Predictive Policing – In Defense of 'True Positives'

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Imagine that law enforcement agencies, using a profiling program, stop and search only people of a particular ethnicity within a specific area. The results are astounding: seven drug dealers and two robbers on the run were caught. Once in court, all defendants claim the arrest was discriminatory because of an obviously biased profiling program. Their attorneys argue that the evidence obtained as a consequence to the tainted arrests, must be excluded and that only this removal of the fruit of the poisonous tree will motivate legal authorities to closely monitor policing programs and prevent bias as best as they can. On the other side of the room, victims and members of the public want justice. They consider the use of algorithms to bring perpetrators before the law to have been a success.

Administration of criminal justice and profiling

Predictive policing has triggered a heated debate around the issue of false positives. Biased machine training can wrongly classify individuals as high risk simply as a result of belonging to a particular ethnic group and many agree such persons should not have to shoulder the burden of over-policing due to an inherent stochastic problem (cf. Veale,Van Kleek, and Binns 2018). True positives, or individuals who are correctly identified as perpetrators, do not make headlines. If drugs or other incriminating evidence is found in their possession after being stopped and searched, the fact that such evidence was found using biased profiling is justified because the suspicion turned out to be well-founded. Had the police officer identified them, their colleagues would probably laud them for "good intuition." Scholars have demonstrated that sorting by stereotypes is a form of generalization all humans use routinely (Schauer 2003). However, as Hildebrandt (2008, 30) explained in *Profiling the European Citizen*, with

automated profiling the need to effectively constrain such practices in order to prevent a technological infrastructure that practically destroys fairness in criminal justice is eminent.

This provocation argues that the 'true positives' offer the best opportunity to address the issue of biased profiling. The first reason is purely pragmatic – they are already party to a criminal investigation and, as such, have a strong incentive to challenge law enforcement methods and scrutinize policing methods on an individual basis. The second reason is more general (and commonly subscribed to) – that discriminatory stops and searches are inherently unfair, threaten social peace, and frustrate targeted groups (DeAngelis 2014, 43). Use of biased algorithms in policing not only places a burden upon those deemed 'false positives', but also contaminates the 'true positives'. To create an efficient legal tool against discriminatory law-enforcement, defence should be entitled to contest a conviction for biased predictive policing, with a specific exclusionary rule protecting 'true positives' against the use of tainted evidence.

The legal standing of "true positives"

The legal standing of individuals prosecuted following an arrest triggered by biased profiling is unclear. Even an outright illegal arrest may not affect prosecution, although the European Court of Human Rights (ECtHR) has extended certain defense rights to the investigation phase (*Allenet de Ribemont v. France* 1995, 11-13, para. 32-37) and in certain situations, the defense may invoke exclusionary rules with reference to tainted evidence. The problem is that the exclusion of evidence is a controversial issue (Estreicher and Weick 2010, 950-51) and it remains unclear whether biased predictive policing would actually trigger such exclusion. Generally, where incriminating evidence is found, it is the responsibility of the authorities to

clarify the facts and enforce the law. After all, there is public interest not only in bringing criminals to justice, but also in supporting victims.

By contrast, defendants have standing to claim that an arrest was discriminatory and unfair (*Gillan and Quinton v. the United Kingdom* 2010, 42-45, para. 76-87) and it is in the public interest to stop biased police work and discriminatory arrests. How to resolve the conflict between the interests of the public to obtain justice while simultaneously honouring a defendant's rights depends on the composition of each criminal justice system. However, all systems are faced with the issue of biased policing to some degree and all, to a certain extent, operate on the (yet controversial) premise that a threat of excluding evidence will deter authorities from particular practices (Kafka 2001, 1922-25). Therefore, adopting an exclusionary rule appears to be the obvious solution.

Creating a specific legal remedy for the 'true positives' is the most promising way to deter biased predictive policing. Such individuals are already in the courtroom and can raise appropriate objections while the 'false positives' would have to initiate a new legal action and have little incentive to do so. Similarly, courts or administrative bodies empowered to monitor biased profiling may also lack the incentive to draw attention to biased law enforcement practices in the absence of a powerful legal remedy for 'true positives'.

Exclusion of evidence: A price too high to pay?

