

Ethical Profiling

Michael Boylan

Received: 1 September 2010 / Accepted: 1 October 2010 / Published online: 17 December 2010
© Springer Science+Business Media B.V. 2010

Abstract This essay will argue for ethical procedures governing criminal profiling. A model based upon psychological/behavioral data, witness data, and forensic profiling data is sketched out. This model fits the legitimate uses of criminal profiling as an investigation procedure. Racial profiling as a primary sorting factor does not fit the preferred model and has significant downsides and so is rejected as a primary sorting mechanism in criminal investigation procedure.

Keywords Criminal profiling · Forensic profiling · Psychological profiling · Racial profiling

Over the past couple decades few issues have been so socially controversial as racial profiling in a criminal investigation procedure. From investigations in Baton Rouge, LA to Charlottesville, VA to the controversial policies on targeting drivers on the New Jersey Turnpike, racial profiling involving African Americans has been viewed by many (including this author) as an unjustified instance of racism (Boylan 2008). From the bombing of the Murrah Office Building in Oklahoma to the attacks of September 11th 2001 to the ongoing defense of our country against terrorism, the use of racial profiling has been very controversial. Finally, in April 2010 the Republican legislature in the state of Arizona has passed a bill that requires police to approach and question those who reach the level of reasonable suspicion as to their immigration status. Since the state borders on Mexico, the principal intent is to roundup and return Mexican and Central American undocumented individuals to their country of origin. Many believe that this law will encourage racial profiling by

M. Boylan (✉)
Marymount University, Arlington, VA 22207, USA
e-mail: michael.boylan@marymount.edu

police in Arizona to assume that anyone looking Hispanic is guilty until proven innocent.

As the above examples demonstrate, racial profiling as a criminal investigation procedure exists and is very controversial. Is racial profiling justified? How should we think about profiling as a part of the portfolio of a detective? These are some of the questions that are at the heart of this essay. In order to get there, we need to stabilize our vocabulary and set out a model of criminal profiling in order to ascertain whether race should ever constitute primary criminal evidence in an ongoing criminal investigation.

Basic Definitions To avoid confusion let us agree to some fundamental definitions.

Crime. Crime in the context of this essay will refer to breeches in the national, state, or local legal statutes. It also includes acts of mass violence for the purposes of inciting terror (though this is controversial—Palmer-Fernández 2011).

Criminal Evidence. Criminal evidence is of two sorts: primary and secondary factors. *Primary criminal evidence* is a narrow sorting device that concerns evidence that is most effective at identifying or contributing to a profile of the perpetrator of the crime as an individual. Primary criminal evidence is of the quality that can lead to an arrest: probable cause. *Secondary criminal evidence* is a broader sorting device that concerns evidence that is generally used to eliminate classes of suspects from the population of people of interest. Secondary criminal evidence is not of the quality that it can lead to an arrest.

Criminal Profiling. Criminal profiling is the reconstruction of the crime and the crime scene in order to ascertain *who* did *what* to *whom*—*when* and *why*. Criminal profiling is generally of three classes: psychological or behavioral profiling, forensic profiling, witness profiling. Each of these can be used in predictive and retrodictive discovery.

Crime Scene. Refers to the action description of the crime as it occurred: all the individuals involved, what happened, where it happened, and why it happened.

Forensic Profiling. Forensic profiling is the acquisition and evaluation of physical evidence in the light of modern scientific techniques of analysis for the purposes of predictive discovery.

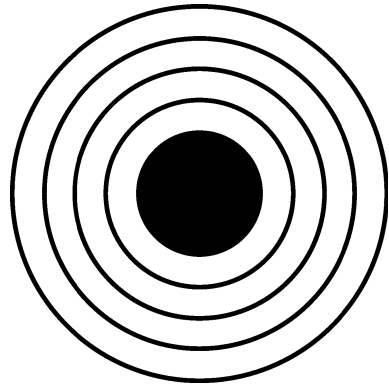
Predictive Discovery. Predictive reconstruction of the crime scene after the fact but before there is enough information for a warrant of arrest.

Psychological/Behavioral Profiling. Psychological/behavioral profiling is the creation of either a general worldview depiction of a *type of person* who might commit some sort of crime (not advocated in this essay) or a narrow worldview sketch that relies heavily upon forensic profiling and witness profiling in order to recognize the *token* (advocated in this essay). Psychological/behavioral profiling can be used in both predictive and retrodictive discovery.

Retrodictive Discovery. Post-arrest reconstruction of the crime scene and the events that led up to it. This sort of discovery occurs before trial in order to determine the mental state of the accused, *mens rea*.

Witness Profiling. Witness profiling is the critical evaluation of eyewitness testimony in order to engage in predictive discovery.

