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How should trial experts approach cases of racial profiling? As a British philosopher, albeit one who has lived and worked in the States, all I can offer are some suggestions and some questions to help readers make the most of their expertise. These are motivated by two concerns. First, from a British perspective, American jury selection is alien to our understanding of the ideal that people are tried by 'a jury of their peers'. In particular, the American practice of selective strikes raises the worry that you cannot consistently ask jurors to evaluate the use of race-based expectations by police when the jury selection process, itself, is shaped by the idea that race is a good predictor of people's beliefs and behaviour. The second concern is an extension and generalisation of the first, and exemplifies the problems posed by racial profiling: what does it mean to treat people as equals in a world where people are disadvantaged because of their race? I will take these concerns in reverse order, briefly say something about them, and then suggest some approaches to racial profiling that, I hope, will be of practical, as well as theoretical, use.

Racial Profiling and Race: Some Terminological Remarks

I will follow Mathias Risse in defining racial profiling as 'any police-initiated action that relies on the race, ethnicity, or national origin and *not merely* on the behaviour of an individual', although these arguments can be generalised to the use of race-based predictions in other areas of the law, such as employment law.[1] I am principally concerned with what I will call 'preventative' or 'prospective' profiling, as opposed to 'post-crime profiling', since this is the one that captures what we typically think about when we worry about racial profiling, and is the form that is most troubling morally, politically and legally.

Post-crime profiling departs from a witness's description, however vague, of a suspect who has committed *an actual crime*. Preventive profiling uses a profile based on statistical evidence of who is likely to commit a crime, in order to initiate police stops and searches in order *to prevent crime*. The pre-emptive features of prospective profiling raise worries captured in American constitutional concerns with 'warrantless searches'.[2]

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[1] M. Risse, 'Racial Profiling: A Reply to Two Critics', in *Criminal Justice Ethics*, 26.1. (2007) 4 – 19. The emphasis in the text is mine. Risse reviews and explains the justification of this definition at pp. 4- 5 in *Criminal Justice Ethics* and at pp. 135-6 of M. Risse and R. Zeckhauser, 'Racial Profiling', *Philosophy and Public Affairs*, 32.2 (2004), 131-70.

[2] See, for example, *Terry v. Ohio* 392 U.S.1 (1968) and its progeny. In *Almeida-Sanchez v. US*, 413 U.S. 266, (1973) Part II of Justice Potter Stewart's Majority opinion generated this much-quoted position: 'the needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels

Prospective profiling, then, would be controversial even if it had no racial features to it. However, in addition to the inevitable worries created by pre-emption, prospective racial profiling generates concerns because of its use of race. Put simply, these are that the use of racial characteristics will exacerbate racism in society, and lead to the abuse and harassment of racial minorities.[3] Thus, pre-emptive racial profiling is controversial on two grounds: first, because it is pre-emptive, and secondly, because of the use of race in pre-emptive police work.

It is important, I think, to say something about what 'race' means in this context. What we are concerned with, when we are concerned with racial profiling, is 'race' as a popular construct, rather than a philosophically coherent or justified entity.[4] In other words, we are concerned with ordinary ideas about race, and with the practices and effects of those ideas – however contradictory these may be, and however lacking in logical consistency, clarity, or 'fit' with biological facts. There is, at present, a good deal of philosophical debate about whether the concept of race is so logically incoherent, and so politically damaging, that philosophers (or other people) should simply stop using it.[5] However, we can largely ignore this debate, although it is important to remind ourselves and juries that there are no biological races and no coherent or consistent group to which racial statistics refer.[6]

The Problem of 'Background Injustice'

We live in a world marked not simply by *racial difference*, but by *racial inequality*. That is, our world is one in which people do not simply bear different racial characteristics, such as colour and shape, but in which people who count as 'black' typically have less wealth, income, power and status than those who count as 'white'. Both the causes and the degree of these inequalities are contested, and for any single person, race may be a poor predictor of their location on hierarchies of income, wealth, power and status. This is partly because racial differences are not the only ones which are associated with inequalities in our societies – sex, and sexual preference, for instance, are also relevant. However, the difficulty of determining where, on a given hierarchy, we will find a

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a resolute loyalty to constitutional safeguards'. This 'resolute loyalty' seems to have found a different expression in the run of cases since *Oliver v. US*, 466 U.S. 170 (1984).

