LEGAL IMPLICATIONS OF PROFILING STUDENTS FOR VIOLENCE

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Abstract

Predicting violent activity with a youth violence profile in schools raises a host of legal concerns focusing on the validity and use of profiles as social science evidence: the impact of potential discrimination, search and seizure, and the implications for privacy. Schools differ from airports or other settings where profiles are used. Profiles are useful if they properly establish reasonable suspicion to stop an individual. They raise more problematic constitutional issues when they support referring a student to alternative educational services. Where a profile identifies students based on race, gender, or proxies for these characteristics, it is invalid. It can also be invalid if it is not a reasonable method of achieving the government’s interest in safe schools. In addition, profiles present significant problems for confidentiality. These issues rest on fundamental concerns about the general validity of profiles as scientific tools: their objectivity, accuracy, sensitivity, over-inclusiveness, and general scientific acceptance. Consequently, the use of profiles in a school setting is highly problematic and controversial.

* The author wishes to thank Laird Kirkpatrick, U.S. Department of Justice, and many members of the staff of the Hamilton Fish Institute, including Dr. Paul Kingery, Dr. James Derzon, Nancy Budd, Aaron Alford and Janet Humphrey; for their contributions and suggestions for this article. The strength of this article is the result of their clarifying arguments, concise editorial comments, and significant intellectual curiosity; while any deficiencies remain those of the author. The Hamilton Fish Institute is administered by The George Washington University Institute for Education Policy Studies, Graduate School of Education and Human Development. Prepared under a grant from the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice (97-MU-FX-K012), points of view or opinions in this document are those of the Institute and do not necessarily represent the official position or policies of the U.S. Department of Justice.
Introduction

In April 2000, Secretary of the Department of Education, Richard W. Riley, announced his opposition to the use of behavioral profiling systems to identify potentially violent students by schools, in a speech to school counselors in Chicago (Cooper, 2000). Secretary Riley went on to state “[w]e simply cannot put student behaviors into a formula to come up with an appropriate response.” The Secretary’s comments are some of the latest in a long-standing debate over the use of violence prediction tools to identify potentially violent students before they unleash their carnage on an unsuspecting school or community.

On the other side of the issue, parent groups, students and law enforcement who see the daily press reports of school violence, teen shootings and similar tragedies throughout America are calling for effective ways to prevent school violence. (A full discussion of school violence trends may be found in the article by Dr. Paul Kingery and Mark Coggeshall in this special issue). In light of the level of violence affecting America’s youth, it only seems natural that as each new school shooting grips the public’s attention, parents, teachers, school officials and policy-makers would demand a profile of school shooters in order to identify the source of potential violence before it erupts. Typically, a profile identifies a person likely to commit an act (usually criminal) of a certain type. These types of profiles are developed from extensive research and analysis of the crimes and behaviors of actual perpetrators: terrorists, drug couriers, and assassins, for example. The assembled information is compiled to identify the key characteristics of each type of crime and the corresponding characteristics of the type of person most likely to commit that type of crime. Accordingly, they are used to assess all persons in a given location or under a particular to set of circumstances to determine if they match the profile and represent a potential threat to the safety of others.

A youth violence profile would most closely resemble the dangerous passenger profile used by the Federal Aviation Administration to identify possible drug couriers and terrorists in the airport setting. First, both are based on the methodology just described. Second, both are
utilized in specific, highly insular environments; namely an airport or a school. Third, they identify potentially violent individuals from a large population of highly similar individuals most of whom are engaged in innocent behavior. Finally, the assessment based on the profile is done under significant time constraints; time is of the essence in deciding on a profile match before a person boards a plane, or enters a school.

Predicting violent activity in the school context raises a host of legal and ethical concerns. These concerns center on the validity (meaning the profile’s ability to measure what it purports to measure and conformance to accepted scientific standards), and use of profiles as social science evidence, the impact of potential discrimination, search and seizure; and implications for privacy and the use of student records. The use of profiles as social science evidence will be addressed in the initial section of this article regarding General Validity, while the search and seizure aspects of profile usage are addressed under the second section, Profiles as Grounds for Search and Seizure. The third section, Constitutional Issues: Access to Education Services based on Profiles, addresses constitutional issues involving referral of students to alternative education based on profile matches. The implications for student privacy are discussed in the fourth section on Privacy and Educational Records. This article attempts to outline the breadth of these issues without suggesting concrete answers. The development of the law and ethics in this area is too new to allow for statements of definitive guidelines, and true to form, a legal article is long on problems and short on solutions. In truth, this is less a testament to the limitations of legal analysis, than it is a recognition of the need to engage in the thoroughly democratic process of assembling potential rules of conduct and guidelines for profiles in a comprehensive and collaborative fashion involving all the disciplines of science, medicine, health and law. Hopefully, this special issue will contribute to the creation of just such a shared understanding.
General Validity: Objectivity, Over-Inclusiveness, Evidentiary Issues