Fig. 1 Target approach to profiling. Bull's eye = Victim; First ring = Victim's family; Second ring = Victim's work/community/church companions; Third ring = Victim's new acquaintances; Fourth ring = Random Strangers



1 A Model of Ethical Criminal Profiling

In the best situation the following is the accepted method used in the United States for a criminal investigation. It all begins when a victim comes forward or when a witness (after the fact) declares that a crime has been committed. The following is a quick guide to how the three legitimate forms of criminal profiling work in the best circumstances. Before this brief examination of the phases of the criminal investigation, let us set out a foundational principle in criminal investigation: most crimes are committed against someone who the perpetrator knows. In order properly to go through the preferred model of profiling, let us visualize these phases like a standard target with concentric circles (Fig. 1).

Phase 1: Determine whether a crime has been committed. Secure the crime scene and the witnesses in order to determine this. For example, several years ago a TWA plane blew up at Kennedy International Airport. Was this an act of international terrorism? No, a faulty ignition spark caused the explosion. Thus, there was no crime committed. There have been many instances of what seems like a natural event—such as the death of an elderly person of wealth that turned out to be a crime. This may be discovered through an examination of the crime scene: e.g., powerful motives to move the estate into probate, further investigation may reveal that a crime has been committed.

Phase 2: If a crime has been committed, then which crime is it? For example, in 1994 Susan Smith said a Black Man killed her children. This is sometimes termed *racial hoax* (Welch 2007). For the hoax to work it depends upon there being a socially constructed general image of the young black criminal predator—such constructed images lie at the heart of racial profiling.)¹ Instead, it was determined that Susan Smith killed her own children.

Another instance of trying to ascertain the sort of crime committed is the bombing of the Mura Office Building in Oklahoma. Determining the nature of the crime proved to be a difficult task. Was it terrorism? If so, was it foreign terrorism?

¹ Of course there are other socially constructed racial stereotypes as well—such as the rabid Islamic extremist. As will be shown later in this essay such stereotypes have vague connection to some empirical data, but the conclusions are not supported by inductive logic.

Was there a particular party being targeted and the general blast used to cover up the real target? Was it a revenge crime of someone who had worked at the building but was fired? There were certainly a number of possibilities.

One way to get a good foundation for this phase of profiling is to begin with the victim and the risk level he/she was willing to accommodate in his/her lives. This is often called victim risk (Douglas et al. 1986). At one end of the spectrum one might set people who will associate with virtually anyone—drug addicts, the homeless, prostitutes, et al. At the other end are those who consciously sequester themselves—the wealthy and powerful. Lifestyle has an effect on becoming a victim (due to probability and risk).

Offender risk is also an important part of a criminal profile (Napier and Baker 2005). Those who abduct in broad daylight in a crowded city setting, for example, are very likely to be caught. This is very risky behavior. Low risk behavior requires planning and stealth.

There are other sorts of pieces to the puzzle such as serial criminals who escalate their behavior on successive criminal acts (Douglas and Munn 1992). The staging of a crime scene is sometimes carefully constructed to misdirect the investigation of physical evidence (Douglas and Munn 1992). Time and location of when the perpetrator spent time with victim can also be crucial (Douglas and Munn 1992). The *modus operandi* signature of the crime can connect separate incidents together (Douglas and Munn 1992). The personality of the crime scene: how the crime looks to investigators also gives a hint as to the worldview of the perpetrator (Hazelwood and Warren 2003).

The above criteria can give good evidence as to whose crime it is via the personal identity of the perpetrator through questions about both the victim and the offender. However, there are still gaps. These require us to move to the next phase.

Phase 3: Create the criminal profile. There are at least three-parts that go into a criminal profile: the psychological/behavioral profile, the witness profile, and the physical evidence (forensic) profile. The overall criminal profile is created interactively in the same time period. One begins with the victim. In our bull's eye diagram above, this is the very center of the target. Why was this person a victim? What elevated her to this status? Since most crimes are not random, the standard procedure is to move outward in concentric circles from the victim to family members, people around her, lovers, friends, co-workers, and finally strangers (at the outside).

The ideal case to illustrate this process is the 1950s New York City case of the Mad Bomber. In the mid-50s the city was terrorized by a series of bombs that went off at various landmarks such as Grand Central Station, Radio City Music Hall, as well as theaters and libraries (Schlesinger 2009). Because the Mad Bomber was very meticulous in his planning and the cases went unresolved for 16 years. The New York City Police Department then consulted psychiatrist James Brussel to create a criminal profile of the perpetrator. Brussel brought in all the physical evidence available for a forensic profile that gave an empirical basis for his subsequent psychological profile. After viewing the evidence Brussel concluded that the suspect was of Eastern European descent, over 40, lived with an aunt or sister, had a serious

illness, attended church, and was soft-spoken and polite. As a result the New York Times ran the following on Christmas, 1968.