[3] Randall Kennedy, *Race, Crime and the Law*, (Vintage Books, 1997), especially ch. 4; David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New Press, 2003); A. Lever, 'Why Racial Profiling Is Hard to Justify: A Response to Risse and Zeckhauser', *Philosophy and Public Affairs*, 33.1. (2005), 94-110; and A. Lever, 'What's Wrong With Racial Profiling? Another Look at the Problem' in *Criminal Justice Ethics*, 26. 1. (2007), 20-28.

[4] For the argument that race, as popularly understood, has no scientific basis, see Kwame Anthony Appiah, 'How to Decide if Races Exist', *Proceedings of the Aristotelian Society*, 106 (May 2006), 363-80.

[5] For efforts to 'rethink' the concept of race, rather than to jettison it, see Sally Haslanger, 'Gender, Race: (What) Are They? (What) Do we Want Them To Be?' *NOUS*, 34.1.(2000), 31-55; 'Oppressions: Racial and Other' in *Racism, Philosophy and Mind*, eds. R. Levine and T. Pataki, (Cornell University Press, 2004), 97-123.

[6] For example, while Risse's justification of profiling refers to 'African Americans' it is obvious that police on the motorway can scarcely be expected to distinguish people's real or acquired nationality. Most of the time, I suspect, what 'race' means in these contexts is colour, with the idea of a black/white distinction structuring the treatment of those who do not fit into this dichotomy.

person, is affected by luck, effort and native talent. In short, because liberal democracies are characterised by important personal, civil and political freedoms, birth is not destiny.

However, the fact that we cannot accurately predict the fate of an individual does not mean that our societies lack either racial hierarchies, or racial differences – anymore than our failure to guess how high someone can jump means that gravity has no bearing on the result. This is scarcely surprising since there are middle-aged people in the United States who grew up with legal segregation, including laws that made it a crime for white people to have sex with non-whites, that prescribed what areas and what schools people attended, and that ensured that white and black people were unable equally to share public facilities such as transport, restaurants, hotels and swimming pools. [7]

Remedying Background Injustice: Courts

What should we do about this inequality, whatever its degree or cause? This question is scarcely the peculiar preserve of courts, but the demands of justice mean that courts are constrained in the ways they can address the problem, as compared, say, to economists, policy-makers or legislators. Criminal courts, in particular, are principally concerned with whether a given defendant has broken a given law. Facts about the justice or injustice of our world do not alter the factual question that a criminal trial must answer, although they may affect our method for determining guilt or innocence, and the moral, political or legal consequences we attribute to this determination.

For example, given what we know about domestic violence (an unjust fact about our world), it may make sense to revise our standards of 'reasonableness', in order to accommodate what is likely to seem reasonable to a victim of domestic violence. Similarly, courts may find that certain facts about injustice mitigate or aggravate a potential crime – picking on the blind, for instance, is generally more reprehensible and despicable than picking on the strong and sighted. The reason is that the injustice is greater: factors that ought to deter us from harming, that ought in fact, to incline us to offer defence and aid, are being deliberately used to harm. So, given the vulnerability of the blind to injustice and other harms, it is particularly reprehensible to steal from them, although stealing from the sighted is also wrong and deserving of condemnation.