The general validity of a profile depends on the circumstances of its use. There is no governing legal rule or case involving a youth violence profile or the use of a profile in a school setting. As discussed in the introduction, however, profiles have been used in a number of other settings and their validity assessed by the Supreme Court and a number of lower federal courts. The courts have avoided ruling on broad cases involving profiling instead focusing on the specific facts of individual cases. Based on this body of law, it may be said that where a profile is used as an investigation tool to assist the determination of the need to stop and search a suspect, it is generally regarded as a valid practice (U.S. v. Lopez, 1971). In the case of U.S. v. Riggs, the court upheld stopping a suspect for identification and inquiry purposes because the Federal Aviation Administration’s “behavioral profile” gave security “reasonable and objectively articulable grounds to suspect Riggs of both trafficking in narcotics and also posing a threat to aircraft security” (U.S. v. Riggs, 1972). The contours of the use of profiles as an investigation approach are explored more deeply in the next section on search and seizure, but it is important to consider the court’s reference to objectivity before leaving the matter for later discussion.

Profile Objectivity

Typically, the Supreme Court requires that an “[e]ffective profile is one that may be ‘objectively employed by the ticket seller [teacher] without requiring any subjective interpolation’” (U.S. v. Bell, 1972). In U.S. v. Lopez, despite upholding the general use of a profile in an airport search context, a lower federal court suppressed the use of the profile because it’s objectivity and neutrality had been compromised. The court was concerned with the elimination of fundamental terrorist characteristics established by research, the addition of “an ethnic element for which there [was] no experimental basis” and the requirement of “an act of individual judgment on the part of airline employees” (U.S. v. Lopez, 1971). The court went on to state “[t]he approved system survives constitutional scrutiny only by its careful adherence to absolute objectivity and neutrality. When elements of discretion and prejudice are interjected it
becomes constitutionally impermissible” (U.S. v. Lopez, 1971) The court suggested that the appropriate remedy for this oversight lie in the continuous supervision and control of personnel who have the power and authority to use the profile” (U.S. v. Lopez, 1971).

Clearly, the court is concerned that profiles be free from issues of race and prejudice and be supported by a thorough analysis of the factors involved in the profile. The concept of neutrality implies that the implementation of a profile will be free of any bias based on impermissible factors, such as race, religion, gender or a host of other classifications which our society deems an inappropriate base for judging individuals. Presumably, this also includes the absence of bias based on prior association of the parties involved, meaning that there should be no significant or compelling personal history between teachers and students that suggests unfairness, animosity, rancor or the like. Moreover, it seems reasonable to suggest that the limits of this neutrality stretch to prohibit even the appearance of bias in the implementation of a profile. Even the suggestion of unfairness or inappropriate application of a profile threatens to undermine its validity and acceptance by the general public and the affected population namely, youth, teachers, school officials and parents.

Issues of individual discretion are somewhat cloudier, however. The law is concerned primarily with an individual employee’s discretion regarding the factors included in the profile in the first instance rather than the exercise of judgement in applying those factors. This concern is particularly compelling in the case of a youth violence profile where numerous and differing risk factor lists exist that might be used as profiles. Our brief foray into this area revealed different formulations compiled by the Centers for Disease Control, the American Psychological Association, the U.S. Department of Justice and the U.S. Department of Education. With so many, the risk of individual decisions at the classroom or school levels seems greatly heightened.

Yet, it may be impossible to ensure the required objectivity and neutrality is present because, simply and fundamentally, schools and airports are too different. In an airport, strangers come together for a brief time for a utilitarian purpose (travel), while schools, in contrast, are
places where people form long-term intimate personal relationships focusing on social and cooperative goals. It may well be that in the context of an airport or other public place that a profile will be implemented in a fashion that allows for its objective use. Usually in such a highly public setting, the passengers, travel agents, airline personnel, security officers and others are largely unknown to each other. This anonymity promotes a greater level of tolerance for the unavoidable diversity one is likely to encounter during travel. In this scenario, security officials are more likely to utilize a profile in an objective manner - all they have to go on is the factors listed in their profile, and they are actively seeking those individuals who meet several of the criteria and disregarding at a moment’s reflection those who do not. Under such circumstances, the security officers do not have time or inclination to consider subjective factors such as concerns about past actions of individuals, beliefs about political or social issues, personal habits or hobbies, or relationships with other members of the traveling community.

The situation is exactly the opposite in the school setting. In most cases, the students, teachers and administrators in any given school will be relatively well known to each other, at least in their immediate group of association. Teachers will be reasonably familiar with the lives, interests, problems, hopes, dreams, and fears of many of their students. In fact, as a society we hope that teachers will concern themselves with such matters. Consequently, teachers will be aware of those students who excel or are “problem” students. Under such circumstances, the probability that a profile might be applied subjectively and selectively increases dramatically. An integral part of the growth and learning process involves exploration of the bounds of social acceptance through a process of rebellion and antipathy to authority. While some of this behavior may rise to the level of violence or criminality, much of it remains relatively harmless and free of violence. Students exhibiting such behavior tend to generate more attention, however, and will certainly be well known to their teachers and the school administration. Moreover, these same students are likely to score high on the factors associated with any profile, if for no other reason than they are more highly visible among the student population, or consume the greater part of a
teacher’s time. For these reasons, it is not altogether clear that a profiling tool could be described accurately as “objective.”

