Proving Racial Profiling

The term 'racial profiling' was largely unknown prior to the early 1990's. By the end of the decade most state legislatures had passed laws prohibiting racial profiling and a few required law enforcement departments to collect and report data on officer/citizen contacts. Initially, the focus of racial profiling research was on the effect of drug courier profiles on the population of individuals stopped. These profiles were developed, albeit haphazardly and inequitably, to provide officers with a tool to identify individuals likely to be trafficking illegal drugs. Unfortunately, many of these profiles were both inappropriately and heavily influenced by the race or ethnicity of the driver or on other behaviors that are common within racial and ethnic minority communities. Today, racial profiling research has numerous dimensions, including the agency officers exercise when deciding whether to conduct a stop, search or arrest. The common objective throughout this research is to determine whether routine law enforcement practices result in more frequent or severe outcomes (e.g. citation vs. arrest) for racial or ethnic minority individuals.

Since the beginning, racial profiling research has grappled with several methodological challenges:

1. It is difficult to estimate the racial and ethnic proportions within an actual driving population. Commonly referred to as a 'benchmark', researchers have yet to find a valid or reliable method for estimating the racial and ethnic proportions within a population of individuals at risk of being stopped.
2. Law enforcement stop datasets seldom contain enough information to eliminate plausible alternative explanations (i.e. other than the race or ethnicity of the individuals) for the outcomes of stops.
3. Law enforcement stop datasets almost never contain the requisite information to establish a causal relationship between an individual's race or ethnicity and an officer's decision to initiate a stop.

The Initial Stop

There are dozens of legitimate reasons for an officer to initiate a traffic stop. Most of these reasons are likely related to the officer's observation of a traffic violation. Officers also decide to initiate stops because the vehicle meets the description of a vehicle previously used in a suspected criminal event or is possibly stolen. Sometimes, officers develop a reasonable suspicion that the individuals in the vehicle are involved in criminal behavior. And, it is perfectly legitimate for an officer to initiate a stop when they believe the individuals in the vehicle are in need of assistance or to warn motorists of potentially dangerous situations.

The race or ethnicity of an individual is never a legitimate reason for an officer to initiate a stop. The exception of course is when an officer uses the description of an individual that may include information on the individual's race or ethnicity that is suspected of prior criminal behavior.

California's definition of racial profiling comes from Assembly Bill 953, Section 4(e).

> "Racial or identity profiling," for purposes of this section, is the consideration of, or reliance on, to any degree, actual or perceived race, color, ethnicity, national origin, age, religion, gender identity or expression, sexual orientation, or mental or physical disability

in deciding which persons to subject to a stop or in deciding upon the scope or substance of law enforcement activities following a stop, except that an officer may consider or rely on characteristics listed in a specific suspect description. The activities include, but are not limited to, traffic or pedestrian stops, or actions during a stop, such as asking questions, frisks, consensual and nonconsensual searches of a person or any property, seizing any property, removing vehicle occupants during a traffic stop, issuing a citation, and making an arrest.

This definition of racial profiling, which is typical, explicitly states that an officer is guilty of racial profiling when they initiate a stop based on "…the consideration of, or reliance on, to any degree, actual or perceived race, color, ethnicity, national origin…" of an individual, absent a "specific suspect description". An allegation of racial profiling is relatively simple with respect to the elements of this violation. A stop predicated to any degree on the race or ethnicity of an individual is racial profiling. In other words, the allegation is that the race or ethnicity of an individual is the cause of the police officer's decision to initiate the stop.

Confirming a causal relationship between two or more variables is exceedingly difficult. Luckily, social research methodology provides some direction in the form of a series of conditions that must be met in order to establish a causal relationship.

The first causal condition is generally referred to as temporal order. This condition requires that the cause must precede the result. Unfortunately, the data on officer/citizen contacts used in the State of California (collected by the California Attorney General through its Racial and Identity Profiling Act Board) does not measure what the officer knew about individuals prior to deciding to initiate a contact. More to the point, it is not possible to confirm a causal relationship between an individual's race or ethnicity and a police officer's decision to initiate a stop when we cannot establish if the police officer even knew the individual's race or ethnicity prior to the stop.

The second condition is correlation. A correlation is a demonstrable and reliable relationship between two or more variables. For example, if one were to allege that poverty causes crime then it is necessary to prove that as the level of poverty increases the level of criminal behavior increases and that as the level of poverty decreases the level of criminal behavior decreases. This is an example of a positive correlation. Some correlations are negative. For example, if one were to allege that an increase in penalty for speeding violations reduces traffic accidents then it is necessary to demonstrate that as the penalty increases the frequency of traffic accidents decreases, and vice versa. Establishing correlation in racial profiling research is dependent on the estimate of racial and ethnic proportions with the population of individuals at risk of being stopped. As mentioned earlier, estimates of the driving population remain a serious challenge in racial profiling research. Furthermore, we are not altogether sure what sort of correlation we are looking for. Does the proportion of Black individuals stopped increase in neighborhoods populated principally by Black individuals establish a correlation consistent with a racial profiling allegation? Or does the proportion of Black individuals stopped increase in neighborhoods populated principally by White individuals establish a correlation consistent with a racial profiling allegation?

