10 Racial profiling as pejorative discrimination¹

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10.1 Introduction

It seems intuitive to many people that racial profiling is morally repugnant. A 2017 report of the Ontario Human Rights Commission, *Under Suspicion*, calls racial profiling an ‘insidious and particularly damaging type of racial discrimination that relates to notions of safety and security’ (p. 9). The report details the daily reality of racial profiling for members of Indigenous communities, Muslims, Arabs, West Asians, and Canadians of African descent. It includes a wide range of phenomena under ‘racial profiling’, such as surveillance in retail or airport security that disproportionately affects members of minority groups, suspicion and prejudice directed towards Indigenous people by child protection services, and the criminalisation of racialised youth in policing. The focus of the philosophical literature is often narrower and limited to racial profiling in law enforcement. Following this literature, I adopt the definition that ‘racial profiling’ is ‘any police-initiated action that relies on the race, ethnicity, or national origin, and not merely on the behaviour of an individual’ (Risse & Zeckhauser 2004, p. 136).²

David Harris (2017) describes three waves of racial and ethnic profiling in criminal contexts (in the United States in particular). The first refers to policies developed in the 1980s and 1990s targeting drug crimes that concentrated on highway traffic stops of Black and Hispanic men; the second is the profiling of Arabs and people of Middle Eastern appearance after the terrorist attacks of 11 September 2001; and the third is the more recent targeting in the United States of people of Hispanic descent who appear to be undocumented or ‘illegal’ immigrants (Harris 2017, pp. 120–124). It is important to note that profiling need not be *de jure*, namely sanctioned by an explicit law or policy. It can also occur *de facto* without authorisation of the state, due to racist implementation of policies, implicit racial biases or even unintentional microaggressions (cf. Hosein 2018, p. e3).³

Philosophers classify racial profiling as discrimination because it constitutes disadvantageous differential treatment of people who are profiled relative to people who are not profiled (Lippert-Rasmussen 2013, Chapter 12; Eidelson 2015, Chapter 7). It also counts as group discrimination because it is disadvantageous differential treatment on the basis of perceived group identity (Lippert-Rasmussen 2013, p. 273). Discrimination can be direct or indirect; it can be the result of an

explicitly discriminatory policy, or of a facially neutral policy that has a differential impact on minority groups (Khaitan 2018). Stop-and-frisk, or the ‘*Terry* stop’, is an ostensibly neutral policy allowing police to stop and search people whom they reasonably suspect have committed, are committing, or will commit a crime (Torres 2015, p. 932). However, empirical evidence about racial disparities in the implementation of the *Terry* stop shows that it is indirectly discriminatory. From 2004 to 2012 in New York, 83% of those stopped under stop-and-frisk were Black and Hispanic (Torres 2015, pp. 933–934).

On most philosophical analyses, neither racial discrimination nor racial profiling is immoral by definition. There is also no consensus in the philosophical literature that racial profiling is morally wrong. On the contrary, profiling has seemed to be warranted on the basis of statistical correlations between criminality and people of certain racial or ethnic backgrounds. As Mathias Risse and Richard J. Zeckhauser put it, ‘racial profiling assumes certain crimes are committed disproportionately by certain racial groups. Hence special efforts at crime reduction directed at members of such groups are justified, if not required’ (2004, p. 144). Racial profiling is ‘rational’ if it increases the number of criminals caught by the police, reduces overall criminal activity, and therefore promotes the important public good of security.⁴ However, this does not settle the question of whether profiling is morally permissible. Despite being beneficial for crime reduction, there may be significant costs that outweigh the benefits. In addition, or alternatively, profiling may be impermissible for non-consequentialist reasons: it may violate rights or be inconsistent with the obligation of the state to treat all citizens with equal respect.

The first goal of this chapter is to employ procedural justice theory to examine consequentialist arguments for and against the morality of racial profiling. Procedural justice focuses on the interpersonal or process-related aspects of laws and policies that obtain independently of and in addition to the outcome-related aspects (Tyler 1990, p. 7). Tom R. Tyler calls this:

the normative perspective on procedural justice, [which] views people as being concerned with aspects of their experience not linked only to outcomes. Normative aspects of experience include neutrality, lack of bias, honesty, efforts to be fair, politeness, and respect for citizens’ rights.

(Tyler 1990, p. 7)

For instance, groups that are targeted by profiling experience both the policy itself, and the specific police–citizen interactions that occur when it is implemented, as biased, unfair, and disrespectful. Tyler and his colleagues argue that such experiences lead to loss of trust in the police and a perception that the criminal justice system is illegitimate, which in turn reduces compliance (e.g. Tyler 2006, p. 379). Reducing compliance with law will inhibit overall security and hence undermine the very goals that profiling aims to achieve. Therefore, considerations from procedural justice call arguments *for* racial profiling (that putatively establish its rationality) into question. They also reinforce consequentialist arguments *against* profiling. Consequentialist arguments focus on weighing

outcomes: the benefits of reducing crime are weighed against the costs of contributing to racism. One prominent argument claims that, in an already-racist society, the small additional contribution of racial profiling to racism will be outweighed by the benefit of promoting security (Risse & Zeckhauser 2004, p. 147). But once we recognise the magnitude of the process-related harms experienced by members of profiled groups, this argument is no longer plausible.⁵

The second goal is to develop a new, non-consequentialist objection to racial profiling. I argue that profiling constitutes disrespectful treatment and therefore violates the state's obligation to treat citizens with equal respect. The procedural justice literature is important for this argument as well. There is evidence that when people think that the procedures used to enforce laws or policies are unfair, this negatively affects their sense of self-worth and self-respect (e.g. Meyerson 2015, pp. 258–259). This raises the question of whether profiling constitutes disrespectful discriminatory treatment. Does the experience of profiled groups that they are being treated unfairly and disrespectfully track *actual* disrespectful treatment by police or by the state? If so, this would provide a non-consequentialist or deontological objection to racial profiling. Many philosophers nonetheless dismiss the deontological argument.⁶ In particular, despite arguing that the moral wrongness of core racial discrimination can be traced to disrespectful treatment, Benjamin Eidelson (2015) claims that racial profiling itself is not disrespectful in the relevant sense. My goal is to counter this argument and show that profiling constitutes disrespectful treatment.

