

USING THE CHARTER TO STOP RACIAL PROFILING: THE DEVELOPMENT OF AN EQUALITY- BASED CONCEPTION OF ARBITRARY DETENTION[©]

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Do the police use race as a proxy for criminality, particularly, in drug cases? If so, is this a rational discriminatory practice that is based on who the usual offender is or an offensive exercise of racial prejudice? What are the consequences for those communities targeted by the police? This article investigates these questions that have gone unanswered for too long in Canada. After offering a definition of racial profiling, evidence is presented that suggests that the practice is rampant in the United States and is likely practiced by some Canadian police forces, particularly, in cities with large visible minority populations. As for its rationality, recent statistical evidence on drug use and trafficking reveals that racial profiling is a fallacy. As for its reasonableness, racial profiling has had a catastrophic impact on those communities targeted by the police. This article examines how the *Charter* can be used to stop this practice. Since racial profiling is exercised through the use of pretext vehicle stops and investigative detentions, the focus is on section 9 of the *Charter* which protects against arbitrary or discriminatory police detentions. While the seminal section 9 cases of *Brown v. Durham Regional Police* and *R. v. Simpson* provide some protection against racial profiling, issues of proof and cognitive distortion limit their effectiveness. Thus, enhanced section 9 standards need to be developed. This article looks at infusing section 9 with the equality principles animating section 15(1) of the *Charter*.

Est-ce que la police utilise la race comme substitut pour la criminalité, surtout dans les cas impliquant la drogue? Si oui, est-ce que ceci constitue une pratique rationnelle discriminatoire basée sur les caractéristiques habituelles du contrevenant, ou est-ce un exercice de préjudice racial? Quelles sont les conséquences pour les communautés ciblées par la police? Cet article examine ces questions demeurées sans réponse pendant trop longtemps au Canada. Après avoir présenté une définition du profilage racial, l'auteur offre de la preuve qui suggère que la pratique règne aux États-Unis et est probablement utilisée par certaines forces policières au Canada, surtout dans les villes où l'on retrouve des populations importantes de minorités visibles. Quant à sa rationalité, les statistiques récentes sur l'usage et le trafic de drogue révèle que le profilage racial est un sophisme. Quant à son caractère raisonnable, le profilage racial a eu des impacts catastrophiques sur les communautés visées par la police. Cet article examine comment on peut abandonner cette pratique à l'aide de la *Charte*. Puisque le profilage racial sert de prétexte pour arrêter les voitures et mener des détentions pour fins d'enquête, l'auteur porte attention à l'article 9 de la *Charte* qui protège les citoyens contre les détentions arbitraires et discriminatoires. Malgré que les décisions *Brown c. Durham Regional Police* et *R. c. Simpson* offrent une certaine protection vis-à-vis l'utilisation du profilage racial, leur efficacité est réduite en raison des difficultés de preuve et de distorsion cognitive. Finalement, les standards de l'article 9 de la *Charte* ont besoin d'être améliorés. Cet article examine la possibilité d'infuser les principes de l'égalité émanant de l'article 15(1) de la *Charte* à l'article 9.

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I.	INTRODUCTION	

Criminologists and other scholars have long believed that the police profile and target racial minority groups for investigative detentions, interrogations, and searches.¹ Recently, the use of racial profiling has faced increased exposure and scrutiny in the United States as a result of class- action

¹ See the discussion of the relevant literature in S. Wortley, “The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice” *Criminology* [forthcoming in 2002] [hereinafter “The Usual Suspects”].

lawsuits,² media accounts,³ and federal civil rights and state hearings.⁴ The American public now has compelling evidence that the police subject a significant and disproportionate number of African-Americans to routine vehicle stops and searches as a low-visibility means of discovering contraband, that is, drugs, weapons, and proceeds of crime.⁵ Indeed, the activity has become so pervasive in the black community that the phrase “DWB” (driving while black) has been coined to describe why people are actually being pulled over by the police.⁶

The use of racial profiling is not, however, confined to the United States. Part II of this article reveals that blacks in Toronto and parts of England are also subjected to a disproportionate number of police encounters.⁷ Nor is racial profiling solely a black issue. While this article looks at the problem in the context of the black community, a number of other minority groups have been victimized by racial profiling. In the United States, these groups include Hispanics, Asians (on the west coast), and Arabs (at airports).⁸ In Canada, Aboriginals have also been subjected to racial profiling, for example, in the West.⁹

Notwithstanding that using race as a proxy for criminality is a remarkably offensive exercise of racialized prejudice and contravenes the most basic and fundamental principles of human dignity and equality, racial profiling is not without its supporters. Indeed, it is a practice that has been taught and defended by American law enforcement as a reliable, efficient, and necessary

² See e.g. *Wilkins v. Maryland State Police*, Civil No. MJG-93-468 Civ. (D. Md. 1995, Settlement Agreement) [hereinafter *Wilkins*].

³ See G. Webb, “DWB” *Esquire* 131:4 (April 1999) 118.

⁴ In New Jersey, for example, there have been numerous hearings and investigations over the last three years. See L. Mansnerus, “Inquiry to Explore What Officials Knew About Profiling, and When” *The New York Times* (19 March 2001) B5; D. Kocieniewski, “New Jersey Senate Asks Whitman’s Staff to Turn Over Documents on Racial Profiling” *The New York Times* (21 November 2001) B5.

⁵ See D.A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* (New York: New Press, 2002) [hereinafter *Profiles in Injustice*]. Harris is the leading American scholar on racial profiling.

⁶ See the discussion in K. Meeks, *Driving While Black: Highways, Shopping Malls, Taxicabs, Sidewalks: How to Fight Back if You are a Victim of Racial Profiling* (New York: Broadway Books, 2000).

⁷ Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995) at 335-75 [hereinafter *Report on Systemic Racism*]; T. Bunyan, “The Cycle of UK Racism: Stop and Search and Imprisonment” (1999) 9 *Statewatch* 1 at 1-4.

⁸ *Profiles in Injustice*, *supra* note 5 at 129-44.

⁹ See K. Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 222-23, 256-58 [hereinafter *Due Process and Victims’ Rights*]. In addition, of course, Japanese Canadians and Japanese Americans were subjected to racial profiling during World War II.

use of limited state resources.¹⁰ Part III of this article investigates and rejects this claim. A close examination of the basis for racial profiling, particularly as a means of detecting drug traffickers, reveals that it is not only based on flawed assumptions, but it is a practice that has catastrophic effects on the black community.

The remainder of this article examines how the *Canadian Charter of Rights and Freedoms*¹¹ can be used to resist and challenge a practice which has endured despite its shaky foundations. Resort to due process will not be a complete solution. In order for racial profiling to be stopped, there must be a cooperative effort between the police, government, and the judiciary. However, the lack of any institutional response to the findings of the Ontario Commission on Systemic Racism suggests that reform of issues affecting vulnerable and disenfranchised groups will only occur if state actors are “prodded” by the judiciary. This “prodding” can occur most effectively through a vigorous and principled application of the *Charter*.¹²

In Part IV of this article, the current standards under section 9 of the *Charter* are examined as a means of checking racial profiling. These standards have emerged from two seminal Ontario Court of Appeal decisions: *Brown et al. v. Regional Municipality of Durham Police Service Board*¹³ and *R. v.*

¹⁰ See J. Wilgoren, “Police Profiling Debate Hinges on Issue of Experience vs. Bias” *The New York Times* (9 April 1999) B1. These same arguments are being used to justify racial profiling in the “war on terrorism.” See e.g. E. Morgan, “Terrorism Challenges the Profiling Taboo” *National Post* (2 January 2002). A cogent criticism of the use of racial profiling in this context is presented in S. Choudhry, “Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter” in R.J. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 367. See also D.A. Harris, “‘Flying While Arab,’ Immigration Issues, and Lessons From the Racial Profiling Controversy” (2001), online: United States Commission on Civil Rights <<http://www.usccr.gov/pubs/tragedy/imm1012/harris.htm>> (date accessed: 14 May 2002).

¹¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹² For similar views see H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968); A. Young, “All Along the Watchtower: Arbitrary Detention and the Police Function” (1991) 29 *Osgoode Hall L.J.* 329. In the United States, some “prodding” has occurred as a result of the national exposure of racial profiling. For example, there is currently a bill before Congress to ban racial profiling by all federal agencies. See *End Racial Profiling Act of 2001* (S. 969, 107th Congress, (2001) [hereinafter *End Racial Profiling Act*]. In addition, as will be seen below, some U.S. states have already enacted legislation aimed at combatting racial profiling. However, without constitutional oversight, there is no guarantee that this kind of legislation will be passed in every state and, more importantly, properly funded and enforced. For example, in California, the American Civil Liberties Union (ACLU) and other groups are suing the governor for failing to fund the mandatory data collection program required under California’s racial profiling legislation. See “Civil Rights Groups Sue Governor Davis for Eliminating Key Racial Profiling Data Collection Provisions from State’s Budget,” online: American Civil Liberties Union <<http://www.aclu.org/news/2001/n110101f.html>>(date accessed: 14 May 2002).

¹³ [1998] 43 O.R. (3d) 223 (C.A.) [hereinafter *Brown v. Durham Regional Police*].

Simpson.¹⁴ Unfortunately, problems of limited application, proof, and cognitive distortion plague these standards and they appear inadequate to combat a growing problem in urban police forces. Consequently, in Part IV, an attempt is made to devise enhanced *Charter* standards through the development of an equality-based conception of arbitrary detention. Four new section 9 standards are advanced: (1) placing the onus on the Crown to establish that a so-called routine traffic stop of a black driver was not motivated by race, (2) placing the onus on the judiciary to ensure that conduct claimed to warrant a criminal investigation is interpreted in a race-neutral manner, (3) deeming all criminal investigatory stops as detentions, and (4) deeming all unlawful detentions of racial minorities as arbitrary. These new standards should serve to strengthen our commitment to equality, ensure greater *Charter* compliance, and stimulate institutional reform.

II. THE MEANING AND USE OF RACIAL PROFILING

A. *The Manifestations of Racial Profiling*

Racial profiling is the practice of targeting racial minorities for criminal investigation solely or, in part, on the basis of their skin colour.¹⁵ It is conduct that is premised on the assumption that the “usual offenders” can be located within a particular group in society. Using race as the sole basis for the investigation occurs, for example, when an African-Canadian man is stopped while driving or walking even if the officer has no legitimate reason to suspect that he is involved in criminal conduct. In these cases, the investigation is motivated by a conscious or unconscious belief that African-Canadian men are the usual drug or weapons offenders. As will be seen below, this form of racial profiling is most commonly manifested in pretext vehicle stops where the police can rely on their power to regulate traffic and vehicle safety to mask their true intent.¹⁶ Using race as a partial basis for the investigation most commonly occurs when the police are using their crime-control power to conduct a criminal investigatory detention.¹⁷ Racial profiling is implicated in this context

¹⁴ [1993] 12 O.R. (3d) 182 (C.A.) [hereinafter *Simpson*].

¹⁵ See *R. v. Richards* (1999), 26 C.R. (5th) 286 at 295 (Ont. C.A.) [hereinafter *Richards*]. See also the definition contained in the *End Racial Profiling Act*, *supra* note 12, § 501(5).

¹⁶ In Canada, this traffic regulation power authorizes the police to conduct random vehicle stops which serve as an open invitation to conduct pretext race-based stops. See *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 [hereinafter *Ladouceur*] and the discussion below.

¹⁷ In Canada, this crime control power is known as the *Simpson* or *Ferris* power following the judgments of the Ontario Court of Appeal in *Simpson*, *supra* note 14 and the British Columbia Court of Appeal in *R. v. Ferris* (1998), 16 C.R. (5th) 287 (B.C. C.A.) [hereinafter *Ferris*]. In the United States, this crime control power is referred to as the *Terry* power following the decision of the U.S. Supreme Court in

because assumptions about race and crime play a role, along with other race-neutral behaviour, in creating a suspicion in the mind of the police officer that the individual has engaged in, or is currently engaging in, criminal activity.

For the purposes of constitutional protection, no distinction should be drawn between these two uses of race by law enforcement.¹⁸ Legitimizing the use of race based on the degree to which it is used as a basis for an investigation is dangerous. Even in circumstances where an officer can point to other conduct that raised his or her suspicions, when properly analyzed through a race-neutral lens, this conduct may actually turn out to be entirely innocuous. Evasive action is one such example. A black person who has historically been harassed by the police may avoid an officer who is approaching, not out of a consciousness of guilt, but to avoid being harassed, or in some cases, out of a sense of self-preservation.¹⁹

In some investigative detention cases, race will be the decisive factor that leads to the investigatory stop. Rubin “Hurricane” Carter’s experience with the police serves as a good example. In the spring of 1996, Carter was enjoying dinner with his friends at a restaurant in the west end of Toronto. After dinner, he went to get his car in the parking lot. Four unmarked cruisers surrounded him and two plainclothes detectives came to each side of his door. He was handcuffed, arrested, and his Mercedes was searched. The police believed that Carter was a person who had been seen selling drugs earlier that night. The problem was that, other than the colour of his skin, Carter did not look anything like the suspect. The suspect was described as “thirty-ish” and not wearing glasses. Carter was in his sixties and he was wearing glasses. After realizing their mistake, the officers released Carter.²⁰ This case indicates that even in a situation where the police have a specific description of the perpetrator and are attempting to locate that person, they will sometimes use the race-based part of the description to detain anyone who is a member of that minority group.