Look for a heavy man. Middle age. Foreign born. Roman Catholic. Single. Lives with brother or sister. When you find him, chances are he'll be wearing a buttoned double-breasted suit. Buttoned. (Brussel 1968)

The profile allowed police to narrow their search to George Metesky, a former disgruntled Con Edison worker. Brussel's profile was amazingly accurate down to the buttoned double-breasted suit. This was really the beginning of scientific criminal profiling in America.²

However, criminal profiling is not an easy process. Greg McCrary, a former field agent for the FBI, told me of one case he worked on in New York City. It was an apartment building that had a predominantly Jewish clientele. An elderly woman was murdered and found on the stairwell. She was taken to the morgue and autopsied. In the autopsy some hair samples were identified as being from an African American under 60 (the age most men turn gray). This physical finding led to creating a forensic profile of the killer that he was an African American aged 15–60 with some access to the building. As detectives were gathering those who had opportunity and fit the forensic profile, it was discovered that the body bag was one that had been used in an earlier case and not discarded. The hairs found on the body were from the contaminated body bag. The police had to start all over again beginning with the victim and the chart of acquaintances. By looking at the circumstances of the crime scene and the circle of those who knew her a psychological/behavioral profile was created that eventually led to an arrest.

In another case that McCrary worked in Atlanta concerned a series of child murders within the African American community. This community was very racially stressed. They were reacting to what they saw as severe racial backlash against civil rights. The shared community worldview was that a racist white man had committed the crime. This was a clear case of racial profiling by the community. It deleteriously affected what potential eyewitnesses said (because it altered their perceived reconstruction according to what they expected to see) and the given psychological/behavioral profile that was being developed was also skewed improperly. Unfortunately, there was no physical evidence that would pinpoint anyone. In this instance profiling did not work. It was only by working the bulls eye approach that the serial killer, a black man living in the community, was apprehended through traditional means, motive, and opportunity criteria of someone within the scope of acquaintances.

A final example in this category also came from McCrary's work in Rhode Island. There was a murder in a neighborhood that was 90% white Roman Catholic. Because most of the neighborhood was white, investigators began with a racial profile assumption that the murderer was also white. But this assumption poisoned the legitimate profiling process just as it had in Atlanta. The murderer was one of

² Of course the ideal of the criminal profiler who uses physical evidence and witnesses testimony (when available) to construct a psychological/behavioral model of the perpetrator first appeared in fiction through characters such as Sherlock Holmes and Hercule Poirot. Sometimes real life follows art.

only a handful of African Americans living in the area. He was apprehended via the bull's eye approach: he knew the victim and had business dealings with him. When this individual became a person of interest, forensic evidence led to a profile that resulted in an arrest warrant.

Phase 3 is all about creating criminal profiles: the psychological/behavioral profile, the witness profile, and the physical evidence (forensic) profile. Sometimes these are effective and sometimes not. The most reliable input, for the most part, is the physical evidence. But the physical evidence does not speak for itself, it must be interpreted within the context of the profile.

The least reliable part of the process is eyewitness testimony (including spontaneous confessions). This may seem counterintuitive since eyewitnesses were there and saw everything. However, there are mitigating factors such as the trauma of the event itself. Post-Traumatic Stress Disorder can occur in various degrees especially to victims of violent crimes. It can cause memory errors based upon the witness or victim's own personal worldview (a capacity that tries to make sense of what happens in life). Large cognitive dissonance on the part of various parties in a crime may contradict the records of video surveillance cameras (the best sort of eye witness). There is also the phenomenon of false confession. This is most prevalent in cases in which there is wide publicity about the crime committed.

A well-agreed upon set of general profiling basics follows Douglas et al. (1986)³:

- (a) input: collecting crime scene information
- (b) decision process: arranging the input into meaningful patterns and analyzing victim and offender risk
- (c) crime assessment: reconstructing the crime and the offender motivation
- (d) criminal profile: developing these specific descriptions of the offender (Douglas et al. 1992)
- (e) Investigation: using the profile as an aid or adjunct in investigation
- (f) Apprehension: checking the accuracy and the description against new information that emerges in the investigation and changing the profile accordingly.

These are important categories and there was much overlap in my discussions with practitioners of profiling.

Phase 4: Go to the prosecuting attorney with a written affidavit to apply for a warrant of arrest. At this stage the completed predictive discovery profile containing input from witnesses, psychological/behavioral assessment, and physical evidence undergoes careful scrutiny before being presented to the judge who may issue the warrant of arrest.

Phase 5: Arrest the suspect and turn him over to forensic psychologists to engage in retrodictive profiling. This is an area that should not be ignored in profiling. In discussions with Mary Lindahl, a forensic psychologist, on this phase of criminal profiling I found that the retrodictive discovery phase is similar, but different from the predictive discovery phase. In the retrodictive discovery phase, the profiler is

³ cf. also to Schlesinger (2009), Kocsis (2003a, b, 2006), and Rossmo (2000).

confronted with an established case against the defendant. It has met the probable cause standard and the district attorney believes that she can prove beyond a reasonable doubt that the defendant is guilty. Most people who get to this stage *really are guilty*. But as we know, going back to at least Thomas Aquinas, there are two modes of retributive justice: first order (proving that x actually did y to z) and the second order (how culpable was x) (Boylan 2004). The forensic psychologist's role in retrodictive discovery is primarily the latter (but as an officer of the court she is also bound to convey evidence [psychological profiling] that might be exculpatory (first order).

