

Profiling in counter-terrorism

Dr Kat Hadjimatheou
Research Fellow
Dept. of Philosophy
University of Birmingham

Outline

- Is ethnic profiling harder to justify than behavioural profiling in principle or for contingent reasons?
- Recent ethical theory on profiling versus legal principles
- Wrong of wrongful discrimination versus wrong of moral assessment based on morally irrelevant traits
- Conclusion: Applying both principle to debate on profiling provides better account of distinction between use of ethnic & behavioural traits

A definition of profiling in counter- terrorism

The systematic association of sets of physical, behavioural, psychological or ethnic characteristics with terrorist criminality and their use as a basis for making law-enforcement decisions.

The different bases of profiling

- **Ethnic profiling:** race, skin-colour, religious appearance, national origin, language.
- **Behavioural profiling:** intentional behaviour (purchasing patterns, travel patterns) & non-intentional behaviour (body-language, facial expression)
- **Biometric profiling:** heart rate, eye movements, blood pressure etc.
- **DNA profiling**

Recent literature on ethics of ethnic profiling

(1999-2010: Kennedy; Schauer; Risse & Zeckhauser; Lever;
Lippert-Rasmussen; Bou-Habib; Reiman)

2 hurdles to justifiability:

1. In-principle condition of permissibility
2. Conditions necessary for compatibility with fairness, equality, reciprocity & consequentialist considerations

1. In-principle condition of permissibility

- Ethnic profiling permitted **in principle** if evidence demonstrates correlation between ethnic traits & crime
- Thus **anti-discrimination** norm respected: people should only be treated differently on basis of reasons relevant to legitimate aim (Bernard Williams, 1963)
- Nothing morally untoward about responding to individuals on the basis of statistical indicators their broad characteristics suggest

2. Additional conditions of moral justifiability

- Does not cause greater harms than averts
- Does not violate moral rights
- Respects principle of reciprocity: applied in such a way that generates a sufficient benefit to those profiled
- Does not conflict with other norms of equality (e.g. anticaste principle)
- In practice this means not or hardly ever applied when group targeted is victim of (relevant) background injustice

The background injustice approach

‘[Ethnic] profiling aimed at a particular group is rendered morally more problematic by the fact that that group has been treated unjustly in other contexts’ (Bou-Habib, 2010)

Background injustice: systematic disadvantage in multiple spheres of society including or especially access to opportunities/housing/jobs and/or victim of prejudice.

Implications of background injustice approach

- Problem with ethnic profiling lies not in any inherent feature of ethnicity but the social conditions in which the profiling of ethnicity is practiced
- Any intuition that ethnic profiling prima facie worse than behavioural explained only by contingent features of ethnicity
- Contingent feature= trait has been the criterion of background injustice.

Normative implications of background injustice approach

- Profiling of ethnic traits not/hardly ever permitted against groups suffering from background injustice
- Profiling of ethnic traits permitted against groups *not* suffering from background injustice
- Profiling of ethnic traits permitted in a society *not* characterised by background ethnic injustice
- Also: profiling of any kind of traits- including behaviour- equally difficult to justify when the group profiled is the victim of a relevant background injustice

Possible shortcomings

- Approving profiling of one ethnic group but not another seems unfair
- Does not address intuition that identity/immutable traits prima facie less sound basis for criminal justice decisions

Legal principle: identity versus conduct

“It is a fundamental principle of the rule of law that law enforcement actions should be based on an individual's personal conduct, not on their identity.”

(EU Parliament *Committee on Civil Liberties, Justice and Home Affairs Working Document* on the problem of profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control, DT\745085EN.do 30.9.2008)

Related principle? Immutability

Law enforcement decisions should not be “based primarily on skin colour or other immutable characteristics”

(American Civil Liberties Union *Sanctioned Bias: Racial Profiling Since 9/11*, 2004, New York.)

The control principle(s)

1. We are morally assessable only to the extent that what we are assessed for depends on factors under our control (Nagel, 197)
2. Two people ought not to be morally assessed differently if the only other differences between them are due to factors beyond their control (Nelkin: 2008)

Control principle: sphere of application

- Narrower than anti-discrimination principle: applies only to actions that convey moral assessment/judgement or allocate *moral* responsibility
- Therefore relevant to criminal profiling but not profiling in medical context/jury selection etc.

Control principle & profiling

The fact that ethnic traits are not within our control yields an **in principle** reason for objecting to the profiling of ethnic & biometric traits and for distinguishing morally between profiling of ethnic & biometric and behavioural traits.

Potential benefits of applying control principle

- Compatible with anti-discrimination principle and background injustice arguments
- Help to make sense of why ethnic profiling potentially troubling irrespective of social status of group
- Help to make sense of intuition (and police rules of evidence) that behaviour less problematic a basis for suspicion than ethnicity

Possible lines of objection 1

- Control principle not engaged by profiling in first place
- Because profiling doesn't involve judgement; just a rational response to undeniable facts
- Therefore current ethical theory already exhaustively describes moral risks of profiling
- And further mention of 'identity' & 'immutability' should be purged from discussion of criminal profiling

Possible lines of objection 2

1. Normative implication irrational & absurd: non-controlled traits should *never* be basis for allocating suspicion?
2. Conflicts with more weighty moral requirement to pursue & prevent crime, thus reducing harm to innocents.

Possible line of response to both 1&2

- Being X ethnicity is an identifying characteristic for police only because it is contingently connected with other, morally assessable, characteristics (ie. probable involvement in terrorist acts)
- So people not judged in virtue of ethnicity but in virtue of overall likelihood of being involved in crime
- Which is something they can control *as long as some controllable traits also included in the profile*

Possible implications for counter-terrorism profiling

1. Profiling victims of background injustice still worse than profiling other groups
2. But principled distinction between ethnic & behavioural profiling sustainable
3. Profiling ethnicity permissible, but ethnicity should not be *sole* basis for suspicion of any crime but always used in combination with behaviour
4. Neither should biometric /DNA traits