In any case, what is clear is that the use of a profile requires an objective and neutral application of its elements, and that employees not be allowed the freedom to include or omit factors based on their subjective perspectives.

Profiles as Evidence: Over-inclusiveness

In contrast to the investigation context, profile evidence is not admissible, generally, in a court proceeding to establish guilt, on the rationale that profile evidence represents a type of character evidence, which is disfavored by American courts, except in limited circumstances not applicable here (Kirkpatrick, 1998). The view is that such evidence would be “too sweeping and over inclusive, and hence potentially misleading to juries and unfairly prejudicial to defendants” (Kirkpatrick, 1998).

Typically, a profile includes a number of factors that taken individually would result in the selection of almost any individual in a given circumstance or locale as a potential match to the profile and most of these individuals will be innocent of any wrongdoing, whatsoever. This is especially true in the case of a youth violence profile in light of the relative infancy of the predictive tools and the imprecision of existing measures.

The social science research in this area concerns itself with several factors including the level of positive prediction (accuracy), the sensitivity of the profile and interrelationship of these two factors. The odd dynamic is that as the level of accuracy increases, the level of sensitivity decreases, and vice versa (Derzon, 2000). In other words, as prediction (accuracy) improves, the effort becomes less precise in solving the problem of violence because a significant number of violent youth will not be identified by the profile. On the other hand, as sensitivity is improved, the effect is to identify more persons who do not belong in the prediction. This relationship is described more fully in Dr. James Derzon’s article: Antisocial Predictors of Violence, in this special issue.
In any case, the sensitivity dynamic is the over-inclusiveness problem commonly associated with profiles. These profiles are based on samples of compiled data regarding the known characteristics of known shooters. As such they focus on the characteristics of a known population, heighten the impact of those characteristics on selection and improve the level of sensitivity. In doing so, however, they cast their net too wide and include youth who will not exhibit violence but who may possess one or more of the identified risk factors. This over-inclusiveness problem severely diminishes the general validity of a profile and presents serious constitutional issues discussed in a separate section below.

The dynamic between profile accuracy and sensitivity does suggest some policy implications worth a moment’s reflection, however. If sensitivity is society’s concern, namely to account for all the violent youth, then the intervention program used in response should be positive, educational and nurturing rather than punishing and retributive. This is so because we are likely to identify youth who may be at-risk but will never commit a crime or exhibit any violent tendencies. Inflicting a penal-type solution on these youth would exacerbate their problems, while a strong educational and social skills approach promises great returns in terms of their employment prospects, social development, contribution to society, and savings to the criminal justice system. However, if programs and interventions aimed at the potential outcome, youth violence, are harsh, punitive and penal in nature, then greater predictive strength (accuracy) will be needed and should be desired. This argues for placing as much emphasis on accuracy as possible because society will want to guarantee that those who are subjected to limitations on their educational opportunity and civil rights are a true threat.

Clearly, however, this latter approach is fraught with difficulty, so much so that it proves unworkable. The greatest legal objection is that it somehow implies that youth may be deprived of certain rights or opportunities based on their potential for violent or criminal acts, rather than the act or wrongdoing itself. Our legal tradition abhors this approach. The U.S. v. Lopez court remarked disapprovingly on this very subject in stating:
Undoubtedly there are persons with objectively observable characteristics who provide a higher statistical probability of danger than the population as a whole. But our criminal law is based on the theory that we do not condemn people because they are potentially dangerous. We only prosecute illegal acts. Putting a group of potential violators in custody on the ground that this group contained all or nearly all of the people who would commit crimes in the future would raise the most serious constitutional issues. (U.S. v. Lopez, citing Williams, Bonkalo, Woods)

For these reasons, profile evidence is generally avoided as a basis for the potential deprivation of liberty or rights, especially as evidence to be used in a formal trial or hearing. As a matter of policy however, it is worthwhile to consider how such evidence would be treated if the general prohibition did not exist.

The most appropriate legal standards that might establish the validity of profile use as evidence may be drawn from the Supreme Court’s rulings on the admissibility of scientific syndrome evidence, notably the Daubert v. Merrell Dow Pharmaceuticals (1993) case. Syndrome evidence relates to descriptions of “pattern[s] of behavior or psychological reactions typical of a particular type of offender or crime victim…,” an area closely related to the focus of profiles (Kirkpatrick, 1998). The Daubert case relies on a two-part test that is based on federal evidence rules for admitting scientific expert testimony (Daubert v. Merrell Dow Pharmaceuticals, 1993). This test requires a determination by a trial judge, that an expert will testify to 1) scientific knowledge, 2) that will assist a jury in understanding key facts of the case.

The latter factor is generally viewed as a relevancy requirement, namely that information must be relevant to an issue in the case and provide the jury some information otherwise not available to it. Generally, all information related to a case is considered relevant. It seems clear that profile information indicates something about the person and/or the crime or wrongdoing that would be informative and persuasive for a jury or hearer of fact. Undoubtedly, a determination regarding a referral to mental health counseling services or the presence of mitigating factors in a
suspension/expulsion hearing would be aided by the availability of information regarding a student’s match with profile characteristics.