Justice, therefore, requires us to notice and respond to racial inequalities, (when we have identified them) *in some ways and not in others.* Racial inequality does not turn what was a crime (theft, say) into a non-criminal act – in that sense, knowledge of racial inequalities or even racial differences, is irrelevant to the judgement of a court. In another way, however, justice does require us to identify and to take account of racial inequalities, as well as of racial differences. It requires us to take account of them in so

[7] The failure to acknowledge this, and its likely consequences for racial equality, is one of the difficulties of Michael Levin's perspective on racial profiling. See Michael Levin, 'Comments on Risse and Lever', in *Criminal Justice Ethics* 26.1 (2007) 29-35. Levin is an example of someone who denies that racial inequality characterises American society and who seems to believe that there is a significant biological component to racial disparities in crime, notwithstanding the fact that 'There cannot be a crime gene…since crime is a legally defined category of behavior'.

far as (a) they may constitute aggravating or mitigating factors; (b) they suggest alternative accounts of what happened; and (c) they suggest the need for *different methodologies* for determining and assessing what happened (as with standards of reasonableness).

Participation and Democratic Legitimacy

So, background injustice means that *we cannot treat people fairly by assuming that race is irrelevant* to the way we determine and assess crimes, even though the ways in which it is relevant may be complicated and contested. The idea of formal equality before the law, therefore, requires some attention to the substantive inequalities which people bring into court with them. A nice example of this was provided in a recent issue of *The Jury Expert*, in an article concerned with the legacy of sexual, rather than racial, injustice.[8]

Background injustice, then, explains why racially mixed juries are generally necessary for justice. These reasons parallel epistemological arguments for revising electoral practices in the USA and UK so that the formal equality created by universal suffrage and equally weighted votes does not consistently result in legislatures dominated by relatively elderly, wealthy and middle class white males.[9] The epistemological claim for revised representation is that we will learn and deliberate better if our legislatures and juries fairly represent the cleavages in our society than if they do not.

This epistemological claim can be distinguished from a straightforward concern for fairness or equality – whose strength is independent of any benefits that might accrue to deliberation. [10] However, both epistemological and fairness arguments for mixed juries reflect the view that democracy requires more than the 'equal consideration of interests' by political or judicial authorities.[11] Rather, it requires that people be able to participate in collectively binding decisions freely and as equals. In what follows, I will draw out the implication of these points for jury selection, and for the ways in which attorneys frame issues of race and crime.

Racial Inequality, Democracy and Jury Selection

Some ways of rectifying injustice are likely to cement, rather than alleviate, inequality. This is my worry about using race (and sex) as grounds to strike people from juries. One reason why all-white juries and all-white legislatures are problematic, and why 'token'

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[8] See, for example, Elizabeth J. Parks-Stamm's 'Anticipate and Influence Juror Reactions to Successful Women' in the Nov. 2008 issue of *The Jury Expert* (20.4), 8-15

[9] Anne Phillips, *The Politics of Presence*, (Oxford University Press, 1995); Melissa S. Williams, *Voice, Trust and Memory: Marginalised Groups and the Failure of Liberal Representation*, (Princeton University Press, 1998); Iris Marion Young, *Inclusion and Democracy*, (Oxford University Press, 2002).

[10] John Rawls, *A Theory of Justice*, (Harvard University Press, 1971); Part 1, section 14 on 'fair equality of opportunity'. At p. 84 Rawls refers to the 'realisation of self which comes from a skilful and devoted exercise of social duties'. To be deprived of this, when one is otherwise capable of fulfilling those duties, is to be harmed, and unfairly treated.

[11] A helpful introduction to some of these issues is Albert Weale, *Democracy* (St. Martin's Press, 1999). More specialised sources include J. Cohen, 'Procedure and Substance in Deliberative Democracy', in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. S. Benhabib, (Princeton University Press, 1996), 95-119; and B. Manin, 'On Legitimacy and Deliberation', *Political Theory*, 15. (1987).

minority members will not solve the problem, is that they *preclude adequate deliberation* before legally binding decisions are made. The difficulty, if we want our decisions to be reasoned, and to reflect the knowledge of our peers, is that all-white juries are likely to reflect only some of the knowledge of our fellow citizens. So, even if an all-white jury could somehow be unprejudiced, it would still be incomplete and inadequate in its perspective on collective matters.

