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RacialProfiling

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Racial Profiling

A Special BCCLA Report on Racial Profiling in Canada

The B.C. Civil Liberties Association: Working to End Racial Profiling

Racial profiling is bad policy. Although promoted as improving security, it has not been demonstrated to do that. To the contrary, it decreases security, including by undermining the respect to which each member of society is entitled and weakening the fabric of our multicultural democracy. Under a regime employing racial profiling, travel by those who fit the suspect profile is impeded. The right to leave home and move freely without harassment and scrutiny is infringed or denied. That infringement extends not just to social and commercial activities, but also participation in democratic processes, including exercising the right to vote and the right to attend and participate in the debates of the day. Further, by heightening racial tensions, racial profiling affords a free pass to those who would destabilize society by accentuating differences among citizens as a basis for unequal treatment. The social cost arising from such steps ought not, and cannot, be measured in money. For the BCCLA, racial profiling's remarkable costs to our democratic life as Canadians, as well as to our safety and the safety of others we care about, are inexcusable.

On May 12, 2007, with the generous support of the Law Foundation of British Columbia, the BCCLA welcomed some of the foremost thinkers on the issue of racial profiling to the Wosk Centre for Dialogue. Guests of the Association that day included esteemed immigration and human rights lawyer Barbara Jackman; scholar and future BCCLA board member, University of Windsor Associate Professor Reem Bahdi; Pritchard-Wilson Chair in Law and Policy at the University of Toronto, Kent Roach; RCMP Chief Superintendent Richard Bent; criminology scholar, Professor Scot Wortley, also of the University of Toronto; leading minds in the area of racial profiling policy, Professor Frances Henry and Carol Tator of York University and Daniel Moeckli, an Oberassistent in Public Law at the University of Zurich and a Fellow of the University of Nottingham Human Rights Law Centre.

Rob Holmes
BCCLA President

All of the guests of the Association welcomed that day produced papers for presentation at the conference that caused a great deal of public discussion and debate on the issue of racial profiling, an issue that even then was struggling to find broader recognition as a harm to public security as well as a harm to the participation of many groups in the fulsome debate and struggle of our democratic process. The BCCLA pledged that day to publish the presented papers and make them widely available, and the happy day has finally come that we have made good on that promise.

Given the time that has passed since the date of the conference, we are very pleased to make these papers available together with an update from BCCLA board member Reem Bahdi. Most of the papers' authors took the opportunity presented by the publication of their papers to update their findings and conclusions to make them relevant to Canada in 2010. We greatly appreciate their time and effort in the first, and now this second, go around.

The BCCLA remains resolutely opposed to racial profiling. To that end we trust that this collection of papers enlivens and informs debate, enlightens readers to nuances of the issue, and encourages people to become involved with the BCCLA. Our work towards eliminating racial profiling is ongoing. Educating the public about the issues and encouraging government and police officials to show due respect for the rights and liberties of all remains our chief concern. Thank you for your continuing interest in our work.

Setting the Stage:
An Introduction to Six Papers on Racial Profiling
March 2010

Reem Bahdi[1]

Umar Farouk Abdulmutallab's failed attempt to ignite a bomb on Christmas Day, 2009, as Northwestern flight 253 descended to the Detroit airport has spurred a new round of debate over the efficacy of racial profiling as a national security strategy. In May 2007, in Vancouver, B.C., the BC Civil Liberties Association (BCCLA) held a public conference on racial profiling. Questions of racial profiling – broadly understood as profiling on the basis of race or religion – had hardly received the attention it deserved at the time and the Association's board felt that it was important to encourage a public and open dialogue on the issue. To that end, they invited a number of experts to share their opinions about racial profiling and national security. The papers commented on here reflect the range of papers presented at the Vancouver conference.

While some considerable time has passed since the 2007 conference, the problem with profiling and stereotyping in Canada has yet to be adequately addressed. For example, both the O'Connor and Iacobucci commissions of inquiry found that national security agencies had improperly labelled four Arab Muslim men an imminent threat to Canada and wrongly linked them to Al Qaeda. These labels, according to both Commissioners, were inflammatory and lacked investigative foundation. While the commissions condemned the labelling and, in the case of the O'Connor Commission, provided important policy statements against profiling, they did not offer a sustained analysis of whether racial profiling or stereotyping came into play based on the facts before them.

In a continuing effort to encourage greater discussion of the meaning and consequences of racial profiling, the BCCLA board decided to make the 2007 conference papers available to readers on the Association's website. In the Summer of 2009, the Association adopted a policy paper on racial profiling in which it committed to work against racial profiling by, among other things, contributing to public education on the subject. A number of the authors who participated in the 2007 conference were invited to update their papers over the Spring and Summer of 2009. By making these papers available, the BCCLA aims to promote public education about this pressing topic. This short essay is meant to "set the stage" for the reading of the five papers that are available on associated web pages.

The authors who wrote the papers represent various disciplines, perspectives and experiences. They all agree that racial profiling cannot be tolerated in a multi-cultural society and accept that racial profiling is not an effective law enforcement strategy. However, they take different positions about whether profiling is, in fact, practiced in Canada and have different reasons for rejecting profiling.

Reg Whitaker begins his paper, *Profiling: From Racial to Behavioural to Racial?,* with a profound and eloquent observation: racial profiling inevitably reflects society's fault lines. He reviews the logic, feasibility and effectiveness of adopting "behavioural profiling" as a security-screening device at airports. He emphasizes that behaviour profiling can shade into racial profiling. Adopting Ben Gurion Airport in Israel as his test case, he notes that behavioural profiling *works*, but

the attendant human rights costs are too high for most societies to absorb because behaviour profiling becomes mingled with racial profiling in practice.

In presenting his analysis, Whitaker posits a trade-off between human rights and security. Some might argue that the trade-offs are worth it. Whitaker is more cautious. He concludes that behavioural profiling cannot be dismissed because it has some predictive value, although great care is required in adopting and implementing profiling policies:

> *Perhaps the most useful advice is to urge moderation and restraint. If the racial and religious elements of behavioural profiling can be handled with extreme caution and circumspection, within a framework that insists upon respect for human rights and non-discrimination, behavioural profiling may prove to be a risk-management device that offers some additional security. But it does negotiate a fine line, with an ever-present downside.*

Whitaker acknowledges some of the inefficiencies and harm associated with profiling, but remains committed to the presumption that profiling, at some level, can have predictive value. He notes, for example, that terrorist attacks against an Air India flight that originated in Canada might have been averted if a behaviour- profiling policy had been in place:

> *When passenger "M. Singh" showed up at the Canadian Pacific ticket counter in Vancouver with a demand that his bag be interlined[2] to Air India flight 182 departing from Toronto Pearson, even though he had no confirmed ticket for that flight, a series of warning flags should have been applied. The expensive ticket had been purchased at the last moment in cash; the passenger name had subsequently been changed; and "M. Singh's" manner in demanding the improper interlining of his bag was aggressive and bullying. All these anomalies should have singled out "M. Singh" and his bag for police attention, and the lives of 329 people would have been spared. Tragically, the harried*

> *CP ticket agent, against her better judgment, against airline rules, and to her lifelong regret, gave in and unwittingly allowed the fatal bag to proceed.*

Whitaker strives, admirably, to take both sides of the debate seriously. He does not, however, engage with those who question that human rights and security need be traded off against each other. As I discuss in my own contribution to this collection, scholars like Bernard Harcourt, author of *Against Prediction,* point to the substitution problems and evasion opportunities occasioned by racial profiling. Harcourt and others reject the security versus human rights trade-off that frames much of the profiling analysis because they have not been convinced that profiling *does* lead to security (though it clearly violates human rights). Their logic is simple: if there is no evidence of the security gains attributable to profiling, then there is no need to ask whether the human rights losses are worth it from a security perspective. Consider Air India, for example. While behavioural profiling may have prevented the bombing by drawing attention to the irate and insistent behaviour of the bomber, one needs to consider whether adherence to racially-neutral airline policies in place at the time would have achieved the same results.

Other important questions remain unanswered in the paper as well. Whitaker draws his conclusion that profiling works largely from his briefings with Israeli security officials and his tours of the main Israel terminus, Ben Gurion Airport. As he notes, there have been no terrorist attacks at Ben Gurion or on the Israel airline, El Al. This is certainly an impressive claim. However, one should be very cautious in concluding that profiling therefore works in the short- or long-term as a counter terrorism measure. Israel's profiling practices extend beyond far beyond Ben Gurion. Israel's laws and policies define the behaviour and limit the mobility of individuals according to race and religion through an elaborate system of controls and screening devices that include check points, walls, gates, trenches, towers, road blocks

and by-pass roads – access around, through or on these structures is explicitly defined by race and religion. Yet, Israel is nonetheless subject to terrorist attacks. Clearly profiling does not work in these contexts. Indeed, one might wonder whether animosity and conflict are exacerbated rather than thwarted by the very system of racial and religious profiling and controls that purportedly aim at security. In all fairness to Reg Whitaker, his paper does not purport to answer all questions – it is simply intended to set out the parameters of the debate. My own observations are intended to broaden those parameters.

My own contribution to this collection, authored with Olanyi Parsons and Tom Sandborn, takes the form of the *BCCLA Position Paper on Racial Profiling* as adopted by the BCCLA board. The paper surveys the experiences of Blacks, Arabs, Muslims and Aboriginal peoples with profiling in Canada, but it does not purport to offer an exhaustive overview of racial-profiling practices or the communities that are affected by it. The paper sets out the various arguments advanced by proponents of profiling such as the claim that it proves to be an invaluable risk-assessment tool. A question often repeated by those who support profiling is: Since all the men involved in the September 11 attacks were Arab and Muslim, does it not make sense to concentrate greater resources on people who share this profile than on others? The answer developed in the paper is: No. The paper explores whether racial profiling can lead to greater security or, put differently, whether there must inevitably be a trade-off between human rights and national security. It concludes that racial profiling does not generate security. As Bernard Harcourt observes:

> There is no reliable empirical evidence that racial profiling is an effective counter terrorism measure and no solid theoretical reason why it should be. The possibility of recruiting outside the profiled group and of substituting different modes of attack renders racial profiling in the counter terrorism context suspect.

Moreover, a recent study sponsored by the Canadian Human Rights Commission and the Canadian Race Relations Foundation has confirmed that racial profiling is not an effective law enforcement strategy in *any* context. The authors of the paper note that while statistics might be useful to determine risk, channel resources and define priorities in other aspects of law enforcement, statistical analysis aimed at supporting racial profiling is unreliable. In the national security context, the authors emphasize, for example, that the statistics have no predictive value because the samples are too small to be meaningful.

Turning their attention largely to the profiling of Black communities in Canada, Frances Henry and Carol Tator's *Theoretical Perspectives on Racial Profiling in Postmodern Societies* accepts Whitaker's starting point. They agree that racial profiling reflects society's fault lines. However, they part company with Whitaker by concluding that profiling can never be an effective law enforcement tool. They set out to illustrate the futility of employing racial profiling in an anti-discriminatory fashion precisely because racial profiling is a product and tool of discrimination. The implication to be drawn from Henry and Tator's essay is that Whitaker fails to appreciate the full significance of his own observation that profiling reflects society's fault lines. As Henry and Tator put it:

> "*[t]he processes of racialization are deeply embedded in the ideological frameworks and interlocking discursive spaces and structures of lawmaking, immigration, criminal justice, education, the media and various other vehicles of social control and representation.*"

Recognizing that police and other agencies deny relying on racial profiling in their law enforcement work, Henry and Tator point to the development of counter-narratives that have emerged from racialized communities and their allies who take very seriously the experiences racialized communities have with profiling. They examine the narratives advanced by police, including the

argument that racial profiling, when it does take place, is the product of a few "bad apples" or individual, rogue officers who do not represent the position of the larger institution. They also analyze the techniques adopted by apologists for profiling and conclude that these constitute an effort to control and limit the kinds of conclusions that can be drawn about profiling. They conclude by reminding readers that racial profiling, to the extent that it is used and justified by law- enforcement agencies, is supposed to keep society safe from violence. Yet, they argue, profiling is *itself an act of violence*. Not only does it impose hardship upon individuals and communities, "*it challenges the ideals and core values of a democratic liberal society.*"

While Henry and Tator focus on profiling as a manifestation of larger social biases, Barbara Jackman, in *Sustaining Investigations and Security Certificates through the Use of Profiles*, employs the case of Hassan Almrei, a Syrian Muslim man held under a security certificate, to illustrate how profiling operates within the legal system. She argues that in national security cases, profiling lies at the core, and not the periphery, of decision-making, but that it is very difficult to prove that profiling has taken place because profiling is embedded in the inferences and conclusions drawn by virtually all actors in the national security system, from the national security agencies themselves to the courts that review them. National security agencies openly indicate that they rely on profiles such as travel patterns, political views and associations.

Jackman argues that these profiles are *implicitly racialized*. An Arab, Muslim man may become the subject of a national security investigation not specifically because he is Arab or Muslim. Rather, his Arab and Muslim identity either implicitly becomes the reason why he is targeted or it becomes the lens through which acts and incidents in his life are judged. For example, individuals come under scrutiny because they might have travelled to Afghanistan to fight

against the Soviets. Since it is mostly Arabs and Muslims who tend to travel for this reason, the scrutiny is implicitly based on race. Jackman notes that agency claims that they do not rely on racial profiling is thus based on a logical and factual fallacy: national security agencies treat profiling based on travel as racially-neutral when it is, in fact, a *substitute* for race and religion.

Moreover, the racial and religious identity of the individual becomes the lens through which the dangerousness of the activity is assessed. Thus, for example, an Arab Muslim who travels to Afghanistan is ultimately presumed to have done so for nefarious reasons. Even though most individuals who travelled to fight against the Soviets in Afghanistan are not prone to fundamentalism, national security agencies presume that they are fundamentalists. Further, they interpret the life events of their targets through this lens of fear and suspicion while remaining unaware that they are stereotyping and making false generalizations. As Jackman puts it:

> *It is the character of being Arab and/or Muslim that informs the concern about travels and other such elements of a profile. As such, what results is a nuanced profile, rooted in racialized characteristics, but not perceived as grossly stereotypical. The additional factors are seen as being grounded in the experience of the intelligence service with terrorists, and as such are considered "objective" indicators of concern, rather than being grounded in racialized characteristics. Hence, the "profile" is legitimized. This divorces the profile from the racialized characteristics although it is a profile which draws its very sustenance from such characteristics. [Emphasis supplied.]*

Indeed, the Federal Court recently quashed the certificate issued against Almrei on December 14, 2009. In a fascinating 183-page decision, The Honourable Justice Mosley noted the case against Almrei was based on invalid inferences, questionable logic and faulty information. The case serves as a wake-up call for anyone interested in national security and intelligence gathering

in Canada and reaffirms the concerns raised by Barb Jackman.

Richard Bent wrote his paper, *Racial Profiling and National Security: Canada's Response to Terrorism*, while holding the post of Deputy Criminal Operations Officer, Community, Contract and Aboriginal Policing Services, RCMP "E" Division. Bent's main argument is that police do not engage in systemic profiling though "a few bad apple" officers might turn to profiling. He explores a dimension of the racial profiling debate that has not received sufficient attention: the need to build community trust to ensure effective cooperation between profiled communities and the police. Bent argues that trust must be built to counter the perception that racial profiling exists. To that end, Bent reviews the various trust-building initiatives that the RCMP and federal government have undertaken:

> *Created in February of 2005, the CCRS (Cross Cultural Roundtable on Security) is composed of 15 volunteers from a range of ethnicities and cultures who are tasked with upholding the government's commitment to involve all Canadians in building and maintaining an effective approach to the security and protection of Canada. The creation of the CCRS appeared to reflect awareness that national security concerns could divide communities and result in the singling out of minority groups. In creating the CCRS, the government sought to maintain ongoing community dialogue encouraging understanding and respect of all segments of society.*

Bent also discusses specific RCMP initiatives. For example, the RCMP Integrated National Security Enforcement Teams (INSET) consulted with members of the Muslim community to develop sensitivity training materials:

> *The national security educational components focus on diversity and culture, human rights concerns in national security, racial profiling, bias-free policing, national security community outreach programs, and national security youth outreach. Examples of*

> *this cultural awareness education include cultural practices, such as offering to remove shoes, asking if a woman is comfortable alone with a male investigator, or allowing a witness to be accompanied by someone during an interview.*

Richard Bent holds a generally positive view of these initiatives. Unfortunately, Bent's paper does not mention the experiences of Maher Arar, Abdullah Almali, Ahmed Al Maati or Muyyad Nurredin who, in part as a result of actions taken by the RCMP and other Canadian officials, found themselves in overseas torture chambers. As noted above, the commissions of inquiry that examined their stories found that the men were improperly tarnished with associations to Al Qaeda and labeled as imminent threats to Canada. Both commissions found that the labels were inflammatory and lacked investigative foundation. While the Iacobucci Report, which examined the cases of Almalki, El Maati and Nurredin, was issued after Bent wrote his paper, the O'Connor Inquiry reported several months before Bent's paper. Readers may well be disappointed that Bent does not raise the case of Maher Arar either in discussing the extent to which profiling might have been at play in his story or in discussing the impact of Arar's experiences on trust-building between Arab and Muslim communities and the police. As I testified before the O'Connor Inquiry, Arabs and Muslims in Canada fear being "Arar'ed," by which I meant that they fear having innocent actions interpreted through the lens of Islamophobia and anti-Arab stereotyping.

While they do not engage the specific RCMP or federal initiatives discussed by Bent directly, both the Whitaker and Henry and Tator papers implicitly deal with the issue of trust. Whitaker's paper suggests that the discourses around profiling are so diverse that trust-building would prove complicated indeed. Henry and Tator's analysis suggests that trust-building is impossible if the agencies that police communities do not take the experiences of members of these commu-

nities seriously. In other words, the problem is not simply one of "perception," but of the real experiences of individuals and communities that have endured profiling.

Daniel Moeckli's contribution to this collection, *Terrorist Profiling and the Importance of a Proactive Approach to Human Rights Protection*, puts racial profiling into a larger global context. In contradistinction to Bent, Moeckli contends that police forces across the Western world rely on racial profiling. He observes that counter terrorism strategies tend to give police forces special powers not ordinarily available in other criminal or administrative contexts. He notes that this potent arsenal has been further expanded after September 11, as law enforcement agencies have been granted evermore power to deter and prevent, rather than just to investigate and prosecute, terrorism.

Moreover, law enforcement authorities generally enjoy extremely wide discretion in deciding how – and in particular against *whom* – to use these far-reaching powers. The broad discretion that law enforcement authorities enjoy is generally not subject to robust judicial review. Moeckli's paper examines whether selecting persons for enhanced law enforcement scrutiny based on race or religion is compatible with international human rights standards and offers some possible strategies of ensuring that law enforcement authorities comply with these standards when engaging in anti-terrorism efforts. To do this, the paper examines the police tactics employed after September 11 in three Western democracies: the United States, the United Kingdom and Germany, all of them states with relatively large immigrant communities.

Like Jackman, Bahdi, and Henry and Tator, Moeckli takes seriously claims by racialized communities that they are subject to profiling. Like these other authors, he also rejects racial profiling as a national security strategy. He demonstrates how profiling violates international human rights law and indicates how the technique has proven

unhelpful across Europe. While Moeckli does not examine developments in Canada, his conclusions regarding the wide range of discretion afforded to law enforcement agencies and the lack of effective oversight of these agencies certainly applies to Canada. As he notes, national security agencies turn to the prevention side of their mandates to seek even broader discretion.

Testimony at the O'Connor Commission revealed that CSIS wanted the RCMP to lay charges against Abdullah Almalki while he was held in Syria so that he could be brought back to Canada. However, the RCMP did not have enough evidence against Almalki to charge him, so their strategy shifted to prevention, rather than enforcement. In the RCMP framework, prevention including seeking access to the information that Abdullah might provide under torture by the Syrians. "We may have to take and be satisfied with the prevention side of the mandate and hope that additional information can be gleaned with respect to his plans…" wrote Corporal Rick Flewelling, the man tasked with overseeing the RCMP anti-terrorism investigation, with reference to Abdullah Almalki while Almalki was being held by the Syrians.

Similarly, Moeckli's observations about the lack of effective oversight proves relevant to Canada. The O'Connor Inquiry made several recommendations regarding the need for a new oversight body, but such a body has yet to be introduced. Shirley Heafey, a BCCLA board member and former Chair of the Commission of Public Complaints Against the RCMP (the CPC), has repeatedly stressed that the CPC lacks the resources and legal authority to oversee the work of the RCMP. The CPC, unlike the Security Intelligence Review Committee which oversees CSIS, does not have the clear statutory authority to compel testimony or require the production of documents or impose change upon the RCMP. Heafey bluntly summed up the situation: "We can't investigate unless there's a complaint and even if there is a complaint, we can't see the information," she said. "So for all practical

purposes, there's no civilian oversight." Even the Security Intelligence Review Committee, often heralded as the best model for oversight and accountability, can only make recommendations, not binding decisions.

There have been a number of significant developments since the five papers referred to here were written. For example, as noted above, the Federal Court has reviewed the reasonableness of the security certificates issued against several Arab, Muslim men including Hassan Almrei. For example, the public summary of the "Security Intelligence Report" that supported the government's case against Almrei was reviewed by expert witness Professor Brian Williams, who concluded that the report "was not written by experts," but appeared as if the authors had cobbled the material together in about two weeks using Google as their primary resource. Justice Mosley of the Federal Court observed,

> As I understand the Ministers' position, anyone who shares the principles of Al Qaeda and is in some way linked to it is a member of the Bin Laden network... .

> [However,] individuals and groups who have no connection with Al Qaeda cannot be said to be part of the network without some other indicia of membership such as willingness to follow directions from Bin Laden. It is not enough, in my view, to assert membership in an organization merely on the basis of a shared ideology. That is what I believe the Ministers have been attempting to do in this case. They can't establish that Almrei is a member of Al Qaeda or an affiliated organization and have attempted to bring him within the scope of this amorphous concept of a network based on his belief and participation in jihad.

> An "unrestricted and broad" interpretation of organization does not encompass those who have expressed views that are sympathetic to the ideology of Bin Laden and Al Qaeda and approval of the

> actions they have taken. That is far too broad a net to cast and would be incompatible with the freedom of expression guaranteed by our Charter.

While Justice Mosley does not discuss the role of racial profiling, the findings in the case lend credence to Barb Jackman's central claim: the racial and religious identity of the individual becomes the lens through which risk or dangerousness is assessed. A full analysis can be found on the BCCLA national security blog at http://nationalsecurity.bccla.org/.

Recently, we have also learned that behavioural profiling will make its ways to Canadian airports following the report made by the 2006 Advisory Panel to the Minister of Transport reviewing the *Canadian Air Transport Security Authority Act* chaired by Reg Whitaker. These developments attest to the importance of the issues discussed in these papers and the need for ongoing public education and discussion about the efficacy of racial profiling. Virtually all of the authors of the papers represented in this important current collection denounce profiling.

Finally, we are just beginning to learn the extent to which Canadian policies and practices are influenced by American policies and practices. Perhaps Benamar Benatta's case best illustrates this point. Benamar Benatta, an Algerian, Muslim aeronautics engineer, came to Canada on September 5, 2001 via the United States and made a refugee claim. As he was travelling on false documents, Benatta was held in immigration detention while Canadian officials confirmed his identity. After the September 11 attacks, however, Canadian officials handcuffed Benatta and drove him over the border to the United States without his knowledge or consent. Handed over to American officials, he remained in American detention for approximately five years. Mr. Benatta has since returned to Canada and has been recognized as a refugee by the government of Canada. While in American custody, Benatta was abused and

arbitrarily detained. The American Civil Liberties Union identified Mr. Benatta in 2004 as one of "America's Disappeared."

While Benatta was in US detention, the United Nations Working Group on Arbitrary Detention considered his detention arbitrary – which, by definition, means that he was outside the protection of the law – and further noted that his treatment may amount to torture. In reaching its conclusion that American officials had arbitrarily detained Benatta, the Working Group had regard for the fact that Mr. Benatta was held incommunicado and assigned "high security status."

The FBI had cleared Benatta of any terrorist links in November 2001, but he was not told that he had been cleared and not assigned a lawyer until April 30, 2002. Further, the Working Group noted that Mr. Benatta had been held in detention for over-staying his visa to the United States and not released for five years, in part, because he did not have the funds to pay a $25,000 bond. The Working Group concluded that such treatment was disproportionate to the alleged wrong committed by Mr. Benatta, namely overstaying a visitor's visa by a brief period.

Benatta was eventually brought before an American magistrate. Although he did not use the term, Magistrate Schroeder effectively found that Benamar Benatta had been a victim of racial profiling:

> *There is no doubt in this Court's mind that the defendant, because of the fact that he was an Algerian citizen and a member of the Algerian Air Force, was spirited off to the MDC Brooklyn on September 16, 2001 and held in SH [special housing] as "high*

security" for purposes of providing an expeditious means of having the defendant interrogated by special agents of the FBI's ITOS as a result of the horrific events of September 11, 2001.

Magistrate Schroeder also noted that Benatta "undeniably was deprived of his 'liberty' and held in custody under harsh conditions which can be said to be 'oppressive.'" Although charges against Benatta were dismissed in October 2003, he remained detained in the United States until July 2006 on the claim that he was a flight risk. Benatta has since returned to Canada and has brought a case against the Canadian government for its part in his arbitrary detention and torture in the United States. While the precise role that Canadian officials played in his detention and torture might yet be revealed through litigation, it is clear that Canadian officials, at minimum, drove Benatta over the Rainbow Bridge from Ontario to New York and handed him over to their American counterparts.

While most law enforcement officials renounce racial profiling and while most commentators either adopt a cautious approach to profiling or, more prominently, reject it altogether, the problem of racial profiling will not go away. Canada, like other jurisdictions around the world, continues to grapple with racial profiling in law enforcement. The BCCLA has determined that racial profiling is counter-productive in both the criminal and national security contexts and has committed to developing a strategy toward eliminating racial profiling. The papers commented upon above set out the main issues raised by racial profiling and should provide the basis for further discussion and action aimed at eradicating racial profiling in Canada.

ENDNOTES

1   Reem Bahdi teaches Access to Justice and Torts at the University of Windsor. Her current research focuses on the feasibility of using tort law to hold government decision-makers accountable for actions resulting in the torture of Canadian citizens abroad. Professor Bahdi is Co-Director of the Project on Judicial Independence and Human Dignity, an initiative which aims to support access to justice in Palestine through continuing judicial education and directed civil society engagement.

2   In this case, interlining refers to a shipment carried by different carriers on different legs of a journey.

Profiling: From Racial to Behavioural to Racial?

Reg Whitaker[1]

Profiling is seen in very different ways by the profilers and the profiled. Analysis of the effectiveness of the practice varies dramatically according to the perspective of the analyst. Policing and security agencies assert that they do engage in racial and religious profiling, as such, and that such profiling is neither efficient nor effective. Those on the receiving end, on the other hand, assert that they are targeted along racial and religious lines. In certain senses, both the profilers and the profiled are right.

This paper focuses on a case study of improvements in security screening of air passengers in North America and Europe using the Israeli-inspired concept of "behavioural profiling" of passengers, in which emphasis is placed on detecting atypical or anomalous behavioural patterns that flag a small number of suspect passengers for closer scrutiny. A federal advisory panel on aviation security, of which the author was the chair, examined behavioural profiling closely and, while refusing to rule the concept out, expressed caution about moving too quickly in this direction. While there may be value from a risk-management perspective, there may also be pitfalls to this approach, not the least of which is racial stereotyping.

In the immediate aftermath of 9/11, in the midst of many media calls I received, was one from a reporter who was writing a story about the impact of new anti-terrorist security measures on Muslim and Arab communities. Did the new measures, she inquired, add up to racial/religious profiling? "Of course they do," I responded. "I have a problem," she said. "Every outside expert has given me this response. But every government official I have contacted in Canada and the United States denies that this is what they are doing." Rather too quickly, perhaps, I countered: "Well, they would, wouldn't they?" I went on to suggest that government people could hardly own up to the unpleasant reality of their own policies.

I have subsequently come to see my reaction as rather too glib. I believe that it would be more appropriate to indicate that governments and minority communities are talking past one another, each embedded in discourses that are mutually exclusive. I have spoken with security and policing officials who adamantly assert that they do not profile terrorist suspects on racial, ethnic, or religious lines because such a practice would be a violation of rights. Somewhat more convincingly, they insist that such profiling would be a colossal waste of time and resources, and would divert them from the hard work of detecting the real evidence of terrorist threats.[2]

Two Discourses

The official security discourse is that of risk analysis: resources are limited; 100% security is impossible; the rational response is to analyze the risk levels of potential threats and deploy resources proportionately. In screening for the potential risks posed by individuals, a multitude of risk factors should be brought into play. Among leading risk indicators, national and ethnic origins and/or religious beliefs may be included. In a climate in which the principal terrorist threat after 9/11, Madrid, London, etc.

is believed to emanate from those espousing an extreme Islamist ideology, perhaps it is not surprising that at points of entry to Western countries, say, young males of Arab or Muslim origin should be seen as posing a potentially higher risk than other categories of persons whose identities pose relatively lower risk, as measured in both cases by a number of indicators, such as gender, age, travel patterns, etc. But the implications of this are quite limited. To put the matter simply: even if most of the terrorists who threaten Western society today are inspired by Islamist ideology, only a tiny proportion of persons of Muslim identity pose any sort of terrorist threat; therefore, any profiling program that flags persons as risky solely on the basis of religion would be catastrophically inefficient and ineffective. Adding an FWA ("Flying While Asian") offence to aviation security (as has been alleged in the UK) would be as foolish from a purely practical point of view as the justly-condemned DWB ("Driving While Black") offence in urban policing – and equally repulsive from a human rights standpoint.

