Racial Profiling and Criminal Justice

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Abstract According to the main argument in favour of the practice of racial profiling as a low enforcement tactic, the use of race as a targeting factor helps the police to apprehend more criminals. In the following, this argument is challenged. It is argued that, given the assumption that criminals are currently being punished too severely in Western countries, the apprehension of more criminals may not constitute a reason in favour of racial profiling at all.

Keywords Apprehension of criminals · Criminal justice · Racial profiling · Retributivism · Utilitarianism

The main argument that has been presented by advocates of the use of racial profiling as a law enforcement tactic is that race (or ethnic) characteristics help the police to target those more likely to be criminals. That is, by using race as a targeting factor, the police will apprehend more offenders. (Harris 2006) This argument has been advanced in relation to the traditional discussion not only on the legitimacy of a disproportionate use of stops and friskings of minority groups on the streets and highways, but also in relation to the ways in which racial profiling has more recently become an instrument in the war against terrorism. However, the force of this apparently appealing argument has not been left unchallenged.

First, the argument has been questioned on empirical grounds. For instance, it has been argued that, once one stops regarding the argument as a matter of mere “common sense” and turns instead to empirical evidence, what one finds is that in relation to stops and searches the police get no higher returns from their
enforcement efforts by using race as one among other targeting factors. That is, the “hit rate” of criminals is no higher. (Harris 2006: 21f) Furthermore, it has been suggested that the use of racial profiling as a means of catching terrorists will, due to the ability of terrorist groups to adapt to racial characteristics in the recruitment of members, fail in the long term. (Harcourt 2007) In short, the empirical strength of the argument is not as obvious as one might at first sight expect.

Secondly, the argument has also been challenged on normative grounds. That is, even if the argument is assumed to be empirically true, it has been suggested that the costs of the use of racial profiling are likely to outweigh the gain of apprehending more criminals. (Lever 2005) Or, that there are certain constraints—for instance, resulting from rights against discrimination—forbidding the use of racial profiling independently of the fact that this enforcement tactic may be desirable in terms of higher hit rates for criminals.

Thirdly, it has been objected that an increase in the hit rate of criminals resulting from the use of racial profiling is by no means tantamount to the fact that the number of criminals is decreasing. The argument is that the use of profiling of a minority may, on the one hand, lead to a decrease in the offending pattern of this minority but, on the other, may imply that the majority will offend more now that they are being searched less. Due to the obvious fact that the majority is numerically larger—and perhaps also to the fact that the elasticity of offending to policing may be less for the targeted group than for members of the majority—the increased efficiency of racial profiling may also increase overall crime in the society. (Harcourt 2004).

The purpose of this paper is to examine a fourth way in which the “hit rate argument” could be challenged. What I suggest is that, even if it is correct that the use of racial profiling leads to the apprehension of more criminals, and if there are no discrimination-based constraints against profiling particular groups, and, finally, if profiling does not have an impact on the crime rate of non-targeted groups or the majority, the hit rate argument may still not be sound. That is, even under these conditions the fact that the hit rate is increasing may still not be desirable. Now, admittedly, at first sight this response seems somewhat strange—perhaps even bizarre. After all, it is widely agreed in the discussion on racial profiling—as well as in criminal justice ethics discussions in general—that it is highly desirable that more criminals be apprehended. However, a hint of the argument that I shall present is given by turning to modern punishment theory. A point of view shared by many theorists—despite major disagreements when it comes to outlooks on the justification of punishment—is that the existing penal order is not morally sound. More precisely, many theorists subscribe to the view that most criminals are currently being punished too severely. For instance, on consequentialist grounds this claim is sustained by pointing to the fact that, for many types of crime, it does not make a difference in terms of crime prevention if these crimes are punished less severely. (Doob and Webster 2003) But if this is so, then this clearly supports a consequentialist accusation of over-punishment. From a retributivist point of view, the arguments on over-punishment are, due the variety of different theoretical positions, somewhat more diverse. However, it is a fact that several influential retributivists explicitly endorse the view that retributivism would imply more
leniency in punishing compared to the existing penal levels in most countries. To take a few examples; R. G. Singer has underlined that it is a misconception to think of the desert model as a derivative of a “throw away the key” approach to punishment. He suggests that confinement should be reserved only for the most serious crimes and that, even then, its duration should be relatively short. (Singer 1979: 44) Likewise, Murphy holds that if the desert theory was followed consistently one would probably punish less and in more decent ways than one actually does. (Murphy 1979: 230) And von Hirsch claims that terms of imprisonment even for the most serious crimes should seldom exceed 5 years. (von Hirsch 1993: Chapter 10).