Section 10.2 addresses the consequentialist arguments for and against racial profiling. I argue that the procedural justice notion of legitimacy undermines the rationality argument *for* profiling. I also identify the costs of racial profiling and suggest that process-related harms are an important component of these costs. I conclude that there is no convincing justification for profiling on consequentialist grounds. In Section 10.3, I explain Eidelson's argument that racial profiling does not constitute disrespectful treatment. The argument turns on a distinction between 'basic disrespect' and 'conventional disrespect'. The former corresponds to Stephen Darwall's notion of recognition disrespect, namely, failure to appropriately take account of a person's normative standing in moral deliberation (Darwall 1977). Eidelson claims that profiling perpetuates racist social meanings (generalisations that associate racialised groups with criminality), which are conventionally disrespectful to racialised groups. However, by hypothesis, racial profiling is based on true statistical correlations between these racialised groups and criminality, and hence does not convey an attitude of basic disrespect (Eidelson 2015, p. 86). Section 10.4 challenges this argument. I agree that racial profiling is conventionally disrespectful; it contributes to conventional meanings that are racist and hence is morally problematic on consequentialist grounds. However, this does not preclude the possibility that it also corresponds to basic disrespect. I propose that profiling functions as a particular form of generalisation called a 'striking-property generic' (Leslie 2007, 2008, 2017). On Sarah-Jane Leslie's analysis, striking property generics make claims about the *natures* of the members of the groups they describe. I argue that attributing criminality by nature to members of profiled

groups is both a violation of recognition respect—it makes a moral mistake about the normative status of members of profiled groups—and an unjustified violation of a second form of respect, *appraisal* respect (Darwall 1977).

10.2 Consequentialist arguments and procedural justice

Some philosophers maintain that the adverse consequences of profiling are not significant enough to establish that it is unethical. Risse and Zeckhauser (2004) assume that profiling is rational and offer a ‘qualified defence’ of its moral permissibility; they claim that the costs to targeted groups are likely to be minimal and hence do not outweigh the beneficial consequences of reducing crime. David Boonin’s (2011) ‘reluctant defence’ is more circumspect, arguing that profiling is sometimes rational and sometimes not (p. 326). However, for Boonin, the costs of profiling are all reducible to subjective responses on the part of members of profiled groups. These types of costs are neither weighty enough nor well-justified enough to override the presumed benefits. In this section, I revisit the rationality and morality arguments in the light of procedural justice theory.

10.2.1 *The rationality argument*

The claim that profiling is rational constitutes the first step in a broadly consequentialist defence of racial profiling. For the sake of argument, I accept the assumption that there are non-spurious, statistical correlations between certain racialised groups and rates of criminality.⁷ Does profiling these groups in fact reduce criminal activity and promote the public good of security? According to one prominent argument, the answer is no. Harris points to empirical evidence about ‘hit rates’, the ‘rate at which officers’ activity results in the recovery of contraband or guns, the detection of other offenses, the making of arrests, or the writing of summonses’ (Harris 2017, pp. 138–139, Harris 2002, pp. 79–80). The evidence suggests that whereas people in minority groups are stopped by police at a higher rate than whites, the hit rate for these groups (e.g. for possession of contraband or weapons) is *lower* than it is for whites (Harris 2017, p. 138). This seems to establish that racial profiling is less successful at apprehending criminals than random searches.

It has been suggested, however, that the hit rates argument is inconclusive.⁸ I therefore propose an alternative reason to question the rationality of profiling. Consider the idea of legitimacy in procedural justice theory. Legitimacy corresponds to citizens’ beliefs that an authority’s power is legitimate and exercised in ways that are appropriate (Tyler 2006, p. 377). It includes the sense that one ought to obey the directives of the authority. According to scholars of procedural justice, when law and other authorities are perceived as legitimate, compliance will be achieved without coercion or incentives that are in citizens’ self-interest. The contrary is also true: when authorities are perceived as unfair and illegitimate, compliance will be undermined. Since racial profiling is perceived by targeted groups as unfairly singling them out, compliance is therefore likely to be eroded.

Indeed, this is recognised by the police themselves. In describing attempts of advocates of tighter immigration controls to involve local police in their efforts, Harris (2017) says,

Local police ... understood that becoming adjunct forces to federal deportation efforts would cause their own immigrant communities—both undocumented and documented people—to fear involvement with them. That fear would cause people to avoid calling police with reports of crime for fear of bringing immigration policing into any given situation. This would give predators in the community—robbers, killers, domestic-violence perpetrators, even child molesters—free rein.

(Harris 2017, p. 124)

Rick Trinkner, Jonathan Jackson, and Tom R. Tyler (2018) identify an additional concern: citizens' sense of the legitimacy of an authority is not limited to the 'how' of the exercise of the authority's power, but also extends to the 'when' and 'where' of its exercise—that is, to the citizen's perception of the appropriate boundaries of the power being exercised (2018, p. 282). For instance, in discussing the *Terry* stop, these authors note that:

some citizens are not only concerned about the manner in which the police conduct such stops, but also question whether the police have the right to enter individuals' personal space.

(2018, p. 282)

Thus, racial profiling is likely to undermine legitimacy due to the perception that it unfairly singles out profiled groups and its implementation exceeds the boundaries of the legitimate authority of the police.