Members of the targeted communities and civil libertarians are concerned that *any* consideration of race, ethnicity, or religion should be included in risk calculations. When a visible minority air passenger, for instance, finds himself persistently picked out at airport security or immigration control points for special attention not accorded non-visible minority passengers, it is hardly surprising that humiliation, frustration and anger result. The official risk discourse offers little solace in such situations: one is no less humiliated for being treated as a statistical threat construct than as a target of old-fashioned racism. Of course, unwarranted attention may in practice be the result of front-line personnel interpreting risk more crudely than the theory permits, or letting their own prejudices rule in situations in which there is considerable scope for arbitrary officiousness. But this, too, is a challenge to the official risk discourse. If front-line implementation of security cannot properly follow through the theory, there is clearly a problem with the theory.

Inevitably, even with the best of intentions and monitoring of administrative practice, persons from Muslim and/or Arab backgrounds will, in the present global context, find themselves picked out for security attention disproportionately to persons who are neither Muslim nor Arab and, as a result, there will be a perception of the violation of human rights.[3] The official position is that risk analysis justifies this otherwise disproportionate attention. After 9/11, the London underground and Madrid train bombings, and the number of terrorist plots allegedly uncovered in the US, UK and Canada, it would be reckless and irresponsible for authorities to ignore this crucial, if by itself, limited, risk factor. It is hard to argue with the logic of either of these seemingly-contradictory positions. Both are right, but in the sense that they begin from different premises.

There may not be any clear way out of this impasse. Profilers will continue to profile because it makes more sense to them than it does not to profile. And those profiled will continue to complain about the practice. From time to time egregious examples of profiling-related injustice will impinge upon the public consciousness, but such instances will be matched by the evidence of religious-based terrorism threatening public safety, with attendant calls for better security measures, including more and better profiling of high-risk persons. Yet even if the impasse remains, it is still worth casting more light on just what profiling can reasonably be expected to do, as well as its limitations as a security measure.

Profiling as a Risk-Management Tool

What exactly is profiling? If we look for an officially-sanctioned definition, we search in vain. Not surprisingly, officials are reticent about laying down markers to attract complaints of rights violations. Of course, there is no codification of the practice into legal language, like the controversial definition of terrorism written into the 2001 *Anti-Terrorism Act* that, in part, has already fallen prey to critical judicial review.[4] There is no shortage, however, of practical statements about how to ap-

ply the procedure in specific contexts. From these we may distill a neutral definition. Profiling refers to the observation, recording and analysis of selected characteristics of individuals or groups for the purpose of predicting future behaviour. There are a number of key elements involved in this process. The collection of personal data is the necessary, although not sufficient, condition for compiling profiles. Less obvious, and less frankly admitted by practitioners, is a further assumption: both the selection of what data to compile, and the analysis of this data, presuppose prior guidelines, or pre-existing models – what to look for and why it matters. Finally, there is a crucial assumption that the past, as revealed in the collected data, can be predictive of the future. If, for example, a set of characteristics ($\mathbf{x}$) has in the past been highly-correlated with a certain behaviour pattern, say, pedophilia, then it follows that if a particular individual exhibits a high correlation score with $\mathbf{x}$, he may represent a high risk as a potential, or actual, but as yet undetected, pedophile. Or in other words, he exhibits the profile of a potential offender.

The forensic investigation that followed the 9/11 attacks in the United States, unprecedented in its scope and depth, revealed detailed transactional trails, both paper and electronic, left by the terrorists as they planned and executed the acts that cost the lives of close to 3,000 people. These trails retroactively yielded patterns, or profiles, of what a potential Al Qaida terrorist threatening the United States *might* look like, assuming, of course, that future attacks will mirror the patterns established in 9/11. The promise of this investigation for the future was its apparent potential for predicting, and interdicting, other terrorist plots by identifying the kind of individuals who posed a high threat risk and offering direction to the kind of personal data that could pick out such individuals from the crowd.

Profiling is nothing if not predictive. The first two elements (data collection; prior modeling) are crucial to determining the predictive capacity of any profiling exercise. If the data is inadequate or if the analysis is faulty, predictive capacity is dubious – and the possibility of false negatives as well as false positives and potential violations of individual rights rises sharply. We should be clear that high accuracy in prediction is not the required standard from a security and policing perspective. What is being measured is *risk*, itself more a matter of statistical probability than of certainty. Security screening, for instance, does not indicate culpability, but rather seeks to identify levels of risk and to screen out those who might potentially pose a threat according to agreed-upon risk indicators, those who match or approximate the profile of a risky individual. False positives are an inevitable by-product of any risk-based approach. Of course this standard, far lower than that required in criminal justice, begs the question of the impact on individuals falsely identified as high risk, or the impact on entire communities in effect singled out as suspect on the basis of the correlation of high risk with a minority of individuals from that community. Once again, we have two parallel discourses, each yielding very different results.

Let us stay for a moment with the official discourse, and even, for purposes of argument, grant its tacit assumption that the production of false positives, even in limited proportions, and the resultant collateral human damage is a regrettable, but inevitable, result of risk-based security. Let us look closely at the profiling process, in its own terms, and attempt to assess its usefulness and its limitations as a security measure.

First: data collection. Once, finding sufficient information might have been a problem. Today, in the midst of the information technology revolution, with the emergence of what many have called a surveillance society[5] in which transparency is as much or even more characteristic of the private sector than of the public sector, the problem is the opposite. There is the "Sorcerer's Apprentice" syndrome: how to contain and manage the relentless flow of data. To some enthu-

siasts, this is not a problem, but an opportunity. Most notorious was the Bush administration's "Total Information Awareness" program under the direction of impresario John Poindexter who spoke glowingly about "command and control of the global transaction space" where terrorists leave "an information signature. We must be able to pick this signal out of the noise."[6]

The TIA program was so egregiously oversold and roused such antipathy even from conservative supporters of the administration that it was scrapped. However, a multitude of TIA-like programs under other names have followed. The Poindexter theory – vacuum up all the "noise" and you will find the "signal" – remains in some sense the ruling guide to American anti-terrorist surveillance practice. After recent intelligence failures such as 9/11 and the London underground, others have questioned whether too much information impedes rather than facilitates finding the signal. "Connect the dots" seems like a wise admonition, but not when there are too many dots for any analyst to connect sensibly and instructively.

This brings us to the second element in the profiling process, prior modeling. The prior model contains the expectations the analyst brings to the collected data. Raw mined data needs to be structured. The model tells the analyst what questions to address, which data to focus on, what kind of signal is to be sought out of the noise. Put so baldly, this may sound like prejudice (literally, pre-judgment) at work. Certainly there is enormous scope for prejudice and the application of ideological blinkers. The intelligence literature is rife with warnings about the analytical pitfalls that await those trying to deduce the intentions and future actions of adversaries from the information collected on their past and present behaviour.[7]

Yet there is no escaping the obligation of the analyst to have a pre-packaged model to apply: otherwise, all is drift and confusion. Even hard scientists do not devise testable hypotheses from indiscriminate innocent observation. They pick and choose what they observe and how they measure it from pre-determined ideas of what might be interesting and useful. Far down the food chain of knowledge, lowly intelligence analysts grappling with the more intractable difficulties of observing adversaries who are deliberately setting out to conceal their tracks and baffle investigators, are in even more need of sharp-edged models that will cut through the noise with some prospect of success.

The issue then is not that the analyst is "prejudiced," but rather how well, or badly, the pre-judgment directs the analyst in separating signal from noise. The full returns on the so-called "Global War on Terror" are not yet in. However, we have the example of counter-espionage from the Cold War that preceded the present security focus on terrorism. The example is not encouraging.

In the early Cold War years, a series of British defections to the USSR uncovered high-level penetration of the UK by Soviet intelligence (the so-called Cambridge Ring that ultimately proved to include at least five Britons, all with senior roles in the UK diplomatic and intelligence services). The shock waves from this development struck all the Western capitals, especially Washington, where the Cambridge case quickly became a paradigm for Cold War counter intelligence. In various ways, all the Cambridge spies had been ideologically motivated by sympathy for Communism conceived in the 1930s while at university. The model of the "ideologically-motivated traitor focused attention away from betrayals based on non-ideological motives and sent counterintelligence experts chasing after mythical hares. The Cold War paradigm developed abstract profiles of *spies who might have been* and then set out to match real public servants to these hypothetical profiles to find cases of risk." By the early 1970s, reckless internal "mole" hunts had been unleashed in the US, UK and Canada. This "hunt had become, in the hands

of true believers, a methodology that admitted of no disproof and turned self-destructively inward".[8] In Canada, there were two leading victims of this kind of profiling. Herbert Norman, a distinguished scholar and diplomat, took his own life while Ambassador to Egypt in 1957 after repeated attacks from witch-hunting US politicians, who were only repeating unfounded allegations developed by the RCMP and FBI as a result of Cambridge-style profiling. Leslie James Bennett, who had headed the Soviet desk in the RCMP security service, did not lose his life, but his career, when he was forced out of the service, and out of Canada, after being profiled as a Cambridge-style mole by counterintelligence. It turned out that there *was* such a mole, but it was not Bennett, but, instead, a Mountie who bore no similarity to the profile – quite the opposite – and thus went undetected. The mole, Gilles Brunet, son of a Deputy Commissioner of the RCMP and apparent model officer, did sell out his country, but out of motives of greed and self-indulgence, not ideology. Subsequently, with the uncovering of the Aldrich Ames and other similar affairs, the US learned that money had become a much likelier motivator for betrayal than ideology had been for the 1930s generation. In short, the Cambridge profile had turned out to be a diversion, one that produced counter-intelligence failure, not to speak of collateral human damage.

The Cold War example is a cautionary tale. It does not disprove the value of profiling, but it does caution against placing too much weight on the past to predict the future. There are some indications that the lesson may have been taken to heart by at least some in the security world post-9/11. Warnings abound concerning the dangers of fixating too literally on the profiles of the 9/11 bombers. To illustrate the point, Richard Reid, the would-be shoe-bomber, was not of Arab or Asian origin (although he was a convert to Islam); the perpetrators of the London Underground bombings were British-born; and the majority of the Toronto group charged under

the *Anti-Terrorism Act* are Canadian-born. In all these cases, however, Islamist ideology continued to be a common thread.

Women have been used as suicide bombers by Hamas in Israel, overturning certain preconceptions of Israeli security. It is not rocket science for terrorists facing security measures designed to block 9/11 profile conspirators to see the advantages of designing different, less suspect, profiles for front-line *jihadist* soldiers of the future. Nor has this possibility escaped the minds of security officials who urge wide vigilance against new and unanticipated terrorist methods: Donald Rumsfeld's "unknown unknowns." If there is one post-9/11 cliché to match "connect the dots," it is "think outside the box".[9]

That said, while appeals to think outside the box and imagine the unimaginable may have some play at the more rarefied atmosphere at or near the top of security intelligence agencies, it is much less likely to be on the plate of street-level front-line workers doing the daily business of screening individuals as, say, in the busy airports of the world. Here adherence to one-size-fits-all guidelines and narrow rule-based decision-making, backed by the usual bureaucratic "cover-your-ass" mentality, will tend to force thinking strictly within the box.[10]

Air Passenger Profiling: A Case Study

In this context, I would like to focus on a case study of a proposed innovation in profiling in aviation security. I recently served as chair of an advisory panel reviewing Canadian aviation security that reported to the Minister of Transport and Parliament in late 2006.[11] The occasion for this exercise was a mandate in the *Canadian Air Transport Security Authority (CATSA) Act* of 2002 for an independent review after five years. CATSA was created after 9/11 as a federal Crown Corporation responsible for security screening passengers and their belongings at 89 designated Canadian airports. In the course of our review, we

examined screening practices and performance across Canada and abroad and we looked at various suggestions for improvements in the system. Featuring prominently among these suggested reforms were recommendations to shift focus away from screening for *dangerous objects*, the focus of the then current mandate, toward screening in the first instance for *dangerous persons*.

There has been an undercurrent of support for this latter approach since 9/11, much of it inspired by Israeli methods of passenger profiling, as implemented at Ben-Gurion International Airport in Tel Aviv. But support appeared to gather momentum following the shock to the existing screening system after the discovery in August 2006 of an alleged terrorist plot to target a series of transatlantic flights simultaneously, and the sudden imposition of bans on carry-on liquids and gels, etc. throughout European and North American airports. There followed a spate of media commentaries, favourably citing the Israeli experience, arguing that it was a waste of time to screen unthreatening people's bags and persons for potentially dangerous objects when such objects will only be employed by the tiny percentage of passengers with intent to wreck havoc. The latter category, it was suggested, would fit the profile of air terrorists and could be screened out, thus enhancing security while at the same time improving the efficient flow-through of peaceful passengers from ticket counter to aircraft.

One response to the admonition to look for dangerous people rather than dangerous objects is to recall the dubious slogan of the gun lobby: "Guns don't kill, people kill." Of course, people kill much more efficiently with guns than without. Screening for dangerous passengers, while relaxing controls over dangerous objects, would invite resourceful terrorists to evade screening with enhanced access to weapons or improvised explosives once on board. In any event, passenger profiling is only one part, albeit an important part, of an impressive multilayered system of

security at Ben-Gurion.[12] It is the multilayered approach (if a threat makes it past one layer, chances are high that it will fail to penetrate other layers) that has made Israeli security the alleged gold standard in civil aviation security, according to most aviation security experts. In 1972, Ben-Gurion's predecessor, Lod Airport, was attacked by three members of the Japanese Red Army who opened fire with automatic weapons and threw hand grenades at people in the airport, killing 26 and injuring 78. Ben-Gurion offers elaborate protection against such an attack, which has never been repeated.

The Israeli approach focuses on reducing the primary emphasis on screening for objects without removing that requirement. As the former head of Israeli air security explained to an American congressional committee, it is impossible to do a thorough check of all passengers:

> *These checks consume a long time (about one hour for a single passenger with one checked bag), they are very intrusive and considered by most passengers as a very substantial hassle. It became clear that it will be impossible to provide this type of procedure to all passengers and therefore a need to develop a method that will allow an intelligent decision as to who is more eligible for this thorough search.*

> *The answer to this need came in the development of a systematic, real time, investigation of the passenger profile. This well designed procedure allows the security officer to make a decision, based on identifying the level of risk, as to the level of checks to be performed before the passenger is allowed to board the aircraft.*

> *This real time investigation can be as short as 90 seconds or last as long as 20 minutes. It involves the checking of documents (I.D., flight tickets etc.) and questions that relate to the passenger's journey and background.*

> *This profiling method has been used very successfully for the last 32 years by the state of Israel.[13]*

When interviewed, if a passenger exhibits, for instance, high levels of stress, or reveals contradictions in his story, this will focus even closer attention. The precise criteria flagging further checking are not publicly available as this is considered sensitive information, but the Israelis argue strenuously that this procedure is not in based on such simplistic categories as race, ethnicity, or religion. Israeli profiling claims to be *behavioural*, looking to indicators of anomalous patterns that send warning signals that something may not be quite right with regard to a particular passenger.

The Israelis cite as the primary success of their system the detection of an explosive device in an attempted terrorist attack on El Al flight from London to Tel Aviv in 1986, employing a pregnant and very naïve young Irish woman. A suspicious El Al security officer, noting anomalous aspects to the woman's story, discovered that the woman was carrying a bag she had received from her Palestinian "boyfriend." The thorough check of the bag exposed Cemtex and a sophisticated altimeter initiation device disguised as an electronic calculator. The Israelis cite the absence of any further such attempts on El Al as evidence that their system acts as an effective deterrent.

There is much to be said for Israeli-style passenger profiling purely from a security standpoint. The Air India bombing in June 1985, an act of mass murder in relation to the population of Canada at the time comparable to the death toll of 9/11 on the United States, and today the subject of a judicial commission of inquiry, could have been averted had Israeli-style behavioural profiling been practiced in 1985 at Canadian airports. When passenger "M. Singh" showed up at the Canadian Pacific ticket counter in Vancouver with a demand that his bag be interlined[14] to Air India flight 182 departing from Toronto Pearson, even though he had no confirmed ticket for that flight, a series of warning flags should have been applied. The expensive ticket had been purchased at the last moment in cash; the passenger name had subsequently been changed; and "M. Singh's" manner in demanding the improper interlining of his bag was aggressive and bullying. All these anomalies should have singled out "M. Singh" and his bag for police attention, and the lives of 329 people would have been spared. Tragically, the harried CP ticket agent, against her better judgment, against airline rules, and to her life-long regret, gave in and unwittingly allowed the fatal bag to proceed. But there was at this time no training in behavioural profiling offered air carrier employees; no authority issued staff to question passengers about their circumstances; and no intelligence warnings given to front-line employees about the security threat to Air India from Sikh extremists.

There is another point, rather more unsettling. While the behavioural anomalies surrounding passenger "M. Singh" would have constituted the core of any passenger profiling exercise that might have screened out the bomber, the fact of "M. Singh" being apparently of Sikh background was hardly marginal. Rather, his apparent racial/religious background would be an important factor in a context in which Sikh extremists were threatening Air India flights. In other words, behavioural profiling does not, and cannot, rule out taking into consideration racial and religious factors as a component of the larger picture, even though profiling Sikh passengers as constituting risks would have been neither appropriate nor acceptable.

Given its attractiveness as a potentially-effective risk-management tool, the Israeli approach to passenger profiling is increasingly finding support outside Israel. The leading private screening company at European airports is headed by an Israeli who is introducing elements of passenger profiling into the European airports with which his company has contracts.[15] After the August 2006 plot was uncovered, European ministers decided to consider the formal adoption of Israeli-style passenger profiling.[16] Boston Logan

Airport has introduced the SPOT (Screening of Passengers by Observation Techniques) program directly inspired by Israeli advisors.[17] SPOT is now being promoted by the US Transportation Security Administration for adoption by other American airports.

In our Panel's *Report* we paid careful attention to programs that:

> *...rely upon observation of atypical behaviour patterns to identify suspicious persons who are flagged for closer attention. It is important to note that these programs do not attempt to extrapolate presumed intentions, but merely observe anomalous external behaviour.*

Yet despite the clear advantages promised by such approaches, we were cautious about moving quickly in this direction.

> *We have some concerns about the application of this approach in Canada. However interpreted, it implies a degree of discretion assigned to frontline personnel to make judgments about passengers – judgments that might have serious impact on individuals. We note that the threat environment in some other countries greatly exceeds anything experienced in Canada; consequently there is widespread acceptance in Israel, for example, of security measures that might not be as acceptable to Canadians. We would note as well the danger of such a system of passenger analysis being misunderstood as 'profiling,' which in its ethnic, religious and racial forms is generally seen as inappropriate, if not illegitimate, in Canada. In fact, these implications are neither necessary nor inevitable if such an approach is planned and implemented properly. However, there would certainly be public perception and civil liberties issues that must be taken seriously.*

> *Despite our reservations about the introduction of the behavioural analysis method as an additional type of screening tool, the Panel recognizes that its application is being both tested and adopted in a few other countries. Before the adoption of such a technique is considered for Canada, it would be necessary to review international experiences with this method and to carry out carefully planned and controlled pilot projects in*

Canada in order to assess such things as the accuracy of the behavioural analysis process, the competencies and training required, and the impact on the overall efficiency and effectiveness of screening.[18]

If I may introduce a personal note, I was given a behind-the-scenes tour of Ben-Gurion by the Israel security service, *Shin Bet*. While impressed by the depth and scope of the many layers of security, I had reservations about the profiling. Very young security officers were making quick visual judgments as passengers entered the airport, judgments that could shunt someone into the high-risk stream. My own contacts in Israeli universities had reported to me that students doing their compulsory military service, who were assigned duties as airport profilers, sometimes received what they considered less than adequate training and admitted that judgments were often arbitrary. I could not help but wonder to what degree Arab Israeli and Palestinian passengers might receive differential, if not discriminatory, treatment – hardly surprising, perhaps, in the high-risk and volatile security situation in Israel.

In fact, Israeli Arabs and Israeli human rights groups have been making such claims for some time.[19] Israeli spokespersons explaining their system in other countries have in the past tended to dismiss these claims, stressing the behavioural focus of their profiling, while occasionally acknowledging that the since the main security threat comes from Palestinians, there is an additional risk factor associated with Israeli Arabs that is taken into consideration in profiling. Yet, in a recent editorial, the Israeli newspaper *Haaretz* commented: "Every traveler passing through Ben-Gurion International Airport recognizes the scene: Arab passengers, citizens of Israel, are automatically pulled aside for security checks, some of them degrading, which sometimes last for hours." The newspaper went on: "There is no dispute that security checks are essential to ensure the safety of flights and passengers. But there are ways to carry them out without besmirching an entire community by suggesting that every Arab

is a suspect unless proven otherwise….There is no reason to discriminate against Israeli Arabs, in airport terminals or anywhere else. A community of one million people, the vast majority of whom have never participated in terrorist activities against the country, does not deserve to be automatically considered suspect."[20]

Examples abound of clearly discriminatory and humiliating treatment routinely accorded non-Jewish air travelers, especially Arab Israelis, Palestinians, and other non-Israeli Arabs. Take the case of the first-ever Israeli Arab cadet, or diplomatic intern, in the Foreign Ministry, the daughter of an Israeli Supreme Court Justice, who despite her eminently respectable credentials, was taken out of the passenger line and subjected to intrusive and humiliating questioning both on departing and arriving back in Israel from Europe.[21] Or the example of an Israeli-Arab member of the law faculty at the Hebrew University attempting to board a flight to Tunis to participate in an academic conference, who was detained and prevented from boarding when security screeners discovered she resided in East Jerusalem.[22]

It is therefore of considerable interest that the Israeli press has reported that *Shin Bet* has in effect accepted that charges of discrimination have some apparent substance, and have publicly stated their intention to revamp their system to minimize such discriminatory treatment: "The *Shin Bet* security service is to acquire a security system based on new technology in order to prevent the need for separate personal checks of Arab passengers in airports, *Shin Bet* chief Yuval Diskin said….Once the new technology has been introduced, identical checks will be conducted for Arab and Jewish passengers and will no longer include body searches for Arabs….Diskin said that in some instances, those conducting security checks have already been instructed to ease their checks of Arab passengers."[23]

Like Arab passengers, independent observers will retain some scepticism concerning these claims of reform. For instance, reform was widely advertised to the system of highly-visible coloured tags attached to baggage, corresponding to the three levels of risk determined in the initial triage at Ben-Gurion, in which Arab passengers had their bags fixed with red tags, thus alerting all further screening on those so selected to apply the maximum and most-intrusive special interrogations and searches. In the reformed system, all passengers, of whatever origin, were to be allocated identical white tags.[24] Following this change, it soon became apparent that nothing substantial had changed. Luggage belonging to Arab passengers still undergoes a more thorough security check than that of Jews; Arab luggage is sent to an X-ray scanner with higher resolution than is used on Jewish luggage. And everyone immediately noticed that the "identical" white tags were not identical: Jewish white tags had the number "1" printed on them, while Israeli Arabs' white tags had "2" affixed, and non-Israeli Arabs were issued white tags with the number "5".[25]

Israeli authorities explained that the new system was intended to "prevent a sense of discrimination among various sectors."[26] Did these authorities actually think that the targets of a continuing discriminatory practice would not notice the slightly-less visible tagging? Or was the exercise merely one of public relations with no real intention to transform the practice? Ariel Merari, Israeli aviation terrorism expert and an adviser on terrorism to former Prime Minister Yitzhak Shamir, insists that ethnic profiling in airport screening is both effective and unavoidable: "It's foolishness not to use profiles when you know that most terrorists come from certain ethnic groups and certain age groups. A bomber on a plane is likely to be Muslim and young, not an elderly Holocaust survivor. We're talking about preventing a lot of casualties, and that justifies inconveniencing a certain ethnic group."[27]

However, the notoriety of discriminatory practices at Ben-Gurion has even reached the US State Department which has issued a travel advisory to Palestinian Americans planning on flying to Israel.[28] And the complaints of human rights

groups within Israel have risen in recent years.[29] We may thus expect that further visible changes will be made, without actually eliminating the crucial element in the behavioural profiling approach, which is to identify the risk level associated with those coming from particular groups, along with other non-ethnic risk identifiers.

I would like to draw some observations from this brief consideration of the "Israeli system." First, it must be said that security at Ben-Gurion is truly impressive. As a multilayered designed-in security system, Ben-Gurion is unmatched in the civil aviation world. Its incident-free record, situated as it is in an extreme high-risk environment, speaks for itself, as does the matching security record of the national airline, El Al.[30] However, neither the dense security architecture of Ben-Gurion, nor the elaborate security precautions surrounding El Al flights everywhere in the world, are exportable as a complete package, since neither such high-risk perceptions nor such generous funding levels are likely to be found anywhere else. There are, however, elements of the Israeli system that are eminently exportable, and passenger profiling is one of these.[31] As an export product it has so far had limited, but significant, success in North America and Europe, and appears to be on an upward trajectory of acceptance and implementation.

Looked at strictly as a security measure, Israeli passenger profiling has a number of strengths. One thing must be understood, even by its critics: *it works*. Yet looking at it simply as a socially- and politically-neutral security technique misses a great deal that is critical to grasping the significance of passenger profiling in its Israeli context. Passenger profiling arose out of a very specific social and political context: an embattled state confronting hostile forces outside and deeply apprehensive of forces within that challenge the state's very definition. Within a context of a society hierarchically constructed with a privileged Jewish majority; an Arab-Israeli minority of decidedly second-class status; and, since 1967,

occupied territories with subject Palestinian populations, in a fluid situation of persistent tension, conflict and violence between Israeli Jews and Palestinians, it would be delusional to expect that any security screening process for Israel could escape the constraints of national ideology and attain a neutral and scientific impartiality.

It is no surprise, then, to find that the system reproduces *in its own workings* the same ideological colour of the larger society that gave rise to it. In theory, passenger profiling could focus on anomalous behaviour patterns as risk identifiers, but, in practice, racial, ethnic, religious profiling, with all the discriminatory implications implicit in such techniques, has always been central to the approach.

Passenger profiling serves dual functions: it is effective security measure and, at the same time, is yet one more part of a system of domination and repression that works consistently to discriminate against persons of Arab and Muslim background. Passenger profiling serves not only security concerns, but also the pervasive requirement for social control of the non-Jewish population, especially crucial as it operates as a sorting system at the entry and exit points from Israel. Nor can the two functions be disentangled. In the specific context of unresolved Palestinian-Israeli conflict, targeting Arabs is a scientifically-sound aspect of passenger profiling, while it is, at the same time, inherently and irredeemably discriminatory and repugnant to human rights.

In the wider world to which Israel exports its technique, behavioural profiling remains a viable, if controversial, tool from the point of view of security in the age of terrorist threats to public safety. Profiling is also inherently dangerous from a human rights perspective inasmuch as it inevitably impacts differentially on different groups. Tensions between the two discourses will continue, and no doubt resulting conflicts in the real world will continue to simmer and occasionally boil over. In countries where com-

munity tensions are less intrusive than in Israel, the racial and religious elements of behavioural profiling must be handled with extreme caution and circumspection, within a framework that insists upon respect for human rights and non-discrimination. Assuming this caveat, profiling may prove to be a risk-management device that offers some additional security. But it would seem that in the country that gave birth to the technique, there is little, if any, likelihood of the balance between security and human rights being negotiated successfully without a fundamental transformation of the nature of that society.

I do not propose to pass judgment on the Israeli system here. My point is simply that even the reputedly most effective system of behavioural profiling – seen strictly from a security perspective – is not proof against discriminatory elements based on race and/or religion creeping into the process.

In Lieu of a Conclusion

I conclude as I began, that is to say, without a definitive conclusion. Behavioural profiling remains a viable, if controversial, tool from the point of view of security in the age of terrorist threats to public safety. Profiling is also inherently dangerous from a human rights perspective inasmuch as it inevitably impacts differentially on different groups. Tensions between the two discourses will continue, and no doubt resulting conflicts in the real world will continue to simmer and boil over from time to time.

Perhaps the most useful advice is to urge moderation and restraint. If the racial and religious elements of behavioural profiling can be handled with extreme caution and circumspection, within a framework that insists upon respect for human rights and non-discrimination, behavioural profiling may prove to be a risk-management device that offers some additional security. But it *does* negotiate a fine line, with an ever-present downside.

ENDNOTES

1   Reg Whitaker is Distinguished Research Professor Emeritus at York University and Adjunct Professor of Political Science at the University of Victoria. Recent books include *The End of Privacy: How Total Surveillance is Becoming a Reality* (1999) and *Canada and the Cold War* with Steve Hewitt (2003). He served on the Advisory Panel to Justice O'Connor on the Commission of Inquiry into the Maher Arar affair; chaired the Advisory Panel to the Minister of Transport reviewing the *Canadian Air Transport Security Authority Act* in 2006; and advised the Commission of Inquiry into the Air India bombing on the aviation security aspects of the Air India bombing.

2   This information is drawn from confidential interviews. As information from confidential sources cannot be cited, where useful, the confidential origin of information will be noted.

3   This problem was highlighted when an RCMP criminal intelligence brief ("Law Enforcement Requirements to Combat Terrorism," dated September 18, 2001) was subjected to close scrutiny by the lawyer for Maher Arar at a public hearing of the (O'Connor) Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, June 30, 2005. The document had identified the "type of adversary we are up against" by describing what was known at the time about the 9/11 hijackers, identified by a number of behavioural characteristics. Under questioning, an RCMP anti-terrorism officer was asked if this description would not apply to "many, many North American Arab/Muslim men who have adjusted and integrated into Canadian…society" and that this description constituted "an express invitation to racially profile people when you have a mandate, sir, as you had, which is to turn over every stone." The officer was reduced to mumbled agreement, captured in the transcript as "Mm-hmm."

4   The definition of terrorism in the 2001 *Anti-Terrorism Act*, including a consideration of motive, quickly attracted much critical attention from academics and subsequently has been challenged in the Ontario courts: *R. v. Khawaja* [2006] 214 Canadian Criminal Cases, 3rd series, 399 (Ontario Superior Court); Kent Roach, "The Charter and Terrorism Offences: A Comment on *R. v. Khawaja*," (2007), 11 *Canadian Criminal Law Review*, p. 273. Any attempt to define profiling in law would invite severe attack, and prudent governments have left it instead in the field of administrative practice.