In the following, I do not attempt to establish that these contentions on the current tendency to over-punish criminals are correct. This would require a comprehensive discussion of penal theory and would distract me from my focus on racial profiling. However, what I shall do is to assume that the above claims are correct. That is, more precisely, I shall make the, admittedly, somewhat general assumption that, when it comes to the type of crimes committed by those who are targeted by the police use of racial profiling, these are currently being punished too severely in Western countries. Given this assumption, the question to be examined in this paper is: How does this affect the ethical assessment of the use of racial profiling? In order to answer this question, I shall start by considering it from a traditional utilitarian perspective and, subsequently, consider it from a retributivist point of view. As already indicated, the conclusion to be drawn is that what has typically been enunciated as the main reason in favour of the use of racial profiling may not constitute a pro reason at all. This conclusion is not based on the initially-mentioned more traditional criticisms against racial profiling. Moreover, it stresses an important point which, to my knowledge, has been ignored in the heated debate on the issue, namely, that the use of racial profiles by the police cannot be evaluated independently of considerations on the legitimacy of our criminal justice practice; that is, without addressing the question of how a society punitively responds to its criminals.

1 Utilitarian Punishing and the Desirability of Apprehensions

From a utilitarian point of view, punishment may be justified as an instrument in the prevention of future crimes. A punishment practice that does not lead to crime prevention—or other desirable effects—would be unjustified. In Bentham’s oft-quoted words this would “be only adding one evil to another.” (Bentham 1943: 396) However, estimates as to when one has reached the optimal balance between the suffering caused by punishment and the suffering avoided through the prevention of crime are far from simple. Let us start by taking it for granted—and indeed this is an uncontroversial assumption—that the state is not able to apprehend all criminals. Now the question arises, what would constitute the optimal number of apprehended criminals? The answer that immediately and probably comes to mind is: as many as possible. However, from a utilitarian perspective this need not be the case.
General prevention is a result of the assumption among potential criminals that they may be apprehended and punished if they commit a crime.\(^1\) Obviously this assumption will itself be a result of the fact that one knows that the law prescribes punishment of perpetrators or that some perpetrators have been punished for their crimes. But the assumption need not in any simple way depend on the ratio of criminals that are being apprehended for their crimes. For instance, most people—including potential criminals—do not know the percentage of apprehended criminals relative to the number of crimes committed. In other words, whether the ratio of apprehended criminals is somewhat higher or lower need not have any impact on people’s judgments with regard to the likelihood of being apprehended and, consequently, need not affect the general preventive effect of the punishment system. There may, so to speak, be a point at which the curve flattens out in the sense that an increase in the ratio of apprehended criminals no longer results in an increase in general crime prevention. But if that is the case, then it seems that apprehension and punishment of a larger percentage of criminals will no longer be desirable—in fact, from a utilitarian point of view it would be wrong. Moreover, over-punishment may affect when this point is reached. A society that punishes criminals too severely—i.e., that in utilitarian terms punishes more severely than is required—may be more likely to reach the point at which an increase in the ratio of apprehensions is undesirable.

Now how do these considerations relate to the initial question on the justification of applying racial profiling as a tactic for the apprehension of more criminals? The full answer to this question depends, as we shall see shortly, on a comparison in terms of harmfulness of the use of race as a targeting factor with other or with no use of profiling tactics. As has been pointed out, the use of racial profiling may cause harm in direct as well as indirect ways.