The former requirement presents the more difficult case because it is generally viewed as creating an evidentiary reliability standard that information be based on scientific inquiry that has been subjected to appropriate validation (Ingram, 1998). Several factors provide guidance on appropriate validation:

1) whether the conclusion can be tested,
2) whether the procedure and basis of conclusion has been subjected to peer review and publication,
3) the test’s known or potential rate of error,
4) standards of control for the technique’s operation,
5) the level of general acceptance in the scientific community. (Ingram, 1998)

Whether profiles based on social science research and particularly those involving youth violence meet these requirements seems an entirely open question. Arguably, youth violence profiles ultimately will be constructed according to standard methods of scientific inquiry such as surveys of school shooters and the compilation of statistics and risk factors for youth to identify trends. Yet it is not clear that these profiles have been assembled to date according to standard and accepted lines of scientific inquiry, which is not to suggest that the social science identifying particular risk factors for violence among youth is invalid, but only that it cannot fairly be said to have been developed with the purpose of serving as a law enforcement tool in mind. At a more fundamental level, the social science methods that assemble these risk factor analyses often represent aggregated information regarding the risk that a given population will be involved in a specific behavior. This aggregation provides useful information about the group at risk for violence but may not have significant predictive ability when focused on individuals. In this light, a profile might be useful in identifying a “hot spot,” a community, neighborhood or school, more at-risk than others that needs additional prevention and intervention efforts.
In addition, few could argue that social scientists, educator or policy-makers have had sufficient time to evaluate the effectiveness of these profiles as predictive tools. To bolster this argument, there clearly has not been sufficient time to subject these profiles to independent testing and verification or for them to gain general acceptance in the scientific community. Moreover, to improve the predictive strength of these profile models as applied in individual cases, a more complete understanding of the correlation between a profile and the outcome it addresses is needed. Therefore, more empirical data are necessary. A significant problem, however, is that referencing back from school shootings to assemble a profile is probably mathematically flawed in that it over-samples those individuals who are clearly positive for the violence outcome (Derzon & Wilson, 2000). This over-sample contributes to the over-inclusiveness of profiles when they are applied to a general population, as previously discussed.

In sum, these considerations indicate that a legitimate profile will be one based on objective and neutral factors, established by comprehensive research and replication, and accepted generally by the scientific community. Lacking these assurances, schools, education leaders and the general public would be justified in treating profiles with significant skepticism. The presence of these conditions, however, will improve the use of profiles by practitioners and enhances their treatment in areas of the law considered in the remainder of this article. We now turn to those additional issues.
Profiles as Grounds for Search or Seizure

In some circumstances, a list of risk factors for youth violence or a profile of a potentially dangerous student may be used as grounds to stop a student for questioning or to search his or her possessions or person. There is no Supreme Court case addressing the use of risk factor lists or profiles in the school setting. Consequently, we must turn to the Court’s leading decisions on search and seizure in the school setting in combination with its jurisprudence on the use of passenger profiles used in airports for guidance regarding the issues implicated by the use of a profile in a school.

Generally, school officials may search a student “if search is justified at its inception and is conducted in a manner reasonably related in scope to the circumstances” (New Jersey v. T.L.O., 1985). The reasonableness standard is intended “to ensure student’s rights [will] be invaded no more than necessary to maintain order in schools, not to authorize all searches conceivable to school officials” (New Jersey v. T.L.O., 1985).

A search will be justified where there are reasonable grounds for suspecting a search will reveal contraband, or evidence that a student is violating school rules (Rapp, 1999). The scope of the search is permissible where the measures used are reasonably related to the objective of the search and not excessively intrusive given the age and sex of the student and nature of the infraction (Rapp, 1999). Accordingly, school officials may inspect a student’s bag (purse, backpack, duffel) and clothing for hidden weapons, cigarettes and drugs where they have reason to do so: e.g, a tip, observation of materials associated with drug use, bulges characteristic of weapons, the student lacks the proper school pass and acts excited or aggressive when confronted by school officials (Rapp, 1999). Security officers may stop and frisk a student and proceed on reasonable suspicion resulting from the stop (Rapp, 1999).

In addition, the court has expressly approved the use of “probabilistic” profiles in the airport setting to identify potential drug couriers or terrorists (U.S. v. Sokolow, 1989). The basis for this conclusion rests on the notion that while “[a]ny one of [the] factors is not by itself proof
of any illegal conduct and is quite consistent with innocent [activity] . . . taken together they amount to reasonable suspicion” (U.S. v. Sokolow, 1989). In these circumstances, the fact that a list of factors giving rise to reasonable suspicion are also part of a profile “does not somehow detract from their evidentiary significance…” (U.S. v. Sokolow, 1989). Numerous other cases have allowed the search of individuals, particularly in the airport setting, based on their identifications through the use of a profile and noted that under the circumstances the officers possessed reasonable suspicion to stop a suspect (U.S. v. Riggs, 1972).

