

Crimes of Equality: the Racial Profiling Paradox of Canada's 'War on Terror.'

by

Ilona Catherine MacDonald Cairns  
LL.B., The University of Edinburgh, 2007

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**Supervisory Committee**

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## Abstract

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This thesis examines the relationship between the phenomenon of racial profiling in the post-9/11 context and section 15 of the Canadian *Charter*. More specifically, this thesis exposes and unravels the paradox whereby Canada's equality guarantee lacks potential to control or protect against racial profiling in the 'war on terror', despite the fact that especially acute and complex equality concerns are triggered by the practice. Chapter one explores the way in which the debate surrounding racial profiling has shifted and taken on distinctive features post-9/11. These changes to the debate give rise to heightened equality concerns and are complicated by the racialization of religion. Chapter two asks why Canada's equality provision has been largely invisible in the criminal justice context through examining the conceptual relationship between the nature of the criminal justice system and the logics of section 15. Finally, chapter three addresses, in turn, the shape of racial profiling jurisprudence and the treatment of race and religion under section 15. I conclude with some comments about whether it is always correct to discuss racial profiling in the language of equality.

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## INTRODUCTION

In the past twenty-five years, two major events have dramatically changed the nature and structure of criminal justice in Canada. The first is the introduction of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> in 1982, a product of the liberal aspiration to empower individuals, implement international human rights norms, and ensure that the state can be effectively held to account when it exceeds the reasonable limits of its power. The second is September 11<sup>th</sup>, 2001; a day that instigated an unprecedented and vicious international ‘war on terror.’ This thesis exposes a deeply worrying and unexplored paradox that lies where these two hugely transformative events intersect with a powerful and distressing criminal justice phenomenon: racial profiling.

The paradox is brought into light when we come to reflect on what exactly the *Charter* offers to victims of racial profiling in the post-9/11 context. Given that racial profiling is inextricably intertwined with a discourse of discrimination, stereotyping, dignity, stigmatization, disadvantage and prejudice, and is widely condemned on the basis that it reflects and perpetuates social inequality, one would be excused for imagining that victims of racial profiling are offered constitutional protection by the equality provision of Canada’s most sacred legal instrument.<sup>2</sup> Yet, puzzlingly, when the violent hand of criminal justice is deployed against individuals in an unequal and illegitimate fashion, there is a yawning gap between what section 15 of the *Charter* should be able to do in theory, and what it can do in practice.

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<sup>1</sup>Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter “*Charter*”].

<sup>2</sup> Please note that my dominant focus in this thesis is on section 15(1), and not section 15(2), of the *Charter*. Unless otherwise specified, therefore, any reference to section 15 hereunder should be taken as a reference to section 15(1), which provides:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Why is it, then, that victims of racial profiling, an ostensibly archetypal example of discrimination and a practice that strikes at the heart of egalitarian values, are offered so little protection by Canada's constitutionally protected equality guarantee? Focusing specifically on racial profiling in the post-9/11 context, this thesis seeks to untangle the reasons why section 15(1) of the *Charter* lacks potential to control, stop or protect from discriminatory law enforcement practices in the 'war on terror' and expose what lies behind the racial profiling/section 15 paradox. I have chosen to focus on racial profiling in the aftermath of September 11<sup>th</sup> attacks because the paradox is even stronger and even more visible in this environment: as equality concerns have become more broad, complex and acute in the post-9/11 context,<sup>3</sup> the efficacy of section 15 as a legal tool has been considerably lessened.

Although complicated, interesting and technical legal issues often arise where criminal and constitutional law cross,<sup>4</sup> the paradoxical relationship between racial profiling and section 15 triggers particularly difficult questions and has far-reaching implications. Inquiring as to why section 15 is surprisingly inattentive to such a well-recognized and hotly debated legal harm not only leads us to doubt the very purpose and usefulness of one of Canada's most valued constitutional provisions, but to reflect on when we are willing to limit the equality rights of individuals, and under what circumstances. Moreover, because it is the equality rights of racial, religious, or ethnic minorities that are at issue, we are forced to reassess the levels of tolerance and prejudice in our society, and question the true strength and quality of the multicultural, multiethnic fabric that supposedly defines Canadian constitutionalism.

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<sup>3</sup> Chapter one will elaborate on how equality concerns have become more broad, complex and acute in the post-9/11 environment.

<sup>4</sup> See generally Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough: Carswell, 2001).

The juridical location of the discrimination or injustice adds another layer of complexity and concern. As is hinted at above, racial profiling is distinguishable from other section 15 issues simply by virtue of the fact that the practice occurs in the criminal justice sphere. Within the boundaries of this sphere the interests of the state are pitted directly and forcefully against the rights of the individual and, correspondingly, the consequences of being targeted or discriminated against by a law enforcement officer during the course of a criminal investigation may be markedly different (and distinctly troubling) than those resulting from state denial of a benefit, for example. In addition to those harms commonly associated with unequal treatment (loss of dignity; reduction in self-respect and self-worth; financial loss; stigmatization), a victim of discrimination in the criminal justice system may ultimately face criminal prosecution, denial of physical liberty and permanent social ostracization.

It should be emphasized here that the central purpose of this thesis is not to argue that it is preferable that racial profiling be dealt with directly under section 15. Rather, I simply intend to expose an interesting and relatively unexplored relationship that, in my view, has become even more fascinating in recent years. At this early stage, however, it is worth drawing attention to one compelling reason why racial profiling *should* be dealt with under Canada's equality provision. Given the special constitutional and social value attached to section 15, it is plausible to argue that a successful finding of racial profiling under section 15 would have tremendous symbolic force and underline the truly heinous nature of the practice. Whereas the expressive harm caused by racial profiling may be missed if a claimant seeks redress from another constitutional provision (or via other legal or extra-legal means), a finding under section 15 of the *Charter* would crystallize racial profiling as an equality issue and ensure that the harms caused by discriminatory law enforcement practices are clearly and properly identified. One of the key aims of this thesis is to

show the precise way in which the equality dimension of racial profiling has been so badly lost, and elucidate the far-reaching implications of this loss. Before turning to explain the map of my inquiry, however, certain definitional and methodological issues that arise in any study of racial profiling, must be addressed.

### **Defining ‘Equality’ and ‘Racial Profiling’**

One intrinsic difficulty with researching the interaction between Canada’s equality provision and racial profiling is that there is no universally-accepted definition of, or meaning attached to, either ‘racial profiling’ or ‘equality.’ Equality, for example, is a remarkably fluid, indeterminate and contested concept that means different things, to different people in different contexts and across cultures. As Ronald Dworkin has correctly observed, "[p]eople who praise it or disparage it disagree about what they are praising or disparaging."<sup>5</sup> Despite the lack of a precise definition, however, it is clear that equality is one of the most fundamental and valued concepts in Canadian legal culture. As quoted in *Andrews v Law Society of British Columbia*,<sup>6</sup> the first section 15 case heard by the Supreme Court:

Equality is a protean word. It is one of those political symbols - liberty and fraternity are others - into which men have poured the deepest urgings of their heart. Every strongly held theory or conception of equality is at once a psychology, an ethic, a theory of social relations, and a vision of the good society.<sup>7</sup>

In Canada and elsewhere, the distinction between ‘formal’ and ‘substantive’ conceptions of equality is likely the most pivotal to legal conversations about equality.<sup>8</sup> Indeed, the Supreme

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<sup>5</sup> Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, (Cambridge: Harvard University Press, 2000) at 2.

<sup>6</sup> (1989) S.C.J. No. 6, (1989) 1 S.C.R. 143 [hereinafter “*Andrews*”].

<sup>7</sup> *Ibid.* at page 10.

<sup>8</sup> For a clear and thorough analysis of the difference between formal and substantive equality, see Oddný Mjöll Arnardóttir, *Equality and non-discrimination under the European Charter of Human Rights*, (The Hague, New York: M. Nyhoff Publishers, 2003) at pages 18-20. At page 18, Arnardóttir observes that the distinction between

Court of Canada's unrelenting propensity to deliver section 15 judgments grounded in a seemingly formal conception of equality (despite countless rejections of such an approach and endorsement of substantive equality in theory) underlies the majority of academic criticism directed at section 15 jurisprudence.<sup>9</sup>

With respect to racial profiling, the absence of consensus over the meaning of this term is deeply troubling because in order to find a solution or remedy to a problem, it is necessary to have a clear idea of exactly what the problem is. As Kent Roach has commented, "[a]ny debate about profiling that is not guided by a clear definition is bound to be a recipe for frustration and bitterness."<sup>10</sup> The United States' experience with the 'war on drugs' has confirmed that attempts to deal with racial profiling without a concise definition can lead to the development of a false consensus and confusion.<sup>11</sup>

Nevertheless, at least in the academic world, there has been a general acceptance of Harvard Law Professor Randall Kennedy's distinction between a broad and narrow definition of racial profiling.<sup>12</sup> According to the broad definition, racial profiling "consists of a decision to detain or arrest an individual or subject an individual to further investigation, solely on the basis of

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formal and substantive equality has been classically drawn "along the lines of whether it concerned respectively only the *application* of the law regardless of its content or whether it concerned the content of the law as in a requirement of a just distribution of benefits and burdens or some form of social justice" but goes on to explain that there are two other important characteristics of substantive equality, namely, the idea that different situations should be treated differently and further, that substantive equality may infer positive obligations on the state.

<sup>9</sup> See generally Sheila McIntyre & Sandra Rodgers, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms*, (Ontario: LexisNexis, 2006) and Fay Faraday, Margaret Denike & M. Kate Stephenson, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

<sup>10</sup> Kent Roach, as quoted in David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) at 12.

<sup>11</sup> Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, "Defining Racial Profiling in a Post-September 11 World," (2003) 40 *American Criminal Law Review* 1195 at 1203.

<sup>12</sup> Sujit Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the *Charter*" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 368-70.

his or her race or ethnicity.”<sup>13</sup> In contrast, the narrow definition holds that racial profiling occurs when race and ethnicity are taken into account together with *other factors*, such as suspicious behaviour.<sup>14</sup> As Sujit Choudhry points out, this latter definition has been adopted by supporters of profiling, partly because it “appears to dilute the importance of race and ethnicity,”<sup>15</sup> thereby downplaying their role in law enforcement decisions.

In the post-9/11 context, however, both the broad and narrow definitions appear dated and unsatisfactory insofar as they fail to recognize that factors other than race or ethnicity may be taken into account by law enforcement or security officials in their decisions to investigate, detain or arrest, and further, that it is not always easy or possible to ascertain the basis upon which a person has been profiled. Today, the comprehensive definition of racial profiling proposed by David Tanovich is more accurate and relevant, and bridges the divide between the broad and narrow definition of profiling. Throughout this thesis, therefore, I rely upon the following definition of racial profiling:

Racial profiling occurs when law enforcement or security officials, consciously or unconsciously, subject individuals at any location to heightened scrutiny based solely or in part by race, ethnicity, Aboriginality, place of origin, ancestry, or religion or on stereotypes associated with any of these factors rather than on objectively reasonable grounds to suspect that the individual is implicated in criminal activity. Racial profiling operates as a system of surveillance and control.<sup>16</sup>

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<sup>13</sup> *Ibid.* at 368.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* Importantly, however, Choudhry stresses that this definition is somewhat misleading as using race or ethnicity *at all* must mean that it can play a decisive role in law enforcement or investigation.

<sup>16</sup> Tanovich, *The Colour of Justice*, *supra* note 10 at 13. The inclusion of religion in Tanovich’s definition of racial profiling is interesting and significant. Indeed, some might object to the reference to religion on the basis that ‘religious profiling’ (particularly in the ‘war on terror’ context) is a distinct problem that deserves to be recognized as such. It might be argued along these lines that the ‘tucking in’ of religion into the definition of ‘racial profiling’ deflects attention away from discrimination that is inherently religious in nature and ensures that such discrimination is inadequately dealt with. As will become clear in this thesis, however, one of the key defining features of profiling discourse in the ‘war on terror’ is the blurring of the lines between race and religion and the persistence of the language of race. Viewed in this light, the use of the ‘catch-all’ term ‘racial profiling’ to describe discriminatory law enforcement practices based on either race, religion or a combination of race, religion and other factors, is simply an accurate reflection of how profiling is articulated in public discourse. It is for this reason that I use the

Definitional problems are intensified in the post-9/11, counter-terrorism environment as - like ‘equality’ and ‘racial profiling’ - there is no universally-accepted or workable definition of ‘terrorism’ in neither international nor Canadian law.<sup>17</sup> The inability (or unwillingness)<sup>18</sup> to agree on a universal and objective definition has led Rosalyn Higgins to declare that the word ‘terrorism’ is devoid of legal significance.<sup>19</sup> Together with the vagueness surrounding the term ‘equality’, disagreement over how to define and attach legal meaning to ‘terrorism’ and ‘racial profiling’, may itself partially explain why section 15 and racial profiling appear incompatible in a political climate so heavily focused on terrorism prevention and punishment.

#### **A Note on the Practical and Methodological Challenges with Racial Profiling Evidence**

As with definitional issues, in any research dealing with racial profiling it is also essential to be aware of the difficulties and limits inherent in gathering and examining information and/or data purportedly verifying the frequency and pervasiveness of racial profiling. The most obvious difficulty is that, as with all forms of racial discrimination, it is exceptionally difficult to prove racial profiling, and even more challenging to prove that a specific act of racial profiling was purposeful.<sup>20</sup> By its nature, racial profiling usually takes place ‘on the ground’ in the course of everyday human interactions where individuals’ intentions are not always clear and altercations are

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term ‘racial profiling’ throughout this thesis despite acknowledgment that there is a clear religious dimension to terror suspect profiling.

<sup>17</sup> For a detailed analysis of the history of terrorism in both international law and Canadian jurisprudence see Faisal A. Bhabha, “Tracking ‘Terrorists’ or Solidifying Stereotypes? Canada’s Anti-Terrorism Act in Light of the Charter’s Equality Guarantee,” (2003) 16 *Windsor Review of Legal and Social Issues* 95 at 99-110.

<sup>18</sup> *Ibid.* at 100. Here, Bhabha describes how the only consensus reached by a United Nations Ad Hoc Committee, established in 1972 to develop an international strategy and definition on ‘terrorism’, was that further attempts to define terrorism should be resisted. Bhabha also explains how this “policy of avoidance” suited the interests of “the developed and developing states.”

<sup>19</sup> Rosalyn Higgins, “The General International Law of Terrorism” in Rosalyn Higgins & Maurice Flory, eds., *Terrorism and International Law* (New York: Routledge, 1997) at 28.

<sup>20</sup> Julie Kai & Joseph Cheng, “The Invisibility of Race in Section 15: Why Section 15 of the Charter Has Not Done More to Promote Racial Equality” (2006) 5 *Journal of Law & Equality* 125 at 143.

not always reported. Where an instance of suspected racial profiling *is* reported, the lack of an explicit declaration of intent creates opportunity for state officials to provide *ex post facto* explanations for their behaviour that are unrelated to race.<sup>21</sup>

As Julie Kai and Joseph Cheng highlight, however, it is not only the burden on the claimant to rule out competing explanations of the impugned behavior that presents difficulties in proving racial discrimination, but the fact that the decision to act on the basis of race may be unconscious.<sup>22</sup> In other words, the state official may not even be aware that they have engaged in racial profiling. This is because racial profiling (like the majority of race discrimination in society) is systemic in nature; its roots intertwined with a long history of racist laws, policies, institutions, processes and power dynamics. According to Carol Tator and Frances Henry, racial profiling and everyday racism are inseparable.<sup>23</sup> These two scholars understand racial profiling deeply and broadly as including “the various discourses that are articulated by the police, governments, and other authorities, *and* by the media, in their efforts to rationalize and justify racialized behaviours and practices.”<sup>24</sup>

Although more subtle or systemic forms of racism may lead to difficulties with proof, critical race scholarship emphasizes that no form of racism is less damaging or pervasive than another.<sup>25</sup> It is important to bear in mind that law enforcement or security officials who engage in racial profiling based on unconscious stereotypes are no less of a concern than those who hold overt racist beliefs. The point that embedded or systemic racism and more explicit forms of racism

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at 143.

<sup>23</sup> Carol Tator & Frances Henry, *Racial Profiling in Canada: Challenging the Myth of ‘A Few Bad Apples’*, (Toronto, Buffalo, London: University of Toronto Press, 2006) at 8.

<sup>24</sup> *Ibid.*

<sup>25</sup> Please see generally Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001) and Richard Delgado & Jean Stefancic, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 2000).

are of equal concern is an obvious yet crucial one, frequently made by scholars of racial discrimination.<sup>26</sup>

Aside from the difficulties in collecting data and/or information in the first place, there are other, largely methodological, challenges involved in conducting, interpreting or analyzing research on racial profiling. As a great deal of the body of research on the extent of racial profiling post-9/11 takes the form of studies or reports by either non-governmental organizations, public interest groups or human rights groups with specific causes, interests and goals, one has to query the political impetus behind such projects and how neutral or objective these studies or reports actually are. The fact that Alnoor Gova and Rahat Kurd explicitly acknowledge their potential for bias in their recent study on the impact of racial profiling exemplifies this point. They state: “In research of this nature, neutrality is impossible to achieve. Indeed, by conceiving of such a project, we position ourselves in relation to its central questions: we value these.”<sup>27</sup>

Tator and Henry also draw attention to a number of methodological issues that may arise in the study of race, crime and profiling.<sup>28</sup> These include the absence of a standardized indicator of comparison for law enforcement stops<sup>29</sup> and the tendency for researchers to compare and contrast the experiences of racialized minorities directly with those of the white majority; a trend that risks reinforcing the ‘white’ experience as the norm. Throughout this thesis, therefore, I remain conscious of the limits and flaws inherent to studies (and indeed all claims) in this area and concede that their research findings and statistics are not always an entirely accurate reflection of reality. Nevertheless, as will become clear in the pages that follow, the importance, content and

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<sup>26</sup> See Tanovich, *The Colour of Justice*, *supra* note 10 at 13. Tanovich makes this point clearly here, stating, “the day-to-day racial profiling that occurs today in Canada today is primarily about stereotyping rather than the expression of animus or overt racism. Those who target out of hate...are truly the “bad apples.””

<sup>27</sup> Alnoor Gova & Rahat Kurd, *The Impact of Racial Profiling: A MARU Society/UBC Law Faculty Study* (Vancouver: Metropolis British Columbia, 2008) at 12.

<sup>28</sup> Tator & Henry, *supra* note 23 at 18-21.

<sup>29</sup> *Ibid.* at 18.

sheer extent of the evidence overshadows any methodological limits and flaws and justifies a certain degree of reliance upon recent racial profiling research.

### **My approach**

To begin to tell this story and unpack the equality paradox of racial profiling in the ‘war on terror’, it is first necessary to demonstrate that racial profiling post-9/11 is a unique and dangerous phenomenon that triggers and perpetuates heightened equality concerns. In chapter one, I present evidence of racial profiling in the aftermath of September 11<sup>th</sup> and explain how and why debate surrounding the practice has undergone an enormous and significant transformation in recent years. By the end of this chapter, it will become clear that the same climate that gives rise to equality problems simultaneously reduces the likelihood that such problems will be properly and effectively responded to. Nonetheless, at this stage in the unfolding story - where section 15 concerns appear to be squarely raised - Canada’s equality provision appears well-suited to address contemporary racial profiling.

In chapter two, however, I lay bare a tense conceptual relationship that casts doubt over claims that section 15 is the correct legal tool to deal with post-9/11 racial profiling. Juxtaposing the logics of section 15 with the nature of the criminal justice system leaves us with the perception that section 15 may be conceptually or structurally ill-equipped to deal with any criminal justice issue, including racial profiling. In chapter three, I examine the jurisprudence in this area to ascertain whether this conceptual tension has any practical relevance and significance. In the end, we will see both that the wrong of racial profiling is exceptionally difficult to deal with constitutionally, and that there are inherent limits to the *types* of discrimination that section 15 is ready, willing and able to address. To conclude, I will speculate from a theoretical standpoint about whether it is even correct (or beneficial) to analyze criminal profiling in the language of

equality.

Exposing why section 15 lacks efficacy in the post-9/11 racial profiling context has broader implications. It is part of the process of uncovering why equality is so difficult to maintain and respect in a climate of fear, anxiety and uncertainty, and is thus a step towards discovering other and more effective ways to ensure that commitments to equality and multiculturalism are not always an early casualty of war.<sup>30</sup> Indeed, as Kent Roach has observed, making such improvements “might not only result in moral and normative gains, but also be instrumental in combating terrorism.”<sup>31</sup> Otherwise put, paying proper attention to equality concerns may lead to a more secure Canada.

Indeed, it is worth acknowledging here that Canada has, relatively speaking, taken several active and meaningful steps to involve and engage with communities affected by the September 11<sup>th</sup> backlash.<sup>32</sup> Establishing a new cross-cultural roundtable on national security issues (including racial profiling),<sup>33</sup> introducing new provisions to the *Criminal Code* to, amongst other things, better protect against hate crimes and propaganda,<sup>34</sup> and taking heed of various arguments and submissions made by both Muslim and civil liberties groups in response to the introduction the *Anti-Terrorism Act*,<sup>35</sup> are all actions signaling that the Canadian government has recognized the threat to equality, diversity and tolerance posed by the ‘war on terror’ and has attempted to minimize this threat.

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<sup>30</sup> See Sujit Choudhry & Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability,” (2006) 41:1 *Osgoode Hall Law Journal* 1 at 1.

<sup>31</sup> Kent Roach, “Canadian National Security Policy and Canadian Muslim Communities,” in Abdulkader H. Sinno, ed., *Muslims in Western Politics* (Bloomington: Indiana University Press, 2009) at 220.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at 239-240 and Canada. March 7, 2005(a) “Inaugural Meeting of Cross-Cultural Roundtable on Security.” Available at [http://ww2.ps-sp.gc.ca/publications/news/2005/20050307\\_e.asp](http://ww2.ps-sp.gc.ca/publications/news/2005/20050307_e.asp).

<sup>34</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>35</sup> See Roach, *Canadian National Security Policy and Canadian Muslim Communities*, *supra* note 31 at 221. These groups included the Canadian branch of the Council on American-Islamic Relations (CAIR-CAN), the Muslim Lawyers Association, the Canadian Muslim Civil Liberties Association and the Canadian Bar Association.

Nevertheless, as we will see in the first chapter of this thesis, the praise-worthy steps taken by the government have proven inadequate to stop profiling in the post-9/11 climate and have been overshadowed by controversy. In recent months and years, we have been starkly reminded of the downfalls of prioritizing overly-zealous security policies and procedures over equality and liberty. The Canadian security certificate system<sup>36</sup> and new enhanced powers under the *Anti-Terrorism Act*, for example, have not helped combat terrorism but have only served to fuel controversy and increase frustration, bitterness and anger. These sentiments provide fertile ground for more violence and a less tolerant, equitable society. Through illuminating the various tensions that underlie the paradoxical relationship between racial profiling and equality in the ‘war on terror’ and emphasizing the seriousness of issues we must confront at this unique time in history, this thesis hopes to intervene in the effort to ensure that equality concerns are always given due attention even, and especially, at times when security is perceived to be at stake.

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<sup>36</sup> For a detailed discussion of Canada’s security certificate system and an argument that this system contravenes section 15(1) of the *Charter*, see Jonathan Shapiro, “An Ounce of Cure for a Pound of Preventive Detention: Security Certificates and the *Charter*,” (2008) 33:2 *Queen’s Law Journal* 519.

## CHAPTER ONE: THE CHANGING FACE OF RACIAL PROFILING: NEW VICTIMS, NEW DEBATE, NEW COMPLEXITIES

*“It would be criminally negligent if Air Canada did not engage in racial profiling.”<sup>37</sup>*

*“Although race thinking varies, for Muslims and Arabs it is underpinned by the idea that modern, enlightened, secular peoples must protect themselves from pre-modern, religious peoples whose loyalty to tribe and community reigns over their commitment to the rule of law. The marking of belonging to the realm of culture and religion, as opposed to the realm of law and reason, has devastating consequences.”<sup>38</sup>*

### INTRODUCTION

If the ‘war on drugs’ in the United States can be described as the moment when the racial profiling debate was born,<sup>39</sup> then the ‘war on terror’ can be described as the moment it entered into adolescence. In the wake of the September 11<sup>th</sup> attacks, racial profiling has garnered a new and different wave of attention and debate surrounding the practice has become more complex, more tumultuous and more nuanced compared to that in its infancy. Moreover, as Western nations have united and committed to fight terrorism together, racial profiling has attained an added international dimension. In turn, not only have our past understandings and definitions of racial profiling been broadened and complicated, but our responses to it have been challenged and in some cases, forced to adapt. In this chapter, I examine the unique and important changes to the racial profiling landscape post-9/11, offer explanations for these changes, and consider exactly

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<sup>37</sup> ‘Profiles in Prudence (editorial)’ *National Post* (20 September 2001).

<sup>38</sup> Sherene H. Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008) at 9-10.

<sup>39</sup> For a history and origins of the term ‘racial profiling’ see Samuel R. Gross, “The Rhetoric of Racial Profiling,” (2006) *University of Michigan Public Law Working Paper No. 66*. Available online at the social science research network electronic paper collection: <http://ssrn.com/abstract=938921>.

what these changes signify. I will reveal that racial profiling, and the debate surrounding the practice, are distinctive in nature and give rise to heightened and complex equality concerns.

The most notable (and I believe most illuminating) change to the racial profiling landscape in the aftermath of 9/11 is the shift in the nature and focus of the debate on this controversial issue. Whereas before September 11<sup>th</sup> disputes could largely be categorized as ‘factual’ (i.e. someone would allege that law enforcement officials had acted on the basis of race and this would be denied),<sup>40</sup> today divergence of opinion is more likely to be ‘definitional’ or, more interestingly, ‘normative’ (what constitutes racial profiling? Is it justified in the name of security?).<sup>41</sup> This movement to normative debate occurred incredibly swiftly and, for some, without hesitation; the prior consensus that racial profiling was “wrong and unconstitutional no matter what the context”<sup>42</sup> breaking down the moment that the perpetrators of the heinous attacks were publicly identified as Muslim terrorists. Perhaps unsurprisingly, this shift in reasoning was quickly reflected on the ground as reports of racial profiling and spiraling hate crimes<sup>43</sup> multiplied and were seized upon by the media, human rights organizations and several politicians. Part one of this chapter will present and analyze evidence of racial profiling post-9/11 and demonstrate that it is a very real concern, and one distinguishable from other and/or past instances of the practice. Part two of this chapter will describe the key features of the shift in the racial profiling debate from ‘factual’ to

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<sup>40</sup> Samuel R. Gross & Debra Livingston, “Racial Profiling under Attack,” (2002) 102:5 *Columbia Law Review* 1413 at 1414.

<sup>41</sup> *Ibid.*

<sup>42</sup> John Ashcroft quoted in Leonard M. Baynes, “Racial Profiling, September 11<sup>th</sup> and the Media: A Critical Race Theory Analysis,” (2002) 2 *Virginia Sports and Entertainment Law Journal* 1 at 21.

<sup>43</sup> According to a statement by the Canadian Islamic Congress, between 2001 and 2003, there was a 1,600 per cent increase in hate crimes. In the United States, reports of hate crimes against Muslims also increased exponentially: between 2001 and 2003 there was an increase of 300%, and by 2005 this figure had swelled again by 50%. See Amaney Jamal & Nadine Naber, *Race and Arab Americans Before and After 9/11* (Syracuse: Syracuse University Press, 2008) at 115. In Britain, one month after the London bombings, a British newspaper carried the headline: ‘Faith Hate Crimes Up 600% After Bombings’ See M. Cole & A. Maisura, “Shut the f\*\*\* up’, ‘you have no rights here’: Critical Race Theory and Racialisation in post-7/7 racist Britain”, (2007) 5:1 *Journal for Critical Education Policy Studies*. Please note that this journal article has no page numbers.

‘normative.’ Exploring and elaborating on these key features will reveal other changes to racial profiling discourse post-9/11 and enable me to comment on the implications of these changes.

Viewed abstractly, it is perplexing that a single event on one day in history can lead to arguments that core human rights norms should be abandoned and that it is in some way acceptable or justified to retreat from a long-fought-for commitment to banish discrimination and prejudice in society. Juxtaposing the sudden shift in attitudes and values with those espoused at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance sponsored by in UN and held in Durban, South Africa in the weeks preceding 9/11, Charles Smith asserts: “it is as if the will of the world was spun on a coin and the movement towards Durban reversed overnight.”<sup>44</sup> Indeed, the speed and relative ease with which new normative arguments that racial profiling is warranted in certain circumstances arose casts doubt over the true strength and depth of the pre-9/11 consensus that racial profiling is an inherently indefensible and unjust practice. For example, the sharp and hasty change in sentiment raises questions as to whether the prior consensus was fragile or superficial or as to whether 9/11 simply brought underlying prejudice to the surface. To make full sense of the shift in the racial profiling debate, it is necessary to turn to more theoretical terrain and consider the conflation of race and religion, the racialization of religion and the idea of ‘race thinking’ in the ‘war on terror.’ By exploring these ideas in Part three of this chapter, I will argue that the blurring of the boundaries between race and religion is not simply a distinctive feature of the post 9/11 racial profiling landscape, but that it is inextricably intertwined with (or to some extent the driving force behind) new normative arguments.

By focusing on the shifting racial profiling landscape in this chapter, I will show how and suggest why official, academic and public opinion has evolved in a way that has ignited a new and

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<sup>44</sup> Charles Smith, *Conflict, Crisis, and Accountability: Racial Profiling and Law Enforcement in Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2007) at 21.

fiery debate. In my view, any research that analyzes post-9/11 racial profiling must acknowledge and take into account these significant changes. The purpose of this chapter, however, is not simply to add context to my broader project. On the contrary, the questions I seek to answer here carry enormous implications for my research and are pivotal to my analysis of the difficulties of using section 15 of the *Charter* as a tool to stop, protect against or control racial profiling post-9/11. By the end of this chapter, the racial profiling/section 15 paradox of Canada's 'war on terror' begins to emerge. It will become clear that although contemporary racial profiling is, in essence, an equality issue, the potential of Canada's equality guarantee is lessened by the very same environment that pushed equality concerns to the fore.

## PART I: RACIAL PROFILING IN THE 'WAR ON TERROR'

### *a) The origins and nature of racial profiling post-9/11*

There is little disagreement or controversy over what catalyzed the proliferation of racial profiling, and debate surrounding the practice, following 9/11. After the perpetrators of the atrocities were clearly and publicly identified by U.S. officials as being of Arab origin, and media coverage bombarded us with images of Middle Eastern terrorists, there was little doubt in anyone's mind as to who would bear the brunt of any retaliatory justice, whether state-sanctioned, in the form of racial profiling, or private in nature, in the form of hate crimes.<sup>45</sup> In Canada, as elsewhere, the fact that the 9/11 terrorists had been identified as belonging to a particular identity category,<sup>46</sup> lead to real doubts over the true nature of the government's new anti-terror measures, shaped by

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<sup>45</sup> See Leti Volpp, "The Citizen and the Terrorist," (2002) 49 *University of California Los Angeles Law Review* 1576 at 1583. Here, Volpp posits that there is a direct relationship between the seemingly official endorsement of racial profiling by the state, and the increase in hate crimes. She states: "that an epidemic of hate violence has occurred within the context of "private" relations does not mean that such violence is without "public" origins or consequences."

<sup>46</sup> *Ibid.* at 1576. Here, Volpp argues that September 11<sup>th</sup> facilitated the consolidation of a new identity category that groups together "Middle Eastern, Muslim or Arab" people.

the adoption of the *Anti-Terrorism Act*<sup>47</sup> and the *Immigration and Refugee Protection Act*<sup>48</sup> and buttressed by revision to an array of statutes cutting across many spheres of law.<sup>49</sup>

Predictably, the Canadian government's ostensibly neutral and colourblind legislative measures have been vigorously challenged and staunchly opposed<sup>50</sup> on the basis that they will be implemented in a disproportionate and discriminatory fashion that targets Arabs, Muslims and others perceived to conform to the stereotypical image of the 'terrorist.'<sup>51</sup> Those opposed to Canada's anti-terror legislation on the basis that it creates opportunity for racial profiling also draw attention to the troubling fact that the government has not, to this day, acknowledged the potential for racial profiling under the new laws. For Reem Bahdi, the legislature's silence regarding racial profiling, "at best, fails to effectively check racial profiling and, at worst, creates opportunities for racial profiling."<sup>52</sup> Further, it could be argued that this silence is in fact the official acceptance of the legitimacy of racial profiling in the face of the terrorist threat, especially in the light of recommendations that the bill include a ban on racial profiling or an anti-discrimination clause.<sup>53</sup>

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<sup>47</sup> S.C. 2001, c.41 [Bill C-36].

<sup>48</sup> S.C. 2001, c.27 [Bill C-11].

<sup>49</sup> For example, following 9/11, amendments were made to the *Foreign Missions and International Organizations Act* (S.C. 1991, c.41), the *Criminal Code* (R.S.C. 1985, c.46), the *Official Secrets Act* (R.S.C. 1985, c. 0-5), the *Canada Evidence Act*, (R.S.C. 1985, c. C-5) the *Proceeds of Crime Act* (R.S.C. 2000, c-17) and the *Aeronautics Act* (R.S.C. 1985, c. A-2).

<sup>50</sup> See generally Daniels, Macklem & Roach, eds., *The Security of Freedom*, *supra* note 12 and Kent Roach, *September 11: Consequences for Canada* (Quebec: McGill-Queen's University Press, 2003).

<sup>51</sup> Thus, soon after 9/11 when Ontario Premier Mike Harris announced the formation of a new special police unit with a focus on preventing terrorism through deportation, controversy over exactly who would be targeted, ensued. See Reem Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism," (2003) 41 *Osgoode Hall Law Journal* 293 at 296.

<sup>52</sup> *Ibid.* at 297.

<sup>53</sup> Kent Roach & Sujit Choudhry, "Brief to the Special Senate Committee on Bill C-36," 5 December 2001 and Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law, and Policy" in Daniels, Macklem & Roach, *supra* note 12 at 111. Please note, however, that although the government ignored the issue of racial profiling, the *Anti-Terrorism Act* included additional measures to protect against hate crimes, amended the *Criminal Code* to criminalize mischief against property used for religious worship, and amended the *Criminal Code* hate propaganda provisions to authorize a judge to order that publicly available hate propaganda be deleted from a computer system within the jurisdiction of the court. However, such provisions have come under fire on the basis that they are merely 'token' provisions and do little to stop hate crimes or address the root causes of religious and/or racial violence. Most notably, they do nothing to address discrimination by state officials in the form of racial profiling. See also Choudhry & Roach, *Racial and Ethnic Profiling*, *supra* note 30.

At times of intense panic and anger - when history has repeatedly shown that both governments and individuals are prone to overreaction - anything other than a strong, clear condemnation is insufficient and implicitly condones discriminatory action.<sup>54</sup> Viewed in the light of this background, the growing evidence of racial profiling post-9/11 is hardly surprising and in many ways, simply confirms what many considered inevitable.

In Canada, it was the case of Maher Arar that thrust concerns about the application of the anti-terrorism legislation and post-9/11 prejudice, including the issue of racial profiling, to the forefront of public debate.<sup>55</sup> Profiled as a ‘terrorist’ in the U.S. while returning home from vacation, Arar was detained and subsequently deported to Syria where he was held in a tiny cell, repeatedly tortured and forced to falsely confess to links with Al Qaeda.<sup>56</sup> In 2006, following intense pressure from numerous human rights organizations<sup>57</sup> and a Commission of Inquiry into the actions of Canadian officials involved in his case,<sup>58</sup> Arar was cleared of all terrorism allegations by the Commissioner of the Inquiry, Justice Dennis O’Connor.<sup>59</sup> Arar’s story demonstrates the peculiarity and uniqueness of contemporary racial profiling in several ways.