B. *Racial Profiling and the “War on Drugs”*

Terry v. Ohio, 392 U.S. 1 (1968) [hereinafter *Terry*].

¹⁸ This is the position advocated by R. Kennedy, *Race, Crime, and the Law* (New York: Pantheon Books, 1997) at 148-49. See also Choudhry, *supra* note 10.

¹⁹ Indeed, the *Report on Systemic Racism*, *supra* note 7 at 377 concluded that “the number and circumstances of police shootings in Ontario have convinced many black Ontarians that they are disproportionately vulnerable to police violence.” In Ontario, sixteen black men were shot by the police between 1978 and 1995, ten of them fatally. See *Due Process and Victims’ Rights*, *supra* note 9 at 230-33.

²⁰ See T. Tyler, “Hurricane Carter Arrested By Mistake” *The Toronto Star* (12 April 1996) A22; T. Tyler, “Ex-Boxer ‘Hurricane’ Carter Angered By 2nd False Arrest” *The Toronto Star* (13 April 1996) SA2; and T. Tyler, “Ex-Boxer Fights Police ‘Disrespect’ ‘Gangsterism prompted false arrest’ he says” *Toronto Star* (16 April 1996) A6.

In the United States, the “war on drugs” began with a focus on preventing drugs from entering the country. In the early 1970s, Special Agent Paul Markonni of the U.S. Drug Enforcement Agency (DEA) developed a drug courier profile to assist the police in identifying likely suspects at the border. The original profile was based not so much on race, as on behavioural characteristics, such as, travelling from a drug-source country, travelling under an alias, a low-paying job, visibly sweating during the Customs interview, and using cash to pay for the plane tickets.²¹ This profile is now used in Canada to fight Canada’s “war on drugs.”²²

As the U.S. federal government intensified the “war” in the mid-to- late 1980s, the emphasis of law enforcement shifted to stopping the domestic transportation of drugs. It was during this period that the foundations of racial profiling began to take root. First, the drug courier profile became fixated on race.²³ Second, a DEA training program entitled “Operation Pipeline” was used to teach drug enforcement officers to conduct race-based pretext vehicle stops to search for drugs.²⁴ David Harris provides the following succinct summary of these developments:

In 1985, the Florida Department of Highway Safety and Motor Vehicles issued guidelines for the police on “The Common Characteristics of Drug Couriers.” The guidelines cautioned troopers to be suspicious of rental cars, “scrupulous obedience to traffic laws,” and drivers wearing “lots of gold,” or who do not “fit the vehicle,” and ethnic groups associated with the drug trade. Traffic stops were initiated by state troopers using this overtly race-based profile.

The emergence of crack in the spring of 1986 and a flood of lurid and often exaggerated press accounts of inner-city crack use ushered in a period of intense public concern about illegal drugs, and helped reinforce the impression that drug use was primarily a minority problem. Enforcement of the nation’s drug laws at the street level focused more and more on poor communities of color... [L]aw enforcement tactics that concentrated on the inner city drug trade were very visibly filling the jails and prisons with minority drug law offenders ... Thus a “drug courier profile” with unmistakable racial overtones took hold in law enforcement.

²¹ See M.R. Cogan, “The Drug Enforcement Agency’s Use of Drug Courier Profiles: One Size Fits All” (1992) 41 *Cath. U.L. Rev.* 943.

²² See *R. v. Granston* (2000), 146 C.C.C. (3d) 411 (Ont. C.A.). See also *R. v. Monney*, [1999] 1 S.C.R. 652 at 683-84.

²³ See E.L. Johnson, “‘A Menace to Society’: The Use of Criminal Profiles and its Effects on Black Males” (1995) 38 *Howard L.J.* 629; R.S. Susskind, “Race, Reasonable Articulate Suspicion, and Seizure” (1994) 31 *Am. Crim. L. Rev.* 327. See also the dissenting opinions in *United States v. McKines*, 933 F.2d 1412 (8th Cir. 1991) at 1436; *United States v. Taylor*, 956 F.2d 572 (6th Cir. 1992) at 581, 590.

²⁴ See Webb, *supra* note 3 for a detailed discussion of the origins and use of “Operation Pipeline.” According to Webb, many believe that Bob Vogel, a Florida state trooper, was the creator of the pretext *modus operandi* of “Operation Pipeline.” Indeed, Vogel’s use of pretext stops in Florida was acknowledged and criticized in *U.S. v. Smith*, 799 F.2d 704 (11th Cir. 1986). Notwithstanding this judicial rebuke, Vogel was elected sheriff of Volusia County and he continued to use his pretext methodology. In the late 1980s, race-based pretext stops were a common occurrence on a section of the Florida highway patrolled by Vogel and his “Selective Enforcement Team.” This data is summarized below.

...

In 1986, a racially biased drug courier profile was introduced to the highway patrol by the DEA. That year the agency launched "Operation Pipeline," a little known highway drug interdiction program which has, to date, trained approximately 27,000 police officers in 48 participating states to use pretext stops in order to find drugs in vehicles. The techniques taught and widely encouraged by the DEA as part of Operation Pipeline have been instrumental in spreading the use of pretext stops, which are at the heart of the racial profiling debate. In fact, some of the training materials used and produced in conjunction with Pipeline and other associated programs have implicitly (if not explicitly) encouraged the targeting of minority motorists.²⁵

Corporal Rob Ruiters of the Royal Canadian Mounted Police (RCMP) introduced Operation Pipeline into Canada eight years ago after learning about it at a lecture in Minnesota on drug smuggling. The first Pipeline training course was set up in Manitoba in 1994 and, to date, Ruiters has trained 10 000 law enforcement officials (including OPP officers and Canada Customs officers). According to the RCMP, Operation Pipeline/Conway/Jetway (OPCJ) "enhances police officers' observational, conversational, and investigative skills, heightening their ability to detect the abnormal activity of travelers, and take action."²⁶ While there is no evidence that OPCJ explicitly encourages officers to use race-based pretext vehicle stops as an opportunity to discover contraband, this is a reasonable inference given the American experience.²⁷

C. *The Evidence of Racial Profiling*

The American experience²⁸ with racial profiling is exemplified by the *Wilkins* case.²⁹ In May 1992, Robert Wilkins, a Harvard Law School graduate, was on his way home from a family funeral in Chicago when he was stopped

²⁵ D.A. Harris, "Driving While Black: Racial Profiling On Our Nation's Highways" (1999) (ACLU Special Report) online: American Civil Liberties Union <<http://www.aclu.org/profiling/report/index.html>> (date accessed: 7 June 2002) [hereinafter "Driving While Black"]. See also *Profiles in Injustice*, *supra* note 5 at 48-52.

²⁶ "Securing the Right of Passage: Pipeline, Convoy, Jetway Program Gaining Ground Across the Force," online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/online0106c.htm>> (date accessed: 23 May 2002). See the discussion of the use of OPCJ in *R. v. Kane*, (1998) 174 N.S.R. (2d) 40 (S.C.); *R. v. France*, [2002] N.W.T.J. No. 36 (S.C.), online: QL (NWTJ); *R. v. Arabi*, [2002] A.J. No. 549 (P.C.), online: QL (AJ); and *R. v. Ferrari* (2001), 210 Sask. R. 282 (Q.B.), appeal dismissed (2002), 213 Sask. R. 288 (C.A.) [hereinafter *Ferrari*]. See also D.M. Tanovich "Operation Pipeline and Racial Profiling" 1 C.R. (6th) [forthcoming in 2002].

²⁷ We may never know the methodology of OPCJ since access to the RCMP training materials will likely be refused on the basis of public interest privilege. See *Ferrari*, *supra* note 26.

²⁸ For a thorough look at the American experience, see *Profiles in Injustice*, *supra* note 5 at 53-72; D.A. Harris, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters" (1999) 84 *Minnesota L. Rev.* 265 at 275-88 [hereinafter "The Stories, the Statistics, and the Law"].

²⁹ See *Wilkins*, *supra* note 2.

by the Maryland police. After telling the occupants that their rental car was travelling twenty miles over the speed limit, the officer asked the driver, Wilkins' cousin, to sign a written consent to search the car. Wilkins knew his rights and told his cousin to say no. As a result, they had to wait over an half hour until a drug-sniffing dog was located. When the dog arrived, they were forced to stand in the rain while the dog performed its task. After forty-five minutes of degrading and humiliating treatment, Wilkins and his cousin were finally allowed to leave. Wilkins immediately contacted the American Civil Liberties Union (ACLU) who launched a civil suit against the Maryland police on his behalf. The lawsuit was quickly settled after a police document that contained a profile targeting African-Americans came into the possession of Wilkins' legal team. One of the conditions of the settlement required the Maryland police to keep track of who they stopped. This data revealed that 72 per cent of all those stopped and searched were black even though blacks only made up 17 per cent of drivers in the area where the statistics were collected.³⁰ Recent data suggests that the Maryland police continue to use racial profiling.³¹ In 2000, more than half of the cars stopped and searched on I-95 were driven by African-Americans.³²

Similar evidence of race-based stops has been uncovered in other U.S. states such as New Jersey, Florida, and California. In New Jersey, state documents released by the attorney general's office reveal that over the last decade, eight out of every ten vehicles stopped on the New Jersey Turnpike were driven by blacks and Hispanics.³³ These are staggering numbers given that blacks, for example, only make up 15 per cent of the Turnpike's traffic violators.³⁴ Recently, two New Jersey police officers involved in the highly publicized 1998 shooting of three unarmed black and Hispanic youths during a vehicle stop admitted that the stop was the result of racial profiling. The officers stated that "their supervisors had trained them to focus on black and brown-skinned drivers because, they were told, they were more likely to be

³⁰ See *Profiles in Injustice*, supra note 5 at 8-10, 60-62. See also D. Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: The New Press, 1999) at 34-36 [hereinafter *No Equal Justice*].

³¹ "Driving While Black", supra note 25.

³² L. Montgomery, "Racial Profiling in Maryland Defies Definition—or Solution" *The Washington Post* (16 May 2001) A1.

³³ This evidence eventually led the governor of New Jersey, Christine Whitman, to admit that racial profiling is "real, not imagined." See "Driving While Black", supra note 25. See also I. Peterson, "Whitman Says Troopers Used Racial Profiling" *The New York Times* (21 April 1999) A1; D. Kocieniewski & R. Hanley, "Racial Profiling Was The Routine, New Jersey Finds" *The New York Times* (28 November 2000) A1.

³⁴ See *No Equal Justice*, supra note 30 at 38.

drug-traffickers.”³⁵ So well taught are the New Jersey police, that notwithstanding three years of intense scrutiny over previous profiling practices, racial profiling remains a prevalent practice.³⁶

In Florida, police videotapes of 1100 vehicle stops in the late 1980s showed that 70 per cent of drivers stopped by the police were black or Hispanic even though blacks and Hispanics comprised only 5 per cent of all drivers on the particular stretch of highway studied.³⁷ In California, high profile incidents of racial profiling have been exposed in the media and commented on in judicial decisions. For example, in *Washington v. Lambert*,³⁸ the Ninth Circuit Court of Appeals observed that:

In recent years, police in the Los Angeles area have unlawfully detained Hall of Fame baseball player Joe Morgan. ... The police have also erroneously stopped businessman and former Los Angeles Laker star Jamaal Wilkes in his car and handcuffed him, and stopped 1994 Olympic gold medalist Al Joyner twice in the space of twenty minutes, once forcing him out of his car, handcuffing him and making him lie spread-eagled on the ground at gunpoint. ... Similarly, actor Wesley Snipes was taken from his car at gunpoint, handcuffed, and forced to lie on the ground while a policeman kneeled on his neck and held a gun to his head. ... Actor Blair Underwood was also stopped in his car and detained at gunpoint. We do not know exactly how often this happens to African-American men and women who are not celebrities and whose brushes with the police are not deemed newsworthy. It is clear, however, that African-Americans are stopped by police in disproportionate numbers.³⁹

This empirical and anecdotal evidence strongly suggests that when the American police stop black (and Hispanic) drivers, they are not doing so to issue a traffic ticket, but to fulfill the mandate of “Operation Pipeline.” The evidence also confirms that a number of police forces have adopted a race-based profile of the drug courier.⁴⁰

³⁵ The officers eventually pleaded guilty to minor charges and received a \$280 fine notwithstanding that the young men were shot at eleven times. The victims of the shooting received a settlement of 12.9 million dollars. See D. Kocieniewski, “New Jersey Troopers Avoid Jail in Case That Highlighted Profiling” *The New York Times* (15 January 2002) A1; I. Peterson & D.M. Halbinger, “New Jersey Agrees To Pay \$13 Million In Profiling Suit” *The New York Times* (3 February 2001) A1.

³⁶ See M. Newman, “Percentage of Minority Drivers Stopped on Turnpike Rises Again” *The New York Times* (18 July 2001) B6.

³⁷ See D.A. Harris, “Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops” (1997) 87 J. Crim. L. & Criminology 544 at 561-63 [hereinafter “Driving While Black and All Other Traffic Offenses”].

³⁸ 98 F.3d 1181 (9th Cir. 1996).

³⁹ *Ibid.* at 1182, note 1.