A person who is stopped and searched by the police may well find this highly inconvenient and uncomfortable. If the person has reason to believe that she is stopped partly because of her race, this may further contribute to feelings of frustration or humiliation. Thus an assessment of on-the-spot effects on well-being may show stops and searches as a result of racial profiling to be more costly than stops and searches carried out randomly or in accordance with other sorts of selection procedure. Moreover, many theorists agree that an on-the-spot assessment of well-being does not present an exhaustive picture of the costs of racial profiling. For instance, R. Kennedy has pointed to the more general feeling of resentment, the sense of hurt, and a loss of trust in the police among groups subjected to increased police attention as a result of racial profiling, (Kennedy 1999: Chapter 4) And even though such feelings and mistrust may only partly result from the use of racial profiling, most theorists nevertheless seem to agree that there is more to the costs than an on-the-spot evaluation reveals. A particularly noteworthy set of consequences relates to the possible self-perpetuating effects of the use of racial profiling. If the police increase their attention on a particular minority group then, obviously,

\(^{1}\) It is sometimes held that general prevention might also be reached in other ways. For instance, the punishment system may function as a way of generating or re-affirming existing societal norms of behaviour. However, the argument I shall put forward may also be presented even if general prevention can be achieved through other sorts of mechanisms.
more criminal members of this group will be apprehended. However, an uncritical reading of criminal justice statistics showing an over-representation of this minority may lead politicians and others to believe that members of this group are more criminal than those of another group; and this may be so even though the over-representation is simply the result of the increased police attention. (Johnson 1995) Now, this may itself reinforce the practice of racial profiling and, more importantly, it may contribute to the general perception in the populace of members of this group being criminal. In this way, the use of racial profiling may result in or strengthen the fact that race is being used as a proxy of crime, which may thus contribute to discriminatory tendencies in the society. And, as is well-known, racial discrimination may have various harmful effects on those discriminated against. Thus, on the one hand, it may be correct—as pointed out by Risse and Zeckhauser—that an important contributor to the harm involved in racial profiling may be the existing underlying racism in the society. (Risse and Zeckhauser 2004: 143f) On the other hand, the use of racial profiling may itself—due to the outlined sort of mechanism involved—initiate or contribute to racism in the society. Now I shall not engage further in the discussion of the possible ways in which racial profiling may cause harm. What is important here is to give some support to the claim that racial profiling may be more costly than random procedures or other ways of profiling. Given this claim, we can now return to the utilitarian analysis.

What we have seen above is that, from a utilitarian point of view, it need not be the case that it is desirable to apprehend as many criminals as possible. Suppose first that a society is in a situation in which a point has been reached above which a further increase in the ratio of apprehended criminals will no longer contribute to an increase in crime prevention. In that case, there would be no ground for increasing the apprehension ratio—in fact, increasing it would be wrong—no matter whether this is done by the use of racial profiling or by some other targeting tactic. Suppose, instead, that the optimal ratio has still not been reached, i.e., that it would still be desirable from a utilitarian point of view to increase the percentage of criminals that are apprehended. Then if this could be done either by the use of racial profiling or by applying other procedures to apprehend criminals then—due to the fact that racial profiling is a more costly tactic—one should choose the latter possibility.

Thus, in sum, what follows from a utilitarian criminal justice approach is that the main premise of the hit rate argument for racial profiling—namely, that this type of profiling increases the number of apprehended criminals—may not succeed in sustaining the use of racial profiling after all. Even if the premise is empirically correct, it is not necessarily desirable to apprehend more criminals. There may be a point at which an increase in the percentage of apprehended criminals is simply not desirable or, even if further apprehensions are desirable, this goal may be reachable in other less harmful ways than by the use of racial profiling. Moreover, the more a society tends to over-punish criminals, the more likely it seems that there may be a point at which an increase in the ratio of apprehended criminals is undesirable.

Now it might be argued that the above considerations are based on a very large number of if’s—that is, that they involve a high number of stipulations on the mechanisms of general crime prevention and on the harmful effects of racial profiling. The answer to the accusation is a clear “yes.” However, the point has not
been to suggest that crime prevention always follows the outlined pattern or that the application of racial profiling necessarily causes the suggested kinds of harm. Rather—and more modestly—the point is to show that the hit rate argument in favour of racial profiling cannot be presented independently of considerations of criminal justice practice. The desirability of the premise that more criminals will be apprehended cannot—even if this is correct—be taken for granted if one favours a utilitarian approach to criminal justice.