Indeed, I would be inclined to suppose it inadequate even in cases that only concerned white people, and where we would not expect racial prejudice to be a factor. We do not well understand the ways in which race intersects with social cleavages based on class, sex, or religion, despite the pioneering work of legal theorists like Kimberle Crenshaw and philosophers like Elizabeth Spelman.[12] Consequently, we have a very poor sense of how racial distinctions shape white people's expectations of other white people - of the way they should behave, the motives they should have, the sorts of homes, jobs, sexual partners and tastes they should have.

Put crudely, the legacy of white superiority may mean that some people appear more 'white' than others, even when they fall on the 'white' side of our colour hierarchies.[13] So, white people can disadvantage other white people because of the assumptions about white people that they unconsciously hold; just as black people may disadvantage other black people because they are thought not to be black in the right way, or to the right degree, and so on. A racially mixed jury is much more likely to pick up these matters, in part because black people are more attuned to the ways that white people make racial judgements, and because they are more attuned to the ways in which black people favour or disfavour other black people based on their skin colour, wealth, education and other attributes.

Hence, even when we are not concerned with racial prejudice, there are good reasons to want a racially mixed jury. The reasons are that this fosters reasoned assessment of the evidence; enables people to reflect on their own assumptions, knowledge and experience; and exemplifies the qualities of free, fair and equal deliberation which give juries their democratic appeal. If this is so, however, *there are good reasons to be wary of jury-selection procedures which depend on the idea that we can predict people's judgements on matters of substance based on their racial characteristics*; and good reasons to be wary of forms of arguing and presenting evidence which are likely to reinforce, rather than to undermine, the assumption that race is destiny.

If these points are persuasive, then we may want to distinguish the different ways in which courts can respond to background injustice – in the case of race, as in other cases. In some, what we want to do is block the operation of prejudice directly: and this was the object of the recent article in *The Jury Expert*. In others, we seek to acknowledge that

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[12] For examples of a much larger literature, see Kimberle Crenshaw, 'A Black Feminist Critique of Antidiscrimination Law' in *Philosophical Problems in the Law*, ed. D. M. Adams, (4th Edition, Wadworth, 2005), 339-343; and And Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought*, (Beacon Press, 1988), especially pp. 80-132.

[13] See, for example, Noel Ignatiev, *How The Irish Became White*, (Routledge, 1995)

formal equality before the law is insufficient to ensure equal justice, given background inequality. However, in these cases, we are not seeking simply to block prejudice, but to open dialogue about what it would mean to treat people as equals; about what justice requires. Hence, I would suggest, it is one thing to ensure that a jury is racially mixed, so that deliberation can adequately reflect the different beliefs and experiences of citizens; and another to try to establish what different jury members are likely to believe *in order to constitute a jury of a particular type*, particularly susceptible to certain types of rhetorical strategies and arguments, and particularly likely to return one verdict rather than another in cases involving race and crime.

Racial Profiling: Some Facts for Attorneys

I have argued that racial difference and racial inequality mean that we cannot ignore race in court; and have argued that ideals of free, equal and reasoned deliberation across racial lines mean that we should avoid practices and forms of argument which are likely to reinforce race-based differences of opinion and judgement. So, what can we say about race and crime in cases where what is at issue is the legality of a race-based stop and search, whether or not it results in an arrest for illegal conduct?

(1) *Criminals are a minority of the population and, also, a minority of their respective racial groups.* Most people do not go around assaulting, stealing, killing, carrying illegal weapons, or owning and dealing in illegal drugs. So even if one racial group is more likely to commit a particular crime – even crimes in all categories – than other racial groups, most members of that group are unlikely to do so. Thus, while there are important controversies about how far arrest rates reflect the actual incidence of crimes; and how far arrest rates reflect prejudice against racial minorities and/or the poor and/or young men, crime is committed by a minority of our population and a minority of any subgroup within it.[14]

