Crapping Out with Crime Statistics

Robert Steinbuch
University of Arkansas at Little Rock William H. Bowen School of Law, resteinbuch@gmail.com

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Statistics take facts and offer predictions. With a big enough sample, the predictions are highly accurate. In the gambling game craps, for example, a player can bet on a "hard" number. A hard roll is when both dice land on the same number. So, a hard eight occurs when both dice land on four. The odds of rolling a hard eight are low—one in thirty-six. In contrast, the statistical likelihood of rolling a seven (a.k.a. a "natural") is much higher—one in six. Yet, notwithstanding the odds, the fact is that gamblers still play and sometimes win the hard eight.

Racial profiling occurs when statistics are used to foretell crimes by cohort, and these predictions are employed in law enforcement. It is highly controversial. Proponents point out that with accurate data, it allows for greater efficiency in law enforcement. Opponents are often skeptical of the data and also highlight that individuals should not be subjected to greater law enforcement as a mere consequence of racial identity. Moreover, the critics are rightly concerned about the potential for second-order discriminatory effects.

One of the issues related to, but distinguishable from, racial profiling, however, is law enforcement's use of race in describing actual criminal suspects.[1] This is not racial profiling per se.

For example, I previously received a community email describing a local robbery. It read:

> This afternoon, a [victim] reported . . . that he had been robbed at gunpoint . . . . The 21-year-old male was walking . . . in front of the field house . . . when a male approached him from behind and robbed him of his backpack.

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1. Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 133 (2006).

The suspect took the backpack and started running north . . . . The victim described the suspect as being around 5'6" to 5'8" and about 200 pounds. The suspect was wearing a black hoodie with blue jeans and Nike shoes. He was also wearing a goblin Halloween mask that was green with yellow around the eyes. The weapon was described as a silver automatic.[2]

There was no mention of the race of the perpetrator. Yet, the victim had some significant detail in his description of the robber, including the height and weight of the perpetrator, the brand of shoes he was wearing, and the color and type of weapon used. So, I asked the official who sent the email about the race of the perpetrator. She did not know, did not know if the victim was asked, and referred me to the investigating detective. The police officer never returned my email or a call inquiring into this issue.

Of course, it is possible that the robber completely hid his race by both wearing gloves and a mask that fully covered the head and neck of the perpetrator, including around his eyes.. Or maybe the victim just did not get a good enough look at the bad guy to determine his race—notwithstanding the other specifics that he provided regarding the criminal. It is also possible that the absence of race in the description in this specific instance, as well as the police's failure to respond to inquiries thereabout, was simply an oversight. In fact, I have seen crime reports from the very same source subsequently that *did* specify the race of suspects along with other identifying characteristics.

And just prior to going to print on this article, I received another community email describing a robbery without any reference to race. The events were described as: "A male suspect wearing a mask approached the victim's vehicle and asked for his wallet. When the victim didn't hand over his wallet, the suspect waved a knife and cut the victim's hand. The suspect then hit the victim's head and face with a second weapon described as a mesh-like bag with a heavy object inside. After the victim gave his wallet to the suspect, the suspect asked for his cell phone and destroyed it."[3] And the portion of email concerning the perpetrator of the aggravated assault read: "The suspect is described as 6' to 6'1 weighing 160 to 180 pounds. He was wearing a blue button-down shirt, blue jeans, and dark blue tennis shoes."[4]

So, I contacted first the police department involved, which politely referred me to the official sending out the notice. She very promptly responded "We disclose race only if it is part of the description that might help identify a suspect who is at large. We would not specify race if the suspect had

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2. Email on file with author.
3. Email on file with author.
4. Email on file with author.

already been apprehended. In this case, the victim didn't know the race of the person because he had a complete mask and was covered up."