5   Also known as the end of privacy, see Reg Whitaker, *The End of Privacy: How Total Surveillance is Becoming a Reality* (New York: New Press, 1999).

6   Quoted in Reg Whitaker, "A Faustian Bargain? America and the Dream of Total Information Awareness," in Kevin D. Haggerty and Richard V. Ericson, eds., *The New Politics of Surveillance and Visibility* (Toronto: University of Toronto Press, 2006: 157).

7   The US 9/11 Commission has an interesting chapter entitled "Foresight – and Hindsight" in which the authors discuss *imagination and the need to institutionalize imagination* in intelligence warnings about terrorist threats: *Final report of the National Commission on Terrorist Attacks Upon the United States* (New York: W. W. Norton & Company, 2004: 339-360).

8   Reg Whitaker, "Spies Who Might Have Been: Canada and the Myth of Cold War Counterintelligence," *Intelligence and National Security* 12:4 (October 1997), p. 25.

9   In a document prepared by the New York Police Department Intelligence Division, "Radicalization in the West: The Homegrown Threat" (Mitchell D. Silber and Arvin Bhatt, Senior Intelligence Analysts, 2007), the authors note that while homegrown radicals exhibit a "remarkable consistency in the behaviors and trajectory across all the stages" of their radicalization into terrorists, there is no "useful profile to assist law enforcement to predict who will follow this trajectory of radicalization" (p. 82) and that "ordinary" people may be sought out by extremists "because they are 'clean skins'" (p. 85).

10 Examining the US, UK, and Germany since 9/11, Daniel Moeckli makes the point that "the law enforcement agencies of all three states at issue have regularly used terrorist profiles that are based on stereotypical group characteristics such as 'race', 'ethnicity', national origin and religion to select the targets of their preventive powers" and have done so mainly out of political convenience: Moeckli, "Terrorist Profiling and the Importance of a Proactive Approach to Human Rights Protection," pp. 1-2, paper presented at the B.C. Civil Liberties Association's 2007 Conference on Racial Profiling, Vancouver, BC, Canada, and drawn in part from his 2008 book, *Human Rights and Non-Discrimination in the 'War on Terror'* (Oxford: Oxford University Press).

11 *Flight Plan: Managing the Risks in Aviation Security*, Report of the Advisory Panel on the Review of the Canadian Air Transport Security Authority Act (Ottawa, December, 2006).

12 Further detail and citations are not provided as the security tour at Ben-Gurion is provided on a confidential basis.

13 Remarks of Rafi Ron, CEO, New Age Technology, Ltd. before the Aviation Subcommittee, U.S. House of Representatives Committee on Transportation and Infrastructure, February 27, 2002.

14 In this case, interlining refers to a shipment carried by different carriers on different legs of a journey.

15 International Consultants on Targeted Security – Europe Holdings BV.

16 Ben Webster, "Muslims face extra checks in new travel crackdown," *The Times* (London), (August 15, 2006).

17 See, for example, Sally B. Donnelly, "A New Tack for Airport Screening: Behave Yourself," *Time*, May 17, 2006; Jeff Jacoby, "What Israeli security could teach us," *The Boston Globe*, August 23, 2006.

18 *Flight Plan: Managing the Risks in Aviation Security*, Report of the Advisory Panel on the Review of the Canadian Air Transport Security Authority Act (Ottawa, December, 2006), 7.4, pp. 160-161.

19 Larry Derfner, "Stereotyping security," *The Jerusalem Post*, March 22, 2007; Yoav Stern, "Rights group wants to monitor Arab travelers' airport checks," *Haaretz* (English edition), January 11, 2007.

20 *Haaretz,* "Clipping El Al's wings," September 20, 2007.

21 Larry Derfner, "Stereotyping security," *The Jerusalem Post*, March 22, 2007. Acutely, the journalist raises the question: "It bears understanding that if ethnic profiling can't be helped, the ethnics being profiled can't help the way they take it."

22 Richard Silverstein, "Israeli-Arab Hebrew University Professor Harassed, Denied Permission to Attend Academic Conference," *Tikkun Olam*, November 25, 2006.

23 Yoav Stern, "Shin Bet: New system will ease checks of Arabs at airport," *Haaretz* (English edition) February 28, 2007.

24 Zohar Blumenkrantz and Yoav Stern, "Colored tags for Arabs' luggage at Ben Gurion airport discontinued," *Haaretz,* August 7, 2007.

25 "Flying While Arab: Israeli Airport Security Harassment," *Tikkun Olam*, August 7, 2007.

26 Comment attributed to Avner Ovadia, Transportation Ministry spokesperson, in Blumenkrantz and Stern, "Colored tags for Arabs' luggage at Ben Gurion airport discontinued," *Haaretz,* August 7, 2007.

27 "Israel's airport security challenged: Arabs complain they face racist treatment when boarding planes," The Associated Press, March. 19, 2008; Zohar Blumenkrantz, "Mazuz moves to limit racial profiling at Ben-Gurion Airport," *Haaretz,* June 4, 2008.

28 "Palestinian Americans warned of security profiling at B-G Airport," *Haaretz,* March 20, 2008.

29 Yuval Yoaz and Jack Khoury, "Civil rights group: Israel has reached new heights of racism," *Haaretz,* December 16, 2007.

30 El Al's exemplary security record does not carry over into an equally-impressive record in aviation safety. The US Federal Aviation Administration in late 2008 downgraded Israel's aviation safety rating to Category 2, which is "commonly assigned to developing countries": Zohar Blumenkrantz, "El Al plane nearly crashed close to Jerusalem hills," *Haaretz*, February 4, 2009.

31 Another example is that of the highly-trained armed air marshals who fly on all El Al international flights. This was an Israeli innovation copied by airlines in a number of Western countries, including the United States and Canada.

Racial Profiling
B.C. Civil Liberties Association
Position Paper

Reem Bahdi
with Olanyi Parsons and Tom Sandborn

Racial profiling is both ineffective as a law enforcement strategy and offensive to fundamental principles of civil liberties and the Canadian *Charter of Rights and Freedoms*.[1] The BCCLA is committed to helping end the influence of racial profiling in Canadian law enforcement as a step toward making the day to day operation of government less corrupted by a practice that allows racism and social bias to direct and distort the way government powers touch the lives of democratic citizens. Racial profiling harms individual Canadians and distorts the functioning of our democracy. By adopting this position paper, the BCCLA commits to a multi-faceted strategy to denounce and help eliminate racial profiling in Canada. This effort will, over time, include:

- developing education and outreach efforts that demonstrate why racial profiling should be denounced from a civil liberties perspective;
- engaging policy-makers and legislators in supporting laws, policies and practices that eliminate profiling from Canadian law enforcement and security agencies;
- engaging in test case litigation involving allegations of racial profiling.

Racial profiling is both ineffective and wrong. Racial profiling's adverse effects outweigh its alleged benefits in all areas where law enforcement or intelligence interact with society, including criminal, immigration and national security contexts and racial profiling undermines fundamental Canadian values. The perception that crime is rampant in today's society or national security is under attack does not justify ineffective and irrational tactics by law enforcement and security agencies which disregard human rights, violate the *Charter* and erode civil liberties.

Communities that are subjected to racial profiling are unfairly over-policed, unjustly scrutinized and disproportionately represented in the criminal justice system.[2] Racial profiling is the product of stereotyping of racialized communities and it fuels further stereotyping.[3] We pause here to note that the term racialized communities is used rather than terms such as "visible minorities", "persons of colour" or "non-white persons". References to the term "racialized communities" conveys that it is a social construct to view persons or groups who share (or are perceived to share) a given ancestry as different and unequal in ways that matter to economic, political and social life, and that this view is not based in reality.

Victims of racial profiling have their liberty interests taken from them. They are stopped, searched, arrested, subjected to unwarranted force, detained in custody[4] and in the most extreme cases, shot, tortured or killed as a result of being ill-perceived as a serious threat. Racial profiling has had a long and inglorious history in Canada, with serious impacts on surveillance,

search, investigation, arrest and incarceration rates for the racialized communities singled out for its destructive attentions. Racial profiling can not only result in distorted levels of law enforcement and imprisonment, as it has for members of Canada's First Nations; it can be literally lethal, resulting in unnecessary deaths of suspects selected not on the basis of sound police practice, but on the basis of institutionalized racism and private bias. Since the tragic events of September 11, 2001, the destructive impacts of racial profiling have been felt more and more seriously by Canadian residents who are or are perceived to be of Muslim origin.

Racial profiling has not been proven as an effective policing strategy. It does not effectively combat crime and/or terrorism since innocent individuals are wrongly targeted, detained and interrogated, while those who are responsible may slide under the radar because of an under-inclusivity of searches and inquiries. Racial profiling also promotes cynicism about law enforcement and the judicial system amongst members of racialized communities who are subjected to racial profiling, thus decreasing the probability of citizen co-operation with legitimate investigations.

Racial Profiling: What Is It?

For the purposes of this paper, "profiling" and "racial profiling" are used interchangeably, to reflect the reality that illegitimate and *Charter-offending* law enforcement profiling can be conducted in terms both of explicitly racial categories and in terms of social/religious/cultural identities that serve as proxies for race and similarly are invoked to justify behaviour that singles out the profiled for disproportionate suspicion, surveillance, investigation and arrest. We adopt the Ontario Human Rights Commission's definition of racial profiling, which is: "any action undertaken for reasons of safety,

security or public protection, that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin, or a combination of these, rather than on a reasonable suspicion, to single out an individual for greater scrutiny or different treatment".[5] Essentially, racial profiling is the use of race as a proxy for risk in the policing of criminality, and more recently, terrorism. Racial profiling can be an overt strategy of law enforcement or subtle and unconscious. In its overt form, racial profiling involves the targeting of certain communities or individuals within a community for surveillance on the basis that the community itself is susceptible to crime. This form of racial profiling was evident most dramatically after September 11 when Arab and Muslim communities were held under surveillance as potential threats to national security.

In its more subtle form, racial profiling involves the filtering of information through the lens of stereotype. For example, we believe that the RCMP racially profiled Maher Arar when they associated him with Al Quaeda with very little evidence to substantiate their conclusions. The fact that Maher Arar was an Arab Muslim man almost certainly factored into the RCMP's assessment of him. This form of racial profiling can also impact on police conduct in other ways. It can lead police to use unwarranted lethal force against members of racialized communities.

The use of disproportionate force by police is inevitably linked to an assessment, based on stereotype, that the individual they are confronting is inherently violent because of their racialized status. One recent and tragic international example was the killing of Charles de Menezes, an innocent Brazilian man, in London, England following the July 7, 2005, subway bombings.[6] Because de Menezes was brown skinned, he was mistaken for a terrorist, with fatal conse-

quences. Another fatal incident was the shooting death of a young Aboriginal leader, J.J. Harper, on March 9, 1988. Harper was stopped by a Winnipeg police officer, who had mistaken him for a car thief. A scuffle ensued and Harper was shot, and killed.[7] Harper allegedly had nothing in common with the suspect who was being sought other than his Aboriginal identity.

The Canadian media has significantly contributed to stereotyping and profiling of racialized communities by linking them with violence and aggression. For instance, the moral panic and anti-Black stereotypes that were perpetuated by various media outlets following the 'Just Desserts' killing in Toronto, Ont. indirectly condoned the subsequent racial profiling of Black Jamaican men on the basis that there is a relationship between Blackness and crime.[8] This incident also prompted the Canadian government to introduce amendments to the *Immigration Act* through Bill C-44[9] in 1995. Bill C-44 removed the right of permanent residents to appeal deportation orders based on criminality when the Minister issued an "opinion" that the appellant was a "danger to the public in Canada."[10]

Given the negative stereotypes that associated Black males with criminality, Bill C-44 was the legislator's attempt to "get tough on crime." This translated into a message to get tough with certain communities. Although racial profiling of Blacks was not explicitly permitted in Bill C-44, a study released by the African Canadian Legal Clinic ("ACLC") in 2002 entitled "A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination" revealed that it commonly occurred.[11] The report showed that since Bill C-44 nearly 40% of the total removals from Ontario were Jamaicans, and that it was five times the number of the next highest recipient country of Trinidad & Tobago, another Caribbean country, and more than the number of deportees to all of Europe, the United States and South America combined.[12]

The media has also fueled the profiling of Arabs, Muslims and Asians. Several studies have demonstrated how the media has portrayed these groups as inherently violent. For example, Willard Oxtoby's study of American perceptions of Arabs confirms that Arabs are commonly depicted as fanatical, irrational, immoral, untrustworthy, and incorrigible barbarians bent on destroying peace. Oxtoby cites a 1976 issue of *Harpers Magazine* as an example: "Arabs are religious fanatics devoted to a non-Western warrior religion. Their bequests to us include the words *assassin* and *jihad* … the Arab draws his blade with gusto, and when he is finished butchering he is always that much closer to Allah."[13] Canadians receive this stereotype of the Arab as terrorist, or potential terrorist, through American media as well as Canadian sources.[14] September 11 simply amplified the stereotype. On June 14, 2003, for example, The Globe and Mail printed a cartoon honouring Father's Day. The cartoon depicted an Arab man with stereotypical features gleefully receiving a belt of explosives from his young son.[15]

The Extent of Racial Profiling in Canada

While some deny that racial profiling takes place in Canada and argue that those who believe that there is a problem are either misguided or misinformed, others contend that racial profiling remains a part of the arsenal of police.[16] Ken Closs, Chief of the Police Services in Kingston, Ontario acknowledges that racial profiling is a common policing tactic.[17] This acknowledgement is reinforced by a May 2005 study of police statistics in Kingston, Ont., which found that young Black and Aboriginal men were more likely to be stopped than men from other groups. The data showed that police in the predominantly White city were 3.7 times more likely to stop a Black as opposed to a Caucasian,

and 1.4 times more likely to stop an Aboriginal person than a White.[18]

Stephen Lewis, the former Ontario NDP leader and Canadian Ambassador to the United Nations, released a report in December 1995, which extensively examined racism in policing in Canada. Researchers for the report conducted telephone interviews in 1994 with 1,257 individuals who self-identified as Black (417), Chinese (405), or White (435). The study revealed that:

- 17% of Black residents reported having been stopped on two or more occasions over the previous two years, as compared to only 8% of White residents; and
- 43% of Black male residents reported having been stopped by the Toronto police in the previous two years, as opposed to only 25% of White male residents.

Racial profiling in Ontario is often referred to bitterly as having created the crime of "driving while black" or "DWB." David Tanovich's book, The Colour of Justice, opens with a vivid account of a DWB incident.

> *In the early morning hours of October 22, 2003, Dwight Drummond, a popular Citytv assignment editor, and his friend, Ron Allen, were driving home in Drummond's Blue Volkswagen Passat. They were young Black men and about to experience, as Drummond would later call it, a "rite of passage" – an unwarranted encounter with the police.*[19]

The two men were boxed in by police cruisers, ordered to exit their vehicles, raise their hands, get on their knees, and lie on their stomachs with their hands outstretched. They were handcuffed, searched and placed in the cruiser.

> *What was a routine ride home from work and a meeting of friends suddenly escalated into a situation where Drummond and Allen faced the very*

> *real possibility of joining the many other young Black men who have been shot by the Toronto police under troubling circumstances.*[20]

Scot Wortley, one of the commission researchers and criminology professor at the University of Toronto, conducted a follow-up study. Wortley found that Blacks were still two-times more likely to experience a single stop, four-times more likely to experience multiple stops and seven times more likely to experience an "unfair" stop.[21]

1 Profiling Blacks

Prior to 9/11, Black Canadians were subject to some of the most egregious examples of racial profiling.[22] In waging the "war on drugs" between 1986 and 1992, police intensified their patrol of low income areas in Ontario targeting Black people as suspects.[23] This directly resulted in the overrepresentation of Blacks in prison as reported by The Ontario Systemic Racism Commission even though there was no evidence to suggest Canadian Black populations were any more likely to use or profit from drugs than members of other races.[24] The perceived success of profiling Blacks signaled by the high incarceration rates fueled the already existing stereotype that young Black males were likely to be involved in drug related crimes and in turn contributed to more overt racial profiling. Consequently, the profile became so loosely based that any Black male regardless of his age, or location was a potential threat.[25] Toronto police went as far as initiating what legal scholar David Tanovich calls a no-walk list requiring African Canadian youth and other racialized groups to carry identification while walking the streets of Toronto. [26]

The limitless precautions taken at the sight of a Black male with no evidence of criminal activity other than the colour of his skin, immediately poses the question "is this really necessary?"

For instance, the *Toronto Star* recently conducted a national survey in which it asked Canadians how many people with a Canadian criminal record are visible minority, including Aboriginals. The average response in the survey was 36.7 per cent, while the correct answer, which comes from an RCMP database containing the criminal histories of 2.9 million people, shows that the percentage of "non-Whites" with a criminal record is 16.7 per cent – below 2006 Census data on the total percentage of visible minorities (racialized communities) and Aboriginal groups in Canada (20.0 per cent). Even though the statistics show that racialized communities are not committing as many crimes as so many believe, the targeting of these communities, particularly Blacks and Aboriginals, has lead to an over-representation of these groups in the criminal justice system.[27]

2 Profiling Arabs and Muslims

September 11 lead to an increased acceptance of racial profiling of Arabs and Muslims for national security. Special forces, such as the RCMP and CSIS, were instructed to use their discretion in order to minimize the likelihood of another terrorist attack.[28] Moreover, the Canadian parliament passed statutes in response to September 11, including Bill C-36, the *Anti-terrorism Act* and Bill C-17, the proposed *Public Safety Act*, which were absolutely silent on this issue. These bills neither explicitly authorized profiling nor expressly banned it. Consequently, profiling persons based on race, ethnicity, place of origin and/or religion was implicitly accepted by the Canadian government. It is not surprising that racial profiling has become part of the "war against terrorism."

The post 9/11 wave of panic and insecurity felt by many Canadians has served as a rationale for profiling Muslim and Arab communities since it seems to only make sense to focus one's resources on the likely perpetrator. This idea was supported by Ed Morgan, Professor of Law at the University of Toronto. After 9/11 Professor Morgan said that "[w]e have to assume that some level of profiling will not only be done but upheld." He said that "[i]t is only rational law enforcement to do some kind of profiling -- if you have evidence to fit the profile."[29] Given that Arabs and Muslims were portrayed as fanatical, violence-loving maniacs in the popular presses of both Canada and the United States even before the 9/11 incident, the subsequent profiling of them was perceived by many as rational, reasonable and inevitable.

The mass hysteria caused by 9/11 all but solidified the common stereotype associating terrorism to Arab and Muslims and the panic that followed was a major contributor in making profiling an acceptable tool just as it seemed to be falling out of favour; although not necessarily out of use. In a survey released in 2003, 48 per cent of Canadians reported that they approved of profiling Arabs and Muslims,[30] despite the fact that their civil liberties were going to be called into question. Moreover, a survey released in 2002 by a national Islamic anti-discrimination and advocacy group (Council on American-Islamic Relations CANADA (CAIR-CAN)), a majority (60 percent) of Canadian Muslims say they experienced bias or discrimination since the 9/11 terrorist attacks.[31]

In addition, a national survey conducted by Ipsos Reid in 2005 revealed that Muslims and Arabs were the most likely group to be targets of racism, at 38 per cent - a finding that largely results from the after-effects of the 9/11 terrorist attacks against the United States.[32] The overwhelming support for profiling Arabs and Muslims along with the increased racism that they were subjected to after 9/11 served to justify and condone intensifying the scrutiny, surveillance and profiling of individuals based on ethnicity, place of origin and religion.

Although we still do not have a complete or fully accurate picture of how the Arab and Muslim community has been affected by stereotyping in law enforcement and racial profiling, we do know that the consequences can be severe. Maher Arar's case represents an extreme example of racial profiling gone wrong. Canadian officials labeled Arar an "Islamic Extremist" without an evidentiary basis and thus contributed to his detention and torture overseas. But there are other serious consequences. The freezing of assets of those individuals and entities identified as terrorist is but one example.[33] The Office of the Superintendent of Financial Institutions (OSFI) held the responsibility of issuing a consolidated list with the names of terrorists to the financial institutions.[34]

However, in addition to providing the list, they also advised the institutions to "regard with suspicion not only the people whose names are on the list, but anyone whose name resembles the name of a listed person."[35] This measure encouraged racial profiling as it promoted further scrutiny of Arabs and Muslims on the sole evidence of their last name. Furthermore, it resulted in many innocent people with common Arabic/Muslim names being humiliated and forced to endure the hardship of convincing their financial institutions that they are not the listed entity.[36] While the primary focus of this paper is on the negative impacts of racial profiling when it misguides the law enforcement powers of the state, it is notable how the damage created by racial profiling by law enforcement filters out into the larger society and creates more irrational bias and unfair treatment in matters like banking.[37]

Security measures which were derived with no intention of exacerbating the disparity between human beings can, and have had, the opposite result. For example, airlines are required to provide information on passengers at the request of foreign governments regardless of their nationality.[38]

This seemingly unbiased requirement provides an open door for racial profiling because of the existing stereotype linking Arabs and Muslims to terrorism. Given that Arabs and Muslims are already depicted in America as violent, fanatical, incorrigible barbarians bent on destroying peace,[39] it should come at no surprise that upon receipt of information that an Arab is travelling aboard an aircraft, they would likely be subject to intense scrutiny within an airport setting.[40] It is without a doubt that racial profiling in Canada has contributed to the hardships faced by the Arab and Muslim community. Individuals are being subjected to greater scrutiny, unjust surveillance, an intrusion of their privacy rights and even torture.

3 Other Victims of Profiling in Canada

Although the profiling of Blacks, Arabs and Muslims receive the most media attention and scrutiny, other racialized groups such as South Asians and Aboriginals feel the sting of being stigmatized. The Criminal Intelligence Service Canada (CISC) provides reports each year linking South Asians to the drug trafficking scene between Vancouver and Alberta resulting in the same type of increased scrutiny used by police, which ultimately leads to complaints and challenges.[41] These reports also include Aboriginals, South Americans and Caribbean groups and their propensity to commit certain types of crimes.[42]

Aboriginal peoples in particular have historically experienced racial profiling in their interaction with police and the criminal justice system.

It is well documented that Aboriginal peoples are vastly over-represented in the criminal justice system and that the treatment they receive, while there, is

strikingly different from other racial groups. While representing only 2.8 per cent of Canada's population, self-identified Aboriginal people represent approximately 17 per cent of the federal offender population. Adult Aboriginal persons are incarcerated more than 6 times the national rate. Aboriginal inmates waive their rights to a parole hearing more frequently than do other inmates. And parole is denied at a higher rate than for non-Aboriginal offenders.[43]

Nineteen years after his conviction, Micmaq Donald Marshall was exonerated by a Commission of Inquiry that found that racism and prejudice against Aboriginal peoples and a willingness at all levels of the criminal justice system to presume that Aboriginal peoples are prone to criminality resulted in Marshall's wrongful conviction.[44] Very simply, had Marshall been White, the investigation would have taken a different turn.

Arguments in Favour of Racial Profiling:

Even though the adverse effects of racial profiling on individuals and communities have been documented and widely discussed, some proponents of racial profiling nonetheless contend that the price is worth it. Proponents of racial and ethnic profiling often validate profiling on the basis of utilitarian logic which holds that crimes are committed disproportionately by certain racial groups and that therefore disproportionate targeting and suspicion of members of those groups is appropriate. It is within this context that some individuals would support racial profiling. Racial Profiling, it is argued, prevents terrorist attacks and activities.

1 Deter and Disrupt

Advocates of profiling justify it as a counter-terrorism measure for three main reasons. First, they argue that racial profiling deters and disrupts terrorist networks and activities. For example, the American Department of Homeland Security asserts that various anti-terrorism measures which focus on Arabs and Muslims enhance national security because they deter and disrupt terrorist activity. For example, justifying policies aimed at weeding out and deporting Arab and Muslim men after September 11, the DHS asserted that the programme was justified because it "signaled a clear message to those 'sleeper' terrorists embedded in U.S. communities, that U.S. immigration law would be enforced." DHS also claimed that programmes which focused on Arabs and Muslims "forc[ed] would be terrorists to comply with the terms and conditions of their admission to the United States or run the risk of being removed from the United States. This additional pressure may make the job of carrying out a terrorist mission much more difficult, therefore disrupting the mission."[45]

2 Muslim is Simply Part of the Equation

The second type of argument advanced in favour of profiling relies on analytical reasoning. Proponents argue that it not only necessary but inevitable that race and/or religion will become a probative factor in investigations given that national security is threatened by Muslim extremism. In such a context, one cannot take Muslim out of the equation. Thus, it makes sense to focus on Maher Arar as an investigative target if one is concerned about "Islamic extremism." Arar came to the attention of RCMP officials because of his association and meetings with Mr. Abdullah Almalki. Arar had several characteristics which would have identified him as a risk if one accepts the efficacy of racial profiling: he was an Arab Muslim man who also knew about wireless technologies, was born in Syria and travelled to countries that had links to terrorism. The same kind of logic might be applied to the Air India disaster. Given that

Canadian officials knew about a specific threat by Sikh extremists, they could have prevented the Air India tragedy if they had simply paid greater attention to Sikh passengers the fateful day when a suitcase filled with explosives was allowed onto a flight originating from Canada.

3 Risk Management

Finally, some proponents of profiling contend that racial profiling makes statistical sense as a risk management and resource allocation strategy. Racial profiling gained popularity within law enforcement circles as part of a general move towards profiling and statistics based risk management theory. Rather than appealing to vague claims about deterrence and substitution, some advocates contend that racial profiling makes statistical or actuarial sense. The actuarial argument for profiling purports to appeal to value-free hard facts and seemingly neutral numbers. Profiling is presented as an aspect of a risk management. As one commentator has observed,

> *Young Muslim men bombed the London tube and young Muslim men attacked New York with airplanes in 2001. From everything we know about the terrorists who may be taking aim at our transportation system, they are more likely to be young Muslim men.*[46]

Racial profiling, according to this viewpoint, is just smart law enforcement. If you know that risk comes from within a particular group, then it only makes sense to focus resources on that group. After all, statistical or actuarial methods have worked in law enforcement when compiling other types of profiles such a geographic profiling.

Popular press articles supportive of profiling often rely on statistical arguments. For example, Heather MacDonald, a writer for the City Jour-

nal, is convinced that the "anti-profiling crusade thrives on an ignorance of policing and a willful blindness to the demographics of crime."[47] In her article, she cites a number of statistics demonstrating the reportedly elevated crime rates amongst racial minorities in comparison to the majority. This is then used to substantiate her claim that race is a likely indicator of potential criminal activity. In response to what she calls the hue and cry of anti-profiling juggernauts, MacDonald states that there is "nothing illegal about using race as a factor among others in assessing criminal suspiciousness"; especially given the fact that many crime filled areas just happen to be populated by minorities.[48] "Hence, special efforts at crime reduction directed at members of such groups are justified, if not required"[49]

According to this argument, the resulting feeling of inferiority faced by the supposed victims of racial profiling are minor when compared to the salutary benefits of catching criminals. In essence, if you make a few innocent Blacks or Arabs uncomfortable at the benefit of stopping a major drug deal or terrorist plot, you have made an acceptable trade off of rights for security in the public interests. Indeed, Risse and Zeckhauser contend that the hurt feelings of minorities does not have so much to do with racial profiling as it does with their historical encounters with the ruling class.[50] In that sense, the harm is expressive since an event or practice is a reminder of other painful events or practices. As an example, women have been treated as merely sex objects for hundreds of years, so it is not surprising that many would be against pornography due to its historical background.[51] Yet pornography, in large part, constitutes a legal practice. History is the driving force behind the alleged overreactions which underlie anti-racial profiling arguments. But, racial profiling should not be abandoned for this reason. Rather, the underlying pathology which leads some

to reject racial profiling needs to be understood so that the value of racial profiling can be appreciated.[52]

Arguments Against Racial Profiling:

1 Profile Evasion and Substitution

First, critics of racial profiling in the national security context in general and of the DHS counter terrorism programmes in particular point out that terrorists tend to study and know the legal and administrative regimes within which they are working. They carefully alter or tailor their behaviour to escape scrutiny within the confines of a given regime. The 9/11 Commission Staff Report About Terrorist travel confirmed this point. It noted that:

> *To avoid detection of their activities and objectives while engaging in travel that necessitates using a passport, terrorists devote extensive resources to acquiring and manipulating passports, entry and exit stamps, and visas. The al Qaeda terrorist organization was no exception. High-level members of al Qaeda were expert document forgers who taught other terrorists, including Mohamed Atta, the 9/11 ringleader, their tradecraft. The entry of the hijackers into the United States therefore represented the culmination of years of practice and experience in penetrating international borders.* [53]

Terrorists also have access to sophisticated fraudulent documents and other means to evade the profile. This is particularly the case where the profile relies on stereotypes of Arab and Muslim looks and behaviour.

New York City Police Commissioner Raymond Kelly pointed to the substitution problem when he expressed his frustration with the suggestion that profiling is just smart law enforcement. Commissioner Kelly stated that:

> *Look at the 9/11 hijackers. They came here. They shaved. They went to topless bars. They wanted to blend in. They wanted to look like they were part of the American dream. These are not dumb people. Could a terrorist dress up as a Hasidic Jew and walk into the subway, and not be profiled? Yes. I think profiling is just nuts.*[54]

Similarly, Bernard Harcourt concludes:

> *There is no reliable empirical evidence that racial profiling is an effective counter-terrorism measure and no solid theoretical reason why it should be. The possibility of recruiting outside the profiled group and of substituting different modes of attack renders racial profiling in the counter-terrorism context suspect.*[55]

MI5 has recently reportedly reached a similar conclusion about the ineffectiveness of racial profiling as a national security strategy.[56]

A recent study sponsored by the Canadian Human Rights Commission and the Canadian Race Relations Foundation has confirmed that racial profiling is not an effective law enforcement strategy in any context. The study extensively reviewed the profiling literature and concluded that "the results are credible and suggest that profiling does not constitute an effective method of investigation or prevention. This is especially the case for studies on racial profiling."[57]

The fact that the profile can be evaded undermines all three arguments in favour of racial profiling. The three strands of the pro-profiling position all tend to assume the elasticity of the targeted groups (more attention on the groups will mean less terrorist activities within them) but ignore the elasticity of the non-profiled groups (less attention on the non-profiled groups creates greater opportunities within

them). This dual elasticity creates the opportunity for substitutions. Individuals change tactics, seek to evade the profile by either recruiting from outside the profiled group or creating identities for themselves that evade the profile.