First, as a Syrian-born Sunni Muslim man, Arar fits neatly into the mould of the racialized terrorist whose only ‘crime’ was that he has connections with other individuals suspected of terrorist activity. In this way, Arar’s experience is the archetypal example of the dangers of ‘flying

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<sup>54</sup> Moreover, as Choudhry and Roach point out, the legislature’s silence on the issue of racial profiling has further-reaching constitutional implications. See *ibid.* at 3. They state: “[s]hould profiling be held to violate a *Charter* right, the absence of an explicit authorization of profiling in Bills C-36 and C-17 has important legal implications with respect to possible attempts to justify profiling under section 1 of the Charter, as well as the remedies available should profiling fail the test of justification.”

<sup>55</sup> For an in-depth analysis of Maher Arar’s plight, see “Chapter 4: Maher Arar Returns” in Smith *supra* note 44. For more information please see also [www.maherarar.ca](http://www.maherarar.ca) and [www.cbc.ca/news/background/arar/](http://www.cbc.ca/news/background/arar/).

<sup>56</sup> *Ibid.*

<sup>57</sup> These organizations included the Canadian Arab Federation, The Muslim Canadian Congress, Amnesty International and the International Civil Liberties Monitoring Group. See Smith, *supra* note 44 at 13.

<sup>58</sup> *The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* was established by former Prime Minister Paul Martin. See generally Smith, *ibid.* at 158.

<sup>59</sup> Arar was cleared of all terrorism allegations on September 18, 2006. Information available at [www.maherarar.ca](http://www.maherarar.ca). Please note that the Arar Commission website and the Arar Commission report are no longer available online.

while Arab/Muslim’<sup>60</sup> post-9/11. Secondly, and more disturbingly, his tragic story highlights how racial profiling in the post-9/11 climate performs an additional function: it targets and condemns individuals and launches them into a state of exception.<sup>61</sup> Sherene Razack articulates this idea clearly, she states:

What remains significant about contemporary racial profiling of Arabs and Muslims, however, is not this well established history but the fact that anti-Muslim racism now operates in a culture of exception, where to be profiled as a terrorist is to have a high chance of being taken to a place of law without law.<sup>62</sup>

Closely tied to the idea of a ‘states of exception’ where the rule of law does not offer any protection is the notion of pre-emptive punishment.<sup>63</sup> As Mirzoeff has noted, the justificatory logic underlying both pre-emptive punishment and the exiling of Muslims and Arabs to ‘states of exception’ is colonial in nature;<sup>64</sup> resting on the supposition that the nation state must be protected from dangerous outsiders who “cannot be governed through the rule of law as can Europeans.”<sup>65</sup> Referring to Canada in the aftermath of September 11th, Razack argues that pre-emptive punishment and the abandonment of law are facilitated by new or increased powers of surveillance powers, detention, prosecution and conviction in Canadian legislation.<sup>66</sup>

Finally, although the Canadian government has exonerated, compensated and apologized to Arar,<sup>67</sup> for many this is overshadowed by the fact that Canadian security officials have not been

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<sup>60</sup> The phrase ‘flying while Arab/Muslim’ draws on the euphemism ‘driving while Black’ that is commonly used to describe the experiences of African Americans being disproportionately stopped on highways for minor traffic violations, and then illegally searched (known as “the pretext stop”). See Baynes, *supra* note 42 at 9.

<sup>61</sup> Razack, *supra* note 38 at 26.

<sup>62</sup> *Ibid.* at 34. See also Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005).

<sup>63</sup> Razack, *supra* note 38 at 29-34.

<sup>64</sup> Nicholas Mirzoeff, *Watching Babylon: The War in Iraq and Global Visual Culture* (New York, London: Routledge, 2005) at 119-21.

<sup>65</sup> Razack, *supra* note 38 at 31. See also Part three of this chapter.

<sup>66</sup> *Ibid.* at 30.

<sup>67</sup> Prime Minister Stephen Harper issued a formal apology to Arar on behalf of the Canadian government on January 26, 2007, and announced that Arar would receive \$10.5 million in compensation, and an additional \$1 million for legal costs. See “Harper’s apology means the world: Arar” *CBC News*, available online at [www.cbc.ca/news](http://www.cbc.ca/news). This

held fully accountable for their failings,<sup>68</sup> by the inadequacy of the government's response to the recommendations of the Arar Commission<sup>69</sup> and perhaps most significantly, by the ever mounting evidence that Arar's experience is not an isolated or exceptional one, but a mere thread in the expanding web of discrimination and prejudice, aided and abetted by government law and policy. In the years since the inquiry, it has become clear that the Arar affair has done little to stop racial profiling or prejudice, signifying that even the most high profile, extreme and vagrant violation of an individual's human rights and dignity is not enough to force the government to retreat from its extreme and discriminatory policy and help break the powerful 'us' versus 'them' paradigm that underlies and drives racial profiling post-9/11.<sup>70</sup>

Since the Arar affair, Canada has been caught up in several other high-profile controversies stemming from the questionable actions of security officials and their seeming endorsement of racial profiling. It has been alleged, for example, that the twenty-three South Asian males arrested and labelled terrorists during the RCMP's anti-terror operation "Project Thread" in 2003 were selected for investigation because of their Muslim names.<sup>71</sup> The fact that none of these men were ever charged with a terrorism-related offence is highly illustrative of the inherently ineffective nature of racial profiling in 'war on terror'. This case also illustrates how individuals, by sole virtue of their name, religion and immigration status, can so easily find themselves labelled and stigmatized as 'terrorists' and left with "a tarnished reputation, traumatized and with major

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came a few months after RCMP Commissioner Giuliano Zaccardelli apologized to Arar and his family on September 28, 2006. See "RCMP chief apologizes to Arar for 'terrible injustices'" *CBC News*, available online at [www.cbc.ca/news](http://www.cbc.ca/news). Subsequently, Mr Zaccardelli resigned from his position as RCMP Commissioner. See "RCMP commissioner's resignation not enough, Maher Arar insists" *CBC News*, available online at [www.cbc.ca/news](http://www.cbc.ca/news).

<sup>68</sup> See generally Smith, *supra* note 44 at 175-176, "RCMP commissioner's resignation not enough, Maher Arar insists" *CBC News* available online at [www.cbc.ca/news](http://www.cbc.ca/news) and information available at [www.maherarar.ca](http://www.maherarar.ca).

<sup>69</sup> *Ibid.*

<sup>70</sup> See Part three of this chapter for a detailed elaboration of this paradigm.

<sup>71</sup> Michelle Shephard & Sonia Verma, "'They only arrested the Muhammads'; 23 students falsely labelled 'terrorists. Failed marriages, lost jobs left in wake." *Toronto Star*, November 30, 2003 available online at [www.thestar.com](http://www.thestar.com). Although an internal RCMP inquiry concluded that there was no evidence of racial profiling in this investigation, suspicion remains. See Tanovich, *The Colour of Justice*, *supra* note 10 at 26.

personal and family setbacks.”<sup>72</sup> The arrest of the ‘Toronto 18’ in June 2006,<sup>73</sup> the Iacobucci Inquiry in 2008 regarding the role of Canadian officials in the torture of three men tortured in Syria (and in the case of one man in Egypt),<sup>74</sup> and the Omar Khadr affair,<sup>75</sup> are only a few more examples of high-profile, heavily-reported controversies that have assured that racial profiling and the treatment of suspected terrorists remains a hotly debated and politically-charged topic in Canada.<sup>76</sup>

*b) Empirical evidence of racial profiling post-9/11*

Although the above cases gained publicity and attention because the details are particularly abhorrent and concerning, there is plentiful evidence<sup>77</sup> that racial profiling post-9/11 has also been

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<sup>72</sup> Jack Layton, quoted in Tanovich, *ibid.*

<sup>73</sup> See generally Razack, *supra* note 38 at 3.

<sup>74</sup> See generally [www.iacobucciinquiry.ca/en/home](http://www.iacobucciinquiry.ca/en/home). The Iacobucci internal inquiry was established in October 2006 to examine the actions and role of Canadian security officials in the detention and alleged torture of Abdullah Almalki, Muayyed Nureddin, and Ahmad El Maati. In October 2008, Justice Iacobucci found that the actions of Canadian officials indirectly contributed to the mistreatment and torture of these men in Syria and Egypt. The final report is available online at [www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf](http://www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf).

<sup>75</sup> Omar Khadr is a Canadian citizen captured by American forces and sent to Guantanamo Bay at the age of 15, after allegedly throwing a grenade that killed a U.S. soldier. His story has been highly controversial not least because he has been held without trial in Guantanamo Bay for six years, but because the Canadian government has consistently refused to seek his extradition or repatriation despite pleadings from Amnesty International, UNICEF and the Canadian Bar Association.

<sup>76</sup> In the United States, the issue of racial profiling gained significant publicity when William Shatner, an Arab U.S. secret service agent, was evicted from American Airlines Flight 363 after an airline host perceived his behaviour to be suspicious. See Bahdi, *supra* note 51 at 309. George Bush responded that he would be “madder than heck” if investigators proved he had been racially profiled. See Volpp, *supra* note 45 at 1580. In the United Kingdom, the racial profiling controversy peaked with the killing of Jean Charles de Menezes, an innocent Brazilian man who was shot seven times in the London underground after being mistakenly identified as a suicide bomber. For more information, see Peter Taylor, “The Terrorist who wasn’t,” *Guardian* 6 March, 2008. Available online at [www.guardian.co.uk](http://www.guardian.co.uk).

<sup>77</sup> Although the results of several of these studies may not be altogether surprising, or even groundbreaking, they are important insofar as they give credence to the existence of racial profiling, and necessary insofar as they place pressure on the Canadian government to concede that racial profiling is a problem and create room for state responses. However, it is pertinent to be conscious of the limits and problems of these studies as this may partially explain why they have not forced the Canadian government to take action or change policy. For example, many studies on the subject of racial profiling are relatively limited in scope, in that they only focus on one aspect or dimension of racial profiling. CAIR-CAN’s study, for example, focuses only on the role of racial profiling in visitations by security officials. See also footnote 81 below.

occurring on a less extreme (but on a more routine) basis, in many different contexts.<sup>78</sup> For example, in 2004, the Canadian Council on American-Islamic Relations (CAN-CAIR) conducted a national survey on security visitations of Canadian Muslims post-9/11.<sup>79</sup> Essentially, the issue driving this research was whether Muslim or Arab men in Canada were being subjected to unfair, disparate and threatening treatment during visits by security officials (including the RCMP, CSIS and the police) on the basis of their race, religion, ethnicity or place of birth.<sup>80</sup> In other words, concerns about racial and religious profiling were at the heart of this report.

CAIR-CAN's main finding was that of the 467 respondents surveyed, eight percent had been questioned by security officials.<sup>81</sup> Generally, the findings of CAIR-CAN's report are consistent with the findings of other racial profiling studies and are useful and revealing in several ways. Firstly (and most obviously), they suggest that racial profiling is occurring in Canada, and that Canadian Muslims perceive it to be a problem. This highlights that post-9/11 racial profiling is not confined to the United States where Amnesty International reported in 2004 that racial profiling has escalated since 9/11.<sup>82</sup> Secondly, CAIR-CAN's finding that the majority of those

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<sup>78</sup> Although the focus of this research is on racial profiling in the security or law enforcement context, it is worth noting here that one of the key distinguishing features between racial profiling before and after 9/11 is the fact that it is now more evident that racial profiling can and does occur in contexts outside of the criminal law, whether in employment, banking or immigration. For a detailed analysis of these new sites of racial profiling in Canada see Bahdi, *supra* note 51.

<sup>79</sup> *Presumption of Guilt: A National Survey on Security Visitations of Canadian Muslims*, available online: CAIR-CAN <http://www.caircan.ca/downloads/POG-08062005.pdf>.

<sup>80</sup> *Ibid.* at 4-5.

<sup>81</sup> *Ibid.* at 3. It is important to note, however, that the report estimates that this percentage is the result of under-reporting, and is likely considerably higher. Unfortunately, there are several methodological flaws that undermine the quality and respectability of CAIR-CAN's research and findings. CAIR-CAN's sample, for example, was hardly representative of the Canadian Muslim population: surveys were distributed at mosques, thereby increasing the likelihood that the sample would be comprised of ardent Muslims most likely to be suspected and interviewed by authorities, and excluding more secular Muslims and Muslim women who may not attend mosques. In addition, CAIR-CAN fails to take into account or acknowledge the possibility that of the 43% of respondents who claim to know someone contacted by security officials, two or more may be responding to the same security visit. I am indebted to Paul Bramadat, the director of the Centre for Religion and Society at the University of Victoria, for these particular insights and ideas.

<sup>82</sup> *Threat and Humiliation: Racial Profiling, Domestic Security, and Human Rights in the United States*, available online at: Amnesty International USA, [www.amnestyusa.org/racial\\_profiling/report/rp\\_report.pdf](http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf). The most striking finding of Amnesty International USA's research (which focused on racial profiling in the law enforcement

questioned were Muslim males appears to expose the increasingly gendered and religious dimension to contemporary racial profiling.<sup>83</sup> Thirdly, this report allows us to better understand the impacts of post-9/11-racial profiling on its victims and the specific ways in which their equality and dignity are violated.<sup>84</sup>

Alnoor Gova and Rahat Kurd's recent qualitative research project confirms that the impacts and effects of racial profiling may be distinctive in the post-9/11 racial profiling context.<sup>85</sup> From the interviews conducted by Gova and Kurd, it is striking how many of their respondents reported experiencing some form of racial profiling while travelling or crossing borders. This is significant because, as many scholars have pointed out, Western nation states have long used border control to exclude and racialize.<sup>86</sup> Moreover, it is at borders where sharp distinctions between citizens and non-citizens are particularly salient and particularly easy to enforce. Because of this, those profiled at borders risk losing not only their liberty, but their freedom to enjoy their home, their sense of belonging, and their equality as citizens: these risks are not as likely to be attached to racial profiling in other contexts.<sup>87</sup>

The point to be emphasized here is that the above-mentioned studies help clarify that the space where racial profiling occurs matters a great deal, and that the prominence of the new space where racial profiling occurs - at the borders of nation states - is significant in terms of how a

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context) was that approximately thirty-two million Americans, a number equivalent to the population of Canada, reported they have already been victims of racial profiling.

<sup>83</sup> For an elaboration of the religious elements of post-9/11 racial profiling please refer to part three of this chapter.

<sup>84</sup> CAIR-CAN's data on the respondents' reactions to being contacted, for example, indicated that the majority (46%) felt "fearful, freaked out, paranoid, confused, and/or anxious" and that a sizable percentage (26%) felt "harassed and pressured, violated and/or discrimination against." See *Presumption of Guilt*, *supra* note 79 at 13.

<sup>85</sup> See Gova & Kurd, *supra* note 27. To be clear, I am not suggesting here that emotions experienced by victims of racial profiling in another context are any less serious or troubling, but merely that they are experienced in different ways.

<sup>86</sup> See for example Chapter 3, "Borders and Exclusions" in Smith, *supra* note 44 and Audrey Macklin, "Borderline Security" (2002) in Daniels, Macklem & Roach, *supra* note 12.

<sup>87</sup> Furthermore, the idea that feelings of harassment, discrimination and pressure are experienced more acutely in a very public setting (such as a check-in or security line up at an airport) is a theme that appears in Gova and Kurd's report. See Gova & Kurd, *supra* note 27 at 34.

victim experiences the discrimination and how society responds to it. From an equality perspective, this new space becomes an additional and more complex site of discrimination; a site where sources of inequality are new and intersecting (race, religion, citizenship, ethnicity, gender) and where the consequences of this discrimination may entail exclusion from membership in the nation state.<sup>88</sup> The pervasiveness and distinctiveness of post-9/11 racial profiling, coupled with the reality that those profiled as ‘terrorists’ may find themselves locked into a ‘state of exception’ where the rule of law no longer offers any protection, is profoundly concerning. Even more disturbing, however, is the fact that discrimination of this nature and extent has not been universally condemned. As the threat to equality has grown post-9/11, so too has the tendency to defend racial profiling as a legitimate tool of terrorism prevention in some, many, or all circumstances. It is to this issue that I now turn.

## PART II: THE MOVEMENT IN DEBATE FROM ‘FACTUAL’ TO ‘NORMATIVE’

For as long as the term has existed, ‘racial profiling’ has triggered debate, controversy and passion. In Canada, the issue was first thrust to the fore by Scot Wortley who, in a 1995 study for the Commission on Systemic Racism in the Ontario Criminal Justice System, found that African Canadians were twice as likely as whites to be stopped by police once, and four times as likely to be stopped more than once.<sup>89</sup> At this time, the dominant sentiment towards racial profiling was

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<sup>88</sup> For a detailed consideration of the way in which citizenship rights have been eroded for Muslims and people of colour in the ‘war on terror’ see Sunera Thobani, “What’s Rights Got to Do With It? Citizenship in an Age of Terror” in McIntyre & Rodgers, *supra* note 9.

<sup>89</sup> Scot Wortley, “The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice” presented to Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen’s Printer for Ontario, 1995) at 352 - 360. A few years later, after analyzing data collected by the African Canadian Legal Clinic in the 1990s, Wortley also concluded that there was strong evidence that African Canadians were subject to higher levels of scrutiny than white individuals by immigration officials at Pearson International Airport. See R. James, “Black Passengers Targeted in Pearson Searches? Lawyers plan court fights over “racial profiling” by customs officials at airport,” *Toronto Star*, 1998.

that it was “wrong and unconstitutional no matter what the context”<sup>90</sup>; this was the official position of the American and Canadian governments and reflected the prevailing public opinion in both these countries.<sup>91</sup> Ironically, a bill that would ban racial profiling - the *End Racial Profiling Act* - was introduced to the United States Senate only a few months before 9/11 when the practice was given a new breath of life and legitimacy.<sup>92</sup>

Although the condemnation of racial profiling pre-9/11 is obviously morally admirable, it is important to note that it came at a time when public discourse often denied the occurrence of racial profiling. Put another way, those who denounced racial profiling in theory did not necessarily believe that the problem existed in practice. They merely believed that *if* it existed, it would be wrong. Allegations of profiling, such as those made by Wortley in Canada, were adamantly denied by law enforcement officials, who insisted that their investigatory techniques were fair and lawful. Although it can certainly be argued that in many circumstances denial stems from misunderstandings as to what exactly constitutes racial profiling,<sup>93</sup> in the light of the release of 91,000 pages of internal records by the state of New Jersey revealing a systemic policy of pulling over African American or Hispanic drivers, it is hard to accept that a ‘misunderstanding’ lay behind the state governor’s unwavering, decade-long denial that racial profiling was a problem in his state.<sup>94</sup> Prior to September 11<sup>th</sup>, it was questions and issues of this nature that formed the crux of the debate in racial profiling discourse: the point of departure for debate was whether racial profiling was or was not in fact a tool of law enforcement, and if so, how to stop it or provide

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<sup>90</sup> John Ashcroft quoted in Baynes, *supra* note 42.

<sup>91</sup> For example, in 1999, 81% of respondents in a U.S. national poll said they disagreed with racial profiling. See Gross and Livingston, *supra* note 40 at 1413.

<sup>92</sup> Choudhry, *Protecting Equality in the Face of Terror*, *supra* note 12.

<sup>93</sup> See for example Tanovich, *The Colour of Justice*, *supra* note 10 at 4.

<sup>94</sup> The release of these internal records followed the controversial shooting of three unarmed minority men in the state of New Jersey. Please see generally Peter Verniero & Paul. H. Zoubek, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* (20 April, 1999), available online: New Jersey State Department [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf).

remedies to its victims. Broadly speaking, the central contentions were ‘factual’ in nature.

By the end of 2001, attitudes to racial profiling switched dramatically. Forty-eight percent of Canadians expressed their support of racial profiling<sup>95</sup> and fifty-eight percent of Americans were in favour of “requiring Arabs, including those who are U.S. citizens, to undergo special, more intensive security checks before boarding airplanes in the U.S.”<sup>96</sup> At the same time, the prior consensus among academics that racial profiling was wrong began to breakdown. As Bahdi explains, the ‘war on terror’ gave rise to new debates about “whether Canadian society can morally, legally, or politically condone racial profiling.”<sup>97</sup> Broadly speaking, these arguments can be classified as ‘normative.’<sup>98</sup> Similarly, disputes over whether the practice is actually constitutional have been obscured by tangential discussions. Is terrorism more of a threat to our livelihood than illegal weapons and drugs?<sup>99</sup> If yes, is it therefore justified to resort to measures that will disproportionately affect members of racial, ethnic or religious groups who are already marginalized in society? Is the threat of terrorism so grave and immediate that it qualifies as an ‘emergency’ or an ‘exceptional circumstance’?<sup>100</sup> How ‘effective’ does racial profiling have to be before it is acceptable?

The key questions I seek to answer with respect to the shift in debate are *why* it happened

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<sup>95</sup> Bahdi, *supra* note 51 at 296.

<sup>96</sup> David A. Harris, “New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001,” (2004) *Utah Law Review* 913 at 914.

<sup>97</sup> Bahdi, *supra* note 51 at 295.

<sup>98</sup> See for example Gross & Livingston, *supra* note 40 at 1414. As Gross and Livingston point out, debates since 9/11 have also been more ‘definitional’ in nature. That is, they have revolved more around what exactly constitutes racial profiling. In this respect, Gross and Livingston focus on United States’ Justice Department’s interview campaign in 2001. They analyze whether the 5,000 interviews conducted by the Justice Department – of mostly young Middle Eastern men – fits into the definition of ‘racial profiling.’ I am not going to consider the definitional arguments separately, however, as I believe they are inextricably linked with normative arguments. It appears to me that the purpose of narrowing or morphing the definition of racial profiling is often (but not always) simply to make certain actions of law enforcement officials justifiable or, in other words, normatively acceptable.

<sup>99</sup> Harris, *supra* note 96 at 915.

<sup>100</sup> Stephen J. Ellmann, “Racial Profiling and Terrorism,” (2003) 22 *New York Law School Journal of International and Comparative Law* 305 at 313.

and *what* it signifies. One basic explanation for the movement away from factual debate stems from the reality that racial profiling has simply become increasingly hard to deny in the light of growing evidence of the practice. However, the diminished viability of factual arguments does not explain why public and academic sentiment is increasingly in support of racial profiling. To begin to answer this question, it is necessary to explore the arguments on both sides of the debate in more detail.

a) *The balance between security and human rights*

Essentially, the new normative reaction to racial profiling is driven by the perception that the stakes are significantly higher when terrorism is at issue and hinges on the notion that the norm of colour-blindness should be surpassed by the norm of national security in times of war.<sup>101</sup> As Stuart Taylor contends, racial profiling should not be prevented by “the forces of head-in-the-sand political correctness” if another attack is to be avoided.<sup>102</sup> His message that “this is not a close call. It has nothing to do with prejudice. It is a matter of life or death”<sup>103</sup> bluntly captures the sentiment that the war against terrorism can be distinguished from the ‘war on drugs’ or the ‘war on gangs.’ Unfortunately, this line of reasoning ignores that many lives have been lost as a result of drug abuse and gang violence, and completely overlooks the deleterious effects of racial profiling on the individuals subjected to it, and the larger social costs of the practice.

A milder version of Taylor’s viewpoint (and one advanced frequently since September 11<sup>th</sup>) acknowledges that racial profiling involves a degree of prejudice, but sustains that security concerns and risk to the public must, at some point, outweigh human rights and freedom. Of course, attempting to balance security and fundamental freedoms is not a new challenge faced by

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<sup>101</sup> Baynes, *supra* note 42 at 6.

<sup>102</sup> Stuart Taylor as quoted in Harris, *supra* note 96 at 915.

<sup>103</sup> *Ibid.*

liberal democracies.<sup>104</sup> It is, however, a challenge that has been poorly responded to in the past and which must therefore not be accepted lightly.<sup>105</sup> It is important to note at this point that the image of a balance is not merely a feature of the normative debate. Rather, the amenability of racial profiling to the metaphor of balance is what actually *makes* contemporary racial profiling debate ‘normative.’ The very purpose of the language of balance is to make an argument about how things should or ought to be or about what position is ‘more’ right or ‘more’ wrong. On a different note, I would also suggest that the metaphor of balance not only implies that there is a need to limit one right (or set of rights), but at the same time, operates to make any limits appear reasonable and just.<sup>106</sup>

Gova and Kurd’s qualitative study demonstrates that “national security rationale” is not only prevalent in academic discourse, but that it plays a heavily influential role on the ground, particularly at airports when decisions are made to screen or subject an individual to surveillance.<sup>107</sup> The heightened prevalence of security rationale in racial profiling discourse post-9/11 is deeply significant to my project. As I show in detail in the next chapter, there is an inherent tension between criminal justice logic - security, punishment and public order - and the logic of equality law. I would therefore suggest here that as the perception that security (in this case national security) is under threat intensifies, so too does the inherent tension between equality and criminal justice. This point will be developed fully in the next chapter.

*b) The casting of racial profiling as a question of liberty*

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<sup>104</sup> Choudhry & Roach, *Racial and Ethnic Profiling*, *supra* note 30 at 2.

<sup>105</sup> Consider, for example, the disenfranchisement and internment of the Japanese Canadians during WWII.

<sup>106</sup> For a detailed and thought-provoking article about how the language of balance has been employed in the post-9/11 context see Jeremy Waldron, “Security and Liberty: The Image of Balance,” (2003) 11:2 *The Journal of Political Philosophy* 191.

<sup>107</sup> Gova & Kurd, *supra* note 27 at 6.

Predictably, many proponents of racial profiling today insist that they have managed to strike a delicate balance between the abrogation of rights and risk of harm and/or security. However, without clarifying exactly how ‘harm’ and ‘risk’ are measured and defined, these are precarious and shaky claims to make. It is also interesting to consider here exactly what rights are being abrogated, as this is not always made clear in academic writing in this area. Is it equality rights that are being compromised, or rights to liberty, or both? As Waldron argues, the difference is important.<sup>108</sup> He posits that the image of a balance between security and liberty in the post-9/11 world is grossly misleading and obscures the true nature of the trade-off that it produced by anti-terrorist legislation (and the racial profiling that inevitably stems from it.)<sup>109</sup> It is not the liberty of everyone that is being sacrificed in the war on terror, but the equality of specific, identifiable minorities.<sup>110</sup>

Waldron’s observation is both accurate and extremely relevant to my project. When one examines how racial profiling has been cast in public and academic discourse post-9/11, references to equality rights are noticeably absent, even by some who condemn the practice. This stands in contrast to racial profiling conversations before September 11<sup>th</sup>, which frequently centered on how racial profiling in the context of traffic stops, for example, violated the equality rights of African Americans, Asians and Hispanics and the ways in which the courts dealt with such cases under constitutionally protected equality provisions.<sup>111</sup> In my view, the mischaracterization of racial

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<sup>108</sup> See Waldron, *supra* note 106 at 201. Here, Waldron points out here that Ronald Dworkin has also highlighted the problem with making the claim that civil liberties are diminished equally for everyone. Dworkin writes:

None of the administration’s decisions and proposals will affect more than a tiny number of American citizens: almost none of us will be indefinitely detained for minor violations or offences, or have our houses searched without knowledge, or find ourselves brought before military tribunals on grave charges carrying the death penalty. Most of us pay almost nothing in personal freedom when such measures are used against those the President suspects of terrorism.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> See for example Carl J. Schifferle, “After *Whren v. United States*: Applying the Equal Protection Clause to Racially Discriminatory Enforcement of the Law,” (1997) 2 *Michigan Law and Policy Review* 159. And more

profiling as general question of ‘our’ liberty (or reasonable limits on ‘their liberty’) as opposed to a specific question of ‘their’ equality post-9/11, is a crucial feature of the normative shift because it obscures and depersonalizes the shame, inconvenience and suffering experienced by victims of racial profiling and allows justificatory arguments to flourish without true acknowledgement of the odious nature of the practice. This is concerning (and even ironic) because, as I have shown above, victims of racial profiling post-9/11 are likely to be profiled in a fashion (and space) that contravenes their right to equality particularly acutely on different and intersecting grounds, and that may entail far-reaching and drastic consequences. For this reason, it could be argued that equality issues are especially relevant and important in today’s climate.<sup>112</sup>

*c) Disputes over effects and effectiveness*

Questions related to the effectiveness of racial profiling as a tool of law enforcement have also been the source of considerable disagreement post-9/11. This stems from the ostensibly obvious point that in order for justificatory arguments to hold any weight, there must be some evidence that what is being justified is rational in so far as it yields material and visible results. As Daphne Barak-Erez posits, “[i]f group profiling is not effective, its use does not pose a human

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recently, Lawrence W. Williamson, Jr., “Profiling, Pretext and Equal Protection: Protecting Citizens from Pretextual Stops Through the Fourteenth Amendment,” (2003) 42:3 *Washburn Law Journal* 657.

<sup>112</sup> The invisibility of references to equality in contemporary racial profiling discourse may also partially explain section 15’s uselessness with respect to racial profiling post-9/11. If racial profiling has ceased to be viewed as an equality issue in dominant public discourse, then it follows that using the equality provision would not be the obvious remedial route for victims of the practice to take. It is also important to note here, however, that although racial profiling was more frequently articulated in egalitarian terms prior to 9/11, in practice, the few racial profiling cases heard by the Canadian courts before 9/11 were mostly constitutional challenges made under sections 7 and 9 of the *Charter*, and not section 15. See generally Tanovich, “Chapter 8: Litigating Cases” in *The Colour of Justice*, *supra* note 10 and Choudhry & Roach, *Racial and Ethnic Profiling*, *supra* note 30. As I will show in the next chapter, this can largely be explained by the deep conceptual tension between equality and criminal justice that has meant section 15 has been greatly underutilized in the criminal justice realm. Considered in this light, the casting of racial profiling as a liberty question post-9/11, therefore simply reinforces and perpetuates the notion that criminal justice issues (including racial profiling) and equality issues are incompatible, and the view that liberty is the dominant logic of criminal justice. In sum, the miscategorization of racial profiling as a liberty question not only gives new normative arguments more legitimacy by masking the true effects of racial profiling, but exacerbates the tension between equality and criminal justice, thereby potentially reducing section 15’s efficacy in the post-9/11 racial profiling context.

rights dilemma but rather fails a simple rationality test.”<sup>113</sup> The problem here is (and it is a very significant problem) that there is little, if any, factual proof that racial profiling is effective. Yet, strangely, this fact seems to have been lost by some proponents of racial profiling: in the absence of factual evidence they seem to presume that racial profiling is effective to some degree and move straight to questions about exactly *how* effective it needs to be before it is acceptable. Stephen Ellmann, for example, asks questions along these lines:<sup>114</sup> at airport security, if 1 out of every 1,000 people profiled turns out to be a security threat is this sufficient justification?<sup>115</sup> What if the ‘success rate’ is only 1 in 10,000?<sup>116</sup> Similarly, discussing the effectiveness of the New York City Police Department’s anti-gun campaign, Gross and Livingston write:

From January 1998 through March 1999, guns were found on only 2.5% of the nearly 60,000 people who were stopped for suspected gun possession - one person in 40. Assuming the police did use race to decide whom to stop and frisk, would we feel differently about the practice if they had found weapons on 90% of those they searched? How about 30%?<sup>117</sup>

The arguments made by those stringently opposed to racial profiling are a little clearer. This is because there are many who would continue to argue against racial profiling no matter how effective it was proven to be. Those who fall into this category emphasize that racial profiling can never be justified because the social costs - the perpetuation of social inequality and the stigmatization of already vulnerable communities - are always too high. Otherwise put, the damaging effects of profiling are understood as far outweighing any potential advantages. Nevertheless, this fact does not foreclose arguments that racial profiling is inherently ineffective as a method to reduce the threat of terrorism. Indeed, many argue that because racial profiling is

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<sup>113</sup> Daphne Barak-Erez, “Terrorism and Profiling: Shifting the Focus from Criteria to Effects,” (2008) 29 *Cardozo Law Review* 1 at 3.

<sup>114</sup> See Ellmann, *supra* note 100.

<sup>115</sup> *Ibid.* at 328-329.

<sup>116</sup> *Ibid.*

<sup>117</sup> Gross & Livingston, *supra* note 40 at 1427.

simultaneously vastly over-inclusive and under-inclusive it is an inefficient use of resources and thus has a negative impact on intelligence gathering and can actually impede investigation efforts.<sup>118</sup> For example, the point is frequently made that racial profiling carries the danger of alienating members of Arab and Muslim communities who may possess valuable and useful information.<sup>119</sup>

Although there is no solid factual basis as to whether racial profiling is effective or ineffective, at the present moment, there is considerably more evidence suggesting that it is the latter. For instance, of the 1,200 suspected Al Qaeda sympathizers detained by the United States' FBI in the wake of September 11<sup>th</sup>, by 2002 all but seventy-four were released.<sup>120</sup> Further, over the last few years, there have been growing reports that Al Qaeda and other terrorist groups are making a conscious effort to 'beat the profile'<sup>121</sup> and recruit individuals with diverse nationalities and backgrounds. Indeed, some of the most high-profile terror-arrests following September 11<sup>th</sup> have been made against individuals who do not conform to the stereotypical 'terrorist' profile.<sup>122</sup>

Interestingly, Barak-Erez suggests that one possible way to "improve the balance struck in this area between effectiveness and human rights"<sup>123</sup> is to shift the focus of the racial profiling

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<sup>118</sup> For example see Tanovich, *The Colour of Justice*, *supra* note 10 at 112-117 and Bahdi, *supra* note 51.

<sup>119</sup> See Tanovich, *ibid.* at 115. Tanovich writes:

[o]ne of the best sources of intelligence on terrorism connected to the Arab-Muslim world will come from these communities. However, such sources are not likely to come forward with information if our governments implicitly sanction the use of racial profiling or if the police harass members of these communities, as they appear to be doing, in the hope that someone will agree to act as an informant.

<sup>120</sup> Furthermore, of the seventy-four still detained at this point, thirty-eight were to be deported for reasons unrelated to terrorism. See Baynes, *supra* note 42 at 26.

<sup>121</sup> Tanovich, *The Colour of Justice*, *supra* note 10 at 115.

<sup>122</sup> The first alleged terrorists apprehended in the U.S. before they could carry out their acts of terror were Richard Reid (aka the "Shoe Bomber"), a British citizen of Jamaican origin, and Jose Padilla, a Hispanic American. See Baynes, *supra* note 42 at 34. Since then, John Walker Lindh, a White American man and David Hicks, a White Australian man, were both discovered to be fighting for the Taliban in Afghanistan and apprehended by U.S. authorities. See Tanovich, *ibid.* at 33. Lindh has since been prosecuted for conspiracy to kill, to commit terrorism, and to support terrorists. Baynes, *supra* note 42 at 10. These examples capture the way in which racial profiling is 'under-inclusive' and thus ineffective.

<sup>123</sup> Barak-Erez, *supra* note 113 at 10.

debate from criteria to effects. Barak-Erez argues that racial profiling can be tolerable if it does not have ‘long-lasting’ effects on people’s lives.<sup>124</sup> She states that “[f]rom this perspective, it should be easier to accept the use of profiling for short-time searches and much harder, if not impossible, to justify a complete denial of the possibility to immigrate based on the applicant’s group affiliation.”<sup>125</sup> Gross and Livingston also toy with the idea of using effects to delineate ‘less’ and ‘more’ preferable forms of racial profiling. Referring to the internment of the Japanese during WWII, they ask,

[W]hat if, instead of being forced to sell their property for pennies on the dollar, to leave their homes, schools, farms, jobs, and communities, and to spend three and a half years behind barbed wire, Japanese Americans had been asked to report for interviews with the FBI? What if in addition they were required—because of their ethnicity—to report their whereabouts to the police periodically, but were otherwise allowed to lead their lives as they wished?<sup>126</sup>

In my opinion, Barak-Erez’s effects-based argument is simply another branch of the idea that a balance must be struck between competing rights. In essence, the purpose of her proposition is to render racial profiling normatively acceptable under certain conditions and thus to reasonably justify limiting the rights of certain minorities.<sup>127</sup> It is striking to note here, however, how much

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<sup>124</sup> *Ibid.* at 7.