In short, profiles contribute to the formation of reasonable suspicion authorizing school officials to stop and search students for suspected wrongdoing. So long as they are used in an investigatory manner, consistent with the requirement for reasonable suspicion to stop an individual they are probably a valid tool. Caution must be exercised however, to ensure that the scope of the search does not exceed the original justification for the search, namely that the search is consistent with the profile factors. However, the appropriateness of profile use in the school setting may be questioned at a fundamental level.

“Critical Zones”

The difference between the use of a profile in an airport setting and a school setting involves a fundamental question about the similarity of the settings in the first instance: Are they really the same or are there significant differences between them that impact whether it is reasonable to use a profile?

Airports are recognized as a “critical zone,” where more intensive and intrusive searches are reasonable in light of the extreme risk to life and property represented by weapons in a plane (Smith, 1998). The notion that airports are a critical zone rests on the extreme vulnerability of the individuals utilizing the air travel system. As stated by the Fifth Circuit Court of Appeals, the need for heightened security in airports as an “exceptional and exigent situation” is based on a variety of factors:
At the core of this problem is the hijacker himself. In some cases he is a deeply disturbed and highly unpredictable individual -- a paranoid, suicidal schizophrenic with extreme tendencies towards violence. Although the crime of air piracy exceeds all others in terms of the potential for great and immediate harm to others, its undesirable consequences are not limited to that fact. Among other things, it has been used as an avenue of escape for criminals, a means of extorting huge sums of money and as a device for carrying out numerous acts of political violence and terrorism. Perhaps most disturbing of all is the fact that aerial hijacking appears to be escalating in frequency (U.S. v. Moreno, 1973).

For these reasons, it is reasonable to implement the most effective and comprehensive prophylactic measures possible in order to ensure the safety of an airport, airplanes and the traveling public. Consequently, few question the need for metal detectors, multiple checkpoints, video surveillance, or the use of profiles to identify potential terrorists in the airport setting.

In contrast, it is not altogether clear that a school is a “critical zone,” as it is understood in the airport setting. Strong arguments exist on both sides. First, individuals at a school (students, teachers, administrators, staff) may readily escape a situation rapidly escalating towards violence. They can leave a room, jump out a window, or desert the campus location altogether if they feel their safety is threatened. Their choice to do so does not necessarily present them with the threat of imminent death represented by escaping an airplane flying at 30,000 feet.

In addition, the potential for harm is somewhat lesser in a school setting. A terrorist can destroy an entire plane with a bomb or well-placed gunshot, killing hundreds of people with a single, brief act. However, the school shootings that have occurred to date, while horrible, have not claimed hundreds of lives and the average incident of violence involves person-on-person violence harming single individuals or small groups. It is harder in the school or community setting for a perpetrator to harm a great number of individuals than it is in an airport setting. No judgment of the relative importance of airport or school violence in human, emotional, or
personal terms is intended by these comments; only recognition of the difference in scale involved in each circumstance.

Finally, and perhaps foremost, the perpetrator in a school setting, whether a highly motivated gang member, homicidal teen or garden variety bully, is generally not the crazed fanatic associated with acts of international terrorism. It seems unfair, and at least an overstatement, to describe these youth as “paranoid, suicidal schizophrenics with extreme tendencies to violence,” the concern so eloquently stated by the Fifth Circuit (Moreno). While it is true, that school shooters may be extremely disturbed and highly motivated, as was the case with the Columbine High shooters, it is probably not true in the case of the young boy from Mt. Morris, Michigan, who killed Kayla Rolland, a fellow first-grader, in February 2000. In fact, his crime was based on anger, confusion and misunderstanding, and he lacks the capacity to be charged in Michigan due to his age. Claiming he was a paranoid schizophrenic would hardly capture the circumstances of his life which involved heavy drug use by guardians, poor living conditions, and ready access to guns. A fair comparison would not place a terrorist and a potential school shooter necessarily in the same category. For these reasons, it is hard to see a school as a critical zone.

On the other hand, strong arguments support viewing schools as “critical zones.” Perhaps the most persuasive argument rests on the American belief in the fundamental value of children and our concern for preserving the safety and innocence of young people. As a society we place a high premium on protecting our children, often couched in terms of fulfilling the promise of our most precious resource and preserving a legacy to our future.

In addition, schools are a critical zone in light of their salience as a target for domestic terrorism in its many possible forms. Clearly, the use of a school as an intended target would afford significant leverage in forcing compliance by political leaders, school districts or wealthy parents with any number of demands. Whether a lone disaffected teen, or a highly organized
gang, a school would present a unique opportunity to extort money, compel political action, or bargain for release of fellow gang members.

Consequently, the use of profiles to identify potentially violent individuals is probably justified as an investigation technique to the extent schools are viewed as “critical zones” deserving heightened levels of security. Significant legal hurdles remain, however, before a profiling tool may be used for other purposes in the school environment.