When Lindahl worked on the unabomber case, there were some real questions about the *mens rea* of Ted Kaczynski. Dr. Lindahl had to determine whether he was sane enough for trial and if there were any mental capacity issues that might properly be raised in court. This required not only discussions with the defendant, but his mother and brother (who were the ones who turned him in). Dr. Lindahl utilized conventional psychological methods to make professional judgments both in her role as a forensic psychologist (and a prudent and reasonable practitioner in her discipline) and as an officer of the court enforcing legal standards. There are sometimes instances in which the two professional roles conflict. This is a true ethical dilemma. When these situations occur, Lindahl is obliged to present the dilemma to the presiding judge for advisement.

In other cases it is important to make judgments about causation. For example, in the Washington DC sniper killings an elder man, John Allen Muhammad, was traveling with a much younger accomplice and triggerman, Lee Boyd Malvo. Was there coercion involved by Muhammad that might mitigate Malvo's actions? This is the sort of question that physical evidence alone or witnesses alone could not answer: enter Dr. Lindahl and the retrodictive discovery profile.⁴

In this section, a model of criminal profiling has been sketched out. For the most part the section has concentrated upon predictive discovery profiling using the input of psychology/behavioral data, physical evidence, and witnesses. These inputs are merged together for the sake of seeking factors of individuation. When we look at a fingerprint, we are not as interested in the *type* of fingerprint class it represents but rather the individual who possesses the unique print. Or in a DNA sample, a phylogenic analysis is less interesting than individuating aspects of information (and the capacity for this improves almost monthly—Soares 2010). And finally with witnesses, finding out that the defendant is tall is far less valuable than finding out that he has a scar on his left cheek. So what lies behind this basic model is that criminal profiling predictively and retrodictively should be about what philosophers call *token analysis* (emphasis upon the individual) as opposed to *type analysis* (emphasis upon the various abstract classes). The former fulfills the mission and is ethical while the latter does not and is not.

⁴ For the sake of completeness, let me report that any coercion on Malvo was held to be within his power reasonably to withstand. Thus, his sentence was not affected.

2 The Debate on Criminal Profiling

The utility of criminal profiling is not universally agreed upon. Criminologist and former police detective Michael Bolton told me that he thought criminal profiling was just *smoke and mirrors*. In a 2004 study Richard Kocsis set up an experimental mock criminal situation that was evaluated by professional profilers, police detectives, psychologists, college sophomores majoring in science, and psychics. The point was to see which group would perform the best. The professional profilers did the best with the college science students and psychologists a close second. Police detectives were next and the psychics were the worst. Kocsis concluded that experience in critical thinking was the key for the higher performing groups. In fact he and a co-author set out methodological procedures in textbook detail (Palermo and Kocsis 2005—especially part 3). Those profiles that seek particularity rather than a general schema work the best say Palermo and Kocsis. This can only occur when crime scene analysis leads the profile (Palermo and Kocsis 2005—part 2). Mere psychological speculation alone leads to generalizations that are often of little value.

Several authors have made this sort of point about specificity. For example, Grimland et al. (2006) argue that the political motivations and tactics of certain terrorists are more useful for solving the crime than psychological analysis of *types*. Understanding the uniqueness of various war contexts is a better tool because it is more specific.

Another attack against type criminal profiling comes from Wolf and Lavezzi (2007) concerning the profiling of serial killers. Wolf and Lavezzi contend that among serial killers there is no effective general profile. Therefore, criminal profiling based upon generalized models is (at least in the case of serial killers) a flawed tool.

Again Torres et al. (2006) examine what psychologists think about generalized profiling. Fewer than 25% thought it was scientifically reliable—though a majority supported continued research that relied heavily upon physical evidence to give it specificity. Only when generalized behavioral models were particularized in this way should (the authors contend) such evidence be admissible in court. This is developed further by Snook et al. (2010) as they criticize the theoretical grounding of criminal profiling and view it as largely ineffective and based upon anecdotal success stories.

Most of the critics of profiling are of this sort. They see profiling based upon generalized patterns with no concrete individuating factors to be of low value and more the tools of psychics than criminal science. Laurence Alison (2005) offers a large review of this debate. However, when the structure of the discussion turns to how a profile is grounded in crime scene data and witness data (to individuate the profile), the critics either support it or think that such an interdisciplinary approach is promising when combined with other physical evidence such as DNA evidence or e-mail correspondence/Internet behavior (Newton 2008 and McCue 2007).

In closing this section, I would add that in the category of retrodictive discovery profiling, there seems to be more agreement that it is a useful procedure. However, even there Wolf and Lavezzi (2007) cite how even convicted criminals can deceive

forensic psychologists. But the nature of the deception plays upon general psychological truisms as opposed to the specificity of the person being examined.