<sup>125</sup> *Ibid.*

<sup>126</sup> Gross & Livingston, *supra* note 40 at 1425.

<sup>127</sup> I believe Barak-Erez’s argument is flawed for several reasons. Firstly, and most obviously, it fails to appreciate that short-term or less privacy-intruding acts of profiling can also be linked to a painful history of social injustice, segregation and stereotyping and that they can be (and often are) no more than a form of discrimination rooted in (and motivated by) power surveillance and control. Secondly, Barak-Erez makes no mention of how (or whether) the cumulative effect of numerous repeated short-term searches/stops would be accounted for. While a one-off experience may be perceived as random and may not trigger long-lasting or harmful effects, after the third, fourth, fifth or sixth occasion, the act will undoubtedly be experienced differently and more acutely by the victim. Thirdly, Barak-Erez does not specify who would be the one measuring whether the effect is sufficiently long-lasting and damaging to render it unacceptable: the victim, the law/security enforcement official, or a neutral observer? Clearly, each would have different ideas and reach different conclusions on this question. Finally, the relevancy of this argument to the post-9/11 racial profiling debate is questionable because, as we have seen, racial profiling of suspected terrorists is, by its nature, deeply harmful and especially likely to have long-lasting and far-reaching effects. In this way, the effects-based arguments are another unfortunate feature of the normative debate post-9/11. While racial profiling leading to interviews or excessive questioning is of course preferable to that which results in detainment, imprisonment or deportation, we should not be ready to accept the former as a legitimate and condonable method of law enforcement. It may be a lesser evil, but it is still deeply problematic.

ground has been conceded to arrive at this point, at which complex and nuanced arguments holding that racial profiling is warranted in some circumstances are common-place in academic debate. Although they stop short of defending racial profiling outright, the ideas expressed by scholars such as Barak-Erez and Gross and Livingston in the years immediately following the 9/11 attacks differ greatly (in substance and in theory) from those that shaped racial profiling discourse pre-2001.

*(d) How far reaching is the shift in debate from 'factual' to 'normative'?*

Although the racial profiling debate has shifted in the aftermath of September 11<sup>th</sup>, and questions that were invisible or unimportant before this day have suddenly been pushed into the spotlight, it is important to recognize that racial profiling outside the war on terrorism context (and the debate surrounding it) has not suddenly become less of a concern, but has merely been sidelined in a time of panic, anger, and confusion. This is not to say, however, that new justificatory arguments may not have had an effect on how racial profiling is articulated more generally in public discourse. How far reaching is the shift in debate? Does the normative shift apply to racial profiling of other minorities too? Has the increasing tendency to defend racial profiling under certain conditions and in some circumstances seeped into discussions about racial profiling in the context of traffic stops? Have our core ideas about racial, religious and ethnic equality changed, or have they just changed depending on if we are talking about the profiling of Arabs and Muslims? From a critical race theory perspective, these questions are important. Indeed, Richard Delgado, one of the most prominent critical race theorists, has recently asked, “will today's heightened patriotism, fear of outsiders, concerns over immigration, and retreat on

civil liberties produce setbacks for Blacks, Latinos, and other groups of color?”<sup>128</sup>

It is indisputable that other minority groups have been affected by the September 11<sup>th</sup> backlash. Incidences of hate crimes and discrimination have not only escalated against Arabs and Muslim individuals and communities, but Sikhs and Hindus - who are perceived to be Muslim or Arab because of their racial features, ethnicity or cultural markers - have also experienced an acute rise in physical and verbal abuse.<sup>129</sup> Moreover, some African American men have reported being profiled as Middle Eastern terrorists.<sup>130</sup> For Baynes, these facts signify that “because of national security concerns, social construction of race in the United States is slipping into a ‘white-against-everyone-else’ paradigm”<sup>131</sup> and that as a consequence “all people of color will be lumped together and will be suspected of being terrorists, tempered by national origin, biracial heritage, and religion.”<sup>132</sup> This statement is reinforced by the indication from the United States’ law enforcement officials that the next Al Qaeda terrorists will likely come from Africa or Asia.<sup>133</sup>

With respect to the normative shift, however, I believe it is not all-pervasive and is in fact unique to racial profiling in the anti-terror context. A concrete example will add support to my point here. In fall 2002, the *Toronto Star* published a series of articles that drew attention to the

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<sup>128</sup> Richard Delgado, Book Review Essay, “Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race,” (2003) 82 *Texas Law Review* 121 at 122. However, Delgado also notes here that “questions of this type, which examine the material determinants of civil rights progress, are not even on the radar screen of the leftist movement - Critical Race Theory - that one would think would be most vitally interested in them.”

<sup>129</sup> See for example Jonathan Stubbs, “The Bottom Rung of America’s Race Ladder: After September 11 Catastrophe Are American Muslims Becoming America’s New N....S?” (2003) 19:1 *Journal of Law and Religion* 115 at 120 -121, Cole & Maisura, *supra* note 43 and Khyati Y. Joshi, “The Racialization of Hinduism, Islam and Sikhism in the United States,” (2006) 39:3 *Equity and Excellence in Education* 211 at 219 – 220. Here, Joshi explains the ways in which Islam, Sikhism and Hinduism are sometimes “presumed to be theologically similar because their adherents are racially similar” and describes how media coverage which showed Bin Laden wearing a turban, led some people to equate the turban with terrorism, conclude that Sikhism was an “offshoot” or “sect” of Islam, and discriminate against Sikhs on that basis.

<sup>130</sup> Although it is impossible to ascertain the motivating factors that lead to this profiling, some have speculated that it is because of their names, or even due to the simple fact that their physical features are similar to those of the stereotypical terrorist. To be sure, it is not always easy to determine whether a person belongs to a certain racial group. See Baynes, *supra* note 42 at 23.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

use of racial profiling in stops, searches, arrests and detentions made by the Toronto Police Services.<sup>134</sup> The evidence put forth in the series - that individuals of African descent were treated disparately by the police - was solid and overwhelming and generated considerable media attention and public debate.<sup>135</sup> Significantly, however, the nature of the highly-charged debate surrounding this particular issue was ‘factual’ as opposed to ‘normative’, despite taking place after 9/11. In response to the *Toronto Star*’s articles, the police went on the offensive: the series’ findings were publicly dismissed by Toronto’s former Police Chief<sup>136</sup> and “the police brass, the union, and members of the Police Services Board all took the position that racial profiling was not a problem.”<sup>137</sup> In addition, the police hired a well-respected criminal defence lawyer to analyze and find fault with the *Toronto Star*’s findings, and launched a \$2.7 billion libel lawsuit against the newspaper.<sup>138</sup> Nobody argued that racial profiling was indeed happening, and that it was in some way warranted. This suggests that racial profiling in other contexts, and against other minorities, is not at issue normatively post-9/11.

The question arises, then, as to *exactly* why racial profiling is perceived as an acceptable law enforcement tool for certain minority groups at certain times in history. Is it the ‘type’ of minority group subject to profiling that matters, or the nature of the event, attack or situation that triggered the profiling? In my view, the increased acceptance and willingness to condone racial profiling post-9/11 reveals considerably more than simply that society’s demand for security and justice has increased as the stakes have gone up. The new normative reaction is a reflection of

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<sup>134</sup> The series of articles were published over the course of a week or so under the headline, “Singled Out” and drew on information obtained by the newspaper under a Freedom of Information request. Please see generally Smith, *supra* note 44 at 10-12 and 23-54 and Tanovich, *The Colour of Justice*, *supra* note 10 at 32-35.

<sup>135</sup> For example, the data revealed that Blacks constituted 34 percent of drivers charged with “out of sight” traffic violations, despite making up only 8 percent of the city’s population. See Tanovich, *ibid* at 33.

<sup>136</sup> Smith, *supra* note 44 at 10.

<sup>137</sup> Tanovich, *The Colour of Justice*, *supra* note 10 at 34.

<sup>138</sup> *Ibid.* at 35.

much more complex anxieties; anxieties that are strong enough to shake-up and re-align our fault lines on prejudice.<sup>139</sup> To understand and make sense of these anxieties, it is necessary to adopt a more theoretical lens and consider the closely-related notions of the racialization of religion and ‘race thinking’. Demonstrating how these ideas have been employed in the ‘war on terror’ will shed a different light on why the movement in racial profiling debate occurred and its significations.

### PART III: ‘RACE THINKING’ AND THE RACIALIZATION OF RELIGION POST-9/11

#### a) *The racialization of religion and its effects*

The conflation of racial (Arab/Middle Eastern) and religious (Islam) categories is another key defining feature of the racial profiling landscape post-9/11, and has added a further layer of complexity to contemporary debate on this issue. Since the ‘war on terror’ was declared, the conflation of the terms ‘Muslim’, ‘Arab’ and ‘Middle Eastern’, has been hard to ignore. As Leti Volpp has observed, the aftermath of 9/11 has confirmed that these different categories of identity are used interchangeably and indiscriminately to describe the ‘terrorist’ enemy.<sup>140</sup> In Canada, the Department of Justice’s inclusion of ‘Muslim’ in its description of groups to whom racial profiling can apply, has seemingly officialized this conflation.<sup>141</sup>

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<sup>139</sup> The idea that racial perceptions and stereotypes as social conditions change has been articulated by Macklin, *supra* note 86 at 396. Discussing the Canadian experience post 9/11, she writes:

Boundaries of membership and modes of exclusion can be (and regularly are) redrawn from within the nation. They trace themselves along fault lines that erupt along the surface of our pluralistic, multicultural democratic country when stressed by a perceived or real crisis.

<sup>140</sup> Volpp, *supra* note 45 at 1576.

<sup>141</sup> Gova & Kurd, *supra* note 27 at 23. The point made by Gova and Kurd here is important. They state: We understand that the Justice Department’s conflation of race with religion in their definition of “racial profiling” is a result of their reading of the *Anti-Terrorism Act*, but we wonder what the state’s purpose is in the conflation? We encourage researchers to investigate “religious profiling” beyond the rhetoric of national

It is likely that the misconception that all Arabs are Muslim and vice versa stems from the fact that whereas only 12 per cent of Muslims are Arab, 90 per cent of Arabs are Muslims worldwide.<sup>142</sup> It is important to be conscious of the blurring of the lines between race and religion, because, as Kyati Joshi points out, it is in these muddy waters that we find the racialization of religion.<sup>143</sup> Joshi characterizes the racialization of religion in the following terms:

When religion is racialized, a particular set of phenotypical features, understood in a specific social and historical context, comes to be associated with a given religion and/or with other social traits. The racialization of religion results in or exacerbates the ethnoreligious oppression of the minority group. Yet, at the same time, the essential nature of the discrimination – racial or religious – becomes disguised or lost entirely.<sup>144</sup>

Under this definition, the racialization of religion is an inherently negative and damaging phenomenon that facilitates oppression and potentially affects how discrimination is recognized. It is argued here that although the boundaries between race and religion have been blurred on countless occasions and in all corners of the world, the racialization of Muslims in the post-9/11 environment - our ‘particular historic moment’ - is particularly pervasive and has unique characteristics and effects. Indeed, it is the *effects* of this phenomenon that are relevant here; it is the effects that perform a specific function and propel new normative arguments that racial profiling is justified. Drawing on some of the effects of the racialization of religion highlighted by Joshi, I will now show how they are tied to the new racial profiling disputes post-9/11.

**(i) The nature of the discrimination is lost<sup>145</sup>**

The final sentence of Joshi’s above definition captures one reason why the racialization of

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security, including an analysis of what interests are at stake in persistently targeting members of one religious community to the comprehensive degree evinced by participants in this study.

<sup>142</sup> Rachel Saloom, “I know who You Are, But What Am I? Arab American Experiences through the Critical Race Theory Lens,” (2005) *Journal of Public Law and Policy* 27:1 at 57-58.

<sup>143</sup> Joshi, *supra* note 129 at 212.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

religion is relevant to the racial profiling debate post-9/11. Today, when law enforcement or government officials use a profile as a proxy for risk, it is often unclear whether the profile is motivated by race or religion. Consider the examples of the veiled woman ‘racially’ profiled and searched at airport security, or the man selected for a security visit because he prays at a particular mosque. Is it their race or religion that led them to be profiled as a potential security threat? In these cases, of course, it appears to be evidence of their religious belief that gives rise to suspicion. However, this fact is often ‘lost’ because the racialization of religion is a process that reconstructs a *religious* group as a *racial* group in the popular mind,<sup>146</sup> and thus masks the true nature of, and motive behind, an act of discrimination. This is significant for several reasons.

Firstly, it raises a terminological problem or what Henry and Tator call a “discursive crisis”<sup>147</sup>: the term ‘racial profiling’ is misleading or even factually inaccurate when the basis for the discrimination is more than likely at least partly religious.<sup>148</sup> The idea that the racialization of religion can operate to obscure the exact prejudices that rumble beneath discriminatory action goes some way to explaining why the language of race persists in discussions of contemporary profiling, despite the reality that such profiling targets members of an identifiable religious group. Secondly, the increasingly religious dimension to profiling post-9/11 is important from an equality perspective as it broadens the net of inequality and draws in more complex questions of religious and racial inequality, and how these forms of inequality intersect. From a practical standpoint, the obscuring of the nature of a discriminatory act gives rise to interesting questions with respect to

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<sup>146</sup> *Ibid.* at 216.

<sup>147</sup> Frances Henry & Carol Tator, *Racial Profiling in Toronto: Discourses of Domination, Mediation, and Opposition* (Toronto: Canadian Race Relations Foundation, 2005). Available online at: [www.crr.ca/divers-files/en/pub/rep/ePubRepRacProTor2.pdf](http://www.crr.ca/divers-files/en/pub/rep/ePubRepRacProTor2.pdf). Henry and Tator describe a discursive crisis as referring “to a set of relations that profoundly affect society – specifically the state of minority-majority relations” at 5. While some commentators have responded to the terminological problem by utilizing the terms racial, religious and ethnic profiling where relevant, others have continued to use ‘racial profiling’ as a catch-all term out of simplicity. However, this latter trend obviously carries the risk of further obscuring the religious dimension to profiling post-9/11.

<sup>148</sup> Joshi, *supra* note 129 at 218.

how a section 15 claimant would effectively frame their claim.<sup>149</sup>

**ii) The racialized religion is seen as monolithic<sup>150</sup>**

The racialization of religion obscures not only the theological differences between different religions, but also the differences within the same religion.<sup>151</sup> As a result, all adherents of a particular religion are essentialized and the diverse practices, traditions and beliefs within the religion - that vary greatly across geographical and cultural lines - are erased. Since 9/11, public discourse has been strewn with sweeping and generalized comments about Islam and has consistently failed to differentiate between radical Wahhabism,<sup>152</sup> and other belief systems within Islam. This has perpetuated the myth that the majority of Muslims are fundamentalist terrorists and has resulted in an official discourse that distinguishes between ‘good’ and ‘bad’ Muslims.<sup>153</sup> This discourse, which has been employed by both the corporate media and by political leaders such as Tony Blair and George Bush, blames ‘bad Muslims’ for terrorism and portrays ‘good Muslims’ as willing to assimilate and disassociate themselves with the violent acts of Islamic radicals. Mahmood Mamdani explores this binary distinction in detail, and argues that unless proven to be ‘good’, every Muslim is presumed to be ‘bad.’<sup>154</sup> Today, the official discourse of ‘good’ and ‘bad’

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<sup>149</sup> The practical implications of the racialization of religion are addressed in chapter three.

<sup>150</sup> Joshi, *supra* note 129 at 220.

<sup>151</sup> *Ibid.*

<sup>152</sup> The Wahhabi movement in Islam originated in Saudi Arabia during the 18<sup>th</sup> Century from the preachings of Muhammad ibn Abd al-Wahhab. Wahhabism is a conservative form of Islam and is especially critical of non-Muslims and the West in general. Although the link between Osama Bin Laden and Wahhabism is disputed, Bin Laden (and thus the events of September 11<sup>th</sup>) has come to be associated with this movement in Western discourse, perhaps because of the fact that all of the 9/11 hijackers were of Saudi origin. See generally William L. Cleveland and Martin Bunton, *A History of the Modern Middle East*, Fourth Edition (Boulder, Colorado: Westview Press, 2009) at pages 71, 122-123 and 231-234.

<sup>153</sup> For example see Mahmood Mamdani, “Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism”, (2002) 104:3 *American Anthropologist* 766 and Nadine Naber who builds on this concept in her introduction to Jamal & Naber, *supra* note 43.

<sup>154</sup> Mamdani, *ibid* at 774. See also Maleiha Malik, “Muslims are now getting the same treatment Jews had a century ago” *Guardian*, 2 February 2007. Available online at [www.guardian.co.uk](http://www.guardian.co.uk). Malik explains that the ‘good Muslim’, ‘bad Muslim’ discourse is strikingly similar to that expressed in 1920s Britain, when Winston Churchill claimed that

Muslims reinforces the idea of a clash between the ‘civilized’ in the West and the ‘barbaric’ in the Middle East: “‘good Muslims’ are praised and paid tribute to by officials, thus clarifying the ‘civilization’ they are encouraging Muslims to emulate.”<sup>155</sup> As has been widely noted, the idea of a ‘Clash of Civilizations’ has been embedded in political and public discourse in the aftermath of September 11<sup>th</sup>. Civilizational language has been employed particularly virulently by the Western media and political leaders to paint the East as a site of oppression and barbarity and the West as a site of order and reason. For example, in the immediate aftermath of September 11<sup>th</sup> Italian Prime Minister Silvio Berlusconi declared that:

the attacks on New York and Washington are attacks not only on the United States but on our civilization, of which we are proud bearers, conscious of the supremacy of our civilization, of its discoveries and inventions, which have brought us democratic institutions, respect for the human, civil, religious and political rights of our citizens, openness to diversity and tolerance of everything.<sup>156</sup>

The line of thinking embodied in comments such as these is unfortunate because the ‘Clash of Civilizations’ thesis is troublesome.

The idea of a ‘Clash of Civilizations’, or perhaps more accurately, a clash between the civilized and the uncivilized, was developed most notably by Samuel Huntington in the early 1990s.<sup>157</sup> Drawing on the work of Orientalist Bernard Lewis, Huntington proposed what many considered an original thesis about the “new phase” in world politics, asserting that “[t]he great divisions among humankind and the dominating source of conflict will be cultural...[t]he clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle

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there “were three categories of Jews – good, bad and indifferent” and that Jews were part of a “worldwide conspiracy for the overthrow of civilization.”

<sup>155</sup> Malik, *ibid.*

<sup>156</sup> Silvio Berlusconi quoted in Volpp, *supra* note 45 in footnote 42 at 1587.

<sup>157</sup> See generally Samuel P. Huntington, “Clash of Civilizations?” (1993) 72:3 *Foreign Affairs* 22. Huntington expanded his ‘Clash of Civilizations’ thesis considerably in Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996).

lines of the future.”<sup>158</sup> Huntington’s argument and observations have been criticized and widely discredited on the basis that they are overly simplistic and even racist. Edward Said captures the most fundamental flaws with Huntington and Lewis’ line of argument in the following statement:

[T]he personification of enormous entities called “the West” and “Islam” is recklessly affirmed, as if hugely complicated matters like identity and culture existed in a cartoonlike world where Popeye and Bluto bash each other mercilessly, with one always more virtuous pugilist getting the upper hand over his adversary. Certainly neither Huntington nor Lewis has much time to spare for the internal dynamics and plurality of every civilization, or for the fact that the major contest in most modern cultures concerns the definition or interpretation of each culture, or for the unattractive possibility that a great deal of demagoguery and downright ignorance is involved in presuming to speak for a whole religion or civilization. No, the West is the West, and Islam is Islam.<sup>159</sup>

From a racial profiling standpoint, the erasure of the differences within Islam, and the arbitrary distinctions drawn between ‘good’ and ‘bad’ Muslims post-9/11 is problematic because it assigns collective blame on an entire minority group and thus creates and perpetuates stereotypes that fuel racial profiling. In this context, it is also clear that the infliction of universal blame and punishment on an entire racial or religious group post-9/11 is part of a larger racial project. The collective responses against Arabs and Muslims in the aftermath of 9/11 stand in stark contrast to those triggered by terrorist acts committed by White individuals who do not fit the Muslim/Arab/Middle Eastern terrorist stereotype in the United States.<sup>160</sup> For example, the Oklahoma bombing by Timothy McVeigh was labelled as a sole and isolated act of deviance by one of ‘us’ because he did “not produce a discourse of good and bad Whites.”<sup>161</sup> Similarly, as Jonathan Stubbs highlights, Western states have not made sweeping and universal judgments, or instigated emergency reactionary policies, against white supremacists and neo-Nazi sympathizers who commit brutal

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<sup>158</sup> Huntington, *Foreign Affairs* article, *ibid* at 22.

<sup>159</sup> Edward W. Said, “The Clash of Ignorance,” *The Nation*, October 4, 2001. Available online at <http://www.thenation.com/doc/20011022/said>

<sup>160</sup> Volpp, *supra* note 45 at 1584-1585.

<sup>161</sup> *Ibid.* at 1585.

crimes of hate against Muslims, Jews and people of colour with alarming and increasing frequency.<sup>162</sup> As Volpp explains, this double standard - the depiction of Whites as individual actors, and non-Whites as being driven by “group based determinism” - is a common technique used to facilitate racial subordination.<sup>163</sup> Today, this racial subordination manifests itself in acts of systemic, state-sanctioned racial profiling against Arabs, Muslims and anyone perceived to ‘look’ like them.

**iii) ‘Othering’ is exacerbated, religion is delegitimized<sup>164</sup> and ‘race-thinking’ is invoked**

The racialization of religion has another powerful effect that has likely enabled the normative shift to occur with relative ease: it renders religion “theologically, morally, and socially illegitimate.”<sup>165</sup> More accurately, it does not render all religion illegitimate, but rather the religion subject to racialization (and perhaps also those religions theologically conflated with it).<sup>166</sup> This delegitimization occurs because the racialization of religion is an oppressive phenomenon that exacerbates the ‘Othering’ of the religion’s adherents.<sup>167</sup> Once religion is delegitimized, it not only becomes easier to misrepresent theologically, but gives rise to ‘race thinking’; a structure of thought that “divides up the world between the deserving and the undeserving according to

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<sup>162</sup> Stubbs, *supra* note 129 at 123-128. At 126, referring to the United States’ government, he writes, “the government has not, however, taken any discernable steps to end foreign reinforcements to neo-Nazi ranks by racially or linguistically profiling immigrants from countries with growing neo-Nazi organizations like the United Kingdom, Canada, Germany, Russia and the Czech Republic.”

<sup>163</sup> Volpp, *supra* note 45 at 1585.

<sup>164</sup> Joshi, *supra* note 129 at 220.

<sup>165</sup> *Ibid.* at 212.

<sup>166</sup> Indeed, the racialization of Islam post-9/11 in dominant Western discourse has actually served to reinforce the legitimacy and power of the dominant religion, Christianity. This is because racialization is an inherently dialectical process, whereby “[A]scribing real or imagined biological characteristics with meaning to define the Other necessarily entails defining Self by the same criteria.” See Robert Miles & Malcolm Brown, *Racism* (London, Paris: Routledge, 2002) at 101. By way of example, Miles & Brown describe how when Europeans identified Africans as ‘Black’ and therefore ‘inferior,’ they were simultaneously identifying themselves as ‘White’ and hence ‘superior.’

<sup>167</sup> Joshi, *supra* note 129 at 220.

descent.”<sup>168</sup> This structure of thought underlies all discriminatory action, including racial profiling.

Through the exacerbation of ‘Othering’ and the invocation of ‘race-thinking’, entire minority groups, entire communities, entire cultures and entire parts of the world come to be seen monolithically through the eyes of dominant society as barbaric, evil, inhuman, uncivilized and tyrannous.<sup>169</sup> As history has repeatedly shown, ‘Othering’ and ‘race-thinking’ facilitate subordination and justify anything from internment, to rape, to torture, to genocide. In some circumstances, they lead to the creation of spaces without law and to the expulsion of whole communities of people from the protection of law,<sup>170</sup> or as Hannah Arendt put it, to the creation of communities of people without “the right to have rights.”<sup>171</sup> In the post-9/11 context, ‘Othering’ and ‘race-thinking’ make racial profiling easier to justify normatively because victims of the practice - transformed into dehumanized, undignified and abstract creatures - are no longer seen as capable or deserving of a right to equality, or of any rights for that matter. As Volpp states, “[t]he shift in perceptions of racial profiling is clearly grounded in the fact that those individuals being profiled as not considered to be part of ‘us’.”<sup>172</sup> The question remains, however, as to how contemporary ‘Othering’ and ‘race-thinking’ is unique and whether this uniqueness carries implications for how we understand the shift in racial profiling debate. In my view, the answer lies in the role that religion has played in post-9/11 discourse.

*(b) The religious component to contemporary ‘Othering’ and ‘race thinking’*

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<sup>168</sup> Razack, *supra* note 38 at 8.

<sup>169</sup> See generally Edward W. Said, *Orientalism* (New York: Random House, 1978) and Miles & Brown, *supra* note 166 at 124.

<sup>170</sup> Razack, *supra* note 38 at 7. See also Agamben, *supra* note 62.

<sup>171</sup> Hannah Arendt, *On the Origins of Totalitarianism* (New York: Harcourt, Brace, Jovanovich Publishers, 1973) at 296-297.

<sup>172</sup> Volpp, *supra* note 45 at 1592.

In the present moment, our ‘race thinking’ for Arabs and Muslims has several defining features. As Razack notes for example, it is rarely explicit but is instead disguised by a dialogue about civilization, revealing itself “in the phrase ‘Canadian values’ or ‘American values’ uttered so sanctimoniously by prime ministers and presidents when they articulate what is being defended in the ‘war on terror’”.<sup>173</sup> It is too simple, however, to say that our contemporary ‘Othering’ and ‘race thinking’ is driven by anxiety about culture and civilization. In my view, the central anxiety - the anxiety that has catalyzed and legitimized controversial anti-terror legislation and thus new normative arguments that racial profiling is justified - is religious in nature. This is not to suggest that clear lines can be drawn between religion and culture, but simply that if religious anxiety was absent, cultural (or indeed racial) difference may not be enough to trigger a retreat from human rights norms and the adoption of discriminatory state policy. Put another way, while cultural and racial differences are important, taken alone they would mean little in the current climate. This idea is reflected in the remarks of respondents in Gova and Kurd’s study who expressed that “cultural similarity is no guarantee of just treatment and a sense of commonality.”<sup>174</sup> It is the way in which culture, religion and race converge that defines our contemporary ‘race thinking’ and ‘Othering.’

In popular public discourse, however, it seems that the importance of religion is disguised by more general Orientalist tropes that juxtapose the ‘civilized’, ‘modern’ and ‘rational’ West with the ‘barbaric’, ‘pre-modern’ and ‘violent’ East, without explicitly linking civilization, modernity and progression with secularism and/or Christianity, and barbarism, pre-modernism and violence with Islam. Although the link is always implicit - for example, in George Bush’s

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<sup>173</sup> Razack, *supra* note 38 at 8.

<sup>174</sup> Gova and Kurd, *supra* note 27 at 18.

characterization of the ‘war on terror’ as a ‘crusade’<sup>175</sup> - it is rarely drawn attention to publicly. Thus, in the same way as the racialization of religion obscures the true nature of a discriminatory act, civilizational discourse post-9/11 allows prejudice and discrimination to flourish without full awareness or acknowledgment of the source of our anxieties. What does this lack of specificity in our ‘race thinking’ tell us about ourselves and our prejudices? On a basic level, it seems to suggest that we are willing to defend ‘civilization’ and ‘progress’ openly but will not admit to anxieties that underlie this defence. More specifically, it suggests that we are not comfortable admitting to religious prejudice, or that we don’t want to talk about religion at all, perhaps because it triggers some kind of ideological anxiety.

If the above ideas are valid and correct, then it provides us with another explanation as to why ‘racial’ profiling continues to be the dominant catch-all term despite a plethora of evidence that the profiling post-9/11 has a significant religious element. A reluctance to openly acknowledge religious prejudice may also explain why the Department of Justice chose to conflate race and religion in their definition of racial profiling, without acknowledging why. If talking about religion (and thus religious profiling) gives rise to ideological anxiety then continuing to talk in terms of race may also be understood as a way of masking this anxiety. Further, although ‘racial’ profiling is also deeply suggestive of prejudice, it is a problem that is already out in the open and that the state is already familiar with (despite the official denial of the practice in Canada). ‘Religious’ profiling, on the other hand, is an issue that is far less familiar and that raises new complex questions about levels of religious tolerance in society. Thus, if the issue is sidestepped entirely, the state can avoid dealing with it at all.

What we are left with is the idea that today’s ‘Othering’ and ‘race thinking’ are unique not

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<sup>175</sup> Volpp, *supra* note 45 at 1582.

only because they are, in part, motivated by religious anxiety, but because this religious anxiety is simultaneously obscured by a persistent dialogue about race and civilization. Whether or not this is indeed reflective of a deeper ideological anxiety (and I suggest it is) the masking of religion (even to a minor extent) is relevant to discussions of discrimination of post-9/11 and, as explained in chapter three, may have practical implications for how a claim of contemporary profiling would be legally dealt with. With respect to the normative shift, religious anxiety should be understood as something that underlies and motivates new justificatory arguments rather than as the sole cause of them. As I state above, it is the way in which race, religion and culture converge in this particular social context that defines our historical moment and the ‘race thinking’ that operates in this moment. I would also suggest, however, that the blurring of race and religion has given rise to a rather peculiar state of affairs: at the same time as producing heightened and complex questions of equality, the convergence of race and religion has operated to facilitate and legitimize arguments that limits on equality rights (in the form of racial profiling) are necessary and defensible.

## CONCLUSION

Racial profiling discourse has undergone several important changes in the aftermath of September 11<sup>th</sup>, and that the climate surrounding the ‘war on terror’ has given rise to novel, complex, nuanced and heated debate. In this chapter, I have advanced evidence that racial profiling in the anti-terrorism context is occurring on a widespread and worrying scale in Canada and elsewhere and described the key features that make it unique to our particular historic moment. Describing how racial profiling disputes quickly switched from ‘factual’ to ‘normative’ in the aftermath of 9/11, and examining the arguments that comprise, and the logics that underlie, the new arguments that racial profiling is warranted under certain conditions, has also been very

revealing. Overall, the new normative debate demonstrates that any attempt to use section 15 as a tool to remedy racial profiling in the post-9/11 climate will be met with staunch opposition. One of the key points I sought to emphasize in this chapter, however, is exactly *how much* of an equality issue profiling post-9/11 appears to be. Profiling in this context is not only pervasive, but the space where it is likely to occur - at Western borders - creates new and intersecting forms of inequality for those who find themselves subject to discriminatory treatment. Further, the consequences of contemporary profiling may be particularly extreme and inequalities that stem from the practice may be experienced more acutely by victims due to the normative shift.

Exposing the religious layer of contemporary profiling and explaining how the racialization of religion has motivated and legitimized the normative shift, serves to strengthen my claim that this profiling is, at its core, an equality issue. Indeed, there are several ways in which the racialization of religion has exacerbated equality concerns at the theoretical level. For example, the erasure of the differences between religions and within the same religion (in this case Islam), perpetuates misconceptions and stereotypes that allow discrimination to flourish, and the delegitimization of religion gives rise to Orientalist tropes that operate to dehumanize and subordinate. At this point, at which discrimination concerns are squarely and acutely raised by the actions of state officials, Canada's equality provision appears to be the logical legal starting place for victims of profiling in the 'war on terror' context.

Paradoxically, however, the same environment that triggered more equality issues at the theoretical level has also reduced the likelihood that equality claims will be warmly received and properly responded to at the legal level. As a result of the process of 'Othering' and 'race thinking', individuals and communities are transformed into wild, violent and dignity-stricken beings who are viewed as inherently undeserving of a right to equality. From the perspective of a

victim of racial profiling who conforms to the image of the Muslim/Arab/Middle Eastern terrorist, 'race thinking' and 'Othering' propels them even further away from the protection of section 15. Moreover, the difficulty of ensuring equality arguments are effectively recognized may be exacerbated by the normative shift that, it could be argued, creates an atmosphere unsympathetic to arguments that profiling is a damaging and discriminatory practice. Unfortunately, as will become apparent in the following chapters, there are many more reasons why Canada's equality provision may not be willing and/or able to fulfill its potential in the racial profiling context. One reason for this is that section 15 appears to be conceptually ill-equipped to deal with *any* criminal justice matter. In other words, it is possible that section 15's lack of potential to control, stop or protect against racial profiling in the post-9/11 context may, strangely, have nothing to do with religion or racial profiling at all. In the next chapter, I analyze the strained relationship between the nature of criminal justice and the logics of section 15 in detail, with the hope of gauging the extent to which this tension explains the racial profiling/section 15 paradox of Canada's war against terrorism.

## CHAPTER TWO: THE LOGICS OF SECTION 15 AND THE NATURE OF THE CRIMINAL JUSTICE SYSTEM

*“The institutional arm of punishment, criminal justice systems, consists of a subset of bodies and practices that were never designed to provide remedies, or to offer alternatives to the victimized.”<sup>176</sup>*

### INTRODUCTION

For many, Canada’s equality guarantee - entrenched in section 15 of the *Charter* - has failed to live up to its original promise. Disappointment has been widespread and emphatically voiced.<sup>177</sup> Equality advocates have dedicated an extraordinary amount of time and effort campaigning, lobbying, arguing and researching in the hope to explain why section 15 has fallen short of its expectations.<sup>178</sup> Most notably, scholars have sought answers as to why the most disadvantaged and marginalized in Canadian society have not been equipped with enforceable, potentially transformative social rights since section 15 came into force, and why government institutions have failed to broadly interpret the provision as creating a positive obligation to take across-the-board action to combat systemic inequalities. Concern over why the Supreme Court of Canada has failed to break from a reductionist, individualistic and formalistic conception of equality to one that is substantive in nature (despite Canada’s alleged fidelity to a substantive conception of equality) has formed the backbone of section 15 critique.<sup>179</sup>

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<sup>176</sup> Laureen Snider, “Feminism, Punishment and the Potential of Empowerment,” (1994) 9 *Canadian Journal of Law and Society* 75 at 77.

<sup>177</sup> For an in-depth critique and analysis of section 15 see McIntyre & Rodgers *supra* note 9 and Faraday, Denike & Stephenson, *supra* note 9.

<sup>178</sup> See generally Bruce Porter, “Twenty Years of Equality Rights: Reclaiming Expectation,” (2005) *Windsor Year Book of Access to Justice* 145.

<sup>179</sup> See generally McIntyre & Rogers, *supra* note 9 and Faraday, Denike & Stephenson, *supra* note 9.

In recent years, the above questions have received considerable attention and have been rigorously explored.<sup>180</sup> Yet there is an important and pressing question that has, relatively speaking, escaped the critical gaze of equality scholars. Why is it that in the criminal justice system - a domain in which inequalities are rife, complex and intersecting, in which state power is at its most pronounced and in which denial of human liberty is at stake - section 15 arguments are rarely advanced, quickly dismissed and consistently marginalized? In the present climate, in which individuals suspected of terrorism face the possibility of having their equality rights violated on multiple levels by acts of racial profiling, and risk finding themselves subject to discriminatory laws that justify exceptional and extreme restrictions on liberty, this question is particularly important. The purpose of this chapter is to offer an answer to this question and gauge whether, or to what extent, the conceptual tensions in the relationship between equality and criminal justice explain the racial profiling/section 15 paradox.<sup>181</sup> Can we conclude that section 15 is structurally or conceptually ill-equipped to deal with criminal justice issues, and therefore racial profiling? Is it that equality logic is flawed, or that it is just at odds with the special and unique nature of criminal justice (and its values)? Is there something extraordinary about racial profiling post-9/11 that intensifies the conflict between equality and criminal justice in this particular context?