Advocates of the rationality of profiling assume a simple proposition, namely, that profiling groups who disproportionately engage in criminal activity will reduce crime and promote security, including for the targeted groups themselves. Evidence about how profiling affects legitimacy within targeted communities calls this conclusion into question. If profiling generates fear, distrust, and the sense that law enforcement is illegitimate, this is likely to reduce compliance and hence make policing such communities much more difficult. Even if we assume for the sake of argument that profiling leads to the apprehension of more criminals, this is not the only dimension to be considered when assessing its rationality. Any small reduction in criminal activity is likely to be offset by a substantial increase in non-compliance within profiled communities. Thus, overall, it is unlikely that profiling will achieve its stated aims of promoting security.

10.2.2 The morality argument

Even if profiling turns out to be rational, this does not settle the question of whether it is morally permissible. I now turn to the arguments offered by Risse

and Zeckhauser (2004) and Boonin (2011) claiming that the costs of profiling do not outweigh the benefit of promoting security. Risse and Zeckhauser classify racial profiling as an ‘expressive’ harm, which corresponds to either a ‘*reminder* of other painful events or practice ... or a focal point for events or practices, a symbol of structural disadvantage or mistreatment’ (2004, p. 147). A focal point becomes ‘associated with harm [that] plausibly accounts for the lion’s share of the harm associated with that practice’ (2004, p. 147). Risse and Zeckhauser ask how much better off ‘African Americans would be if we just got rid of profiling, keeping everything else fixed. We think that the answer is “only slightly so”’ (2004, p. 149).⁹ Thus, underlying racism is responsible for the harm suffered by minority groups and racial profiling is a mere focal point. Any additional harm due to profiling in an already-racist society is negligible and insufficient to outweigh the benefits to security.

Boonin argues that the costs of profiling are all reducible to the negative reactions of members of profiled groups. He claims that this type of cost, although not negligible, is insufficient to outweigh the benefits.¹⁰ The costs identified by Boonin include direct costs, such as feeling ‘distressed, upset, degraded, angry, and outraged at being targeted by race for investigation, at least in part, because of the color of [one’s] skin’, and indirect costs, such as reluctance to move around freely in certain neighbourhoods and distrust of the police and criminal justice system (2011, p. 337). Boonin claims that all the costs arise from the negative reactions of members of profiled groups and that the negative reactions of people subject to a policy do not generate a moral reason against it: ‘[a] moral objection to racial profiling should give us a reason to be outraged by the policy, not a reason to think that people will be outraged by it’ (Boonin 2011, p. 340).

These arguments misrepresent, respectively, the *extent* and the *type* of harm suffered by profiled groups. As others have pointed out (Lever 2005; Eidelson 2015; Hosein 2018), the harms of profiling are not always psychological. Even when they are, they are significant and not reducible to mere negative reactions. The profiling of minority groups leads to a wide variety of harms: it exacerbates the subordination and unequal status of minority groups, inflicts stigma and reputational harm, and contributes to psychological harms such as diminished self-worth and an insecure sense of social identity. For example, the Ontario Report points out that profiling leads to inequality, such as the overrepresentation of minority groups in prisons.¹¹ The report explains that,

Racial profiling by law enforcement can have far-reaching impacts that go beyond the specific incident. For example, racial profiling may contribute to the overrepresentation of racialized and Indigenous peoples in the criminal justice system, beginning with racial differences in stop and search practices. Involvement with the criminal justice system can lead to loss of connections with families and communities, and loss of opportunities for employment, education and social mobility. This exacerbates existing systemic racial barriers for racialized and Indigenous peoples in society.

(OHRC 2017, p. 85)

Profiling also contributes to racial inequalities by perpetuating conventional meanings that associate minority groups with criminality. As Annabelle Lever puts it, racial profiling reinforces ‘odious claims about immorality and criminality’ and ‘white tendencies to draw invidious and complacent racial distinctions’ (2005, p. 97). This will perpetuate the racism that affects all members of profiled groups even if they are never profiled themselves (Eidelson 2015, p. 207).

Further, racial profiling causes significant psychological harms, such as extreme anxiety, humiliation, and alienation. One member of a profiled group describes her reaction as follows:

I live in fear for my black son, I experience sickening levels of anxiety if I text him or call him and [he] does [not] respond within 30 minutes or so. I feel bad that I have put my black children under surveillance in order to protect them from the system that is supposed to protect them (Black female, age 35–44).

(OHRC 2017, p. 86)

Profiling is perceived to place a disproportionate burden on minority groups and hence to be unfair, which—as procedural justice theory has extensively documented will compound the psychological harm. The perception of fair treatment by authorities promotes positive attitudes of self-worth and self-respect, and a secure sense of one’s own social identity (Meyerson 2015, pp. 258–259). As Denise Meyerson explains,

the empirical findings ... show that a key factor in developing and maintaining a favourable social identity is the perception that one has status within one’s group and, furthermore, that when authorities treat people in ways that are interpersonally satisfactory, this sends the message that they have status within their group.¹²

(Meyerson 2015, p. 258)

Interpersonal treatment that is perceived to be biased, unfair, and disrespectful will have the opposite effect. Racial profiling is therefore likely to have extensive negative consequences including undermining self-worth and self-respect, destabilising social identity, and producing a sense of inferior social status.¹³

It is implausible therefore to construe the harms of profiling as either ‘expressive’ of underlying racism and thus minimal, or of a type that is insufficiently weighty to be included in moral argument. Boonin (2011) is correct that subjective outrage or offence in response to some policy is insufficient on its own to provide a moral argument against it (p. 340). But his position conflates an offence argument with a harm argument. The negative psychological effects inflicted on the targets of profiling should not be equated with a subjective sense of offence or even outrage that is felt in response to a policy with which one does not agree. In short, the combined costs of profiling are likely to outweigh any benefits.¹⁴ The remaining question is whether there is a plausible non-consequentialist objection

to racial profiling in addition to the consequentialist ones. Does racial profiling, independently of its consequences, constitute disrespectful treatment of racialised minorities by the state?

