investigators profess it “astounding”⁹⁸ that the journal ranked foremost by political scientists should be from the realm of economics, and speculate that political scientists rate it so prominently in recognition of its status as the flagship journal in the field of economics.⁹⁹ This speculation itself acknowledges the tribute paid by political scientists to the discipline of economics.¹⁰⁰ Economists argue less about whether their field is a science than do practitioners of some other fields of social science.¹⁰¹

91. *Id.* at 5.

92. *Id.*

93. *Id.* at 6.

94. *Id.*

95. James C. Garand and Michael W. Giles, *Journals in the Discipline: A Report on a New Survey of American Political Scientists*, 36 PS: POL. SCI. AND POL. 293 (2003).

96. *Id.* at 294.

97. *Id.* at 298.

98. *Id.*

99. *Id.* at 299.

100. The political scientists' second- and third-ranked professional journals respectively in terms of quality were the *American Sociological Review*, and the *American Journal of Sociology*. *Id.* at 298.

101. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 161 (2nd ed. enlarged 1970). See, e.g., *IS THERE PROGRESS IN ECONOMICS?: KNOWLEDGE, TRUTH AND THE HISTORY OF ECONOMIC THOUGHT* (Stephan Boehm, Christian Gehrke, Heinz D. Kuurz and Richard Sturn eds. 2002); and *IS ECONOMICS AN EVOLUTIONARY SCIENCE?: THE LEGACY OF THORSTEIN VEBLEN* (Francisco Loucá and Mark Perlman eds. 2000).

Economists produced the theory of statistical discrimination.¹⁰² This refers to the reduction of information costs through the use of statistical generalizations regarding race or gender, to infer an individual's probable characteristics. Usually, economists envision statistical discrimination in terms of evoking accurate estimates of the magnitude of, and the direction of, group differences. However, some writers invoke the term more broadly, to encompass perceived differences which either are nonexistent or are not as grand as supposed, even at the group level. Statistical discrimination is deliberate, like discrimination born of animus, but it is motivated from a desire to discover target-persons via minimized information costs, instead of from emotional aversion to a group.¹⁰³

What economists label statistical discrimination, other people denominate as stereotyping.¹⁰⁴ The authoritarian personality, associated with discriminatory attitudes by psychologists, entails an economic dimension. This is because persons with limited intelligence or education employ the cruder screening devices when these people cannot easily meet information costs.¹⁰⁵ To judge someone as a group member, instead of as an individual, is unavoidable and done constantly.¹⁰⁶ To the extent that race positively correlates with possession of unde-

Yet as offered eight years ago by Dr. Andrew Harless, and by the Meyer Kestnbaum Professor of Labor and Industry at Harvard University, James Medoff:

In our time, economists like to think of their field as a dispassionate science guided by logic and evidence. Looking at the history of the field, however, one finds politics to be an inescapable part. The classical economists Adam Smith and David Ricardo crusaded against government policies that protected the interests of aristocratic landowners while stifling those of the emerging capitalist class. Karl Marx, whom economists usually claim as one of their own, was certainly more concerned with politics than economics. His theories were designed to support the interests of the working class against those of the capitalists.

In the end, the economic theories of Marx did fall victim to logic and evidence. The name of Marx was tarnished by the unsuccessful and sometimes inhuman policies of his followers. Nonetheless, Marx may have been right about the relationship between thought and politics. Marx's theories had a blatant political purpose, but he suggested that theories in general had political purposes, acknowledged or not. On this point, logic and evidence do not contradict him.

JAMES MEDOFF AND ANDREW HARLESS, *THE INDEBTED SOCIETY: ANATOMY OF AN ONGOING DISASTER* 71 (1996).

102. MAURO F. GUILLÉN, RANDELL COLLINS, PAULA ENGLAND, AND MARSHALL MEYER, *The Revival of Economic Sociology*, in *THE NEW ECONOMIC SOCIOLOGY: DEVELOPMENTS IN AN EMERGING FIELD* 22 (Mauro F. Guillén, Randall Collins, Paula England, and Marshall Meyer eds. 2002).

103. *Id.*

104. RICHARD A. POSNER, *AGING AND OLD AGE* 322 (1995).

105. *Id.* at 324-25 (citing ERDMAN B. PALMORE, *AGEISM: NEGATIVE AND POSITIVE* 53-54 (1990)).

106. POSNER, *supra* note 104, at 325.

When for good or not-so-good reasons we prohibit the use of a nonspurious generalization, we combat one generalization with another, and may produce a decisionmaking process less accurate (or more costly for an equivalent degree of accuracy) than it would otherwise have been.

FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 216 (2003).

sirable characteristics, it is economically rational for parties to exploit this proxy for the underlying correlated characteristic.¹⁰⁷ Ethnic profiling can be rational policing strategy from a simple efficiency standpoint.¹⁰⁸ Of course, New Jerseyites comprehend that the fact that racial discrimination can be efficient does not guarantee that it ought to be lawful.¹⁰⁹

VI. THE ECONOMICS: THE PERSICO CONTRIBUTION OF 2002

A. Fairness and Effectiveness

In his December 2002 study, *Racial Profiling, Fairness, and Effectiveness of Policing*,¹¹⁰ published in the *American Economic Review*, University of Pennsylvania economist Nicola Persico investigated the tradeoff between fairness and effectiveness in policing.¹¹¹ According to the standard model of crime, participation in criminal activity increases as one's market wage decreases in relation to the rewards accompanying criminality. However, participation in criminal activity diminishes as the risk of apprehension after committing a crime, or the penalty upon conviction of a crime, mounts.¹¹² A rational choice¹¹³ model of policing and crime to study the effect of imple-

You may start out determined to make individual judgments of dogs, or teenage drivers, or job applicants, but to make these judgments you will need standards—and standards require generalizations.

Dan Seligman, *Bookshelf*, WALL ST. J., November 19, 2003, at D12.

107. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 599 (6th ed. 2003).

108. *Id.* at 599-600.

109. *Id.* at 599. Cf. GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 26-33 (2002).

Although we have paid close attention to the practical consequences of specific courses of action, we do not think this a simple practical issue. The problem of racially specific investigations cannot reliably be solved by any direct cost-benefit analysis.

Goss and Livingston, *supra* note 1, at 1438.

110. Nicola Persico, *Racial Profiling, Fairness, and Effectiveness of Policing*, 92 AM. ECON. REV. 1472 (2002). In this 2002 study, Persico invokes the terms "African-American" and "white." (Note the single lower case.) The instant text utilizes the terms "African-American" and "black" interchangeably, for purposes of the current discussion of law and economics.

111. *Id.* at 1494.

112. According to Professor of Economics and Public Policy Alan B. Krueger of Princeton University, and Associate Professor of Middle Eastern Studies at Charles University (Prague) Jitka Malečková. Alan B. Krueger and Jitka Malečková, *Seeking the Roots of Terrorism*, CHRON. HIGHER ED., June 6, 2003, at B11.

113. Rational choice theory informs various economic analyses of law:

Approaches to the study of contract negotiation that rely on traditional law and economic analysis rest on the following fundamental premise: Contracting parties' intrinsic preferences for contract terms are exogenous to contextual factors that frame the negotiations. For example, the content of default terms that will govern the parties by operation of law if the parties do not explicitly contract around them should not affect parties' preferences, nor should the interpersonal dynamics of the bargaining table.

The reason for the persistence of this "preference exogeneity assumption" is embedded deeply in the behavioral model of rational choice theory, which underlies the economic analysis of law. Rational choice theory presumes parties will act so as to maximize their expected utility, which involves comparing end states that might result from alternative be-

menting fairness was Persico's theoretical viewpoint.¹¹⁴ The results stated in this model presume that members of a racial group may be searched disproportionately frequently by racially unbiased police. The premise is that race correlates with other features which are invisible to police, but which do correlate with crime, and as such, race presents a proxy for these additional features.¹¹⁵

The Persico model assumes that the police select whom to search in an effort to maximize successful searches.¹¹⁶ An equal success rate of vehicular searches shown across groups is supportive of the assumption regarding the motivation of police.¹¹⁷ Also, effective interdiction is calculated through determining the total number of citizens committing crimes.¹¹⁸ Given a sum of crimes, effectiveness of interdiction will remain unchanged regardless of whether most crimes are perpetrated by one racial group, or equally by both racial groups.¹¹⁹ Each citizen knows her own legal earning opportunity¹²⁰, which in the Persico model, was permitted to diverge across groups.¹²¹

Fairness of policing means two groups are policed with the same intensity.¹²² Such a definition conforms with the notion that there is some cost levied upon innocent citizens who are searched, and that it is desirable to equalize such anticipated costs across races.¹²³

The model is designed to depict interdiction, which is greatly discretionary inasmuch as it is the police who identify whom to investigate, as with highway searches of vehicles.¹²⁴ This contrasts with police responses to the summons for intervention, e.g., as to domestic vio-

haviors discounted by their likelihood of occurring. In economic analysis of law – at least in the field of contracting behavior – this presumption is usually simplified by assuming that parties will act to maximize their expected wealth.

RUSSELL KOROBKIN, *Behavioral Economics, Contract Formation, and Contract Law*, in *BEHAVIORAL LAW AND ECONOMICS* 117-18 (Cass R. Sunstein ed. 2000).

114. Persico, *supra* note 110, at 1494.

115. *Id.* at 1472 n.4.