At first glance, and at the most basic level, there appears to be two principal tensions between the logics of equality and the nature of criminal justice that may explain the absence of

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<sup>180</sup> See generally, *ibid*.

<sup>181</sup> As I note in chapter one, my focus in this thesis is on racial profiling post-9/11 in the law enforcement, and thus criminal justice, context. Although I also discuss racial profiling at borders and with respect to immigration, I believe the tension between equality and criminal justice is still relevant and influential in considering whether these two latter forms of racial profiling are offered any protection or remedies by section 15. This is because law enforcement and security officials in the prevention of terrorism fulfill very similar duties and both fulfill these duties under the ambit and authority of the *Anti-Terrorism Act*. In the context of the 'war on terror', immigration in Canada has become increasingly securitized and security officials at border crossings have, in many ways, assumed the roles of law enforcement official insofar as they are trying to prevent crime, or more specifically, terrorism, and have powers to arrest and detain those under suspicion. In the counter-terrorism context, security and public safety are the dominant logics underlying both immigration law and the criminal justice system.

section 15 arguments in the criminal justice sphere. First, insofar as substantive equality requires an examination of the broader social context in which a discriminatory act occurs, it appears to be in direct conflict with the criminal law, which typically determines guilt by narrowing its focus on a particular individual who commits a particular crime at a particular time.<sup>182</sup> Secondly, if one understands equality rights as being ameliorative and tied to notions of belonging,<sup>183</sup> autonomy and dignity, the question arises as to how these notions can ever be integrated or realized in a system whose central purpose is to punish, denounce or maintain security and public order. In analyzing the logics of equality and the nature of criminal justice in the light of Canadian jurisprudence and legal theory, this chapter will consider whether these conclusions are accurate and unravel some of the conceptual reasons why equality and criminal justice are so often at odds.

To be clear, I am not contending that equality's role in the criminal law has never been examined, but rather that the relationship between criminal justice discourses and equality discourses has not been adequately explored in light of their conflicting logics and conceptual tensions. Indeed, there was a spell during the 1990s when section 15's interaction with the criminal law was thoroughly explored and hotly debated.<sup>184</sup> In part one of this chapter, I will analyze the insights advanced during this time period with respect to the provision's potential influence in the criminal justice sphere, and the practical explanations that were offered for its absence. I will demonstrate that these insights and explanations only tell part of the story of the relationship between equality and criminal justice.

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<sup>182</sup> Rosemary Cairns-Way, "Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible?" (2005) 4 *Journal of Law & Equality* 203 at 239.

<sup>183</sup> See Donna Greschner, "The Purpose of Canadian Equality Rights," (2002) 6 *Review of Constitutional Studies* 291 at 302. In Greschner's opinion, the core purpose of Canadian equality rights is the promotion of belonging in three distinct types of communities: the universal community of human beings, the Canadian political communities, and the individual identity communities. Put differently, the primary harm that section 15 seeks to redress is that which stems from the exclusion of individuals in these communities.

<sup>184</sup> It is important to note, however, that the debate at this time was noticeably narrow and one-dimensional. See discussion below.

In part two, I will examine the values, aims and objectives embedded in a constitutional guarantee of equality and distinguish between the ‘ideal’ and ‘actual’ logics of section 15. Here, I will speculate on a theoretical level as to what the ‘actual’ logics may reveal about how a racial profiling claim on equality grounds would be dealt with. In the final part of this chapter, I will turn to the nature of the criminal justice system and explore its strained relationship with equality from a more practical standpoint, by highlighting the diverse and conflicting values at issue when Canadian courts sentence Aboriginal offenders. By examining how this contentious issue has been debated, this section will serve as a test case to illuminate whether the logics of equality and the nature of criminal justice need always be regarded as “inherently antithetical.”<sup>185</sup>

## PART I: TWENTY-FIVE YEARS OF SECTION 15 AND THE CRIMINAL JUSTICE SYSTEM

### *a) The invisibility of section 15 arguments in the criminal justice context.*

In 1994, Christine Boyle was one of the first to point out that “equality is not in the forefront of our thinking about the overall burdens and benefits of criminal prohibitions.”<sup>186</sup> Several years later, the claim by an Ontario judge that in seven years and 21,000 cases she had never had an equality argument argued before her by counsel, lent staunch support to Boyle’s conclusion that equality was a “second class right”<sup>187</sup> in the criminal law.<sup>188</sup> Recently, Cairns-Way revisited the issues raised by Boyle with the aim of determining whether “the criminal law

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<sup>185</sup> Cairns-Way, *supra* note 182 at 205.

<sup>186</sup> Christine Boyle, “The Role of Equality in the Criminal Law,” (1994) 58 *Saskatchewan Law Review* 203 at 207.

<sup>187</sup> *Ibid.* at 207.

<sup>188</sup> The Honourable Judge Donna Hackett, “Finding and Following “The Road Less Travelled”: Judicial Neutrality and the Protection and Enforcement of Equality Rights in Criminal Trial Courts,” (1998) 10 *Canadian Journal of Women and the Law* 129. Judge Donna Hackett’s claims appear even more striking when one considers the fact that her judicial experience is in an area with a particularly diverse population. Indeed, Judge Hackett acknowledges the possibility that counsel or accused were more likely to raise equality rights issues in Ontario than in areas with fewer minorities. Judge Hackett also writes that when asked, her colleagues confirmed that they shared her experience.

remained stubbornly impervious to the implications of a contextualized equality standard<sup>189</sup> or whether the courts were “in the midst of a legal paradigm shift triggered by the gradual and systemic incorporation of equality into criminal doctrine.”<sup>190</sup> Drawing on various criminal decisions between 1995 and 2005, in which equality had either been ‘overlooked,’ ‘acknowledged’ or ‘counted,’ Cairns-Way concluded that although some judges and counsel were more willing to consider the relevance and potential influence of section 15 in criminal cases, equality remained a “underutilized and undervalued” principle as far as the criminal law is concerned.<sup>191</sup> Of course, the lack of an explicit mention of ‘section 15’ or ‘equality’ is not necessarily determinative of a court’s lack of awareness or appreciation of equality issues. As I will show, however, it is clear that this absence is the symptom of a deeper uneasiness and of a perception that equality discourse does not belong in the criminal court room.

Although it is abundantly clear that section 15 has played a very minor role in the development of criminal jurisprudence since the provision came into effect, it is equally obvious that section 15’s potential influence on criminal cases is wide-ranging and diverse. Equality concerns permeate every aspect of the criminal justice system including policing, the admission of evidence, jury selection, the treatment of witnesses with special needs, and the application of offences and the interpretation of defences. And, as Christine Boyle describes, section 15 can be used to strike down or to provide support to provisions of the *Criminal Code* or give meaning to certain criminal law concepts.<sup>192</sup> In my opinion, it is this enormous potential impact that makes the marginalization of equality values in the criminal justice system so remarkable and all the more difficult to comprehend. Before turning to consider the practical explanations that were offered for

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<sup>189</sup> Cairns-Way, *supra* note 182 at 205.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.* at 238.

<sup>192</sup> Boyle, *supra* note 186.

section 15's absence in the criminal justice sphere during the 1990s, a word is necessary on the limits to the work of Boyle and others writing about equality's role in criminal cases.

b) *The limits and problems in the academic analysis of section 15's role in the criminal justice system.*

Despite the vast potential influence of section 15 in the criminal law, academic writing in this area has been strikingly narrow and one-dimensional. In the 1990s, the invisibility of section 15 was predominantly explored through a complainant-focused feminist lens<sup>193</sup> and questions relating to the intersection of section 15 with other systemic inequalities - such as those stemming from race or religious affiliation - and the criminal law, were largely obscured by those relating to gender equality.<sup>194</sup> Even then, the experiences of all women were not given equal weight in this body of scholarship,<sup>195</sup> nor did the scholarship pay adequate attention to the complex and intersecting dimensions of gender equality.<sup>196</sup>

On the contrary, at this time feminist analysis concerning the role of equality in the criminal law overwhelmingly focused on the equality rights of the complainant or victim in criminal proceedings and came at the cost of excluding the experience and suffering of other

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<sup>193</sup> The feminist interest in the role of equality in the criminal law was triggered by the watershed decision in *R. v Seaboyer*, (1991) 2 S.C.R. 577 [hereinafter *Seaboyer*], and its aftermath. Ten years after the equally controversial *R. v Pappajohn* decision (1980) 2 S.C.R. 120, *Seaboyer* struck down the rape shield law in the *Criminal Code* and sparked outrage in the feminist community. For a general discussion of the implications of this landmark case, see Elizabeth J. Shilton and Anne S. Derrick, "Sex Equality and Sexual Assault in the Aftermath of *Seaboyer*," (1991) *Windsor Year Book of Access to Justice* 107.

<sup>194</sup> Please note that I am only referring to the absence of analysis of race, religion, section 15 and the criminal law in the literature primarily concerned with the invisibility of section 15 in the criminal law, and not to academic writing more broadly.

<sup>195</sup> See generally Marlee Kline, "Race, Racism and Feminist Legal Theory," (1989) 12 *Harvard Women's Law Journal* 115, for a detailed exploration of the inadequacies of, and gaps in, feminist analysis around this time.

<sup>196</sup> For a thorough and groundbreaking exploration of the notion of intersectionality with respect to gender and race, see Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour," (1991) 43:6 *Stanford Law Review* 1241.

vulnerable women at various stages in the criminal justice process.<sup>197</sup> In particular, the dilemmas faced by racialized female offenders were merely glossed over in feminist analyses of equality's role in the criminal justice system, despite the fact that equality rights concerns are particularly salient, acute and complex for many of these individuals.<sup>198</sup> It is interesting to note here that in the few places in which broader questions of racial and religious equality did attain some visibility, the principal focus was on how or where equality arguments could be advanced to help the minority complainant.<sup>199</sup> Attention to the equality rights of minority *accused* persons was cursory and peripheral.<sup>200</sup> In the context of my broader question, which is essentially concerned with the difficulties of effectively recognizing and responding to the equality rights of accused persons, this gap in equality scholarship is of central importance.

Interestingly, the heavy focus on the equality rights of the complainant is directly linked to the lack of attention given to the equality rights of accused persons, because feminists attempting

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<sup>197</sup> Kline, *supra* note 195 at 125-126. Referring specifically to feminist work concerning criminal justice issues, Kline argued that the work of Boyle and others often spoke “of the experience of women as though the reality of race and racism did not exist.” Further, she criticized the tendency of many feminist authors to only briefly and half-heartedly attend to questions of racial identity and race discrimination, and for failing to theorize about the interaction between race and gender in the criminal law context. In Kline’s view, “the absence of any serious attempt to integrate the distinct experiences of First Nations women into analysis is troubling because of the particular vulnerability of First Nations women within the criminal justice system in Canada.”

<sup>198</sup> See generally *ibid.* For an interesting and recent discussion of the experiences of racialized female offenders in Canada see Sonia Lawrence & Toni Williams, “Swallowed Up: Drug Couriers at the Borders of Canadian Sentencing,” (2002) 56 *University of Toronto Law Journal* 285.

<sup>199</sup> An example of this is Boyle’s discussion of *R. v Keegstra*, a case that involved the constitutionality of section 319 of the *Criminal Code*, prohibiting hate speech. See Boyle, *supra* note 186 at 207. In this case, a section 15 consideration of religious equality could have substantially altered the Supreme Court’s reasoning. It is plausible to argue that equality should not only have been mentioned at the section 1 stage of analysis, (see Benjamin Berger, “Moral Judgment, Criminal Law and the Constitutional Protection of Religion,” (2004) 40 *Supreme Court Law Review* 513 at 523) but that section 15 arguments should have been made central and considered directly alongside those made by the accused that the above provision violated his freedom of expression as guaranteed by section 2 (b) of the *Charter*.

<sup>200</sup> One exception to this statement is the idea that section 15 can be used to influence the construction of objective “reasonableness” tests throughout the criminal law. In this respect, Boyle and others have highlighted the way in which the “ordinary person” test in the defence of provocation - which has long been criticized on the basis that it reflects male (or likely only Western male) norms of behaviour - provides the perfect starting point for exploring the ways in which section 15 can be used to inform notions of normativity and ordinariness. In this context, it has been argued that section 15 could be used in a way that ensures that an accused’s religious, cultural or ethnic background be regarded as relevant in the determination of what is “ordinary” enraging. See generally Boyle, *supra* note 186 at 212-213.

to make room for countervailing complainant's interests in the criminal justice arena often seized upon arguments holding that the rights of accused persons are taken too seriously or given too much weight in criminal process.<sup>201</sup> Put another way, diverting the focus away from the equality (or indeed other) rights of accused persons was (and still is) a tactic used by feminists to draw attention to (and highlight the importance of) the equality rights of victims. The problem here is that the logic underlying this approach relies on an oversimplified and gendered account of victim/complainant (female) and victimizer/offender (male). As Toni Williams points out, this binary between 'the good' and 'the bad,' the 'dangerous' and their 'innocent' victims, breaks down "when individuals at once embody victimized and victimizer, as do many female lawbreakers."<sup>202</sup> Because a disproportionate number of these 'female lawbreakers' are racialized women who do not comfortably fit into the stereotypical 'victim' mould, the existence and operation of this binary indirectly obscures and delegitimizes their experiences and dilemmas.<sup>203</sup>

My key point here is that the feminist push for the marginalization of accused's rights to make room for those of the victim in the criminal justice context, simultaneously involves the marginalization of the equality rights of some of the most vulnerable and oppressed people in Canadian society. This point embodies Marlee Kline's argument that many feminists writing in this area during the 1980s and 1990s had a tendency to simplify women's sites of oppression and thus overlook or ignore the specific troubles and obstacles faced by racialized women.<sup>204</sup> Furthermore, it exemplifies that feminist scholarship at this time failed to adequately grapple with the idea that forms of inequality are intersecting, cross-cutting, and inextricably intertwined with

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<sup>201</sup> I am grateful for the comments of Professor Hester Lessard in helping me to arrive at this argument.

<sup>202</sup> Toni Williams, "Intersectionality analysis in the sentencing of Aboriginal women in Canada: What difference does it make?" Chapter 3 in Grabham, Cooper, Krishnadas & Herman, eds., *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish: New York, 2009) at 81.

<sup>203</sup> *Ibid.*

<sup>204</sup> See generally Kline, *supra* note 195.

vicious cycles of poverty, domestic violence and substance abuse. In sum, this scenario highlights one way in which the language of equality (or equality values) has failed to secure substantive equality outcomes in the criminal justice system.

Although many of the above criticisms and insights relate specifically to feminist scholarship, they illuminate issues that are relevant to my broader project. The trend in 1990s feminist scholarship to overlook the dilemmas of certain female offenders, for example, reflects a more far-reaching, deeper and ever-present societal tendency to simplify or ignore the experiences of vulnerable minorities, whether male or female, who are caught up in cycles of criminal activity. This tendency has been long recognized by critical race theorists, who often point to the criminal justice system as a realm of law in which racism is particularly rampant and damaging and in which equality rights are consistently flouted.<sup>205</sup> In Canada, the claims of critical race theorists were lent validation the Commission on Systemic Racism in the Ontario Criminal Justice System which, *inter alia*, concluded that “the practices of the criminal justice system tolerate racialization.”<sup>206</sup> A plethora of critical race literature lends support to my point that the side-lining of the equality rights (and indeed other constitutional rights) of accused and/or racialized persons is not unique to feminism in the 1990s time frame.

Critiques of feminist work dealing with the role of equality in the criminal justice sphere (such as those made powerfully by Kline) are also useful insofar as they highlight the ways in which legal scholars and the courts struggle to deal with inequalities in their most complex forms. From these critiques, we can more clearly envisage the types of problems the legal system would

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<sup>205</sup> See for example Carol A. Ayward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999) and refer to Jewel Amoah, *Critical Race Theory Bibliography* (Ottawa: Canadian Bar Association, 1999) for a summary of key Canadian work on critical race theory. See also Smith, *supra* note 44 and Tator & Henry, *supra* note 23.

<sup>206</sup> *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra* note 89.

encounter when faced with victims of racial profiling post-9/11 who, as was demonstrated in chapter one, are likely to have their equality rights violated in complex ways on multiple and intersecting levels. It is also interesting to note here that an act of racial profiling is the perfect example of a circumstance in which a racialized individual can simultaneously assume the role of both victim and criminal. This is significant because, as described above, certain critics of feminist scholarship have shown how this dynamic operates to obscure the experiences and dilemmas of specific individuals caught up in the criminal justice system, and thus potentially affects how effectively certain equality rights are dealt with and resolved in this sphere. If it is true that the criminal justice system is more capable of dealing effectively with equality rights of people who fit comfortably into the stereotypical victim or accused mould, but not those who fit into both, then this suggests that victims of racial profiling are almost always going to have problems having their section 15 rights properly recognized by the Canadian courts.

I argue here that a direct consequence of the near exclusive focus on the equality rights of the victim in feminist critique has meant that a large part of the story of the relationship between section 15 and the criminal justice system has been left untold. Indeed, the fact that interest with respect to equality's role in the criminal law has faded as feminist interest has become less intense than in the aftermath of *Seaboyer*, seems to confirm the impact and influence of feminist scholarship on the nature and terms of the debate in this area. It is therefore likely that an examination of equality's role in the criminal justice system from a different angle, or alternative academic perspective, would bring to light very different issues and yield very different explanations for section 15's absence in the criminal justice sphere. This would be valuable and worthwhile because, as I aim to demonstrate in the next section of this paper, many of the explanations previously advanced for the criminal justice system's apparent ambivalence towards

equality rights issues are dated, unsatisfactory, and stop short of exploring the incompatibility of equality discourse and criminal discourse on a theoretical or conceptual level.<sup>207</sup> Nevertheless, I believe these practical explanations are still worthy of consideration as it is likely that the practical and theoretical reasons are inextricably linked, or at least that they are both influential to some degree.

*c) The insufficiency of practical explanations previously advanced for section 15's absence in the criminal justice system*

As the majority of scholars writing in this area have pointed out, the idea that equality arguments are not “conventional or even acceptable”<sup>208</sup> in the criminal justice system is pervasive and not unique to Canada. In the United States, where it has been suggested that reform of the criminal justice system was in fact “related, if not integral, to the Second Reconstruction,”<sup>209</sup> and where criminal procedure reform and improved conditions in prison were realized through resort to equality arguments that emphasized “broad and idealistic concepts of dignity, civilized standards, humanity, and decency,”<sup>210</sup> resistance to equality arguments in the criminal justice system stemmed from the fact that they were largely employed to advance the rights of the criminally accused. These reforms were vigorously opposed by the general public. Viewing public dissatisfaction and anger as a political opportunity, in 1968 the Republican Party began to campaign heavily against the continued expansion of rights to criminal suspects and convicts.<sup>211</sup>

Although Canada does not share the same history as the United States, today, in both the

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<sup>207</sup> Please note that I am not necessarily convinced by these practical explanations, and many of them are not my own. The primary reason for examining these explanations is to demonstrate that they are insufficient: this insufficiency provides me with a solid platform from which to explore deeper, and more interesting, conceptual tensions. See discussion of how these practical are dated and unsatisfactory below.

<sup>208</sup> John McInnes & Christine Boyle, “Judging Sexual Assault Law Against A Standard of Equality,” (1995) 29 *University of British Columbia Law Review* 341 at 344.

<sup>209</sup> Donald Braman, “Criminal Law and the Pursuit of Equality,” (2006) 84:7 *Texas Law Review* 2097 at 2106.

<sup>210</sup> *Ibid.* at 2108 citing *Hutto*, 437 U.S. at 685 (citations omitted).

<sup>211</sup> *Ibid.* at 2110.

United States and Canada, the expansion of rights to those convicted or accused of a criminal offence remains controversial and politically risky. Legal counsel do not formulate their arguments in a vacuum and it has been suggested that they may be influenced by the pressure to avoid appearing ‘pro-criminal’ and excessively ‘rights-promoting.’ In discussing the challenges for racial profiling litigation, David Tanovich also suggests that many defence lawyers are particularly reluctant to raise issues of race. In his view, “this reluctance likely stems from a concern about judicial hostility...a lack of comfort in talking about race, or a lack of cultural competence.”<sup>212</sup> In a climate of fear, in which legal arguments are being advanced in defence of those suspected of terrorism, it could be argued that this pressure or ‘lack of comfort’ is especially acute. Indeed, it is difficult to envision a circumstance in which the media, political and public interest would be higher than when issues about terrorism - and thus the protection of citizens from heinous acts of mass murder - are allegedly at stake.<sup>213</sup>

Here, it is also important to remember how the processes of racialization and ‘Othering,’ currently applied to those who conform to the stereotypical image of the terrorist, can lead to the view that some individuals or communities are not even worthy of the protection of *any* rights. In the post-9/11 context, it could therefore be argued that counsel are not reluctant to make equality arguments because they don’t want to appear overly ‘rights-promoting’ or ‘pro-criminal,’ but because they are influenced by stereotyping and the perception that suspected terrorists are not worthy of the protection of the law. More generally speaking, it may also be that there is a presumption shared by certain criminal justice actors that the accused is already protected

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<sup>212</sup> In discussing the challenges for racial profiling litigation, David Tanovich also suggests that many defence lawyers are particularly reluctant to raise issues of race. In his view, “this reluctance likely stems from a concern about judicial hostility...a lack of comfort in talking about race, or a lack of cultural competence.” See Tanovich, *The Colour of Justice*, *supra* note 10 at 137.

<sup>213</sup> Please note, however, that I am very dubious as to how many, or to what extent, defence counsel would be influenced in this way.

by the rights of due process, and that to the injection of substantive equality arguments would upset the balance between the state and the offender's rights and interests.<sup>214</sup> The perception that accused persons do not require any more rights and the concern that granting more rights would create an imbalance, seems to partially explain why equality arguments are marginalized in the criminal justice system, at least where the rights of the accused are at issue.

Aside from a possible reluctance on the part of counsel to appear “pro-criminal” (that may be even stronger in the present climate), there are other practical explanations that may account for section 15's invisibility in the criminal justice system. Perhaps the most straightforward of these explanations is that section 15 is a relatively new, and therefore unfamiliar, provision. As Judge Donna Hackett points out, many practicing counsel received their legal education in pre-*Charter* days<sup>215</sup> and are therefore less likely to automatically consider or take heed of *Charter* issues. A related idea is that the criminal justice system and the practice of law have not had time to adjust to new norms and principles embedded in the *Charter*. Not only that, but it may be that the legal system is stubbornly committed to “assumptions about the continued correctness of past rules and procedures,”<sup>216</sup> a fact which can be “blinding to current equality issues and the importance of being impartial as between the familiar past and the need for change.”<sup>217</sup>

On another note, some have argued that the fact that equality issues are typically advanced

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<sup>214</sup> I use the word ‘may’ because I am skeptical as to the extent of this presumption's influence on the marginalization of section 15 arguments. It seems to be that it would more likely be a view felt or voiced by judges and Crown prosecutors than by defence counsel. I am not wholly convinced that defence counsel would be apprehensive to make arguments because they fear they may upset this balance. Instead, I have the sense that they may be discouraged by the complexity of section 15 and the confusion surrounding its interpretation in the courts and hence may chose to advance a less perplexing *Charter* provisions (such as section 7 which protects an individual's right to life, liberty and security of person, for example.) However, I maintain that there is a common feeling amongst criminal justice actors that equality rights arguments do not belong in the court room and suggest that the presumption that accused persons already have “enough rights” may underlie and perpetuate this feeling. I am indebted to conversations with my LL.M. law supervisor Benjamin Berger for helping me articulate this point.

<sup>215</sup> Hackett, *supra* note 188 at 132.

<sup>216</sup> *Ibid.* at 131.

<sup>217</sup> *Ibid.* at 131-132.

by intervenor groups rather than counsel, perpetuates the belief that equality arguments are “esoteric wool-gathering”<sup>218</sup> and ensures that they remain firmly on the sidelines. This set of circumstances may give rise to an unfortunate ‘Catch 22’:<sup>219</sup> without precedent counsel are unwilling to make what they consider to be unorthodox and abstract equality arguments that may jeopardize the outcome of the case or may be quickly dismissed by others in the court room. Ultimately, counsel are more inclined to advance arguments that are familiar and that will not set them apart as a “hysterical crusader”.<sup>220</sup> This set of circumstances is compounded by the fact that some members of the judiciary are reluctant to actively draw attention to equality arguments, fearing perhaps that their judicial neutrality may be compromised. The case of *R. v. R.D.S.* is a stark example of the challenges judges may face when they choose to take “the road less travelled” and highlight equality rights issues in the criminal court room.<sup>221</sup>

Although these explanations may go part of the way to explaining a lack of *awareness* of equality rights issues in the criminal justice context, in my view, they do not fully account for the underlying attitude that equality is not relevant, or does not *belong* in the criminal justice system. For example, they do not explain why there has been a relatively quick and universal acceptance of other *Charter* provisions. Why is it that as time has passed sections 9, 10 and 11 of the *Charter* have, relatively speaking, become routine and customary in criminal court rooms but section 15

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<sup>218</sup> McInnes & Boyle, *supra* note 208 at 345.

<sup>219</sup> Cairns-Way, *supra* note 182 at 239.

<sup>220</sup> McInnes & Boyle, *supra* note 208 at 344.

<sup>221</sup> *R. v. R.D.S.* (1997) 3 S.C.R. 484, 1997 SCC 86 [hereinafter *R.D.S.*]. As Judge Hackett observes, however, being constantly mindful of section 15 is legally mandated and can actually enhance independence and impartiality. She states:

If our laws and society were unchanging, judicial impartiality would be a simple matter. Judges could simply sit back and let counsel “go to it.” In reality, however, our laws and society are ever-changing. If judicial impartiality means that judges should ignore equality issues unless counsel raise them, then “judicial impartiality” will be a barrier to the protection and enforcement of *Charter* equality rights. True judicial impartiality requires judges to take the road less travelled and step away from our legal past and assumptions about its continued correctness in order to integrate equality into the interpretation and application of our laws, when appropriate. See Judge Hackett, *supra* note 188 at 140.

has not? Moreover, if counsel were truly fearful of appearing overly rights promoting and members of the judiciary were genuinely afraid of displaying bias, wouldn't these sentiments also be triggered by other *Charter* provisions that protect the accused's rights to due process, and not just by section 15? Looking at these questions and struggling to answer them, one is left with the impression that Canada's equality provision must occupy a unique position at the intersection between *Charter* and criminal justice issues. The inadequacy of practical explanations as to why the criminal justice system is unable to evolve and gradually recognize equality arguments as significant thus reinforces my argument that there is a deeper and more complex tension between the logics of section 15 and the nature of criminal justice.

How, then, do we describe the 'logics' of section 15? How do we define the 'nature' of the criminal justice system? These are not easy questions to answer as there is not full agreement among academics, philosophers, judges and lawyers as to what values, aims and purposes are core to equality and criminal justice, respectively. Nevertheless, jurisprudence and scholarly writing demonstrates that in Canada, equality and criminal justice are understood and articulated in distinct ways, and that the courts have delivered decisions based on certain fundamental assumptions about the logics of section 15 and the nature of the criminal justice system.

## PART II: THE LOGICS OF SECTION 15.

### a) *The 'ideal' logics of section 15.*

In *Vriend v. Alberta*,<sup>222</sup> Justices Cory and Iacobucci asserted that section 15 rights "reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society..."<sup>223</sup> This statement is consistent with the commonly-held belief that constitutionally protected equality rights

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<sup>222</sup> (1998) 1. S.C.R. 493 [hereinafter *Vriend*]

<sup>223</sup> Faraday, Denike & Stephenson, *supra* note 9 at 10, quoting Justices Cory and Iacobucci in *Vriend*.

are distinguishable from other constitutional rights in that they are particularly germane to the pursuit of social justice. The breadth of section 15's potential is not only clear from the language of provision itself<sup>224</sup> - "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination" - but from the Supreme Court's interpretation of section 15 in *Andrews*.<sup>225</sup> The fact that *Andrews* was received warmly by equality advocates<sup>226</sup> and represents a rare moment of consensus in the Court's approach to section 15, makes it a helpful starting point from which to explore the logics of section 15.

In addition to embracing substantive equality with open arms and emphasizing the pitfalls of a formal equality analysis that treats likes alike,<sup>227</sup> the Court in *Andrews* underlined that section 15 was a remedial, effects-based provision<sup>228</sup> that applied to both direct and indirect discrimination.<sup>229</sup> The affirmation that discriminatory intent is unnecessary for a claim to succeed under section 15 is especially important in the 'war on terror' context, as although the *Anti-Terrorism Act* may ostensibly apply to all Canadians, in *effect* it will disproportionately target and discriminate against Canadian Muslims and Arabs. Further, the Court's declaration that section 15's purpose is not only to protect against discriminatory laws but also to promote equality in Canadian society is highly significant as it strengthened hopes that section 15 would be used to transform government policy-making and remedy systemic disadvantage, potentially including that which underlies racial profiling. At this point in time, the Court's reasoning and approach was consistent with the following statement:

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<sup>224</sup> *Ibid.* at 12.

<sup>225</sup> *Andrews*, *supra* note 6.

<sup>226</sup> Faraday, Denike & Stephenson, *supra* note 9 at 12.

<sup>227</sup> *Andrews*, *supra* note 6 at para. 164.

<sup>228</sup> *Ibid.* at para. 165.

<sup>229</sup> *Ibid.* at para. 175. Here, Justice McIntyre defines discrimination as, "a distinction whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others."

[T]he right to equality...calls into scrutiny the quality of the relationships we forge with others in society. It questions the justice of the distribution of rights, privileges, burdens, power and material resources in society and the basis for that distribution. It requires us to articulate and critically examine previously unspoken assumptions and norms and how these norms are embedded in the laws that structure our relationships. Most significantly, it requires us to transform those legal structures to secure substantive equality.<sup>230</sup>

Together with the principles articulated in *Andrews*, the idea captured here - that a constitutionally protected equality right is about both recognition and redistribution - embodies what I call the ‘ideal’ logics of section 15.

In recent years, the Supreme Court has reiterated its commitment to the *Andrews* principles on several occasions. Whereas in *Law v. Canada (Minister of Employment and Immigration)*,<sup>231</sup> the Court endorsed but built upon McIntyre J’s description of the key elements to a discrimination claim<sup>232</sup> and famously declared that “[t]he purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice”,<sup>233</sup> in *R. v. Kapp*<sup>234</sup> the Supreme Court stated that the substantive equality template has been “enriched but never abandoned” in its subsequent decisions.<sup>235</sup> Such statements are also important to defining the ‘ideal’ logics of section 15 and, taken alone or superficially detached from context and critique, suggest that the Supreme Court has not strayed too far from the ideas, values and aspirations the Court attached to section 15 in earlier jurisprudence.

Unfortunately, there is an enormous gap between what the Supreme Court says in theory and what the Supreme Court does in practice with respect to section 15. There is considerable discrepancy between the promise equality seekers originally attached to section 15 in the

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<sup>230</sup> Faraday, Denike & Stephenson, *supra* note 9 at 9.

<sup>231</sup> (1999) 1 S.C.R. 497 [hereinafter *Law*].

<sup>232</sup> *Ibid.* at paras. 3 - 6.

<sup>233</sup> *Ibid.* at para. 52.

<sup>234</sup> (2008) S.C.C. 41 [hereinafter *Kapp*].

<sup>235</sup> *Ibid.* at para. 14.

immediate aftermath of its enactment and the *Andrews* decision, the recent encouraging statements in *Law* and *Kapp*, and how the provision has *actually* changed Canadian society and legal culture. Section 15 has not truly put under scrutiny the relationships we forge with others in society. Nor has it led to the transformation of legal structures to secure substantive equality, or forced us to question the distribution of rights, privileges, burdens, power and material resources in society.

Nevertheless, it would be inaccurate to argue that the introduction of section 15 has been completely futile; far from it. Certain *types* of claims (or claims made by specific groups) under section 15 have not only been successful, but have been huge symbolic victories for certain marginalized groups in Canadian society.<sup>236</sup> Examining the ‘actual’ logics of section 15 will elucidate exactly what characteristics and factors swing equality claims in the direction of either success or failure, and better position me to comment upon whether a racial profiling claim would likely fit into the successful section 15 mould.

b) *The ‘actual’ logics of section 15.*

**(i) The discrepancy between claims to recognition and redistribution.**

As Judy Fudge explains, rights claims that embody a demand for social recognition and respect for different identities, have fared relatively well under section 15, and the *Charter* as a whole.<sup>237</sup> As evidence for this, Fudge describes the way in which the Supreme Court of Canada has responded to claims by lesbian and gay men for equal recognition and dignity.<sup>238</sup> In *M. v. H.*,<sup>239</sup> for example, the court drew on the widespread social prejudice against same sex couples to

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<sup>236</sup> See generally Judy Fudge, “The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts,” in Tom Campbell, Keith Ewing, Adam & Tomkins, *Sceptical Essays on Human Rights* (Oxford: 2001) at 335-358.

<sup>237</sup> *Ibid.* at 341.

<sup>238</sup> *Ibid.* at 341 – 343.

<sup>239</sup> (1999) 2 S.C.R. 3.

conclude that the exclusion of same sex couples from the spousal support provisions of the *Ontario Family Law Act* promoted the view that same sex relationships were “less worthy of recognition and protection.”<sup>240</sup> In this way, the court condemned the legislation’s potential to reinforce social and historical stereotypes. Broadly speaking, *M. v. H.* reflects the Supreme Court’s commitment to the denunciation of stereotyping, and acknowledgement of the recognition harms that stem from this practice.

As Fudge also makes very clear, however, judicial affirmation that different identities should be recognized, respected and valued, is not sufficient and will not redress all forms of injustice and social subordination.<sup>241</sup> One of the ‘ideal’ logics of section 15 is that it should be capable of responding to, and dealing effectively with, recognition *and* redistribution claims, and further, that it should be able to do so in a transformative fashion that transcends pervasive social norms. Unfortunately, the ‘actual’ logic of section 15 in this respect is that “the closer a rights claim is pitched to the recognition pole of the injustice spectrum, the more likely that the Supreme Court of Canada will uphold it.”<sup>242</sup> The Supreme Court has been considerably more reluctant to deliver progressive judgments when equality rights claims are either redistributive in nature, involve expenditure of public funds, or as is more important here, when claims threaten social or legal norms in a significant way.<sup>243</sup> It is important to emphasize, however, that the flaw here is not just the failure of the Court to deal effectively with redistribution claims; there are also very real limits to the *types* of recognition claims that the Court is receptive to. As I show in chapter three, for example, claims for recognition on religious or racial grounds have barely been visible, let

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<sup>240</sup> *Ibid.* at para.73.

<sup>241</sup> Fudge, *supra* note 236 at 350.

<sup>242</sup> *Ibid.* at 341.

<sup>243</sup> *Ibid.* at 342. Fudge refers to *Egan v. Canada* (1995) 2 S.C.R. 513 in which the Supreme Court upheld the exclusion of same-sex couples from access to social benefits in the form of old age pensions under section 1 of the *Charter*, to make this point. This case not only involved the expenditure of public funds but challenged traditional and heterosexual conceptions of marriage.

alone upheld, under section 15.

The pattern that has developed whereby equality rights claims are less likely to be successful if they have a redistributive or transformative dimension is deeply troubling because, as Nancy Fraser strongly emphasizes, recognition and redistribution are not mutually exclusive forms of injustice but are intimately connected and intertwined.<sup>244</sup> In this way, the Supreme Court's inability to respond effectively to redistribution claims can potentially create new (or exacerbate existing) recognition harms and the social inequality that inevitably stems from these harms. Moreover, in being more receptive to certain types of recognition claims that do not threaten dominant social norms or structures, or challenge patterns of social subordination, the Court's focus has become increasingly individualistic and narrow.<sup>245</sup> What do these facts and Fudge's observations tell us about how a racial profiling claim post-9/11 would be dealt with by the Supreme Court in Canada? How exactly can a racial profiling claim be categorized?