Clearly excluding evidence obtained using biased predictive policing techniques will not be a popular remedy in most criminal justice systems. Objections around presumptions of guilt and subverting the interests of justice and the victims would likely be cited. However, if one

scrutinizes these arguments, they may turn out to be less convincing than initially thought.

With reference to the first argument, Art. 6 (2) ECHR guarantees European citizens charged with a criminal offence are "presumed innocent until proven guilty according to law." Courts and legal scholars agree that the meaning of the presumption of innocence is broad. What they don't agree on is whether or not the guarantee extends to investigations and other pre-trial actions and it is not explicitly stated in the Convention. However, according to the case-law of the ECtHR, members of the court may not begin criminal proceedings with the preconceived notion that an individual has committed the offence in question (*Barberà, Messegué and Jabardo v. Spain* 1988, 27, para. 77; *Allenet de Ribemont v. France*, 1995, 11-13, para. 33-36). Referring to this line of cases, scholars correctly argue that if the presumption of innocence is not extended to police profiling it will lose its place as a guiding principle in the era of ubiquitous surveillance and big data.

Regarding the second argument, implicit in the objection to an exclusionary rule barring fruit of the poisonous tree is concern that the wheels of justice will lose momentum if a perpetrator is allowed to walk free despite incriminating evidence. This dichotomy is present for every exclusionary rule and invokes our traditional goals of punishment and deterrence. However, there is also the understanding among citizens that authorities will prosecute crimes properly. This involves integrity in both the investigation and subsequent legal proceedings so that individuals against whom the state has a valid case do not walk free. The public's interest in honesty and transparency in investigations provides protection from arbitrary justice and supports the notion that law enforcement agencies should monitor their profiling programs for implicit bias. The EU lawmaker acknowledges this interest with provisions on accountability in prosecution where automated profiling

carries the risk of prohibited discrimination (cf. Art. 11 para 3 and Art. 10 Directive (EU) 2016/680).[1]

Support for the exclusion of tainted evidence may also be found in the protection against unreasonable detention. According to Art. 5 (c) ECHR, no citizen's liberty may be deprived except in limited situations, including where there is "reasonable suspicion" that the individual committed an offense. The ECtHR has noted that this requirement that the suspicion be reasonable forms an essential part of the safeguard against arbitrary arrest and detention. More specifically, 'having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence' (*Fox, Campbell and Hartley v. the United Kingdom* 1990, 12, para. 32; Ferguson 2015, 286).

In the case of a human police officer, he or she must identify enough elements, or 'probable cause', to satisfy an objective observer regarding the possible guilt of an individual. In contrast, a police profiling system based upon algorithms does not just monitor one potential subject, but categorizes individuals in a way that assumes certain groups are more likely than others to commit crimes, thus deserving of additional police attention. If such profiling leads to a search and subsequent arrest, no individual law enforcement agent has *ex ante* identified any probable cause for the arrest. In fact, he or she may never know how the data was formed that resulted in the arrest. This hardly constitutes the reasonable suspicion required by the ECHR.

Justification of an exclusionary rule is also supported by the principle of equality before the law, which is central to any democracy. If police action is based on algorithms that divide a population into groups based upon particular attributes, the result will be a fundamental change to our

legal system characterized by an increase in unlawful searches and detainment, in addition to violations of the privacy and liberty of all citizens. It will result in the Orwellian world in which 'some animals are more equal than others' and Big Brother is watching you. That said, one would be mistaken to assume that law enforcement agents were 'colour-blind' prior to the advent of automated profiling, but to date, biased searches by human officers have not paved the way to specific exclusionary rules.

Willingness to pay the price

With predictive policing programs on the rise we must be willing to pay the price of a strong exclusionary rule. A rule barring incriminating evidence found in the possession of a 'true positive' after a discriminatory arrest can be grounded in two lines of reasoning. The first is legal and builds upon the rationale that an overpoliced individual can invoke an exclusionary rule on the basis of an unreasonable search. The second line of argument is as simple and straightforward as it is pragmatic: there is public interest in creating an efficient legal tool against biased profiling and against unmonitored use of such programs (Hildebrandt 2015, 184, 195). Therefore, it is the 'true positives' that offer us the best chance to require authorities to monitor their profiling tools due to the inherent incentive in pointing out potential bias and prohibited discrimination during an ongoing proceeding.

Notes

[1] Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA).

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