⁴⁰ Similar evidence of racial profiling has been documented when the police are exercising their stop-and-frisk jurisdiction. In New York City, for example, researchers examined the results of 175 000 stop-and-frisk forms filled out by the police in 1998 and 1999 and found that the overwhelming majority of those stopped were black or Hispanic. See “The Usual Suspects”, *supra* note 1; B. Weiser, “U.S. Detects Bias In

In England, blacks are also an overrepresented proportion of the population stopped by the police. A 1988 random sample of 10 500 residents of England and Wales revealed that a greater percentage of blacks are stopped by police than other racial groups, even when controlling for age, income, gender, and access to vehicles.⁴¹ A more recent study documented that blacks are 7.5 times more likely to be stopped and searched by the police than whites.⁴²

Evidence of the Canadian experience has only recently been collected. One particularly egregious example occurred in Toronto.⁴³ In the early hours of October 22, 1993, Dwight Drummond, a popular City-TV assignment editor, and his friend, Ron Allen, were driving home from work in a blue car when they were stopped by two police officers. With their guns drawn, the officers forced the two men out of the car and subjected them to a “high-risk takedown.” After a search revealed that the men were not in possession of anything illegal, the police removed their handcuffs and let them go. Drummond decided to take some action and filed a complaint with the police. When the initial complaint was dismissed, Deputy Chief Robert Kerr intervened and charged the officers under the *Police Services Act*.⁴⁴ Kerr’s action angered the police and led to a strike.

At their hearing, the officers attempted to justify their actions by suggesting that they had received a tip from a prostitute that two black men in a blue car had left an area where gunshots were heard. The officers also testified that Drummond and Allen had looked over at them “suspiciously,”⁴⁵ “intently,”⁴⁶ and as if they were going to “bolt.”⁴⁷ When the officers could not

Police Searches” *The New York Times* (5 October 2000) A1.

⁴¹ W. Skogan, *The Police and the Public in England and Wales: A British Crime Survey Report No. 117* (London: HMSO Books, 1990). This difference remained statistically significant even after controlling for other relevant variables such as age or gender. See the discussion of the survey in “The Usual Suspects”, *supra* note 1.

⁴² Bunyan, *supra* note 7 at 1-4.

⁴³ See *Ontario (Police Complaints Commissioner) v. Hannah* (1997), 145 D.L.R. (4th) 443 (Ont. Gen. Div. (Div. Ct.)). A further appeal was dismissed. Drummond’s experience serves as a good example of the inefficacy of the police complaints process to combat racial profiling. In Ontario, for example, the African Canadian Legal Clinic reports that between 1992 and 1996, just over 1 per cent of 5 629 complaints resulted in the officer being disciplined. See M. Williams, “Deputation to the Metropolitan Toronto Police Services Board Regarding the Implementation of the Police Complaints Process” (1998), online: African Canadian Legal Clinic <<http://www.aclc.net/submissions/policecomplaint.html>>(date accessed: 14 May 2002); T. Landua, *Public Complaints Against the Police: A View From the Complainants* (Toronto: Centre of Criminology, 1994).

⁴⁴ *Police Services Act*, R.S.O. 1990, c. P.15.

⁴⁵ P. Mascoll, “Police Cleared In ‘Take Down’” *The Toronto Star* (27 September 1995) A1.

⁴⁶ R. DiManno, “TV Editor Fears ‘Open Season’ On Black Men” *The Toronto Star* (27 September 27 1995) A7; Editorial *The Toronto Star* (2 October 1995) A16.

⁴⁷ *Ibid.*

locate or describe this mysterious prostitute or find any mention of her in their notes, the lawyer for the complaints commission suggested that the tip was a “convenient and subsequent figment”⁴⁸ of their imagination.

The Board of Inquiry dismissed the charges stating that while it was aware of the “perception held by some members of the public that black motorists are randomly and arbitrarily stopped by police officers for no reason other than the colour of their skin,”⁴⁹ it was satisfied that the officers’ conduct was warranted in light of the “suspicious activity”⁵⁰ of Drummond’s vehicle. Drummond, angered by the decision, said:

I think it’s open season on young black men in this city. ... The decision sends a message to police officers that they can do what they want, when they want, to any black man. ... Throughout my life, I’ve been going through this thing, day in— day out. It’s been a rite of passage for me. It’s not the first time I was stopped and it probably won’t be the last time.⁵¹

The Drummond case dramatically served notice to the public that racial profiling was not confined to the United States. Indeed, Drummond’s experience was soon confirmed by statistical proof. In 1994, researchers for the Ontario Commission on Systemic Racism conducted telephone interviews with 1257 individuals who self-identified as black (417), Chinese (405), or white (435). The researchers were satisfied that this was a representative sample of the population living in the Metropolitan Toronto area.⁵² The Commission reported that 43 per cent of black male respondents had been stopped by the Toronto police in the previous two years, as opposed to only 25 per cent of white male respondents and 19 per cent of Chinese male respondents. An even greater disparity was found in cases of two or more police stops.⁵³ On the basis of a more detailed analysis of this data, Scot Wortley of the University of Toronto found that racial differences in police contact remained present even after controlling for relevant variables such as age, class, and education. Wortley reported that blacks are twice as likely as whites or Asians to experience a single stop, four times more likely to experience multiple stops, and almost seven times more likely to experience what they perceive to be an unfair stop.⁵⁴

⁴⁸ *Ibid.*

⁴⁹ Mascoll, *supra* note 45.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² See “The Usual Suspects”, *supra* note 1.

⁵³ The Commission reported that 29 per cent of black males and 12 per cent of white males were stopped two or more times by the police in the past two years. See *Report on Systemic Racism*, *supra* note 7 at 352-55.

⁵⁴ “The Usual Suspects”, *supra* note 1.

The findings of systemic racism by the Ontario Commission on Systemic Racism and other royal commissions and studies,⁵⁵ the Ontario data on race-based stops, and the importation of Operation Pipeline suggest that racial profiling has permeated Canadian society. The next part of this article examines the validity and legitimacy of the underlying foundations of racial profiling and whether it is a sustainable practice on grounds of statistical rationality or morals and ethics.

III. EXAMINING THE FOUNDATIONS OF RACIAL PROFILING

A. *The So-Called Statistical Foundation*

As is the case in any group, there are likely to be a few overtly racist police officers who deliberately target blacks as an expression of racial hostility. The vast majority of police officers, however, are dedicated professionals who are trying their best to do a difficult job. Why then is racial profiling such a widespread practice? The assumption that racial profiling is a rational practice is likely based on who is routinely being processed by the criminal justice system. In Ontario, for example, it is not surprising that the police regard black males as the usual drug offenders, given the manner in which crime is reported and the overrepresentation of blacks charged with and convicted of drug offences. Consequently, police officers who use race to target individuals would not identify themselves as racists but rather as officers using what they believe to be a reliable and efficient investigative tool. Moreover, it is unlikely that these same officers are conscious of the impact that profiling has had on minority communities.

The police might also find support for profiling from police bureaucrats, commentators, and public sentiment which advocate the practice as good police work. For example, Bernard Parks, the police chief of Los Angeles, who is himself black, has stated that:

It's not the fault of the police when they stop minority males or put them in jail. It's the fault of the minority males for committing the crime. In my mind it is not a great revelation that if officers are looking for criminal activity, they are going to look at the kind of people who are listed in crime reports. At some point, someone figured out that the drugs are being delivered by males of

⁵⁵ See e.g. Multiculturalism and Citizenship Canada, *Eliminating Racial Discrimination in Canada* (Ottawa: Minister of Supply & Services Canada, 1989); W. Head & D.H. Clairmont, *Discrimination Against Blacks in Nova Scotia* (Halifax: Royal Commission on the Donald Marshall, Jr. Prosecution, 1989); Canada, *Findings and Recommendations, The Royal Commission on the Donald Marshall, Jr. Prosecution*, vol.1 (Halifax: Royal Commission on the Donald Marshall, Jr. Prosecution, 1989) (Chair: T.A. Hickman); Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, (Ottawa: Law Reform Commission of Canada, 1991) and Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply & Services Canada, 1996).

this color driving these kinds of vehicles at this time of night. This isn't brain surgery. The profile didn't get invented for nothing.⁵⁶

Dinesh D'Souza, a conservative American scholar, expressed a similar view in an editorial in *USA Today*:

Far from being a myth, the reality is that young black males are, by far, the most violent group in U.S. society... .Consequently, the treatment accorded young African-American males by police officers, cabdrivers, storekeepers and others cannot be attributed to irrational prejudice. It is more likely the product of rational discrimination.

...

Insurance companies, for example, charge teenage boys higher car insurance rates than teenage girls (or older drivers, for that matter). The reason isn't sexism or anti-male prejudice; the statistical reality is that, on average, teenage boys are far more likely than teenage girls to bash their cars. So the insurance company is treating groups differently because they both behave differently.⁵⁷

In Canada, an internet survey conducted by the Canadian Race Relations Foundation found that 46.9 per cent of respondents thought that government should not ban the use of racial profiling by the police.⁵⁸

B. *Deconstructing the Statistical Evidence*

Given the so-called empirical basis for the argument that racial profiling is a rational practice, the apposite question is whether racial profiling has a statistical foundation. There is no question that the data documenting the overrepresentation of black males in prison is staggering and depressing. In the United States, while African-Americans only made up approximately 13 per cent of the population, half of the inmates in American prisons in the mid-1990s were African-Americans. With respect to drug offences, African-Americans constitute approximately 33 per cent of all drug possession arrests including 47

⁵⁶ J. Goldberg, "The Color of Suspicion" *The New York Times Magazine* (20 June 1999) at 51-87. See also *Profiles in Injustice*, *supra* note 5 at 73-75. These and other similar comments from the police suggest that institutional reforms such as the hiring and promoting of more visible minority officers as well as mandatory training on racism and the impact of discriminatory policing will have very little impact on changing police culture and practice. Indeed, in his book *Profiles in Injustice*, *supra* note 5 at 101, Harris notes that "[a]ccording to the data, racial disparities in stops, searches, and the like seem to have little or nothing to do with the officer's race."

⁵⁷ "Sometimes Discrimination Can Make Sense" *USA Today* (2 June 1999) 15A .

⁵⁸ For the results see online: Canadian Race Relations <<http://www.crr.ca/EN/Survey/Questions/eSurvQ3.asp>> (date accessed: 20 July 2002).

per cent for cocaine possession and 49 per cent of all trafficking arrests.⁵⁹ In addition, they constitute 55 per cent of those convicted of drug offences and 74 per cent of all drug offenders sentenced to prison.⁶⁰

The Canadian situation is just as bleak. While statistics are not collected on the demographics of criminal offences,⁶¹ prison admission data amply illustrates the overrepresentation of blacks in Ontario, particularly for drug offences. Toni Williams, a commissioner on the Ontario Commission on Systemic Racism, highlights this data:

The findings of the six-year study are startling. They show that from 1986/7 to 1992/3 the total number of black admissions to Ontario prisons rose by 204 per cent, as compared to a 23 per cent increase in white admissions and a 40 per cent increase in total admissions. In this period, Ontario's black population increased from 2.4 per cent to 3.1 per cent of the province's population, which is a growth of about 36 per cent. The net effect of these changes was that, although the number of white prisoners grew significantly over the study period (from 49,555 in 1986/7 to 60,929 in 1992/3), they are a declining proportion of all admissions (from 84 per cent in 1986/7 to 73 per cent in 1992/3). By contrast, the dramatic growth in the number of black prisoners (from 4,205 in 1986/7 to 12,765 in 1992/3) meant that black admissions increased from 7 per cent to 15 per cent of total admissions. This shift from white to black prisoners was particularly marked among men and women charged with drug trafficking and importing offences and admitted to prisons serving the Metro Toronto area.⁶²

The mere fact that blacks are overrepresented in the justice system does not, however, support the rationality of racial profiling as a form of "reasonable discrimination." As the Ontario Commission on Systemic Racism observed "[n]o evidence shows that black people are more likely to use drugs than others or that they are overrepresented among those who profit most from drug use."⁶³ Indeed, the limited data available suggests that drug-use rates are relatively comparable among racial groups. For example, a self-reporting household survey in the United States found that 7.9 per cent of African-Americans admitted to using drugs in the last month as compared to 6 per cent of whites. In other words, if the police stopped 1000 white and 1000 black individuals, they would only find 19 more drug users in the group of black detainees.

⁵⁹ M. Mauer, *Race To Incarcerate* (New York: New Press, 1999) at 124-25, 145-49. See also "Driving While Black", *supra* note 25.

⁶⁰ "Driving While Black", *ibid.*

⁶¹ See S. Wortley, "A Northern Taboo: Research On Race, Crime And Criminal Justice In Canada" (1999) 41 Can. J. Crim. 261.

⁶² T. Williams, "Sentencing Black Offenders in the Ontario Criminal Justice System" in J.V. Roberts and D.P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) at 204.

⁶³ *Report on Systemic Racism*, *supra* note 7 at 83.