Criminal Profiling thus seems to be less successful when it relies upon generalities and *types*. It seems to be more successful when it pluralistically gathers in crime scene data to move toward specificity. Since it is unethical to base too much upon that which is factually less effective, criminal profiling is only ethical when it focuses upon individual portraits based upon primary factors such as crime scene evidence, witness testimony, and individuated psychological profiles interactively created. All other sorts of profiles are not the state of the art and as such are unethical.

3 The Problem with Racial Profiling

3.1 Violation of Equal Protection Under the Law

High among the principles of fairness in most systems of justice is treating like cases in an equal manner (Boylan 2004). Statistically, this would lead most to expect rough parity of crime and punishment throughout any given population, *ceteris paribus*. However, in the United States, this is not always the case. In Ohio it was found that African Americans were twice as likely as whites to be pulled over in their car (Birzer and Birzer 2006). In Akron 37.6% of all citations for moving violations went to African Americans while in Columbus it was 50%. In an experiment on the New Jersey Turnpike researchers recorded all vehicles passing them, the race of the driver, and whether they were speeding. The study showed that 15% of the violations that occurred were by African American drivers while 46% of all police traffic stops were to African Americans (Birzer and Birzer 2006). A similar study in Florida showed that on a stretch of Interstate 95 in Florida blacks and Latinos constituted 5% of all drivers yet 70% of all traffic stops (Wise 2005). Other studies have shown similar disparities of stops and searches based upon race (Engel and Calnon 2004; Schmidt et al. 2002; Withrow 2002).

Vikas K. Gumbhir speculates this is because the decision-making capacities of the officers is impaired by three factors: (a) racial stereotypes that are held by the officers that influence the way they perceive racial minorities (mixing facts with value implications), (b) institutional features of police departments such as hiring policies, training, deployment, scheduling, and professional culture, and (c) a backdoor justification of (a) and (b) by arrest figures that appear to show that the targeting behavior is effective police work (Gumbhir 2007).

A key point here is the phenomenon of stereotyping. In the United States many Americans see a young African American as dangerous and menacing. Randall Kennedy (Kennedy 1997) has argued that this attitude goes back to the era of slavery. Blacks were seen as sub-human: like viscous animals that had to be carefully controlled. In 1990 a survey showed that 54% of whites in the United States thought that blacks are prone to violence and are generally more aggressive than whites (Sniderman and Piazza 1993). These stereotypes create an unequal

treatment of African Americans under the law contrary to the principle of treating like cases equally.

In 2002, African Americans comprised 13% of the US population, yet accounted for 38% of all violent crime arrests, 30% of all arrests for property crime (US Department of Justice 2004). African American youth accounted for 43% of the arrests for violent crime and 27% of arrests for property crime.

Not only are African Americans targeted for more careful scrutiny than the mainstream European descent population, but also when they are caught they receive harsher sentences. The best-known example of this is the so-called “crack cocaine” versus “powder cocaine” disparity of punishment. The cocaine of choice among poor African Americans is crack. The cocaine of choice among the wealthy Americans (largely white) is powder cocaine. However, until just recently, the mandatory prison sentences for crack cocaine usage was several times what it was for powder usage. The only possible explanation for this is based upon race and economic class. In addition, a profile of the illegal drug users in the US puts whites at 75% and blacks at 13% (their statistical averages, Katz 2000). Yet the prison population for drug use flips this with African Americans at 75% (Katz 2000)! In general, African Americans are seven times more likely to be incarcerated than whites based upon a population of those arrested: 1–3 (African Americans) v. 1–25 (whites) (Katz 2000).

In the media, there is a routine reinforcement of this stereotype. In a study of the local news in Chicago, black criminals were disproportionately portrayed as scowling in mug shots or in video clips walking with handcuffs led by white policemen (Entman 1990). In this same survey it was found that African American criminals were shown in very negative images 2.4 times more often than their European descent criminal counterparts.

The so-called *law and order* platform and the *get tough on crime* sound bite are often code words for fanning racial prejudice as was depicted with such brute effectiveness by Lee Atwater in G. H. W. Bush’s 1988 presidential campaign through the Willie Horton advertisements on television. Here was the slavery-era image of a savage-criminal-black man who was let out of his cage by softheaded Michael Dukakis—just because Horton met the state parole board standards for parole (equal treatment for like cases).

On the concrete level, these examples of stereotyping have been put forth to show one palpable harm to racial profiling: a violation of justice’s fundamental dictum of equal treatment for like cases—which is unethical. For this reason alone, around the world there should be instigated new policies to limit racial profiling by police.

3.2 Skewed Actuarial Findings Based on Types

Racial profiling is akin to *type profiling* discussed earlier in this essay. This is because a sub-group is set out as being more fruitful for scrutiny than the general population. This is in contrast to this essay’s depiction of profiling as focusing upon forensic evidence, witness evidence, and psychological/behavioral evidence based upon an evaluation of the crime scene and the bull’s eye approach to aim at a token.