2 Racial Profiling and Stereotyping or Discrimination

While the substitution argument focuses on the inadequacy of profiling because of its impact on the behaviour of the profiled terrorist, the stereotyping and discrimination argument focuses on the inadequacy of racial profiling because of its influence on the decision-maker him or herself. Race does not operate as a neutral factor in decision-making. When race and religion form part of the assessment, they eventually overtake other characteristics as part of the purported risk assessment. Instead of remaining one factor among a multitude of factors, race or religion becomes the lens through which all other information is filtered and understood. This is because we often unconsciously make decisions and assumptions about people on the basis of their race. Where the race or religion is associated with stereotypes, the information we assess about an individual is thus filtered through a lens tainted by stereotype.

This type of dynamic played itself out in the case of Maher Arar. Rather than rationally investigating Arar's activities, the RCMP irrationally and without sufficient justification labeled him "an Islamic extremist individual with links to the Al Qaeda network." This information was subsequently shared with American authorities without caveats and lead to Arar's ordeal in Syria. Justice O'Connor neatly summed up the problem with racial profiling and stereotyping in the context of national security investigations. His observations in this regard are worth citing at length.

Although this may change in the future, anti-terrorism investigations at present focus largely on members of the Arab and Muslim communities. There is therefore an increased risk of racial, religious and ethnic profiling, in the sense that race, religion or ethnicity of individuals expose them to investigation. Profiling in this sense would be at odds with the need for equal application of the law without discrimination and with Canada's embrace of multiculturalism. Profiling that relies on stereotyping is also contrary to the need discussed above for relevant, reliable, accurate and precise information in national security investigations. Profiling based on race, religion or ethnicity is the anti-thesis of good policing or security intelligence work.[58]

The propensity for profiling to morph into stereotyping was confirmed by the European Union Network of Independent Experts in Fundamental Rights warnings that the proposed terrorist profiles presented a major risk of discrimination.[59] Profiling and stereotyping are inextricably linked. Profiling – in the sense of allowing race or religion to be considered a risk factor – quickly morphs into stereotyping. Profiling plays to people's fears and presuppositions about group characteristics and invites judgment of an individual through the lens of group characteristics. Profiling cannot be separated from stereotyping. Given the existence of widespread and unconscious stereotypes of Arabs and Muslims, profiling thus leads to irrational results rather than good intelligence or effective enforcement. This argument against racial profiling applies to instances of profiling across time and not simply once the profiled terrorists have the opportunity to devise new tactics.

The concern about profiling and stereotyping exists beyond the counter-terrorism context. In *Radek*,[60] the British Columbia Human Rights Tribunal held that the negative stereotypes of

Aboriginal individuals lead to their victimization. In this case, the respondent developed a neutral policy that intended on denying access to the shopping plaza of all suspicious people and vagrants; however, this policy had an adverse effect on the Aboriginal population. Security officers were advised to look for individuals who: wore ripped or dirty clothing; exhibited attitudes when approached; proved reluctant to answer questions; talked to themselves; had open sores and wounds on their face and body; had red eyes; acted intoxicated or stoned; bothering customers; begged for money or cigarettes on the street; and, had bad body odour.[61] Some of the criteria used to deny access were commonly held stereotypes of Aboriginals. This was reiterated by expert witness, Dr. Bruce Miller, who identified a number of currently held stereotypes about Aboriginal people. These included, but were not limited to the following:

- Aboriginal people are backwards-looking and stand in the way of social progress;

- All Aboriginal people drink and are alcoholics - the "drunken Indian" image;

- Aboriginal people are violent and prone to petty crime;

- Aboriginal people are lazy and will not work or keep a steady job;

- Aboriginal people are unhealthy and have a fatalistic disinclination to do anything about their health and other problems; and

- Urban Aboriginal people are degraded drug and alcohol abusers and sex-trade workers (an image reinforced by the recent publicity about the murder of large numbers of women from the Downtown Eastside, many of whom were Aboriginal).[62]

Dr. Miller explained that stereotypes funnel perception and create a strong conservative bias in the thought process of decision-makers: people place stimuli into existing categories and ordinarily reject discordant observations. In the case of interactions between Aboriginal peoples and members of non-Aboriginal society, the non-Aboriginals channel their observations through their existing schemas or understandings of them.[63] Ultimately, the prejudices against Aboriginals tended to support the idea that they needed to be targeted or watched closely to maintain peace and prevent crime.

3 Implementation Problems

We do not agree that certain groups are more inclined to commit crimes than others. There may well be more drug use in wealthy White neighbourhoods than poorer racialized neighbourhoods, for example, but selective street stops and searches in neighbourhoods where people of colour live and congregate tip the statistics in ways that reinforce racist stereotypes of the "criminal other." Rather, these statistics "produce hidden distortions with significant costs for society."[64] However, even in the event that statistically certain racialized groups are more inclined to commit certain crimes, or at least to be arrested and convicted due to unequal enforcement tactics driven by racial profiling, there is no empirical evidence that racial profiling does in fact reduce crime rates.[65]

Even if racial profiling might work in theory, it is impossible to develop strategies to implement it efficiently and effectively in practice. Experiences in the United States clearly demonstrate this point. For example, after September 11, American authorities developed a system for registering Arab and Muslim non-citizens on the theory that all of the men involved in the terrorist attacks were in the United States on some form of visa and some of them violated the terms of their visas. If they had been caught

and deported for violating the terms of their visas, September 11 might have been avoided. Extensive resources have therefore gone into watch lists and registration programmes. Nonetheless, all of these lists and registration programmes contain gaps and inconsistencies that would have allowed the September 11 terrorists to remain in the United States. For example, the 9/11 Commission Report observes that the exit interview conducted under the NSEERS programme which is designed to track the exit of non-citizens is not conducted at the actual place of exit. It is possible, therefore, that individuals be registered as having departed he United States when they have not in fact left the country. It also remains relatively easy for a sufficiently motivated individual to avoid registration in the NSEERs programme in the first place despite the networks and resources dedicated to NSEERS.

Canadian experiences also suggest the problems with translating profiling into practice. Muslim communities have long complained that national security agencies focus on questions such as how often an individual prays. Presumably such questions come from the belief that if one is investigating Islamic extremists who are driven to violence by religious fervour, then it only makes sense to gauge a target's devotion to his/her religion. There are many grounds on which to criticize such quests to translate profiling theory into practice, including the general point that equating a person's dedication to his or her religion with fanaticism and terrorist propensity smacks of Islamophobia.[66] Religion is central to both the Ku Klux Klan and a Catholic priest. Yet, we would never use devotion to religion to try to distinguish between the Klansman and the priest. Similarly, one cannot say that simply being a dedicated adherent of Islam – as measured by the number of times one prays - should be considered a risk factor. People who are devoted to non- violence pray devoutly. So

what does devotion to religion tell us in assessing someone's behaviour and potential for violence? It tells us little because it does not allow us to distinguish between those who are a risk and those whose values society embraces.

Profiling's Impact Upon Affected Communities

Directly responding to Risse and Zechauser's article, Annabelle Lever challenges the expressive harm thesis stating that it underestimates the damage that racial profiling can do in a society that is predisposed already to favor White people's perspectives on crime. [67] Racial profiling does more than just reflect racist attitudes, habits and institutions[68]; it contributes to them all by compounding on these harms and giving them an official seal.[69] For example, publicly associating Blacks with criminality severely "increases the likelihood that Whites will think of Blacks as importing crime into their supposedly crime-free neighbourhoods".[70] This fuels stereotypes and ultimately leads to increased racism experienced by Blacks in every capacity; even while attending school.[71] Therefore, the incremental harm that Risse and Zechauser speak of is much larger than it is projected to be. Laws and their enforcers should never contribute to or aggravate existing inequalities. [72]

Racial profiling also offends against numerous sections of the Canadian *Charter of Rights and Freedoms*, a document which guarantees Canadian rights against abusive actions of government. Section 15 of the *Charter* was created to ensure equality in the formulation and application of the law.[73] Specifically, it guarantees equality before and under the law, equal protection of the law and equal benefit under the law.[74] Therefore, any unequal treatment or differential impact regardless of the intent of the government action can be seen as a violation of one's *Charter* protected right.

Bearing this in mind, racial profiling offends against this right as it allows enforcers to deliberately subject individuals to differential and unequal treatment without sufficient evidentiary basis. [75] Section 9 of the *Charter* protects individuals from arbitrary detainment.[76] "Canadian law stresses that decisions made on the basis of stereotypes subvert the integrity of any decision-making process. Decision-makers who labour under stereotypical assumptions cannot produce informed, accurate or just results." [77] Therefore, when enforcement agencies arrest and detain individuals for reasons generated by preconceptions, they are in effect violating s.9 of the *Charter*, as well as s.7 since individuals' life, liberty and security interests are being deprived contrary to the principles of fundamental justice. Finally, sections 2(c) and 2(d) of the *Charter*, which protect the fundamental freedom of peaceful assembly and association respectively, are constantly being impaired by the practice of racial profiling, as it subjects individuals to increased scrutiny on the basis of their congregation and association with each other. This could be as simple as a group of Muslims playing paintball or a group of Black males walking and talking on a city street. Canadian research data reveals that Black youth in groups are four times more likely to be stopped and six times more likely to be searched than similarly situated White youth.[78]

Moreover, racial profiling disempowers those racialized communities that are subjected to profiling, and, ultimately creates a level of mistrust between the institutions of the state responsible for administering security and law enforcement and those racialized communities. Lastly, in regard to the societal impact, racial profiling leads to the underrepresentation of these racialized communities in key societal institutions, including ones that are perceived to be engaging in racial profiling.[79]

As a result of racial profiling in Black communities, fear of violence and death at the hands of law enforcement officials in addition to feelings of hurt, resentment and distrust plague many victims.[80] Unfortunately, these feelings resurface even in situations where officers appear to be polite and considerate[81] causing them to arouse even more suspicion from police officers by their actions. It would seem as though the profiled also profile the profiler effectively creating a cycle of "reciprocal distrust".

Profiling's Impact Upon Law Enforcement and Intelligence Agencies

An often overlooked aspect of racial profiling is the fact that it may backfire on the institutions that use it. This can happen in a number of ways. First, because profiling is over-inclusive, it can lead to significant wasted resources and false-leads. Contrary to the suggestion that racial profiling helps focus and funnel resources so that they can be used efficiently, racial profiling thus results in inefficiencies. In the Maher Arar case significant resources were devoted to investigating Mr. Arar in circumstances that implicated his race and religion.[82] Second, profiling can undermine agency reputations. When no concrete evidence was found, not only was Mr. Arar a victim but Canada also suffered the extreme embarrassment of taxing its resources on a false lead. Finally, because profiling is linked to stereotyping, it can create an increased tolerance for stereotyping and racism within an agency.

Conclusion

The BCCLA has an important role to play in any national debate about racial profiling. As one of the nation's oldest and best respected defenders of civil liberties, the Association can contribute through its public education programs, consultations with policy makers and

legislators and interventions into court cases. Moreover, it might offer assistance to those who have been racially profiled and wish to file complaints against police services, customs, security agencies, as well as any other agency and/or institution that profiles solely based on race, place of origin, ethnicity and/or religion. The result will be better law enforcement and more carefully protect civil liberties, especially for visible, racial and religious minorities. It is well past time for the BCCLA to speak out on this important manner. We urge the BCCLA to develop a full position paper, issue a press release about it and empower staff to mount a campaign against racial profiling.

LEGISLATION

Bill C-10: An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make consequential amendment to another Act, (revised 6 June 2007).

Bill C-17: the proposed *Public Safety Act*, 2002, (revised 8 May 2007)

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Theoretical Perspectives on Racial Profiling in Postmodern Societies

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This paper explores the growing debate over racial profiling. The manifestations of racial profiling and racialized policing examined reach well beyond law enforcement. The processes of racialization are deeply embedded in the ideological frameworks and interlocking discursive spaces and structures of lawmaking, immigration, criminal justice, education, the media and various other vehicles of social control and representation. Dominant White authorities have attempted to control the debate over racial profiling with a number of discursive strategies. Similarly, the crisis over racial profiling produced a set of oppositional narratives from those members of the community who are the objectives of racialization. These include Toronto's racially-marginalized communities which were able to name the experience of racial profiling in concrete ways that had heretofore been inaccessible to them and to have their experiences validated. Expressions of resistance also began to arise from within various community constituencies, including White columnists and editors (mainly from the Toronto Star*), lawyers, researchers, community activists and advocates. These counter-narratives serve as primary data in a study of the processes of racialization, as well as a powerful educational and organizational tool.*
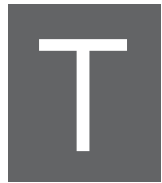
The 2007 conference for which this paper was prepared dealt with an extremely important topic that only recently had come onto the public agenda in Canada. "Racial profiling," a term coined originally in the United States, has undergone change since its initial meaning when it referred exclusively to the compiling of race-based criminal profiles for use by the police. Nowadays, the term is primarily used both here in Canada and in the U.S. to refer to the police use of discretionary authority to pull over Black drivers (Engel, Calnon and Bernard, 2002). It is also used by immigration authorities and other government agencies to describe an approach to controlling racialized minorities, including Arabs, Muslims, Aboriginals and Hispanics.

Racial profiling is probably used most often in the context of police behaviour – specifically, in discriminatory behaviour rooted in stereotypes and prejudices held by individual police officers. Thus, racism within police forces has often been dismissed as nothing more than the rogue actions of a limited number of isolated and bigoted individuals. This is the "few bad apples" thesis enshrined by the then-Mayor of Toronto, Mel Lastman. We have referred to this as one of the main elements of a specific discourse – the denial of racism as a set of institutional practices and communal cultural behaviours that collectively support and reinforce racially-different systemic outcomes. The implication of the "bad apples" perspective is that all we need do to solve the problem of racial profiling is to provide police officers with more training in race relations and cultural sensitivity, or recruit a limited number of racialized officers. This, of course, leaves unchanged the structure of policing as well as the core ideology of police officers – their beliefs, values and norms.

The authors came to the study of racial profiling through our extensive work on racism in Canadian society. To illustrate, both of us have examined systemic racism within the institutions of our society for many years – at both individual and systemic levels – and we have collaborated on a book which explores the phenomenon in

broad terms. We have also looked specifically at the institution of media and, more specifically, on the role it plays in producing, reproducing and disseminating racist ideologies. One of our earliest books (Tator, Henry and Mattis, 1998) explored the transmission of racialized images, ideas and practices in cultural production, including museum exhibits, theatre, film and mass media. Later, we traced the processes of racialization in the everyday discourses that appear in print and television (Henry and Tator, 2002).

Most recently, we have made an attempt to bring some understanding to what is increasingly identified as racial profiling as carried out by policing organizations and specifically targeting people of colour, especially African- descended groups and Aboriginal people. However, given our backgrounds and experience in analyzing attitudes and behaviours considered racialized or stereotypical or misrepresentative, it is not surprising that *we consider racial profiling to be just another buzz label for good old-fashioned racism.*

Racial profiling is not a new phenomenon. Nor is the racial profiling of African Canadians a new issue in Canadian society. When racial profiling is discussed in Canada, the focus is mainly on recent experience, which tends to support the notion (as in Britain) that profiling is a new phenomenon and largely a consequence of changes in immigration patterns and policies which have resulted in substantial numbers of people, including those of African descent, coming to Canada. Racial profiling, in fact, really refers to what the police have always done. Mosher (1998), for example, in analyzing the relations between police and the African-Canadian population in the years 1892 to 1961, found that in six cities in Ontario, 12% of all public-order charges were against African-Canadians, 11% against Aboriginals and 2% against Chinese. He established that these percentages are vastly out of proportion to their actual numbers in the population and, of those charged, African-Canadians and Aboriginals were most likely to be imprisoned and for far-longer periods than other groups.

Nor is racial profiling confined to policing. As we have demonstrated in *The Colour of Democracy: Racism in Canadian Society* (2006) and *Racial Profiling in Canada: The Myth of "A Few Bad Apples"* (2006), racism or racial profiling exists within all institutional sectors even in liberal, democratic societies. Policing culture and practices are a composite of ideologies, values, norms and practices that are deeply connected to, and embedded in, diverse institutional and discursive spaces. In *Racial Profiling in Canada*, we demonstrate how otherness is "marked" in the law, the justice system and systems of governance. We document the link between the legacy of racism in law-making, immigration policies, the justice system and racialized practices in education, including policies such as "zero tolerance," curriculum and teaching practices.

The question that arises from these examples of racism or racial profiling in the varied institutions of Canadian society is simple: "Why does racial profiling, or racism, occur in modern, industrialized societies such as Canada?"

In earlier work, we have described such societies as including both the values normally associated with democracy and those linked to racism, especially the more elusive or covert forms of racism. For example, the values associated with modernism and democracy include justice, equality, constitutional and elected governments which work toward the common good, the notion that individual rights are dominant, even over collective rights, and so on. Yet these commonly-acknowledged "positive" values have not deterred the oppression and inequality that are the product of racism. They have led to the development of some state-organized structures and mechanisms to supposedly alleviate racial disparities, among them, human rights commissions to investigate grievances; constitutional laws such as *Section Fifteen* of the *Canadian Charter of Rights and Freedoms*; and the *Multiculturalism Act of 1988*.

However, these measures do little to alleviate the more subtle forms of the "new racism" or

"democratic racism." Many people in democratic societies are entrenched in attitudes and behaviours that result in discriminatory acts toward "them" or people who are not like "us." We find evidence of discrimination in employment, housing, education, media and the justice system. Thus, democratic racism is an ideology in which two conflicting sets of values are made congruent with each other. Commitments to democratic principles such as justice, equality and fairness *conflict*, but *coexist*, with attitudes and behaviours that include negative feelings about minority groups, differential treatment and discrimination against them. Thus, in these ways, racist sentiments and ideologies are found in democratic societies such as ours. Moreover, the ideology of democratic racism flourishes in societies which have attempted to control such racism – but primarily in such overt forms as discrimination in employment, housing and similar areas of obvious disadvantage. These can be investigated by human rights commissions and through a range of grievance procedures and mechanisms created at various levels of government as well as through private sector corporate and institutional structures. Overarching laws, and recent court decisions which recognize, at least to some extent, the devastating nature of racism, also tend to focus on the most obvious and overt instances of racism.

However, what we refer to here as "democratic racism" is deeply embedded in the popular culture and in popular discourse. It is located within what has been called society's "frames of reference," which include a largely unacknowledged set of beliefs, assumptions, feelings, stories and quasi-memories that underlie, sustain, and inform perceptions, thoughts and actions. Democratic racism, in its discursive or subtle forms, begins in the families and communities within which we are socialized; in the schools and universities in which we are educated; in the media that surround us and communicates ideas, information and images; and in popular culture including the television, films, songs and texts that supposedly provide entertainment.

Racialized discourses cover a wide spectrum of expressions and representations, including a nation's recorded history; scientific forms of racist explanations (such as J.P. Rushton's theory of racial differences); economic, legal and bureaucratic forms of doctrine; cultural representations in the form of national narratives, images, symbols and so on. Social power is reflected in racialized discourse because most of the decision-making elite of this society and others like it are controlled mainly by Whites who maintain a dominant White culture. Thus, there exists a constant moral tension: *the dissonance between the everyday experiences of racialized and Indigenous peoples, juxtaposed with the perceptions and responses of those who have the power to redefine that reality.*

Many people resist anti-racism and equity initiatives because they are unwilling to question *their* own belief and value systems and discursive practices, *their* organizational and professional norms, *their* positions of power and privilege within the workplace and society. Thus, they are unable to examine the relation between cultural and racial differences and the power dynamics constructed around ideas about those differences. Acknowledging that ethno-racial differences make a difference in the lives of people is to concede that Euro-Canadian hegemony continues to function and organize the structures within which the delivery of mainstream programs and services operates (Dei, *et al*, 2004). Resistance may manifest itself as active opposition, expressed openly, but it is more commonly articulated in more subtle forms of discourse. Discourses on race and racism converge with concerns about Canadian identity, national unity, ethnicity, multiculturalism and so on. Discourse provides the conceptual models for mapping the world around us and incorporates both social relationships and power relations, but, as Yon (2000) demonstrates in his ethnographic study of students and teachers in a Toronto high school, discourse about identity and nation that never mentions the word "race" can also be considered racist discourse.

Increasingly, discourses about culture and cultural differences deflect concerns about racism because they are often framed in the context of being "tolerant," "sensitive" and sufficiently enlightened to appreciate and respect the diverse cultures of the "others." Cultural discourse tends to cover up the "unpleasantness" of domination and inequity (Wetherell and Potter, 1992).

There are some major discourses that powerfully sustain the ideology of democratic racism. These include, for example, the discourse of denial (there is no racism in Canada; I am not a racist); the discourse of colour blindness (I never notice the colour of a person's skin); the discourse of equal opportunity (all we need to do is treat everybody the same and fairness is ensured); the discourse of blame-the-victim (if equal opportunity and equality already exist, then the lack of success of some racialized groups must be of their own doing); and the discourse of White victimization (White immigrants to this country suffered just as much as the more recent racialized groups).

One major consequence of the ideology and discourses of democratic racism is that there is a lack of support for policies and practices that might ameliorate the relatively low status of some racialized people who are the main targets of racism. These policies and practices tend to require changes in the existing social, economic and political order, usually by state intervention. The intervention, however, is perceived to be in conflict with, and a threat to, liberal democracy. Thus another important aspect of democratic racism holds that the spread of racism should only be dealt with – if at all – by leaving basic economic structures and societal relations essentially unchanged (Gilroy, 1987). Efforts to combat racism that require intervention to change the cultural, social, economic and political order will lack political support. More importantly, they will lack legitimacy, according to the egalitarian principles of liberal democracy. Thus, challenges

to the dynamics and dominance of world capitalism will be strongly resisted.

The extended opening section of this paper has brought us to the central topic of the 2007 conference, racial profiling, and to our assertion that racial profiling or racism by the police (and members of other institutions) in a democratically racist society is virtually inevitable. However, rather than dwell on aspects of racial profiling already well-known, we want to move on to *theories of explanation* by raising the question of why racial profiling – especially at it affects policing practices – is so prevalent in many postmodern societies where disadvantaged racialized groups, and especially Blacks, are marginalized.

Three distinct, albeit related, theoretical approaches have most influenced our perspective. These are:

1. *Whiteness studies,* which examine the racialization of Whiteness and its role in sustaining systems of power and privilege. This approach focuses on Whites as a racial group in hegemonic control of marginalized subgroups in society.
2. *Blackness studies,* which focus on the abnormalization of Blackness and the Black body image.
3. *Danger and racialization theory*, which refers to the idea that people of colour – and especially Blacks – pose a danger to predominantly White societies.

We have already referred to a fourth perspective emphasizing *discursive analysis theories*, an approach which explores how White hegemonic discourse produces, reinforces and disseminates racism in democratic liberal societies.

Whiteness Studies

The emerging field of "Whiteness studies" focuses on racialization – a process that is normally

understood as making race a relevant factor to people or situations when, in fact, it is totally irrelevant. In this context, we are reversing the term to refer to the racialization of the "White" race. Whiteness studies maintain that if people of colour are racialized, then so should Whites be recognized and identified as members of the White or Caucasian race. White identity is based on the concept that those who have traditionally held hegemonic positions of power over all other groups have done so by constructing hierarchical structures of exclusion and marginality. White studies scholars contend that Whites must accept a race category for themselves, but one which does not include the assumption that they are biologically superior to other "races." Whiteness studies provide something of an answer as to why the discourse of denial of racism is still so powerful and persistent in Canadian society and especially among White power elites.

A bedrock truth in many postmodern societies is that Whiteness is hegemonic over Blackness. This "truth" is believed not only by those who are strongly prejudiced, but also by those who do not perceive themselves as prejudiced, and who are not generally viewed as prejudiced, yet who exercise control over society's structures and systems. The beliefs, values, and norms of the White elite operate in the law, the media, and the educational and criminal justice systems, as well as in other systems of social control and representation. The hegemonic concept has attained its own, largely unconscious reality, which manifests itself in terms of the meaning of "Whiteness," especially in contrast to the meaning of "Blackness." Whiteness has thus become another socially-constructed identity – an identity that has long held the dominant position in perpetuating social inequities.

Whiteness has three interlinked dimensions: it is "a location of structural advantage"; it is a "standpoint or place from which White people look at ourselves, at others and at society"; and it refers to a set of cultural practices that are "usually unmarked and unnamed" (Frankenberg, 1993:1). Whiteness studies shifts the onus in studies of institutionalized racism, of racism in popular culture, and of racism deeply embedded in society, from the disadvantaged groups of colour to those who are White and privileged and whose views are considered natural, normative and basically raceless.

Whiteness studies reverse the focus on "Blackness" and "Otherness" to critically examine the role of Whites in preserving and reinforcing racial bias and exclusion. Whiteness studies analyse the link between white skin and the position of privilege operating in most societies, including those which have been subjected to European colonialism. White privilege confers benefits, whereas people of colour are often disadvantaged, excluded and marginalized because of their skin colour and its associated stereotypic constructs. Whiteness contests the discourse of colour blindness which we noted above as untrue and inaccurate. Whites see the "colour" in others in the same manner that they are seen as "White." Most White people do not, however, recognize themselves as a racial category, and their self-identification rarely includes the descriptor "White." White people are often not even aware they are White and, without that essential self-recognition, they find it difficult to recognize and accept their role as perpetrators of racial discrimination and exclusion. Many Whites do not recognize their own identity as based on race; thus, they do not participate in conversations in which race is discussed.

The power of Whiteness manifests itself in the ways in which racialized Whiteness becomes transformed into social, political, economic and cultural behaviour. White culture, norms and values in all these areas become normative and natural. They become the standard against which all other cultures, groups and individuals are measured – and usually found wanting. Whiteness comes to mean truth, objectivity and merit.

Blackness Studies: Black Body Imagery and Definitions of Masculinity

We racialize Whiteness in order to understand the hegemonic role it plays – often inadvertently – in modern societies. Similarly, we will have to understand Blackness – which has long been racialized – as the other side of that coin. Blackness is contextualized in images of the Black male heterosexual body as represented in a broad spectrum of spaces, including public, social and cultural spaces. These images serve an important function: they define not only skin colour but also constructions of masculinity. More specifically, ideas of Black heterosexual masculinity are found in

> *the popular imagination as the basis of masculine hero worship in the case of the rappers; as naturalized and commodified bodies in the case of athletes; as symbols of menace and threat in the case of black gang members; and as noble warriors in the case of Afrocentric nationalists and Fruit of Islam. While these varied images travel across different fields of electronic representation and social discourse, it is nevertheless the same black body – super star athlete, indignant rapper, 'menacing' gang member, and pitch-man, appropriate middle class professional, movie star – onto which competing and conflicting claims about (and for) black masculinity are waged* (Gray, 1995:402).

Negative and disturbing concepts of the Black male body were constructed under colonialism, which defined Blackness as "the other" and in so doing confirmed the supremacy of Whites as well as the power of the colonizers. Black men thus became subordinate and powerless, robbed of their cultural identities and reduced to stereotypic images based on White men's fantasies (Fanon, 1967). These fantasies were mainly sexual and erotic and based on the imagery of the Black primitive. But those images projected a menace. Colonialism had eroticized Black men and at the same time denied them power; nonetheless, their images were threatening because of their

potential to attract White women and thereby undermine the confidence and self-esteem of White men. Many of the constructs of the Black man that have evolved throughout history are still pervasive, albeit in an altered form. What has remained consistent, however, according to writers on this subject (most of them Black), is the image of the Black male body (Mercer, 1994; Gray, 1995; Carrington, 2002; Chapman and Rutherford, 1989).

According to these scholars, the Black male body is a construct created largely by White men; moreover, Black men do not own their own bodies because they have been subjected to slavery and colonialism by Whites. Blackness is a visible sign of racial difference that leaves Black people vulnerable to societal and individual racism; yet, at the same time, the image of the Black male body carries a set of highly ambiguous meanings. It is the one thing that White men allow Black men to have – they have no choice in this, for after all, one cannot be deprived of one's body except through death.

The supposedly-animalistic Black male body is still represented strongly today in the arena of sports. Sport is a naturally competitive activity and the competition between White men and Black men is highlighted especially in track and field, where Blacks are alleged to have a natural superiority. The media play a key role in perpetuating these images, in that sports reporting is how most people learn about and follow sports (see, for example, Wilson, 1997; Carrington, 2002). In reporting on sports, reporters indirectly strengthen racialized ideologies – for example, they refer to the "natural" athletic ability of athletes who happen to be African Americans; and they disseminate stereotypes about "dumb jocks." This is especially true in the American media, though Canadian sports reporters tend toward it as well (Wilson, 1997; Carrington, 2002). Carrington argues that the "facts of Blackness and the lived experiences of being Black in the new century are no longer invisible in the public sphere as markers of social inequality." Indeed,

Blackness is promoted through "mantras of equal opportunities" such as "diversity" and "multiculturalism." Mainstream media culture is "dominated by Black faces and bodies, from the sports fields and fashion catwalks, to our cinematic screens and music video channels." Further, Carrington contends that Blackness can now be enjoyed "24-7 in a way which is no longer threatening by its mere presence" (Carrington, 2002:3).