2 Retributivism and the Desirability of Apprehending Criminals

Even though retributive theories of punishment—roughly, theories which hold that punishment of perpetrators is justified on the ground of considerations of desert—exist in many different versions, it is commonly held by retributivists that the severity of a punishment should be proportionate to the gravity of the crime. (Ryberg 2004) The traditional retributivist criticism directed against rival consequentialist theories has consisted in emphasizing that such theories allow for disproportionate punishment. According to retributivism, there is a constraint against disproportionate punishing. Obviously, what this means is that a society that punishes offenders too severely is acting morally wrongly. However, no one—to my knowledge—has addressed the question relevant to the present context, namely, what a disproportionate penal practice implies with regard to the desirability of apprehending offenders. Unsurprisingly, there are two possible types of answers to this question.

The first, and seemingly most obvious possibility, is to suggest that violations of the constraint against disproportionate punishing do have implications with regard to the desirability of apprehending criminals. If it is a fact that apprehended criminals will (when proven guilty) be punished in a disproportionately severe manner, then it is wrong to apprehend them in the first place. One way of supporting this answer would be to contend that the state, by apprehending criminals under these conditions, is in fact infringing the disproportionality constraint. Perhaps there are also other possibilities. It might be suggested that the wrongness of apprehending criminals is somehow derived from the disproportionality constraint, even though such apprehensions do not in a direct sense violate this constraint. In the same way as a deontologist might hold it wrong for me—even though, I do not directly violate a constraint against harming others—to hand a knife to a jealous husband who is about to confront his unfaithful wife, it may also be held that the wrongness of the apprehension is indirectly derived from the disproportionality constraint. Precisely how this justification would sound is not crucial. At the end of the day it falls on the shoulders of adherents of this position to fill out the premises of the argument. What is important, however, is that if this is what retributivism implies with regard to apprehension carried out within the framework of a disproportionate penal practice, then obviously the hit rate argument in favour of racial profiling falls apart: further apprehensions will not be desirable.

Some might perhaps argue that this conclusion is premature. It might be suggested that the constraint against disproportionate punishment not only forbids
punishment that is too severe, it also forbids punishing criminals too leniently or not punishing them at all. Several retributivists actually advocate positive versions of retributivism, according to which punishing too leniently is in fact wrong. But if that is the case then it might be wrong not to apprehend criminals after all. However, this answer will hardly do. Firstly, the answer seems to imply that it is wrong to apprehend criminals—because they will be punished too severely—and that it is wrong not to apprehend criminals—because this means that they will not be punished. Obviously, this does not constitute an attractive position. Secondly, if one wishes to avoid this implication, then one would have to establish that violating the constraint against disproportionately lenient punishing by abstaining from apprehending criminals is morally worse than violating the constraint against disproportionately severe punishing. However, it is very hard to imagine that a retributive-based argument in favour of this position can be provided. In fact, insofar as one wishes to make a distinction between the moral legitimacy of up-wards and downwards deviations from proportionality, then the tendency amongst retributivists clearly is to regard punishing too severely as worse than punishing too leniently.2

Thus, this way of blocking the above conclusion on the desirability of apprehensions does not, I suggest, constitute a viable option.

The second possibility is to take the opposite view, that is, to hold that the constraint against disproportionate punishing does not have any implications with regard to the desirability of the apprehension of criminals. For instance, it might be held that the constraint is infringed only by the imposition of a disproportionate punishment; not by the initial act of apprehending criminals. However, this answer does not seem promising. If there is no relation between the obligation to punish criminals and the apprehension of criminals, then it becomes unclear why it should be considered desirable to apprehend criminals in the first place. And it seems somewhat inconsistent to hold, on the one hand, that the desirability of apprehending criminals follows from the obligation to give them their just deserts, that is, to punish them in proportion to the gravity of their crime but, on the other, that the fact that one does not punish them proportionately has no bearing on the question of the desirability of apprehending them. Thus an obvious problem with this approach to the moral relation between punishment and apprehension is that it leaves us without an explanation as to why a society should make effort at all to apprehend criminals in the first place. It might, of course, be suggested that just deserts considerations do not have any implications with regard to the question of the desirability of apprehending criminals, but that this does not exclude the possibility that the question of the moral ground for apprehension should be settled by other moral considerations.