However, others view profiling rather differently. They see it as an actuarial problem of class identification, only. If it *works*, then what is the problem?

As I point out in Boylan (2007) insurance companies that only used actuarial criteria in the assigning premiums in life insurance rating tables in the United States between 1920 and 1970 that were broken out by race, gave significantly higher rates to African Americans. Actuarially, this could be defended to a State Insurance Commissioner as warranted based solely on actuarial figures. But the statistics do not give the entire picture. The *reasons why* African Americans had a skewed mortality rate against the European-descent population was because of the fall-out of various social problems from the post-slavery era: job and wage discrimination, inferior medical treatment options, poverty and poor nutrition, inferior apartheid living environments, and lynching. These factors were instances of oppression by the mainstream society against African Americans. Are the victims required to pay *twice*? This is unjust (Boylan 2004), thus though the actuarial figures for life insurance show a higher morality rate, this should not be a legitimating factor for charging higher rates to African Americans—*because it was not their fault that they were victims*. Society has a negative duty to absorb the cost of their higher respective rates, since it was in that society that the harms occurred.

Bernard Harcourt (2007) has extended a similar line of analysis recently. He sets out three arguments against actuarial profiling. The first is that when police create a generalized profile they risk a ratchet effect. For example, if the Internal Revenue Service (IRS) determines that dry wall workers are more likely to cheat on their taxes than other small businessmen, then the IRS will profile them for particular notice. This will put dry wall workers on notice that they are being targeted and so they will go to greater lengths to hide their monies and others will join the cheating ranks. If this assertion is true, then general profiling of dry wall workers is counterproductive because the policy will enlarge the pool of cheaters rather than diminish it. Harcourt's argument against actuarial group profiling accords with my own (as per the life insurance case). But, of course, this is not the sort of profiling that this essay has endorsed.⁵

Harcourt's second objection against actuarial profiling is that it distorts the carceral population. This is because the penal population is partly an artifact that the state wants to investigate. If we assume, for the purposes of this example, that there are three sub-groups in a population, and if all sub-groups commit crimes to the same degree, then the over-attention to any one of the groups will skew the carceral population (assuming that more attention equals more arrests). Thus, actuarial profiling may *look like* it is succeeding, but the reason is remote and not proximate (as Aristotle set out in his definition of proximate and remote causation in the *Posterior Analytics* I.13). As remote, it does not provide an *explanans* but is actually a causal input of the *explanandum*. Thus, in this second sense actuarial profiling provides district attorneys with prosecutable cases, but the manner in which it does so is unjust relative to the non-profiled populations

⁵ It should be noted here that the sort of profiling described by this author is general profiling—using statistics to create *type analysis*. Instead, I have argued for an individualistic-style, *token*, profiling.

because the *reason* for the extra attention is due to factors arbitrary to the crime, prejudicial intuitions.⁶

Harcourt's third point is that perceived successes of actuarial profiling has an effect in the judicial system such that tougher sentences are given because the targeted population is thought to be of a greater risk. However, the *greater* risk is largely an artificial statistical construction as per the two points listed above.

On the abstract level, what is wrong with racial profiling is that it engages in actuarial profiling. Any group that is targeted *solely* on the basis of actuarial profiling goes against the advocated model of individualized profiling (set out earlier). Theoretically, the practice is unsound and the data generated from such a methodology will be epistemologically flawed. Following William Kingdom Clifford (1901), the use of an epistemologically flawed worldview is unethical.

4 Policy Suggestions

I have argued in Boylan (2004) that there may be biological bases to racism due to kin selection theory in evolutionary biology. Since racism, as such, is in every case immoral Boylan (2004), actions need to be taken to counteract potential natural tendencies of one population against another. Unless one is a biological determinist, we can all work to institute policy changes that will blunt and reduce racial profiling. Nature is not decisive. Our ethical good will is (Boylan 2004).

Birzer and Birzer (2006) give one practical policy suggestion. They look at the U.S. Supreme Court case of *Whren v. United States* (1996). In this case a tacit use of geographical profiling was allowed along with possible racial profiling. The incident occurred in Washington, DC in a "high drug area." The police stopped the vehicle because it had been too long at a stop sign (around 20 s as opposed to the normal 1 or 2 s). When the vehicle was stopped there was a search for drugs and drugs were found. This creates a broad category of discretionary reasonable suspicion for police officers to act according to their intuitions (intuitions that may be racially biased). Birzer and Birzer contend that a better standard is *Batson v. Kentucky* (1986) that was set down to eliminate racial profiling in jury selection. The high court created a *Batson* test to judge peremptory juror rejection.