(2) *Violent crime is mainly committed by the young*. For all racial and ethnic groups, 'the probability of violence accelerates in early adolescence…reaching a peak between the ages of 17 and 18 and then declining precipitously thereafter'. [15] Clearly, this figure does not tell us much about other crimes – white collar crime, presumably, will have an older profile – nor does it tell us who, if anyone, is planning and/or benefiting from violent crime. But it does suggest that the reasonableness of warrantless searches is likely to be

[14] Holbert and Rose show that only 2% of black people are arrested for committing any crime in a given year, although in 2000 black people made up 12% of the population and 56% of those arrested for murder; 42% of those arrested for rape; 61% of those arrested for robbery and so on. See Steve Holbert and Lisa Rose, *The Color of Guilt and Innocence: Racial Profiling and Police Practices in America* (Page Marque Press, California, 2004), p. 126 Likewise between 1995-2000 3431 violent offenses were reported in 180 Chicago neighbourhoods, but personal violence was relatively rare. See, Sampson, Morenoff and Raudenbush, 'Social Anatomy of Racial and Ethnic Disparities in Violence', *American Journal of Public Health*, 95.2. (Feb. 2005), 227-28

[15] Sampson et al., p. 229 As Risse and Zeckhauser note, the situations where profiling seems useful are ones in which 'investigators must make quick decisions about (say) whom to search, or in which large numbers of people are involved; in most other areas a srong case will be available for using (much) additional information about individuals'. Risse and Zeckhauser, 135.

age-dependent, and that many of those involved in violent crime are legally bound to be in school.

(3) *Some people believe that black people are particularly prone to violence*, (whether for genetic or other reasons),[16] *but the evidence does not support this conclusion.* 'High impulsivity increases the risk of violence' but neither that, nor lower verbal/reading ability scores explain more than a small fraction of racial disparities in violent crime as between white and black people in America. As Sampson and his associates put it: 'constitutional factors are significant predictors of violence, but weak explainers of racial/ethnic *disparities* in violence'. [17]

'[O]ne reason Whites have lower levels of violence than Blacks is that Whites are more likely to be recent immigrants'.[18] In fact, 'the sources of violent crime appear to be remarkably invariant across race and rooted instead in the structural differences amongst communities, cities and states in economic and family organization'.[19] Racial disparities in violence, therefore, reflect the fact that America is a 'high crime society' compared to other societies. Racial statistics on violence also appear to lump together groups who, for other purposes, are distinguished based on nationality, religion, native language, employment, political leanings and other factors. *What the statistics pick out, therefore, is far from clear, and their bearing on the behaviour of any particular defendant – whether cop or robber – is uncertain in the extreme*.

(4) *You do not have to suppose the police are particularly prone to racism in order to suppose that racial profiling is wrong.* There is, therefore, no justification for pitting the police against racial minorities – or vice-versa – in cases that involve racial profiling. Racial profiling creates a real risk of injury or death for minorities because profiling itself sends the message that black people are so dangerous that normal

[16] For an example see Michael Levin, 'Comments on Risse and Lever' in *Criminal Justice Ethics*, 26.1. (2007), 29-35, especially pages 31-33

[17] Sampson et al. 229; emphasis in the text.

[18] Sampson et al. 229. Indeed, this 2005 study of 180 Chicago neighbourhoods, found that 'the odds of perpetrating violence were 85% higher for Blacks compared with Whites…the majority of the Black-White gap (over 60%) and the entire Latino-white gap [10% less violence among Latinos than Whites] were explained primarily by the marital status of parents, immigrant generation, and dimensions of neighbourhood social context'.