At first sight, a racial profiling claim seems to be more closely pitched to "the recognition pole of the injustice spectrum," and thus exemplifies the type of claim the Supreme Court is more likely to uphold. Indeed, an act of racial profiling is the optimal example of an act of stereotyping that perpetuates the view that certain identities are less valued and less deserving of respect and protection. Further, like same sex couples denied the equal recognition of their relationships, when victims of racial profiling describe their experience and how it made them feel, they almost always do so in terms of subordination, loss of dignity and self-worth.<sup>246</sup> In spite of this, there are several

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<sup>244</sup> Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a "Post Socialist" Age," (1995) 212 *New Left Review* 68 at 72 and Nancy Fraser, "Reframing Justice in a Globalizing World," (2005) 36 *New Left Review* 69.

<sup>245</sup> This individualistic focus has implications for how we understand the strained relationship between equality and criminal justice. Please see discussion below.

<sup>246</sup> For a thorough examination of the damage to individual and group identity that can stem from racial profiling, see generally Gova & Kurd, *The Impact of Racial Profiling*, *supra* note 27 at 30. Here, one respondent in Gova and Kurd's study stated:

factors that suggest the Court would not be comfortable dealing with a section 15 racial profiling claim. First, as will become increasingly clear in the next chapter, claims for recognition under section 15 on the grounds of race or religion (the two grounds that would be potentially engaged in a post-9/11 section 15 profiling case) have been dealt with relatively unsatisfactorily under section 15. Second, a racial profiling claim post-9/11 would almost certainly be viewed as challenging “dominant social norms or structures” or patterns of social subordination. Given the Supreme Court’s unresponsiveness to recognition claims that are transformative in nature or that threaten state power or privilege, it is questionable whether the Supreme Court would uphold an equality rights claim that it perceived (whether reasonably or not) as pushing against the norm of national and public security, or that called into question the structure and functioning of law enforcement in Canada.

In the aftermath of September 11th, at a time when the norm of national security has particular strength and dominance, the court may be even more reluctant to deliver a progressive judgment. If one understands racial profiling in the post-9/11 context as being state-sanctioned by the *Anti-Terrorism Act*, then recognition by the Supreme Court that an individual’s equality rights have been violated by an act of racial profiling would effectively signal to government that their legislation, purportedly adopted to protect Canadian citizens and state security, is inherently discriminatory and unsustainable. Simply put, such a judgment would almost certainly threaten

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It’s very difficult to describe to someone who hasn’t gone through these experiences about how painful and how humiliating it is...it’s really a horrible feeling...I’ve learned the hard way just to live with it. So, do I want to continue living with it? No, it’s horrible it’s very stressful doing something to his or her own humanity. You are ripping someone apart not because they’re a bad person but because of the colour or where they were born and raised...

CAIR-CAN’s survey on security visitations of Canadian Muslims, is also revealing in this context. See *Presumption of Guilt*, *supra* note 79 at 13. Their data revealed that the majority of respondents (46%) felt “fearful, freaked out, paranoid, confused, and/or anxious” when contacted by security officials, and a sizable percentage (26%) felt “harassed and pressured, violated and/or discriminated against.” See also *Paying the Price: The Human Cost of Racial Profiling*, (Ontario Human Rights Commission, 2003), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/english/consultations/racial-profiling-report.pdf>.

legal norms in a significant way. Moreover, if the Supreme Court delivered a section 15 judgment signifying that racial profiling is a widespread social problem, this would suggest that law enforcement structures or practices required dramatic transformation. Taken together, the above facts suggest that the Supreme Court would not be receptive to a claim by a racial profiling victim under section 15. Put another way, one of the ‘actual’ logics of section 15 highlighted by Fudge – that the Supreme Court is more ready, willing and able to deal with certain ‘types’ of claims – is one factor that underlies the racial profiling/section 15 paradox.

**(ii) The over-reliance on the concepts of dignity and choice and the individualization of equality.**

Although hugely important, the trend identified in the preceding paragraphs is merely one part of the puzzle that has greatly limited section 15’s potential to provide legal redress to victims of post- 9/11 racial profiling. Other inextricably-linked trends (or ‘actual’ logics of section 15) further demonstrate the rigidity of the Supreme Court’s approach and the problems that have stemmed from it. First, despite strongly reaffirming the Court’s commitment to substantive equality in *Eldridge v. British Columbia (Attorney-General)*<sup>247</sup> and again in *Vriend*, the Court has been repeatedly criticized for being overly formalistic, unpredictable and narrow in its approach. The Court’s backward slip into a line of thinking resembling the “similarly situated” test which plagued the *Bill of Rights*,<sup>248</sup> coupled with “the injection of reasonableness considerations into the section 15 test”<sup>249</sup> has become “the vehicle for restoring formalist reasoning and outcomes within what the court continues, wrongly, to characterize as a substantive equality approach.”<sup>250</sup> This statement rings true on a close examination of the recent decision in *Kapp*. Despite citing

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<sup>247</sup> (1997) 3. S.C.R. 624 [hereinafter *Eldridge*].

<sup>248</sup> Faraday, Denike & Stephenson, *supra* note 9.

<sup>249</sup> McIntyre & Rodgers, *supra* note 9.

<sup>250</sup> *Ibid.*

substantive equality as the basis for their ruling, it is plausible to argue that aspects of the Supreme Court's reasoning were rooted in a deeply formal conception of equality.<sup>251</sup>

A related controversial element of the Supreme Court's section 15 jurisprudence over the years is the weight accorded to the concept of dignity in deciding whether discrimination has occurred. Although dignity has always been a strong undercurrent in section 15 cases, in *Law* its protection was declared as the "overriding purpose" of section 15.<sup>252</sup> Unfortunately, the elevation of the role of dignity ignited rather than dampened the criticism of section 15 jurisprudence. Many equality advocates regard it as too vague and abstract a concept, whose relevance is far from unique to equality rights cases.<sup>253</sup> Measuring whether a section 15 violation has occurred against a threshold of dignity is interesting from the perspective of a racial profiling claimant in our post-9/11 world. As I note in Chapter one, the processes of racialization and 'Othering' - currently applied to those who conform to the stereotypical image of the terrorist - transform certain individuals in society into "a form of life that is beyond the reach of dignity and full humanity."<sup>254</sup> This raises interesting questions: how can a person's dignity be damaged sufficiently to lead to a breach of section 15 if that person is dehumanized and viewed as dignity-less? How can section 15 ever be useful to victims of racial profiling if society continues to racialize and perpetuate stereotypes in this powerful way? If the "overriding purpose" of section 15 continues to be the

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<sup>251</sup> For example, it could be argued that the very claim that adjustments to law can have systematic effects, or that the shape of a given law is a vehicle to social change, is formalistic in nature. Moreover, the fact that the Supreme Court had such a narrow and limited level of analysis i.e. the presence and purpose of the ameliorative program, shows that the Supreme Court has failed to truly grasp the broad and extra-legal analysis required by substantive equality. I am indebted to conversations with my LL.M. supervisor Benjamin Berger for these insights. Judy Fudge and Hester Lessard have also expressed skepticism with respect to *Kapp*. They question whether *Kapp*'s apparent rejection of formal equality will have real or lasting effects. See Judy Fudge and Hester Lessard, "Challenging Norms and Creating Precedents: The Tale of a Woman Firefighter in the Forests of British Columbia," upcoming, draft chapter for Judy Fudge and Eric Turner, eds., *Putting Law to Work: Choices and Contexts in Key Labour Law Cases* at 35.

<sup>252</sup> Greschner, *supra* note 183 at 302.

<sup>253</sup> See for example *ibid.* at 301-302 and Faraday, Denike & Stephenson, *supra* note 9 at 15.

<sup>254</sup> Thomas Blom Hansen and Finn Stepputat quoted in Razack, *supra* note 38 at 7.

protection of dignity, then it could be suggested that the provision is futile to those perceived as beyond the reach of this protection. Conversely, it could also be argued that the Court's reliance on dignity makes section 15 the ideal tool to tackle the discrimination caused by racial profiling post-9/11 and the 'Othering' that underlies it. If the degree to which an individual's dignity has been violated is the Court's measure of whether a section 15 claim will be successful, then *absolute* loss of dignity may be viewed as the ultimate violation of equality and section 15 may therefore be uniquely and perfectly suited to disclose and address the harm.

It is important to note here, however, that the Supreme Court has recently acknowledged the downfalls of an over-reliance on the concept of dignity and has seemingly taken a significant step back from the test established in *Law*. In *Kapp*, McLachlin C.J. and Abella J., speaking for the majority, conceded that "several difficulties have arisen from the attempt in *Law* to employ human dignity as a legal test"<sup>255</sup> and further that "human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be."<sup>256</sup> Could this retreat from dignity possibly expand the provision's potential to deal with racial profiling claims by those perceived as not being worthy of dignity, or lessen it?

Aside from the problems highlighted in *Kapp*, the elevated role of dignity in section 15 jurisprudence has had several other effects. For instance, it has meant that the central focus of the section 15 inquiry has become more about whether a reasonable person in the claimant's position would feel that their dignity had been violated,<sup>257</sup> and less about patterns of discrimination and

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<sup>255</sup> *Kapp*, *supra* note 234 at para 21.

<sup>256</sup> *Ibid.* at para 22.

<sup>257</sup> *Ibid.*

systemic exclusion.<sup>258</sup> As Faraday, Denike and Stephenson explain, this effect is problematic because:

it reduces equality to a question of “feelings,” rather than focusing on the social relations and power dynamics that inhere in a given instance of differential treatment. In other words, it locates inequality in individuals rather than in social relations *structured by law* that have material impacts on an individual.<sup>259</sup>

The individualistic approach captured in this statement has permeated the Supreme Court’s equality jurisprudence.<sup>260</sup> For example, the individualization of assessments of discrimination is also driven and perpetuated by the court’s use of the notion of choice (and/or liberty).<sup>261</sup>

Several equality scholars in Canada have expressed concern over the language of choice, liberty and autonomy that runs like a thread through Canadian equality jurisprudence.<sup>262</sup> Or more accurately, they have criticized the specific way in which the “liberty/choice paradigm” (as Sonia Lawrence calls it)<sup>263</sup> has been employed by the Court. The crux of their argument is that the concept of choice has often been invoked as a shield<sup>264</sup> in section 15 cases and that it is “choices more theoretical than real that serve to eliminate the possibility of a finding of discrimination.”<sup>265</sup> As Diana Majury observes, “[c]hoice signals the termination of the discussion rather than the beginning of the inquiry.”<sup>266</sup> *Nova Scotia (Attorney General) v. Walsh*<sup>267</sup> and *Hodge v. Canada*

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<sup>258</sup> Greschner, *supra* note 183 at 318 and Sonia Lawrence, “Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15” in McIntyre & Rodgers, *supra* note 9.

<sup>259</sup> Faraday, Denike & Stephenson, *supra* note 9 at 16.

<sup>260</sup> Indeed, individualism has permeated *Charter* jurisprudence as a whole. On this point See Benjamin L. Berger, “Law’s Religion: Rendering Culture,” (2007) 45:2 *Osgoode Hall Law Journal* 277. This same article is chapter 11 of Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver, Toronto: UBC Press, 2008).

<sup>261</sup> See Lawrence, *supra* note 258.

<sup>262</sup> See generally Lawrence, *ibid.*, Berger, *Law’s Religion*, *supra* note 260, Hester Lessard, “Charter Gridlock: Equality Formalism and Marriage Fundamentalism,” in McIntyre & Rodgers, *supra* note 9 and Diana Majury, “Women are Themselves to Blame: Choice as Justification for Unequal Treatment” in Faraday, Denike & Stephenson, *supra* note 9.

<sup>263</sup> Lawrence, *ibid.*

<sup>264</sup> Majury, *supra* note 262.

<sup>265</sup> Lawrence, *supra* note 258.

<sup>266</sup> Majury, *supra* note 262 at 210.

<sup>267</sup> (2002) 4. S.C.R. 325, 2002 SCC 83 [hereinafter *Walsh*].

(*Minister of Human Resources Development*)<sup>268</sup> - both involving challenges by common-law spouses for statutory benefits - and less obviously *Gosselin v. Attorney General of Quebec*,<sup>269</sup> are all examples of cases in which a focus on choice ultimately sunk the equality claim. The point that the problematic deployment of choice can determine whether or not a claim is positively responded to is crucially important, and I will return to it in chapter three when I come to discuss the implications of framing certain types of discrimination as inherently ‘choiceless.’

For now, however, the key point to be emphasized is that deference to a decontextualized notion of choice individualizes equality claims and marginalizes (or outright obscures) systemic historical or social factors that may underlie discriminatory action. This is so because choice, as the Supreme Court understands it, is a product of the liberal mind; a mind that is bent on empowering the individual and minimizing state interference. As Benjamin Berger explains, Canadian constitutionalism is heavily informed by liberalism<sup>270</sup> and “[I]beralism understands the individual as best served when left to his or her own devices and free to make his or her own choices, unencumbered by contextual constraints.”<sup>271</sup> Simply put, recognizing and responding to the historical, social, structural or systemic roots of subordination does not fit easily with the liberal goals and political assumptions of the *Charter*, including Canada’s equality guarantee.

From a racial profiling standpoint, an individualistic and choice-based focus is troublesome because racial profiling is a practice that cannot be separated from its historical and social context: it is always linked to a history of social injustice, segregation and stereotyping and should always be understood as a form of discrimination rooted in (and motivated by) power, surveillance and control. Thus, if the Supreme Court adopted an individualistic lens when faced with a racial

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<sup>268</sup> (2004) 3 S.C.R. 357 [hereinafter *Hodge*].

<sup>269</sup> (2002) 4 S.C.R. 429, 2002 SCC 84 [hereinafter *Gosselin*].

<sup>270</sup> *Ibid.* at 291.

<sup>271</sup> Berger, *Law’s Religion*, *supra* note 260 at 291.

profiling case under section 15, the true nature of the profiling, and the diverse and wide-ranging societal impacts of the practice, would be concealed. It is important to note here that inherently individualistic reasonableness assessments - explicitly rejected by the Court in *Andrews*<sup>272</sup> - are also used to assess government policy decisions.<sup>273</sup> Indeed, many equality scholars have argued that the Supreme Court persistently defers to the principle of parliamentary sovereignty in section 15 cases,<sup>274</sup> reducing equality rights to only “one of the plurality of interests to be balanced in post-Charter policy-making”<sup>275</sup> and signalling that “it is really up to Parliament to decide how much equality it wants to promote, and how.”<sup>276</sup>

In turn, this deference has obscured the *effects* of government action on marginalized and disadvantaged groups and has discouraged governments from making positive, transformative steps to ensure that section 15 is given weight and value in policy making.<sup>277</sup> This deferential mindset is likely to perpetuate the marginalization of equality values in the criminal justice system and therefore the uselessness of section 15 in a racial profiling context. If judges were more willing to break from the formalistic, individualistic and deferential rut of current section 15 jurisprudence *outside* of the criminal justice context, it seems plausible that they would be more willing to step out of their comfort zones *within* the criminal justice system. But by sending the message to Parliament that “it is not our job” the judiciary construct a massive barrier to change.

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<sup>272</sup> *Andrews*, *supra* note 6 at paras. 179-82, discussing the reasonableness test articulated by McLachlin J. (as she then was) in the *Andrews* British Columbia Court of Appeal decision. See *Andrews v. Law Society of British Columbia*, [1986] B.C.J. No. 338, 27 D.L.R. (4<sup>th</sup>) 600 (C.A.).

<sup>273</sup> Sheila McIntyre, “Deference and Dominance: Equality without Substance,” in McIntyre & Rodgers, *Diminishing Returns*, *supra* note 9 at 96.

<sup>274</sup> See for example, Mary Eberts, “Section 15 Remedies for Systemic Inequality: You Can’t Get There From Here,” in McIntyre & Rodgers, *ibid.*

<sup>275</sup> *Ibid.* at 389.

<sup>276</sup> *Ibid.* at 410.

<sup>277</sup> *Ibid.* at 397-399. Interestingly, Mary Eberts underlines the ways in which the Charter’s lack of retrospective application, the rules governing standing or public interest groups and the undermining of the class action as a charter strategy, further ensure that social and historical disadvantage is obscured in equality analyses, and perpetuates the political powerlessness of equality claimants.

In the criminal justice system - where there is already a perception that equality does not fit or belong and where state control is most powerful and respected - breaking from the norm is even less likely. And when serious and deep-rooted inequalities (including those underlying racial profiling) are weighed against security concerns in the anti-terror context, judicial initiative is less likely still.

The injection of individualistic and choice-based thinking into section 15 analysis is interesting on another level. As I note in the introduction, one of the potential points of unease in the relationship between equality and criminal justice is that equality rights are often understood as taking into account, responding to, and remedying, broad social disadvantage, whereas criminal justice is typically understood as narrowly focusing on an individual's actions at a specific moment in time. My analysis of the logics of section 15 in this section throws this understanding of the conceptual tension between equality and criminal justice into flux. Juxtaposing the 'ideal' and 'actual' logics of section 15 in this section has revealed that equality rights cases in Canada do anything but take into account, respond to or remedy broad social disadvantage. Rather, as a result of the Supreme Court's interpretation of section 15, discrimination claims are isolated from their social context and attention is diverted away from patterns of subordination and systemic inequality. The 'actual' logics of section 15 can therefore be described as individualistic, dignity-centered and choice-based. The question remains, however, as to whether our assumptions about the individualistic nature of the criminal justice are correct. Only after this question has been answered will I be able to comment upon whether and to what extent the conceptual tension between equality and criminal justice explains the racial profiling/section 15 paradox.

### PART III: THE NATURE OF THE CRIMINAL JUSTICE SYSTEM.

Even without examining the logics of section 15 or the nature of the criminal justice system

in detail, there appears to be something of a misfit between the notions of equality and criminal justice. From an ideological and abstract perspective, the terms ‘equality’ (or ‘equality rights’) and ‘criminal justice’ give rise to very different - if not antithetical - images and responses.<sup>278</sup> Whereas visions of equality and non-discrimination invoke images of victims and remedies, the criminal justice system is tied to images of villains, prisoners and punishment. Whereas equality rights may seek to protect against stigmatization and stereotypes, the criminal justice system stigmatizes and may serve to perpetuate stereotypes. Whereas equality rights may seek to promote inclusion and belonging in communities,<sup>279</sup> the criminal justice system is focused on exclusion and incarceration. Whereas equality rights may seek to encourage respect for human dignity, the criminal justice system may strip it away. And whereas equality rights may seek to protect against discriminatory state action, the criminal justice system is the domain where state power is at its most coercive and repressive.

a) *The nature of the criminal justice system: truly individualistic?*

Although it can be said that social control and regulation are germane to other state institutions,<sup>280</sup> the criminal justice system is distinguishable by way of its employment of coercive measures, reliance on punishment, and strongly utilitarian goals. Moreover, in contrast to other institutions, the criminal justice system is presumed uninterested in the story and history of those who pass through its gates. As Laureen Snider puts it, the primary role of social control is “made easier if its ‘clients’ are de-legitimized, rendered voiceless and powerless, ideologically and

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<sup>278</sup> I concede that if I was referring to section 15 specifically, different images and responses may come to mind depending on whether we were dealing with the ‘ideal’ or ‘actual’ logics of equality. My goal, here, however, is more broad. I simply intend to show that certain images and responses are triggered by the words ‘equality’ and ‘equality rights’. These images and responses are not necessarily reflective of how Canada’s equality guarantee has been interpreted or what it does in practice, although they may be.

<sup>279</sup> Greschner, *supra* note 183.

<sup>280</sup> Snider, *supra* note 176 at 82.

structurally isolated from the working class.”<sup>281</sup>

In adjudicating guilt or innocence, therefore, the criminal courts rely on narrow and abstract understandings of individuals. Judgments are made by examining whether a specific event or state of affairs was caused by the accused’s conduct at a specific time, and further, whether the accused’s behaviour was conscious, intentional and reckless, and thus criminal. In making these determinations, the criminal court is guided by the law of evidence and the rules of relevancy that, with exceptions, play their part in narrowing the focus and bolstering the individualistic conception of the criminal actor at the prosecutorial stage. Looking at or thinking about this adjudicative function in a vacuum, one may be tempted to conclude that the criminal justice system has an intrinsically individualistic focus and from this, infer that it is conceptually at odds with section 15 which, ‘ideally’ (or according to its ‘ideal’ logic) requires an examination of the broader social context in which a discriminatory act occurs.

To assume that the prosecutorial stage in the criminal process is reflective of the inherently individualistic nature of the criminal justice system, however, would be seriously misguided. The adjudicative or decisional function of the criminal justice system should not be conflated or confused with the purpose or function of the criminal justice system as a whole which, according to the 1969 *Report of the Canadian Committee on Corrections*, is “to protect all members of society, including the offender himself, from seriously harmful and dangerous conduct.”<sup>282</sup> Perhaps more than any other piece of legislation, the *Anti-Terrorism Act* has this notion at its very core. This is because terrorism is perceived as the gravest of dangers by members of Canadian society and the prospect of an attack stirs up fear and horror in a way that nothing else can. The

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<sup>281</sup> *Ibid.*

<sup>282</sup> *Report of the Canadian Committee on Corrections, 1969* in Craig L. Boydell & Ingrid Arnet Connidis, *The Canadian Criminal Justice System* (Holt, Rinehart and Winston, 1982) at 54.

unique nature of terrorism means that individuals turn to, and rely on, the government and its institutions for protection and justice because they personally cannot take any real steps or cautions to protect themselves or their family from an attack. Whereas everyday measures can be taken to help reduce the risk of falling a victim to other criminal activity - such as increasing security around your home to help prevent burglary, or avoiding dark, quiet places late at night to avoid being attacked - little can be done to avoid being victim to a terrorist atrocity. Where terrorism is at issue, only the state has any degree of control, and exclusive power and trust is thus placed in the hands of its institutions (including the criminal justice system and immigration) by the helpless public. Simply put, the protectionist function of the criminal justice system is stronger (and more necessary) than ever in the 'war on terror'.<sup>283</sup> Broadly speaking then, the foundation of the criminal justice system can be described as the protection of society and the maintenance of order within that society; punishment of individual actors is a means to achieve these ends. It is beyond doubt that the purposes of punishment serve the interests of society and the state, as well as the victim of the crime. The logic behind retribution, for example, is that the accused has caused harm and that society (and the victim) is entitled to inflict harm in return. And it is well established that deterrence is both particular and general, in that it operates not only to deter individuals from offending again, but to deter all members of society from engaging in illegal acts. In *R. v. Hall*,<sup>284</sup>

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<sup>283</sup> Immigration also fulfils a highly protectionist function in the 'war on terror' and is akin to that of the criminal justice system. For many, this function is defined by the issuance of security certificates on the basis of information provided by the Canadian Security Intelligence Service (CSIS) under Canada's Immigration and Refugee Protection Act (S.C. 2001, c.27, s.82 [IRPA]). These certificates facilitate the exclusion of persons who have engaged in terrorism or who are members of an organization that is engaged, was engaged, or is likely to engage in terrorism and, worryingly, the procedure before and after a certificate has been issued, varies for residents and non-residents of Canada. See Bhabha, *supra* note 17 at 103-109. In 1995, the exclusion process in Canadian immigration law was challenged by a Convention refugee from Iran. In *Ahani v. Canada* (1995) 3 F.C. 669 (T.D.), the Federal Court held, *inter alia*, that detention prior to a hearing is justifiable, and not in breach of section 10(c) of the Charter, in such cases where the interests of public safety are at stake. Although pre-9/11, this case exemplifies how the logics of immigration and the criminal justice system (public safety, security) are almost identical when dealing with those suspected of having links to terrorism. For a deep and excellent analysis of the security certificate process in light of section 15 see Shapiro, *supra* note 36.

<sup>284</sup> (2002) 3 S.C.R. 309, 2002 SCC 64.

the Supreme Court confirmed that public protection remains one of the primary aims of Canada's criminal justice system and highlighted the importance of public confidence in the administration of justice. In fact, the Court suggested that public confidence and public order are intimately linked. Speaking for the majority, McLachlin C.J. stated:

To allow an accused to be released into the community on bail in the face of a heinous crime and overwhelming evidence may erode the public's confidence in the administration of justice. Where justice is not seen to be done by the public, confidence in the bail system and, more generally, the entire justice system may falter. When the public's confidence has reasonably been called into question, dangers such as public unrest and vigilantism may emerge.<sup>285</sup>

Again, such a statement resonates even more powerfully in the present context. In recent years, there has been an overwhelming pressure for the perpetrators of the September 11<sup>th</sup> attacks to be brought to justice. The unyielding demand for justice to be done and to be seen to be done has been unparalleled, manifesting itself in anything from arguments defending and condoning Guantanamo Bay and Western involvement in Afghanistan and Iraq to, less alarmingly, campaigns and groups set up either to support those affected by 9/11<sup>286</sup> or push for more accountability, more thorough investigation and more answers from the state.<sup>287</sup>

The above facts demonstrate that just as the 'actual' logics of Canadian equality rights are highly individualistic and cannot be strictly described as always drawing on and responding to

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<sup>285</sup> *Ibid.* at para. 26.

<sup>286</sup> There are numerous support groups and non-profit organizations of this nature. Families of September 11, Inc., for example, state that their mission is to "[T]o raise awareness about the effects of terrorism and public trauma and to champion domestic and international policies that prevent, protect against, and respond to terrorist acts." Please refer to their website: <http://www.familiesofseptember11.org>. Other prominent groups include Tuesday's Children, (<http://www.tuesdayschildren.org>) and The September 11<sup>th</sup> Families Association (<http://www.911families.org>).

<sup>287</sup> Such groups include 911 Truth.org, who describe investigation, education, accountability and reform as the pivots of their mission (<http://911truth.org>) and Scholars for 9/11 Truth & Justice (<http://stj911.org>). Of course, many are still angry and dissatisfied at what they perceive to be a lack of justice post-9/11 and some have resorted to extreme measures. Indeed, it could be suggested that the staggering increase in hate crimes is a reflection of the sentiment that justice has not been sufficiently served. In the present context, "public unrest and vigilantism" seems to be defined by certain individuals taking justice into their own hands and retaliating against those they perceive to be responsible for the September 11<sup>th</sup> attacks.

societal disadvantage as its 'ideal' logic suggests, the focus of the criminal justice system is largely rooted in concerns about society's welfare, and is only individualistic as a means to this end. Therefore, the argument that criminal justice and equality discourses are at odds because the former is individualistic and the latter is not, is misleading. In fact, juxtaposing a thorough examination of equality jurisprudence with a consideration of the purposes of the criminal justice system as a whole reveals that the inverse may be true: whereas section 15 is individualistic in 'actual' logic, the nature of the criminal justice system is governed by a broad concern for societal protection and safety. In the following section, I turn to the issue of the sentencing of Aboriginal offenders in Canada and explore how conflicting equality and criminal justice (or more specifically security) concerns have been voiced and responded to in this particular area. This section serves as a test case to illustrate that the inherent nature of the criminal justice system is to turn away from substantive equality concerns (and thus the 'ideal' logics of section 15) and towards the needs of society the moment that security is perceived to be under significant threat.

*b) The logics of equality and the sentencing of Aboriginal offenders in Canada*

As a stage in the criminal process at which equality considerations have crept into the criminal law, but also at which individual choices and circumstances are customarily taken into account by criminal courts, sentencing is an interesting area to examine in the light of the logics of section 15. Aboriginal sentencing is particularly interesting as here the criminal justice system has moved away from a heavy-handed focus on punishment and has opened its mind to principles of restorative justice that are more conceptually compatible with notions of substantive equality, dignity and recognition.

In response to increasing concern about the over-representation of Aboriginal offenders in Canadian penal institutions, in 1996 the Canadian government introduced section 718.2(e) of the

*Criminal Code* which provides that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders.”<sup>288</sup> The introduction of this provision reflects an acknowledgment of the Canadian courts’ persistent failure to attend to the exceptional circumstances and inequality experienced by indigenous peoples in Canada. Section 718.2(e) is thus an example of positive government action to address a specific and systemic form of subordination and respond to substantive equality concerns. Put another way, the ‘ideal’ logics of equality form the backdrop to this reform. In *R. v Gladue*<sup>289</sup> and *R. v Wells*<sup>290</sup> the Supreme Court interpreted section 718.2(e) as conferring a duty upon judges to consider unique systemic factors that may have contributed to an accused’s conduct<sup>291</sup> and stressed that section 718.2(e) is a remedial provision.<sup>292</sup> Further, *Gladue* and *Wells* confirmed that by taking into account the traditional Aboriginal preference for restorative justice principles and community-based sanctions,<sup>293</sup> which focus “on the healing of the relationships that have been jeopardized by the wrongdoer’s behaviour,”<sup>294</sup> judges will arrive at more culturally-appropriate and equitable sentencing options. In effect, the Court signaled that in some circumstances the criminal law is capable of taking into account deep-rooted patterns of inequality, and accepting their potential link to criminal behaviour.

However, although section 718.2(e) opens the door for the courts to view an accused’s conduct in the light of historical and social disadvantage, it is important to emphasize that the

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<sup>288</sup> *Criminal Code* R.S.C. 1985, c. C-46, ss 718.2(e).

<sup>289</sup> (1999) 1. S.C.R. 688 [hereinafter *Gladue*].

<sup>290</sup> (2000) 1. S.C.R. 207 [hereinafter *Wells*].

<sup>291</sup> David E. Ives, “Inequality, Crime and Sentencing: *Borde, Hamilton* and the Relevance of Social Disadvantage in Sentencing Law,” (2004-2005) 30 *Queen’s Law Journal* 114 at 114.

<sup>292</sup> *Gladue*, *supra* note 289 at para. 94.

<sup>293</sup> *Ibid.*

<sup>294</sup> Tim Quigley quoted in Adam Vasey, “Rethinking the Sentencing of Aboriginal Offenders: The Social Value of s.718.2(e),” (2003) 15 *Windsor Review of Legal and Sociological Issues* 73 at 82.

sentencing process itself is still heavily and narrowly focused on the individual and the criminal act that the individual committed at a specific time. In the sense that it is a highly individualized process infused with state-acknowledged substantive equality concerns, Aboriginal sentencing is therefore very unique. It is a stage at which courts are required to apply an individualistic and choice-based focus that is reflective of the ‘actual’ logics of section 15, while simultaneously taking the ‘ideal’ logics of equality into account.

Before turning to consider the debate surrounding Aboriginal sentencing and what it reveals about the conceptual tension between the logics of equality and the nature of criminal justice, I would like to pause to consider a possible objection to my use of Aboriginal sentencing as an example of how the discourses of equality and security intersect. It could be argued that it is not sensible or even appropriate to use the sentencing of Aboriginal offenders to demonstrate the tense relationship between equality and criminal justice because the decision to identify in statute that the circumstances of Aboriginal offenders may require particular attention at sentencing is, in essence, part of the wider state effort to address complex *sovereignty* issues. Relatedly, one might claim that because Aboriginal status and equality holds a different, unique and very special place in Canadian legal culture, any conclusions drawn from this test case are not likely to be universally relevant. In my view, however, using the sentencing of Aboriginal offenders as an example of how equality and criminal justice discourses clash in theory and in practice, may actually strengthen my argument. If the tension between equality and criminal justice reveals itself in this special area in which so much is at play and at stake - or more specifically if the norm of security strongly pulls against the norm of equality *even when* sovereignty and aboriginal status concerns enter the picture - then the extent and degree of the tension becomes hard to dispute or even

deny.<sup>295</sup> An examination of the criticism directed at Canada's Aboriginal sentencing regime clearly illuminates this tension between equality and criminal justice, and further, demonstrates what happens when the logics of equality come into contact with a highly contentious criminal justice issue.

Two main criticisms have been leveled at section 718.2(e) and its interpretation by the Canadian Courts. First, there are those who oppose the provision on the basis that it goes too far and, in fact, reinforces inequality by failing to adhere to the idea that all similarly situated offenders should be treated alike. As Julian Roberts and Philip Stenning contend, "it is not fair to sentence non-Aboriginal and Aboriginal offenders differently *solely by reason of their race and without regard to any other characteristics which they may share.*"<sup>296</sup> This statement is reflective of the belief that the focus at sentencing should be solely on the individual and the way in which that individual's choices, capacity and circumstances relate to or explain the committal of a particular criminal act at a particular time. For commentators such as Roberts and Stenning - who adhere to a desert model of sentencing which prioritizes proportionality and parity<sup>297</sup> - the central concern is that a different "sentencing methodology"<sup>298</sup> for Aboriginal offenders ultimately leads to a "race-based discount"<sup>299</sup> in the form of more leniency and less punishment. Also, those who are of the opinion that section 718.2(e) goes too far likely share the fear of the trial judge in *Wells* that community sentences in place of incarceration leave "the necessary elements of deterrence and denunciation...lacking."<sup>300</sup> Insofar as they advocate an individualistic, choice-based and formal

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<sup>295</sup> Simply put, in proving the greater, I simultaneously prove the lesser. I am grateful to the comments of my LL.M. supervisor Benjamin Berger for drawing my attention to this possible objection.

<sup>296</sup> Julian V. Roberts and Philip Stenning, "The Sentencing of Aboriginal Offenders in Canada: A Rejoinder," (2002) 65 *Saskatchewan Law Review* 75 at 84.

<sup>297</sup> Ives, *supra* note 291 at 133.

<sup>298</sup> *Ibid.* at 115.

<sup>299</sup> *Ibid.* at 131.

<sup>300</sup> Vasey, *supra* note 294 at 78.

sentencing focus in the name of equality, arguments that section 718.2(e) goes too far embrace the ‘actual’ logics of section 15. It appears that in the criminal justice system - in which questions of liberty, denunciation and public safety are at stake and public interest is high - the pressure to treat individuals identically is more prevalent than in any other domain of law.

The second category of criticisms leveled at section 718.2(e) and *Gladue* is that they do not go far enough. Scholars who adhere to this viewpoint likely believe that underinclusiveness and recognition of difference are necessary under a substantive vision of equality but have concerns that sentencing reforms are insufficient as they fail to get to the root of Aboriginal offending and the over-representation crisis. As Adam Vasey emphasizes, “the over-representation process extends far beyond the bounds of the criminal justice system, of which the sentencing process is merely one part.”<sup>301</sup> To be sure, it would be profoundly naive to view s. 718.2(e) as a panacea for social disadvantage and inequality of Aboriginal persons in the criminal justice system.<sup>302</sup> The fact remains that law enforcement and sentencing practices still adversely affect those of Aboriginal ancestry and in fact, often come into conflict with the section 15 rights of the accused. Section 718.2(e) is futile if a court fails to consider the equality implications of certain *non-custodial* sentences: probation orders with conditions to abstain from alcohol, for example, need to take into account the fact that many of Canada’s Aboriginal population are trapped in a vicious cycle of poverty, alcohol and substance abuse and are often unable to abide by such conditions.<sup>303</sup> In a similar vein, the criminal justice system needs to be awake the dangers of enforcing failure to appear notices if the reason the accused failed to appear is closely linked to their dire social

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<sup>301</sup> Vasey, *supra* note 294 at 85.

<sup>302</sup> Please note that although Canada’s overall incarceration rate has decreased since 1996, the number of Aboriginal people in prisons has increased. Strikingly, the Aboriginal female population of the federal prisons doubled between 1996 and 2006. Williams, *supra* note 202 at 88.

<sup>303</sup> See generally Christopher Nowlin, “Taking Aboriginal Justice Beyond *Gladue*: Canadian Criminal Law in Conflict with Human Rights,” (2004) 67 Saskatchewan Law Review 59.

circumstances,<sup>304</sup> and also to the factors that led to the offence and the charge in the first place: was the accused a victim of racial profiling? Was the accused intoxicated at the time of the offence? Is the accused a victim of domestic violence? Substantive equality and recognition of difference will be impossible to secure in the criminal justice sphere if such questions are not addressed.