Constitutional Issues: Access to Education Services based on Profiles

Beyond the investigation context, the use of a profile in the school setting may implicate constitutional protections in a variety of ways. Primarily, we must be concerned with the due process and equal protection concerns of using the profile to assign the student to specific services or educational environments? This section seeks to explore the scope of the former question. Before proceeding, however, please note that the focus of this issue is to define the minimum level of services that must be afforded all students equally. Accordingly, this discussion does not reach the use of profiles as a diagnostic tool to direct students to medical, mental health or violence prevention services because those services exceed the minimum level of service required of schools and are based on need. The Constitution is concerned with deprivations of rights, not the allocation of important health services.

Generally, constitutional law requires that all individuals be afforded equal enjoyment of fundamental rights (Neil Broadly et al. v. Meriden Board of Education et al., 1992, citing Campbell v. Board of Education, 1984). The protection of equal enjoyment grows out of equal protection law which, requires that individuals affected by a governmental action or statute be treated uniformly; in other words that the rights, privileges or responsibilities imposed on an identified segment of the population apply equally to all members of that group (Franklin v. Berger, 1989, citing Reynolds v. Sims, 1964, and Cleburne v. Cleburne Living Center, 1985). This does not mean pure or absolute equality, rather it requires that government classifications stand on reasonable grounds (Franklin v. Berger, 1989).
What constitutes reasonable grounds will depend on whether the classification or government action affects a fundamental right or an “inherently suspect” group. Where state action infringes on a fundamental right or impacts an “inherently suspect group, strict scrutiny will apply, requiring that the state action be narrowly tailored to achieve a compelling state interest” (Reynolds v. Sims, 1964, and Cleburne v. Cleburne Living Center, 1985).

Accordingly, where a youth violence profile is utilized as a matter of school policy to identify and refer students to an alternative education program, to the extent the profile selects students based on race, ethnic background or gender, it will clearly have constitutional problems. An “inherently suspect” group has traditionally been defined as a “discrete and insular minority” subject to “invidious discrimination” and is commonly understood to include racial minorities and ethnic groups (Cleburne v. Cleburne Living Center, 1985). There are almost no circumstances under which such a classification can be argued to be a narrowly tailored attempt at achieving a compelling government interest. Of course, the presence of such factors in a profile is unlikely for exactly this reason, and notably the factors identified in most risk factor lists that could be utilized as profiles do not include any of the prohibited factors.

The fact of selection according to a profile probably does not create a “discrete and insular” group deserving of protection under constitutional standards. Several courts have ruled that special education students or exceptional students are not considered a “discrete and insular minority” deserving heightened judicial protection (Neil Broadly et al. v. Meriden Board of Education et al., 1992). Accordingly, a class of violators of school rules, or potential violators of school rules does not seem discrete and insular, or deserving of exceptional judicial protection. The more difficult case involves possible proxies for the prohibited factors, namely, characteristics that appear benign as an initial matter, but when utilized in a profile have the effect of selecting individuals who are disproportionately members of a protected class. Characteristics included in the youth profile which might work as proxies in this way include: poverty, school achievement or skills, weapons possession or history of suspension. Minorities, particularly
blacks, are disproportionately represented in these characteristics, raising the question, if not the conclusion, of invidious discrimination. A study in Michigan, for example, established that African-American students were suspended and expelled from school at a rate 250% greater than white students (Andrejevic, 1997). While the question of invidious discrimination in profile implementation is untested in any case law to date, it is easy to see the extreme problems created by utilizing a profile that may work in this way to over-identify racial minorities, the learning disabled or other protected classes.

In contrast, where neither a fundamental right nor a “discrete and insular minority” is involved, the state action is valid provided it rests on some rational basis, meaning that it is reasonably related to achieving a legitimate state purpose (Reynolds v. Sims, 1964, and Cleburne v. Cleburne Living Center, 1985). In this case, it is not necessary for the state to utilize the best possible methods to achieve its goals, rather all that is required is that the methods actually used be reasonable (Tyler v. Vickery, 1976).

It has been long-standing belief that the government has a compelling interest in ensuring a strong system of education, necessarily implying it is free of violence. In Brown v. Board of Education (1954), the Supreme Court observed:

> Education is perhaps the most important function of state and local governments.... It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.... It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education (Brown v. Board of Education, 1954).

For this reason, school officials have a strong obligation, both moral and legal, to take action in dealing with undisciplined youths, who may potentially threaten the welfare and safety of the other children in attendance. School safety is probably not a compelling enough interest to select youth for attention by prevention or intervention programs based on race, however. Race-
based classifications are upheld only in situations designed to remediate past discrimination, such as in college admissions (and even this purpose is under serious question). Maintaining school security is critically important to the well being of young people, but probably not so important as to justify race-based classifications to maintain order. In fact, such methods in schools would run counter to decades of judicial interpretations and development of social norms explicitly aimed at removing race-based classifications from all manner of education practice. To insert such considerations back into the educational environment would play to the worst instincts and base assumptions about violence in America.