(1) The defendant(s) must first show that they are members of a cognizable racial group and that the prosecution has exercised peremptory challenges to remove from the venire, members of the defendant's race; (2) the defendant(s) may rely on the fact that peremptory challenges are a jury selection practice which allows those who are minded to discriminate to do so; and (3) the defendant(s) must show that these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude the prospective juror on account of race. The burden then shifts to the prosecutor to show a race-neutral reason for excluding the prospective juror (*Batson v Kentucky*, 1986)

⁶ This point links with my own examinations of a couple of actual cases in Boylan (2008).

A Batson-styled rule on racial profiling in the field could be applied to actual cases where the defendant can show that the police officers were inclined to discriminate behind the guise of an allowable discretion in detaining a defendant.⁷ In response the police's burden of proof is that their actions were based upon *race neutral* actions (that themselves were epistemologically justified without recourse to race). This version of the Batson test would need further specification, of course. But such specification has been developed over time with jury selection so that one might assume that the same might occur with criminal investigation procedures. Once such prudent procedures have adequately evolved, then some version of an exclusionary rule might be adopted for those not abiding by this Batson-style test. The exclusionary rule (or some form of it) is a very blunt instrument that does sometimes let guilty defendants walk free, but sometimes it is the only way to modify criminal investigation procedures.⁸ For example, it could be argued that *only* the exclusionary rule stopped abuses in criminal interrogation and the proper gathering of evidence.

Other sociological institutional approaches have been advocated in the past, but this is a much harder reform. One can hire and promote more minorities in the police force so that the police mirror the general population in any given locale, but if the institutional ethos is group profiling oriented, then no change will occur. This leads to the most important policy change: training in individualistic criminal profiling using the tripartite model advocated in this essay. When one is focused upon individuals and not upon groups, then actuarial profiling is difficult—the methodology is all wrong. This last policy suggestion has great promise because it has nothing to do with changing people's hearts, but rather trains them in the most effective methods of catching and convicting criminals.

5 Conclusion

At the writing of this essay, racial profiling is as important an issue as ever. Not only is it an element in normal policing, but also it is now a feature in protecting our cities against terrorism. When the general population begins to feel afraid, there is a biologically based tendency to blame groups of people. But this is not statistically but rather emotionally founded. Racial profiling is wrong on three fronts: (a) it is type oriented and thus violates the token-oriented method of accepted criminal profiling, (b) because of (a) it violates the dictum of justice that like cases be treated equally (equal protection under the law), and (c) it theoretically is flawed because it skews statistical analysis through gross actuarial methodological errors. Through this mixture of ethical and epistemological malfeasance, racial profiling is not in step with proper criminal profiling and it also commits grave ethical and

⁷ Jeffrey Reiman (1996) discusses automatic procedures that limit police discretion (and thereby support the liberty of all). A Batson style test with reasonable procedures that are developed over time would be in the spirit of Reiman's argument.

⁸ There is a brief discussion of the pros and cons of a form of the exclusionary ruling for evidence obtained via racial profiling by David Wasserman (1996).

epistemological errors. As such we need to explore policies to mute and eliminate it as a criminal investigation procedure.

Acknowledgments I would like to thank Greg McCrary, former field agent for the FBI, Michael Bolton, criminologist and former police detective, and Mary Lindahl, a high profile forensic psychologist for their real world insights that have greatly improved my essay. All errors, of course, are my own.