Moreover, there is one severe limit to s. 718.2(e)'s scope that stands out. The Supreme Court stated in *Gladue* that when Aboriginal offenders are charged with serious offences - which have mandatory minimum terms of imprisonment attached - the provision is unlikely to have any influence.<sup>305</sup> Thus, when the stakes are highest and when equality and liberty concerns are most acute, the criminal courts are least likely to draw on a provision which is rooted in principles of substantive equality. This limit to section 718.2(e) demonstrates that equality concerns are only regarded as acceptable in the criminal justice sphere up to a certain point: as the stakes increase for both society and the offender, the demand for punishment - or more specifically *equal* punishment - almost always trumps the demand for equality. Put another way, when security is perceived to be under significant threat, the 'ideal' logics of section 15 are abandoned, the 'actual' logics take over, and the social focus of the criminal justice reasserts itself, even at one of the most individualistic stages of the criminal process. It is therefore completely inaccurate to argue that the criminal justice system and equality are conceptually incompatible because the former is individualistic and the latter is not. Examining the equality concerns voiced in response to the introduction and judicial interpretation section 718.2(e) of the *Criminal Code* has shown that the inverse is true.

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<sup>304</sup> *Ibid.*

<sup>305</sup> Sanjeev S. Anand, "The sentencing of aboriginal offenders, continued confusion and persisting problems: a comment on the decision in *R. v. Gladue*" (2000) 42: 3 *Canadian Journal of Criminology* 412 at 415. See also Williams, *supra* note 202 at 87. Here, Williams states: "[E]ven the failures of imprisonment, such as its purported inability to speak to Aboriginal persons, may be disregarded in the far from unusual circumstance of a judge sentencing an Aboriginal person who has been convicted of a 'more serious' offence" and further that "[S]uch erasures and omissions communicate ambivalence about the substantive equality project of sentencing Aboriginal people differently."

The above observations are pivotal to understanding the racial profiling/section 15 paradox post-9/11. They highlight that when questions of terrorism are at issue and the stakes for offender and society are the highest they can possibly be (and the demand for punishment is at its staunchest) the likelihood of equality rights arguments being perceived as relevant or holding weight and influence in a criminal court, is at its weakest. Even in the best test case in which questions of sovereignty and Aboriginal status are at stake, the nature of the criminal justice system is to turn away from the needs of the individual (which, of course, includes having equality rights respected) and towards the needs of, and pressures from, society as a whole.

## CONCLUSION

In my view, it is the unyielding demand for punishment and security that underlies the perception that equality arguments (and therefore section 15) do not belong in the criminal justice system. Together with various practical obstacles, the idea that punishment and security should trump equality as the stakes go up and the ill-conceived and unsustainable notion that equality and criminal justice are incompatible because the latter is inherently individualistic and the former is not, discourages counsel from advancing equality rights arguments and perpetuates section 15's invisibility in the criminal justice sphere. Overall, there are two main points to be taken from this chapter.

The first is that the logics of section 15 are undoubtedly conceptually inconsistent with the nature of the criminal justice system, but in a different and more complicated way than we might have initially assumed or imagined. The second is that the tension between the logics of equality and the nature of criminal justice is most obvious, and most limiting, when security concerns and demand for punishment are most rampant. At this point, then, what we are left with is the perception that the section 15/profiling paradox exists because the logics of equality are

conceptually incompatible with *any* criminal justice matter. In light of the bleak reality that the relevance of equality to the criminal law is not going to fade, this conclusion is obviously very troubling and raises interesting questions about whether tensions can be resolved, overcome or put aside in a way that expands the potential of section 15 with respect to criminal justice issues.<sup>306</sup> For the purposes of this thesis, however, our concern is whether this perception fully explains why the paradox exists, or whether there is something more to the story.

In the following chapter it is revealed that there is considerably more to the story. Chapter three examines how racial profiling is currently legally dealt with under the *Charter*, and how it could potentially be dealt with under section 15. Further, I consider how racial and religious discrimination, of any nature, is currently understood and addressed in Canada. By the end of this chapter we will see that, in addition to conceptual tensions between equality and criminal justice, there are other hugely significant doctrinal, structural and practical limits to section 15 that account for the provision's uselessness in the post-9/11 racial profiling context. We will find ourselves face to face with the bleak and certain reality that one of Canada's most valued constitutional provisions cannot address the type of harm that many would rightly and logically presume it was originally designed to protect.

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<sup>306</sup> As Cairns-Way notes, the answer, or answers, to such questions are inescapably complex. See Cairns-Way, *supra* note 182 at 240. I believe a partial answer may lie in the gap between the 'actual' and 'ideal' logics of section 15. If the Supreme Court's approach to section 15 was less deferential, less formalistic, less individualistic and less-dignity-centred and more progressive and substantive, then section 15's potential would widen and controversy surrounding the provision would fade. Indeed, it may be that by recognizing the major downfalls of their interpretation of section 15 and the *Law* test, the Supreme Court in *Kapp* opened a door and widened equality's potential in the criminal justice system. I would also suggest, however, that a change in section 15 will only be meaningful if it is paralleled by a change in the criminal justice system. The more that the criminal justice system branches out from a rigid focus on punishment and moves towards a vision of justice that incorporates restorative principles, the more likely it is that it will be responsive to equality arguments and truly capable of protecting society's interests. I concede that in the specific context of terrorism prevention where public demand for justice and punishment is unparalleled and accompanied by enormous domestic and international pressure, such reforms are much less likely.

## **CHAPTER THREE: RACE, RELIGION & PROFILING - WHAT THE COURTS HAVE TO SAY**

### INTRODUCTION

In the preceding chapters, we have moved closer to understanding and gauging the extent of the racial profiling/section 15 paradox of Canada's 'war on terror.' In chapter one, I exposed the distinctive nature of racial profiling in the post-9/11 climate. Through revealing the additional religious dimension to contemporary profiling and explaining how the space where this profiling occurs - at the borders of Western states - can function to exclude and stigmatize in a particularly powerful and alarming way, I demonstrated that racial profiling in its current form and context raises especially acute and complex questions of equality. At this point in the unfolding story - when it seemed clear that racial profiling post-9/11 is, at its core, an equality issue - section 15 appeared to be the logical and correct starting place for those who find themselves victims of the practice. In chapter two, however, the story took an interesting twist. Here, it became evident that the deep conceptual tensions between the logics of section 15 and the nature of the criminal justice system considerably reduce the likelihood that equality arguments would be warmly received in a political climate committed to fighting terrorism and punishing its adherents. From an abstract perspective, the suitability of section 15 as a legal tool to stop, control or protect against racial profiling, began to fade.

In this chapter, I examine the shape of the jurisprudence in this area to see how the insights drawn out in chapters one and two play out on the ground. My aim is two-fold: first, to verify whether and to what extent the case law confirms my observations in the previous chapters and, second, to see whether the case law yields any new explanations for the racial profiling/section 15

paradox. Part one examines how the Canadian courts have approached and responded to racial profiling claims generally. Through juxtaposing cases in which the courts have been responsive and unresponsive to the issue of racial profiling, I will identify trends in the jurisprudence and highlight the main challenges with racial profiling litigation. In Canada, racial profiling cases have primarily arisen in the context of vehicle stops, searches and investigative detentions and, as a result, have typically engaged with section 7, 8 or 9 of the *Charter*.<sup>307</sup> Further, the vast majority of racial profiling jurisprudence comes from the lower courts of Ontario, and involved either Black or Aboriginal accused. Although the nature and details of profiling in the ‘war on terror’ context may distinguish it from the profiling that the courts have previously dealt with (insofar as it involves the targeting of Arabs and Muslims (a *religious* minority)) and is likely to occur at the borders of our nations) profiling cases outside the ‘war on terror’ context are still instructive. As will become clear in the pages that follow, similar legal issues may arise regardless of the exact nature, context or location of the profiling. Further, because the Canadian courts have heard neither a claim of post-9/11 racial profiling,<sup>308</sup> nor a claim of religious profiling, current *racial* profiling jurisprudence is our only source of guidance and our best point of reference.

In part two, I will consider the role (if any) that section 15 has played in racial profiling cases to date and speculate as to what role it *could* play. Further, while space does not allow for a full section 15 analysis of contemporary racial profiling,<sup>309</sup> I will illuminate some of the hurdles a victim of contemporary racial profiling would likely face if they choose to make a claim under

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<sup>307</sup> Of these provisions, section 9 of the *Charter* is the one most frequently engaged in racial profiling cases. Perhaps the two most important cases under section 9 are *Brown et al. v. Regional Municipality of Durham Police Service Board* (1998) 43 O.R. (3d) 223 (C.A.) and *R. v. Simpson* (1993) 12 O.R. (3d) 182 (C.A.).

<sup>308</sup> Please note that I am referring specifically to racial profiling in the law enforcement and *Charter* context. Outside of this context, the case of *Asad v. Kinexus Bio Informatics Corp.*, [2008] BCHRTD No.293 could be regarded as a positive finding of racial profiling post-9/11. In this case, the BC Human Rights Tribunal concluded that Kinexus Bioinformatics Corp. had discriminated against their employee Mr. Asad regarding his employment because of his race, religion, place of origin, and political belief, contrary to s. 13 of the *BC Human Rights Code*. See para. 37.

<sup>309</sup> Indeed, something very similar to this has already been completed. See Bhabha, *supra* note 17.

section 15. In the final part of this chapter, I will broaden my scope and consider how other forms of racial and religious discrimination have been dealt with under section 15 of the *Charter*. Understanding why section 15 has played a minimal role in resolving equality issues as they relate to racial and religious minorities will offer a different perspective on why section 15 lacks potential to deal with racial profiling claims post-9/11. The provision's lack of influence in racial or religious equality cases more generally suggests that section 15 may simply be unable or unsuited to deal with certain *types* of discrimination.

In the end, we will see that it is not only the fact that profiling is a criminal justice issue that prevents section 15 from being a useful constitutional tool in post-9/11 racial profiling context. Although features of the relationship between section 15 and the criminal justice system are problematic, there are various other practical factors and doctrinal problems that, to varying degrees, underlie and explain the racial profiling/section 15 paradox of the 'war on terror.' The practical implications of the normative shift and the racialization of religion, explored in chapter one, will also become evident as my discussion of the practical and doctrinal limits to section 15 proceeds. Whereas the rise in justificatory arguments is troubling because it appears to shift the focus away from whether a discriminatory act has actually occurred and directly towards whether it is acceptable, the blurring of the boundaries between race and religion raises complicated questions about how a discrimination claim would be framed and effectively responded to under section 15. With the addition of a religious layer to our conception of 'racial' profiling, the web of prejudice generated by profiling expands and becomes more tangled. And as the threat to equality becomes all the more grave, discrimination simultaneously become less legally manageable via section 15. Simply put, the injection of religion into contemporary racial profiling discourse widens the gap between what section 15 of the *Charter* should be able to do in theory and what it

can do in practice with respect to racial profiling in the post-9/11 climate, complicating and exacerbating the paradox along the way.

## PART I: CHARTER JURISPRUDENCE ON RACIAL PROFILING

Despite the enormous interest and literature on the subject, racial profiling jurisprudence under the Canadian *Charter* is limited and underdeveloped.<sup>310</sup> Whereas the Supreme Court of Canada has not yet had the opportunity or apparent inclination<sup>311</sup> to rule on the matter, it is clear that the lower courts are still grappling to fully understand what constitutes racial profiling and how to make sense of it as a legal concept. Although this may not be altogether surprising considering that both the *Charter* and racial profiling (as a recognized social phenomenon) are relatively new features of Canadian legal culture, the dearth of clear, consistent jurisprudence makes it an interesting time to reflect on the legal challenges and hurdles inherent in racial profiling cases, and consider whether current constitutional standards for dealing with such cases are adequate or effective.

### *a) Judicial responsiveness to cases of ‘pure’ racial profiling*

Fortunately, there has been judicial recognition that racial profiling is a social reality and concern in Canada. Indeed, *R. v Brown*,<sup>312</sup> is a seminal moment in the Canadian court’s racial

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<sup>310</sup> Please note that the Canadian courts have never been faced with a claim of religious profiling in the law enforcement context. It is for this reason that my central discussion in this part of the chapter is on ‘racial’ profiling. I remain fully conscious of the fact that the lines between ‘racial’ and ‘religious’ profiling in the ‘war on terror’ are blurred.

<sup>311</sup> The Supreme Court has been criticized for avoiding the issue. See Benjamin L. Berger, “Race and Erasure in *R. v. Mann*,” (2004) 21 *Criminal Reports (Articles)* 58 and discussion below.

<sup>312</sup> (2003) 173 C.C.C. (3d) 23 (Ont. C.A.) [hereinafter *Brown*]. In *Brown* at para. 165, the Ontario Court of Appeal defined racial profiling as involving “the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group” and, in the case at hand, found there to be sufficient evidence that the police officer engaged in racial profiling in his decision to investigate a young black man. However, the case was ultimately dismissed as a result of comments made by the trial judge in response to an allegation of racial profiling (see para. 188.) These comments were found to amount to a reasonable apprehension of bias.

profiling jurisprudence.<sup>313</sup> In this case, the Ontario Court of Appeal acknowledged that racial profiling takes place and made some important observations about the existence and subconscious nature of the practice.<sup>314</sup> Unfortunately, although the courts appear willing to concede that racial profiling is widespread and reprehensible in theory, in practice there have been surprisingly few confirmatory findings of racial profiling under the *Charter*.<sup>315</sup> Of those cases in which racial profiling has been successfully argued, *R. v Nguyen*<sup>316</sup> provides an interesting starting point.

At issue in *Nguyen* was whether a police officer, who was investigating marijuana grow operations, had engaged in racial profiling by systematically looking up Vietnamese names in the Land Registry Office and then using this list to decide who to target for investigation. Van Trong Nguyen, who subsequent to the officer's investigation was charged with several serious drugs-related offences,<sup>317</sup> argued at trial that evidence should be excluded and proceedings stayed because the officer violated his rights under sections 7 and 8 of the *Charter* by using "race as a proxy for criminal activity."<sup>318</sup> Concluding that the officer's "only reason for investigating Mr. Nguyen is that he was living in the home of his wife, Ms. Do, and they were Vietnamese",<sup>319</sup> the court found that racial profiling had taken place and that the admission of evidence would bring the

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<sup>313</sup> More recently, in the case of *Peart v. Peel Regional Police*, (2006), 43 C.R. (6th) 175 (Ont. C.A.) the Ontario Court of Appeal declared at para. 91:

Racial profiling is wrong. It is wrong regardless of whether the police conduct that racial profiling precipitates could be justified apart from resort to negative stereotyping based on race... Police conduct that is the product of racial profiling and interferes with the constitutional rights of the target of the profiling gives rise to a cause of action under the *Charter*.

<sup>314</sup> *Brown*, *supra* note 312 at para. 8.

<sup>315</sup> Since the first judicial finding of racial profiling in *R. v. Chung* (1994), 23 W.C.B. (2d) 579 (Ont. P.C.) there have only been six positive findings of racial profiling under the *Charter*. It is important to note here, however, that there have been several positive findings of racial profiling under provincial human rights legislation. See for example *Phipps v. Toronto Police Services Board*, [2009] OHRTD No. 877, *Nassiah v. Peel (Regional Municipality) Services Board*, [2007] OHRTD No. 14, *Radek v. Henderson Development (Canada) Ltd.*, [2005] BCHRTD No. 302 and *Johnson v. Halifax (Regional Municipality) Police Service*, [2003] NSHRBID No. 2.

<sup>316</sup> (2006) O.J. No. 272 (S.C.J.) [hereinafter *Nguyen*].

<sup>317</sup> *Ibid.* at para. 2. These offences included production of a controlled substance, possession for the purpose of trafficking and possession of narcotics.

<sup>318</sup> *Ibid.* at para. 18.

<sup>319</sup> *Ibid.* at para. 46. Emphasis added.

administration of justice into disrepute.<sup>320</sup> Significantly, the court also declared that “[r]acial profiling undermines the inherent *equality* enjoyed by all citizens and is incompatible with Canadian policing traditions.”<sup>321</sup>

*Nguyen* is unique and interesting not only because it is a rare example of a successful racial profiling claim, but because the circumstances in which the racial profiling took place are comparable to those in which allegations for racial profiling in the ‘war on terror’ have arisen thus far. Consider, for example, CAIR-CAN’s allegations that security officials targeted Muslim and Arab men for investigation on the basis of their race, religion, ethnicity or place of birth, or the allegation that the twenty-three South Asian males arrested in the RCMP’s ‘Project Thread’ were selected for investigation because of their Muslim names, or the 5,000 interviews of Middle Eastern men by the United States’ Justice Department directly following the attacks. *Nguyen* occupies an interesting position in Canadian racial profiling jurisprudence because, in contrast to the majority of other cases, the discrimination did not occur in the context of a vehicle stop or investigative detention. Rather, the allegation of racial profiling arose when a police officer actively sought out information and consciously targeted an individual on the basis of his race. For this reason, it is likely that *Nguyen* would serve as a helpful and relevant precedent if a Canadian court was faced with an allegation that security or law enforcement officials had looked up and then targeted specific individuals because of a perceived link between their religion, race, ethnicity or citizenship, and their criminal propensity.

Another finding of racial profiling came in *R. v Khan*.<sup>322</sup> After being stopped for supposedly driving erratically, a large amount of cocaine was discovered in Mr. Khan’s car and he

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<sup>320</sup> *Ibid.* at para. 44.

<sup>321</sup> *Ibid.* at para. 29. Emphasis added.

<sup>322</sup> (2004) 24 C.R. (6<sup>th</sup>) 48 (Ont. S.C.J.) [hereinafter *Khan*].

was charged with possession for the purpose of trafficking.<sup>323</sup> Mr. Khan alleged both that the stop was arbitrary and in breach of section 9 of the *Charter* because it was motivated by racial profiling, and that the search of his vehicle was in breach of section 8 of the *Charter*.<sup>324</sup> Whereas one of the officers testified that he was overwhelmed by the strong odour of cocaine that “came flying out the door” of the vehicle,<sup>325</sup> Mr. Khan insisted that the drug was not his and that he was unaware of it being in his car.<sup>326</sup> Although there is often inconsistency between the version of events provided by police officers and the accused in racial profiling cases,<sup>327</sup> in *Khan*, the disparity was particularly striking. Indeed, in finding that the police officers had engaged in racial profiling, Molloy J stated: “I accept the evidence of Mr. Khan as more credible than that of either officer. I quite simply do not believe the evidence of the officers...In my view, the evidence is overpowering that the testimony of Officer Asselin and Officer James is untrue.”<sup>328</sup> In my opinion, what connects *Nguyen* and *Khan* is the relative lack of difficulty with the issue of proof. As I discuss below, the current legal reality is that racial profiling has to be perceived as ‘pure’ to be objected to in the courts.

*b) Judicial unresponsiveness to issues of race and racial profiling*

For every positive finding of racial profiling in the Canadian courts, there are many more cases in which racial profiling has been unsuccessfully argued. Often, the issue is disposed of quickly (and sometimes fleetingly) by the courts because there are other factors that can explain why the officers chose to stop a vehicle or investigate or search an individual. *Kent*,<sup>329</sup> in which

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<sup>323</sup> *Ibid.* at para. 1.

<sup>324</sup> *Ibid.* at para. 3.

<sup>325</sup> *Ibid.* at para. 14.

<sup>326</sup> *Ibid.* at para. 3.

<sup>327</sup> For example, see also *R. v. Kent* (2008) 80 W.C.B. (2d) 871 (Ont. S.C.J.) [hereinafter *Kent*].

<sup>328</sup> *Khan*, *supra* note 322 at para. 66.

<sup>329</sup> *Kent*, *supra* note 327.

the accused claimed he had been stopped because “he was a young black man driving a Cadillac”,<sup>330</sup> is a recent case in point. In this case, the Ontario Superior Court of Justice readily accepted the testimony of the police that they had stopped Mr. Kent in order to check his documents after they saw him make a right turn on a red light, without even discussing the issue of racial profiling. In dismissing the accused’s application, Harvison Young J simply stated: “I have found on the facts that Mr. Kent did fail to stop at a red light. Accordingly, his detention was not arbitrary and the facts as I have found them do not disclose a violation of his s. 9 rights.”<sup>331</sup> Crucially, in its ruling, the court did not even explicitly entertain the possibility that the police testimony was false or that racial stereotyping, unconscious or not, played a role in the officers’ decision to stop the vehicle. In many ways, *Kent* is, sadly, a typical racial profiling case. *Kent* exemplifies that if an act of racial profiling is not ‘pure’ - that is if there are any other plausible explanations for an investigation, stop or detention - the Courts are surprisingly quick to dismiss a racial profiling claim. What is most striking about this decision, however, is that the phrase ‘racial profiling’ only appears once in the entire judgment.<sup>332</sup>

Regrettably, *Kent* also does not stand alone in its failure to explicitly mention, discuss or condone racial profiling. In fact, even in some cases involving racialized accused where a violation of section 9 of the *Charter* has been found, references to racial profiling, or even race or ethnicity, are noticeably absent.<sup>333</sup> More concerning still, however, is that this trend does not appear to be unique to Canada’s lower courts. In *R. v. Mann*,<sup>334</sup> the Supreme Court of Canada passed up the perfect opportunity to voice its influential opinion on the issue of racial profiling, choosing instead to deliver a judgment largely devoid of “contextual appreciation for the racial

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<sup>330</sup> *Ibid.* at para. 3.

<sup>331</sup> *Ibid.* at para. 34.

<sup>332</sup> *Ibid.* at para. 32.

<sup>333</sup> See generally Tanovich, *The Colour of Justice*, *supra* note 10 at page 137.

<sup>334</sup> (2004) SCC 52, 21 C.R. (6<sup>th</sup>) 1 (S.C.C.) [hereinafter *Mann*].

dimensions of investigative detentions.”<sup>335</sup> A recently-decided quartet of cases,<sup>336</sup> holding *inter alia* that evidence obtained in violation of the *Charter* can be used to convict an accused unless the violation is blatant, seems to confirm the Supreme Court’s lack of attention to, and appreciation of, the legal relevance of race in law enforcement cases.

Although it has been suggested by some that the four recent cases strike a careful balance between the rights of the accused and the public interest in crime prevention and prosecution,<sup>337</sup> in my view, the decisions are troublesome in light of all we know about discriminatory and illegitimate police practices. By sending the message that evidence obtained in violation of the *Charter* may be used to convict an accused under certain circumstances, the change in the law may fuel (or at least fail to sufficiently discourage) police misconduct, including racial profiling. Further, the Supreme Court’s decisions create the possibility that evidence obtained as a result of racial profiling will be deemed admissible. In light of these concerns, it is surprising and deeply worrying that the Supreme Court yet again declined to address the issue of racial profiling when it was presented with the opportunity.

There is another aspect of the decisions that is troubling when examined through a racial lens. In *Grant*, the Supreme Court set out to finish what it started in *Mann* - namely, to clarify when police interactions with the public qualify as detentions under section 9 of the *Charter* - holding that psychological detention occurs when a reasonable person in the subject’s position

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<sup>335</sup> Berger, *Race and Erasure in R. v. Mann*, *supra* note 311 at 2.

<sup>336</sup> See *R. v. Suberu*, (2009) S.C.C. 33. [hereinafter *Suberu*]; *R. v. Shepherd*, (2009) S.C.C. 35; *R. v. Harrison*, (2009) S.C.C. 34 and *R. v. Grant*, (2009) S.C.C. 32. [hereinafter *Grant*].

<sup>337</sup> James Stribopoulos, for example, is of the view that the four decisions are actually a victory for those concerned with civil liberties. See James Stribopoulos, “Friday’s Supreme Court of Canada Judgments: For Civil Libertarians, Like a Breath of Fresh Air,” (20 July, 2009) *The Court*, available online: [www.thecourt.ca](http://www.thecourt.ca). Further, referring to the section 9 aspects, Donald Stuart believes that the Supreme Court “has fashioned a uniquely Canadian, balanced approach of which we should all be proud.” Quoted in Kirk Makin, “Supreme Court rules on tainted evidence,” *The Globe and Mail* July 17, 2009 available online at [www.globeandmail.com](http://www.globeandmail.com).

would conclude that he or she had been detained.<sup>338</sup> The problem here is that what is interpreted as reasonable will likely differ for members of minority groups who, as a result of years of racial profiling and other discrimination, already have a strained relationship with the police and may be considerably more wary or distrustful of their intentions.<sup>339</sup> In *Suberu*, the Court was completely blind to this issue, and yet again, decided the case without any acknowledgement of the social reality of racial profiling.<sup>340</sup>

It is important to emphasize, however, that racial profiling claims are not usually unsuccessful or inadequately responded to because of the courts' blatant inattention to the issue. Rather, lack of evidence and problems with proof are the main reasons why Canada's racial profiling jurisprudence is narrow and limited. The way in which lack of evidence can doom a racial profiling case is exemplified in the following statement by Miller J in *R. v. Roberts*:<sup>341</sup>

There is *no basis* for concluding that Mr. Roberts vehicle was stopped because of racial profiling, and I am satisfied there was no improper purpose in the stop of Mr. Roberts' vehicle...While I accept that Mr. Roberts' race would have been obvious to the officers once his vehicle was stopped, there is *no evidence* upon which the Court could find the actions taken by police were related to Mr. Roberts' race...There is *nothing in the evidence* from which this Court could infer an improper purpose in the police actions.<sup>342</sup>

Unfortunately, Canadian racial profiling jurisprudence is replete with judicial statements along these lines. It is beyond doubt that lack of proof is one of the main challenges for claimants in

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<sup>338</sup> *Grant*, *supra* note 336.

<sup>339</sup> See generally Christopher Bird, "It's Not A Post-Racial World: *R. v. Suberu* and the Failure of Objectivity," (August 14<sup>th</sup>, 2009) *The Court*, available online: [www.thecourt.ca](http://www.thecourt.ca). Bird observes, "the theoretically objective nature of the *Grant* standard is one with the potential to be abused (presumably unintentionally) by judges unwilling or unable to consider that the reasonable person standard, when applied to interactions with the police, *must* address a shift in that standard when accounting for persons of certain races and classes predisposed to not trusting police officers or trusting them less."

<sup>340</sup> *Ibid.* Bird describes the main failure of *Suberu* as "the application of a one-size-fits-all standard that unfortunately appears to be grounded in white privilege. If all that is reasonable when dealing with a police officer is what is reasonable for a white person (or a rich person, for that matter) to believe, then how can it be considered a truly objective standard?"

<sup>341</sup> (2007) 75 W.C.B. (2d) 254 2007 CLB 2578, 55 M.V.R. (5<sup>th</sup>) 238 (Ont. S. C.J.) [hereinafter *Roberts*].

<sup>342</sup> *Ibid.* at paras. 32 and 33. Emphasis added.

racial profiling litigation. Indeed, as I note above, the reason why there were positive findings of racial profiling in *Nguyen* and *Khan* was, in my view, simply because racial profiling was relatively easy to prove and the claims were not overshadowed by alternative explanations. Whereas in *Nguyen* the very act of looking up Vietnamese names amounted to tangible evidence that racial profiling had taken place because it formed the “only” basis for the investigation, in *Khan*, there were clear, discernable inconsistencies in the police testimony that lent support to the allegation of racial profiling.<sup>343</sup> Otherwise put, if the police officers in *Khan* had not blatantly lied and fabricated evidence, or if the officer in *Nguyen* had not *solely* relied on a list based on stereotypes about race and crime and had taken other factors into account in determining how to investigate marijuana grow-up operations, it is doubtful whether racial profiling would have been successfully argued in either case.<sup>344</sup> As I note at several points above, the Canadian courts appear surprisingly reluctant to scrutinize, dissect or challenge the alternative explanations put forth to justify an investigation, stop, search or detention, if they do not perceive the racial profiling to be ‘pure’. The fact that racial profiling claims come to be so quickly and easily overshadowed by alternative explanations seems to imply that the criminal Courts are automatically more willing to accept the testimony of law enforcement officers than that of racialized offenders. The apparent speed and ease with which the judiciary tend to accept the testimony of law enforcement officers over that of racialized accused could either be understood as a manifestation of systemic racism in the criminal justice system, or simply as a sign that the judiciary are heavily influenced by safety and security concerns in criminal cases. Either way, the reality that victims of racial profiling must

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<sup>343</sup> In contrast, the court found that Mr. Khan’s testimony dovetailed exactly with all the other evidence. More specifically, his version of events fitted perfectly with the timing from internal police computer records. See generally *Khan, supra* note 322 at paras. 64 to 69.

<sup>344</sup> In other cases where racial profiling has been successfully argued, evidence of the practice was not quite so obvious but was enough. See for example *R. v. Peck*, (2001) O.J. No. 4581 (S.C.J) and *R. v. Campbell*, (2005) Q.J. No. 394 (Q.C. crim. & pen.).

overcome such a high barrier of proof in order to have their experience taken seriously, reinforces my argument in chapter two that it is extremely difficult for racialized offenders to have their rights properly recognized and effectively responded to in the criminal justice sphere.

The case of *R. v. Greaves*<sup>345</sup> is interesting, however, because it suggests that the courts' unwillingness to deliver findings of racial profiling is not always related to lack of proof. In contrast, the racial profiling argument advanced in this case was unsuccessful because the court allowed an officer to rely in part on his supposition "that the combination of one black and two white males was 'unique'" in that area.<sup>346</sup> This belief was relied upon in the absence of other evidence suggesting that the individuals targeted were implicated in the reported incident,<sup>347</sup> and despite the fact that the accused did not match the description of the suspect originally provided to the officer by the police dispatcher. Proof was not an issue because the officer in question freely admitted that he relied on the belief that it was unusual to see a black man in the company of a white man in that particular area. This case demonstrates that even with proof of racial profiling - in this case an explicit statement by the officer - there are some circumstances where the Canadian courts are sometimes willing to overlook the damaging effects of systemic racism and turn a blind eye to discriminatory law enforcement practices. Also, it is significant to note that *Greaves* forms part a wider judicial trend whereby the Canadian courts have accepted race and suspect descriptions in policing as legitimate.<sup>348</sup> It is an example of a case in which the lack of a working

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<sup>345</sup> (2004), 24 C.R. (6<sup>th</sup>) 15, 189 C.C.C (3d) 305, 322 W.A.C. 31 (B.C.C.A). [hereinafter *Greaves*].

<sup>346</sup> *Ibid.* at para. 42.

<sup>347</sup> See Tim Quigley, "Annotation" (2004) 24 C.R. (6<sup>th</sup>) 17.

<sup>348</sup> In *R. v. Smith*, (2004) 26 C.R. (6<sup>th</sup>) 375 (Ont. S.C.J.) the trial judge stated at para. 36:

The use of race as a descriptor of an individual or group of individuals, where there are other reasons to differentiate or select on the basis of race, may or may not contravene the principles of fundamental justice. This will depend on whether there are legitimate reasons which arise from the combination of race and other factors which make it legitimate to use race as a descriptor in the course of selecting a person, or groups of persons, for scrutiny. An obvious example would be where the victim of a crime describes the perpetrator in part by reference to the perpetrator's race.

definition of racial profiling led a court to conclude that the officer's actions did not amount to racial profiling.

A clear picture of how racial profiling is currently handled and understood in the Canadian courts should now be beginning to appear. And already we are beginning to see that the conceptual tensions exposed in chapter two only partially explain the racial profiling/section 15 paradox. Through drawing attention to the most important cases and significant moments in racial profiling's brief Canadian legal history, I have pointed to several clear, discernable trends in the jurisprudence that enhance our understanding of the relationship between racial profiling and section 15. Broadly speaking, the phenomenon of racial profiling seems to be something the courts are willing to condemn in theory but far less willing to deal with in practice. Whereas the Supreme Court apparently wants to avoid the issue altogether, the lower courts are still fumbling in the dark and are rarely willing to conclude that racial profiling directly led to a police decision to detain or investigate. To make matters worse, courts at all levels are attempting to adjudicate discriminatory law enforcement claims without a solid, unified and workable definition of racial profiling.

At this point, arguments maintaining that racial profiling is better dealt with under other constitutional provisions are unconvincing. To the extent that racial profiling has been dealt with under sections 7, 8, or 9 of the *Charter*, the issue has generally been accompanied by a string of unsuccessful racial profiling arguments. Allegations of profiling are rejected in court either due to lack of evidence, where race was only part of the reason why the police made a decision to investigate or intervene or, as was the case in *Greaves*, where a court simply does not believe that the use of race in policing constituted racial profiling. Overall, it is abundantly clear that racial

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See also *R. v. Clayton* (2005) 194 C.C.C. (3d) 289 (Ont. CA). Further, see Tanovich, *The Colour of Justice*, *supra* note 10 at 159. Here Tanovich argues that *Mann*, *supra* note 334, "tacitly approves the use of race when tracking a known suspect."

profiling has been dealt with unsatisfactorily in Canada, and that it is a difficult problem to address in the courts, regardless of what legal route is taken. The trend in the jurisprudence whereby racial profiling is found to offend *Charter* rights only if it is ‘pure’ is concerning because, in a heavily regulated states such as Canada, situations where there isn’t *some* plausible alternative explanation, are extremely rare. For this reason, it is unfortunate that the judiciary is not more skeptical of police evidence, and more willing (or able) to see the broader social context in which decisions to investigate, stop, arrest or detain an individual are made, and the equality implications of these decisions.

Although this chapter is beginning to reveal that there are practical as well as conceptual tensions that underlie the racial profiling/section 15 paradox, it is important to emphasize that the observations made in this chapter corroborate my findings in chapter two in several ways. First and foremost, my analysis of racial profiling jurisprudence has confirmed that the criminal justice system is often unresponsive to claims by offenders who are racialized, particularly those who simultaneously embody the role of offender and victim. Notably, *Mann* and the recent quartet of cases decided by the Supreme Court are emblematic of a judicial lack of interest or appreciation for how race can dramatically affect the legal treatment one receives at all stages of the criminal justice process. Moreover, the power and influence of the norm of security in the criminal justice sphere, explored in detail in chapter two, is likely another reason why the Courts appear more inclined to believe alternative explanations provided by the police in the face of racial profiling allegations.

At this stage, however, it is still unclear whether the dearth of racial profiling findings is specifically linked to current legal standards. Referring to racial profiling litigation under section 9 of the *Charter*, Tanovich argues that there are inherent limits to current *Charter* standards, and that

ultimately it is safe to conclude that these standards have little impact on deterring racial profiling or offering redress to its victims.<sup>349</sup> Tanovich points out that there are practical, doctrinal and theoretical limits to section 9, including the narrow detention approach under section 9,<sup>350</sup> lack of judicial review of police stops<sup>351</sup> and the burden on victims of racial profiling to prove a section 9 violation on a balance of probabilities.<sup>352</sup> The question thus arises as to whether section 15 would be more effective at dealing with racial profiling. Would adopting new or enhanced constitutional standards involving Canada's equality provision be a way to break from the current rut in which racial profiling claims are, more often than not, doomed to failure? In the next part of this chapter, I analyze the role section 15 has played in racial profiling litigation thus far, and speculate as to whether increased reliance on the provision could bring anything new, different or valuable to the constitutional table, or whether section 15 also offers little to racial profiling victims. Ultimately, we will see that there are various practical and doctrinal problems with section 15 that parallel, and sometimes intertwine with, the conceptual tensions exposed in chapter two.

## PART II: THE CURRENT AND POTENTIAL ROLE OF SECTION 15 IN RACIAL PROFILING LITIGATION

### a) *The absence of section 15*

Ironically, one of the only recent references to Canada's equality guarantee in Canadian racial profiling jurisprudence is a statement by Westmoreland-Traoré J in *Campbell*<sup>353</sup> that section 15 has been underutilized in racial profiling cases. Indeed, since section 15 of the *Charter* came

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<sup>349</sup> Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-based Conception of Arbitrary Detention," (2002) 40:2 *Osgoode Hall Law Journal* 145 at 175.

<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.* at 176.