Even if the state has a sufficient interest in using a profile under some circumstances, it may find difficulty in arguing that the profile is reasonable, much less “narrowly tailored,” in achieving its goal due to concerns about objectivity and over-inclusiveness discussed earlier. The issue of objectivity questions whether a youth violence profile can be described as such when the basic elements of the profile may not yet be established with any general scientific agreement, and when the application of a profile in the school setting may be tainted by subjective concerns, teacher-student relationships and other appearances of bias. Requiring that a profile be objective does not require that it be the best possible method to achieving the government’s interest. It simply means that it must bear indications of validity, fairness and reliability that society as a whole would be prepared to recognize as proper. The absence of agreed upon profile factors make it difficult to describe a profile as a reasonable, for if it were so, general agreement would seem a relatively easy matter. More importantly, a reasonable approach by the government surely would not allow for the potential of bias and tainted application by those charged with implementing the profile. A reasonable method would encourage fairness and protect both teacher and student alike from the possibility or temptation of misuse, prejudice or animosity. A reasonable formulation of a youth violence profile would make allowances for the close and familiar circumstances of a school setting in order to ensure it accurately identified those most at-risk.
A more compelling concern regarding the reasonableness of profiles stems from the tendency of such tools to be over-inclusiveness in their scope. As previously discussed, these profiles, which are keyed to be highly sensitive to select all youth who may be violent, tend to identify individuals engaged in perfectly innocent and normal activity. Reducing this likelihood entails improving the accuracy of the profile, but the corresponding effect is to reduce the sensitivity of the tool, meaning that fewer potentially violent youth are identified. So, if the very construction of the profile oscillates between better accuracy and better sensitivity, can the profiling tool be accurately described as reasonable. We miss more potentially violent youth than we actually identify and include too many innocent youth with these methods, making the existing technology in this field too speculative to be reasonable in the eyes of the constitutional law.

For these reasons, it seems unwarranted to consider profiling a reasonable attempt at achieving the government’s interest in preserving safe schools and a strong educational system. Logic dictates that to the extent that a profile is not reasonable in achieving the government’s stated objectives, it cannot be narrowly tailored to achieving those ends. Consequently, serious doubt exists regarding the constitutionality of profiles as a selection mechanism for many school programs aimed at at-risk youth.

Privacy and Educational Records

The development of passenger profiles enjoyed extensive cooperative efforts between a variety of law enforcement agencies including the Federal Bureau of Investigations (FBI), Department of Justice, Customs Service, Secret Service (Department of Treasury), Federal Aviation Administration and the Central Intelligence Agency. The frightening prospect of the intersection of profiling and database interconnectivity was anticipated by the Lopez court when it observed “employing a combination of psychological, sociological and physical sciences to screen, inspect and categorize unsuspecting citizens raises visions of abuse in our increasingly technological society” (U. S. v. Lopez, 1971, see also Smith, 1998). Other commentators have
pointed out that marketing and insurance companies have collected personal information on databases, while the government has gathered information as well for social security purposes, public school operations, commercial regulation and national defense and observed that “[a]irport security officials have longed for the day when they would have access to these databases for the purpose of singling out potential terrorists” (Smith, 1998).

So, the natural question concerns the next step in the development of youth violence profiles: Will school safety efforts involve data sharing across education, health and human service, and juvenile justice resources to personalize profiles (Smith, 1998)? If so, what information will be included and who will have access to it? The leading federal statute on the use of school based information regarding students, the Family Educational and Privacy Rights Act (FERPA), ensures that the student and their parents will have access to a students’ records, be able to correct erroneous facts and be notified when that information is shared with other schools, organizations or entities. This parental access and control of student records extends to profile match information.

**Family Educational and Privacy Rights Act (FERPA)**

The important student records issue rests on the classification of a profile, or more specifically, the profile match regarding a particular student, as an educational (medical) record or a disciplinary record. Generally, FERPA requires that schools obtain prior written permission from a parent before releasing the educational records of a student to an individual, agency or organization. Federal funding may be denied if a school maintains a policy or practice that does not require this prior parental permission. Educational records are defined in the statute as “those records, files, documents, and other materials which (a) contain information directly related to a student; and (b) are maintained by an educational agency or institution or by a person acting for such agency or institution.” (FERPA)

Accordingly, education records may include attendance records, academic information, general administrative records, and records of extracurricular activity to name only a few examples. In
addition, education records may include a variety of medical records such as psychological
evaluations and the results of Rorschach tests used for diagnostic purposes (Theumann, 1993).
Based on this definition, it seems clear that information relating to a student’s match with a
profile would be considered an educational record under FERPA. Furthermore, if the profile
were utilized as a screening device to direct at-risk students to counseling, health or alternative
education programs, it would also be a medical record, which are expressly viewed as educational
records by the statute and corresponding case law.

On the other hand, the statute exempts certain information from the definition of
educational records, only one of which is important for our discussion; namely, “records
maintained by a law enforcement unit of the educational agency or institution that were created
by that law enforcement unit for the purpose of law enforcement” are not considered education
records (FERPA). Despite this exemption, schools may include information concerning
disciplinary action taken against a student for conduct that “poses a significant risk to the safety
or well-being of that student, other students or other members of the school community” in the
educational records of a student (FERPA). Thus, to the extent a profile is utilized by school
security to promote law enforcement purposes, profile match information may be a disciplinary
record, exempt from consideration and treatment as an educational record.