References

- Alison, Laurence J. 2005. *The forensic psychologist's casebook: Psychological profiling and criminal investigation*. Cullumpton: Willan.
- Birzer, Michael L., and Gwynne Harris Birzer. 2006. Race matters: A critical look at racial profiling, it's a matter for the courts. *Journal of Criminal Justice* 34: 643–651.
- Boylan, Michael. 2004. *A just society*. Lanham, MD and Oxford: Rowman and Littlefield.
- Boylan, Michael. 2007. Genetic profiling: Ethical constraints upon criminal investigation procedures. *Politics and Ethics Review* 3: 236–252.
- Boylan, Michael 2008. Racial profiling and genetic privacy in criminal investigation procedures. *Center for American Progress*.
- Brussel, James S. 1968. *Casebook of a crime psychiatrist*. New York: Grove Press.
- Clifford, William Kingdom (1901). The ethics of belief. In *Lectures and essays*, Vol 2, 163–205. London: Macmillan & Co.
- Douglas, J.E., R.K. Ressler, A.W. Burgess, and C.R. Hartman 1986. Criminal profiling from crime scene analysis. *Behavioral Sciences and Law* 401–421.
- Douglas, J.E., A.W. Burgess, A.G. Burgess, and R.K. Ressler. 1992. *Crime classification manual*. San Francisco: Josey-Bass.
- Douglas, J.E., and C. Munn. 1992. Violent crime scene analysis: Modus operandi, signature, and staging. *FBI Law Enforcement Bulletin* 1: 1–10.
- Engel, R.S., and J.M. Calnon. 2004. Examining the effects of drivers' characteristics during traffic stops with police: Results from a national survey. *Justice Quarterly* 21: 49–90.
- Entman, R.M. 1990. Modern racism and the images of blacks in local television news. *Critical Studies in Mass Communication* 7: 332–345.
- Grimland, Meytal, Alan Apter, and Ad. Kerkhof. 2006. The phenomenon of suicide bombing: A review of psychological and nonpsychological factors. *Crisis* 27: 107–118.
- Gumbhir, Vikas K. 2007. *But is it racial profiling?* New York: LFB Scholarly Publishing LLC.
- Harcourt, Bernard E. 2007. *Against prediction: Profiling, Policing, and Punishing in an Actuarial Age*. Chicago: University of Chicago Press.
- Hazelwood, R., and J.I. Warren. 2003. Linkage analysis: Modus operandi, ritual, and signature in serial sexual crime. *Aggression and Violent Behavior* 8: 587–598.
- Katz, J. (2000, February 15). A nation of too many prisoners?. *Los Angeles Times* A-1.
- Kennedy, Randall. 1997. *Race, crime, and the law*. New York: Vintage.
- Kocsis, Richard N. 2003a. Criminal psychological profiling: Validities and abilities? *International Journal of Offender Therapy and Comparative Criminology* 47: 126–144.
- Kocsis, Richard N. 2003b. An empirical assessment of content in criminal psychological profiles. *International Journal of Offender Therapy and Comparative Criminology* 47: 38–47.
- Kocsis, Richard N. 2004. Psychological profiling of serial arson offenses an assessment of skills and accuracy. *Criminal Justice and Behavior* 31: 341–361.
- Kocsis, Richard N. 2006. *Criminal profiling*. Totowa: Humana Press.
- McCue, Colleen. 2007. *Data mining and predictive analysis*. Amsterdam: Elsevier.
- Napier, M.R., and K.P. Baker. 2005. Criminal personality profiling. In *Forensic science: An introduction to scientific and investigative techniques*, 2nd edn., ed. S.H. James, and J.J. Nordby, 615–634. Boca Raton, FL: CRC Press.
- Newton, David E. 2008. *DNA evidence and forensic science*. New York: Facts on File.
- Palermo, George B., and Richard N. Kocsis. 2005. *Offender profiling: An introduction to the sociopsychological analysis of violent crime*. Springfield: Charles C. Thomas Publishers, Ltd.

- Palmer-Fernández, Gabriel. 2011. Cosmopolitan revisions of just war theory. In *Morality and global justice*, ed. Michael. Boylan. Boulder: Westview.
- Reiman, Jeffrey. 1996. Is police discretion justified in a free society? In *Handled with discretion: Ethical issues in police decision making*, ed. John. Kleinig, 71–84. Lanham: Rowman and Littlefield.
- Rossmo, D.K. 2000. *Geographic profiling*. Boca Raton: CRC Press.
- Schlesinger, Louis B. 2009. Psychological profiling: Investigative implications from crime scene analysis. *The Journal of Psychiatry and Law* 37: 73–84.
- Schmidt, E.L., P.A. Langan, and M.R. Durose. 2002. *Characteristics of drivers stopped by police*. Washington, DC: U.S. Department of Justice, Bureau of Statistics.
- Sniderman, P., and T. Piazza. 1993. *The scar of race*. Cambridge: Harvard University Press.
- Soares, Christine (May 2010). Portrait in DNA. *Scientific American* 302: 14–15.
- Snook, Brent, Richard M. Cullen, Craig Bennell, Paul J. Taylor, and Paul Gendreau. 2010. The criminal profiling illusion: What's behind the smoke and mirrors? *Criminal Justice and Behavior* 35: 1257–1276.
- Torres, Angela N., Marcus T. Boccaccini, and Holly A. Miller. 2006. Perceptions of the validity and utility of criminal profiling among forensic psychologists and psychiatrists. *Professional Psychology: Research and Practice* 37: 51–58.
- US Department of Justice (2004) *Crime in the United States, 2002*. from http://www.fbi.gov/ucr/cius_02/html/web/arrested/04-table43.html Retrieved Feb 14, 2007.
- Wasserman, David. 1996. Racial generalizations and police discretion. In *Handled with discretion: Ethical issues in police decision making*, ed. Kleinig. John, 115–130. Lanham: Rowman and Littlefield.
- Welch, Kelly. 2007. Black criminal stereotypes and racial profiling. *Journal of Contemporary Criminal Justice* 23.3: 276–288.
- Wise, T. 2005. Racial profiling and its apologists. In *Annual editions, criminal justice*, ed. J.L. Victor, and J. Naughton, 100–103. Dubuque: McGraw-Hill/Dushkin.
- Withrow, B.L. 2002. *The Wichita stop study*. Wichita: Wichita State University, Midwest Criminal Justice Institute.
- Wolf, Barbara C., and Wendy A. Lavezzi. 2007. Paths to destruction: The lives and crimes of two serial killers. *Journal of Forensic Science* 52: 199–203.

Copyright of Journal of Ethics is the property of Springer Science & Business Media B.V. and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.