Moreover, it is generally accepted that whites make up close to 77 per cent of all drug users in the United States.⁶⁴

A similar pattern exists in the case of drug trafficking. A 1997 study found that drug users “were most likely to report using a main source who was of their own racial or ethnic background.”⁶⁵ Similarly, a 2001 Department of Justice report revealed that:

[A]lthough African-Americans and Hispanics were more likely to be stopped and searched, they were less likely to be in possession of contraband. On average, searches and seizures of African-American drivers yielded evidence only eight per cent of the time, searches and seizures of Hispanic drivers yielded evidence only 10 per cent of the time, and searches and seizures of white drivers yielded evidence 17 per cent of the time.⁶⁶

While this is American data, there is no reason to believe that drug use or trafficking rates in Canada are any different. Consequently, when properly analysed, the so-called statistical evidence does not support a reasonable-discrimination argument. The fact that blacks are stopped and searched a disproportionately greater number of times creates the impression that they are involved in drug activity in higher numbers than members of other groups. The overrepresentation statistics simply establish that if a group is subjected to enough scrutiny, criminal behaviour will be found.

C. *The Impact of Racial Profiling*

Even if there were a statistical link between race and drug trafficking, would this statistical link provide a morally or ethically defensible foundation for racial profiling? There is a strong argument to be made that state-sanctioned discriminatory treatment of vulnerable and disadvantaged groups should never

⁶⁴ See *National Household Survey on Drug Abuse, Population Estimates 1995* (Washington: Substance Abuse and Mental Health Services Administration, 1996) at 18-19, 30-31, 36-37. This data is summarized in Mauer, *supra* note 59 at 146-47. There is also little difference in use rates when this data is broken down into different drug categories. The only cognizable difference is with respect to crack use. However, crack use is very low among all groups. In the survey, 0.6 per cent of blacks admitted to using crack as compared to 0.1 per cent for white respondents. Moreover, the majority of crack users in the United States are white. See Mauer, *ibid.* at 148.

⁶⁵ K.J. Riley, “Crack, Powder Cocaine, and Heroin: Drug Purchase And Use Patterns In Six U.S. Cities” (National Institute of Justice & Office of National Drug Control Police, 1997) at 1, online: National Criminal Justice Reference Service <<http://www.ncjrs.org/pdffiles/167265.pdf>> (date accessed: 9 June 2002).

⁶⁶ *End Racial Profiling Act*, *supra* note 12, § 2(5). In addition, the data generated from the *Wilkins*’ case found that when the Maryland State Police actually found drugs, it was in the same percentages among whites and blacks. This and other data confirming comparable and, in some instances, higher trafficking rates among whites is documented in *Profiles in Injustice*, *supra* note 5 at 60-84.

be permitted even if it could be defended as rational.⁶⁷ Not only would such a practice allow the police to routinely harass minority groups under the guise of law enforcement, but further, the deleterious effects of racial profiling clearly outweigh any salutary benefits to law enforcement. These deleterious effects include overrepresentation in the criminal justice system, social stigmatization, psychological harm, the creation of negative views about the justice system, and distorted policing.

Not only are blacks overrepresented in the criminal justice system, but their overrepresentation in Ontario, for example, exceeds that of other overrepresented groups. Consider the following statistics:

Using 1991 census data from Ontario, and 1992-1993 admissions data from Ontario correctional facilities, analyses reveal a prison admission rate of 705 per 100,000 residents for whites, compared to 3,686 for blacks. The rate for Aboriginals is 1,993 per 100,000. When the male data are analyzed separately, the black admission rate rises to 6,796 per 100,000, compared to 1,326 for whites and 3,600 for Aboriginals.⁶⁸

As noted earlier, these increased admission rates relate primarily to drug offences. It is suggested, therefore, that the primary cause of overrepresentation is the extent to which African-Canadians are placed under the microscope of police surveillance.⁶⁹ If economic and social conditions were the principal causes of overrepresentation then one would expect the incarceration rates between blacks and Aboriginals to be the same (as opposed to almost twice as high for blacks), and one would expect the rates between black men and black women to be comparable as well.⁷⁰

⁶⁷ Unfortunately, as a matter of principle, two recent Supreme Court of Canada decisions have endorsed an informed statistical generalization (or reasonable discrimination) exception to section 15(1) of the *Charter*. See *Law v. Canada*, [1999] 1 S.C.R. 497 at 561 [hereinafter *Law*] and *Little Sisters & Book Emporium v. Canada*, [2000] 2 S.C.R. 1120 at 1187 [hereinafter *Little Sisters*]. In *Little Sisters*, the Court suggested that discriminatory targeting might be reasonable or rational if based on fact. It is unlikely, however, given the prevalence of racism in Canada and the impact of racial profiling on the black community, that the Supreme Court would apply *Little Sisters* in this context. The relationship between the informed statistical generalization exception to section 15(1) is considered in more detail by Choudhry, *supra* note 10 at 375-77.

⁶⁸ J.V. Roberts & A.N. Doob, "Race, Ethnicity and Criminal Justice in Canada" in M.H. Tonry, ed., *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives* (Chicago: University of Chicago Press, 1997) at 481.

⁶⁹ Compare *Due Process and Victims' Rights*, *supra* note 9 at 229-30. There, Roach argues that "the contribution of discriminatory enforcement to overrepresentation" has been overemphasized and that an additional focus should be on the social and economic conditions that face minority groups rather than on over-policing.

⁷⁰ Even Michael Tonry, who is more in line with the Roach view, appears prepared to accept that racial bias is the most likely cause of the overrepresentation of blacks charged with drug offences. See M.H. Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (New York: Oxford University Press, 1995) at 49-80 [hereinafter *Malign Neglect*].

Racial profiling has, thus, created a disproportionately large class of racialized offenders.⁷¹ It has also criminalized many predominantly black neighbourhoods in Toronto that are commonly referred to by the police as “high crime areas.” This criminalization has contributed to the perpetuation of the belief that there is a link between race and crime. For example, a 1995 Angus Reid Gallup poll revealed that 45 per cent of those surveyed believe that there is such a link.⁷² The widespread belief that the face of crime is black has stigmatized the black community, and has had a tremendously negative impact on their dignity and sense of self-worth.⁷³

Overrepresentation and stigmatization have also resulted in a number of political consequences for the black community in Toronto. Racial profiling makes the black community a political target to the extent that statistical overrepresentation can be manipulated by the state. And finally, when the police need to stir up the “law and order” agenda, they have a ready-made group and neighbourhood that they can turn toward to find criminal activity.⁷⁴

One of the most troubling effects of racial profiling is the large number of innocent black men and women in Toronto who have been stopped and harassed by the police. Police stops are inherently coercive, but even more so for minority groups. Unjustified stops have been described by black people as humiliating, frightening, and degrading.⁷⁵ Many of these stops have led to violence. Therefore, it is not surprising that blacks have been forced to alter the

⁷¹ Some have argued that this is the “shadow agenda” of the “war on drugs” (that is the control and destabilization of the black community by the white majority). See e.g. J.G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (Cambridge, U.K.: Cambridge University Press, 1996). Others have argued that this was a foreseeable consequence of the “war.” See *Malign Neglect*, *ibid.* at 81-123.

⁷² *R. v. Barnes* (1999), 27 C.R. (5th) 290 at 297 (Ont. C.A.).

⁷³ Overrepresentation has also disadvantaged the black community in other ways. Many individuals leave prison scarred and traumatized while others leave with deadly diseases such as HIV or tuberculosis. Employment and educational opportunities which were scarce prior to incarceration become even scarcer after release from prison. Finally, in many black neighbourhoods, the role model for young black men is their father, brother, or friend serving time in prison. These collateral effects of overrepresentation are documented in *Malign Neglect*, *supra* note 70; C.R. Mann, *Unequal Justice: A Question of Color* (Bloomington: Indiana University Press, 1993).

⁷⁴ The importance of being able to produce crime to sustain the agendas of the police and government is precisely why reform is unlikely without judicial prodding. See R.V. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982) at 5-15, 197, 200. In the context of drug offences, see *Malign Neglect*, *supra* note 70; P.J. Giffen et al., *Panic and Indifference: The Politics of Canada's Drug Laws: A Study in the Sociology of Law* (Ottawa: Canadian Centre On Substance Abuse, 1991).

⁷⁵ See “The Usual Suspects”, *supra* note 1; *Profiles in Injustice*, *supra* note 5 at 94-117; “The Stories, the Statistics and the Law”, *supra* note 28; C. Foster, *A Place Called Heaven: The Meaning of Being Black in Canada* (Toronto: Harper Collins, 1996); and A. Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (New York: Ballantine Books, 1992).

manner in which they go about an activity that so many of us take for granted—driving a car. As Harris has observed:

Some completely avoid places like all-white suburbs, where they fear police harassment for looking “out of place.” Some intentionally drive only bland cars or change the way they dress. Others who drive long distances even factor in extra time for the traffic stops that seem inevitable. ... African-American parents know that traffic stops can lead to physical, even deadly, confrontation. Karen, a social worker, says that when her young son begins to drive, she knows what she’ll tell him:

“The police are supposed to be there to protect and to serve, but you being black and being male, you’ve got two strikes against you. Keep your hands on the steering wheel, and do not run, because they will shoot you in your back. Let them do whatever they want to do. I know it’s humiliating, but let them do whatever they want to do to make sure you get out of that situation alive. Deal with your emotions later. Your emotions are going to come second—or last.”⁷⁶

Stops that are based on race confirm to all blacks, rich or poor, that race still matters and that no matter how law abiding you are, your skin colour will always place you in a class of “usual offenders.”⁷⁷ This sense of injustice can undermine confidence in the legitimacy and integrity of the criminal justice system.⁷⁸ Indeed, the Ontario Commission on Systemic Racism found that more than 52 per cent of black respondents believed that judges in Ontario do not treat black accused the same as white accused.⁷⁹ Once the perception of legitimacy is lost, blacks, who are overrepresented as victims, may decide not to call the police for protection and vindication. Black jurors may choose to nullify a case because they view the police evidence with suspicion. In addition, “the perceived existence of unfair sanctions, combined with the absence or lack of sanctions for race-based harms” may lead to future criminal offending.⁸⁰

Racial profiling is not a reliable investigatory tool. It results in a large number of false positives and false negatives.⁸¹ Indeed, the data on drug use and trafficking suggests that as many, if not more, offenders would be apprehended if the police were to focus their attention on whites. Nor is racial profiling a fair investigatory tool. Why should one community be singled out for constant and

⁷⁶ “Driving While Black”, *supra* note 25.

⁷⁷ See S. Wortley, R. MacMillan & J. Hagan, “Just Des(s)erts? The Racial Polarization Of Perceptions of Criminal Injustice” (1997) 31 *Law & Soc’y Rev.* 637; “The Usual Suspects”, *supra* note 1.

⁷⁸ See D. Cole, “Race, Policing and the Future of Criminal Law” (1999) 26 *Hum. Rts.* 2 at 3-4. See also *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000); Kennedy, *supra* note 18 at 151-53.

⁷⁹ *Report on Systemic Racism*, *supra* note 7 at 14-15.

⁸⁰ K.K. Russell, “The Racial Hoax as Crime: The Law as Affirmation” (1996) 71 *Indiana L.J.* 593 at 609.

⁸¹ See *Profiles in Injustice*, *supra* note 5 at 78-87; D. Cole & J. Lamberth, “The Fallacy of Racial Profiling” *The New York Times* (13 May 2001) s. 4:13. See also *End Racial Profiling Act*, *supra* note 12 § 2(5) which contains an explicit clause that profiling does not work.

intense surveillance? For example, if the police were to focus all their effort on investigating tax evasion in restaurants and other cash businesses, instead of over-policing black neighbourhoods, it is staggering to think how many middle-class Canadians would be stigmatized with allegations and convictions for fraud.

As an unreliable and unfair police technique, racial profiling results in distorted policing, which in turn further negatively impacts on minority groups. Policing based on racial stereotypes leads officers to look at their environment in a skewed manner. As Anthony Thompson of New York University School of Law notes:

Significantly, schemas [defined by Thompson as categories based on stereotypes] may cause biases in the ways in which an officer processes information. An officer may misinterpret ambiguous conduct that could be consistent with innocence to coincide with the prevailing schema. Similarly, officers may overlook or reinterpret behaviour that does not seem to fit the schema. Thus, exculpatory conduct may be dismissed. More troubling still, an officer's schema can be in use constantly and employed even when situations are not necessarily criminal in nature. ... [Consequently] [m]any of the perceptions and judgments an officer reports on a witness stand—for example, the commission of a “furtive gesture,” an “attempt to flee,” “evasive” eye movements, “excessive nervousness”—will not be an accurate rendition of the suspect's actual behaviour but rather a report that has been filtered through and distorted by the lens of stereotyping.⁸²

Distorted policing has been manifested in Toronto, for example, in the following cases where a black man was arrested, in part, because: he was seen putting “something” in his mouth and then walking away “quickly”;⁸³ or he refused to answer the officer's questions;⁸⁴ or he was talking on his cell phone at a high crime location.⁸⁵

These effects of racial profiling are overwhelming, and, unfortunately, they are often overlooked in discussions of the legitimacy of the practice. Having examined the use, foundations, and impact of racial profiling, the article turns to an assessment of what the law has done and what the law can do to bring an end to this discriminatory and destructive police practice.

IV. THE CURRENT *CHARTER* STANDARDS

A. *Section 9: The Protection Against Arbitrary Detention*

⁸² A.C. Thompson, “Stopping the Usual Suspects: Race and the Fourth Amendment” (1999) 74 N.Y.U. L. Rev. 956 at 987, 991. The *Drummond* case discussed earlier serves as a good example of what Thompson is talking about.