Consequently, when the profile match is viewed as a medical or psychological record, it
qualifies as an educational record. In contrast, if it is a security or law enforcement record it will
be a disciplinary record and may be treated as exempt from a student’s educational records or
may be included in educational record. In the latter situation, notice to the student’s parents and
permission prior to release is not required. Consequently, parents may not necessarily be
informed of the existence of such information on their child, or be afforded an opportunity to
review and correct the information if necessary.

Sharing Educational Records
The confidentiality of juvenile records (educational and medical) has long been regarded as a compelling state interest, requiring trial courts, state agencies and school districts to take reasonable steps to ensure that privacy is maintained. So, for example, juvenile education and medical records may be sealed in court proceedings despite a presumption that such proceedings are open to the public and media (State ex rel Garden State Newspapers v. Hoke, 1999).

Reporting information collected by a school to an outside agency or another school is a delicate matter, but one squarely addressed by FERPA provisions. Generally, a school that discloses an educational record must take three steps:

1) make a reasonable attempt to notify the parent (or student of age of majority),

2) provide a copy of the record that was released, and

3) provide a hearing if requested (34 Code of Federal Regulations 99.34).

A school may disclose information to another school or institution where the student is attending if the student is enrolled or receives services from the other institution, and the preceding conditions are met. In addition, student disciplinary records may be shared between schools attended by the student in question, provided that the teachers or school officials have a “legitimate educational interest in the behavior of the student” (FERPA). Consequently, sharing a profile match on a student with another school will probably be permissible regardless of the classification of the information as a disciplinary record or an educational record. Schools generating such information will simply need to ensure that the recipient school has a legitimate educational interest in the child, a relatively easy obstacle to overcome.

Sharing student records with law enforcement personnel is also specifically provided for in FERPA, which allows disclosure of even personally identifiable information from educational records without the consent of student or parents to state or local juvenile justice officials or in health and safety emergencies (FERPA, see also Rapp, 1999). Exceptions of this type are sufficiently broad to even allow possession of a criminal defendant’s school records by a
In the case of profile match information, it seems clear that this information, regardless of its classification as an educational record or not, can be shared with law enforcement agencies in keeping with the provisions of FERPA. If personally identifiable information may be shared with law enforcement and juvenile justice authorities, then profile information undoubtedly is also available for their use. Once again, schools generating profile information should ensure that recipient agencies have a legitimate interest in the information and the child as a matter of policy. It may be useful to note that the Gun Free Schools Act requires state laws on reporting weapons in schools and serious violence to law enforcement, thereby providing at least one legitimate interest required by FERPA (Gun Free Schools Act of 1994).

The area of difficulty rests in the release of educational records to non-law enforcement or school agencies such as the media, social service agencies or private companies. At least one court has held that newspapers may be entitled to receive and publish criminal investigation and incident reports compiled by school security, where such reports do not contain information required for enrollment or attendance, nor academic data, because reports are not exempt from disclosure under state sunshine law nor protected as "educational records" under FERPA (Bauer v. Kincaid, 1991). So, we return full circle to the record classification issue. If profile match information is regarded as a disciplinary record its release to media organizations may be permissible. Moreover, the release of that information may or may not require notice to the parents. In contrast, if it is considered an educational record, the possibility that the information may be withheld from the media is greater and the protections afforded parents and student through notification and a hearing must be maintained.

Conclusion

Clearly then, the use of profiling techniques present truly formidable concerns when focused on youth violence issues and used in an educational setting. The rush to stop the violence
in our schools is understandable in light of the school shootings in the last three years and the chronic levels of violence among youth. The expansion in, and arguably effective, use of profiling in other areas such as law enforcement, drug interdiction, and terrorism prevention, promotes the notion that such techniques will bring the same results for schools. Schools are different places, however, with different rules, norms and customs than airports or other places where profiles are commonly used. In a school, how a problem is addressed is often more important than the purported message of any given lesson. Consequently, administrators, teachers and school safety officers walk a very delicate balance between ensuring a safe environment through the use of all the methods potentially available to them, and creating a sense of fear, paranoia, infringement of personal rights and violation of constitutional guarantees through the use of those same methods. As we have seen, in the investigation context, profiles are generally useful tools so long as they lead to proper assessment of reasonable suspicion to stop an individual. Profiles present more problematic constitutional issues where they are used as tools for referring a student to alternative education or counseling services. Even if it doesn’t implicate these issues, it may be an invalid tool since it may not be a reasonable method of achieving the government’s interest in safe schools. In addition, profiles present significant school record keeping and right to privacy problems depending on whether they are educational records or disciplinary records. All of these issues rest on fundamental concerns about the general validity of profiles as scientific tools; their objectivity, accuracy, sensitivity, tendency to be over-inclusive and general acceptance in the scientific community. For these reasons, the use of profiles involving youth in a school setting is highly problematic and controversial.
References

34 Code of Federal Regulations 99.34


U.S. v. Moreno, 475 F.2d 44 (5th Cir. 1973)