10.3 Eidelson's argument: profiling and disrespect

Eidelson claims that profiling is not disrespectful in a 'basic' sense. Although the wrong-making feature of core cases of racial discrimination is disrespectful treatment, racial profiling is an exception because it is not a violation of what Darwall calls 'recognition respect' (Darwall 1977). Racial profiling is based on statistical correlations, not on a mistake about the personhood of the recipient. Eidelson (2015) observes that it 'seems foolish to deny that there are often genuine correlations between certain perceptual features, such as race or sex, and other relevant traits, including some forms of criminality' (p. 175). Hence, on Eidelson's account, racial profiling based on genuine statistical correlations does not display the attitude necessary for disrespectful treatment. This section outlines Eidelson's argument in detail. The argument turns on a distinction between profiling as *an attitude of basic disrespect* and profiling *as contributing to conventionally disrespectful social meanings*. Eidelson rejects the former and therefore the possibility of a non-consequentialist argument based on recognition respect. He nevertheless adopts the latter to argue that profiling is impermissible for consequentialist reasons.

Eidelson considers racial profiling as a case study of racial discrimination. The conceptual analysis of discrimination should be distinguished from its wrong-making features. He says, 'discrimination is best seen as a very general kind of act—one that is only sometimes wrong. Acts fitting within that type may be wrong in different cases for different reasons' (Eidelson 2015, p. 73). Eidelson claims, however, that 'core' cases of discrimination are wrong for non-consequentialist reasons. Suppose a person is denied a job purely on the basis of their race (or other arbitrary personal characteristic), but finds a better one immediately afterwards. Eidelson argues that the wrong is not just a 'contingent' matter, as it would be on a consequentialist analysis. Rather, our moral intuitions imply that such cases are 'intrinsically' wrong—that there is an objective basis of the wrongness independently of contingent effects. The objective basis in core cases of racial discrimination is a violation of recognition respect. Eidelson (2015) explains that,

the relevant sort of respect—recognition respect for someone's standing as a person—imposes an affirmative obligation that one take to heart the various normative upshots of ... being a person and regulate one's action accordingly. On this view, what matters is how an agent deliberates, rather than the social meaning of her act. But her deliberation is rendered morally defective not merely by the presence by some positive factor of animus or a discriminatory belief, but by the *absence* of appropriate recognition of someone's personhood whether that absence comes about willfully or by neglect.

(pp. 74–75)

Thus, Eidelson (following Darwall) offers a 'deliberative' conception of respect. This should be distinguished from two other possible conceptions: (i) a 'mental state' conception on which a necessary condition of disrespectful treatment is contempt or animus for the targeted group; and (ii) an expressivist conception on which a sufficient condition for an agent to express disrespectful treatment is for that agent to express a disrespectful conventional meaning through actions or words.¹⁵ The expressivist conception takes exemplars of racial discrimination, for instance, the 1890 Louisiana law that prohibited people of different races from travelling together on trains,¹⁶ to be wrongful, not because they are the result of hostile racist intent, but because the meaning they express is morally unacceptable.¹⁷ Different expressivist views explain the wrong-making feature in different ways. For instance, such treatment may constitute an insult, 'an expression of the view that certain people are inferior or socially unacceptable' (Scanlon 1998, p. 72); or it may convey a demeaning message which is disrespectful 'in an especially strong way [because it is] an expression of a lack of respect for the equal humanity of the other' (Hellman 2008, p. 36).

Eidelson unpacks the relations between the different conceptions of respect as follows. Disrespect on the mental state conception is an example of basic disrespect on the deliberative conception because deliberation can be morally defective as a result of racist animus or a racist belief. On the other hand, expressive disrespect is not equivalent to basic disrespect on the deliberative conception. Engaging in action that corresponds to a demeaning conventional meaning is not sufficient on its own for the attitude of basic disrespect. This is because, on expressive views, the presence of certain social conventions is sufficient for disrespect to be displayed and hence expressivist views effectively render the moral wrongness of discrimination a contingent matter. For example, failing to shake someone's hand in a culture when this is required by norms of courtesy is taken to be disrespectful just because it expresses an insulting or disrespectful social meaning (Anderson & Pildes 2000, pp. 1512–1513, quoted in Eidelson 2015, p. 86). Eidelson argues that although this might be conventionally disrespectful, it does not correspond to an attitude of basic disrespect. He explains that,

one can act disrespectfully by unwittingly failing to integrate someone's standing as a person in one's practical deliberation ... But one does not fail to satisfy the relevant criteria *simply* by acting in ways that are conventionally disrespectful, such as failing to shake someone's hand in a culture with which one may be unfamiliar. To disrespect someone is to fail to take account of the normative significance of some facet of her moral standing; and it is just not up to a culture to decide what constitutes such a failure.

(Eidelson 2015, p. 86)

The implication of Eidelson's analysis is that racial profiling is not disrespectful in an 'intrinsic' sense on any of the three conceptions of respect. Racial profiling is not disrespectful on the mental state conception because it need not and typically does not rely on racist animus or contempt. It is not disrespectful on the deliberative conception because the associations on which racial profiling is based,

such as ‘Blacks are more likely to be drug couriers’, are non-spurious statistical correlations. There are ‘genuine correlations between certain perceptual features, such as race or sex, and other relevant traits, including some forms of criminality’ (Eidelson 2015, p. 175). Hence, racial profiling cannot be traced to a mistake in practical reasoning about the moral status of the profiled groups. Finally, racial profiling is not disrespectful in the basic sense on the expressive conception. Even if profiling were to convey an insulting or demeaning social meaning, this would be due to contingent circumstances only and would constitute at most ‘conventional disrespect’. It would not correspond to the basic or intrinsic disrespect that is the wrong-making feature of core cases of racial discrimination.