116. *Id.* at 1488.

117. *Id.*

118. *Id.* at 1493. "In this paper effectiveness of interdiction is synonymous [sic] with 'crime minimization.'" *Id.* at 1473 n.6.

119. *Id.*

120. *Id.* at 1476.

121. *Id.*

122. *Id.* at 1477.

123. *Id.*

If using a statistically rational profile that includes race imposes a tax on innocent African-Americans, then the Age Sixty Rule imposes an age tax on fit older pilots, the actuarial practices of insurance companies impose a Massachusetts tax on safe Massachusetts drivers, and the exclusion of well-behaved English soccer fans imposes an English tax on them. SCHAUER, *supra* note 106, at 335 n.21.

124. Persico, *supra* note 110, at 1476. Synthesize the relevance of this point with the definition of racial profiling herein as delineated in Section VA, *supra*.

lence.¹²⁵ The allegation of racial disparity is made particularly with reference to high-discretion interdiction.¹²⁶ Attention is limited to the kind of crimes which are the object of interdiction, for example, transporting drugs, in the case of vehicular searches.¹²⁷ When the model is applied to vehicular searches, it carries implications for that fraction of motorists adjudged guilty of drug transport along highways.¹²⁸

A finding that success rates are similar across racial groups squares with the premise that police actually do maximize the success rate of their searches.¹²⁹ On Interstate 95, African-American drivers are approximately six times more likely to be searched than are white drivers. Yet the success rate of searches does not significantly differ between these groups: 34 percent for African Americans versus 32 percent for whites.¹³⁰ Fairness and effectiveness are perhaps antithetical.¹³¹ Prohibiting the police from invoking some ethnic characteristics might diminish the effectiveness of policing.¹³²

B. *Fairness, Effectiveness, and Income Distribution*

Restricting the police might or might not impinge upon the effectiveness of interdiction; it depends upon the relative elasticity to policing within the two groups.¹³³ Legal earning opportunities matter because, under a certain intensity of policing, those citizens whose legal earning options are more lucrative will refrain from crime, while those below this threshold will not.¹³⁴ Conditions can exist where a modest shift toward equalizing search intensities across groups can obstruct effectiveness.¹³⁵

Of interest is income distribution, divisible by quantiles, because citizens are assumed to contrast their legal income against the potential payoffs of crime. When these income distribution quantiles bunch

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1478.

130. *Id.*

131. *Id.* at 1480.

132. *Id.* at 1472.

Ignoring real differences, which is what most generalizations do, is often desirable; but even when ignoring real differences is desirable it is not without costs. As a generalization, the principle of treating all equally is a principle that ignores real differences, and consequently comes at a price.

SCHAUER, *supra* note 106, at 216. Although Schauer, the Frank Stanton Professor of the First Amendment at the John F. Kennedy School of Government, Harvard University, offers a seven-page discussion headed "Driving while Black," *id.* at 191-198, Schauer's index omits Nicola Persico. *Id.* at 358.

133. Persico, *supra* note 110, at 1474.

134. *Id.*

135. *Id.* at 1480.

closely, a large proportion of the population enjoys access to incomes nearly equal to one another; specifically, incomes crowd near the income level of the citizens precisely indifferent between committing crimes or not.¹³⁶ In these situations, a trifling decrease in the expected rewards of crime will turn a major portion of the population from committing crimes to working for an honest wage.¹³⁷

Of relevance in the *comparative* spread of the quantiles: Were the quantiles of the legal income distribution in a first group more widespread than those of a second group, then redirecting interdiction efforts from the second group means a large fraction of honest citizens in that second group migrate into crime (although few criminals among the first group reform toward legal activities).¹³⁸ One foresees the first group to be less responsive to policing than its counterpart.¹³⁹

In fact, one can assess the 1999 yearly earning distributions of males ages 15 to 55 residing in metropolitan statistical areas of the United States.¹⁴⁰ At least at the general level of abstraction in the Persico model, if police were restricted from reallocating resources from African-Americans to whites, a move to fairness, then the total crime would not decline.¹⁴¹ A tradeoff between fairness and effectiveness in policing can emerge from interracial income disparities.¹⁴² This finding is contradictory with the optimistic insistence of Bureau of Justice Director Nancy Gist, as quoted in Section VA, *supra*.

In any event, the model in Persico's 2002 paper is not conclusive. Persico insists that "[t]he model is too stylized to have direct policy implications"¹⁴³. . . "[t]he model is too general to be applied to any specific environment"¹⁴⁴, and "[d]ue to the many simplifications and to the generality of the model, no part of the analysis should be understood to have any direct policy implications."¹⁴⁵

But in light of last year's New Jersey legislation, *Racial Profiling, Fairness, and Effectiveness of Policing* provides a most fruitful resource. Why? As explained in its conclusion¹⁴⁶, "[i]n order to obtain policy implications, the model needs to be tailored to specific situa-

136. *Id.* at 1481. Persico utilizes the term "quantile."