But these happenstances, still raised the general concern over the intentional omission of racial identity in a police warning resulting from a mistaken concern for racial profiling. Nonetheless, had this problem been merely a theoretical concern that dawned on me from some of the aforementioned events, I would not have written this article. But this issue is not simply an academic exercise. It is quite real. For example, Wesleyan College intentionally undertook such action.

Wesleyan's President Roth decreed that the school's police would no longer include racial identifications in its safety alerts.[5] The newspaper reported that "[t]he move has been recommended by a Public Safety Review Committee, which consists of students, faculty, and staff members."[6]

The school's president wrote:

> The committee has recommended that Public Safety modify campus safety alerts to provide descriptions of suspects without using race as a descriptor, and Public Safety has adopted this practice. The committee continues to review the department's policies and protocols, web presence, and schedule of trainings. Ensuring that there is a clear path for reporting concerns to the department is important.[7]

Good suspect descriptions are multi-factored, but when they devolve to race as the sole or primary factor, they are highly problematic.[8] When warnings of criminal activity to the public break down to mere racial identity, they feed insidious discrimination with very little likelihood that they will result in successful law enforcement. Unsurprisingly, therefore, courts have invalidated police actions that were mainly race-based because these descriptions do not yield valid and reliable identifications.[9] In one case, the District of Columbia Court of Appeals noted that "[d]escriptions applicable to large numbers of people will not support a finding of probable cause."[10] Further, commentators soundly have highlighted the remarkably damaging role that law enforcement directly has played at times in the past in racism

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5. *Roth: Public Safety Will No Longer Include Race in Safety Alerts*, WESLEYING (March 28, 2013 at 12:30 PM), http://wesleying.org/2013/03/28/roth-public-safety-will-no-longer-include-race-in-safety-alerts/.

6. *Id.*

7. Michael S. Roth, *Diversity Forum Update*, ROTH ON WESLEYAN (March 27, 2013), http://roth.blogs.wesleyan.edu/2013/03/27/diversity-forum-update-2/?ref_homepage; WESLEYING, *supra* note 5.

8. Sinha, *supra* note 1, at 133.

9. *Id.* at 135.

10. Brown v. United States, 590 A.2d 1008, 1017 (D.C. 1991); Sinha, *supra* note 1, at 158.

in the United States.[11] And this historical context is no doubt relevant for future legal policy decisions.

"While the Supreme Court has recognized race as one legitimate factor, among others, contributing to police actions, it has also acknowledged the impact of unconstrained police discretion on communities of color."[12] Crafting the appropriate balance is not without challenge. Thus, the United States Department of Justice permits suspect descriptions only as follows: "[U]se of race or ethnicity is permitted only when the officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an identified criminal activity."[13]

Disclosing the race of a specific criminal who already committed a past crime in an attempt to apprehend him, however, is not profiling. And if ample other information is available, race should be included in legitimate law-enforcement alerts because such particulars are *facts* not *predictions*, i.e., data not statistics.

Let us go back to our craps example. While the odds of rolling a hard eight are low, once a shooter has, in fact, done so, the odds that she has done so are 100%. The same is true for the criminal suspect. Once we know the race of the wrongdoer, it is an actual datum—not an educated soothsaying.

For sure, distinguishing racial profiling from race used in suspect descriptions is not always easy. In New York, the City Police's stop-and-frisk program has been described as both.

> Mayor Michael Bloomberg said Friday he believes the New York Police Department stops white people too much and nonwhite people too little based on murder suspect descriptions.
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> . . . .
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> "One newspaper and one news service, they just keep saying, 'Oh, it's a disproportionate percentage of a particular ethnic group.' That may be. But it's not a disproportionate percentage of those who witnesses and victims describe as committing the murders," said Mr. Bloomberg, speaking on his weekly radio show about the large percentage of blacks and Latinos who are stopped by police in the five boroughs each year.
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> "In that case, incidentally, I think, we disproportionately stop whites too much and minorities too little," the mayor said. "It's exactly the reverse

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11. Sinha, *supra* note 1, at 158.