Although Eidelson rejects the conclusion that racial profiling constitutes an attitude of basic disrespect, he argues that profiling is impermissible on consequentialist grounds. In particular, profiling contributes to racist social meanings that inflict ‘broad’ social harm on members of profiled groups even absent actual encounters with police (2015, p. 197). This ‘Broad Harm Argument’¹⁸ first distinguishes profiling from ‘suspect descriptions’, individualised descriptions based on evidence about the actual perpetrator of a crime (2015, pp. 178 ff.). Unlike profiling, the use of suspect descriptions is often taken to be morally acceptable (2015, p. 178). For example, Harris says that,

The state—through its agents, the police—has the power to step in to investigate and prevent crime, but ... must meet legal standards that require some amount of evidence stemming from the personal conduct of the suspect, or because they match the appearance of a perpetrator (in a somewhat detailed, not general, way) witnessed by others.

(Harris 2017, p. 137)

For Eidelson the morally relevant distinction between uses of profiling and suspect descriptions is that the former ‘derive all their force’ (2015, p. 182) from generalisations about the whole group, whereas the latter do not.

Consider Eidelson’s examples. Suppose a redheaded person is observed fleeing the scene of a crime and the police stop all redheaded people in the vicinity. The justification for stopping redheaded people is that having red hair (matching the suspect description) increases the probability that the stopped person is the perpetrator. The suspect description (‘being redheaded’) does not rely on any generalisation that connects being redheaded to criminality. Indeed, redheads as a group may in fact commit fewer crimes than other groups (2015, p. 183). Now suppose the police stop people of Middle Eastern appearance because of the (putative) statistical correlation between being Middle Eastern and being a terrorist. Unlike the evidence on which suspect descriptions are based, the evidence for racial profiling is non-individualised because,

if nothing further is known about the [unidentified] terrorist, the criteria used to identify him in particular may derive all of their force from generalizations about the whole class of people who commit terrorist acts.

(2015, p. 182)

Suspect descriptions and profiling are morally distinct because,

when we scrutinize someone because of a suspect description rather than a profile, we effectively dilute the inference from possessing a particular trait to criminality by introducing a mediating factor of personal identity.¹⁹

(2015, p. 187)

Eidelson therefore claims that the moral harm of profiling is its perpetuation of social meanings that are *generalisations associating whole racialised groups with criminality*. This is, however, a contingent effect of profiling not an example of ‘intrinsic’ or basic disrespectful treatment.

On Eidelson’s argument, the problematic generalisations conveyed by profiling are at most conventionally disrespectful. There is no ‘intrinsic’ or objective basis for the wrongness of these generalisations that is independent of the contingent (and historically racist) association between racialised groups and criminality. In the next section, I develop an argument based on striking property generics to challenge this claim. For now, let me briefly mention two *prima facie* reasons to question Eidelson’s conclusion. First, as noted by procedural justice theory, people have ‘normative experiences’ in response to the procedures used by the state to achieve its ends; they can be perceived as biased and disrespectful of citizens’ rights (Tyler 1990, p. 7). Even if people endorse the goal of racial profiling (that is, to promote security), being stopped by police for no reason except skin colour (which often occurs for instance to Black drivers of expensive cars)²⁰ is experienced as disrespectful because,

it undermines and calls into question everything you’ve accomplished in your life, everything you’ve worked for. No matter how hard you’ve worked, no matter what you do ... you’re treated like a common criminal.

(quoted in Eidelson 2015, p. 205)

The experience of citizens provides some evidence, albeit defeasible evidence, that the encounters with police that occur in profiling constitute *actual* disrespectful treatment. In addition, one may wonder whether Eidelson’s insistence that there is an intrinsic wrong-making feature of core cases of racial discrimination could be applied to racial profiling itself. Subjecting innocent people to stop-and-frisk on the basis of arbitrary personal characteristics seems wrong even absent historically racist associations between the characteristic and criminality. For instance, suppose there are statistical correlations between certain types of criminality and being redheaded, being white, or being male.²¹ Since there are no problematic social meanings that associate these characteristics with criminality, would profiling on the basis of these characteristics be permissible?

10.4 Profiling and generics

Drawing on the lessons of procedural justice research, I return in this section to the attitudes inherent in the police–citizen encounter. Eidelson’s argument that

profiling contributes to conventionally disrespectful racist generalisations does not preclude the possibility that the encounter is also disrespectful in a basic sense. I propose three arguments for the claim that racial profiling constitutes an attitude of disrespect. First, in addition to the conventional generalisations identified by Eidelson and the statistical generalisations on which profiling is based, there is a third form of generalisation, a ‘striking property generic’, that is relevant to the morality of profiling. I argue that racial profiling conveys striking property generics that implicitly attribute a negative property *by nature* to members of profiled groups (Leslie 2017).²² Since this is a moral mistake about their personhood, it is inconsistent with recognition respect and therefore constitutes a kind of basic disrespect. Second, in permitting racial profiling policies, the police and the state disregard the perpetuation of the racist conventional meanings identified by Eidelson. The attitude of indifference towards the perpetuation of racist meanings that attribute criminality to minority groups also constitutes basic disrespect. Third, there is a second form of disrespect, ‘appraisal disrespect’, that often occurs as a result of racial profiling. Appraisal respect is an attitude of ‘positive appraisal of a person or his qualities’ (Darwall 1977, p. 39). Whereas recognition respect is a moral requirement and hence recognition disrespect is *always* morally wrong, negative appraisal may in some instances be justified, namely when a person’s merits do not warrant an attitude of positive appraisal. However, since racial profiling mostly targets innocent people just on the basis of their group identity, racial profiling corresponds to *unjustified* negative appraisal, or disrespect.