<sup>353</sup> *Campbell*, *supra* note 344 at paras. 25-36.

into force in 1985, the courts have shown resistance to attempts to use the provision as protection against discriminatory law enforcement.<sup>354</sup> On a few occasions, courts have initially appeared open to such attempts, only for the equality challenge to fail following limited discussion or analysis. In *R. v. Smith*,<sup>355</sup> for example, the Nova Scotia Court of Appeal recognized the trial judge's assertions that "s. 15 protection includes inequality in the administration of law by police or prosecutors"<sup>356</sup> only to later quickly dismiss the section 15 challenge.<sup>357</sup>

In *R. v. White*,<sup>358</sup> it was alleged that the police had engaged in gender discrimination in their enforcement of street prostitution laws. This case represents another unsuccessful claim of discriminatory law enforcement under Canada's equality guarantee. *White* affirms that the courts not only have difficulty dealing with claims of racial profiling under section 15, but also with any claim of discrimination in the law enforcement context. The more recent Supreme Court decision in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*<sup>359</sup>, suggests something different, however. In holding that custom officials had discriminated on the grounds of sexual orientation by adopting a stricter attitude to the importation of homosexual erotic material than heterosexual erotic material, Canada's highest court signalled that it may be responsive to claims of racial profiling and capable of recognizing the damaging effects of the practice.<sup>360</sup> With this decision, *Little Sisters* laid down a seed with the potential to grow into a helpful precedent in racial profiling jurisprudence. Yet, as is discussed below, *Little Sisters* simultaneously hardens the judicial ground against that growth.

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<sup>354</sup> See *Paul Magder Furs Ltd.* (1989), 49 C.C.C. (3d) 267 (Ont. C. A.) and *Bridges* (1989), 58 C.C.C. (3d) 1 (B.C.S.C.).

<sup>355</sup> (1993), 23 C.R. (4<sup>th</sup>) 164 (N.S.C.A.).

<sup>356</sup> Stuart, *Charter Justice in Canadian Criminal Law*, *supra* note 4 at 445.

<sup>357</sup> The claim in *Smith* arose out of several days of racially motivated fights at a high school. The Court of Appeal concluded that there was no evidence of discrimination in the police investigation or prosecutions. See generally *ibid.*

<sup>358</sup> (1994), 35, C.R. (4<sup>th</sup>) 88 N.S.C.A. [hereinafter *White*].

<sup>359</sup> (2000), 2 S.C.R. 1120, 2000 SCC 69 [hereinafter *Little Sisters*].

<sup>360</sup> Choudhry, *Protecting Equality in the Face of Terror*, *supra* note 12 at 371.

*b) The practical potential of section 15*

Lack of precedent has not dissuaded academics from arguing that section 15 can, and should, occupy a more active and prominent position in racial profiling jurisprudence. Whereas some have proposed that section 15 principles be used to inform current litigation standards under section 9 in order to bring the discriminatory effects of profiling more clearly into light, others have argued that racial profiling should be dealt with directly under section 15. As both legal routes would be available to a racial profiling victim post-9/11, both are worthy of consideration here. Still, it is important to bear in mind that the preferable legal path may be different for a victim of post-9/11 racial profiling than for a victim of racial profiling in another context. Because racial profiling post-9/11 is distinctive in nature, it may require a different legal response.

**(i) Enhanced litigation standards involving section 15**

According to Tanovich, there are several reasons why racial profiling should not be directly scrutinized under section 15. He rightly notes that section 15 has proved to be one of the most challenging *Charter* provisions to apply,<sup>361</sup> acknowledges the lack of equality jurisprudence in the criminal justice context that I highlight in chapter two,<sup>362</sup> and points to the fact that an accused person would require considerable resources in order to mount a section 15 claim.<sup>363</sup> Nevertheless, Tanovich argues that incorporating an equality-orientated analysis into the interpretation of section 9 using section 15 principles would encourage the Canadian courts to deal with racial profiling in a more fair and effective manner.<sup>364</sup> Tanovich posits that this approach would draw attention to the salience of race in traffic stops and investigative detentions

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<sup>361</sup> Tanovich, *Using the Charter to Stop Racial Profiling*, *supra* note 349 at 177.

<sup>362</sup> *Ibid.*

<sup>363</sup> *Ibid.* at 178

<sup>364</sup> *Ibid.*

and ensure that “the courts become more alive and sensitive to the concerns of visible minorities.”<sup>365</sup> In other words, enhanced litigation standards involving section 15 would challenge the seeming judicial inattentiveness to the relevance of race in law enforcement, discussed earlier in this chapter.

Although four new equality standards are proposed by Tanovich,<sup>366</sup> perhaps the most significant and convincing of these involves the shifting of the evidentiary burden to the Crown under section 9.<sup>367</sup> Requiring the Crown to establish that a vehicle stop or investigation was not motivated by race would likely minimize the difficulty with proof that plagues so many racial profiling cases because discriminatory intent on the part of the police - which is often so hard to prove because of the unconscious and systemic nature of racism - would be presumed.<sup>368</sup> It is difficult to see how this could be anything other than a positive development in racial profiling jurisprudence. Nevertheless, it is important to recognize that there are limits attached to an equality-infused approach to section 9. Most notably, this new constitutional standard would only come into play if section 9 applied in the first place.<sup>369</sup> In a claim of racial profiling post-9/11, the context may or may not give rise to a section 9 claim. Consider, for example, if an allegation of racial profiling arose in similar circumstances to those in *Nguyen*, that is, if security or law enforcement officials targeted Muslim and Arab men for investigation on the basis of their names. In such circumstances, section 9 would not apply. In contrast, a direct legal challenge under section 15 should (at least in theory) always be available to a racial profiling victim, regardless of the context.

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<sup>365</sup> *Ibid.* at 179.

<sup>366</sup> See generally *ibid.* at pages 180-185.

<sup>367</sup> *Ibid.* at 180.

<sup>368</sup> *Ibid.*

<sup>369</sup> Tanovich himself acknowledges this limit. *Ibid.* at 178.

**(i) Racial profiling claims directly under section 15**

At the most basic level, it can be argued that section 15 is the correct legal path to take because racial profiling is, at its core, an equality issue.<sup>370</sup> As racial profiling in the ‘war on terror’ triggers heightened and complex equality concerns, it seems especially logical that section 15 should play a role in addressing racial profiling in the post-9/11 context. Further, it is possible that the framing of a racial profiling claim under section 15 would have the consequence of crystallizing racial profiling as an equality issue, thus drawing more widespread and public attention to the practice and the damaging effects that result from it. I suggest that because equality holds status as a special and meaningful constitutional right that reflects Canadian society’s fundamental dreams, hopes and aspirations,<sup>371</sup> a finding of racial profiling directly under section 15 would have more symbolic and far-reaching consequences than a finding under sections 7, 8 or 9 of the *Charter*. At present, the legal status quo for dealing with racial profiling is not only ineffective, but it appears to completely circumvent the gravamen of the problem. A finding of racial profiling under section 15, on the other hand, would have tremendous expressive force, underscore the unacceptability and heinous nature of the practice, and thus signal that there is an urgent need to address the problem.

Unfortunately, at the same time as being the most potentially rewarding, influential and valuable constitutional right, equality is perhaps the most difficult and confusing right to apply.<sup>372</sup> Indeed, if racial profiling was directly scrutinized under Canada’s equality guarantee, several practical and doctrinal issues would arise that could potentially jeopardize the section 15 claim. In

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<sup>370</sup> As Tanovich observes, section 15 “would appear to be the logical place to address racial profiling since the practice squarely raises the equality concerns of discriminatory treatment, disproportionate burdens, and intrusions on human dignity.” Tanovich, *Using the Charter to Stop Racial Profiling*, *supra* note 349 at 177.

<sup>371</sup> See *Vriend*, *supra* note 222.

<sup>372</sup> See for example Beverly McLachlin, “Equality: The Most Difficult Right” (2001) 14 S.C.L.R. (2d).

the post-9/11 climate, in which the moral status of racial profiling is contested and the lines between race and religion are blurred, it is likely that these issues would be more numerous and acute. Rather than provide a full and technical section 15 analysis of post-9/11 racial profiling, in the next section I focus on what I consider to be the most interesting issues likely to arise under a section 15 analysis of racial profiling. This analysis will yield new explanations for the racial profiling/section 15 paradox.

*c) The hurdles of section 15*

**(i) The section 15 test**

At present, the test for determining whether there has been a section 15 *Charter* violation is in a state of flux. In *Kapp*, the Supreme Court took a step back from the three-step test it established in *Law*,<sup>373</sup> acknowledging the downfalls of a dignity-orientated analysis and retreating back to the two-part test established in *Andrews*.<sup>374</sup> Unfortunately, *Kapp* left many questions unanswered and failed to give the lower courts clear direction as to how future section 15 claims should be dealt with. Following the decision, section 15 cases heard by the lower courts suggest that *Kapp* has had little effect, other than to re-formulate the section 15 test as a two-part instead of a three-part test.<sup>375</sup> In attempting to determine whether discrimination has taken place, these cases

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<sup>373</sup> *Law*, *supra* note 231 at para. 88. The *Law* test involves three questions: (1) Does the impugned law draw a distinction? (2) Is the distinction drawn on an enumerated or analogous ground? (3) Is the distinction discriminatory? It is the third part of the *Law* test that is the most important. The Supreme Court in *Law* identified four principal contextual factors to consider during analysis at this third step. The factors are (i) evidence of pre-existing disadvantage, prejudice or stereotype; (ii) whether the impugned legislation takes into account the claimant's actual situation, capacity or need; (iii) whether the impugned legislation sets out an ameliorative programme; (iv) the nature and scope of the interest involved.

<sup>374</sup> In *Andrews*, *supra* note 6, the court formulated the following two-step test for determining whether or not discrimination occurred: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

<sup>375</sup> See for example *Hartling v. Nova Scotia (Attorney General)*, (2009) NSSC 2 at para. 17; *Withler v. Canada (Attorney General)*, (2008) BCCA 539 at para. 155; *Confédération des syndicats nationaux v. Québec (Procureur général)*, (2008) QCCS 5076 at paras 326-27; and *Downey v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, (2008) NSCA 65.

continue to refer to the concept of dignity and continue to apply *Law*'s four contextual factors. In this way, post-*Kapp* cases exemplify the persistent application of the 'actual' logics of section 15 in Canadian equality jurisprudence.

In the recent case of *Ermineskin Indian Band and Nation v. Canada*,<sup>376</sup> however, the Supreme Court carried out a section 15 analysis as if *Law* never existed and relied solely upon *Andrews* and *R. v. Turpin*<sup>377</sup> in assessing whether there was a section 15 violation. The lack of reference to *Law*'s contextual factors or the concept of dignity sends a clear message to the lower courts that *Law* is no longer the leading section 15 case.<sup>378</sup> In sending this message, the Court seemingly distanced itself from the formal, dignity-focused, individualistic 'actual' logics of section 15. Yet it has been argued that the decision in *Ermineskin* is unsatisfactory in several ways. Commenting on the case, Jonnette Watson Hamilton and Jennifer Koshan point out that the Court does not in fact reiterate or affirm its commitment to substantive equality (as it did in *Kapp*) and appears to narrow the analytic focus to whether discrimination was the result of prejudice and stereotyping.<sup>379</sup>

Coupled with a lack of doctrinal guidance by the Court, Hamilton and Koshan contend that the decision in *Ermineskin* may cause the lower courts to "fixate on the words 'prejudice and stereotyping' as a complete statement of the harms the substantive equality prohibits,"<sup>380</sup> thus deflecting attention away from the other harms stemming from discrimination. Further, Hamilton and Koshan highlight that the Court completely bypassed the issue of grounds in *Ermineskin*, neither commenting on the relationship between the grounds violated and the discrimination

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<sup>376</sup> (2009) S.C.C. 9. [hereinafter *Ermineskin*].

<sup>377</sup> (1989) 1 S.C.R. 1296.

<sup>378</sup> See Jonnette Watson Hamilton & Jennifer Koshan, "The End of Law, A New Framework for Analyzing Section 15 (1) Challenges," (April 15th, 2009) *The Court*, available online: [www.thecourt.ca](http://www.thecourt.ca).

<sup>379</sup> *Ibid.*

<sup>380</sup> *Ibid.*

suffered, nor addressing the role of comparator groups in section 15 analyses.<sup>381</sup> Viewed from this angle, *Ermineskin* has simply resulted in more confusion over how discrimination under section 15 should be properly scrutinized; a fact that may deter a victim of discrimination from using the provision in the first place. Yet strangely, from a racial profiling perspective, the shift in *Ermineskin* towards the language of prejudice and stereotyping may actually prove helpful to victims of discriminatory law enforcement. If one understands the link between racial profiling, prejudice and stereotyping to be the very essence of what makes racial profiling discriminatory and objectionable, it is probable that a narrow, prejudice-centred, stereotype-focused analysis would actually work in favour of a section 15 racial profiling claimant. On the other hand, there is very little guarantee that the Supreme Court will continue to apply the approach followed in *Ermineskin*. With respect to the section 15 test, the only thing that is certain is that it is prone to change in some way. Thus, despite the fact that the language of prejudice and stereotyping is *exactly* the type of language one would hope was prevalent in a racial profiling case, I maintain that the lack of clarity surrounding the section 15 test is one issue a racial profiling victim would face if they chose to make a claim of discrimination under Canada's equality provision.

### **(ii) Enumerated or Analogous Grounds and Intersectionality**

Whether a court chose to apply the three-step *Law* test or the two-step test articulated in *Andrews*, a claimant would be required to show that they belong to a class either listed in, or analogous to, section 15. Typically this requirement is fulfilled with little difficulty. In the context of racial profiling post-9/11, on the other hand, it is possible that the racialization of religion (discussed in chapter one) would make it less straightforward for a victim to frame a claim. This is because the racialization of religion can operate to obscure the motivating factor

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<sup>381</sup> *Ibid.*

behind a discriminatory act. If the true or exact nature of the discrimination is concealed, then a barrier may be constructed against a section 15 claimant who may not know whether it is their racial or religious equality (or both) that has been violated by an act of profiling.

My point is not that the courts are always incapable of responding to claims that involve discrimination on more than one ground (indeed, the Supreme Court made it clear in *Law* that a claimant can articulate their discrimination claim under one or more grounds),<sup>382</sup> but simply that the inability to pinpoint the exact motivation behind a discriminatory act may make it more difficult to make a clear, concise, specific and effective equality argument under section 15. It is also worth noting that questions relating to intersectionality could arise if contemporary racial profiling was examined under section 15, as in many circumstances it is likely that an individual will have been subject to racial profiling on the basis of both their race and religion.<sup>383</sup> Given the courts' difficulties with intersectionality in other contexts,<sup>384</sup> it is worth questioning whether the judiciary would be able to respond effectively and meaningfully to the intersection of race and religion in this unique time in history. It is certainly possible that this problem would contribute to

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<sup>382</sup> *Law*, *supra* note 231 at para. 523.

<sup>383</sup> And as I noted in chapter one, there are several other grounds on which an individual's equality can be violated by an act of racial profiling post-9/11. Because of the space where post-9/11 racial profiling takes place, and because of the interests at stake, equal rights on grounds of citizenship, ethnicity and nationality may also be at issue here.

<sup>384</sup> See generally Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15," (2006) 24 *Windsor Year Book of Access to Justice* 111 at 132-134 for an example of the Supreme Court's difficulty dealing with claims where there are intersecting personal characteristics resulting in unequal treatment. Here, Gilbert and Majury (at footnote 73) define intersectional analysis in the following terms: "Intersectional analysis is based on the recognition that an individual's experiences are based on multiple, intersecting identities. While these multiple identities can be linked to more than one ground of discrimination, the experiences that flow from them cannot be assigned to a single or even multiple grounds." Gilbert and Majury use the case of *Falkiner v. Ontario (Director, Income Maintenance Branch, Ministry of Community and Social Services)* 212 D.L.R. (4<sup>th</sup>) 633, 59 O.R. (3d) 481 to highlight the Supreme Court's problems with intersectionality. In this case, the claimants' characteristics were treated as "severable and unrelated" by the Court. For an excellent paper dealing with issues of intersectionality in Canadian Human Rights cases please see *Ontario Human Rights Commission*, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims", Discussion Paper, Policy and Education Branch (2001). Available online: <http://www.ohrc.on.ca/English/publications>]. Pages 16-18 provide a summary of how the Supreme Court of Canada has articulated intersectionality claims.

section 15's uselessness with respect to racial profiling claims.

### (iii) Stereotyping and statistical generalizations

At first sight, the centrality of stereotyping to both the *Andrews* and *Law* tests suggests that racial profiling (in any context) would be effectively dealt with under section 15. More specifically, by using race or religion as a proxy for risk, contemporary profiling of Arabs and Muslims clearly relies on a stereotype that certain groups are predisposed to committing acts of terrorism and therefore strikes at the heart of section 15. However, despite strong judicial statements against stereotyping, *Law* and *Little Sisters* somewhat paradoxically leave room for an argument that not all stereotyping violates section 15. Read together, these cases suggest that an act of profiling may not be discriminatory if it is based on an “informed statistical generalization.”<sup>385</sup> This inconsistency creates the possibility for the government to argue that racial profiling in the ‘war on terror’ is based upon evidence that Arabs and Muslims are statistically more likely to be involved in terrorist activity, and that it is therefore acceptable. Such an argument would be concerning not only because it potentially jeopardizes a claim of racial profiling under section 15, but because it would be out of place. The Supreme Court’s early section 15 jurisprudence was clear that analysis of whether discrimination has occurred should focus solely on the experience of the claimant and that justificatory arguments and balancing of interests should be reserved for analysis under the *Charter*’s reasonable limits

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<sup>385</sup> Although the court in *Law* placed limits on its statement that distinctions drawn on the basis of “informed statistical generalizations” would not be regarded as discriminatory if they are linked to the actual need of the claimant, the court cast doubt on the meaning and extent of these limits in *Little Sisters*. In this case, despite finding that customs officials had discriminated on the grounds of sexual orientation by adopting a stricter attitude to the importation of homosexual erotic material than heterosexual erotic material, the majority later stated that the actions of the Customs agents would have been constitutional had they been based on ‘evidence that homosexual erotica is proportionately more likely to be obscene than heterosexual erotica’. In other words, the profiling would not have been discriminatory if it had been based on statistical evidence. For careful elaboration of this point see Choudhry, *Protecting Equality in the Face of Terror*, *supra* note 12 at 375.

clause, section 1.<sup>386</sup> Unfortunately, the importation of justificatory arguments directly into section 15 has been another worrying trend in Canadian equality jurisprudence and a considerable source of criticism.<sup>387</sup>

#### **(iv) Section 1 and national security concerns**

Even if racial profiling in the post-9/11 (or racial profiling in any context) was found to be discriminatory under section 15, it could still be justified by the government under section 1 of the Charter.<sup>388</sup> As Choudhry and others have noted, several difficult issues would arise at this stage.<sup>389</sup> These would include whether the racial profiling was prescribed by law; whether racial profiling minimally impairs the right to equality; whether there is a rational connection between profiling and the prevention of terrorism; and whether there is a pressing and substantial legislative objective attached to profiling. With respect to this latter issue, the Canadian government would undoubtedly argue that their objective is to prevent future acts of terrorism (thus protecting its citizens from heinous acts of mass murder) and to punish those who support or carry out such acts. With an objective this pressing, the rights of minorities are easily obscured. As was shown in chapter two, as the stakes go up for both society and offender, the demand for security, public safety and punishment will almost always trump the demand for

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<sup>386</sup> See *Miron v. Trudel* (1995) 2 S.C.R. 418.

<sup>387</sup> See generally Sheilah Martin, “Balancing Individual Rights to Equality and Social Goals,” (2001) 80 *Canadian Bar Review* 299 and Marissa Olanick, “Reconsidering Kapp – An Unintended Barrier to Future Equality Claims” (August 7<sup>th</sup>, 2009) *The Court*, available online at [www.thecourt.ca](http://www.thecourt.ca), criticizing *Kapp* for failing to address such criticisms.

<sup>388</sup> Section 1 of the *Charter* provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The test for section 1 was established in *R. v. Oakes* (1986) 1 S.C.R. 103. Under this framework, the government must prove on a balance of probabilities that the relevant law’s objective is sufficiently pressing and substantial to override the constitutional right, and also that the means chosen to limit the right are proportionate to the law’s objective.

<sup>389</sup> Choudhry, *Protecting Equality in the Face of Terror*, *supra* note 12 at 378 and Bhabha, *supra* note 17 at 123-133.

equality. In the next part of this chapter, I analyze several recent minority rights cases that have underscored how dangerous section 1 of the *Charter* can be in the current climate focused on safety and security.

The normative shift in the racial profiling debate may also affect how racial profiling is dealt with under section 1. In chapter one, I demonstrated that the movement to justificatory arguments in racial profiling discourse has been widespread, pervasive and fuelled by a powerful phenomenon: the racialization of religion. The increasingly dominant perception that racial profiling is a legitimate and defensible practice may, at best, lend support to the government's case that racial profiling is justified on grounds of safety and security and, at worst, fail to weaken or sufficiently challenge arguments that excuse or rationalize the practice. Further, it seems equally possible that the normative shift could work against section 15 claimants and impact how a racial profiling claim is dealt with before it even reached the section 1 stage. The movement away from whether a discriminatory act of racial profiling actually took place directly towards whether the act is justified immediately opens a door for the government to justify its action and deflects attention away from the experience of the claimant. This is a worrying prospect because, as I note above, the injection of justificatory arguments into section 15 is problematic and likely one reason why so few section 15 cases have been successful before the Supreme Court.

We now have several new explanations for the racial profiling/section 15 paradox. It is becoming evident that the conceptual tension between the logics of equality and the nature of the criminal law is only one piece of the puzzle as to why victims of contemporary racial profiling are offered so little by Canada's equality guarantee, despite the fact that racial profiling squarely raises grave and complex equality concerns. This chapter has revealed that, largely because of issues with proof - the Canadian courts have difficulty clearly understanding and positively responding to

racial profiling regardless of the factual context given or the legal avenue taken. Furthermore, there is little precedent for section 15 being used in racial profiling cases and, if a profiling claim were to be examined directly under the provision, several difficult issues would arise under a section 15 analysis that could be detrimental or fatal to a racial profiling claim. These issues are exacerbated due to both the normative shift and the racialization of religion explored in chapter one. There is, however, another trend in Canadian constitutional law that further explains why section 15 cannot effectively deal with contemporary racial profiling. Over the years it has become apparent that questions relating to racial and religious equality *of any nature* are noticeably absent in section 15 jurisprudence. However, despite the dearth of direct discrimination claims under section 15, the language used, and the stories told, by the Supreme Court in other contexts tell us that racial and religious discrimination are understood in very particular and distinctive ways. Thus, we can draw many conclusions about how racial and religious equality are legally understood in Canada simply by looking to other places in the Supreme Court's jurisprudence. The pervasiveness of the discourse of choice, in addition to the discourse of safety and security in recent Supreme Court decisions, are especially interesting and revealing.

### PART III: RACIAL AND RELIGIOUS DISCRIMINATION AND CHOICE UNDER SECTION 15

#### *a) Racial discrimination under section 15*

Although section 15 has fallen short of expectations on many levels, in many ways, and for many different equality seeking groups, nowhere is its lack of success more striking than in matters relating to racial discrimination. Thus far, section 15 has done very little to promote, redress or remedy racial equality issues, regardless of the context. Indeed, it was not until *Kapp*

in 2008, a challenge against a British Columbia program that issued a communal fishing licence to three Aboriginal bands, that the Supreme Court faced its first direct claim of racial discrimination under section 15. Yet, regrettably, *Kapp* tells us little about how the Supreme Court understands racial discrimination and offers few clues as to how a future claim would be dealt with. This is not only because other enormously important legal questions were at issue in the case - such as whether the program was protected by section 15(2) of the *Charter*,<sup>390</sup> the ambit and operation of section 15(2)<sup>391</sup> and whether section 25 of the *Charter* served to insulate the program from a charge of discrimination<sup>392</sup> - but because the claim of racial discrimination was made by a group of mainly White fishermen *against* a racialized minority. Therefore, although *Kapp* is a watershed case for other reasons, it is not reflective of how one might expect a racial discrimination claim to typically arise, or to be framed. Yet, sadly, *Kapp* is very much typical in that it does not reflect *why* Canada has a constitutional provision that protects against discrimination based on race in the first place. The case is also typical in that it reveals very little about how or whether the Supreme Court understands the idea of systemic racism and its relationship to acts of discrimination.

Although there are no other cases in which race discrimination has been directly analyzed under section 15, there are several cases in which section 15 is referred to, if only tangentially.<sup>393</sup> These include *R.D.S* and *R. v Williams*.<sup>394</sup> In *R.D.S*, the issue facing the Supreme Court was whether a trial judge was influenced by a reasonable apprehension of bias in her decision to acquit a Black accused. The allegation of bias stemmed from Justice Sparks' claims that there was a history of racism in law enforcement practices and that police officers were prone to

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<sup>390</sup> *Kapp*, *supra* note 234 at paras 27-61.

<sup>391</sup> *Ibid.*

<sup>392</sup> *Ibid.* at paras 62-122.

<sup>393</sup> See Jai & Cheng, *supra* note 20 at 126-128.

<sup>394</sup> (1998) 1 S.C.R. 1128 [hereinafter *Williams*].

overreaction when dealing with non-White groups.<sup>395</sup> Speaking for the majority that narrowly held that Justice Sparks's comments did not raise a reasonable apprehension of bias, McLachlin J stated that section 15 should be used by the Court to assess the standards of reasonableness.<sup>396</sup> Similarly, in *Williams* - in which the central legal issue was whether prospective jurors can be questioned about their possible racial bias - McLachlin J stated that section 15 should be used as an interpretative guide to section 11(d) of the *Charter* which guarantees the accused's right to an impartial jury.<sup>397</sup> As in *R.D.S.*, section 15 is only mentioned tangentially in *Williams*.

Thus, although *R.D.S.* and *Williams* are encouraging decisions insofar as they suggest that the Supreme Court is able and willing to recognize systemic inequality in some circumstances,<sup>398</sup> their brief and cursory mention of section 15 also suggests that Canada's equality guarantee is not the preferred, necessary or correct legal path to take in order to have a claim of racial inequality properly recognized and remedied. This insight is lent support by the fact that there are other seemingly quintessential racial equality cases in which section 15 is either not mentioned *at all*,<sup>399</sup> or in which the courts decide to sidestep or ignore the section 15 question.<sup>400</sup> Although the tense and conflicting relationship between equality and the criminal justice system may partially explain why section 15 is invisible in *criminal* cases (and virtually invisible in *R.D.S.* and *Williams*), the fact that section 15 is rarely invoked in *any* case of race discrimination, suggests that something else is at play.

Why, then, has section 15 so rarely been used as a tool by those seeking racial equality? Before turning to consider a number of relatively recent explanations for why race discrimination

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<sup>395</sup> See *R.D.S.*, *supra* note 221 at para. 74.

<sup>396</sup> *Ibid.* at para. 46.

<sup>397</sup> *Williams*, *supra* note 394 at para. 48.

<sup>398</sup> Jai and Cheng, *supra* note 20 at 127-128.

<sup>399</sup> See for example *R. v. Spence* (2005) 3 S.C.R. 458.

<sup>400</sup> See for example *Ferrel v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97 (C.A.).

cases are infrequently dealt with under section 15, it is necessary to say a word about the historical relationship between race and the law in Canada, as this relationship has undoubtedly shaped how race discrimination is understood and addressed today. As Joanne St. Lewis writes:

Through the doctrine of precedent, the law is rooted in the past. It becomes difficult to envision a racism-free jurisprudence when the law relies upon concepts derived from a time when chattel slavery existed, women were not persons, and colonization, including the theft of aboriginal lands, was in full force. We have not yet had an acknowledgement of this conceptual taint, much less an attempt by the courts to revitalize the law within an anti discriminatory framework. Legal precedents cannot transcend this racist history. It is one of the primary, yet invisible, obstacles within the legal system.<sup>401</sup>

Several commentators have claimed that the notion that racism is not, and never has been, a serious problem in Canadian society, is a popular myth that directly affects how racial discrimination is dealt with in Canada. The result of the pervasiveness of this myth, Brown and Brown argue, “has been the frustratingly slow and inadequate response of Canadian governments, institutions, and other organizations to racist laws, policies, and practices.”<sup>402</sup> Regrettably, the somewhat romantic perception that Canada is multicultural, tolerant and egalitarian has prevailed in spite of plentiful evidence that racism, and indeed other forms of prejudice, are deeply embedded in Canadian society. Indeed, in searching for answers as to why race has been invisible under section 15, we must not forget that throughout the twentieth century, the Supreme Court played a role in supporting and perpetuating racism. Consider *Christie v. York Corporation*<sup>403</sup> a 1940 case in which the Supreme Court held that discrimination was legal in Canada absent any positive law forbidding it, and *Noble Wolfe v. Alley*,<sup>404</sup> a 1951 case involving a Canadian Jew who was denied the right to purchase property because of a covenant preventing owners from selling to Jews. These examples serve as stark reminders that,

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<sup>401</sup> Joanne St. Lewis, “Racism and the Judicial Decision-Making Process,” in Carl E. James, ed., *Perspectives on Racism and the Human Services Sector: A Case for Change* (Toronto: University of Toronto Press, 1996) at 106.

<sup>402</sup> Rosemary Brown & Clela Brown, “Comments: Reflections of Racism,” in Carl E. James, *ibid.* at 48-49.

<sup>403</sup> (1940) S.C.R. 139.

<sup>404</sup> (1951) 92. S.C.R. 64.

until relatively recently, the Supreme Court of Canada was “legitimizing racial categories and maintaining barriers among them.”<sup>405</sup> It is also important to remember that, compared with the United States, Canada was relatively late in putting in place constitutional or statutory mechanisms that enabled racial minorities to seek legal redress from discrimination.<sup>406</sup> History therefore warns us that it is erroneous to put Canada on a pedestal when attending to questions about the intersection of law and race.

The fact that legal developments aimed at combating discrimination are fairly new in Canada forms a crucial backdrop to the question of why racial equality seekers have not been able to make extensive use of section 15 as a litigation tool. Of course, legal and human rights developments and increased judicial sensitivity to issues of racism have still not resulted in the eradication of racism altogether. Rather, such developments have been paralleled by the creation of more subtle forms of discrimination and the concealment of racism. Because racial discrimination is now commonly perceived to be a reprehensible and heinous form of discrimination, outright and explicit displays of racial prejudice are increasingly rare. Not only are individuals unlikely to explicitly state that they are treating someone differently because of their race, but governments are extremely unlikely to draw explicit distinctions based on racial grounds. As I have explained at several points above, the subconscious and invisible nature of racism makes it very difficult for individuals (whether victims of the discrimination or witnesses to it) to prove that a specific act was motivated by racist beliefs. Often suspicion or a gut-feeling is the only proof there is. The inherent difficulty in proving racial discrimination is a rather obvious reason why section 15 has not done more to advance racial equality. Although it is

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<sup>405</sup> James Walker, “Race”, *Rights and the Law in the Supreme Court of Canada* (Ontario: The Osgoode Society, 1997) at 302.

<sup>406</sup> Aylward, *supra* note 205 at 81-82.

fortunate that Canadian discrimination law has adopted an adverse affects doctrine so that claimants are not required to establish discriminatory intent, it is important to note that it is also challenging to prove that a law, policy, practice or system has a discriminatory effect.

Aside from inherent difficulties with proof, there are several other reasons why section 15 has been underutilized in the race discrimination context. As Julie Jai and Joseph Cheng highlight, one such reason is that discrimination based on race (sometimes even when a government party is involved) is “for reasons of jurisdiction, cost and available remedies” primarily dealt with under provincial human rights legislation rather than under section 15.<sup>407</sup> Another possible explanation for why section 15 race discrimination jurisprudence is so sparse is that cases of racial discrimination do not fit into the analytical framework that has been most successfully used by section 15 claimants.<sup>408</sup> Jai and Cheng point to two broad types of cases that have been successful before the Court - challenges to laws that contain explicit distinctions based on enumerated or analogous grounds and challenges to legislative benefit schemes on the basis of under-inclusion - and explain that claims of race discrimination rarely slot into this framework.<sup>409</sup> For example, while it is (unfortunately) still plausible that a pension plan would fail to extend certain benefits to partners of the same sex, it is highly unlikely that the same scheme would fail to extend benefits to individuals who have partners belonging to a certain race or ethnicity.

Jai and Cheng’s observations are concerning insofar as they suggest that the Supreme Court is still more receptive to claims challenging a discriminatory distinction that has been explicitly drawn, despite a body of jurisprudence under the *Charter* and human rights codes

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<sup>407</sup> Jai and Cheng, *supra* note 20 at 143.

<sup>408</sup> *Ibid.* at 135-140.

<sup>409</sup> *Ibid.* at 136.

verifying that Canadian law prohibits both discriminatory intent and discriminatory *results*. This unfortunate trend in Supreme Court jurisprudence reduces the likelihood of section 15 being used to address discrimination based on race because, as explained directly above, racism today is rarely explicit. The fact that the Court talks in the language of effects but acts most effectively when discrimination is explicit and overt is again reflective of the ‘actual’ logics of section 15. It is reflective of the Supreme Court’s tendency to formalize analysis, the Court’s hesitancy in identifying discrimination concealed in laws, policies, structures or institutions, and its overall inability to properly grasp the dimensions of systemic inequality. Indeed, the apparent inability (or unwillingness) to adopt a more effects-based level of analysis tells us that the Supreme Court’s lack of appreciation for how race and the law intersect, extends far beyond the law enforcement context.

The key point here is that section 15 may simply be more capable of addressing claims where discriminatory intent is not hidden, and therefore, that racial discrimination claims *in any context* are unlikely to fit into section 15’s preferred mould of analysis. Interestingly, however, the way in which racial discrimination has been linked to the notion of choice in other section 15 jurisprudence suggests that race discrimination is *exactly* the type of discrimination the Supreme Court believes section 15 was designed to address.

As Sonia Lawrence has examined in detail, the Supreme Court has told stories of race discrimination for the purpose of analogy in several section 15 cases.<sup>410</sup> These narratives - which appear to present race discrimination as the ultimate and most heinous violation of section 15 - are important insofar as they provide us with some idea of how the Supreme Court understands race

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<sup>410</sup> Lawrence, *supra* note 258.

discrimination.<sup>411</sup> However, contrasted with the particular story in the case under examination, these narratives have fulfilled a very specific and worrying purpose: to draw a line between “‘real’ discrimination in which all versions of choice have been eliminated”<sup>412</sup> and discrimination in which an element of choice remains.<sup>413</sup> As several equality scholars have shown, a pattern has developed in section 15 jurisprudence along these lines: if the Court is satisfied that a claimant had some control over (or choice as to) the situation that gave rise to the discrimination, the likelihood of the equality rights claim being successful is considerably reduced.<sup>414</sup> According to Diana Majury, choice has been invoked by the Supreme Court as a shield against equality claims.<sup>415</sup> For this reason and for others touched on in chapter two, the Court’s emphasis on choice has been a source of considerable criticism.

My specific interest here, however, lies not in how the Court’s emphasis on choice affects how effectively section 15 claims are dealt with (although this is incredibly important). Rather, I am interested in the Supreme Court’s framing of race as immutable and thus of race discrimination as the most “‘real’” form of discrimination. At first glance, this seems to suggest that the Supreme Court would be receptive to a claim of race discrimination if it was presented with such a claim; if the perception that a victim’s choice contributed in some way to the discriminatory situation is detrimental to a section 15 claim, then it flows that the perception that a victim was ‘choice-less’ would have the opposite effect. However, on a more careful examination it becomes clear that the Court’s descriptions and stories of race discrimination (and therefore the idea that it is the most

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<sup>411</sup> *Ibid.* at 125-127.

<sup>412</sup> *Ibid.* at 115.

<sup>413</sup> See generally *ibid.*

<sup>414</sup> See generally *ibid.* See also Majury, *supra* note 262 at 219, arguing that “[t]he choice insulation is used under section 15 as the basis for the determination that there has been no discrimination, thus precluding exploration of the context and impact of the choice, including any systemic inequalities that may have affected or circumscribes the alleged choice that was made.”