⁸³ *R. v. Errol Johnson* (1995), 39 C.R. (4th) 78 (Ont. C.A.) at 78.

⁸⁴ *R. v. Charley* (1993), 22 C.R. (4th) 297 (Ont. C.A.) at 297.

⁸⁵ *R. v. C.S.* (1997), 13 C.R. (5th) 375 (Ont. Ct. Jus.) at 375.

In the United States, vehicle and “stop-and-frisk” stops are scrutinized under the search-and-seizure provisions of the Fourth Amendment. Given the structure of our constitution, Canada has approached the matter differently. Police detentions are currently examined under section nine of the *Charter*, which provides that, “[e]veryone has the right not to be arbitrarily detained or imprisoned.”⁸⁶

The key to understanding section 9 lies in its triggering mechanisms: detention and arbitrariness. The Supreme Court of Canada has defined “detention” under section 9 in the same manner as it has defined “detention” under section 10 of the *Charter*.⁸⁷ So, for example, a detention is said to arise under both sections where (i) there is a deprivation of liberty by physical restraint or, (ii) there is criminal liability arising from the failure to comply with a police demand or direction, or (iii) a state of psychological compulsion arises in the form of a reasonable perception of suspension of freedom of choice.⁸⁸ All random vehicle stops are now deemed to be a detention under section 9.⁸⁹ The same is not true for criminal investigative stops, which still require an application of the above threefold test to determine whether in all of the circumstances the stop amounted to a detention.⁹⁰

Arbitrariness under section 9 refers to indiscriminate, abusive, or discriminatory discretionary exercises of a detention power. An indiscriminate exercise of discretion is one that lacks a rational or reasonable basis.⁹¹ Usually, the rationalized standard comes from legislation or common law authorizing the detention.⁹² An abusive exercise of discretion is one that is capricious⁹³ or exercised for an improper purpose such as facilitating unlawful conduct or a constitutional violation.⁹⁴ A discriminatory exercise of discretion is one that is exercised for an improper purpose such as race. This aspect of arbitrariness is

⁸⁶ *Charter*, *supra* note 11, s. 9.

⁸⁷ Upon detention or arrest, a police officer is required under s. 10 to inform an individual of the reason for his or her detention and of their right to speak to a lawyer.

⁸⁸ See *R. v. Therens*, [1985] 1 S.C.R. 613 at 638-45.

⁸⁹ *Ladouceur*, *supra* note 16 at 1276, 1283-88.

⁹⁰ See the discussion in *R. v. Powell* (2000), 35 C.R. (5th) 89 (Ont. Ct. Jus.) [hereinafter *Powell*]. The implications for racial profiling of not deeming all investigative police stops as detentions under section 9 are discussed below.

⁹¹ *Ladouceur*, *supra* note 16 at 1277.

⁹² Therefore, one of the first steps under section 9 is to ask whether the detention was authorized by law. Of course, the law itself may not provide sufficient criteria for the exercise of the power thereby rendering the law arbitrary. See *e.g. Hufsky v. The Queen*, [1988] 1 S.C.R. 621.

⁹³ See *R. v. Cayer* (1988), 66 C.R. (3d) 30 at 43 (Ont. C.A.).

⁹⁴ See *Brown v. Durham Regional Police*, *supra* note 13 at 236-38.

implicated by racial profiling.⁹⁵ While, in theory, section 9 promises much, the Supreme Court of Canada failed to give this constitutional provision the necessary teeth to protect Canadians from discriminatory exercises of discretion when it decided the random vehicle stop case of *Ladouceur*.

B. Section 9 and Regulating Traffic Stops

1. The *Ladouceur* Decision

Only ten days after the proclamation of the *Charter*, two Ottawa police officers decided to randomly stop Gerald Ladouceur to see if he had a valid driver's licence. The officers had no reason to believe that there was anything amiss about Ladouceur or his vehicle.⁹⁶ As it turned out, Ladouceur's licence had, in fact, been suspended.⁹⁷ The issue before the Supreme Court of Canada was whether the police have a constitutionally valid power to randomly stop a vehicle to check its fitness, or to ensure that its paperwork is in order. While all nine Supreme Court justices agreed that the power to make random traffic stops either under the common law ancillary power doctrine⁹⁸ or under provincial traffic legislation⁹⁹ constitutes an arbitrary exercise of discretion, the justices split 5-4 on whether the violation was a reasonable limit under section 1 of the *Charter*. Justice Cory, for the majority, concluded that a random stop power was necessary to enable the police to control the "depressing picture of the killing and maiming that results from the operation of motor vehicles on the streets and highways of the nation."¹⁰⁰ Justice Cory did attempt to place one limit on this wide-reaching power by suggesting that the police would not be

⁹⁵ *Ibid.*

⁹⁶ *Ladouceur*, *supra* note 16 at 1269.

⁹⁷ Ladouceur was convicted of driving while his licence was suspended contrary to the provisions of the *Highway Traffic Act*, R.S.O. 1990, c. H8 and fined \$2000.

⁹⁸ See *R. v. Dedman*, [1985] 2 S.C.R. 2 [hereinafter *Dedman*].

⁹⁹ For example, this power is legislated in section 216(1) of the *Highway Traffic Act*, *supra* note 97 and similar provisions across the country.

¹⁰⁰ *Ladouceur*, *supra* note 16 at 1279. Unfortunately, the Court did not see the wisdom in the American position which rejected the necessity argument and limited the power of the police to stop vehicles to situations where the officer has some basis to believe that the individual is unlicensed (that is reasonable suspicion) or that a traffic law has been violated (that is probable cause). See *Delaware v. Prouse*, 440 U.S. 648 (1979).

permitted to take advantage of the detention to conduct unreasonable searches or seizures.¹⁰¹

The minority expressed grave concerns about the potential for abuse because of the lack of an objective standard to guide the police in deciding what drivers to stop. Justice Sopinka, for the four-member minority, put it this way:

[T]he roving random stop would permit any individual officer to stop any vehicle, at any time, at any place. The decision may be based on any whim. Individual officers will have different reasons. Some may tend to stop younger drivers, others older cars, and so on. Indeed, as pointed out by Tarnopolsky J.A., racial considerations may be a factor too. My colleague states that, in such circumstances, a *Charter* violation may be made out. If, however, no reason need be given nor is necessary, how will we ever know? The officer need only say "I stopped the vehicle because I have the right to stop it for no reason. I am seeking unlicensed drivers."¹⁰²

A similar concern was expressed by Justice LaForest, in his dissenting opinion, in the *Belnavis* decision which was decided after *Ladouceur*:

The vagueness of the standard also has grave implications for equality in the application of the law. As I noted in *Landry* ... such vague discretion "is unlikely to be used as much against the economically favoured or powerful as against the disadvantaged" It does not prove but certainly does not detract from this thesis that the appellants in the present case are both members of a visible minority.¹⁰³

By upholding the random stop power, *Ladouceur* gave the police an implicit licence to engage in racial profiling by means of pretext stops. As Justice Sopinka observed, we will rarely know if "racial considerations" play a role because officers can insulate the true reason for the stop by claiming that they are just checking for a valid licence. Hopefully, *Ladouceur* will soon be reconsidered. The decision may actually contain the seeds of its own demise. When discussing the proportionality prong of the section 1 minimal impairment test, Justice Cory held:

Finally, it must be shown that the routine check does not so severely trench upon the s. 9 right so as to outweigh the legislative objective. The concern at this stage is the perceived potential for abuse of this power by law enforcement officials. In my opinion, these fears are unfounded.¹⁰⁴

¹⁰¹ *Ladouceur, ibid.* at 1287. This limit does not, however, offer much protection against state intrusion as the stop itself will often provide the necessary grounds for the search. For example, in some cases, the police will see contraband as they are conducting a plain-view inspection which they can now do with a flashlight in the name of officer safety as per *R. v. Mellenthin*, [1992] 3 S.C.R. 615. In other cases, the police may secure the consent of the driver to search the vehicle. Finally, this residual constitutional protection would only be available to the driver of the vehicle given the decision in *R. v. Belnavis*, [1997] 3 S.C.R. 341 [hereinafter *Belnavis*] that, generally speaking, passengers in a vehicle have no standing to challenge a search of the vehicle.

¹⁰² *Ladouceur, ibid.* at 1267.

¹⁰³ *Belnavis, supra* note 101 at 376-77; *R v. Landry*, [1986] 1 S.C.R. 145 at 186.

¹⁰⁴ *Ladouceur, supra* note 16 at 1287.

At the time that *Ladouceur* was decided, there was very little empirical evidence of racial profiling. This evidence now exists and it establishes that the power to stop vehicles randomly is being abused by the police. In any event, *Ladouceur* is not the last word on this issue.

2. The Relevance of Race and Identifying Pretext Traffic Stops

In *Brown v. Durham Regional Police*,¹⁰⁵ a case involving the targeting of motorcycle gangs on a highway in Eastern Ontario, the Ontario Court of Appeal placed two important limits on the exercise of the *Ladouceur* power. It held that section 9 is violated and not saved by section 1 where the police use the *Ladouceur* power as pretext for a criminal investigation,¹⁰⁶ or where the police conduct a traffic stop with a co-extensive improper purpose.¹⁰⁷ In its definition of improper purpose, the court included the targeting of racial groups.¹⁰⁸ The court clearly acknowledged the danger of and potential for racial profiling by recognizing that stopping someone because of race, even in part, is an improper purpose and therefore unconstitutional.

With this important constitutional safeguard, the relevant question becomes: how do we determine whether a stop was based on race? Justice Doherty offers the following suggestions:

The police purposes, when effecting a stop and detention, must be ascertained from the evidence of the officers involved, the persons detained, and other evidence concerning the conduct of the stops. ... [I]f only people of colour were stopped at a checkpoint, the inference could be made that the stop was discriminatory and, therefore, improper. Stops which are selective in the sense that a certain person or group is targeted must be carefully scrutinized.¹⁰⁹

In practice, however, racially motivated stops will only rarely be proved through direct evidence.¹¹⁰ It is futile to expect that officers will admit that they stopped a motorist because of race. It is also unlikely that an accused will have

¹⁰⁵ *Brown v. Durham Regional Police*, *supra* note 13.

¹⁰⁶ *Ibid.* at 235. The court also observed, however, that there is nothing wrong with the police using a valid traffic stop as an opportunity to facilitate a criminal investigation provided that that investigation does not go beyond the scope of a valid traffic stop by conducting unreasonable searches.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at 238. The Ontario Court of Appeal came to a similar conclusion in the context of a licence demand in *Richards*, *supra* note 15 at 293-94. Thankfully, these cases were not influenced by *Whren v. U.S.*, 517 U.S. 806 (1996) [hereinafter *Whren*] where the U.S. Supreme Court held that an officer's motivation in making the stop is an irrelevant consideration under Fourth Amendment analysis.

¹⁰⁹ *Brown v. Durham Regional Police*, *ibid.* at 297-98.

¹¹⁰ This point is made by Justice Trafford in *R. v. Brown* (2002), 48 C.R. (5th) 291 [hereinafter *Brown*]. *Brown* is discussed by C. Boyle in "Annotation" (2002), 48 C.R. (5th) 201 at 203.

sufficient resources to demonstrate that a particular officer disproportionately stops black motorists.

Justice Doherty recognized, however, that the issue can be established from a circumstantial perspective.¹¹¹ Given the American experience, one way to determine whether the vehicle stop is the product of racial profiling is to look at whether the stop is a pretextual one. In other words, did the officer act in accordance with standard procedure for a traffic stop? In answering this question, there are a number of relevant factors that could be considered:¹¹²

1) The nature of the police officer's work: most traffic stops are conducted by officers assigned to traffic duty or constables patrolling the streets. It would be highly unusual for a narcotics officer or an officer in an unmarked car to conduct a routine traffic stop to check the driver's licence or to enforce a minor traffic violation;

2) The call, if any, to the dispatcher: it is not uncommon for the police to call dispatch and advise them of the vehicle stop. If a call is made and no reason is given for the stop, this would be suspicious as it would suggest that the officer is hiding the true reason for the stop or has not yet realized a need to fabricate a reason. Similarly, a call for back-up made prior to the stop of the vehicle is far more consistent with a criminal investigation than a traffic stop;

3) A computer check: it is also not uncommon for the police to conduct a computer check on the vehicle and the driver's licence as part of a routine traffic stop. However, the timing and scope of the check can provide some evidence of the true purpose of the stop. In most cases, the computer check is conducted after the officer has obtained the name or licence from the driver. It would be unusual, therefore, for a computer check to be conducted before speaking to the driver. It would be particularly suspicious if the computer check was conducted before the officer even pulled over the vehicle in circumstances where the officer claimed that the driver was speeding or otherwise driving in a hazardous manner. Generally speaking, pre-stop computer checks are more consistent with a criminal investigation, for example, to see if the car is stolen. Finally, it would be suggestive of a criminal investigation if information from the criminal record database of the Canadian Police Information Centre were checked during the stop;

¹¹¹ This assumes, of course, that the evidence establishes that the officer was in a position to see the race of the driver or one of the occupants. Findings of fact in this regard will turn on such factors as the time of day and whether the vehicle's windows were tinted.