However, the effects of discrimination and inequality are still present in Western liberal democracies. This "spectacle of hyperblackness" (Carrington, 2002:4) is a mechanism for continuing historically-derived racialized images and ideologies. Blackness is represented to this day by these images, and the Black male body "has come to occupy a central metronymic site through which notions of 'athleticism' and 'animalism' operate….These tropes of Blackness provide the discursive boundaries within which the black subject is still framed" (Carrington, 2002:4). Black participation in sports, Black presence in media reporting and the growing use of Black bodies in advertisements in which their strength, power and virility are highlighted, all point to a paradoxical contradiction between these images and the reality of the lived experiences of most Black men.

Thus, the image of the Black male body, in times past as well as in contemporary society, creates fear and apprehension and is probably one critical factor in the continued oppression of Blacks, especially men, by the dominant hegemonic forces – primarily White men. Images of Black men and their bodies are disseminated today largely through the sports in which they are alleged to have natural ability; through the media, which highlight Black men's supposed propensity for criminal activity (mugging, rape, homicide); and through the spectre of racialized crime.

According to Gray (1995:402), today, similar contradictory images are produced and disseminated that require "new contextualizations and different reading strategies." An example is young Blacks' hero worship of gangsta rap, which also generates powerful images of Black masculinity. Another example is the commodification and "naturalization" of Black athletes, who are deemed to have natural prowess, and whose talents are then commodified in advertisements. The menace presented by Black gang members and the construct of the "noble warrior" presented by Afrocentric nationalists and the Fruit of Islam, the male-only paramilitary wing of the Nation of Islam, are further examples. These images are found on television and in films and are often cited in social discourse. And they all branch out from the same trunk: "It is nevertheless the same black body – super star athlete, indignant rapper, 'menacing' gang member, ad pitch-man, appropriate middle class professional, movie star – onto which competing and conflicting claims about (and for) black masculinity are waged" (Gray, 1995:402).

Gray goes on to suggest that the negative and disturbing images emanating from rappers and gang members represent the oppositional and resistive forces that have created a new and menacing construction of the Black male. These forces are contested not only by Whites, but also by the middle-class and civil rights elements within the Black community itself.

Evident in the discourse of the new Blackness – as represented by these various and contested images that are emerging from the contemporary cultural life of Black Americans – is that racial profiling is by and large simply another approach to the social control of Blacks (and other ethno-racial communities, in Canada and elsewhere). Racial profiling, then, *is mostly about how the White gaze filters notions and images of Blackness.*

Danger and Racialization Theory: Moving Toward Racial Profiling

Whiteness has become normalized; it follows that non-Whiteness has become "abnormalized." It is easy to notice the abnormal because of their

skin colour. Thus Black drivers are immediately perceived in terms of a particular body and colour image associated – almost subliminally – with a criminal disposition. Skin colour is the basic marker; agents of social control such as the U.S. Drug Enforcement Agency (DEA) then draw from a set of visible cultural behaviours associated with that "abnormal" skin colour. Examples of these behaviours: wearing gold chains; wearing a black jump suit; carrying a gym bag; being a member of an "ethnic group associated with the drug trade"; and travelling from a "source city" such as Los Angeles, Miami, or Detroit, or in a car bearing licence plates from a state in which there are source cities (Ehreneich, 1990). These features are also observable through surveillance techniques such as CCTV. Individuals demonstrating these features are then stopped and searched for no other reason than that they fit a profile.

To be preventive, to be proactive, surveillance must be able to identify the abnormal by what it *looks like* rather than by what it *does:* it needs to abnormalize – or criminalize – by visible social category, not by social behaviour (Fiske, 2000). Black men are the first group to be abnormalized; in this sense, racism is the ultimate source of their "abnormalization by surveillance." The abnormalization of the racial "other" is what presumably enables the DEA to identify drug-runners by what they look like. The same process manifests itself in other arenas. Banks employ it to identify users of stolen credit cards; and stores employ it to identify shoplifters by their appearance (that is, rather than by their behaviour). As Fiske (2000:53) notes: "Surveillance is a technology of Whiteness that racially zones both the city space that exists as a matter of physical geography, and the social space, that while metaphorical, is nonetheless really inhabited in different places by different social groups." This processing is central to modern-day forms of racism. Fiske contends that "at the core of this process is the way that Whiteness normalizes itself, and excludes itself both from categoriz-

ing and being categorizable: it thus ensures its invisibility" (2000:62).

The abnormalization of the Black male has also been noted in the processes whereby the notions of *race* and *danger* are brought together. The idea behind this is that people of colour – especially Blacks – pose a threat to predominantly White societies (Rose, 2002; Garland, 1996; Visano, 2002; Hall *et al.*, 1978; Jiwani, 2002:67-86). A recent, highly provocative article by William Rose provides some compelling answers to the question of why racial profiling against people of colour takes place. Rose discusses what he calls the "risk society'" or the "return of dangerous classes." He notes that the use of race and especially Blackness as a "proxy for criminal dangerousness" is embedded deep in American history: "Black bodies have [been] supersaturated with meaning.…The narrative attached to Black men in particular, has been one of criminal danger" (2002:182).

Drawing from Garland, a British criminologist, Rose notes that penology has moved away from the rehabilitative model toward one in which society must be protected from rising criminality. Garland contends that high crime rates have become a normal social fact in the United Kingdom and in many other countries as well. The fear of crime and criminality has reached epic proportions. It has become yet another modern danger "which has been routinized and normalized over time" (Garland, 1996:446). As a consequence, the emphasis has shifted from rehabilitating criminals to managing crime in the most efficient manner possible given the state's limited resources. In the United States, this has resulted in a bureaucratic approach to crime, one that involves more and more punitive measures. State after state has undertaken "legislative efforts to stiffen criminal penalties, introduce mandatory minimum sentences [and] revitalize the death penalty" (461). Garland further notes that since the late 1970s there has been a "new and urgent emphasis upon the need for security,

the containment of danger, and the identification and management of any kind of risk." He goes on to argue that an important effect of all this has been the "emergence of a criminological discourse of the 'alien other.' [This approach] represents criminals as dangerous members of distinct racial and social groups which bear little resemblance to 'us'.…[It is] a criminology which trades in images, archetypes and anxieties, rather than in careful analyses and research findings" (461).

Rose maintains that racial profiling is driven by two factors: an adaptive or managerial approach to crime, and a new emphasis on punitive responses to it. He contends that racial profiling "results from the politicization of danger. That is, "profiling" may appear to be grounded in some sort of actuarial calculation, but it is not. Rather, "it is a new way of talking about danger" (Rose 2002:185). Garland contends that there is a "new penology" that deals less with morality, diagnosis, or intervention than with regulating levels of deviance. This new penology is concerned with "techniques to identify, classify and manage groupings sorted by dangerousness." The objective is not to identify a dangerous offender but to "identify and manage 'risky' population subgroups sorted by danger" (2002:449).

Racial profiling, and police stops and searches of Black drivers undertaken, not because of traffic violations, but because they are "driving while Black," have become endemic in these societies. Similarly, police stops and searches of Blacks on street corners, in Black neighbourhoods, and in shopping malls are conducted on suspicion of criminal activity even when there is no observable evidence that any law is being violated. Russell-Brown (2004:66) suggests that the profiling of young Black men takes place "whether they are driving while Black, walking while Black, sitting while Black, bicycling while Black, or breathing while Black."

Citing Rodney King, Mike Tyson and O.J. Simpson as examples, Fiske (2000:60) maintains that in White America, Blacks – and especially Black men – must be watched because they demonstrate an ever-present danger to the social order of White society: "In the contemporary U.S. city the image of a Black man 'out of place' is immediately moved from information to knowledge, from the seen to the known. In these conditions being seen is in itself oppressive. To be seen to be Black or Brown, in all but a few places in the U.S., is to be known, to be out of place, beyond the norm that someone else has set, and thus to be the subject of white power."

It is not only that such persons are *seen* in places, but also that this seeing becomes transformed quickly into the notion of *danger*. An example of this – one often encountered by individuals of African descent – involves being stopped by the police for being present in a White neighbourhood. A Black man in a predominantly White geographic space is immediately suspect because he is out of place and perceived as acting abnormally.

Moreover, White people need to engage in critical self-reflection to find the "traces of a deeply sedimented white knowledge that the Black man is always, potentially at least, the source of social disorder, and that this disorderliness can be all too easily imagined in terms of excessive sexuality or criminal drug use" (Fiske, 2000:54). The Black man has been made to symbolize the internal threat to law and order, which is implicitly framed in the discourse of Whiteness. Threats of Blackness that cannot be eliminated must be contained. Surveillance must therefore be directed constantly at the male Black body to ensure that he is contained in his place (both geographically and socially). When he is allowed outside of his place, he must be watched to ensure that his behaviour is "normal," as measured by White standards. In this way, *not only surveillance, but also constant monitoring in the form of police stops and searches and other forms of racial profiling, become essential to what is a highly segmented and racialized postmodern society.* These dynamics are more deeply entrenched in the United States and United

Kingdom; however, the signs of surveillance, control and containment are also present in Canada, especially in large urban centres such as Toronto.

Visano embraces a similar analytical framework in his examination of racial profiling and criminalization in the criminal justice system – specifically in policing. He asserts that the qualitatively-different policing of Black and White communities reflects historical and colonial hegemonic systems of racism. Approaches to policing that view Blacks as intrinsically criminal and as potential threats to law and order open the gates for more strongly-racialized practices, including racial profiling. He suggests that criminalization can be understood as a "staged process that manipulates sanctions by defining disturbances…as totalizing narratives of trouble that warrant closure, containment, and coercion." One of the dominant narratives on which the criminal justice system builds is "the criminal subject as the essentialized and inferior other" (2002:212). When layered with colour, class and gender, the criminalized "other" constitutes a serious threat to the dominant White society, its social institutions and the state as a whole.

The criminal justice system and other institutions – including the media and other vehicles of cultural and knowledge production – perpetuate a pathology of deviance by problematizing race and thereby generating a climate of mutual threat" (Russell-Brown, 2004:67). The resulting relationship between minority citizens and the police is characterized by what Russell-Brown describes as underground codes. These codes, which hinge on the nexus between race and crime, make it possible for society to ignore and dismiss the concerns of minority communities. Thus the dominant White culture does not perceive racial profiling as a threat to the public. At the same time, these codes or myths reinforce stereotypes of crime and criminality as "a Black problem" or "an Aboriginal issue" (Russell-Brown, 2004:98).

In this paper we have attempted to deconstruct the underlying processes of racialization on which so much policing is based; to expose the multitude of meanings attached to racial profiling; and to unravel the coded language and racialized discourses that associate Black and other racialized communities with deviant and dangerous "otherness." Ultimately, the suppression of basic civil and human rights, and the everyday narratives of large and small aggressions against Blacks, Aboriginals and other people of colour reveal the huge social and psychological costs to society. Racial profiling exists in Canada, presumably to help in keeping its citizens safer from violence, yet it is, ironically an act of violence itself – an act that challenges the ideals and core values of a democratic liberal society.

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ENDNOTES

1   Frances Henry, Professor Emerita, York University, is one of Canada's leading experts in the study of racism and anti-racism. Since the mid-seventies, when she published the first study of attitudes toward people of colour, she has pioneered research in this field. Her most recent book (co-authored with Carol Tator and published in 2009) is *Racism in the Canadian University: Demanding Social Justice, Inclusion and Equity. Racial Profiling in Canada: Challenging the Myth of "a Few Bad Apples"* (2006) examines racial profiling in systems of policing and also demonstrates how profiling is carried out in other institutional arenas of society. Other books include co-authorship of *The Colour of Democracy: Racism in Canadian Society*, now in its fourth edition, a work that demonstrates how the "new racism," here identified with the concept of "democratic racism," manifests itself within Canadian institutions. Other publications include a book on racist discourse in the media, *Discourses of Domination: Racial Bias in the Canadian English Language Press*, 2002, which uses critical discourse analysis as a tool for deconstructing racism in media representation. As an anthropologist, Professor Henry's area of specialization is the Caribbean. She has written the only ethnographic study of the Caribbean community in Toronto, *The Caribbean Diaspora in Toronto: Learning to Live with Racism*, 1994, and recently published *Reclaiming African Religion in Trinidad: The Orisha and Spiritual Baptist Faiths*, 2003.

Carol Tator has worked on the frontlines of the anti-racism and equity movement for over three decades as an advocate, educator and scholar. She teaches anti-racism and equity in the Department of Anthropology at York University. Published widely on the subject of racism, she has co-authored five books with Frances Henry, including *The Colour of Democracy: Racism in Canadian Society*, 4th edition, 2009, *Racism in the Canadian University: Demanding Social Justice, Inclusion and Equity; Racial Profiling in Canada: Challenging the Myth of "a Few Bad Apples,"* 2006, *Discourses of Domination: Racism in the Canadian English Language Press*, 2002, and *Challenging Racism in the Arts: Case Studies of Controversy and Conflict*, 1998.

Sustaining Investigations and Security Certificates Through the Use of Profiles

Barbara Jackman[1]

The Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP) commonly and openly use racial and religious markers not only to identify persons of interest but to justify ongoing investigations and sharing of information with respect to citizens and non-citizens and to establish the case against non-citizens. This paper argues against the institutional claim that these practices are not racial profiling.

Intuitively, counsel representing individuals alleged to pose a security threat to Canada know that racial profiling plays a role in the identification of targets, in sustaining investigations, and in affecting the conduct and outcome of judicial proceedings. Knowing this is one matter, proving it is another – it is rarely possible to establish the insidious role racial profiling plays in the investigative and judicial process.

This paper does not attempt to provide answers to the problem of racial profiling in national security cases. This is a complex and layered problem. At best, the paper raises questions for debate and discussion.

Racial profiling has been recognized as an existing factor in criminal law enforcement. The Court of Appeal for Ontario in *R v Brown*[2], indicated:

> *9 In the opening part of his submission before this court, counsel for the appellant [i.e. the crown] said that he did not challenge the fact that the phenomenon of racial profiling by the police existed. This was a responsible position to take because, as counsel said, this conclusion is supported by significant social science research. I quote from the Report of The Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer for Ontario, 1995) (Co-chairs: M. Gittens and D. Cole) at p. 358: The Commission's findings suggest that racial-*

> *ized characteristics, especially those of black people, in combination with other factors, provoke police suspicion, at least in Metro Toronto. Other factors that may attract police attention include sex (male), youth, make and condition of car (if any), location, dress, and perceived lifestyle. Black persons perceived to have many of these attributes are at high risk of being stopped on foot or in cars. This explanation is consistent with our findings that, overall, black people are more likely than others to experience the unwelcome intrusion of being stopped by the police, but black people are not equally vulnerable to such stops.*

While the Court noted that a racial-profiling claim could rarely be proven by direct evidence, as a police officer is not likely to admit it as the reason for stopping and checking a person, the Court accepted that such a claim may be established by inference drawn from circumstantial evidence.[3] An instance where the offence could not have been known before a person is subject to a police stop, as for example, where the person is carrying two driver's licences, may be more amenable to establishing that profiling played a role in the stop.

In national security cases, suspect identification based on a racial profile presents similar problems of proof. The fact that profiling is used is not usually at issue. What is problematic is establishing that the profiling is rooted in racialized characteristics. It is not as simple as establishing that an intelligence officer could not have known

before targeting a person that the person was of concern were if not for the use of a profile, as in the case with the "discovery" of two licences after a police stop. There are normally other factors at play – association, political views and attitudes, and other aspects of a profile not overtly rooted in racialized characteristics. For example, an Arab Muslim may become the subject of a national security investigation not solely because he is Arab and Muslim, but, rather, because he holds what are perceived as traditionalist views of Islam – or he was in Afghanistan during the anti-Soviet jihad, or because he travelled to countries or areas of concern to the Canadian Security Intelligence Service (CSIS or "the Service"), such as Yemen, Azerbaijan or the Pakistani border with Afghanistan. This is not a "profile" based solely on being Arab and/or Muslim. It is, however, a profile very much dependent for its contour on such characteristics. How likely is it that non-Muslims travelled to Afghanistan to participate in the anti-Soviet jihad? Further, how likely is it that travelling to Yemen or Azerbaijan will be of real concern, if the traveller is a Christian university student or a white middle-class middle-aged couple with a family? It is the character of being Arab and/or Muslim that informs the concern about travels and other such elements of a profile. As such, what results is a nuanced profile, rooted in racialized characteristics, but not perceived as grossly stereotypical. The additional factors are seen as being grounded in the experience of the intelligence service with terrorists, and as such are considered "objective" indicators of concern, rather than being grounded in racialized characteristics. Hence, the "profile" is legitimized. This divorces the profile from the racialized characteristics although it is a profile which *draws its very sustenance from such characteristics*.

This is the primary problem in national security cases: the profile is perceived as legitimate. When a young black man is stopped by the police and the only charge laid is holding two licences, this is perceived by the courts as inherently wrong, because the inference drawn from the facts is

that race was the primary motivator for the police check, and that it is not acceptable to engage in profiling based on race. When an Arab Muslim on a nuanced profile is brought before the Court for the state to establish that there are reasonable grounds to believe that the person is a terrorist or a member of a terrorist organization, the nuanced profile is accepted as legitimate.

Rather than imply racial profiling, the profile itself establishes the case on the basis of the inferences drawn from it. A "reasonable" inference is drawn that a Muslim Arab would have gone to participate in the anti-Soviet jihad because he is a religious ideologue bent on destroying the western world; and, if he were not an extremist before he went, he became one while there. A "reasonable" inference is drawn that he travelled to Afghanistan to be trained by Bin Laden, or one of his terrorist associates, to engage in jihad against the western world. A "reasonable" inference may be drawn that he travelled to countries like Yemen or Azerbaijan to make contact with other terrorists. All are "reasonable" inferences to be drawn from the profile, and it does not matter that such inferences are denied, they are sufficient to establish the case. The root of this profiling is the person's identity as an Arab Muslim. The inferences would not be drawn but for this identity. The assumptions underlying the identity profile sustain the inferences drawn from the other "objective" factors. Unlike racial profiling in the context of police stops, the profile in national security cases sustains the state's case, often with little else.

A good example of this is the case of Hassan Almrei, a Syrian Arab Muslim who grew up in Saudi Arabia. The state alleged that there were reasonable grounds to believe that Almrei is a member of a network of extremist groups and individuals who follow and support the Islamic extremist ideals espoused by Osama Bin Laden.[4] The case was based on a number of factors: he participated in "jihad" and shares bonds with individuals in the Osama Bin Laden network;[5] he was in contact with Arab Afghans implicated

in Bin Laden's network, i.e., those who fought in Afghanistan in the 1980's and early 1990's against Soviets and the Soviet-backed communist regime;[6] he obtained and traveled on false travel and other documents and was involved in a forgery ring with international connections that produces false documents;[7] and he behaved in a clandestine fashion and was preoccupied with security.[8] The Service concluded that he would provide assistance in the movement of Al Qaeda members through providing forged or falsified documents based on the factors noted above.[9]

These allegations were dealt with in detail by two judges of the Federal Court on Almrei's two applications for release from detention.[10] Both judges, Justice Blanchard first and then Justice Leyden Stevenson, determined that Almrei presented a danger to Canada's security to such a degree that he could not be released from detention.[11] Justice Leyden Stevenson characterized the essential nature of the case against Almrei: "Islamic extremist ideology, as earlier noted, is the force that drives the Ministers' case. When reduced to its bare bones, the Ministers' position is founded largely on Mr. Almrei's participation in jihad."[12]

"Jihad" participation – bonds with those in the OBL network

Justice Blanchard determined on the basis of secret evidence that Almrei was not credible in stating that he had gone to Afghanistan along with many young Arabs to participate in the jihad, that he had not been involved in the fighting and that he did not share the views of Bin Laden. He accepted the state's assertions that Almrei was prepared to engage in combat; that his involvement in jihad put him in a community of individuals who support Osama Bin Laden; that he was not credible because he failed to disclose his role as Imam to authorities in making his refugee claim; that he funded his own travels to Afghanistan; and that he could not remember the names of other camps in Jalalabad.[13] Justice

Blanchard further determined that Almrei was not credible as to his account of his associations with others who had gone to Afghanistan. Almrei admitted the associations, but indicated that they were not nefarious.[14]

Justice Leyden Stevenson also reviewed the evidence, concluding that Almrei's "participation in jihad (specific to him) gives rise to an objectively reasonable suspicion that Mr. Almrei did adopt the Islamic extremist ideology espoused by Osama bin Laden."[15] He had denied this. She based her conclusion on a CSIS assessment that Islamic extremists present a threat to Canada; that Almrei had been under the command of two Islamic hardliners while in Afghanistan (not Bin Laden); that he was young and impressionable at that time and so it was not probable that he would not adopt their views; that he admired one of these commanders and kept in touch with him after leaving Afghanistan; that his father was a member of the Muslim Brotherhood, even though Almrei indicated that his father was not a fundamentalist; that Almrei had returned to Afghanistan a number of times between 1990 and 1995, not just going there once; because the CSIS officer J.P. testified that those who attended Al Qaeda and its affiliated camps were instructed on its ideology, and would have pledged allegiance to its goals; and because he was not bothered by people dying when he was in Afghanistan as he saw them as martyrs (although he was speaking in the context of a war, where fighters were killed in battle).[16]

False documents

Justice Blanchard noted that the state's case on this point was based on the fact that Almrei knew individuals in Montreal who could obtain false documents; he profited from obtaining a false passport for another Arab (who had also been in Afghanistan); he had a reputation in the community as a person who could obtain false documents; he was not credible as he could not remember why the other Arab needed the pass-

port (Almrei had said that his friend wanted to visit his mother and had no status in Canada and no documents); he could not recall who gave him the name of the Montreal contact; he knew it was illegal to obtain a false document; and he had befriended a human smuggler in Thailand and kept in touch with him after coming to Canada. Justice Blanchard concluded on this evidence and the secret evidence that Almrei was involved in an international forgery ring.[17]

Justice Leyden Stevenson also concluded that Almrei was involved in a forgery ring. Almrei admitted that he had helped another Arab, who had also been in Afghanistan, to obtain a false passport. He had also helped to arrange for an Arab woman without status to enter into a marriage of convenience to secure status, and had contacts with the man she married, who was himself alleged to be involved in procuring false documents. She concluded that "the totality of the evidence provides reasonable grounds to believe and gives rise to an objectively reasonable suspicion that Mr. Almrei participated in a network involved in forged documentation."

Clandestine behaviour

Almrei had indicated that if he engaged in clandestine behaviour, there were reasons for this – he was under an ongoing investigation by CSIS of which he was aware; there is mistrust of the Service in the Muslim community; and since September 11, 2001, Muslims are perceived to be targeted. Justice Blanchard rejected his explanations, finding him not credible on the basis of secret and public information. He found that he had engaged in clandestine behaviour.[18] Justice Leyden Stevenson, on the other hand, concluded that the allegation that Almrei was preoccupied with security and behaved in a clandestine fashion was weak. She noted: "Aside from the fact that participation in a document forgery ring (if established) would necessarily involve clandestine behaviour, the only public evidence to support this allegation is that Mr. Almrei's cell phone was

not registered in his name. The evidence in the confidential record is similarly equivocal and I attach little weight to it."[19]

Justice Blanchard summarized his reasons for concluding that Almrei was a danger to the public:

> *129 I have found Mr. Almrei's testimony before this Court not to be credible. I have also made the following determinations with respect to Mr. Almrei, (1) that he used clandestine methodologies; (2) that he supports the extremist ideals expressed by Osama Bin Laden; (3) that he is not credible with respect to his Arab-Afghan connections; (4) that he is not credible with respect to his involvement in Jihad; and (5) that he was involved in a forgery ring with international connections that produces false documents.*

> *130 I am satisfied that, should Mr. Almrei be released, there is a strong likelihood that he will resume his activities and become re-acquainted with his connections in the forgery ring and those Arab-Afghans connected to the Osama Bin Laden network.[20]*

Justice Leyden Stevenson also summarized the basis for her conclusion that Almrei is a danger to the public:

> *397 This brings me to the final aspect of this stage of the inquiry. The Ministers contend that it is the combination of Mr. Almrei's participation in jihad, adoption of the Islamic extremist ideology espoused by Osama bin Laden, and participation in a network involved in forged documentation that constitutes the danger to the security of Canada or to the safety of any person. The adoption of the Islamic extremist ideology is the driver. I have determined that Mr. Almrei has adopted the Islamic extremist ideology of Osama bin Laden, as that term is defined today, and that he participated in a network involved in forged documentation. His participation in jihad has long been established. His participation in jihad, in the circumstances specific to him, is the foundation for the finding that he is an individual who adopted the Islamic extremist ideology.*

> *398 The combination of the factors leads to a situa-*

tion whereby Mr. Almrei, even if he personally has no intention of committing a direct act of violence in Canada, has the potential to facilitate the movement of others who also harbour such beliefs and ideals and to position them to perpetrate violence on foreign or Canadian soil. This threat is substantial and it is serious. The factors giving rise to the finding of danger have been assessed individually and it necessarily follows that the same result is applicable to their combination. I conclude, on a balance of probabilities, that Mr. Almrei constitutes a danger to national security or to the safety of any person....[21]

As background to the determinations made in Almrei's and the other Arab Muslim security certificate cases, is the general profile developed by CSIS. In a CSIS threat assessment of June 24, 2005, entitled "Islamic Extremists and Detention: How Long Does the Threat Last?",[22] the Service opens with the statement that "thousands of extremists passed through Al Qaeda or Al Qaeda-affiliated training camps in Afghanistan during the 1990's." It notes "all attendees were indoctrinated into an extremist form of Islam that called upon adherents to kill those perceived as the enemy. This ideology was drummed into these individuals and is likely to remain with them for years." The assessment covers those who did not go to the Afghan camps by stating "Others who did not attend training camps have turned out to be just as radical and dangerous. Violent beliefs of Islamic extremists will not fade with time, rendering these individuals threats to public safety for years to come." Under the sub-heading "Once a Terrorist, Always a Terrorist?", the assessment concludes that the general conditions which promote social harmony – a sense of morality that violence on another is ethically wrong, and the deterrent of punishment by the state – do not apply to Islamic extremists. It goes on to assert that for Islamic extremists it is actually moral to commit acts of violence to fulfill one's religious obligation and that the fear of punishment is irrelevant because the extremist wishes to die. It notes "Therefore the deterrents available to civilized societies to counter religious extrem-

ism using traditional methods remain a serious challenge." The premise of the assessment is that such persons must be detained indefinitely. It provides some examples of extremists who were released and returned to terrorism. If notes, for example, that ten of the Guantanamo detainees who were released returned to terrorist actions.[23] The report creates an impression that all who participated in the Afghan conflict are believers in an Islamic extremism rooted in a religious belief lacking in human morality.

In Almrei's case, CSIS applied this profile. A CSIS officer testified that Almrei "had a profile." Blanchard, J. summarized the evidence of this officer, J.P., that the "main concerns about Mr. Almrei were his military training and his ability to forge documents. J.P. commented that Mr. Almrei's profile compared with the profile of Al Qaeda members, and indicated that there were "sufficient elements of a profile in this case...."[24]

If one considers the findings of the Court against the profile being applied by the Service, the basis for the conclusions are questionable, at least on the open evidence.[25] The essential premise of the state's case was that Almrei supported the extremist ideals of Osama Bin Laden. This was based on his participation in the jihad in Afghanistan. The CSIS position, set out above, is that everyone who went to Afghanistan was indoctrinated into, and pledged allegiance to, the extremist Islamic ideology of Osama Bin Laden. Further, that all the training camps were run by Bin Laden or, if not by him, by others who shared his beliefs. This, of course, is simplistic – and simply not true. It conflates the history of the jihad against Soviet control in Afghanistan with the development of Al Qaeda as though the two were one and the same thing.[26] It assumes that the Islamic beliefs of all commanders in Afghanistan were the same as those of Osama Bin Laden. And it assumes that all who travelled there shared a belief in a jihad directed against Western interests, without regard to principles

of morality and the rule of law. Participation in the Afghan conflict does not *per se* give rise to a finding that a person is a threat to Canada, absent the acceptance of a presumption that the youth who went there were all extremists. Learning how to use a Kalashnikov rifle does not mean that a person has a propensity to use one outside the context of an armed conflict or against innocent persons. If this were a legitimate inference, the same could be said of members of the Canadian armed forces, who also have learned to use weapons.

In Almrei's case there was testimony from individuals knowledgeable about the Afghan conflict. Both the Yale law professor, Dr. El Fadl, and the former representative of the Muslim Brotherhood in England, Dr. El Helbawy, provided detailed information. Both noted that the struggle against the Soviets was supported by the United States, and most Middle East countries. Large numbers of Muslim youth from various parts of the world, notably Saudi Arabia, Egypt, United Arab Emirates, Algeria and Jordan, responded to calls from states and mosques to help the Afghans. Some governments, like Saudi Arabia, offered financial assistance for youth to participate. Most who went did not receive rigorous military training, but only elementary basic training necessary for their own safety. Dr. El Fadl indicated that many went because of the Muslim belief that one must come to the aid of a Muslim brother or sister. The prevailing mood at that time was that a communist state had invaded a Muslim state; Muslims equated communism with atheism, and a number of governments, including Saudi Arabia, pressed this view. The majority of young people who went to help in Afghanistan worked in non-combat positions such as humanitarian and educational activities. There were over 100 aid organizations operating in the region during this conflict.[27]

Dr. El Helbawy, who had been in Pakistan for a number of years at the time of the jihad, knew many Afghan leaders, including Sayyaf, Mas-soud, Rabbani, Hekmatayar, Mojadedi, Khalis, Nabi and Gailani. He explained that there were hundreds of training camps in Afghanistan during this period run by many different people and different groups, often without proper organization. Dr. El Fadl indicated that Bin Laden may have had about 30 camps of which about 15 were active. He indicated that there were many other camps run by other groups. Bin Laden was not a "major player" during the jihad. He was seen at the time to be pro-Saudi and was rumoured to have dealings with the CIA. He did not come to prominence until much later in 1995 or 1996.[28]

Dr. El Helbawy and Dr. El Fadl indicated that very few of the young men who went to Afghanistan became extremists – perhaps at most 15%. Most were average, decent, moral Muslims who had strong religious beliefs. They were being fed a one-sided account, that the "bad guys" were the Soviets and the "good guys" were the Afghan people who were being dominated by the bad guys.[29] Dr. El Fadl distinguished between extremists and Muslims who are critical of the United States. A large number of Muslims are critical of the US invasions and do not trust US motives. They see the US invasions as disproportionate to the harm inflicted on the US. Dr. El Fadl indicated that there is no correlation between opposing the US invasions and being an extremist. Extremists have a very distinctive creed of violence, and believe in a continuous state of revolution that is ultimately going to bring down the evil powers of the world, so that violence for them has become a way of life.[30]

When one considers the evidence and its complexity, it begs the question of why the Court decided to conclude that Almrei adopted extremist beliefs, over his denials, simply because he was in Afghanistan, rather than accepting that he was one of the roughly 85% of Muslim youth who were observant believers trying to help out a victimized people, as he had testified. When virtually all the commanders in Afghanistan were observant Muslims, is it fair to assume that they

all indoctrinated everybody in their camps into the extremist ideology of Osama Bin Laden, a commander whom many later opposed through the Northern Alliance? There were clearly human rights abuses in the course of the armed conflict by all commanders, and while egregious and wrong, it was in the course of an armed conflict and does not translate into a propensity to later attack civilians in the West. For both judges involved in reviewing Almrei's case, it was his participation in the Afghan conflict that led to the conclusion that he had adopted the Islamic extremist ideology of Osama bin Laden. Such a conclusion is rooted in the CSIS profile which the Court applied, namely that anyone who had been in Afghanistan must have been an extremist, notwithstanding the expert evidence to the contrary before the Court (which was not rejected as not being credible). Justice Blanchard drew this conclusion without even linking it to the danger presented, as though, once determined, it *automatically* led to a conclusion that Almrei presented a danger. Justice Leyden Stevenson's conclusion of extremism was likewise rooted in Almrei's participation in the Afghan armed conflict. Once this finding was made, the other allegations were sustained by it.