Finally, the third condition involves the elimination of plausible alternative explanations of the outcome. Often, this is the most challenging condition. In racial profiling research the researcher would be required to eliminate other plausible explanations of why racial and ethnic minorities are over-represented in stops, other than race or ethnicity. The most obvious alternative explanation lies in how officers are allocated throughout a community. Normally, patrol resources are assigned throughout a community on the basis of demand for law enforcement resources. For example, neighborhoods from which high calls for service (a measure of victimization) originate often are assigned more patrol officers. Sometimes these neighborhoods are principally populated by racial and ethnic minority individuals. Because of this, it is possible that racial and ethnic minority individuals are more at risk of being stopped merely because there are more officers legitimately assigned to the neighborhoods where they live.

Decisions After the Initial Stop

Once an individual is stopped, and in particular after the officer makes the initial face to face contact, the focus of the analysis changes. During this part of the officer/citizen interaction it is likely the officer is aware, or at least has a perception, of an individual's race or ethnicity.

To address the section of the definition of racial profiling that covers "the scope or substance of law enforcement activities following a stop", analysts will compare the proportions of individuals by race or ethnicity that are searched, arrested or involved in a physical confrontation with the officer. Most studies find that higher percentages of racial and ethnic minorities are searched, arrested or involved in a physical confrontation. For some, this may appear to be definitive proof or racial profiling. However, it fails to satisfy the previously mentioned conditions of causality and in particular the third condition to eliminate plausible alternative explanations. Well-established, routine officer practices and procedures offer numerous legitimate alternative explanations for these elevated percentages.

The most important aspect in any analysis of searches is not that a search occurred. It is how much discretion the officer used during the search process. Some searches are required by law or policy. Searches of persons incident to an arrest or inventory searches of impounded vehicles are examples. Officers are required to conduct searches under these conditions. Searches predicated by a warrant are more discretionary, but it is unlikely that an officer would choose not to serve a search warrant after establishing probable cause and securing approval for the search from an independent magistrate. Searches predicated on the presence of evidence in plain view or justified by exigent circumstances are somewhat discretionary, but only if one accepts allowing an officer to ignore evidence of criminality. The focus of the analyses involving searches should be on consent searches. These searches are wholly discretionary and do not require an officer to establish any level of proof of nefarious behavior.

Likewise, arrests may not be completely discretionary. An arrest warrant is an order from a legitimate court to arrest a person. While it is possible that an officer may choose to ignore a valid warrant, the probable cause for this type of arrest was established before the officer encountered the individual. Some arrests are mandatory. For example, many states and some communities require an officer to arrest a person suspected of domestic violence. Similarly, when an officer has

probable cause to believe a person has violated a no-contact order they are often required to initiate an arrest. The focus of the analyses involving arrests should be on truly discretionary arrests. More importantly, the dataset should provide some insight into the context of events that results in an arrest. For example, some sort of correlation between the severity of the alleged behavior and the decision to arrest is essential to determine whether racial and ethnic minorities are arrested for comparatively less severe behaviors. In addition, a complete analysis of arrest decisions should include some evaluation of whether or not discretionary arrests actually result in the filing of criminal charges.

Finally, many racial profiling studies rightly compare the percentages of individuals by race or ethnicity that are involved in physical confrontations with an officer. The use of force is a serious event that warrants the attention of law enforcement administrators, political leaders, and the community at large. Unfortunately, nearly all racial profiling studies that record use of force incidents do not measure the origin of the force. It is not known whether the use of force was proactive or reactive. Did the officer initiate the use of force or did the officer react to an individual's use of force? Despite its importance to our understanding officer behavior, this question cannot be answered by the data that is currently available.

A Lack of Analytical Curiosity

The most ubiquitous threat to racial profiling analysis is a lack of analytical curiosity. Most analysis of racial profiling data rely on a single variable – the race or ethnicity of individuals. When they find, for example, that Hispanic drivers are arrested at a disproportionately higher rate than White drivers, they conclude their analysis and offer this finding as definitive proof of profiling, or at least discrimination. There is seldom a sufficient attempt to evaluate the effect of other variables within the dataset that might explain this alleged disparity. To do so requires the development of more sophisticated statistical models (e.g. logistic regression). Unfortunately, many of these inferential statistical models are hampered by the nature of the data available.

The risk to public policy based on an incomplete analysis of data on officer/citizen interactions can be considerable. For example, in one study the analyst reported a very high percentage of stops in neighborhoods principally populated by racial or ethnic minorities. The author alleged that the higher proportion of police officers assigned to work in these particular neighborhoods is evidence of systemic racial discrimination at the command level of the police department. The author went further and recommended a reduction in the number of patrol officers assigned to these neighborhoods in order to avoid the potential for what he called "over policing". Advocates within these communities strongly objected to this recommendation. They knew the police were there in higher numbers because these neighborhoods experienced higher levels of victimization, as evidenced by calls for service originating in these neighborhoods. In the end, the political leaders rightly chose to ignore the analyst's recommendation.

Conclusion

For an issue as important as racial profiling, it is critical that research be informed by high-quality data and sound analytical processes. The complexities inherent in the study of racial profiling – such as establishing reliable benchmarks, identifying causal relationships, and eliminating

alternative explanations – demand a level of rigor and context that is largely absent from the existing body of research. With elected leaders relying on this research to create laws and allocate resources, these flaws and analytical shortcomings risk leading to policies that undermine public trust and harm both law enforcement and the communities they serve. To understand and address the true nature of racial profiling, it is essential that researchers improve their data collection and analytical methodology to accurately capture key information and reflect the unique dynamics of law enforcement operations.