¹¹² Many of these factors are discussed in A. Abramovsky, "Pretext Stops Of Motorists In New York" (1998) 220 N.Y.L.J. at 3. See also the discussion in W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 3d ed., vol. 1 (Minnesota: West Publishing, 1996) at 119-20; D.A. Sklansky, "Traffic Stops, Minority Motorists, and the Future of The Fourth Amendment" (1997) Sup. Ct. Rev. 271 at 287, note 73.

4) The length of time it took for the motorist to be stopped: one would reasonably expect that when an officer sees a traffic violation, he or she would immediately stop the vehicle and issue a ticket or warning. Where the stop occurs at some later time and place, one can reasonably infer that the officer is conducting criminal surveillance of the driver or occupants and now seeks to use the traffic violation to further that investigation. It would also be suspicious where the officer waits until the vehicle is on a side-street. This suggests that the officer wants to shield his or her conduct from public view;¹¹³

5) The nature of the questioning: when an officer conducts a routine traffic stop, normal procedure would be for the officer to ask the driver questions about his or her licence, registration, and insurance status. It would be inconsistent with a routine stop if the officer's first questions were more of an investigatory nature (for example, "what are doing in this neighbourhood", "where did you get this car," or "are you on bail?"). It would also be particularly telling if the officer asked a question for which he or she knew the answer in an attempt to create a basis for a "flimsy" arrest (arrest for obstruction of police, for example) as an arrest would then give the officer a basis to conduct a search of the person and the vehicle;¹¹⁴

6) An investigation of the passengers: it is inconsistent with the purpose of a random vehicle stop for the officer to ask for identification from the passengers or to ask them to exit the vehicle. It would be even more unusual for the officer to conduct a computer check on the passengers;¹¹⁵

7) The officer's notes: For example, a police officer who conducts a race-based stop and makes a notation "stopped suspicious vehicle" may later realize or be told that the reason for the stop will not pass constitutional muster. The officer may then turn around and alter, add, or in an extreme case, prepare a second set of notes with a "legitimate" reason for the stop; and¹¹⁶

8) The issuance of a traffic ticket: finally, it would be a suspicious circumstance where an officer claimed that the driver had violated some serious traffic law but then did not issue a traffic ticket.¹¹⁷

Other relevant facts that can be used to support a racial-profiling argument are those circumstances surrounding the stop that tend to reveal

¹¹³ In *People v. Letts*, 180 A.D.2d 931 (N.Y. App. Div. 3rd Dept. 1992), for example, a New York court found a stop to be pretextual where the police followed the accused's vehicle for six miles after witnessing a traffic violation in hopes of observing a drug transaction.

¹¹⁴ See *People v. Rijo*, 220 A.D.2d 217 (N.Y. App. Div. 1st Dept., 1995) [hereinafter *Rijo*]; *People v. Roundtree*, 234 A.D.2d 612 (N.Y. App. Div. 2nd Dept., 1996) [hereinafter *Roundtree*]; and *People v. David*, 223 A.D.2d 551 (2nd Dept., 1996) [hereinafter *David*].

¹¹⁵ See *People v. Mikel*, 152 A.D.2d 603 (N.Y. App. Div. 2nd Dept., 1989) at 605.

¹¹⁶ See *Brown*, *supra* note 110.

¹¹⁷ See *Rijo*, *supra* note 114; *Roundtree*, *supra* note 114; and *David*, *supra* note 114.

stereotypical assumptions. For example, a “red flag” is raised where a vehicle stop of a black male takes place in a “high crime area,” a predominantly white and affluent neighbourhood, or where the car is an expensive one. Finally, given that Operation Pipeline is being taught in Canada, it will be relevant to the inquiry to determine if the officer has received formal or informal training in Pipeline.

C. Section 9 and Regulating Criminal Investigatory Detentions

1. The *Simpson* Decision

In December 1989, Constable Wilkin was investigating a suspected “crack house” in Regent Park in Toronto. He observed a woman enter the house. She had left her car in the driveway with its engine running. A few minutes later, the woman exited the house with Simpson, a black man. They got into the car and left the residence. Wilkin followed the car and signalled for it to stop. He decided to investigate Simpson who was sitting in the passenger seat. During the course of his investigation, Wilkin observed a bulge in Simpson’s front pant pocket. He reached over and felt a “hard lump.” He ordered Simpson to remove the object. After a brief struggle, Wilkin seized a plastic bag containing ten grams of cocaine from Simpson’s hand.¹¹⁸

Since Wilkin testified that he did not stop the vehicle pursuant to *Ladouceur* but rather as part of his criminal investigation, the issue in the Ontario Court of Appeal was whether there was lawful authority for the detention. The court concluded that there was no explicit legal authority permitting the police to detain individuals in their cars or on the street for criminal investigations. The court filled the void by turning to the ancillary power doctrine,¹¹⁹ which is an enabling power because it authorizes the police to do what is necessary to investigate and solve crime. However, it also has a built-in balancing mechanism. The doctrine only authorizes conduct that can be sustained as a justifiable exercise of police power. *Simpson* held that this common-law power could authorize criminal investigatory detentions in some cases. While the *Simpson* power has never been explicitly recognized by the Supreme Court of Canada, it has now been endorsed by most appellate courts

¹¹⁸ *Simpson*, *supra* note 14 at 190.

¹¹⁹ This doctrine has its origins in Canada in *Dedman*, *supra* note 98.

across the country.¹²⁰ The breadth of the *Simpson* power is explored in the next two sections.

a. Reasonable suspicion and threshold reliability

In *Simpson*, the court recognized that an automatic detention power in the name of crime control would invite discriminatory policing.¹²¹ Consequently, the court concluded that a level of individualized suspicion of wrongdoing was required. It adopted a standard of “articulable cause” or “reasonable suspicion.” The court described this standard as “[a] constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.”¹²²

Relying on tangible and reliable information is an important safeguard in ensuring that race does not infect the reasonable suspicion calculus. In many cases, the information that serves as the foundation for the investigatory detention will come from direct observation of what the police believe to be a criminal act.¹²³ In other cases, the information will come from an informer, police intelligence or a complainant. In *Simpson*, for example, the information that a particular location was being used to sell cocaine was obtained from an unidentified “street contact.” The court scrutinized the information in much the same way that a court would evaluate whether an informer’s tip was sufficiently reliable to warrant the issuance of a search warrant.¹²⁴ In doing so, Justice Doherty rejected the threshold reliability of the tip used to justify *Simpson*’s detention because:

[C]onstable Wilkin did not know the primary source of the information and he had no reason to believe that the source in general, or this particular piece of information, was reliable. ...

¹²⁰ See e.g. *Ferris*, *supra* note 17; *R. v. Marshall* (1996), 187 A.R. 308 (C.A.); *R. v. Lake* (1996), 113 C.C.C. (3d) 208 (Sask. C.A.); *R. v. Pimentel*, [2001] 2 W.W.R. 653 (Man. C.A.); *R. v. Burke* (1997), 118 C.C.C. (3d) 59 (Nfld. C.A.); *R. v. Carson*, (1998) N.B.R. (2d) 39 (C.A.); and *R. v. Chabot* (1993), 86 C.C.C. (3d) 309 (N.S. C.A.).

¹²¹ *Simpson*, *supra* note 14 at 202.

¹²² *Ibid.* It is clear from this definition that reasonable suspicion has both an objective and subjective component.

¹²³ Assessing the reliability of this information through a race neutral lens is discussed below.

¹²⁴ Of course, since the standard of belief is lower in the *Simpson* context, the reliability assessment is not as rigorous as in the search warrant context. Nevertheless, the relevant reliability factors include the sufficiency of an informer’s information, the factors looked at include the detail of the tip, the source or means of the informer’s knowledge, and whether there are any indicia of his or her reliability. See *R. v. Lewis*, [1998] 38 O.R. (3d) 540 (C.A.) [hereinafter *Lewis*]. In *R. v. Golub*, [1997] 34 O.R. (3d) 743 (C.A.), the court held that this kind of a reliability assessment is not required, even in the arrest context, where the information comes directly from the complainant.

Attendance at a location believed to be the site of ongoing criminal activity is a factor which may contribute to the existence of “articulable cause.” Where that is the sole factor, however, and the information concerning the location is itself of unknown age and reliability, no articulable cause exists. Were it otherwise, the police would have a general warrant to stop anyone who happened to be at any place which the police had a reason to believe could be the site of ongoing criminal activity.¹²⁵

b. Beyond reasonable suspicion

The court’s application of the ancillary power doctrine in *Simpson* made the reasonable-suspicion threshold only one part of the analysis into whether the detention power can be exercised.¹²⁶ The “totality of the circumstances” test looks at balancing a number of relevant factors.¹²⁷ It is important to consider the extent of the intrusion when balancing the relevant factors. So, for example, while *Simpson* may authorize a brief pat-down search for weapons where reasonable suspicion exists to believe that the person is armed, it does not authorize the police to engage in a general search of the person during detention.¹²⁸

Unfortunately, most of the post-*Simpson* jurisprudence has focused on the issue of reasonable suspicion to the exclusion of other relevant factors. Two factors which are particularly relevant in the context of racial profiling include the nature of the offence being investigated and the nature of the police investigation. With respect to the former, *Simpson* suggests that not all offences will trigger the detention power. The court held:

... a reasonably based suspicion that a person committed some property-related offence at a distant point in the past while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about the offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute the suspicion.¹²⁹

It is significant that the court does not use the adjective “serious” to describe the kind of offence that it anticipates would justify an investigatory detention. Rather, the illustrative example given is that of a “violent” crime and a fleeing felon. Arguably, the power would not be justified where a suspect is

¹²⁵ *Simpson*, *supra* note 14 at 204.

¹²⁶ *Ibid.*

¹²⁷ Some of these factors include the duty being performed, the extent to which some interference with individual liberty is necessary in order to perform that duty, the importance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference. See *ibid.* at 199-200.

¹²⁸ See *R. v. Johnson* (2000), 32 C.R. (5th) 236 at 238-239 (B.C. C.A.); *R. v. Polashek*, [1999] 45 O.R. (3d) 434 at 444 (C.A.).

¹²⁹ *Simpson*, *supra* note 14 at 204.

investigated on a public street for simple possession of narcotics, or for a property-related offence not involving violence.¹³⁰

When the police are exercising their crime-control function on the streets, they are generally conducting one of the following functions: crime solving (investigating a specific crime following a complaint from a victim),¹³¹ crime detection (investigating an occurrence they witnessed and suspect to be a crime, or are investigating a high-crime location as occurred in *Simpson*),¹³² and crime prevention (engaging in police surveillance and presence to prevent the commission of criminal offences).¹³³ In *Brown v. Durham Regional Police*, the Court of Appeal held that the *Simpson* power does not authorize detentions in the name of crime prevention. Justice Doherty, for the court, stated:

[T]he “investigative detention” power recognized in *Simpson*... is a reactive power dependent upon a reasonable belief that the detained person is implicated in a prior criminal act. The protection against police excess rests not only in the standard itself, but in its retrospective application. It is self-evident that assessments of what has happened and an individual’s involvement in those past events are much more likely to be reliable than are assessments of what may happen in the future and the involvement that an individual may have in those events should they occur. ... To properly invoke... [their crime prevention function], the police officer must have reasonable grounds for believing that the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is not detained.¹³⁴

This final limit on the *Simpson* power is important because crime prevention policing is far more susceptible to racial profiling than crime solving and crime detection policing.

D. *The Limits of the Current Charter Standards*

It is unfortunate that we do not have any recent data to empirically test whether the *Brown* and *Simpson* standards have had any impact on race-based police stops. It is also unfortunate that the race of the accused is rarely mentioned in judgments as it prevents academics and others from accessing

¹³⁰ This interpretation would be consistent with the approach advocated by R.L. Bogomolny that “[p]erhaps, police intervention [on the street] should be limited only to situations involving potentially violent or dangerous crimes.” See R.L. Bogomolny, “Street Patrol: The Decision to Stop a Citizen” (1976) 12 *Crim. L. Bull.* 544 at 581.

¹³¹ This is representative of a pure reactive model of policing.

¹³² This is representative of a hybrid model of policing that is both reactive and proactive. It is usually initiated by police intelligence or general complaints of criminal activity from the community.

¹³³ This is representative of a pure proactive model of policing.

¹³⁴ *Brown v. Durham Regional Police*, *supra* note 13 at 246, 249. See also the discussion in Young, *supra* note 12 at 389-90. This aspect of *Simpson* distinguishes it from its so-called American counterpart of *Terry*, *supra* note 17 because *Terry* has been interpreted as authorizing crime preventative detentions. See Bogomolny, *supra* note 130 at 549-53.

evidence of police misconduct. Nevertheless, some conclusions can be drawn about the efficacy of the current *Charter* standards to address racial profiling.