This is evident in the Court's conclusions on the other principal allegation against Almrei – his involvement in procuring false documents. He was alleged to be involved with a forgery ring with international connections. There was no allegation that this ring was created to support terrorists or even that it was involved in supporting terrorists. The allegation on its own would not lead to a finding that Almrei would support terrorist activities. At best, it showed that he was engaged in criminal activity. Refugees travel on false documents. Almrei, a recognized Convention refugee, could not get a passport from Syria. Undocumented persons use false documents. Helping a woman without status in Canada to obtain landing through a marriage of convenience is not unheard of within a community where many lack status. It is the Islamic extremist label which

colours these activities. Having determined that Almrei believed in extremism, this sustained the finding that he would act to support terrorists through helping them to obtain false documents because he had obtained one for another Arab who had been in Afghanistan. Justice Leyden Stevenson did not even find that this support would necessarily involve an intent to engage in violence in Canada on Almrei's part. She noted that "even if he personally has no intention of committing a direct act of violence in Canada," he had the *potential* to facilitate the movement of others who harbour such beliefs and ideals.

While it is not possible to know what motivated the judges in Almrei's case to draw the conclusions that they did, the case made by the government, articulated by Justice Leyden Stevenson as being driven by Almrei's participation in jihad as the indicator of his adoption of extremist beliefs, is troubling. Not only does it involve a simplistic and ahistorical view of the Afghan conflict, it presumes a blind and unthinking adherence to extremist beliefs based on one's religious beliefs and applies to all who went to Afghanistan.[31]

The security certificate subjects have the additional disadvantage of not being Canadian citizens. Status is another layer that informs judicial decision-making. Canada's immigration history is one of racism, religious intolerance, gender discrimination and class bias. Historical jurisprudence generally reflects this history of intolerance of "socially unacceptable" strangers.[32]

While this paper has focused on the case of Hassan Almrei, others subject to security certificates have faced similar assumptions. The demonization of "others" is apparent in many cases, including Kurds, Tamils and Palestinians alleged to be inadmissible on the ground of being a threat to Canada's national security. The root assumption in these kinds of cases is that the individual is amoral, lacking consideration for the humanness of others, and incapable of rational thinking, having been blinded by a belief, imputed to the

person on the basis of her ethnicity, religion, or race or a combination of such factors. The ultimate conclusions against the person may be drawn from a variety of factors which appear unrelated to a racial profile, but such conclusions could not be sustained without the assumptions rooted in the profile itself.

ENDNOTES

1   Barbara Jackman is an experienced immigration and refugee lawyer based in Toronto. She was called to the bar in 1978 and practices in the area of immigration and refugee protection law through her law firm, Jackman & Associates. Ms. Jackman has represented clients in a number of high-profile cases involving Canada's anti-terrorism laws and immigration security certificates.

2   *R v Brown*, (2003) 173 C.C.C. 3d 23.

3   *Ibid.,* at para. 44.

4   *M.CI. v Almrei, Case Summary,* Oct. 18, 2001, p. 1; Nov. 1, 2002, p. 3. Since this paper was written, there have been further legal developments. The Supreme Court of Canada in *Charkaoui v M.C.I.,* [2007] S.C.J. No. 3 concluded that the security certificate process did not meet fairness standards required under s. 7 of the *Charter of Rights and Freedoms*, 1982. As a result, Parliament enacted new legislation in February, 2008 which rendered ineffective the security certificate that had been issued against Mr. Almrei and others and provided for a new process. A new certificate was issued against Mr. Almrei and a new hearing held during the summer of 2009. A decision on this is pending in the Federal Court.

5   *M.CI. v Almrei, Case Summary,* Oct. 18, 2001, p. 14-15, 21; Nov. 1, 2002, p. 6.

6   *M.CI. v Almrei, Case Summary,* Oct. 18, 2001, p. 16-17; Nov. 1, 2002, p. 6.

7   *M.CI. v Almrei, Case Summary,* Oct. 18, 2001, p. 13, para. 24, p. 14, 17-19; Nov. 1, 2002, p. 7.

8   *M.CI. v Almrei, Case Summary,* Oct. 18, 2001, p. 1, 17; Nov. 1, 2002, p. 7.

9   *M.CI. v Almrei, Case Summarizing,* Nov. 1, 2002, p. 6; There were several other less- significant allegations, such as Almrei's involvement in a honey business. *Case Summary,* Oct. 18, 2001, p. 15. Blanchard, J. did not really address this, while Leyden Stevenson, J. discounted it, concluding that the Ministers' reliance on his honey business to conceal his true purpose in travelling to various locations in the Middle East was speculative. *Almrei v M.C.I.*, [2005] F.C.J. No. 1994 at para. 344. Almrei had opened a little stall selling honey and *oud* (a resin used to make perfume) when he was in high school. Later he operated a little business selling the same things. The link to Bin Laden was a New York Times article written by a reporter, later discredited as a mouthpiece for the US Pentagon, that Bin Laden had moved money and arms through a honey business.

10 The reasonableness hearing before the Federal Court on the security certificate was brief. The Court refused to close the hearing to listen to why Almrei believed that he could not give some evidence in public and as a result he did not testify. The certificate was upheld as a result. It was only in the release application hearings, where Almrei was permitted to lead some evidence *in camera*, that an assessment of the case against him was undertaken by the Court.

11 It is ironic that of the five Arab Muslim men detained on security certificates in recent years, the other four have been released even although, on the face of it, the allegations against the others were far more serious than those laid against Almrei. Almrei remains detained at present. He was detained in October, 2001, just after the September 11, 2001 attacks.

12 *Almrei v M.C.I.*, [2005] F.C.J. No. 1994 at para. 343.

13 *Almrei v M.C.I.,* [2004] F.C.J. No. 509, at para. 111-113.

14 *Ibid.* Blanchard, J, at para. 121; one of the men with whom Almrei had contact is a Canadian citizen and subject to no apparent state controls or actions against him.

15 *Ibid.* Blanchard J., at para. 382.

16 *Ibid.* Leyden Stevenson, J, at para. 347-382.

17 *Ibid.* Blanchard, J. at para. 108-110.

18 *Ibid.* Blanchard, J., at para. 125-126.

19 *Ibid.* Leyden Stevenson, J, at para. 345.

20 *Ibid.* Leyden Stevenson, J., at para. 343.

21 *Ibid.* Leyden Stevenson, J, at para. 397-398.

22 IB 2005-6/10(b), June 24, 2005. It appears that the assessment was prepared ostensibly to provide the federal government with information about the threat presented by detained Islamic extremists, but actually to shore up the state's case in several of the security-certificate cases, which were then before the Federal Court on applications for release from detention.

23 The CSIS assessment provides no precise citations, although the reference to the Guantanamo detainees was taken verbatim from a *Washington Post* article. The assessment also makes no reference to the balance of the *Post* article which noted that the ten who returned to terrorist activities were ten out of several hundred detainees released or returned to the custody of authorities in their home countries. The assessment is misleading, not only because it is not based on the percentage of those released who returned to terrorist activities to determine the degree of threat presented, but also because it leaves the impression that *all* who are detained will return to such activities.

24 *Almrei v M.C.I.,* [2004] F.C.J. No. 509.

25 In security certificate cases, there is secret evidence not disclosed to the person. This makes it difficult to sustain a case of racial profiling because the secret evidence is not known and cannot be challenged. In Almrei's case, he denied support for the "extremist ideals" of Osama Bin Laden. There was no direct public evidence to counter his statement. At best, there was evidence from which a negative inference was expected to be drawn. For example, the RCMP pulled photos of Bin Laden, the war in Chechnya and other such photos from Almrei's computer. It did not disclose that these were not collected by Almrei, but rather were simply photos from public news reports and articles that had been accessed. Unmentioned were other photos which would have indicated that he read many different news reports.

26 The Afghan jihad was in fact, an international armed conflict, within the meaning of the *Geneva Conventions, 1949* and the two *Protocols,* and was in this sense legitimate in the context of international law norms. *Geneva Conventions Act, R.S.C. 1985, C. G-3.*

27 *Almrei Hearing Transcript,* Jan. 5, 2004, p. 1067-1071, 1074-1075, 1085-1086, 1107-1112, 1118-1119.

28 *Almrei Transcript,* Jan. 5, 2004, p. 1083-1086, 1092-1094, 1099-1100, 1119-1120, 1143-44, 48.

29 *Almrei Transcript,* Jan. 5, 2004, p. 1071-75, 1079-1090, 1101-1102, 1110-1112.

30 *Almrei Transcript,* Jan. 5, 2004, p. 1114-1118.

31 This perception differs from that taken by state officials before Justice O'Connor at the Arar Commission. The view expressed before Justice O'Connor was that participating in the Afghan conflict did not lead to a conclusion that the person was an extremist. See, for example, the testimony of Gar Pardy, DFAIT, Commission Transcript, May 26, 2005, pp. 3942-3943. It is clear, however, that but for the failure to openly aver to profiling on the basis of being in Afghanistan that racial profiling played a significant, if not determinative, role in what happened to Maher Arar.

32 For a succinct overview of this history, see *The Immigrant's Handbook, A Critical Guide,* Law Union of Ontario, Black Rose Books, Montreal, 1981, Chapter 1, "History of Immigration Laws and Policy," pp. 16-51. There are other books which document this history, one of the more famous ones being *None is Too Many, Canada and the Jews of Europe 1933-1948*, by Irving Abella and Harold Troper, Lester & Orpen Dennys, 1983. Another profoundly-disturbing book for lawyers is Constance Backhouse's *Colour Coded, A Legal History of Racism in Canada, 1900 - 1950*, University of Toronto Press, 1999. See also the Canadian Council for Refugees website at www.web.net/~ccr/fronteng.htm; and Barbara Jackman, *One Measure of Justice in Canada: Judicial Protection for Non-Citizens,* Canadian Bar Association, April, 2005.

Racial Profiling and National Security:
A Canadian Police Perspective

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This paper examines the Canadian police experiences with Project Shock (the RCMP investigations in Canada as a result of the September 11, 2001 attacks in the United States), the influence of interest groups in the crafting of the Anti-Terrorism Act *and the community-outreach programs and other preventative measures the police in Canada use to safeguard against racial profiling in national security investigations.*

This analysis examines how the protections enshrined in the Charter *and the* Canadian Human Rights Act*, the Canadian approach to identifying and targeting individuals and groups suspected of being involved in terrorist acts or other threats to national security, the practices and policies of government and police and the ongoing accountability through legislation and the courts fulfill their responsibility to provide the appropriate balance between the rights of individuals and the protection of society in reference to the issue of racial profiling.*

A preliminary examination of whether there was racial profiling during Project Shock suggests that there were very few complaints of racial profiling by police. Nonetheless, the RCMP addressed this possibility and took several proactive steps to minimize the potential for conscious or subconscious profiling of suspects. These steps, such as meetings with diversity groups by senior police managers, are explored.

The Canadian response to the terrorist attacks in the United States on September 11, 2001 has focused the public's attention on the issue of national security. One of the potential risks associated with a focus on anti-terrorism is the use of racial profiling against minority groups. Racial profiling represents the unjust use of superficial characteristics (e.g., race) to identify and target those individuals who should be subject to greater police attention. Given that the terrorist hijackers on 9/11 were all Arab and Muslim individuals, there has been an increased perception of the use of profiling or specific targeting of Arab and Muslim communities for investigation of terrorist-related activities in Canada.

Although there is no empirical evidence to prove the use of racial profiling in national security issues in Canada, it is important to recognize that there is the potential for its use. Of importance, therefore, is what Canada and its law enforcement and security agencies are doing to ensure that racial profiling is not practiced. The Canadian police response to perceptions of racial profiling involves actively engaging in community initiatives to promote greater community understanding of police purposes and tactics and to incorporate community concerns in the development of their initiatives. In addition, the Canadian government has also engaged in a series of community consultations to determine community perceptions and understanding of legislative acts, such as the *Anti-terrorism Act*.

Moreover, there have been a series of Supreme Court and other court cases that have shed some light on the courts' position on racial profiling and other national security measures involving minority groups.

This paper examines the development of racial profiling in Canada and the United States, and examines the methods used to ensure that racial profiling is not used by Canadian law enforcement agencies. In particular, attention is focused on the *Canadian Charter of Rights and Freedoms* and judicial decisions in relation to the *Anti-terrorism Act* as they pertain to racial profiling. Moreover, this paper examines several of the initiatives of the Canadian law enforcement community to address public concerns about the perceived use or potential use of racial profiling.

Definition of Racial Profiling

The term "profiling," in reference to racial profiling, was not defined until March 2004, when the online edition of the Oxford English Dictionary revised its contents to include the following definition:

> *a) the recording, itemisation, or analysis of a person's known psychological, intellectual, and behavioural characteristics, especially as documentation used…in the assessment of an individual's capabilities; b) selection for scrutiny by law enforcement officials, etc., based on superficial characteristics ([such] as ethnic background or race) rather than on evidentiary criteria.* (Manski, 2006:F347).

Racial profiling is an example of definition b) in that it occurs when law enforcement officials base their justifications for increased scrutiny on the characteristic of race without any additional evidence to implicate the individual in wrongdoing.

The use of racial profiling in law enforcement is an extremely controversial issue with law enforce-

ment officials, policy makers and academics on both sides of the issue – those who recognize its potential role in advancing national security interests and those who give primacy to its potential to violate or corrupt civil and human rights. One of the leading arguments against the use of racial profiling is that the practice results in the targeting of innocent members of minority populations with little statistical evidence that its use increases law enforcement's ability to prevent and respond to criminal activity (Heumann and Cassak, 2005).

Dangerously, racial profiling can lead to a situation in which the public' sand criminal justice agencies' beliefs that minorities commit more offences are substantiated by the fact that the police arrest more minority offenders (Heumann and Cassak, 2005). Conversely, supporters of the use of racial profiling argue that inclusion of race as one of many factors in a profile allows law enforcement officials to make better use of limited resources in preventing and responding to criminal activity. In fact, some make the argument that if police stop minorities more often, it is because they are more often committing violations and, therefore, the police are simply doing their job effectively (Heumann and Cassak, 2005).

In considering the ethics of racial profiling, Risse and Zeckhauser (2004) reference its efficiency. For them, if racial profiling assists police in reducing crime, notwithstanding that it may be ethically challenging, its benefits to the public good outweigh its risks to individual and collective rights. However, studies from the United States have suggested that racial profiling is not an effective or efficient police practice. For example, Knowles, Persico, and Todd (2001) devised a model in which the "hit rates," or success rate of police searches of civilians, were compared between high-crime-propensity groups. Their empirical research indicated that when hit rates differed, they tended to be lower among certain

minority groups, specifically African American and Hispanic populations. This finding suggested that these minority groups had a greater risk of being stopped and searched without any subsequent findings of wrongdoing (Dominitz and Knowles, 2006). Similarly, Heumann and Cassak (2005) contended that, while the hit rates were approximately the same for white and black individuals (around 28 per cent), many more black motorists were subjected to traffic stops, resulting in a higher number of false positive hits.

In practical terms, racial profiling has the potential to negatively affect the relationship between specific communities and the police. Experiencing racial profiling may lead victims to disrespect or distrust agents of the criminal justice system. According to Melchers, "racial profiling beliefs are a threat to social cohesion and public safety. They drive a wedge between law enforcement officials and those who, for whatever reason, come to think of themselves as their victims" (2006:4). Similarly, Heumann and Cassak (2005) noted that many law-abiding black Americans have been stopped by the police, ostensibly for traffic violations, although they were often not issued a ticket or charged with any traffic law violation. They suggested that this practice reduces positive perceptions of minority populations toward the police and other criminal justice agents (Heumann and Cassak, 2005).

Origins of Racial Profiling

The practice of racial profiling began in the United States in the 1980s as part of the United States' "War on Drugs" (Heumann and Cassak, 2005; Tanovich, 2002). In the 1970s, a "drug courier profile," which included information on race, was developed to assist security personnel to identify those who might be transporting drugs by air. While the profile contained a reference to race, it essentially focused upon behavioural indicators, such as location of origin of the flight, using cash to purchase the plane ticket, using an alias, or appearing nervous (Heumann and Cassak, 2005; Tanovich, 2002).

In the 1980s, United States law enforcement personnel began to crack down on the transportation of drugs along national highways. In assisting officers in determining who to target, the Drug Enforcement Agency (DEA) provided law enforcement officers with a drug courier profile (Heumann and Cassak, 2005; Tanovich, 2002). Given that the behavioural indicators from the airplane drug courier profile were less-easily observed with highway drivers, the new profile increased the emphasis on non-behavioural indicators, such as race. In effect, specific minority populations were identified as being more significantly involved in the drug trade than others.

This police strategy, named Operation Pipeline, resulted in the use of this profiling tool by law enforcement officers in 48 states (Heumann and Cassak, 2005). Tactically, Operation Pipeline involved officers making traffic stops for motor vehicle violations, such as speeding or weaving. The motor vehicle violation gave the officer a probable cause to make the stop, which subsequently allowed them to further investigate for signs of drug trafficking. If the officer was suspicious that the occupants of the vehicle may be engaged in illicit drug trafficking, they would ask for consent to search the car and would conduct pat-down searches of the occupant(s). Through this practice, traffic stops began to be referred to as pretext stops, a means to allow law enforcement officers to legally stop a driver to search for drugs without any legitimate reason to assume that the vehicle or its occupants had drugs (Heumann and Cassak, 2005).

Although the DEA denied that Operation Pipeline involved profiling potential drug couriers based on race, reports in the 1980s and 1990s suggested that the DEA associated certain drugs with specific ethnic groups, such as Thais, Colombians and Cubans. In addition, a 1991 report by the California legislature on Operation Pipeline revealed that nearly all motorists arrested were minorities (80 to 90 per cent), while only 10% were white (Heumann and Cassak, 2005). In the mid-1990s, Operation Pipeline was implemented

in Canada. Despite the fact that there was no evidence of Canadian law enforcement officers racially profiling drivers, Tanovich (2002) contended that as in the United States, racial profiling practices were likely also employed in Canada.

Research on racial profiling has also been conducted in Canadian jurisdictions. In 1994, the Ontario Commission on System Racism interviewed over 1,300 residents in the Metropolitan Toronto area. Respondents were asked to self-report the number of police stops they had experienced over the past two years. The results showed that nearly half (43 per cent) of respondents identifying as black males reported being stopped by the Toronto police, as compared to 25% of white male respondents and 19% of Chinese male respondents (Tanovich, 2002). Further analysis indicated that these racial differences remained even after controlling for additional relevant variables, such as age, class and level of education. Overall, the results indicated that blacks were twice as likely as whites or Asians to be stopped by the police a single time and four times more likely to be stopped multiple times. Furthermore, blacks were nearly seven times more likely than whites or Asians to perceive a police stop as unfair.

However, Melchers (2006) contended that the arguments that support the existence of racial profiling were based on flawed research and methodological weaknesses. Specifically, he argued that:

> *What we learn first and foremost from the U.S. experience of efforts to address allegations of "racial profiling" through empirical testing, is their futility. No challenge to "racial profiling" can have salience so long as "racial profiling" is held as an unassailable belief. Allegations of "racial profiling" are not falsifiable, no more than are beliefs of any sort. "Racial profiling" beliefs cannot be disproved through data collection* (Melchers, 2006:4).

In other words, analysts frequently employ data obtained from the census, traffic surveys and

traffic stop outcomes as base rates to compare traffic-stop data. However, as stated by Heumann and Cassak (2005), a more proper comparison measure may be the number of minority drivers who committed traffic violations because, while minority drivers may be pulled over at a higher rate than non-minority drivers, it may be because they commit more traffic violations and not because of some explicit or implicit form of racial profiling.

The RAND Corporation similarly argued that these comparisons lack additional relevant information, such as the frequency of exposure to police or driving behaviours. The RAND Corporation subsequently employed an innovative method of analyzing stop data. In exploring whether traffic stop decisions were influenced by observations of race, the study used a "veil of darkness" methodology. Essentially, the researchers argued that as it becomes darker during the day, the ability for a law enforcement officer to determine the race of a driver prior to stopping the driver is impeded. In order to explore the role of race, the researchers compared the distribution of race among traffic stops made for a moving traffic violation one hour before sunset and one hour after sunset. The results indicated that there was not a significant difference among black drivers pulled over during the day (50 per cent of stops) compared to at night (54 per cent). The authors concluded that race did not play a role in officer decisions to make a traffic stop. However, the authors did find the appearance of some racial disparities with respect to post-stop activities, such as the length of the stop and the frequency of pat searches. Black drivers were more often stopped for a longer period of time and were more often subjected to a pat-down search. The authors concluded that these disparities could be rectified through departmental policies and training (RAND Corporation, 2004).

From the studies conducted to date, the research supporting or negating the existence of racial profiling in police practices remains inconclusive.

While there does appear to be some evidence that racial profiling has occurred outside the context of national security in the United States, there is no empirical evidence that it has been used in Canada within the context of national security. However, this is not to say that the potential for using racial profiling does not exist in Canada. Given this, Melchers (2006) suggested that police and other agents of criminal justice must remain transparent and accountable to the public to maintain their confidence that racial profiling does not occur. In addition, there are two important safeguards against its use, namely the *Charter of Rights and Freedoms* and the *Canadian Human Rights Act*.

Racial Profiling and Canadian Human Rights

In Canada, academics have argued that the use of racial profiling violates various aspects of the *Canadian Charter of Rights and Freedom*, as well as the *Canadian Human Rights Act* and the rights protected by Human Rights Commissions. The *Charter* sets out the basic rights and freedoms of all Canadians. The fundamental freedoms set out by the *Charter* under Section 2 include the freedoms of a) conscience and religion; b) thought, belief, opinion and expression; c) peaceful assembly; and d) association. The *Charter* also specifies a number of legal rights, such as the right to life, liberty and security of the person (Section 7); the right to be secure against unreasonable search and seizure (Section 8); the right to an informed and lawful detention and to be informed of the right to retain and instruct counsel (Section 10); the right to be tried within a reasonable time (Section 11(b)); and the right to be presumed innocent (Section 11(d)).

It is important to note that under Section 1, the limitations clause of the *Charter*, these rights and freedoms can be subject to reasonable limitations when deemed justifiable in a free and democratic society. For instance, the Canadian courts have deemed that while Section 319 of the *Criminal Code,* which prohibits the unlawful promotion of hatred against identifiable groups, violates the freedom of expression found in Section 2(b) of the *Charter*, this violation can be justified under Section 1 as a reasonable limitation to the freedom of expression (*R v. Keegstra,* 1990).

Several rights and freedoms have been discussed specifically in relation to racial profiling. These sections include the equality rights, protected under Section 15, and the freedom against arbitrary detention, as set out in Section 9.

Section 15(1) of the Charter

Academics have suggested examining racial profiling in police practices under Section 15(1) of the *Charter* as this section applies to equality rights. Specifically, Section 15(1) stipulates that all individuals are equal under the law and that they have the right to equal protection and benefit of the law without discrimination, such as discrimination based on race, national or ethnic origin, colour, or religion. However, this section is one of the most difficult provisions to apply because this provision is constantly changing and there is a lack of existing legal guidance to provide direction in using this approach (Tanovich, 2002). In additional, the financial resources required to mount a legal case proving a violation of this section of the *Charter* is prohibitive for many citizens. Given this, Tanovich (2002) argued that racial profiling cases would be better served by section 9 of the Charter.

Section 9 of the *Charter*

Section 9 of the *Charter* applies to the protection of citizens against arbitrary detention by the police. The powers handed to police by this section have been shaped by two key case decisions. In *Ladouceur*, the use of the "roving random stop" by law enforcement officials was deemed permissible by the courts (*R v. Ladouceur*, 1990). According to Tanovich (2002), this case provided police with the powers to stop any

individual, at any time, in any place, and for any reason. Tanovich argued, therefore, that this case provided police with an "implicit licence to engage in racial profiling by means of pretext stops" (Tanovich, 2002: 167). However, these powers were somewhat limited by the case of *Brown*, in which the courts ruled that Section 9 of the *Charter* was violated if the traffic stop was conducted for an improper purpose, such as the targeting of a specific racial group (*Brown et al. v. Regional Municipality of Durham Police Service Board,* 1998). Although difficult to prove, this case provided a number of sources of circumstantial evidence that would lend support to the claim of racial discrimination (Tanovich, 2002).

Given the difficulty in proving the law enforcement officer's intention in making the traffic stop, Tanovich (2002) argued that Section 9 of the *Charter* should be amended to include four additional subsections. These sections include that: 1) an onus should be placed on the Crown to establish a lack of racial motivation in police traffic stops of minority motorists; 2) an onus should be placed on the judiciary to interpret the defendant's conduct that allegedly gave justification for further police investigation in a race-neutral manner; 3) all investigatory stops should be deemed to be detentions; and 4) all unlawful detentions of racial minorities should be deemed to be arbitrary detentions, including stops of pedestrians. Tanovich's argument is perhaps extreme considering the strong decisions from the Supreme Court with respect to protecting the rights under the *Charter*. The Supreme Court has been, and is, in fact, a strong check and balance against infringements on rights. In addition, a *Charter* amendment as suggested is very unlikely. Unlike amendments to other federal statutes, an amendment to the *Charter* requires, in addition to passage in Parliament, a majority approval of the provinces.

Racial Profiling after September 11, 2001

Heumann and Cassak (2005) contended that the terrorist acts in New York City and Washington on September 11, 2001 resulted in a major shift in the way racial profiling was perceived by Americans. Prior to these events, there was a near consensus on the fact that race should not be the sole factor in determining who to investigate for suspected criminal activity. However, after 9/11, the public's perception on racial profiling as a means of identifying potential hijackers was much more favourable. Heumann and Cassak (2005) noted that many of those who previously spoke out against racial profiling favour its use in screening air passengers. Furthermore, members of "targeted" minority groups, such as Arabs and Muslims, supported the use of some racial profiling as "Arab-Americans… want to be safe when we fly. Cooperating with security procedures, even when we suspect that we are getting more attention than our fellow citizens, makes sense" (Heumann and Cassak, 2005:167).

Heumann and Cassak (2005) identified the development of a "Hijacker Financial Profile" following the events of September 11. In this profile, race or ethnicity was the primary, and sometimes even the sole factor, in determining who to investigate prior to boarding a plane. In support of this approach, a Gallup poll in the United States identified that 71% of African-Americans and 63% of other non-whites (including Arabs) supported the use of intensive pre-flight boarding security measures that focused on Arabs. The level of support among whites for these practices was much lower (57 per cent). The Detroit Free Press similarly found that nearly two thirds (61 per cent) of Arab-Americans supported more intensive security measures for people appearing to have Middle Eastern features and accents (Heumann and Cassak, 2005).

The September 11, 2001 terrorist attacks also changed the debate about racial profiling in Canada. As a result of the attacks, Canadian law enforcement agencies implemented a number of projects aimed at enhancing the security and safety of Canadian citizens. The challenge facing the government was to find a balance between civil rights and national security. The Canadian

government's national security policy entitled *Securing an Open Society: Canada's National Security Policy* (2004) was a broad, multi-faceted policy covering the areas of intelligence, emergency planning and management, public health, transport security, border security and international security. The Executive Summary states:

> *It is crafted to balance the needs for national security with the protection of core Canadian values of openness, diversity, and respect for civil liberties…* (vii).

This theme continues in the first chapter of the policy document:

> *A core responsibility of the Government of Canada is to provide for the security of Canadians. The right to life, liberty, and security of the person is enshrined in our Charter of Rights and Freedoms. A clear and effective approach to security is not just the foundation of our prosperity – it is the best assurance that future generations will continue to enjoy the very qualities that make this country a place of hope in a troubled world* (1)

While the various projects implemented by Canadian law enforcement agencies were intended to increase the safety and security of Canadian citizens, critics have cautioned that they have served to alienate the population of interest from law enforcement officials. In other words, in identifying terrorist suspects, law enforcement requires the assistance of the very group subjected to additional police tactics, such as increased surveillance and infiltration (Heumann and Cassak, 2005). However, members of these populations have distanced themselves from Canadian law enforcement agencies due to increased distrust of the police and segments of Canadian society. In terms of preventing terrorism on Canadian soil, Canadian law enforcement officials appear to realize that they must form working relationships with Arab and Muslim populations. In more general terms, with respect to racial profiling and the police, Canada and its law enforcement agencies have partnered with minority communities to assist them in ensuring that systemic racial profiling does not occur.