Sarah-Jane Leslie’s work provides an illuminating account of the psychology and the semantics of generalisations or ‘generics’ (Leslie 2007, 2008, 2017). Generics attribute a trait to a category in general without employing the quantifiers ‘all’, ‘some’, or ‘many’, such as ‘Scots drink Iron Brew’ or ‘Sharks attack surfers’.²³ Leslie claims that the cognitive mechanism that forms generics is ‘primitive’ and is ‘our most basic and immediate means of obtaining information about categories’ (2007, pp. 383–384). The mechanism forms generalisations in three ways that correspond to different types of generics. First, the mechanism makes ‘neutral’ generalisations that rely on statistical information about the possession of the trait by members of the kind: ‘Scots drink Iron Brew’ or ‘Cars have radios’ are true only because a majority of members of the kind possess the trait. Second, generics can be formed in the absence of evidence that the majority of members of the kind have the property if the property is considered to be characteristic of the kind. For example, reproduction is a characteristic of animal kinds in general and egg-laying is a characteristic of the particular animal kind ‘duck’. Speakers assent to ‘ducks lay eggs’ despite the fact that only female ducks lay eggs (Leslie 2008, pp. 32–33).²⁴

For purposes of the argument here, I focus on the third category, ‘striking property generics’, such as ‘Sharks attack surfers’ or ‘Blacks are violent’. These attribute ‘harmful, dangerous, or appalling properties to the kind ... the sort of property of which one would be well served to be forewarned’ (Leslie 2008, p. 15). Like characteristic generics, their truth does not require a majority of

members of the kind to exemplify the property. Indeed, we often assent to striking property generics even when there are only a small number of instances of a kind that possess the property. Less than 1% of mosquitoes carry the West Nile virus yet we take the generic ‘Mosquitoes carry the West Nile virus’ to be true; only a small number of sharks have attacked surfers, yet we take ‘Sharks attack surfers’ to be true, and so forth. Leslie argues that the formation of these generics is due to an ‘unreflective’ and ‘pervasive’ cognitive tendency to make generalisations about both the natural and the social world (2017, pp. 398–403). She proposes that when we encounter harmful or appalling properties, ‘we seek to generalize the property to a kind whose members are disposed to manifest it’ and that this requires essentialising the kind—that is, tacitly positing ‘that there is some hidden, nonobvious, and persistent property or underlying nature shared by members of that kind that causally grounds their common properties and dispositions’ (2017, p. 405). Leslie’s proposal about the truth conditions of striking property generics is that they are true if and only if there is at least one instance of the kind that has the property *and* the kind is an essentialised kind, i.e. members of the kind are disposed by nature to have the property (2017, p. 404). Therefore, the generic ‘Sharks attack surfers’ is true because some sharks have attacked surfers and all sharks have a tendency to attack surfers due to their underlying nature.

It is especially important to note that Leslie’s psychological picture applies to the social world. There are numerous historical examples of the formation of striking property generics in social contexts (Leslie 2017, pp. 398–403). As Leslie notes, ‘the “introduction” conditions ... are very undemanding when it comes to how prevalent the property has to be in the general population’ (2017, p. 397). People regularly assent to striking property generics about social kinds—‘Blacks are criminals’ or ‘Muslims are terrorists’—because of a primitive cognitive tendency to form striking property generics when confronted by harmful, dangerous properties. The undemanding introduction conditions are easily satisfied in racist background conditions, which already include implicit biases and historical tropes that connect minorities with criminality.²⁵ Even the presence of exceptions will not block the formation of these generics. Leslie argues that the cognitive mechanism of generalisation is unaffected by the simple fact of ‘negative counterinstances’ (there are many Muslims who are not terrorists) and will be undermined only when the members of the kind who are exceptions display a ‘positive alternative property’ (2007, p. 385). It is plausible that in societies that are both racist and highly segregated (in which for instance members of the majority rarely encounter Muslims), there will be little evidence available to the majority that members of the minority have positive alternative properties.²⁶ Hence, the lack of sufficient available evidence about the positive traits of minority groups will be an important additional factor in the formation of (false) striking property generics.

I now draw on both aspects of Leslie’s account—the psychology and the semantics—to argue that racial profiling is inconsistent with recognition respect. Consider first the psychological picture. When a racial profiling policy is introduced, there will be little cognitive resistance to seeing it as anything other than

tacitly conveying a striking property generic. Although it purports to be a neutral crime-reduction strategy based on statistics, both the police who implement profiling and the targeted person or group will be hard-pressed to differentiate the statistical rationale from a generic that attributes criminality. An especially important aspect of Leslie's psychological picture is her observation that the introduction conditions of striking property generics are *undemanding*. In racist social conditions, a racial profiling policy will itself contribute to the introduction conditions because it will reinforce the already-present association between the profiled group and the to-be-avoided property. As Adam Omar Hosein points out, a claim by the criminal justice system, that profiling is a neutral crime-reduction policy because it relies on statistical evidence about crime rates, could reasonably be treated as a sham (2018, p. c11)—especially because the state *could have* selected an alternative crime-reduction strategy, such as randomised screening, that genuinely is morally neutral.²⁷

Suppose I am right that racial profiling tacitly conveys striking property generics due to the cognitive disposition to form these generics in precisely the circumstances in which racial profiling operates. Leslie's conception of the semantics of these generics helps to show that they, and hence racial profiling, violate recognition respect. The crucial feature of striking-property generics is that they pick out essentialised kinds and attribute a disposition to have the negative property (i.e. criminality, being a terrorist) to the *nature* of each member of the kind. This is inconsistent with recognition respect because it is a moral mistake about the personhood of each profiled person (as well as about members of the whole group). Notice that, although social conditions might be required to trigger the formation of striking-property generics, once they are formed, they provide the objective basis of the wrongness of racial profiling. That is, the wrongness of profiling does not depend on the contingent effects of such generics. Notice, too, that the disrespect argument does not have to rely on Leslie's (perhaps controversial) analysis of the truth conditions of generics. Sally Haslanger develops a parallel account that relies on pragmatics rather than semantics. She claims that generics like 'Blacks are criminals' *implicate*, rather than assert, false claims about natures:

There is a set of problematic generics that introduce implicitly into the common ground a proposition about how ... blacks *are* by nature or intrinsically. These cases are problematic because the proposition introduced is false.
(Haslanger 2011, p. 193)

The advantage of employing Haslanger's approach is that it is compatible with saying that problematic striking-property generics are sometimes *true*. Suppose the criminal justice system insists that it is relying on true statistical generalisations about Muslims being more likely to engage in terrorism or Blacks being more likely to be drug dealers. The pragmatic implicature identified by Haslanger is compatible with the truth of these claims. Nevertheless, because the implicature that is introduced by a racial profiling policy makes false claims about the

nature and personhood of Muslims or Black people, the policy is inconsistent with recognition respect.²⁸

Let's now turn to a second argument that racial profiling is inconsistent with recognition respect. Recall Eidelson's conclusion that the wrongness of racial profiling is due to its contingent effects, namely its contribution to racist social meanings. He claims that therefore racial profiling is only conventionally disrespectful; it is not a mistake of practical deliberation but rather expresses a social meaning that is disrespectful in a racist cultural context. (In the same way, failing to shake someone's hand might express disrespect in a culture, yet not correspond to a failure of appropriate practical deliberation about a person's normative status.) Eidelson does acknowledge, however, that *indifference to* and *disregard* for people's normative standing will constitute recognition disrespect: 'one can act disrespectfully by unwittingly failing to integrate someone's standing as a person appropriately in one's practical deliberation' (2015, p. 86). I suggest that introducing *de jure* profiling or permitting *de facto* profiling corresponds precisely to this kind of disregard. Indifference on the part of the state towards the effect of policies in contributing to racist social meanings is itself equivalent to disregarding the moral standing of such minority groups. This is especially true when these racist social meanings are, as I have just argued, indistinguishable from problematic striking-property generics that attribute criminality by nature to members of the profiled group. This disregard on the part of the state in specific police–citizen encounters, or more generally, turns a violation of conventional disrespect into a violation of basic recognition disrespect. As Darwall puts it, 'One is not free, from a moral point of view, to act as one pleases in matters which concern something which is an appropriate object of moral recognition respect' (1977, p. 40).

Finally, there is another potential disrespect argument based on the second form of respect identified by Darwall, appraisal respect, which is an attitude of 'positive appraisal of a person or his qualities' (1977, p. 39). Unlike recognition disrespect, appraisal disrespect is morally wrong only when it is unjustified. If someone actually has an evil character, it will be justified to negatively appraise his character. However, most people who are profiled are innocent; they are subjected to policies such as stop-and-frisk purely on the basis of their group membership or social identity. This relies neither on evidence from their own behaviour that they have engaged in criminal activity, nor even on individualised evidence about the perpetrator of the crime being investigated (that is, on a suspect description).

Moreover, if I am right about the operation of striking-property generics in racial profiling, profiling conveys the generalisation that members of profiled groups are disposed to criminality *by nature*. It is obvious that this is a false and unjustified appraisal of their characters. In addition, a study by Leslie and her colleagues suggests that, once people assent to striking-property generics, they think that arbitrarily selected members of the kind are not only disposed by nature to have the relevant property but *actually* have it (Leslie 2017, pp. 397–398; Khemlani, Leslie, & Glucksberg 2012). This finding is a plausible explanation of why innocent people who are profiled experience it as disrespectful. They rightly

suspect that racial profiling conveys the unjustified assessment that they are actually a criminal. For these reasons, it is plausible to conclude that racial profiling conveys an attitude of unjustified appraisal disrespect in addition to constituting recognition disrespect.

10.5 Conclusion

This chapter has made a case for the moral impermissibility of racial profiling. I employed considerations about legitimacy from procedural justice theory to undermine arguments for the rationality of profiling. I also noted that process-related harms, such as diminished self-respect, reinforce the consequentialist arguments against profiling. The main argument of the paper developed a non-consequentialist objection to profiling. Being subjected to profiling, or being a member of a profiled group, generates the feeling that the criminal justice system is unfair and disrespectful. I argued that the feeling that it is disrespectful is justified; profiling *actually does* constitute disrespectful treatment. The argument does not imply, however, that racial profiling in all contexts is disrespectful, or that racial profiling that is disrespectful is always impermissible. For instance, racial profiling with the aim of promoting diversity in jury selection (Lever 2011), will not be based on false striking-property generics or negative appraisals of people's characters and hence may well be morally unobjectionable.

Further, although I have not spelled out the implications of my argument for the obligations of the state, this chapter has shown only that *de jure* and *de facto* racial profiling violates a prima facie state obligation to treat people with respect. I have not shown that this obligation is absolute or always overriding, so it is possible that in some rare and unusual situations, the obligation will not obtain all things considered. In all standard situations, however, racial profiling will be morally impermissible.

Notes

- 1 This chapter has benefited from very helpful comments from Catriona Mackenzie, Denise Meyerson, and Therese MacDermott, as well as from members of audiences at Macquarie University, the University of Glasgow, and Western University, especially Sarah Armstrong, Andrew Botterell, Carolyn McLeod, and Rob Stainton.
- 2 A note on the term 'race': although there is philosophical debate about the term 'race', I assume here what I take to be the consensus view that there no such thing as race as an intrinsic biological property of individuals. The term 'race' as I use it here is shorthand for perceived race or assumed race.
- 3 For a definition and discussion of microaggressions, see McTernan (2018).
- 4 Boonin clarifies the distinction between the rationality and morality arguments. Profiling can be 'an effective public policy, and so in that sense a rational one' (2011, p. 308). However, even if it is rational or 'instrumentally useful', [it] 'could be unethical nonetheless and would merit rejection for that reason' (2011, p. 308).
- 5 Eidelson makes a similar point under what he calls the 'Narrow Harm Argument'. For example, he says that opponents of racial profiling 'might do better to emphasize simply how badly it hurts innocent people relative to the benefits it yields' (2015, p. 206).