12. *Id.* (footnote omitted).

13. *Id.* at 139 (quoting U.S. Dep't of Justice, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, 5 (2003), http://www.google.com/url?sa=t&rct=j&q=& esrc=s&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fwww.justice.gov%2 Fcrt%2Fabout%2Fspl%2Fdocuments%2Fguidance_on_race.pdf&ei=sO76UoKgAYr2gWu24 DwDQ&usg=AFQjCNFFFl6Rxw1FOMRqHsiLglEtDm8tlA&bvm=bv.61190604,d.b2I).

of what they're saying. I don't know where they went to school, but they certainly didn't take a math course, or a logic course."

Mr. Bloomberg said flatly on Friday: "Nobody racially profiles."

. . . .

[Council Member Brad] Lander [in contrast] said he doesn't believe the NYPD is stopping more than 500,000 people each year because they believe they are murder suspects. Only 13% of stops are based on a suspect fitting a description, he said. By far, the biggest category of stops is based on "furtive movement," which is overwhelmingly applied to people of color, he said.

. . . .

Supporters of the tactic say it has contributed to crime reduction in the city. In 2012, there were 417 murders, a 35.7% drop since Mr. Bloomberg became mayor in 2002.

. . . .

"There's a couple of these newspapers and news services keep writing, 'Oh, you're stopping a disproportionate percentage of a particular ethnic, or religious or age or gender group.' That's not the test," [Mayor Bloomberg] said. "The test is are you stopping a disproportionate percentage of people who fit the description that witnesses or victims have come up with based on the crimes that have been committed."

[Mr. Bloomberg said Friday] most serious crimes in New York City are committed by male minorities ages 15 to 25. He said his administration has worked aggressively to reverse that trend.

"But when it comes to policing, the police have to be able to go out and stop, look for those that fit the description of a witness or a victim after a crime," Mr. Bloomberg said. "And if you can't do that, then, you know, you just turn over the streets to the criminals literally over night."[14]

When the policy was challenged in district court, however, the court called the stop-and-frisk program an "indirect form of racial profiling."[15] While the court acknowledged that "[t]here is no question that a person's race, like a person's height or weight, is a permissible consideration where a

14. Michael Howard Saul, *Bloomberg: NYPD Stops Whites 'Too Much'*, METROPOLIS BLOG (June 28, 2013, 11:50 AM), http://blogs.wsj.com/metropolis/2013/06/28/bloomberg-nypd-stops-whites-too-much/; Michael Howard Saul, *Mayor Bloomberg Says Whites Stopped 'Too Much'*, WALL ST. J. (June 29, 2013, 12:19 AM), http://online.wsj.com/news/articles/SB10001424127887323873904578573940988785874.

15. Floyd v. City of New York, 959 F. Supp. 2d 540, 603 (S.D.N.Y. 2013).

stop is based on a specific description of a suspect,"[16] it found that New York's practice "of targeting 'the right people' encourages the disproportionate stopping of the members of any racial group that is heavily represented in the NYPD's crime suspect data."[17] It noted that "[t]he City and its highest officials believe that blacks and Hispanics should be stopped at the same rate as their proportion of the local criminal suspect population. But this reasoning is flawed because the stopped population is overwhelmingly innocent—not criminal."[18]

As an immutable characteristic, race is far more informative than some of the facts listed above—like the clothing of the robber. Jim Norton, a popular comic, discussed this very phenomenon in a recent show. He ridiculed police emphasis on the clothing of a wrongdoer coupled with the complete omission of racial identity. He sarcastically questioned whether those focusing on garb believe that criminals feel bound not to change their apparel until they are apprehended, while noting the obvious fact that race cannot be discarded in the laundry room. I recommend all interested in this important topic evaluate what Norton has to say on this—no joke!

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16. *Id.*
17. *Id.*
18. *Id.* at 560.