Following the events of 9/11, the Royal Canadian Mounted Police (RCMP) began a national investigative and enforcement initiative to prevent and respond to terrorism. Project Shock was the name given to the RCMP investigation into the 9/11 attacks. This investigation followed leads generated from the American investigation and searched for evidence of additional attacks. Prior to 9/11, the RCMP's national security program was largely isolated from other law- enforcement initiatives, which led to a lack of information-sharing. Project Shock developed relationships with organizations such as the Canadian Security Intelligence Service (CSIS), the Department of Foreign Affairs and International Trade, the Canada Custom Revenue Agency, the Department of Justice, Transport Canada, Citizenship and Immigration Canada, the Department of National Defence and the Privy Council Office (Brian, 2002). The RCMP also reached out to the community, for example, by providing a public information line for terrorism-related tips. This resulted in thousands of tips that were subsequently investigated (RCMP, 2006). In addition, the RCMP National Security Investigation Section made contact with leaders in the Muslim communities to share information and to explain the nature of the investigation. Key to this interaction was opening lines of communication with the communities in order to provide clarity of the police role and to provide assurances that the police would not target Muslims or persons of Middle Eastern descent.

An enquiry to the RCMP Criminal Intelligence Directorate, Ottawa, revealed that there were no public complaints to the RCMP of "racial profiling" flowing from the RCMP investigation during Project Shock. There were, however, sentiments expressed through the media and other venues used by the Middle Eastern ethnic communities that they felt under constant suspicion and that

they were wrongfully being linked to terrorist activity. The Canadian government, police and security intelligence agencies were aware of community concerns regarding the limitation of some civil rights in support of national security and, in response, the police identified the need to educate the public and to inform them that police policy is to identify persons of interest based on intelligence and information about behaviour and activities, not based on their appearance or ethnic or religious beliefs.

It must be kept in mind, however, that none of this guarantees that violations of civil rights on the basis of racial profiling will not occur. However, it does suggest that the police are attentive to being transparent and building into their practices a series of checks and balances. It is also encouraging that the police are attentive to the feeling and perceptions of those Canadians who are most threatened by the potential of racial profiling. It is also important to note that Canadian police and security intelligence agencies rely on legislation to grant them their powers and authorities. Given this, politicians and bureaucrats must balance civil rights against the need to protect national security through the expansion of powers to agents of the state. An example of the difficulty in balancing the need to ensure national security while protecting individual rights is the *Anti-terrorism Act* which was passed soon after the 9/11 terror attacks.

In responding to the threat of terrorism, the Canadian government introduced the *Anti-terrorism Act,* Bill C-36, in 2001. The act was designed to uphold the delicate balance between the public's right to safety and basic human rights as enshrined by the *Charter*. Essential to the act are six foundational principles; these principles, which included the principles of protection, restraint and minority rights, emphasized the need to ensure that the implementation of the *Anti-terrorism Act* provisions and powers were achieved in a manner that both defended public security and abided by the rule of law (*Anti-terrorism Act* consultation, 2004).

The *Anti-terrorism Act* sought to criminalize activities that took place prior to the occurrence of a terrorist act (Department of Justice, no date, a), such as financing terrorist organizations. The legislation also provided for additional investigatory tools and powers to allow the Canadian government and its public agencies to better protect the security of its citizens while safeguarding the basic human rights secured in the *Charter* (Department of Justice Canada, no date, b). These safeguards included: requiring the consent of the Attorney General for investigative hearings or to prosecute terrorism offences; requiring a high degree of mental culpability to prove the commission of a terrorist offence; the inclusion of sunset clauses and other Parliamentary reviews, annual reports and the incorporation of Parliamentary and judicial review mechanisms; protection against self-incrimination in investigative hearings; and the need to establish reasonable grounds prior to utilizing preventive detention or requiring attendance at an investigative hearing (Department of Justice Canada, no date, b).

However, some have argued that the *Anti-terrorism Act* undermines several basic rights and freedoms (e.g., Canadian Labour Congress, 2007). The British Columbia Civil Liberties Association (BCCLA) took the position that, while "no rights are absolute, and security is a fundamental condition of the exercise of all other rights" (Barriere, 2001:2), some provisions in the *Anti-terrorism Act* should be revised. For example, the investigative hearing procedures permit the government to require an individual to appear before an investigative body presided over by a judge. The individual can then be compelled to answer questions or provide documents, such as journals or letters. However, Barriere (2001:6-7) argued that the investigative hearing procedures threaten the basic principle of the right to speech, the principle that individuals may choose when and to whom they speak. In order to limit the restrictions placed on basic rights and freedoms by the provisions in the *Anti-terrorism Act*, the BCCLA recommended that many of the provisions be accompanied with sunset clauses to necessitate

their revision or extension by Parliament within a specified amount of time following their enactment (Barriere, 2001:6-9, 13, 17).

Both prior to and following the Royal Assent given to Bill C-36, the government of Canada heard a number of submissions from various interest groups concerned with the reach of the bill. For example, the Canadian Bar Association, the Federation of Law Societies of Canada, the Canadian Association of University Teachers, the University of Toronto: Faculty of Law, the International Civil Liberties Monitoring Group and the Muslim Lawyers Association submitted concerns regarding the bill (Carters Professional Corporation, 2007).

The Canadian Bar Association (CBA) argued that the bill was unnecessary as the government already has legislation to fight terrorism, namely the *Criminal Code* and the *Immigration Act*. The CBA recommended, however, that if the Bill should be implemented, sunset clauses should be attached to reduce its potential negative effects on basic rights and freedoms. The CBA also argued against the definition of terrorist activity as written in the bill because it was felt that the definition was overly broad and would subsume too many innocent individuals and organizations, such as those engaged in public demonstrations or strikes. Perhaps most relevant to this paper, while recognizing that the provision for preventive arrest does involve several checks and balances, the CBA maintained that this provision may be disproportionately applied to minorities (Canadian Bar Association, 2001).

In November of 2001, the Coalition of Muslim Organizations presented a submission on Bill C-36 to the Standing Committee on Justice and Human Rights. The Coalition argued that given the "climate of hate and violence directed at Muslim-Canadians, and other minorities" following the events of 9/11, the provisions in the bill were likely to be disproportionately applied to minority members of the Canadian population (Coalition of Muslim Organizations,

2001:2). The Coalition argued that the bill violated fundamental Canadian values and rights. For instance, in agreement with the CBA, the Coalition of Muslim Organizations contended that the definition of terrorist activity, facilitation and terrorist group were all unnecessarily broad. Moreover, they argued that the Bill violated basic rights enshrined in the *Charter*, including: "i) rights upon arrest or detention; ii) due process and the right to full answer and defence; iii) equality guarantee; and iv) prohibition against cruel and unusual punishment" (Coalition of Muslim Organizations, 2001:17). An important recommendation of the Coalition was for the government to engage in public consultations to inform the public of the bill's provisions and to hear the public's perceptions of the bill (Coalition of Muslim Organizations, 2001).

Therefore, in addition to hearing submissions from interest groups, the Government of Canada also reached out to the community to assess their perceptions of the bill. In late 2004, Justice Canada and Public Safety and Emergency Preparedness Canada held a public consultation with representatives of ethno-cultural and religious communities, including the Coalition of Muslim Organizations, the Muslim Students Association, the African Canadian Legal Clinic, the Canadian Council of Muslim women, the Canadian Jewish Congress, the World Sikh Organization and the Muslim Canadian Congress. The focus group responses suggested that many community members did not fully understand the *Anti-terrorism Act*. Others supported the Act, but were disenchanted with the methods by which the police and CSIS implemented its provisions. Still others perceived the act as justifying violations of human rights by state agents. Overall, focus group participants emphasized the need for law enforcement agencies to engage in community consultations to encourage mutual understanding and trust (*Anti-terrorism Act* consultation, 2004).

Focus groups were also conducted with minority community members in March, 2003. Using

a random sampling methodology, individuals throughout Canada were invited to participate in a focus group in which they were asked to express their views of the *Anti-terrorism Act*. In all, 138 participants from approximately 60 ethno-cultural minority groups participated. Based on ethnic background, three focus groups were created: Group 1 consisted of people of Arab, West Asian, North African and Pakistani ethnicity; Group 2 was composed of other Asian ethnicities; and Group 3 involved Western, Northern, Central, Southern and Eastern European ethnicities and those who were Aboriginal or Jewish (CREATEC Centre, 2003). Of interest here is that participants were concerned that the publicizing of identified terrorist organizations could result in minority stereotyping and that police investigative powers could lead to singling out ethnic minorities (CREATEC Centre, 2003).

More recently, the federal government created the Cross-Cultural Roundtable on Security (CCRS). Created in February of 2005, the CCRS is composed of 15 volunteers from a range of ethnicities and cultures who are tasked with upholding the government's commitment to involve all Canadians in building and maintaining an effective approach to the security and protection of Canada. The creation of the CCRS appeared to reflect awareness that national security concerns could divide communities and result in the singling out of minority groups. In creating the CCRS, the government sought to maintain ongoing community dialogue encouraging understanding and respect of all segments of society (Chair, 2006).

The CCRS has engaged in dialogue with a broad range of diverse communities to gauge their perception of new security measures and how they have affected their communities. The relevance to racial profiling here is that the CCRS communicates with senior government officials and ministers to relay the concerns expressed to them by communities. By acting as one link between government and communities, the CCRS

provides government agencies with insights into community perceptions that allows for cultural awareness and sensitivity to be integrated into the shaping of security investigations, training and recruitment, and border activities. The CCRS also facilitates meetings held directly between government representatives and community groups. These meetings allow an opportunity for government to explain what they are doing to protect Canadians and why they are employing the strategies and tactics in place. In return, community groups express their concerns about how these initiatives may disproportionately single out certain members of society. This dialogue has resulted in the reassessment by security intelligence agencies of how to build long-term partnerships and relationships with communities, and an exploration on how best to engage communities in issues of national security. This exploration has led to the recognition of the need for mutual trust and understanding between communities and security intelligence agencies to better protect Canada as a whole (Chair, 2006).

The *Anti-terrorism Act* was created with the *Charter* in mind, building into the legislation several checks and balances to protect the rights of Canadians. Following the events of 9/11, many Canadians became willing, at least temporarily, to allow a suspension of some basic rights to enhance the security of the nation. Following this shift in attitude, the courts were increasingly relied upon to judge the extent to which these basic rights and freedoms could be suspended (Roach, 2002). The *Anti-terrorism Act* provided police forces with increased powers, such as allowing them to make preventive arrests of those they suspected were aiding in or about to commit a terrorist offence. The *Anti-terrorism Act* also permitted the use of investigative hearings, where individuals could be required to appear before a judge or justice of the peace and compelled to provide information. The provision of such powers was approved by the Canadian government, even as it increased concerns regarding the basic infringement of rights, especially among minority

groups.[2] Of concern, at the time, given that the 9/11 hijackers were all Arabs and Muslims, was that such measures would single out Arab and Muslim individuals in Canada on the sole basis of the racial and ethnic profiling of minorities.

An additional measure that has been in practice since 1978, but which only recently has become controversial, is the use of security certificates issued under the *Immigration and Refugee Protection Act*. Security certificates can be issued against non-citizens of Canada (including permanent residents) who are deemed to pose a threat to the national security of Canada. Signed by both the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness, security certificates allow for non-citizens to be detained without charge for an indefinite period of time. The validity of the security certificate is argued in federal courts; once the federal court judge makes the final decision, it is meant to be non-reversible. If the judge deems the certificate to be valid, a removal order is issued which results in the individual's deportation to their home country (Griffiths, 2007). Although the use of security certificates might be justified as a necessary national security measure, its use became controversial in the debate over racial profiling when it was discovered that it has been used against five individuals since 9/11, of whom all were Arab and Muslim men and of whom two were permanent residents of Canada. While not explicitly discussed in these court cases, it is argued by some interest groups that it is possible that racial profiling could play a role in the security certificate process.

In order to prevent these occurrences, Canadian law enforcement officials recognize that responding to accusations of racial profiling requires more than denying the existence of the practice or implementing policies to prevent it. Instead, the RCMP has engaged in a number of initiatives to reach out and partner with communities to address a wide range of national-security concerns, including racial profiling.

For example, community initiatives have been implemented. The community outreach program is a component of the RCMP's Bias-Free Policing Program developed to better engage community partners in preventing terrorist acts (RCMP "E" Division, 2007). The primary goals of the community outreach program include: to engage the community to increase understanding and trust; to ensure all are treated equally and with respect; and to identify and remove barriers. Community outreach programs seek to broaden communication between the RCMP and ethno-cultural communities to allow for greater mutual understanding. This is especially important if members of the community have recently immigrated to Canada from a country characterized by mistrust and corruption of both government and the police. The community outreach programs promote understanding of the legal processes and protection of civil rights, ensure that accurate and complete information is shared, and allow for a discussion of community concerns, for instance, regarding hate crimes or racial profiling. Other police agencies, such as the Vancouver Police Department and Toronto Metro Police, have also established similar community outreach programs.

In addition, the RCMP's Integrated National Security Enforcement Teams (INSET) formed a Community Advisory Group with the Muslim community. Together, they developed a law enforcement training package to educate law enforcement officers on cultural issues and Islam (RCMP "E" Division, 2007). Although not exclusive to the Muslim community, cultural-awareness education in the national-security context has an emphasis on Muslim communities and culture and is similar to that used to educate RCMP members regarding Aboriginal cultures. The national security educational components focus on diversity and culture, human rights concerns in national security, racial profiling, bias-free policing, national-security community outreach programs, and national-security youth outreach. Examples of this cultural awareness

education include cultural practices, such as offering to remove shoes, asking if a woman is comfortable alone with a male investigator, or allowing a witness to be accompanied by someone during an interview.

Moreover, INSET partnered with private businesses to support increased awareness and communication. The RCMP also created community programs to encourage the engagement of a wide range of ethnic, cultural and religious communities with the general purpose of increasing community understanding of the RCMP goals and ensuring that the RCMP understands community goals (McLellan, 2005). At local levels, Community Consultative Groups are being formed whereby the police invite the community to form a consultative group of community leaders through which the community can bring forward its questions and concerns, the police can educate the community and provide community members with information, and in which mutual trust and respect can be developed.

Additionally, police and security intelligence agencies, such as the RCMP and CSIS, have participated in events organized by the CCRS. In February of 2006, the CCRS organized a community event called "Atlantic Regional Symposium: Engaging Canadian Society in Keeping Canada Safe." The event involved panel participation by security officials from the RCMP, CSIS and the Canadian Border Services Agency (CBSA). Panel representatives presented an overview of the roles and responsibilities of their respective agencies with respect to national security activities and took questions from participants. The event enabled a group discussion on the various roles and responsibilities of the security intelligence agencies, individuals and communities in protecting national security. Furthermore, the group discussion focused on a range of topics including racial profiling, balancing human rights with security rights, barriers faced by immigrants to Canada, the need for cultural sensitivity

training for security intelligence agencies, the need for greater outreach to communities and the need to build mutual trust between security intelligence agencies and communities (CCRS, 2007). Similar events have taken place in other Canadian cities.

Law enforcement agencies across the country recognized that certain groups were at risk of being targeted as a response to real or potential terrorist incidents. In June of 2006, twelve adults and five youth were arrested in Toronto and charged with terrorist-related offences under the *Criminal Code*. In perceiving that such arrests could result in unfair accusations and possible hate crimes, the Ottawa Police Service posted a public announcement on its website stipulating that members of the force were meeting with all community organizations with a concern for the safety of their community members or regarding their places of worship. In doing so, the Ottawa Police Service emphasized its strong relationship with diverse ethnic and religious community groups (Ottawa Police Service, 2006). In addition, since 1999, the Ottawa Police Service has operated a Community-Police Action Committee (COMPAC) whose purpose is to maintain a partnership between the police service and visible minority groups characterized by openness, trust and respect.

The Canadian Security Intelligence Service (CSIS) has also recognized the need to establish relationships with various communities, especially since the role of CSIS is not well understood by the majority of Canadians or recent immigrants to Canada. CSIS recognized the need for a multi-faceted approach aimed at demystifying its role and mandate. To accomplish this objective, CSIS targeted national leadership by establishing relationships with national forums and organizations. In addition, CSIS sought to develop relationships with local communities and their leaders. Among CSIS' key messaging to these communities is that these communities have a civic responsibility

to protect society and to deter and prevent any threat to national security.

Conclusion

The events of September 11, 2001 led to new security measures in Canada introduced to better protect its citizens. However, the provisions introduced under the *Anti-terrorism Act* led to a number of concerns regarding racial profiling, specifically within the context of the unfair and inappropriate targeting of minority ethno-cultural communities by law enforcement and security-intelligence agencies. Notwithstanding the fact that there is no evidence of racial profiling in the context of national security issues, Canada, with its historical emphasis on multiculturalism and tolerance, recognized the potential for racial profiling and other abuses and has reached out to diverse ethno-cultural communities in an attempt to engage in discourse to foster greater understanding and mutual trust.

Although Canada's intentions have always been to provide a balance between the protection of basic rights and freedoms and the protection of national security, the introduction of the *Anti-terrorism Act* was viewed by some special-interest groups to have the potential to swing the pendulum in favour of national security concerns. However, recent case law suggests that this may not be the case. The Supreme Court of Canada recently ruled that the security certificate process was unconstitutional in that it violated several rights protected under the *Charter*. There was nothing in the Supreme Court decision that referred to concerns about the potential for racial profiling. The Supreme Court did recognize the value and need to have a security certificate process and gave Parliament one year to address the constitutional concerns. Further, concerns were expressed by various interest groups, academics and lawyers regarding the preventive arrest and investigative hearing clauses and these provisions were both subjected to a sunset clause and, as of March 1, 2007, expired.

Both the government of Canada and its security-intelligence agencies continue to engage in community consultations to minimize the potentially disproportionate impact of the *Anti-terrorism Act's* provisions on minority community members. Public forums and community events have allowed agencies, such as the RCMP, to explain the nature of its roles and responsibilities with respect to security initiatives, and have allowed community members to share their fears and concerns. While community members have generally expressed their satisfaction with the national security provisions, it is essential that such discourse continue to further develop and maintain mutual trust and understanding.

Though there is no evidence of systemic racial profiling, there is no empirical evidence with which to disprove it. Perhaps more importantly, there remains the potential for racial profiling to occur in Canada. One key way to prevent its systematic use is to continue to establish and nurture relationships between community and the police and to maintain a mutual level of trust and respect. In considering appropriate national-security measures, it is not only necessary to consider individual rights, but to have the Canadian public's support, including minority groups' support, for laws enacted or policies implemented. It is also vitally important that the Canadian legal system continue to play its part in ensuring that all the necessary checks and balances exist in national security policies and practices that have the potential for racial profiling.

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ENDNOTES

1   Richard C. (Dick) Bent is Deputy Criminal Operations Officer, Community, Contract and Aboriginal Policing Services, RCMP "E" Division. Dick joined the RCMP in 1974 and served in Alberta for 20 years in a variety of roles. In 1993, Dick was transferred in charge of a Sub/Division General Investigation Section responsible for all serious crime investigations in the Peace River region of Alberta.

In 1994, he was promoted to the rank of Inspector in Nova Scotia, where he worked in planning the 1995 G7 Summit in Halifax, in the Staffing and Personnel Section, and finally as the Officer In Charge of the Federal Policing Branch for the province. In 1997 he was transferred to National Headquarters, where he gained exposure in a number of areas including the Finance Commissioner's Secretariat, Criminal Intelligence and Community, Contract and Aboriginal Policing Directorates. He then worked for two years in Executive/Officer Development and Resourcing. In 2002, Dick was promoted to the rank of Chief Superintendent and transferred to the position of the Deputy Criminal Operations Officer in BC responsible for all federal policing in the province. In 2005 Dick assumed his current role.

2   The provisions regarding investigative hearings and preventive detentions recently were allowed, by way of a sunset clause, to expire. There was one investigative hearing process initiated which was appealed to the Supreme Court of Canada. The Supreme Court of Canada found that the provisions for investigative hearings were not a violation of *Charter* rights. The investigative hearing did not proceed for other reasons.

Terrorist Profiling and the Importance of a Proactive Approach to Human Rights Protection

Daniel Moeckli[1]

We should not waste time searching old white ladies. It is going to be disproportionate. It is going to be young men, not exclusively, but it may be disproportionate when it comes to ethnic groups.

Ian Johnston, Chief Constable of the
British Transport Police, 31 July 2005[2]

In the post-9/11 and 7/7 world, law enforcement agencies are increasingly relying on terrorist profiles that are based on stereotypical group characteristics such as religion, race, ethnicity and national origin to single out persons for enhanced scrutiny. The purpose of this paper is, first, to examine whether this law enforcement method is compatible with international human rights standards and, second, to tentatively sketch some possible strategies of ensuring that law enforcement officers comply with these standards when engaging in anti-terrorism efforts. To do this, the paper looks at the police tactics employed after September 11 in three Western democracies: the United States, the United Kingdom and Germany.
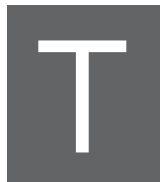
The prediction of the Chief Constable of the British Transport Police, made shortly after the London bombings of 7 July 2005, and quoted above, came true very quickly. By August 2005, his force was five times more likely to stop and search people of Asian appearance than white people.[3] In fact, as will be demonstrated, what is commonly termed "racial profiling" has become one of the central tools of law enforcement agencies in their fight against terrorism, not only in the United Kingdom, but in the Western world in general. The purpose of this paper is, first, to examine whether this method of selecting persons for enhanced law-enforcement scrutiny is compatible with international human rights standards and, second, to tentatively sketch some possible strategies of ensuring that law enforcement authorities comply with these standards when engaging in anti-terrorism efforts. To do this, the paper looks at the police tactics employed after September 11 in three Western democracies: the United States, the United Kingdom and

Germany, all of them states with relatively large immigrant communities.[4]

Section 1 of this paper shows that, in the wake of September 11, states have granted law enforcement authorities not only ever-more preventive powers to detect and deter terrorist activities at as early a stage as possible, but also more discretion in deciding how – and, in particular, against *whom* – to use these powers. As section 2 demonstrates, the law-enforcement agencies of all three states at issue have regularly used terrorist profiles that are based on stereotypical group characteristics such as "race,"[5] "ethnicity,"[6] national origin and religion to select the targets of their preventive powers. Section 3 explores the reasons for this development, highlighting the fact that, especially with the current political climate, such profiling practices are for the police particularly convenient forms of law enforcement. Section 4 examines the compatibility of these selective law enforcement efforts with human rights standards, in particular the right to non-discrimination. Finally, section 5 highlights the importance of a

proactive approach to human- rights protection to ensure that law enforcement agencies respect human rights standards when engaging in anti-terrorism efforts.

1 Police Powers in the Anti-Terrorism Field

Since governments view terrorism as a particularly dangerous form of criminal conduct, they have always accorded law enforcement agencies more far-reaching powers in this field of criminal justice than in others. Special police powers added to those already available under the ordinary laws have included, for example, the authority to arrest terrorist suspects without disclosing the exact reasons,[7] to detain them for longer without charge than normally allowed,[8] to delay their access to a lawyer,[9] and to monitor communications between them and their lawyer.[10]

This strong arsenal has been further expanded after September 11, as law- enforcement agencies have been granted ever-more powers to deter and prevent, rather than just to investigate and prosecute, terrorism. The US post-September 11 legislation has created new grounds for preventive detention[11] and expanded surveillance and search powers.[12] In the United Kingdom, the police have been authorized to stop and search vehicles and pedestrians randomly,[13] to impose control orders on terrorist suspects[14] and, under the *Terrorism Act 2006*, to detain terrorist suspects for up to 28 days.[15] In Germany, the second anti-terrorism package of 2002 grants the law enforcement agencies access to data stored by social insurance agencies as far as they need such information for the purposes of a so-called *Rasterfahndung*,[16] a preventive data mining method described in more detail below.

At the same time, law enforcement authorities generally enjoy extremely wide discretion in deciding how – and in particular against *whom* – to use these far-reaching powers. The first reason for this discretion is that anti-terrorism powers

tend to have a wide scope of application. Terrorist offences are commonly very broadly and vaguely drafted, thus giving the authorities great leeway to argue that they have cause to investigate. Especially laws that criminalise the support or encouragement of terrorism often establish only minimal *actus reus* and *mens rea* requirements.[17]

Furthermore, suspicion of a particular terrorist crime is not always a prerequisite for the applicability of anti-terrorism powers. In the United Kingdom, for example, a police officer can arrest anyone he or she "reasonably suspects to be a terrorist," without the need to have any specific offence in mind.[18] In the case of some preventive powers, the threshold may be even lower, as is illustrated by the stop-and-search powers under Section 44 of the *British Terrorism Act 2000*. This provision authorizes the police, in designated areas, to stop and search people without having to show reasonable suspicion at all.[19] Since September 11, relevant designations have been made for almost every police authority area in Britain, including on a rolling basis for the London metropolitan area.[20] As a consequence, the powers of stop and search under the *Terrorism Act 2000* have been used against tens of thousands of people,[21] including protesters against an arms fair in London,[22] a heckler at a party conference in Brighton[23] and a woman in Dundee for walking along a cycle path.[24] This wide use demonstrates that the scope of discretion for those enforcing an anti-terrorism power such as this is almost unlimited.

The second reason for the broad discretion that law enforcement authorities enjoy in this field is the general lack of judicial oversight over the use of anti-terrorism powers. In some cases, post-September 11 laws expressly exclude effective judicial review. Under the *USA Patriot Act*, for example, the FBI may apply for a court order requiring the production of "any tangible things" from any person, without having to show probable cause; as long as the FBI specifies in writing that the order is for a terrorist investigation, the

court has no authority to refuse it.[25] Similarly, Section 217 of the *Patriot Act* authorizes law enforcement officials to intercept, without a judge's assent, communications of persons using a computer without authorization. Furthermore, even where the law does provide for the possibility of judicial review, courts often tend to take a deferential approach to governmental decisions that touch upon national security interests.[26] As a consequence, as far as anti-terrorism operations are concerned, law enforcement officers will only rarely have to justify their decisions before a court.

In brief, in the anti-terrorism field, legislatures and courts are granting law enforcement agencies not only ever-more powers, but also more discretion over whom to target and what sorts of investigative tactics to use. Governments tend to justify this shift by arguing that only the police and the security forces can understand the real nature and extent of the current terrorist threat – and since only they have the expertise to cope with it, they should be equipped with all the necessary instruments to do so. In the debate on the British *Terrorism Bill 2005/06*, for instance, the Prime Minister justified his proposal for the extension of pre-charge detention of terrorist suspects by repeatedly stressing that this was "what the most senior police officers have asked us to do."[27] William Stuntz contends that there is nothing new about, and nothing wrong with, the claim that, after an event such as September 11 and ensuing public demands for more security, the police should be granted increased powers.[28] "Law enforcement authority," he argues, "naturally varies with the nature and size of the crime problems police must combat."[29] Therefore, courts should be quick to grant the police considerable leeway in how they use their powers in the fight against terrorism.[30]

One can challenge this position on a number of grounds, not least because it is debatable whether there is anything natural and inevitable about a state's reaction to security threats. What

is particularly relevant in the present context is, however, the consequence of the trend described above (and approved by Stuntz). The tendency to grant law enforcement agencies an increasing amount of discretion means that it is left to them to identify the kind of terrorism worth concentrating on and to determine how to target their vast array of powers, which, on their face, are neutral. This lack of accountability over how the fight against terrorism is waged at the law enforcement level, coupled with the shift toward preventive anti-terrorism strategies, has given new impetus to a police tactic that, prior to September 11, had come to be seen as increasingly unacceptable: the use of group characteristics such as race, ethnicity, national origin and religion as part of a profile to decide who merits special attention from law enforcement.

2 The Selective Use of Anti-Terrorism Powers: Terrorist Profiling

Since law enforcement personnel and resources are limited, the police inevitably have to be selective in the use of their anti-terrorism powers. This selection works on the basis of profiles. The EU, for example, has explicitly asked its member states to cooperate with one another and with Europol to develop "terrorist profiles."[31] A group of experts from Europol and several EU member states, among them Britain and Germany, has been established for this purpose.[32] But terrorist profiling also occurs in less explicit forms. For example, the police officer "on the street" often relies on sets of physical or behavioural characteristics when deciding whom to stop and search for anti-terrorism purposes.

A short note on the definition of the term "profiling" is in order. Law-enforcement officers, just like everyone else, react to people they confront based on certain of their traits.[33] When they systematically associate sets of physical, behavioural or psychological characteristics with particular offences and use them as a basis for making their investigative decisions, this may be described as

criminal profiling.[34] Profiles can be either *descriptive*, i.e., designed to identify those likely to have committed a particular criminal act and thus reflecting the evidence the investigators have gathered concerning this act; or they may be *predictive*, i.e., designed to identify those who may be involved in future, or as-yet-undiscovered, crimes.[35] Accordingly, the EU has defined a *terrorist profile* as "a set of physical, psychological or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect."[36] When one of the characteristics used as part of a profile – even if it is in combination with other factors – is race or ethnicity, *racial* or *ethnic profiling* occurs.[37] Underlying this type of profiling is the assumption that members of certain racial or ethnic groups are more likely to commit crime in general or a particular type of crime.[38]

Criminal profiling is used in widely-varying contexts and there is nothing wrong as such with this practice. Detailed profiles based on factors that are statistically proven to correlate with certain criminal conduct can be effective law enforcement tools. This systematic kind of profiling, used in the context of a set of particular known offences, was developed in the 1970s in the United States to prevent the hijacking of planes and to find serial killers.[39]

There is, however, an important difference between serial killer and terrorist profiles. In the case of a killer, the police can collect information to construct a detailed behavioural and psychological profile.[40] In the case of international terrorists, in contrast, they are looking for so-called "sleepers," individuals who do not fit any specific behavioural or psychological pattern, individuals whose very existence is only assumed. Thus, they rely on predictive profiles that, like most predictive profiles, are based on generalizations about groups of people.[41] As a consequence, broad stereotypical traits such as race, ethnicity, national origin and religion have become central elements of the current terrorist profiles.