One possibility is that the desirability of apprehending criminals follows from utilitarian considerations. However, this only leads us back to the considerations of the previous section in which it was made clear that a utilitarian approach does not necessarily imply that an increase in the number of apprehended criminals is

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2 For instance, some retributivists advocate negative versions of retributivism according to which proportionality only sets upper limits—not lower limits—to the severity of punishment. See, for instance, Ryberg (2004: Chapter 6).
desirable. Another possibility is to contend that the apprehension of criminals is a way of showing proper respect to crime victims. However, even if it is possible to provide other reasons as to why criminals ought to be apprehended, it still seems dubious to maintain that the fact that the punishment will be disproportionate has no bearings on the desirability of apprehending a criminal. Analogously, as mentioned, it would seem absurd to argue that even though handing a knife to a jealous husband will lead to a violation of a harm constraint this violation has no bearings on whether I should hand the husband the knife. Or, as another example, suppose that I always end up in beating someone up when I drink alcohol. In that case, it sounds pretty absurd to suggest that the fact that I end up harming someone has no moral bearings on the question as to whether or not I should drink alcohol. Indeed, it is much more plausible to hold that the fact that I will be violating a harm constraint constitutes the very reason as to why it is wrong for me to drink. In a similar vein, it sounds highly dubious to contend that something as important as the constraint against disproportionate punishment has no moral bearings on the retributive view of the desirability of apprehending criminals. At least it seems that the claim that there is no such relation would require a strong argument; however, to my knowledge no such argument exists and it is hard to imagine what it would look like. Thus by following the second track we have in the absence of such an argument come no closer to an understanding of why apprehending criminals is not undesirable in a retributively unjust society.

In sum, what we have seen above is that, from a retributivist point of view, two different approaches might be adopted with regard to the question of how the fact that a society over-punishes criminals affects the question of the desirability of apprehending criminals. It might be suggested that the way criminals are being punished does have an impact on the desirability of apprehending them in the first place. But in that case it is hard to morally sustain apprehensions in a retributively unjust society. Conversely, it might be held that the way one punishes criminals has no bearings on the desirability of apprehending them. But in that case, it is left unclear why the apprehension of criminals should be desirable at all from a retributive point of view. And more importantly, in the absence of a strong argument, this suggestion seems morally highly dubious. Thus all in all it follows that given our initial assumption, that societies today punish criminals too severely, the main premise of the hit rate argument in favour of racial profiling—that such a practice will contribute to the goal of apprehending more criminals, which should be regarded as desirable—does not gain any support from a retributivist point of view.

3 Conclusion

When philosophers and other theorists engage in moral consideration of the moral legitimacy of a certain practice, this is sometimes done by considering this practice in its own right, that is, by isolating it from other practices in which it may intervene. Often this is a reasonable procedure which helps in identifying morally relevant factors. However, it also means that there is the risk that the reached conclusions on the moral plausibility of the practice cannot in any straightforward
way be transferred to the real-life cases in which this practice affects and is affected by other practices that may play a role in a moral assessment. What I have suggested in this paper is that, even though the discussion of racial profiling certainly has brought in more general considerations of social justice or existing racism, there has been a remarkable tendency to ignore how racial profiling as a law enforcement tactic relates to the criminal justice practice, more precisely, to the existing penal order.

Given the initial assumption that many countries today punish criminals too severely, both from a utilitarian and a retributivist point of view, what we have seen is that the main argument in favour of racial profiling, namely, that the use of race as a targeting factor will help the police apprehend more criminals, is much weaker than it at first sight appears. From a utilitarian perspective, there might be a point at which an increase in the ratio of criminals does not contribute any further to general crime prevention and at which further apprehension is therefore not desirable. And even if this point has not been reached it might be possible to reach it by less harmful methods than by using race as a targeting factor in police work. The likelihood that such a point may be reached may increase with the existing degree of over-punishment in many societies. From a retributivist point of view, it is hard to sustain the claim that it is desirable to apprehend criminals if they are subsequently punished in an unjust manner. Thus, it seems that either way, given the over-punishment assumption, the desirability of apprehending more criminals—and thus the hit rate argument in favour of racial profiling—can certainly not be taken for granted. Or, put somewhat differently, even if it is empirically correct that the use of race as an enforcement tactic will lead to the apprehension of more criminals, and even if there are no other moral considerations that undermine the legitimacy of such a practice, it still does not follow that this practice should be adopted as part of the existing police work. One cannot defend the use of racial profiling without committing oneself to moral assumptions on the existing penal order—assumptions which in real life may well be mistaken.

References


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