- 6 Risse and Zeckhauser (2004) and Boonin (2011) both argue that profiling does not constitute a rights-violation, so there is no non-consequentialist objection to profiling. Lever (2005), Lippert-Rasmussen (2013) and Eidelson (2015) all argue against profiling on consequentialist grounds. As far as I know, Hosein's (2018) defence of the position that racial profiling is an injustice is the only example in the literature of a non-consequentialist critique.
- 7 Hosein points out that these statistical correlations can be challenged (Hosein 2018, p. e4).
- 8 I cannot do justice here to Boonin's extensive discussion of Harris's hit rates argument (2011, pp. 314–323).
- 9 Risse and Zeckhauser's expressive argument is extensively critiqued by Eidelson (2015, pp. 203–206). I have benefited immensely from his careful discussion of their view.
- 10 Boonin offers a second objection based on knowledge, which I do not address here (2011, p. 338).
- 11 Some authors argue that these kinds of negative consequences are due to police abuses in executing racial profiling rather than racial profiling itself (e.g. Risse and Zeckhauser 2004 discuss the potential abuses that occur in the context of profiling). It is true that we should not conflate the negative consequences of police abuse with the negative consequences of profiling. However, it seems undeniable that profiling will lead to there being a greater number of encounters between police and minority groups than between police and whites. This in itself could lead to the consequences mentioned here, even if there is no police abuse in these encounters.
- 12 Meyerson is referring in particular to work by Tyler & Blader (2000).
- 13 See also Hosein's recent argument that profiled minority groups have a 'reasonable sense of inferior political status' (Hosein 2018).
- 14 My discussion does not cover all the consequentialist arguments against profiling in the literature, e.g. Kasper Lippert-Rasmussen (2013, Chapter 7) proposes a critique of racial profiling drawing on G.A. Cohen's 'interpersonal test'.
- 15 For a more detailed discussion of the three approaches to characterising disrespectful treatment, see Beeghly (2018).
- 16 This law was challenged in the notorious United States Supreme Court case of *Plessy v Ferguson* 163 U.S. 537 (1896). Homer Plessy, who was seven-eighths white (only his great grandmother was Black), had sat in a white car on a train.
- 17 Note that this understanding of 'expressive' is different from that of Risse and Zeckhauser (2004), discussed above.
- 18 Eidelson also develops a 'Narrow Harm Argument' against racial profiling; see footnote 5.
- 19 Although I cannot pursue this line of thought here, I do not wish to imply that the use of suspect descriptions is never morally problematic, even if it is less obviously problematic than racial profiling.
- 20 The Ontario Report points out that, in general, people risk being profiled when they are deemed to be doing something 'out of place' (OHRC 2017, p. 23).
- 21 Annabelle Lever considers this question using a hypothetical statistical correlation between being white and being a drunk driver (2017, p. 430).
- 22 There are alternative accounts of generics in the literature. See, e.g., the discussion in Haslanger (2011).
- 23 Most of the examples come from Leslie's work or are variations on her examples. I thank Fiona Macpherson for the 'Scots drink Iron Brew' example.
- 24 See Haslanger (2011, pp. 184–185) for further discussion. Haslanger suggests that there are some generics that do not fit neatly into Leslie's taxonomy. Stereotypes such as 'Women are submissive' seem at first to be social generics that are taken to be true because they attribute a characteristic or typical trait to

the kind (i.e. they are analogous to ‘Ducks lay eggs’). However, Leslie’s analysis implies that speakers should *not* assent to ‘Women are submissive’ (as a characteristic generic) because there are numerous women who have alternative positive traits (see Leslie 2007, p. 385, for an explanation). Perhaps then these generics are making normative not descriptive claims, such as that *good examples* of the kind ‘women’ are submissive (Haslanger 2011, p. 200). As Haslanger points out ‘Women are submissive’ could also be a majority generic: if so, it would be true only if most women are in fact submissive.

- 25 I am grateful to members of the audience at Western University, especially Carolyn McLeod, for insisting on the role of implicit biases and other aspects of structural oppression in this argument.
- 26 Jennifer Saul points out that the generic ‘Muslims are terrorists’ is unlikely to be taken to be true in a majority Muslim society (Saul 2017).
- 27 Eidelson himself points to the difficulty of keeping the statistical rationale for profiling separate from an attribution of criminality by nature: ‘[T]he distinction between a trait’s making one (epistemically) more likely to be a drug courier, and its actually making one more likely to be a drug courier, is predictably lost on many people ... adopting a profiling policy may encourage the familiar and hurtful biases that attribute differences in rates of crime to deep-seated differences internal to the people involved, rather than to their social context’ (Eidelson 2015, p. 210).
- 28 In a recent paper, Saul critiques the arguments due to Leslie and Haslanger that generics are ‘especially pernicious’ (Saul 2017). She argues that the focus on generics is misguided, and that the real problem is statements (whether generic or not) that have implicatures of irrelevant associations, e.g. between Blackness and criminality. Unfortunately, I cannot do justice to Saul’s argument in the space available here. I note, however, that it would be difficult to claim that the associations implicit in racial profiling policies between rates of criminality and certain social groups are irrelevant. It is precisely because these associations are (putatively) based on genuine statistical correlations and deemed relevant that profiling is thought to be a worthwhile crime-reduction policy.

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