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 1485

141. *Id.* at 1486.

142. *Id.* at 1494.

143. *Id.* at 1486.

144. *Id.* at 1473.

145. *Id.* at 1494-95.

146. *Id.* at 1493-95.

tions of interdiction.”¹⁴⁷ The next step awaiting analysts of public policy from the school of law and economics is plain: These scholars must become tailors.

VII. CONCLUSION

A. *The Work of 2003*

The preceding discussion has recounted the execution into law last year of the New Jersey Racial Profiling Statute by New Jersey Governor McGreevey. That statute was hailed with a reception appropriate to a watershed enactment. Acting Attorney General Harvey, state senators, assemblymen, and civil rights worthies all shared in this ceremony. Meanwhile, figures in the State Troopers Fraternal Association might have been less receptive to the newborn legislation than were some of their fellow Garden State citizens.

It has been found that this recent enactment, *inter alia*, forestalls law enforcement officers in New Jersey from applying racial features, even if as linked to such supplementary composite characteristics as a vehicle's description, to legitimize investigative stops: The racial profiling debate turns, especially, on roadway stops. This issue was put into some perspective thanks to evidence delivered by the Public Services Research Institute in 2001 to Trenton's Attorney General regarding speeding on the New Jersey Turnpike. High-level speeding along the Turnpike broke on racial lines.

Racial profiling has been defined hereinabove as police activity relying upon race, in contrast with an individual's behavior. Yet the economic theory of statistical discrimination pays tribute to the diminution of costs through adherence to using generalizations about race to infer an individual's own characteristics. Can there exist a tradeoff between protecting the civil rights of every American, through a preclusion of racial profiling, and effective enforcement of our laws, through the efficiencies embodied by statistical discrimination?

B. *The Toil of 2004*

The latest major economic study of racial profiling is Nicola Persico's. His evidence scarcely is heartening. Fairness and effectiveness might prove mutually exclusive. Circumstances can occur whereby a minor shift to equalizing police search intensities across groups would hinder effective law enforcement. A tradeoff between fairness and

147. *Id.* at 1495. Social scientists often tend to defend their choice of a research problem, e.g., the effects of racial discrimination, primarily in terms of the social importance of discovering a solution. Kuhn, *supra* note 101, at 164.

effectiveness in policing can derive from interracial income differences.

Explained Persico in his 2002 study:

One contribution of this paper is to give to rigorous foundation to the idea that fairness and effectiveness of policing are not necessarily in contrast, and to show that due to a "second best" argument, constraining police behavior may well increase effectiveness of interdiction. On the other hand, we have not shown that this is the case in practice. Although we do not claim conclusively to have answered the question, we hope that, if the framework proposed here proves to be convincing, it can provide an analytical foundation for the public debate.¹⁴⁸

In light of the 2003 New Jersey enactment, scholars of law and economics must further clarify for the public the prospect of fairness-effectiveness tensions¹⁴⁹ in coming years.

148. Persico, *supra* note 110, at 164. The theory of second best "... says that, in the absence of being able to attain all the conditions necessary for the existence of the most desirable possible economic situation, the second-best position is not necessarily one in which the remaining conditions will hold." GRAHAM BANNOCK, R. E. BAXTER, AND EVAN DAVIS, *DICTIONARY OF ECONOMICS* 373 (1998). The theory of second best was propounded in R. G. LIPSEY AND K. LANCASTER, *THE GENERAL THEORY OF SECOND BEST* (1956). *Id.*

149. [S]ociety faces a serious trade-off between three important social values when crime rates differ across groups. In particular, society can lower the crime rate and overall probability of convicting an innocent person by making conviction easier for members of the high-crime group and more difficult for members of the low-crime group. Results using FBI data indicate an upper bound on inequality where innocent black Americans are five times more likely to be convicted of a violent crime than innocent white Americans. These findings might also explain survey and empirical evidence that views of the justice system differ across racial groups. Although the data are not sufficient to permit speculation of the degree of inequality that actually exists in the United States, our empirical experiment indicates that inequity can potentially be quite large.

In addition, our empirical findings indicate that eliminating all racial inequality (moving from the upper bound to complete equality) comes at a cost of 1,903 lives per year. Similarly, we find that gender equality would cost 1,400 lives per year. These findings indicate that the United States faces a very serious dilemma between equality and crime, and policies targeted at minimizing the trade-off are the only method by which to improve this dilemma.

Amy Farmer and Dick Terrell, *Crime Versus Justice: Is There a Trade-off?*, 44 J.L. & ECON. 345, 363 (2001) (footnote omitted).