As there are few limits on traffic stops and those that do exist are difficult to prove, it is safe to conclude that section 9 of the *Charter* has had little impact on racial profiling in the context of traffic stops. Similarly, the impact of *Simpson* on criminal investigatory stops has likely been hindered by the doctrinal limits in section 9 which serve to insulate many stops from *Charter* review. One such limit, discussed below, is the narrow detention approach that has been developed. In addition, determinations of reasonable suspicion have likely been infected by distorted policing and judicial decision making. On a more theoretical level, there are a number of reasons why *Brown* and *Simpson* have likely had limited success in combatting racial profiling. These limits include:

1. Limited Judicial Review

There is little judicial review of police stops. First, the *Charter* is generally only invoked where contraband is found as a result of the stop and the police decide to lay a charge.¹³⁵ In the vast majority of random stops, however, the police do not find any contraband. As Justice LaForest observed in his dissenting opinion in *Belnavis*,¹³⁶ “[t]he courts have little ‘feel’ for what [unconstitutional misconduct by the police] means to persons who have committed no wrong or any idea of the number of such people who may be harassed by the overly zealous elements in any police force.” Second, the vast majority of accused persons plead guilty.¹³⁷ Once having pleaded guilty, an accused person is foreclosed from challenging the constitutionality of the stop subsequently on appeal,¹³⁸ or arguably even in a civil action.¹³⁹ Finally, in some cases, the accused may not even be able to afford a lawyer to bring a *Charter* application.¹⁴⁰

¹³⁵ For example, no charge may be laid in a case where contraband is found because the officer may decide to trade full enforcement of the law for an opportunity to harass the individual and “show him who is the boss.” This phenomenon is discussed in J. Goldstein, “Police Discretion not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice” (1960) 69 *Yale L.J.* 543 at 580-84.

¹³⁶ *Belnavis*, *supra* note 101 at 376.

¹³⁷ See J.H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: J. Wiley, 1966).

¹³⁸ *R. v. Fegan*, [1993] 13 O.R. (3d) 88 at 91-92 (C.A.).

¹³⁹ The Ontario Court of Appeal left this issue open in *Hudson v. Brantford Police Services Board* (2000), 158 C.C.C. (3d) 390 at 396 (Ont. C.A.).

¹⁴⁰ See K. Makin, “Lawyerless Litigants Slow Wheels of Justice” *The Globe and Mail* (14 January 2002) A1.

2. The Burden of Proving *Charter* Violations

For those police stops that are challenged in court, the burden is on the aggrieved individual to establish a violation of section 9 on a balance of probabilities.¹⁴¹ Placing an onus on the accused to prove the unstated subjective motivations of a police officer explains why few, if any, racial profiling cases have been challenged and exposed in court.¹⁴² This is significant because criminal cases receive a considerable amount of media attention, particularly cases involving allegations of racism.¹⁴³ The absence of a body of racial-profiling cases may partly explain the lack of any desire by Parliament or the police to acknowledge and address the problem.

3. The Gap Between Legality and Applied Law

As Doreen McBarnet pointed out more than twenty years ago, there is a “gap” between the formal law as enunciated by the courts and the manner in which that law is applied by the police. This gap allows the police to avoid complying with judicial pronouncements.¹⁴⁴ For example, since the police have learned that the *Simpson* limits are only triggered upon a “detention,” they can characterize their street-level investigation as a “stop” or as a “polite and consensual” encounter and thus limit judicial scrutiny of their conduct. Similarly, the police are certainly aware of the virtual automatic inclusionary rule under section 24(2) that now exists for drug evidence obtained in violation of the *Charter*.¹⁴⁵ Thus, they know that there will not be any real consequences for their failure to comply with *Charter* standards.¹⁴⁶

4. Due Process is for Crime Control

¹⁴¹ *R. v. Collins*, [1987] 1 S.C.R. 265 at 277 [hereinafter *Collins*].

¹⁴² One of the rare cases is *R. v. Peck*, [2001] O.J. No. 4581 (S.C.J.), online: QL (SCJ). [hereinafter *Peck*].

¹⁴³ For example, the decision in *Brown*, *supra* note 110 received front page coverage in *The Globe and Mail* and was the subject of an editorial. See K. Makin, “Verdict Against Ex-Raptor Quashed” *The Globe and Mail* (30 January 2002) A1; Editorial, “To Raise the Question of Racial Profiling” *The Globe and Mail* (4 February 2002) A12.

¹⁴⁴ See D. McBarnet, “Arrest: The Legal Context Of Policing” in S. Holdaway, ed., *The British Police* (London: Edward Arnold, 1979) at 24-40.

¹⁴⁵ See D. Stuart, “Eight Plus Twenty-Four Two Equals Zero” (1998), 13 C.R. (5th) 50 at 59.

¹⁴⁶ This point is also made in Justice C. Hill “The Role of Fault in Section 24(2) of the Charter” in J. Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Scarborough: Carswell, 1996) at 69-70.

Finally, due process can sometimes enable crime control.¹⁴⁷ For example, there was no generally recognized power to detain individuals for investigative purposes prior to *Simpson*. While *Simpson* placed some limits on the detention power, it also explicitly recognized the power.¹⁴⁸ Consequently, it is quite possible that the police have been conducting even more investigatory detentions since 1993.

These practical, doctrinal, and theoretical limits of the current *Charter* standards under section 9 suggest that we need to rethink how the *Charter* can be applied to combat racial profiling. This is the purpose of the last part of the article.

V. TURNING TO ENHANCED *CHARTER* STANDARDS

A. *Racial Profiling and Equality Principles*

A number of academics have argued that discriminatory policing should be scrutinized directly under section 15(1) of the *Charter*.¹⁴⁹ This would appear to be the logical place to address racial profiling since the practice squarely raises the equality concerns of discriminatory treatment, disproportionate burdens, and intrusions on human dignity. Indeed, the use of racial profiling in the application of the *Ladouceur* or *Simpson* power appears to fall within the current section 15 test set out in *Law*.¹⁵⁰ However, section 15(1) jurisprudence is constantly in a state of flux and is the most difficult *Charter* provision to apply, as the Supreme Court of Canada has conceded.¹⁵¹ Moreover, there is little, if any, section 15(1) jurisprudence in the law enforcement context to guide the substance and procedure of racial profiling litigation.¹⁵² Finally, criminally

¹⁴⁷ See M. Mandel, "Fundamental Justice, Repression and Social Power" in Cameron, *ibid.* at 369; D. McBarnet, *Conviction: Law, the State, and the Construction of Justice* (London: MacMillan, 1981).

¹⁴⁸ Indeed, some academics have interpreted *Simpson* as a victory for crime-control and criticized it for using the *Charter* to enable police power rather than to constrain them. See D. Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough: Carswell, 2001) [hereinafter *Charter Justice*] at 268; R. Delisle, "Judicial Creation Of Police Powers" (1993), 20 C.R. (4th) 29 at 30.

¹⁴⁹ See e.g. *Charter Justice*, *ibid.* at 447. See also Choudhry, *supra* note 10 at 371-77. In the United States, the Supreme Court in *Whren*, *supra* note 108 recognized that the Equal Protection clause under the Fourteenth Amendment applies to scrutinize discriminatory law enforcement.

¹⁵⁰ *Law*, *supra* note 67 at 548-52.

¹⁵¹ *Ibid.* at 507. See also B. McLachlin, "Equality: The Most Difficult Right" (2001) 14 S.C.L.R. (2d) 17.

¹⁵² In *Charter Justice*, *supra* note 148 at 445-46, Stuart points to only two cases where section 15(1) has been used to challenge discriminatory law enforcement. In both cases, the claim failed with little or no substantive analysis. See *R. v. Smith* (1993), 23 C.R. (4th) 164 (N.S. C.A.); *R. v. White* (1994), 35 C.R. (4th) 88 (N.S. C.A.).

accused persons are also unlikely to have the resources to mount the kind of evidentiary foundation that has traditionally been necessary to establish a section 15 violation. Indeed, this is one of the reasons why American commentators conclude that their equal-protection clause offers little hope of combating racial profiling.¹⁵³

A preferable approach would be to develop an equality-based conception of arbitrary detention under section 9 using section 15(1) principles. Since most racial profiling cases are litigated in the criminal arena, it makes sense to focus on one of the *Charter* rights most commonly relied upon in criminal courts. More importantly, our courts have already recognized that a discriminatory exercise of a police detention power violates section 9. Therefore, it is logical to focus our efforts on ensuring that section 9 is interpreted in a manner that will enable claims of racial profiling to be properly and fairly litigated in court.¹⁵⁴

B. *An Equality-Oriented Approach to Section 9*

Using section 15(1) principles to incorporate an equality-oriented analysis into the determination and application of *Charter* standards is not without precedent. In *R. v. Mills*,¹⁵⁵ the Supreme Court of Canada struggled with where to set the boundaries on the section 7 right to full answer and defence in the context of the production of third-party records in sexual assault cases. The Court applied an equality-oriented approach. Chief Justice McLachlin and Justice Iacobucci, for the majority, held:

Equality concerns must also inform the contextual circumstances in which the rights of full answer and defence and privacy will come into play. In this respect, an appreciation of the myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence. ... When the boundary between privacy and full answer and defence is not properly delineated, the equality of individuals whose lives are heavily documented is also affected, as these individuals have more records that will be subject to wrongful scrutiny. ... These concerns highlight the need for an acute sensitivity to context when determining the content of the accused's right to make full answer and defence, and its relationship to the complainant's privacy right.¹⁵⁶

¹⁵³ See T. Maclin, "Race and the Fourth Amendment" (1998) 51 Vand. L. Rev. 333 at 354-62; M.J. Saly, "Comment, *Whren v. United States*: Buckle-Up and Hold On Tight Because the Constitution Won't Protect You" (1997) 28 Pac. L.J. 595 at 621-26. See also the discussion of the evidentiary foundation required in *United States v. Armstrong*, 517 U.S. 456 at 462-63 (1996).

¹⁵⁴ This is not to suggest that section 15(1) could not play a role in addressing racial profiling and its effects. For example, it could be relied upon where section 9 (or section 8) did not apply.

¹⁵⁵ [1999] 3 S.C.R. 668.

¹⁵⁶ *Ibid.* at 727-28.

Similarly in *R. v. Golden*,¹⁵⁷ the Supreme Court of Canada applied an equality analysis when determining the scope of the common law power of the police to strip search individuals following their arrest. Justices Iacobucci and Arbour, for the majority, held:

... [W]e believe it is important to note the submissions of the ACLC and the ALST that African-Canadians and Aboriginal people are over represented in the criminal justice system and are therefore likely to represent a disproportionate number of those who are arrested by police and subjected to personal searches, including strip searches As a result, it is necessary to develop an appropriate framework governing strip searches in order to prevent unnecessary and unjustified strip searches before they occur.¹⁵⁸

By recognizing equality issues in the interpretation of section 9, courts will become more alive and sensitive to the concerns of visible minorities. In this context, the concern is ridding police departments of stereotypical thinking and disparate treatment based on race. The data suggests that this issue, in particular, is of great concern to most members of the black community. The Ontario Commission on Systemic Racism found that 74 per cent of black respondents thought that the police do not treat blacks the same as whites.¹⁵⁹ More recently in *Brown*, Justice Trafford recognized that racial profiling is a “sensitive issue to a multicultural community such as Toronto” and that all efforts should be made to ensure that allegations of racial profiling are dealt with in a sensitive and impartial manner.¹⁶⁰

Equality concerns can be reflected in section 9, for example, by recognizing that police stops of black citizens are far more intrusive than stops of other groups, that they have imposed disproportionate burdens on the black community, and that racial profiling has led to distorted policing. This recognition should prompt more effective standards to ensure that the police power to detain citizens is not being abused. Enhanced equality standards may, in turn, lead to more *Charter* litigation thereby increasing the likelihood that

¹⁵⁷ (2001), 207 D.L.R. (4th) 18 (S.C.C.).

¹⁵⁸ *Ibid.* at para. 83. The Supreme Court has also recognized equality principles in interpreting provisions of the *Criminal Code*. See e.g. *R. v. Parks*, [1993] 15 O.R. (3d) 324 (C.A.) [hereinafter *Parks*]; *R. v. Williams*, [1998] 1 S.C.R. 1128 [hereinafter *Williams*] in the context of jury selection; and *R. v. Gladue*, [1999] 1 S.C.R. 688 in the context of sentencing.

¹⁵⁹ See *Report on Systemic Racism*, *supra* note 7 at 340. See also S. Wortley, “Justice For All? Race and Perceptions of Bias in the Ontario Criminal Justice System—A Toronto Survey” (1996) 38 Can. J. Crim. 439.

¹⁶⁰ *Brown*, *supra* note 110 at 297-98.

victims of profiling will be able to obtain an appropriate remedy.¹⁶¹ This article proposes four new equality standards under section 9.

1. An Enhanced Litigation Standard for Challenging Racially-Based Traffic Stops

One of the problems with the ability of current section 9 standards to control racially motivated traffic stops is the issue of proof. It is difficult to prove a discriminatory intent. Police officers are adept at ensuring that their notes and testimony conform to expected standards of conduct. In some cases, the officer may fabricate evidence in order to disguise the true reason for the stop. In others, officers may not even be aware that race played a factor in the stop.¹⁶² However, the compelling evidence of racial profiling in the United States, England, and Canada creates a strong inference that when the police stop black motorists, they sometimes do so based on race.