[19] Robert J. Sampson and William Julius Wilson, 'Toward a Theory of Race, Crime and Urban Inequality in *Crime and Inequality*, ed. J. Hagan and R. D. Peterson, (Stanford University Press, 1995), 37-54 and, in particular, p. 41. For example, their study found that the black homicide rate was three times higher in New York than in Chicago; and three times higher in San Francisco than in Baltimore. Black homicide rates in the state of California are three times those in Maryland – but so are white homicide rates. In short, we probably learn more about race and local politics from these figures than we do about race and crime – although crime partly reflects the consequences of past social policies and present politics. Sampson and Wilson's figures on the displacement of poor blacks as a result of urban renewal are truly shocking; 'Nationwide, fully 20% of all central-city housing units occupied by blacks were lost in the period 1960-70…This displacement does not even include that brought about by more routine market forces (evictions, rent increases, commercial development'. They note that 'one of every five poor blacks lived in ghettos or areas of extreme poverty in 1970, by 1980 nearly two out of every five did so'. Sampson and Wilson, p. 42

> standards of procedural justice – the need for warrants, for example – do not apply. You do not therefore have to suppose that the police are especially racist in order to worry that racial profiling creates serious risks of injury and death for racial minorities. You merely have to suppose that police, like other people, are likely to be more fearful and more prone to act with force if they suppose that they are facing people who are particularly prone to violence. The problem is likely to be particularly acute if, as in the USA, police are armed and expect criminals to be, likewise. In short, one of the reasons for thinking racial profiling unjustified is the risk of serious death and injury to civilians that it creates, and the ways in which it is likely to exacerbate any problems of racism in the police, and in society at large. [20]

(5) *You do not need to be indifferent to the victims of crime in order to think that racial profiling is wrong.* Most crime is intra-racial, not inter-racial; young black men are disproportionately likely to be its victims, as well as its perpetrators. Nonetheless, most crime is committed by white people in the United States – as we might expect given their relative and absolute size in the population - and that is why most victims of crime are white.

One of the problems of racial profiling, as of racism, is that it focuses our attention on black people as *perpetrators*, rather than *victims* of crime. They are both. Whether as attorney for the prosecution, or for the defence, therefore, it is important to recognise that white people are likely to overestimate the tendency of black people to commit offenses, and that they are likely to underestimate the tendency of white people to do so. In short, they are likely to think of victims of crime as white, while supposing that the face of crime is black.[21] Unfortunately, this is likely to be true of the police who, after all, are unlikely to be immune to problems of biased perception affecting other members of society.

Racial Profiling and Courts: Some Concluding Thoughts

There are ways to win cases by playing to people's prejudices and exacerbating painful divisions between white and black people and between young black men and older white police. There are ways to constitute and appeal to juries that make such tactics particularly appealing and particularly likely to succeed. Even if the right result is achieved by such means – so that only the innocent go free and only the guilty are convicted – we would have reason to think this a defeat for justice. It would be a defeat because, in the end, it would be chance, not reason, which explains the result: chance that the attorneys were able to push the right triggers, to the right degree, in the right cases, and with the right results. Chance that the right people went free and the right people were convicted. I take it that is not what we want.

Readers of this journal know far better than I that our ability to make reasoned decisions is complicated by our reaction to all sorts of subconscious factors. Many of these extraneous factors do not matter overly-much, because their weight is uncertain, they are

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[20] I present these arguments in more details in *Criminal Justice Ethics* p.24, and *Philosophy and Public Affairs*, pp. 96-98

[21] The phrase 'the face of crime' comes from Harris, p. 169

unlikely all to point in the same direction, and are likely to affect different people in different ways. Nor, of course, do these extraneous factors usually reflect or exacerbate injustice in our society. Unfortunately, we are still a long way from the situation where this is true of race. Attorneys, therefore, can try to win for their side by exacerbating what is known about our vulnerability to racial triggers. Or they can try to win by pretending that racism is no problem, by ignoring its existence, by insisting that it does not exist. I have suggested that neither of these is a good way to win if one cares about justice, or about the ability of people in our society to reach collectively binding decisions freely, reasonably, and as equals.

This is the ideal that underpins democratic government and the jury system. But it is a fragile ideal, and its fragility is apparent in cases where race and racism themselves are the object for judgement. I have therefore tried to suggest how we might think about the problems that racial inequality creates for court procedure, jury selection and for the way attorneys frame their respective arguments. I have only scratched the tip of a rather large iceberg, however, and this can, then, only be an introductory note to a complex and contentious subject.

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