A paradigmatic example of a very systematic approach to using such profiles is the so-called *Rasterfahndung* programme, initiated by the German authorities in the wake of September 11 to identify terrorist "sleepers." The *Rasterfahndung* method is of particular relevance because the German government has repeatedly called for its EU-wide adoption,[42] so that the police forces of other European states may soon employ it as well.[43] *Rasterfahndung* is a screening method whereby the police search personal data sets of public bodies or private agencies according to presumed characteristics of suspects.[44]

This method had been previously employed – without much success[45] – in the late 1970s and early 1980s to track down members of the Red Army Faction who had changed their identity and gone underground. At that time, the police searched for "conspiratorial flats" (apartments) by screening the data of electricity providers and other agencies for clients who apparently tried to avoid contact with the authorities, were using only little electricity and water, paid their utility bills in cash to avoid opening a bank account and similar criteria.[46]

After September 11, the *Rasterfahndung* was revived by the police forces of all German *Länder* (federal states).[47] But while the method had previously been justified by reference to the investigation of specific criminal offences, it was now – for the first time ever – used for purely preventive purposes.[48] Three of the September 11 hijackers had been living in Germany prior to the attacks, and the authorities suspected that more "sleepers" of Islamist terrorist organisations were present in Germany.[49] Furthermore, since it is a typical feature of "sleepers" that they do *not* raise suspicion by their behaviour, the search criteria related this time not to the behavioural pattern of those searched for but to their personal characteristics. Although, especially at the beginning of the search, the exact criteria employed varied from *Land* to *Land*,[50] a federal coordination group later asked the police forces

to use a unified profile with the following criteria: male; age 18-40; current or former student; Muslim denomination; born in, or national of, one of several specified countries with a predominantly Muslim population.[51] Registration offices, universities and immigration authorities had to provide the personal records of all individuals matching this profile, so that the police could analyse them.[52] In total, the data of 8.3 million people were processed. Approximately 32,000 of them fitted all the criteria and were included in a file of potential "sleepers" compiled by the *Bundeskriminalamt* (Federal Criminal Police Office).[53]

In the United Kingdom, developments after September 11 suggest that there has been an increase in racial and ethnic profiling in the exercise of anti-terrorism powers with people of Asian and Middle Eastern appearance as the main target. This is evidenced, for example, by the disparate use of the power to stop and search under Section 44 of the *Terrorism Act 2000*. The general increase in the use of this power[54] has disproportionately affected ethnic minorities.[55] Between 2001-02 and 2002-03, for example, the number of persons of Asian ethnicity subjected to Section 44 searches rose by 302 percent as compared to a rise of 118 percent for white people.[56] By 2003-04, Asian people were about 2.9 times more likely, and black people about 3.3 times more likely, to be stopped and searched under anti-terrorism legislation than white people.[57] In the first two months after the London bombings of July 2005, the number of Asian and black people stopped in the London metropolitan area under Section 44 increased twelvefold on the same period in 2004; for white people the increase was fivefold.[58]

The statement of the Chief Constable of the British Transport Police quoted at the beginning of this paper, as well as a similar remark by the Home Office Minister, Hazel Blears,[59] suggest that this disproportionate use of anti-terrorism powers is not simply the result of decisions taken by officers in the field, but part of a concerted

effort to focus law enforcement resources on certain ethnic groups. As a spokesman of the British Transport Police put it: "We are saying to our officers, not all Asian people are terrorists but given we are looking at Islamic terrorists [sic] – if we were looking for Irish republican terrorists we would not be stopping Asian or black people."[60]

In the United States, the immigration authorities have adopted a series of policies and practices that single out certain groups of immigrants based on their country of origin or nationality and, at least indirectly (through the choice of the targeted countries), their race and religion.[61] More "traditional" law enforcement powers, which are not limited to non-citizens, have also been used to target certain religious and ethnic groups. Thus, there has been a reported increase in road traffic stops of persons of Muslim, Arab, Middle Eastern and South Asian appearance after September 11;[62] the FBI ordered its field officers to count the mosques and Muslims in their areas;[63] and there have been complaints from Muslims who were stopped and searched by the police at or near their places of worship.[64] In short, "[r]acial profiling of citizens and visitors of Middle Eastern and South Asian descent, and others who appear to be from these areas or members of the Muslim and Sikh faiths, has substantially increased since September 11, 2001."[65]

These, and similar developments elsewhere in the world,[66] have led the UN Special Rapporteur on racism to observe that "[t]here is no escaping the fact that [post-September 11 measures] systematically single out persons of Arab or Muslim origin and that the use of racial profiling for operational purposes is everyday practice."[67]

3 Rationales for Terrorist Profiling Based on Race, Ethnicity, National Origin and Religion

For law enforcement authorities, stereotypical traits such as race, ethnicity, national origin and

religion may offer a convenient starting point for their preventive anti-terrorism efforts. Given that all the nineteen suicide hijackers of September 11 were Arab Muslims[68] and three of the four London bombers Muslims of South Asian appearance,[69] reliance on these characteristics seems to make intuitive sense. Moreover, since the legislature and the judiciary tend to grant the police wide discretion over whom to target,[70] there are generally no strict limitations at the national level on the use of characteristics such as race or religion for terrorist profiles.

Importantly, profiling is for the police a *politically*-convenient form of law enforcement: whereas practices that affect everyone might lead to political pressure to curtail police powers, the targeting of marginal groups is less likely to have this effect.[71] In fact, there is now strong support from different quarters for racial and religious profiling to prevent terrorism. Whereas, prior to the September 11 attacks, 81 percent of the American public had opposed racial profiling, after the attacks, 58 percent said that they approve of profiling, as long as it was directed against Arabs.[72] Similarly, several commentators[73] and legal scholars[74] have made the case for racial profiling that focuses on persons of Middle Eastern or South Asian descent. The extremity of the threat posed by terrorism, they argue, makes this police tactic completely different from the kind of profiling designed to help find drugs or guns;[75] with the high stakes involved, and given the identity of the known terrorists, they maintain, singling out Middle Easterners for heightened scrutiny is perfectly justified.[76] In the post-September 11 climate, Samuel Gross and Debra Livingston claim, it is only normal that the public demands "less precision" from the government in its response to terrorism.[77]

Support for racial profiling has also grown in political and government circles. In the United States, several politicians and government officials have advocated the use of this practice,[78] and a bill that would have banned it at all levels of government, introduced in Congress in June

2001, languished in the aftermath of September 11.[79] More limited Department of Justice guidelines, issued in 2003 to address the problem of racial profiling at the federal level, explicitly permit the use of race and ethnicity to prevent potential terrorist attacks.[80] The British guidelines on the use of the police power to stop and search make a similar exception, stating that it "may be [...] appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities)."[81] As explained above, different British officials have explicitly supported profiling practices.

With the sudden public and political support for racial profiling, law enforcement officials are likely to feel encouraged to resort to this tactic. Indeed, Stuntz argues, it seems almost inevitable that the police will rely on racial profiles when they use their increased post-September 11 powers; there is little that the law can do to prevent this, and the courts, he predicts, will be reluctant to disapprove of profiling practices.[82] "In short," he concludes, "racial and ethnic profiling is a fact of life that the legal system probably cannot change."[83]

4 Conformity with Human Rights Standards

The sort of terrorist profiling practices described above raise concerns with regard to a number of human rights guarantees. Data screening initiatives based on broad terrorist profiles that include group characteristics such as religion and national origin may constitute disproportionate interferences with the right to privacy.[84] Stops and searches of persons that are based on stereotypical assumptions that certain religious or racial groups are more likely to pose a terrorist threat than others rather than on specific, individualized evidence may, depending on the particular circumstances, amount to a disproportionate and arbitrary interference with the freedom of movement, the right to privacy and/or the right

to personal liberty.[85] In addition to these possible infringements of substantive human rights guarantees, all these profiling practices involve differential treatment according to criteria such as race, national or ethnic origin and religion and thus raise the question as to their conformity with the human rights principle of non-discrimination. Because of its relevance to different forms of profiling, the issue of discrimination is dealt with in particular detail in this paper.

All the major human rights treaties, including the *International Covenant on Civil and Political Rights (ICCPR),*[86] which has been ratified by the United States, the United Kingdom and Germany, and the European *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),*[87] ratified by the United Kingdom and Germany, prohibit discrimination on all the grounds just listed. Discrimination based on race and national or ethnic origin is also prohibited by the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),*[88] which has been ratified by all the states at issue. Article 5 of the *ICERD* explicitly prohibits racial discrimination with respect to the "right to equal treatment before […] all […] organs administering justice" and to "freedom of movement."[89] Finally, at least the prohibition on the grounds of race and religion is also part of customary international law.[90]

These binding obligations have been reinforced and supplemented by a range of "soft law" standards. The UN Code of Conduct for Law Enforcement Officials, for example, provides that such officials must "maintain and uphold the human rights of all persons," including the right to non-discrimination.[91] Similarly, the European Code of Police Ethics of the Council of Europe recommends that "[t]he police shall carry out their tasks in a fair manner, guided, in particular, by the principles of impartiality and non-discrimination."[92] A provision specifically directed against racial profiling is to be found in the Programme of Action adopted at the UN World Conference against Racism in 2000, urging states "to design, implement and enforce

effective measures to eliminate the phenomenon popularly known as 'racial profiling.'"[93]

However, the fact that the law enforcement practices considered here involve distinctions on the basis of race, ethnicity, national origin and religion does not necessarily mean that they violate the principle of non-discrimination. Government actions inevitably classify persons; the crucial question is whether these classifications are justified or not. According to the jurisprudence of all the relevant human rights bodies and courts, a difference in treatment only violates the principle of non-discrimination if it is not supported by objective and reasonable grounds.[94] The inquiry as to the existence of an objective and reasonable justification is generally divided into the following two sub-tests. First, does the difference in treatment pursue a legitimate aim? Second, is there a reasonable relationship of proportionality between the difference in treatment and the legitimate aim sought to be realized?

As far as the first requirement is concerned, the aim of the profiling practices at issue is the prevention of further terrorist attacks. Undoubtedly, this constitutes a legitimate, even compelling, governmental interest. The decisive question is therefore whether the differential treatment that these profiling practices involve is a proportionate means of achieving this aim. In the present context, it is helpful to deal with the question of proportionality in two separate steps and to examine, first, whether the profiling practices under discussion are a suitable and effective means of countering terrorism and, second, what kind of negative effects these practices may produce.

4.1 Suitability and Effectiveness

When the police have information that a crime they are investigating was committed by someone belonging to a particular ethnic or religious group, it will generally be perfectly reasonable and legitimate for them to use this information for a suspect description. In other words, for the development of *descriptive* profiles, racial, ethnic or

religious characteristics may not only be suitable, but *essential*, elements. If, for example, there was evidence suggesting that there are individuals at large who were involved in the London bombings and that they are of a certain ethnicity, then the police could, of course, rely on these characteristics to target their search efforts.

Yet, as demonstrated above, in the wake of September 11, characteristics such as race, ethnicity, national origin and religion are increasingly used to construct *predictive* profiles. The German *Rasterfahndung*, the use of stop and search powers in Britain and similar law enforcement efforts in the United States are all designed to anticipate and prevent future terrorist attacks, rather than to identify the perpetrators of past acts. Starting from the assumption that certain groups of people pose a greater risk than others, these predictive profiling practices are based on broad generalizations about race, national or ethnic origin and religion. As David Harris has shown, the fundamental problem with predictive, informal, profiles is that they normally reflect unexamined preconceptions rather than systematic analysis of hard data.[95] This is also evident in the post-September 11 context, where law enforcement authorities have often defended their profiling practices not by providing evidence for their utility but by appealing to "common sense."[96]

In fact, however, a careful analysis of the selective law enforcement practices at issue suggests that they are not a suitable means to identify potential terrorists. In order to serve as a suitable and effective counter-terrorism tool, a profile would need to be narrow enough to exclude those persons who do not present a terrorist threat and, at the same time, broad enough to include those who do. However, terrorist profiles that are based on characteristics such as race, ethnicity, national origin and religion are regularly inaccurate and both over- and under-inclusive.

Race, ethnicity, national origin and religion are inaccurate indicators because the initial premise on which they are based, namely that Muslims and persons of Middle Eastern and South Asian appearance or origin are particularly likely to be involved in terrorist activities, is highly doubtful. The appeal to "common sense" cannot compensate for the fact that a statistically-significant correlation between these characteristics and terrorism involvement has never been established. On the contrary, the report of the Official Account of the London Bombings concluded that, as far as the national, ethnic and social background of potential terrorists is concerned, "there is not a consistent profile to help identify who may be vulnerable to radicalisation."[97]

In practice, most terrorist profiles use racial or ethnic appearance or national origin as proxy traits for religion, as religious affiliation is normally not readily identifiable and, in any case, easy to conceal. Yet race and national origin are very poor proxies for religion. For example, a mere 24 percent of all Arab Americans are Muslims.[98] In the United Kingdom, where Muslim religion is often associated with "Asian" appearance, only half of those belonging to this ethnic group are in fact Muslims.[99] Thus, profiles based on racial or ethnic appearance or national origin are overbroad in two respects. First, many of those matching this element will not be Muslim. Second, the overwhelming majority of those who *are* Muslim have, of course, nothing to do with terrorism. As a consequence, the profiling practices under discussion affect – based on an unsubstantiated assumption – a great number of individuals who are in no way linked to terrorism. One may wonder, for example, whether the shooting of Jean Charles de Menezes, the Brazilian mistaken for a terrorist trying to blow up a London underground train, was not a tragic consequence of the over-reliance on stereotypical characteristics such as ethnic appearance in anti-terrorism operations.[100]

At the same time, profiles based on race, ethnicity, national origin and religion are also under-inclusive in that they will lead law enforcement agents to miss a range of potential terrorists who do not fit the profile. First, they focus on only

one form of terrorism, namely Islamist terrorism, even though it is far from clear that future terrorist attacks could not also come from other groups.[101] Second, even as far as Islamist terrorism is concerned, they are under-inclusive. The "shoe bomber" Richard Reid, a British citizen not of Muslim or Middle Eastern origin, would not have been covered by the profile used for the German *Rasterfahndung*; nor would have the "dirty bomber" José Padilla, a U.S. citizen of Puerto Rican descent, nor the "American Taliban" John Walker Lindh, a white U.S. citizen. Terrorist groups have regularly proved their ability to adapt their strategies, with the use of female and child suicide bombers to avoid the stereotype of the male terrorist as just one example.[102] At the moment, the main concern of intelligence services in this regard is that Islamist terrorist groups may increasingly rely on converts.[103] This shows that profiles based on physical characteristics, including ethnic or religious appearance, can easily become self-defeating.

What is even worse, such profiles can shift the attention of law enforcement officers away from more pertinent indicators such as psychological or behavioural characteristics. As Harris has persuasively argued, observing and assessing behaviour is the most – and perhaps the only – promising way of predicting criminal intentions.[104] The importance of focusing on behaviour is highlighted, for example, by the experiences of the US Customs Service. In the late 1990's, the Customs Service stopped using a profile that was based, among other factors, on race and gender in deciding whom to search for drugs.[105] Instead, the customs agents were instructed to rely on observational techniques, behavioural analysis and intelligence.[106] This policy change resulted in a rise in the proportion of searches leading to the discovery of drugs of more than 300 percent.[107] Behaviour would seem to be an equally significant indicator in the terrorism context. "If your goal is preventing attacks," a senior US intelligence specialist has suggested, "you want your eyes and ears looking for pre-at-

tack behaviors, not characteristics."[108] Similarly, practical guidance on stop and search produced by the British National Centre for Policing Excellence on behalf of the Association of Chief Police Officers stresses that "[a]ctions define a terrorist, not ethnicity, race or religion."[109]

Given the deficiencies of the terrorist profiles under discussion, it is not surprising that the law enforcement initiatives based on them have proved largely unsuccessful. Perhaps the clearest example of the ineffectiveness of law enforcement practices based on vague terrorist profiles is the German *Rasterfahndung*. Even when employed as an *investigative* instrument before September 11, the *Rasterfahndung* had proved largely unsuccessful.[110] For the post-September 11, *preventive* initiative, the search parameters have been widened so much that they have become all but meaningless. This is evidenced by the sheer amount of information scrutinized. As explained above, the data of 8.3 million persons have been processed, amounting to more than ten per cent of the German population.[111] Many of those identified as potential "sleepers" were then more closely examined, that is, they were interrogated or put under surveillance or enquiries with their employers were made.[112] Yet, not in a *single* case, has the *Rasterfahndung* led to the detection of a "sleeper."[113] Instead, the few successes achieved by German police forces in detecting alleged Islamist terrorists so far have all been due to traditional law enforcement methods based on specific information.[114] The extremely poor success rate of the *Rasterfahndung*, coupled with its serious impacts on a huge number of innocent people, make this measure highly problematic from the point of view of proportionality.

In the United Kingdom, the widespread, and racially-biased,[115] use of stop and search powers has like-wise produced hardly any results. In 2003-04, for example, 8,120 pedestrians were stopped under Section 44(2) of the *Terrorism Act 2000*. Yet these stops led to only five arrests in connection with terrorism – a "success rate" of

0.06 percent. Incidentally, all of those arrested were white.[116] Similarly, the further increase in stops and searches in the first two months after the London bombings has not resulted in any arrests or charges related to terrorism.[117] Finally, in the United States, the strategy of mainly targeting immigrants of Middle Eastern descent has not produced any significant results in the form of arrests or investigative leads.[118] Vincent Cannistraro, the former head of counter-terrorism at the CIA, has concluded: "It may be intuitive to stereotype people, but profiling is too crude to be effective. I can't think of any examples where profiling has caught a terrorist."[119]

Some government officials have tried to justify this ineffectiveness by arguing that the main aim of these preventive law enforcement strategies was not necessarily the detection of potential terrorists but deterrence and disruption. The Minister of the Interior of the German federal state of Hesse, for example, whilst admitting that the *Rasterfahndung* has not produced any tangible results, argued that it has had the preventive effect of "putting the Islamist potential under pressure."[120] In the United Kingdom, an Assistant Chief Constable defended the lack of arrests as a result of stop and searches by stressing that "this is a power to be used to put people off their plans, hence it is used in a pretty random way."[121] Yet no evidence has been adduced in support of this alleged deterrent effect. Even if preventive law enforcement measures did have such an effect, this could still not justify their selective use: any symbolic policy of deterrence would need to be directed against potential terrorists rather than particular racial, ethnic or religious groups.

To conclude, although it is difficult exactly to gauge the effectiveness of preventive law enforcement techniques, the available evidence suggests that profiling practices based on religious and/or racial characteristics are an unsuitable, and therefore disproportionate, means of countering terrorism: they affect thousands of innocent people, without producing concrete results. Moreover, even if the classifications underlying these methods did correspond to a higher risk posed by some categories of persons, this would still not mean that their use is justified. For, as the following section demonstrates, terrorist profiling practices entail considerable costs, which must also be factored into the proportionality assessment.

4.2 Negative Effects: The Costs of Terrorist Profiling

The kind of terrorist-profiling practices considered here entail three, closely-related, categories of costs: namely, costs to the law enforcement agencies themselves, to the individuals directly affected by these practices and to the communities of those directly affected.

First, the over-inclusiveness of the kind of terrorist profiles described above imposes costs on law enforcement agencies in the form of "false positives" that they have to deal with. The broader the profiles are designed, the greater the number of people whom the police treat as suspects becomes, even though the vast majority of them will turn out to present no risk. This may not only, as explained above, shift law-enforcement's attention away from a more promising focus on behaviour, but may also result in an overwhelming of the system with massive amounts of information that the relevant agencies will struggle to process properly. Analysing 8.3 million personal records, as was done in the German *Rasterfahndung*, obviously presents a massive challenge to the police. Thus, the logic of casting the anti-terrorism net wide comes at a price. Since law enforcement manpower is limited, important resources will be diverted away from other, intelligence-led or behaviour-oriented, anti-terrorism efforts or, indeed, from crime prevention in general. In the German federal state of North Rhine-Westphalia, for example, 600 police officers were delegated to work on the *Rasterfahndung* initiative for several months; during this period, general crime rates rose markedly.[122]

Second, selective law enforcement measures create personal costs in the form of a profound emotional toll taken on those subjected to them. Randall Kennedy has shown that profiling practices have a more serious impact than "neutral" law enforcement methods. Although anyone stopped, searched or questioned by the police may feel intimidated or degraded to a certain extent, the encounter has a particularly humiliating effect when those involved know that characteristics such as race, ethnicity or religion played a role in the law enforcement officer's decision.[123]

Third, these individual experiences may be translated into negative group effects. Terrorist profiling practices single out persons for enhanced law- enforcement attention simply because they match a set of group characteristics, thus contributing to the social construction of all those who share these characteristics as inherently suspect. It is for this reason that a US Department of Justice guide, published prior to September 11, stated that racial profiling should not be allowed even if there was some empirical basis for the stereotypes used: "It would be unfair to stigmatize an entire community based on the conduct of a few."[124] This stigmatization may, in turn, result in a feeling of alienation among the targeted groups, in the present context, especially Muslim and Arab communities. This led the Commissioner for Human Rights of the Council of Europe to warn that the impact of anti-terrorism measures on certain communities "should be an important consideration when deciding to adopt such measures and every effort must be made to avoid the victimization of the vast majority of innocent individuals."[125]

The victimization and alienation of certain racial and religious groups has significant negative implications for law enforcement efforts, as it involves a deep mistrust of the police. The British Metropolitan Police Authority has highlighted "the huge negative impact" of the use of stop and search powers on community relations: "It

has increased the level of distrust of our police; it has created deeper racial and ethnic tensions against the police; […] it has cut off valuable sources of community information and intelligence."[126]

In a similar vein, the Commissioner for Human Rights of the Council of Europe remarked about the increase in stop and searches of Asians that "[t]he maintenance of good community relations is clearly difficult under such circumstances."[127]

In Germany, the Central Council of Muslims has claimed that the government's post-September 11 campaign has not only served to foster prejudice against all Muslims, but also to undermine the confidence of Muslims in the rule of law and in the impartiality and efficiency of the law enforcement authorities.[128]

Such lack of relationships of trust between the police and communities may be especially disastrous in the anti-terrorism context. For the gathering of intelligence is the key to success in largely preventive law- enforcement operations – it is no coincidence that in the case of both September 11 and the London bombings the failure to prevent the attacks has been mainly attributed to the police and security services' (potentially-avoidable) lack of specific intelligence on potential terrorists.[129] Therefore, if, as governments claim, terrorist "sleepers" are really most likely to be Muslim, Middle Eastern and South Asian men, then it would be crucial for law enforcement agencies to enjoy the cooperation of the respective communities. It is telling that one of the few investigative successes of the US authorities in their domestic "war on terrorism" so far was triggered by information from inside the Yemeni community where the suspects in that case lived.[130] To be successful, anti-terrorism law enforcement policies would have to strengthen or, where it has been completely lost, rebuild the trust between the police and communities. Profiling practices have the contrary effect.

4.3 Result

When law enforcement agencies use the kind of terrorist-profiling practices described in this paper, they treat otherwise comparable categories of people differently based on their race, ethnicity, national origin and/or religion. Such differential treatment can only be compatible with the right to non-discrimination if it is a proportionate means of countering terrorism. The sweeping practices under discussion do not meet this demanding proportionality requirement: not only are they unsuitable to identify potential terrorists, but they also entail considerable negative consequences that may render these measures counterproductive in the fight against terrorism.

This is not to argue that the police are never allowed to use terrorist profiles or that criteria such as race, national or ethnic origin and religion can under no circumstances form part of such profiles. If, in the context of an investigation into an already committed terrorist crime, there are reasonable grounds to assume that the suspect fits a certain descriptive profile, then the use of characteristics such as race, ethnicity, national origin or religion is normally unproblematic. Similarly, these factors can be employed to target search efforts where there is specific intelligence suggesting that someone fulfilling these characteristics is preparing a terrorist act.[131]

The situation is different, however, in the case of preventive anti-terrorism efforts that are not based on specific intelligence. While profiles used for such efforts may include behavioural or psychological characteristics, they may not be based on stereotypical generalisations that certain racial, ethnic or religious groups pose a greater terrorist risk than others. The statement of the Chief Constable of the British Transport Police that his force will not search "old white ladies," quoted at the beginning of this paper, is therefore dubious. It may be legitimate for the police, when performing preventive stops, not to focus on persons who are carrying small handbags rather than backpacks, who appear too frail to commit a terrorist attack or who do not behave suspiciously. What cannot be a consideration, however, is whether the person in question is white or black or Asian.

Consequently, in the absence of specific information or useful behavioural indicators, controls will either have to be universal, affecting everyone equally – a very costly but, undoubtedly, also very effective method. Or, if the costs for blanket searches are deemed to be too high, the targets for heightened scrutiny have to be selected on a random rather than on a racial, ethnic or religious basis. In fact, this is what airlines are already routinely doing. As opposed to profiling, random searches are impossible for terrorists to evade and may thus be more effective than profiling.[132]

5 Conclusion: A Proactive Approach to Human Rights Protection

This paper has demonstrated that, after September 11, law enforcement agencies have been granted ever-more preventive anti-terrorism powers as well as more discretion over whom to target and what sorts of tactics to use. Governments have presented this delegation of increased powers and discretion as a natural and inevitable reaction to the increased terrorist threat. As a consequence of this development, law enforcement agents are largely free to choose the anti-terrorism methods that they consider most useful and convenient. Terrorist profiling based on group characteristics such as race, national or ethnic origin and religion may be seen as offering such a useful and convenient starting point for law- enforcement efforts. Since contemporary Islamist terrorist organizations function as loose networks of groups and individuals with often-differing methods and objectives,[133] their "sleepers" do not fulfil a specific behavioural or psychological pattern and all they seem to have in common is their radical religious belief. Ter-

rorist profiling based on religious affiliation and – often taken as obvious indicators of religion – race, ethnicity and national origin is therefore presented as a measure that makes common sense and is, indeed, inevitable. As Stephen Ellmann has claimed, "one aspect of the answer to the question of whether racial profiling should be a response to terrorism is simply that it will be – whether this is authorized or not."[134]

Yet this is a misleading answer. While the profiling practices described in this paper may, at first sight, appear to be convenient tools in the fight against terrorism, their use by law enforcement agencies is far from inevitable. Rather, it is the consequence of conscious decisions taken within a general political climate that favours the targeting of particular marginal groups. As demonstrated above, the governments of the three states at issue, through their anti-terrorism policies and official statements, have, at least implicitly, signalled to law enforcement agencies that they will not only tolerate the use of profiling practices but that they encourage it. This governmental approval, coupled with the fact that these methods seem to enjoy broad public support, makes terrorist profiling also a *politically*-convenient strategy for law enforcement authorities.

Therefore, the first step to ensuring that law enforcement efforts to counter-terrorism comply with human rights standards – and in particular with the principle of non-discrimination – must be to change the general political conditions that are conducive to the use of discriminatory profiling practices. As long as law enforcement agents feel justified and supported in targeting particular racial, ethnic or religious groups for anti-terrorism purposes, a merely reactive approach that is limited to the condemnation of single instances of discriminatory-police practices by courts or human rights bodies will not have a significant impact. Instead, international and regional human rights bodies, as well as those bodies that are charged with monitoring and co-ordinating the implementation of international

obligations to counter-terrorism, should adopt a proactive approach and send a clear signal to states that law enforcement practices adopted in the anti-terrorism context must comply with human rights standards, including the principle of non-discrimination. Calls for upholding the right to non-discrimination in law enforcement efforts may have an important symbolic value, described by Kennedy in the following words: "Even when rightful rules are underenforced, they are still worth fighting for because they set the standards for legitimacy, standards which, like magnets, exert a pull that affects the order of things."[135]

Crucially, international expert bodies should not only highlight that discriminatory anti-terrorism practices are impermissible under human rights law but also, and related to this, that such practices are in fact an ineffective means of countering terrorism.

As a further element of this proactive approach, international human rights bodies should ask states to create clear legal frameworks for the exercise of anti-terrorism powers by law enforcement agents. Instead of granting law enforcement authorities ever-more discretion in exercising their powers, governments should establish strict guidelines as to what factors may or may not be employed for search efforts in the anti-terrorism context. Such guidelines should make clear that terrorist profiles may be based on behavioural or other objective factors, but not on stereotypical generalizations that certain racial, ethnic or religious groups pose a greater terrorist risk than others. To monitor and ensure compliance of anti-terrorism practices with human rights standards and operational guidelines, states should be asked to establish systems of transparent and independent oversight of law enforcement agencies. States should also provide an effective means of holding law enforcement agents accountable for any violations of human rights, including when committed in the context of countering terrorism. Finally, these regulatory

frameworks should be backed up by a system of training of law enforcement agents that makes clear that profiling practices based on race, ethnicity, national origin and religion are incompatible with human- rights standards and ineffective in the fight against terrorism.

ENDNOTES

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2   V. Dodd, "Asian Men Targeted in Stop and Search," *The Guardian*, 17 August 2005.

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7   For the United Kingdom, see *Prevention of Terrorism Act 1989*, Section 14(1)(b); *Terrorism Act 2000*, Section 41.

8   For the United Kingdom, see *Terrorism Act 2000*, Section 41 in conjunction with Schedule 8.

9   *Ibid.*, Section 41 in conjunction with Schedule 8, para. 8.

10 *Ibid.*, Section 41 in conjunction with Schedule 8, para. 9. For Germany, see *Strafprozessordnung* (Code of Criminal Procedure), Article 148(2) in conjunction with *Strafgesetzbuch* (Penal Code), Article 129a.

11 *USA Patriot Act*, Section 412; Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R., Section 287.3(d) (2001).

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RaciaProfiling

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