In light of this evidence and the evidence of systemic racism in Canada, the evidentiary burden under section 9 should shift to the Crown to establish, on a balance of probabilities, that a so-called routine vehicle stop of a black driver was not motivated by race. This approach resembles, in many ways, the current challenge for cause process where evidence of widespread racism is deemed to rebut the common law presumption that all prospective jurors are unbiased requiring all jurors to be pre-screened under section 638(1)(b) of the *Criminal Code*.¹⁶³

Not only is this burden consistent with equality and fairness principles, but also, with precedent and policy. As a matter of precedent, our courts have imposed a number of shifting burdens in the *Charter* context, the most notable being in section 8.¹⁶⁴ As a matter of policy, the Crown is “functionally

¹⁶¹ It is important to point out that *Charter* remedies for racial profiling are not limited to the exclusion of evidence under section 24(2). Damages and stays of proceedings under section 24(1) are available where no evidence was seized during the police stop. On the issue of stays as a possible remedy, see V.C. Toselli, “Arbitrary Detention And Judicial Stay of Proceedings” (1991), 80 C.R. (3d) 86.

¹⁶² See *Brown*, *supra* note 110 at 299.

¹⁶³ See *Parks*, *supra* note 158; *Williams*, *supra* note 158.

¹⁶⁴ For example, once the accused establishes that a search was conducted without a warrant, the onus shifts to the Crown to establish on a balance of probabilities that the search was authorized by law, that the law is reasonable, and that the search was conducted in a reasonable manner. See *Collins*, *supra* note 140 at 278. Indeed, the Supreme Court of Canada has frequently resorted to shifting burdens. See e.g. *R. v. Harper*, [1994] 3 S.C.R. 343 at 354; *R. v. Stillman*, [1997] 1 S.C.R. 607 in the context of section 24(2). See also *R. v. Daviault*, [1994] 3 S.C.R. 63; *R. v. Stone*, [1999] 2 S.C.R. 290. In this latter context, the Supreme Court has imposed an evidentiary burden on the accused because of the difficulty of disproving a claim of extreme intoxication or other form of automatism.

responsible for the maintenance of the administration of justice.”¹⁶⁵ Since the police are part of the administration of justice, the Crown should be held accountable for police misconduct such as racial profiling. Moreover, given the evils of racial profiling, any doubt about the issue should result in an invalidation of the stop.

Finally, the heaviness of the Crown burden should not be exaggerated. The Crown may discharge its burden in one of three ways. First, by establishing that reasonable suspicion existed for the belief that the driver or occupants were implicated in a criminal offence. This would serve to take the case out of the *Ladouceur* context. Second, by establishing that the stop was not a pretextual one but rather a routine traffic stop. Finally, and more satisfactorily, by establishing that the police officer(s) or police division in question do not stop a disproportionate number of black drivers. This data could be obtained by the attorney-general asking the solicitor-general to require the police to keep track of who they stop by recording all police stops.¹⁶⁶ This data could be recorded in a number of ways. The police could be required to manually keep track of who they stop. One of the concerns that has been raised by this approach is that the police will “fudge” the data.¹⁶⁷ To avoid this problem, video cameras could be installed in all police cars. Alternatively, the police officers could be required to advise the dispatcher of the race of the driver before leaving their cars.

If enough of these requests are made, we may see the emergence of legislation requiring all police officers to keep track of who they stop and investigate. As of August 1, 2001, thirteen U.S. states had passed this kind of legislation in response to the racial-profiling controversy. Data collection is also part of the proposed federal *End Racial Profiling Act, 2001*.¹⁶⁸ Federal and provincial legislation prohibiting the use of racial profiling and requiring the police to be accountable through tracking who they investigate is an important step to take in solving the problem. In addition, parliamentary expression of the

¹⁶⁵ J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 420-21.

¹⁶⁶ A data collection system is currently being implemented by Canada Customs. In a settlement agreement in the racial profiling case of *Pieters v. Canada (Department of Revenue)* (2001), C.H.R.R. Doc. 01-201 (C.H.R.T.), online: Canadian Human Rights Reporter <<http://www.cdn-hr-reporter.ca>> (date accessed: 12 June 2002). Canada Customs agreed to conduct a pilot project to keep track of the race and ethnicity of individuals subjected to secondary inspection at ports of entry. Canada Customs also agreed to consider the permanent collection of such data. See J. Saunders, “Traveller wins Customs fight” *Globe and Mail* (6 February 2002) A1.

¹⁶⁷ This “fudging” happened, for example, in New Jersey. See D. Kocieniewski, “Trenton Charges 2 Troopers With Falsifying Drivers’ Race” *The New York Times* (20 April 1999) B1.

¹⁶⁸ See D.A. Harris, “Racial Profiling: The Importance of Federal Legislation” (1 August 2001), online: United States Senate <<http://www.senate.gov/~judiciary/oldsite/te080101sc-harris.htm>> (date accessed: 1 June 2002); *End Racial Profiling Act*, *supra* note 12.

abhorrence of racial profiling would serve to strengthen *Charter* standards and perhaps lead to greater compliance by the police.¹⁶⁹

2. Enhanced Doctrinal Standards for Challenging Racially Motivated Criminal Investigatory Detentions

a. Interpreting reasonable suspicion to avoid distorted policing and law

The problems of distorted policing are particularly acute in the context of criminal investigatory detentions. There is no question that the requirement of an individualized standard of belief as a minimum standard for *Simpson* detentions provides an important protection against the use of racial profiling. However, because reasonable suspicion is such a low standard of belief, it depends heavily on an officer's experience and his or her interpretation of unfolding events when the power is being used to determine whether criminal activity is afoot, that is, crime detection. As noted earlier, this experience and interpretation can be influenced or distorted by unconscious racism.¹⁷⁰ For example, an officer may see a black man in a white neighbourhood carrying a large package and may stop the man to investigate what is in the package because, in the officer's mind, he appears "out of place." Alternatively, an officer may interpret a handshake between two black men in a high crime area as a drug transaction. Such innocent behaviour might not be interpreted in such an incriminating manner if the men were white.

Consequently, it is imperative that courts be cognizant of distorted policing when they defer to the experience of the officer in assessing whether that officer reasonably suspected that he or she was witnessing criminal activity. Courts should also carefully assess the credibility of the police officer to ensure that the officer's evidence about the reasons for the stop are not fabricated.¹⁷¹ Similar caution should be exercised when courts are assessing whether ambiguous conduct objectively rises to the level of reasonable suspicion. In particular, courts should be very careful about what weight is given to so-called "flight" or other evasive action and, in particular, the designation of an area as

¹⁶⁹ In addition to a mandatory data collection requirement, such legislation could create a specific civil tort (that is prohibited racial profiling) and mandate that all police forces take measures to address racial profiling. Moreover, by linking funding with compliance, Parliament could give the *Act* the necessary teeth to ensure that it is not ignored by police forces.

¹⁷⁰ This point is also persuasively made in *No Equal Justice*, *supra* note 30 at 41-47.

¹⁷¹ See *e.g.* *Peck*, *supra* note 142 where Justice Trafford was satisfied that a drug squad officer lied about seeing the accused act suspiciously.

a “high-crime area.”¹⁷² It is important to remember that the designation “high-crime area” is not so much an accurate reflection that more crime occurs in the area as compared to other areas in the city, but rather, that the area is over-policed. Moreover, as a matter of policy, treating the place of the stop as a relevant consideration in the reasonable suspicion calculus unduly prejudices low-income and minority residents. As the Ninth Circuit Court of Appeals observed in *United States v. Arvizu*:

[O]ne’s place of residence is simply not relevant to a determination of reasonable suspicion. Otherwise, persons forced to reside in high crime areas for economic reasons (who are frequently members of minority groups) would be compelled to assume a greater risk not only of becoming the victims of crimes but also of being victimized by the state’s efforts to prevent those crimes—because their constitutional protections against unreasonable intrusions would be significantly reduced.¹⁷³

b. Rethinking the meaning of detention

As noted earlier, not every police stop of an individual on the street will trigger section 9. Applying the section 10 detention jurisprudence, one could argue that most street stops of pedestrians do not qualify as a detention. This is obviously problematic as it serves to further insulate race-based stops from judicial review. A better approach would be to deem all police investigative stops a detention under section 9.¹⁷⁴ This suggestion

¹⁷² See the discussion in D.A. Harris, “Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked” (1994) 69 *Indiana L.J.* 659 at 669-75, 685-87. Harris would go so far as to prohibit the combined use of innocent and necessary activity (that is being in an area where one resides and works) and constitutionally protected activity (that is exercising one’s right to be left alone) as factors to be considered in the reasonable suspicion calculus.

¹⁷³ 232 F.3d 1241, 1250 (9th Cir. 2000).

¹⁷⁴ A similar approach is advocated in Bogomolny, *supra* note 130 at 560-67.

finds support in principle and policy. There is no doctrinal impediment to having a different detention test for sections 9 and 10, particularly in light of the judicially created *Simpson* power. This point is made in Justice Lane's common sense and articulate judgment in *Powell*:

[I]n the context of s. 8 and s. 9 at least, there has been a movement away from a strict application of the *Moran* test in the determination of whether or not a detention has occurred. Post-*Mellenthin*, the cases appear to indicate: 1) that there can be a range of detentions including a "brief detention" for the purpose of identification, 2) compulsion to respond to questions posed by a police officer can be presumed, unless there is evidence indicating informed consent, and 3) that consideration of whether the police had "articulable cause" or authority to stop someone in the first place is fundamental to the legality of the entire encounter. Where there is no "articulable cause", the court can find that there was a detention and an illegal search without the need for any testimony by the accused as to his subjective perception of a sense of compulsion, and without considering the specific factors set out in the *Moran* test.¹⁷⁵

Indeed, such an approach is consistent with *Simpson*'s recognition that an investigatory detention should be brief.¹⁷⁶ Moreover, differentiating detentions under sections 9 and 10 would be one way of resolving an issue left open in *Lewis*¹⁷⁷ concerning whether the police must comply with section 10(b)'s informational component on all *Simpson* detentions. By treating the meaning of detention differently under section 9, not all investigatory detentions would require right-to-counsel warnings. Section 10(b) would only be triggered where the *Simpson* detention is no longer brief and begins to resemble the kind of police encounter traditionally associated with a section 10 detention.

Finally, deeming all street-level investigative stops as detentions is yet another example of how applying equality principles would lead to more sensitive standards under section 9. It is an approach which recognizes the reality that blacks and other visible minorities perceive things differently from others, particularly in relation to the police.¹⁷⁸ Can it really be said, for example, that it is reasonable to expect that a young black man in Toronto would feel free to refuse an officer's request to "come over" or to "stop"?¹⁷⁹

¹⁷⁵ *Powell*, *supra* note 90 at 108.

¹⁷⁶ *Simpson*, *supra* note 14 at 204. While *Simpson* leaves open the possibility that circumstances will justify a detention of some duration, such situations will be rare. See *e.g. R. v. Nicely* (2000), 32 C.R. (5th) 340 (Ont. C.A.) where the Ontario Court of Appeal inferentially accepted that "ushering" a suspect "off the street towards a building" in order to radio the Street Crime Unit for immigration information could not be done pursuant to a *Simpson* detention.

¹⁷⁷ *Lewis*, *supra* note 124 at 551.

¹⁷⁸ See R. Delgado, "Shadowboxing: An Essay On Power" (1992) 77 Cornell L. Rev. 813.

¹⁷⁹ As Justice Mack observed in her dissenting opinion *In re J.M.*, 619 A.2d 497 at 513 (D.C., 1992), "I respectfully venture to suggest that no reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away from a drug interdicting team." See also E.L. Johnson, *supra* note 23 at 662-63; R.S. Susskind, *supra* note 23 at 342-48.

c. Rethinking the meaning of arbitrariness

While every vehicle detention that is not authorized by *Ladouceur* is arbitrary under section 9, the same is not true for other detention situations. Indeed, following earlier jurisprudence, *Simpson* posits that not every unlawful criminal investigatory detention is necessarily arbitrary under section 9.¹⁸⁰ This is troubling because it may preclude victims of racial profiling from obtaining a remedy under the *Charter*. Again, giving special attention to equality principles, a better approach would be to recognize that where a stop of a member of a racial minority cannot be sustained either under the *Ladouceur* or *Simpson* powers, the stop was more likely a result of racial profiling and such detentions must be deemed arbitrary.

VI. CONCLUSION

As a result of the work of the Ontario Commission on Systemic Racism, there is now compelling evidence of racial profiling in Toronto. This is an offensive practice which has dramatic and staggering consequences for the black community. There is no reason to believe that racial profiling does not exist in other major cities in Canada and all Canadians should be concerned about the use of this practice by the police. The Ontario Court of Appeal in *Brown* and *Simpson* has gone some way toward addressing what was, at the time the decisions were rendered, only a theoretical concern. However, racial profiling is so invidious and difficult to prove that the current *Charter* standards are not sufficient to deal with this problem. Enhanced *Charter* standards have been articulated and advanced in this article as an important way in which to provide some redress for and prevention of racial profiling. Those enhanced standards can come from a rethinking of section 9 through the lens of section 15(1) equality principles. While it is hoped that these standards will stimulate institutional reform, they are worth pursuing even if they have no effect on Parliament and only a marginal effect on the police. As was once observed:

That constitutional dictates have not been and might not be enforced is not sufficient reason for courts to stop espousing them. It is important for the courts to say that suspicion based on factors beyond a person's control is wrong, and that action clearly based upon such suspicion will not be tolerated. Such a statement may be a small consolation to the minority group member stopped on the basis of his race, but it is better than nothing.¹⁸¹

¹⁸⁰ *Simpson*, *supra* note 14 at 205.

¹⁸¹ S. L. Johnson, "Race and the Decision to Detain a Suspect" (1983) 93 Yale L.J. 214 at 257-58.