<sup>415</sup> *Ibid.*

choice-less and ‘real’ form of discrimination) are based on an understanding of race discrimination that is obvious and explicit, and therefore out of touch with reality. As Sonia Lawrence puts it:

The narrative of race discrimination presented by the Supreme Court is one where the intention is clearly, directly and openly to differentiate and subordinate on the basis of race...Yet the narrative of “modern” discrimination, including modern racial discrimination, is better understood as one of persistent and ordinary activities, institutions, and disputed “common sense” notions.<sup>416</sup>

In sum, section 15 has rarely been used to address racial equality issues. The provision is likely unsuited to dealing with race discrimination claims not only because of problems with proof, but because such claims may be better dealt with under provincial human rights legislation and typically do not fit into the analytical framework most suited to section 15 claims. These practical barriers are paralleled by the concerning fact that the Supreme Court’s current approach towards, and understanding of, race discrimination is ostensibly flawed. Although it is entirely possible that the Court would adopt a different and more contextual approach if it was faced with an actual case of race discrimination, at present, the Court’s apparent understanding of race discrimination as more ‘real’ than other forms of discrimination and as overt and identifiable, is erroneous and could itself be viewed as a reason why section 15 is the improper tool for dealing with claims of racial discrimination. Canada’s race history also matters here. There is an argument to be made that because Canada’s race history did not explode as it did in the United States, Canada has never sufficiently pushed to take racism seriously or to question the assumption that race is a viable category of difference or political marker. The myth that racism is not a serious problem in Canadian society is a product of Canada’s relatively inexplorative history, and has resulted in a certain degree of complacency towards minority rights issues in Canada. The pervasiveness of this myth has meant that social, political and legal progress with respect to the eradication of racial

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<sup>416</sup> Lawrence, *supra* note 258 at 129.

discrimination in Canada has been slow.

Examining section 15's uselessness with respect to race discrimination claims generally has once again revealed how the Supreme Court's restrictive interpretation of the provision (or application of the 'actual' logics of section 15) diminishes the importance of discrimination that is systemic in nature. Moreover, outlining how race discrimination is understood and dealt with in Canada has drawn attention to several new and distinct issues that underlie the racial profiling/section 15 paradox. However, because racial profiling post-9/11 has a significant religious dimension, it is also necessary to consider how religious discrimination is understood in Canada..

*b) Religious discrimination under section 15 of the Charter*

In chapter one, I revealed that contemporary racial profiling has a substantial religious layer. Although this religious layer has been obscured to some extent by the racialization of religion, 'race thinking' and the political climate that has paralleled this phenomenon, it is wholly possible that an act of profiling could be challenged on the grounds that it violates an individual's religious equality, racial equality, or both. For this reason, it is necessary to briefly consider whether section 15 is a useful tool for dealing with religious discrimination.<sup>417</sup>

Generally speaking, religion has been considerably more visible under section 15 than race. It would be misleading and inaccurate, however, to assume that this means section 15 has been a particularly helpful legal tool for religious equality seekers. As with cases dealing with issues of racial equality, section 15 has played a more tangential (and therefore less influential) role in cases involving the equality rights of religious minorities in Canada. Here, however, there is a clear and

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<sup>417</sup> Please note that I did not discuss religious profiling above because there has never been a case of religious profiling under the *Charter*.

simple explanation for section 15's minimal role: questions relating to religious equality and discrimination are predominantly dealt with under section 2(a) of the *Charter*, guaranteeing freedom of conscience and religion. Although section 15 claims are frequently made in conjunction with claims under section 2(a), once judicial analysis begins, the lines between the section 15 and section 2(a) arguments often become hard to discern, or as is more often the case, the section 15 argument comes to be overshadowed completely.

The recent and controversial Supreme Court decision in *Alberta v. Hutterian Brethren of Wilson Colony*,<sup>418</sup> discussed in more detail below, is a case in point.<sup>419</sup> Despite the fact that concurrent arguments were made under section 2(a) and section 15, the section 15 claim received very little attention because, according to the Court, "it is weaker than the s. 2(a) claim and can easily be dispensed with."<sup>420</sup> The pattern that has developed whereby religious equality issues are filtered through section 2(a) is one rather obvious reason why section 15 lacks potential to deal with religious discrimination, including religious profiling or 'racial' profiling that has a religious layer. In searching to understand how religious discrimination is interpreted and dealt with in Canada, therefore, it would be impossible not to pay attention to section 2(a) cases. Indeed, several academics have acknowledged the important link between section 15<sup>421</sup> and section 2(a) and noted that equality language runs throughout the Supreme Court's section 2(a) jurisprudence.<sup>422</sup> However, because section 2(a) jurisprudence is vast, in the remainder of this section, I focus on a few key cases suggesting that the Canadian courts are only comfortable with religious rights up to

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<sup>418</sup> (2009) S.C.C. 37. [hereinafter *Hutterian Brethren*].

<sup>419</sup> See also *Adler v. Ontario* (1996) 3 S.C.R. and *R. v. Badesha* (2008) O.C.J. 94 [hereinafter *Badesha*] in which Blacklock J stated at para. 76: "Let me say at the outset that, in my view, my analysis of the section 2 (a) issue in this case ought to significantly inform my approach to the alleged section 15 violation."

<sup>420</sup> *Hutterian*, *supra* note 418 at para. 105.

<sup>421</sup> See for example Lorraine E. Weinrib, "Ontario's Sharia Law Debate: Law and Politics under the Charter," chapter 10 of Moon, *supra* note 260.

<sup>422</sup> See for example Berger, *Law's Religion*, *supra* note 260 at 296-297.

a certain point and under certain conditions. The two most recent Supreme Court judgments to squarely address questions of religious tolerance, freedom and equality are *A.C. v. Manitoba (Director of Child and Family Services)*,<sup>423</sup> and *Hutterian Brethren*. In both cases, the religious claimants were unsuccessful. Why? And what message is the Supreme Court sending with these judgments? In *Hutterian Brethren*, the Court held that the Province of Alberta's universal photo requirement for all driving licenses contravened the religious rights of members of the Hutterian Brethren Colony but that the system was nonetheless justified under section 1 of the *Charter* because "the goal of setting up a system that minimizes the risk of identity theft associated with driver's licenses is a pressing and important public goal."<sup>424</sup> Here, we see very clearly the norms of security, public safety and crime prevention trumping the norms of religious freedom and equality despite the fact that the threat to public safety was not especially grave.<sup>425</sup> Simply put, the Court in *Hutterian Brethren* underlines and gives support to the state's duty to protect the integrity of its systems and the safety of its citizens.

The Supreme Court also refers to the state's protective duty in *A.C.*<sup>426</sup> In this case it was held that a Manitoba law under which a Court may authorize treatment that it considers to be in the child's best interests<sup>427</sup> was not unconstitutional. *A.C.*, a fourteen year old girl and a devout Jehovah's Witness, was given a blood transfusion against her wishes and contrary to clear written instructions, after she suffered internal bleeding triggered by Crohn's disease. Although there were several legal questions at issue in this case,<sup>428</sup> the argument under section 2 (a) was, in essence, that

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<sup>423</sup> (2009) S.C.C. 30. [hereinafter *A.C.*].

<sup>424</sup> *Hutterian Brethren*, *supra* note 418 at para. 4.

<sup>425</sup> *Ibid.* In his dissenting judgment, Abella J emphasizes this point. See paras. 148, 158 and 162.

<sup>426</sup> *A.C.*, *supra* note 423 at para. 95.

<sup>427</sup> S. 25(8-9) *Manitoba Child and Family Services Act*, C.C.S.M. c. C80.

<sup>428</sup> These included whether the Manitoba legislation infringed *A.C.*'s liberty and security interests in a manner that violated section 7 of the *Charter* and also whether the fact that the legislation drew a distinction based on age constituted discrimination under section 15(1) of the *Charter*.

the treatment she received contravened her right to practice her religion. Although the Court held that the law did indeed violate A.C.'s right to freedom of religion, they found the violation to be justified under section 1 because "the objective of ensuring the *health* and *safety* of vulnerable young people is pressing and substantial, and the means chosen - giving discretion to the court to order treatment after a consideration of all relevant circumstances - is a proportionate limit on the right."<sup>429</sup>

A similar logic - safety and public protection trumping religious rights - was employed by the Ontario Court of Justice in the important case of *Badesha*. Badesha, a member of the Sikh faith whose religious beliefs dictate he must wear a turban at all times, was charged under the Ontario *Highway Traffic Act* for failing to wear an approved helmet while riding a motorcycle.<sup>430</sup> The claimant's argument that the requirement violated his religious rights under section 2(a) and 15(1) of the *Charter* was unsuccessful because the Court saw the helmet law as being rationally connected to the objective of ensuring the security and safety of the rider and others on the road, and as rightly taking into account the interests of the general public.<sup>431</sup>

Taken together, the above cases send a clear message that there are limits to religious freedom of equality and freedom in Canada, especially when issues of health and safety are involved. *Hutterian Brethren, A.C.* and *Badesha* all embody the idea developed at length in chapter two: that retreats on equality are easily and readily justified when public safety and security are at issue. Moreover, these cases highlight another pattern in situations where a balance must be struck between the rights of a religious individual and the interests of the state, namely, reference to the integrity of systems, statutes or even individuals. Inextricably linked with the Court's

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<sup>429</sup> *A.C.*, *supra* note 423.

<sup>430</sup> S. 104 (1) *Highway Traffic Act*, R.S.O. 1990, c. H.8.

<sup>431</sup> *Badesha*, *supra* note 419.

deference to the state's protectionist function, the language of integrity ostensibly serves to justify retreats on the rights of religious minorities in Canada. In my opinion, the focus on integrity and security in recent jurisprudence has clear implications for how a claim of religious discrimination (or a claim with a religious dimension) in the 'war on terror' context would be dealt with. If the courts are unresponsive to cases in which the safety and security implications are relatively slight when weighed against the threat to religious rights, then it is highly improbable that they would be responsive to a case where the security issue at stake is terrorism prevention. *Hutterian Brethren, A.C.* and *Badesha* all underscore how dangerous the *Charter's* reasonable limits clause, section 1, can be in a political climate bent on prioritizing security. Further, *if* it was established that the legal basis of profiling is the *Anti-Terrorism Act* - a statute that has public protection and security concerns at its core and the integrity of which is already open to debate - it is possible that the courts would be even more wary of threats to its integrity and even more reluctant to deliver a judgment that undermined its goals and objectives.

Yet another commonality that shines through in recent jurisprudence dealing with questions of religious freedom and equality in Canada is the link made between religion and choice. Although many more observations can be made about how religion is constitutionally understood in Canada,<sup>432</sup> I would like to turn my focus now to the notion of choice and consider whether the Canadian court's tendency to discuss religion in the language of choice reveals anything valuable about section 15's suitability to deal with religious discrimination. Evidence of the centrality of choice to the Supreme Court's understanding of religion is not hard to find.<sup>433</sup> Indeed, as Berger

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<sup>432</sup> See for example Berger, *Law's Religion*, *supra* note 260, Moon, *Law and Religious Pluralism in Canada*, *supra* note 260, Richard Moon, "Liberty, Neutrality, and Inclusions: Religious Freedom under the Canadian Charter of Rights and Freedoms," (2003) 41:3 *Brandeis Law Journal* 563 and Shannon Ishiyama Smithey, "Religious Freedom and Equality Concerns under the Canadian Charter of Rights and Freedoms," (2001) *Canadian Journal of Political Science* 85.

<sup>433</sup> See generally Berger, *Law's Religion*, *supra* note 260 at 291-301.

points out, since the first Supreme Court case dealing with religious freedom, “the clear and consistent jurisprudential message has been that religion has constitutional relevance because it is an expression of human autonomy and choice.”<sup>434</sup> Even on a simple and cursory reading of the jurisprudence it becomes clear that the discourse of religious freedom and equality is closely intertwined with a discourse of protecting choices to enable self-fulfillment. Whereas in *Hutterian Brethren*, deprivation of choice appeared to be used as a threshold to determine whether there had been a constitutional violation,<sup>435</sup> in *A.C.* the central issue was whether the claimant’s choice should be recognized, or more specifically, how a young person’s claim to autonomy should be properly balanced with the protective duty of the state.

Several important questions spring from the Canadian courts’ framing of religion as an expression of choice. In the present context, the most obvious and concerning of these is whether the Supreme Court would also understand religious discrimination as a product of choice if it was presented with such a claim under section 15. In other words, could the Supreme Court’s articulation of religion in terms of choice effectively translate into a shield against a religious discrimination claim? As I discuss in chapter two, the Court’s present understanding of discrimination is partially defined by the notion of choice; the more that a claimant’s choice appears to be linked to a discriminatory act, the less chance there is of the discrimination being perceived as ‘real’ and as sufficiently serious to warrant a positive finding from the Court. Therefore, if the answer to the above question is in the affirmative, another reason why section 15 lacks potential to deal with religious discrimination, including racial profiling in the post-9/11

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<sup>434</sup> *Ibid.* at 295.

<sup>435</sup> *Hutterian*, *supra* note 418 at paras 96-98. Here McLachlin C.J., speaking for the majority states:

The impugned regulation, in attempting to secure a social good for the whole of society – the regulation of driver’s licences in a way that minimizes fraud – imposes a cost on those who choose not to have their photos taken: the cost of not being able to drive on the highway. But on the evidence before us, that cost does not arise to the level of depriving the Hutterian claimants of a meaningful choice as to their religious practice, or adversely impacting on other Charter values.

context, begins to emerge. The framing of religion as an expression of choice considered alongside the Court's questionable use of the discourse of choice in section 15 jurisprudence, may signify that religious profiling, or profiling with a religious layer, would be even less likely to be successful than a claim of profiling based solely on race.

The conflation of race and religion, however, adds another layer of complexity. In chapter one, I revealed that the lines between race and religion have become hard to discern and that the racialization of Islam and 'race-thinking' in our particular present moment have functioned to obscure religion to some extent. The question thus arises as to whether the religious dimension to contemporary profiling would even be fully recognized or considered as relevant by a court. Otherwise put, if religion is sometimes treated as race in dominant public discourse will this affect how it is dealt with legally? It is possible, for example, that anti-Muslim 'racism' in the form of contemporary profiling would be treated as just that, and that the court would apply its understanding of race discrimination to the case at hand.

Canada's equality guarantee is thus unable and/or unwilling to effectively deal with race or religious discrimination, regardless of the context. Although race and religion have been relatively invisible under section 15 (to varying degrees and for different reasons), we can nonetheless draw some conclusions about how religious and racial equality issues are legally understood through looking to other places in the Supreme Court's jurisprudence. Whereas race discrimination (or more accurately race discrimination where discriminatory intent is obvious and explicit) appears to be understood as inherently 'choiceless' and thus 'real', it seems religious equality is only recognized up to a certain point. In many religious freedom and equality cases, this point is crossed the moment that either security, public safety or the integrity of a government system or statute is perceived as being compromised. In this way, the manner in which questions of religious

and racial equality are referenced and articulated elsewhere suggest that section 15 would have problems effectively responding to a direct claim of racial or religious discrimination.

## CONCLUSION

The equality paradox of racial profiling in the ‘war on terror’ should now be fully visible. In the end, it has become clear that the conceptual tensions between the nature of the criminal justice system and the logics of section 15 only go so far in explaining section 15’s uselessness as a legal tool in this context. In practice, there are many more factors that exacerbate the provision’s lack of potential. The fact that racial profiling jurisprudence in Canada is sparse and underdeveloped is itself revealing. It reflects both the inherent difficulty that the law has in dealing with racial profiling regardless of what legal avenue is taken to address the issue and the seeming reluctance in the Courts to recognize the problem in practice and to take active and meaningful steps to discourage it. Although it appears that current constitutional standards are insufficient and may in fact be contributing to the lack of positive findings of racial profiling, little precedent exists for section 15 being used to deal with discriminatory law enforcement practices. The fact that profiling of any nature is customarily dealt with under other *Charter* provisions reduces the likelihood that section 15 would be employed to tackle contemporary racial profiling. At this stage, we are left with the impression that the racial profiling/section 15 paradox exists because section 15 has an inherently strained relationship with criminal justice issues, and because the provision has a practically non-existent relationship with profiling.

However, many difficult issues would nevertheless arise *if* section 15 was chosen as a legal tool to address profiling and the harms that inevitably stem from it. Problems range from the ambiguity surrounding the correct section 15 test to be used to analyze claims of discrimination;

how a victim would effectively frame their discrimination claim; whether the idea of stereotyping would work in favor of or against the claimant and, perhaps most significantly, whether profiling could be justified under section 1 of the *Charter*. These issues are exacerbated in the post-9/11 context by the movement to normative debate in racial profiling discourse and the racialization of religion. With these observations in mind, the prospect of section 15 being used as an effective legal tool to deal with contemporary racial profiling is increasingly dire.

Yet there is another trend in the jurisprudence that further weakens section 15's potential. Since the provision came into force in 1985, it has been strikingly inattentive to certain types of claims, namely, those made by victims of religious or racial discrimination. Given that profiling in the post-9/11 is partially defined by the fact that it may be discriminatory on both of these levels, the absence of race and religion under section 15 (to varying degrees and for different reasons, of course) is deeply concerning. What we are left with is the knowledge that Canada's equality guarantee is not only conceptually at odds with criminal justice issues, but that it is neither capable of effectively dealing with profiling, nor responding to racial or religious equality issues in practice.

## CONCLUSION

*“Racial profiling represents a quest for simple answers to immensely complicated questions.”*<sup>436</sup>

*“Equality is the endangered species of political ideals.”*<sup>437</sup>

In this thesis, I have endeavored to explain the paradox arising from the fact that racial profiling, an ostensibly archetypal example of discrimination and a practice that strikes at the heart of egalitarian values, is offered so little by Canada’s constitutionally protected equality guarantee. The racial profiling/section 15 paradox of Canada’s ‘war on terror’ has now been exposed in its entirety. My analysis has revealed, first, that the nature of the sphere in which racial profiling occurs is conceptually incompatible with the logics of Canada’s equality provision; second, that this conceptual incompatibility is paralleled by practical, structural and doctrinal limits to section 15 and third, that difficulties with proof and evidence render racial profiling exceptionally difficult to deal with in the Courts, regardless of the legal route taken. Throughout, I have argued that religious concerns, brought to the fore by the post-9/11 environment, have expanded the web of prejudice generated by profiling, complicated the picture and exacerbated the paradox. As discrimination has spiraled in recent years, as the racial profiling debate has shifted from ‘factual’ to ‘normative’, and as the threat to equality has grown, the likelihood of section 15 being used to effectively process or address this threat has been reduced by the West’s heavily securitized climate. In the end, we are left with a raw and deep paradox that tells us that there is an enormous discrepancy between the official state rhetoric of equality and multiculturalism, and our willingness to defend or uphold these principles when they are put to the ultimate test.

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<sup>436</sup> Bahdi, *supra* note 51 at 317.

<sup>437</sup> Dworkin, *supra* note 5 at 1.

Having thoroughly explored the interaction between racial profiling and section 15, and having exposed a range of factors that underlie and perpetuate the paradox, I would now like to address, and refute, two conclusions that could be drawn from my analysis. The first is that we have simply made a category error by presuming that racial profiling is an equality issue. In other words, the assertion of this paradox could be objected to on the basis that it is wrong to discuss racial profiling in the language of equality or, relatedly, on the basis that it is more fitting or effective to think about racial profiling as a question of liberty. Another potential objection to the paradox is that the ideal of equality can be interpreted in a way that is consistent with racial profiling. Otherwise put, it could be argued that racial profiling is not necessary objectionable from an egalitarian perspective if we simply think about equality differently. In refuting these objections, I argue that racial profiling has not been misdiagnosed as an equality issue and that our “natural tendency”<sup>438</sup> to think of racial profiling as a violation of the ideal of equality is, in fact, sound.

### **The Wrongs of Equality & Racial Profiling**

In chapter one of this thesis, I noted that a rhetoric of striking a balance between security and liberty, as opposed to between security and equality, has become increasingly prevalent in post-9/11 racial profiling discourse. It might therefore be argued in opposition to my analysis that racial profiling is really more about liberty than it is about equality and, correspondingly, that we have miscatergorized racial profiling as, principally, an equality issue. Although it is unlikely that anyone would dispute the fact that equality concerns are triggered by racial profiling, it may nevertheless be argued that racial profiling is not an equality issue *at its core*. Someone making the claim that racial profiling is more about liberty than it is about equality

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<sup>438</sup> Paul Bou-Habib, “Security, Profiling and Equality,” 11 *Ethic Theory Moral Practice* (2008) 149 at 151.

might point to the invisibility of equality arguments in the criminal justice context and assert that liberty is the dominant logic of criminal justice. Similarly, one might highlight the fact that racial profiling is dealt with more frequently under section 7 of the *Charter*, which guarantees the right to life, liberty and security of the person and other the legal rights provisions of the *Charter* (sections 8 and 9) than under section 15.

However, the argument that racial profiling is not in its essence an equality issue can neither draw support from the fact that liberty arguments are more commonplace in the criminal justice sphere, nor from the reality that racial profiling is customarily dealt with under other constitutional provisions. As should be clear from my previous chapters, the absence of section 15 in the criminal justice sphere, and more specifically in racial profiling litigation, is the result of various complex conceptual, doctrinal and practical tensions and is in no way a reflection of the irrelevancy of equality to criminal justice issues or racial profiling litigation. Rather, the absence is simply a reflection of the fact that the equality dimension of criminal justice issues is frequently obscured. Simply put, the two grounds upon which the contention that racial profiling is more about liberty than it is about equality is based, are reflections of the racial profiling/section 15 paradox, rather than factors that undermine it. Moreover, if we compare and contrast the nature of the wrongs associated with, or that result from, unequal treatment with nature of the wrongs done to individuals when they are subjected to racial profiling, it becomes nearly impossible to dispute that racial profiling is, in essence, an equality issue.

But what exactly are wrongs that are associated with, or that result from, unequal treatment? And how are “the wrongs of unequal treatment”<sup>439</sup> the same as or similar to the “wrongs of racial profiling”? Sophia Moreau identifies four substantive conceptions of the

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<sup>439</sup> Sophia Moreau, “The Wrongs of Unequal Treatment,” in Faraday, Denike & Stephenson, *supra* note 9 at 32.

wrong done to individuals when they are unfairly treated unequally. She posits that unequal treatment wrongs individuals when it is based upon prejudice or stereotyping; perpetuates oppressive power relations; leaves some individuals without access to basic goods; or diminishes individuals' feelings of self-worth.<sup>440</sup> Importantly, Moreau also stresses that all four of these conceptions of the wrong can be found in Canadian equality jurisprudence.<sup>441</sup> However, in order to bolster my argument that we have not engaged in a category error by conceiving of racial profiling as an equality issue, it is also necessary to briefly demonstrate that all four of these conceptions of the wrong are connected to racial profiling.

The idea that racial profiling is wrong because it is a manifestation of stereotyping is implicit in racial profiling literature and jurisprudence. According to Bahdi, for example, one of the main problems with racial profiling in the post-9/11 context is its link with stereotyping of Muslims and Arabs. She states: “[r]acial profiling is a problematic weapon in the War against Terrorism because it operates against, and merges with, long-standing and deeply held stereotypes about Arabs and Muslims that threaten to warp rational decision making.”<sup>442</sup> Under the two understandings of stereotyping provided by the Canadian Supreme Court in *Law*,<sup>443</sup> stereotyping is offensive because people are judged based on their membership in a group, rather than as individuals. By using race or religion as a proxy for risk, contemporary profiling of Arabs and Muslims clearly relies on a stereotype that certain groups are predisposed to

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<sup>440</sup> *Ibid.* at 35 to 50.

<sup>441</sup> *Ibid.* at 33.

<sup>442</sup> Bahdi, *supra* note 51 at 304.

<sup>443</sup> In *Law*, the Supreme Court explained that, in the section 15 context, one can understand stereotyping in two different ways. These two meanings are articulated clearly by Choudhry, *Protecting Equality in the Face of Terror*, *supra* note 12 at 371. He writes:

It (stereotyping) can mean that a distinction drawn on the basis of a prohibited ground reflects the view that all members of a group who share a characteristic – race, religion, gender, and so on - possess certain undesirable traits that in fact none of them do...[f]ar more common, though, is a stereotype that is an over-generalization – that is, an assumption that all members of a group possess certain undesirable traits that some members of those possess, when in fact some, or many, do not.

committing acts of terrorism, without adequately and accurately inquiring into an individual's characteristics or circumstances. Assessing individuals based on their group membership is thus the essence of what makes racial profiling objectionable.<sup>444</sup> When this stereotyping is motivated by prejudice, of course, the wrongs are all the more apparent (although it is worth reminding ourselves that racial profiling driven by pure, unbridled prejudice is rare). Here, it is also important to remember that, in post-*Kapp* jurisprudence, stereotyping seems to have taken on a status of first among equals in the wrongs we worry about with respect to section 15.<sup>445</sup>

Moreau argues that another way in which unequal treatment can wrong individuals is through the perpetuation of oppressive power relations.<sup>446</sup> The view that racial profiling is wrong because it perpetuates oppressive power relations is pervasive.<sup>447</sup> Of course, the power relation commonly assumed to be at issue in racial profiling is that between law enforcement agencies and racialized minority communities. Charles Smith describes the connection between discriminatory law enforcement practices and power in the following terms:

Racialized law enforcement has been an extraordinarily powerful tool for preserving social power, and over the last 150 years police forces have been a central resource for social control. Police forces play an important role in maintaining the status quo and ensuring social distance between divergent groups.<sup>448</sup>

Racial profiling is thus “the most recent manifestation of the intensely hostile relationship

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<sup>444</sup> See Moreau, *supra* note 439 at 36-37. According to Moreau, Making judgments about individuals based on their membership in a group is troublesome for a number of reasons. Not only may it be considered arbitrary from the point of view of the individuals who have been denied a benefit or unfairly investigated or detained, but it may diminish the individual's power, choice and ability to define and control their lives in the fashion they desire. Stereotyping is thus damaging to individual autonomy and may affect the processes of identity formation.

<sup>445</sup> See page 113 of chapter three.

<sup>446</sup> Moreau, *supra* note 439 at 40.

<sup>447</sup> See generally, Tanovich, *The Colour of Justice*, *supra* note 10 and Tator & Henry, *Racial Profiling in Canada*, *supra* note 23.

<sup>448</sup> Charles C. Smith, “Racial Profiling in Canada, the United States, and the United Kingdom,” chapter three in Tator & Henry, *supra* note 23 at 56.

between police and subordinated racialized communities...”<sup>449</sup> and undoubtedly perpetuates a ‘we-them’ attitude in police culture.<sup>450</sup> As a practice that is wrong because it is based on stereotypes and perpetuates oppressive power relations, racial profiling appears to be fitting squarely into the mould of an equality issue. The fact that racial profiling may be objected to on the basis that it leaves some individuals without access to basic goods further suggests that it is correct to discuss racial profiling in the language of equality.

Several equality scholars and philosophers have proposed that our aspirations to eliminate inequality are, in part, motivated by a concern that certain people do not have sufficient access to goods.<sup>451</sup> Although the link between racial profiling and lack of access to basic goods is neither frequently nor explicitly made, it is undoubtedly true that a general concern for the well-being of racial profiling victims underlies arguments that the practice is dangerous, abusive and unacceptable. This general concern likely includes an element of fear that victims of racial profiling will, relatively speaking, be worse off in terms of access to goods, than those who are not unfairly and disparately targeted by law enforcement officials. These fears are likely fueled by evidence that many victims of racial profiling incur direct and indirect financial costs as a result of their experiences;<sup>452</sup> costs that may, ultimately, leave individuals without access to basic goods.<sup>453</sup> Of course, the term “basic goods” may also be understood more broadly and less

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<sup>449</sup> *Ibid.* at 55.

<sup>450</sup> See Moreau, *supra* note 439 at 42. In addition to loss of autonomy and a diminished sense of self, the acute power imbalance between law enforcement and racialized minorities may deny individuals “the opportunity to participate as equals in public political argument, the opportunity to have equal influence in certain social contexts, and the opportunity to contribute to a genuinely collective self-determination.”

<sup>451</sup> See for example, Harry Frankfurt, “Equality as a Moral Ideal” in *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988) and Derek Parfait, “Equality or Priority?” *The Lindley Lecture*, University of Kansas (1991).

<sup>452</sup> See *Paying the Price*, *supra* note 246.

<sup>453</sup> It may simply be that objections to racial profiling on the basis that it may leave some individuals without access to basic goods are overshadowed by objections to racial profiling on other the grounds. I suggest here that in contrast to arguments about the sufficiency of goods, a discourse of stereotyping, prejudice or oppressive power

literally so that the tangible effects of racial profiling are of less concern to us here. It could be argued, for example, that liberty is a basic ‘good’ that is distributed in society, and that racial profiling denies individuals access to this good. Nevertheless, regardless of how exactly we define ‘goods’, it is clear that there is some connection between racial profiling and the denial of access to basic goods for those individuals unfortunate enough to fall victim to the practice.

Moreau explains that the fourth way in which unequal treatment can wrong individuals is by causing injury to a person’s sense of self-worth. Self-worth, as Moreau understands it, should not be confused with an objective conception of individual worth or dignity.<sup>454</sup> Rather, a diminished sense of self-worth should be understood *subjectively* according to how an individual perceives his or her own self-worth. According to Moreau, treatment will be unequal and objectionable when “the individual has been made to feel as though she is worthless.”<sup>455</sup> There is a plethora of evidence confirming that racial profiling has this exact effect on individuals, and a consensus amongst those who disparage racial profiling that the practice is improper on this basis.

Strikingly, *Paying the Price*, the Ontario Human Rights Commission’s inquiry into the effects of racial profiling, found that “the impact of racial profiling on people’s dignity and self-esteem was confirmed in almost every submission to the Commission’s inquiry.”<sup>456</sup> The following submission by one victim of racial profiling captures the way in which racial profiling can affect one’s sense of worth:

That experience has caused me much damage mentally. To my self-esteem etc. Despite the fact that I am accomplishing much academically in my life, I still feel inferior to the

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relations is compelling and likely resonates more easily and more powerfully with society at large. Arguments that racial profiling is objectionable because it diminishes individuals’ feelings of self-worth are also powerful.

<sup>454</sup> Moreau, *supra* note 439 at 49.

<sup>455</sup> *Ibid.*

<sup>456</sup> *Paying the Price*, *supra* note 246 at 42.

majority (Whites) and try each day, through psychotherapy, to overcome this dark cloud that hangs over me.<sup>457</sup>

Referring to the aftermath of being profiled, another respondent claimed: “I was sick to my stomach, and most of all, felt a lot of hatred for myself because of who I am.”<sup>458</sup> Both of these statements clearly exemplify that racial profiling is offensive on the basis that it leads to a diminished sense of self-worth.

Through demonstrating that the factors that render unequal treatment unfair, objectionable and wrong are the very same factors that render racial profiling unfair, objectionable and wrong, the very foundation of the racial profiling/section 15 paradox - that racial profiling is, in essence, all about equality - has been strengthened. The potential objection to the paradox, namely, that we have erred in categorizing racial profiling as an equality issue, has been refuted. However, the fact that racial profiling is an equality issue in essence does not foreclose arguments that racial profiling can be justified from an egalitarian standpoint. This is because equality is a multifaceted and contested concept, subject to several plausible interpretations. The second objection I wish to address, therefore, is that the ethical status of racial profiling in the ‘war on terror’ is dependent upon how one interprets or thinks about the ideal of equality. This objection appears to present a challenge to my analysis because the foundational assumption of the paradox - that section 15 should be able to deal with racial profiling in theory - would be seriously undermined if it could be shown that the practice is not necessarily problematic from the perspective of equality.

### **Racial Profiling and the *Ex Ante* Ideal of Equality**

The assertion of the racial profiling/section 15 paradox might also be objected to on the

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<sup>457</sup> *Ibid.* at 47.

<sup>458</sup> *Ibid.* at 63.

basis that racial profiling is not always objectionable when examined through an equality-focused lens. Although there is a distinct lack moral or theoretical reflection on the subject of racial profiling,<sup>459</sup> a few scholars have argued, from a theoretical perspective, that we should not straightforwardly condemn racial profiling on the basis that it involves the disparate targeting of certain minority groups. Risse and Zeckhauser, for example, have proposed that racial profiling might be justified from a utilitarian and rights-based perspective.<sup>460</sup> Paul Bou-Habib, on the other hand, has argued that we should not automatically condemn profiling because it results in inequality, and further, that profiling can be defended from an egalitarian standpoint.<sup>461</sup>

Bou-Habib begins his analysis by considering whether racial profiling violates the ideal of equality by virtue of the fact that it causes unequal outcomes between people. He scrutinizes racial profiling under the two main outcome-focused interpretations of equality, *strict egalitarianism*<sup>462</sup> and *prioritarianism*,<sup>463</sup> and concludes it is very difficult to justify profiling from the perspective of equality under these interpretations.<sup>464</sup> Bou-Habib maintains, however, that profiling can be justified from an egalitarian standpoint if we apply, what he calls, an *ex ante* interpretation of equality. Drawing heavily on the work of Dworkin, Bou-Habib states:

An egalitarian defence of ethnic profiling can proceed by arguing that people need not be equal in their outcomes, so much as in their standing with respect to the, as yet unmaterialised, risks of those outcomes. More specifically, egalitarians can hold that unequal outcomes between people are consistent with the ideal of equality provided that

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<sup>459</sup> This point is also emphasized by Paul Bou-Habib, *supra* note 438 and Mathias Risse & Richard Zeckhauser, “Racial Profiling,” (2004) 32:2 *Philosophy & Public Affairs* 131.

<sup>460</sup> Risse & Zeckhauser, *ibid.*

<sup>461</sup> Bou-Habib, *supra* note 438.

<sup>462</sup> See *ibid.* at 154. Here, Bou-Habib defines *strict egalitarianism* as regarding “an equal distribution of outcomes – that is, a distribution in which everyone has the same – as intrinsically valuable, or valuable for its own sake.” Furthermore, he states that:

strict egalitarians insist that the greater a gap between people’s outcomes a policy causes the morally worse the policy. Any policy that causes outcomes between people to be more unequal than they otherwise might be should therefore be rejected according to strict egalitarianism.

<sup>463</sup> See *ibid.* Here, Bou-Habib describes prioritarianism as an ideal of equality that “demands that we give greater weight to improving a worse off person’s outcome than a better off person’s outcome.”

<sup>464</sup> *Ibid.* at 156.

those outcomes materialise from an earlier condition in which each person had an equal opportunity to insure against the risks of those outcomes materialising.<sup>465</sup>

Under this *ex ante* interpretation, Bou-Habib explains, individuals are treated autonomously and provided with equal opportunities to insure against risk. In this sense, there are clear echoes of Rawls' original position of the veil of ignorance in Bou-Habib's argument.<sup>466</sup> In the post-9/11 racial profiling context, he argues that people, including racial and religious minorities, would be prepared to accept the risk of inequality caused by profiling because, compared with the alternative policies of across-the-board investigation and random profiling, racial profiling is less costly and entails less risk of interference with liberty and less risk of death or injury.<sup>467</sup> He goes on to rebut arguments that racial profiling inflicts a loss of dignity on those selected for investigation.

From a practical standpoint, Bou-Habib's argument that racial profiling can be reconciled with a defensible ideal of equality presents no challenge to the racial profiling/section 15 paradox. His analysis is heavily theoretical and his key observation - that racial profiling is not always objectionable from the perspective of equality - only holds up if the ideal of equality is conceptualized in a very narrow and abstract way. Simply put, his observations are completely separated from the realities faced by individuals, and indeed, from the logics of section 15. In practice, people are not given equal opportunity to insure against the risk of being made worse off than others due to profiling, and it is highly unlikely that they ever would be. Furthermore, I suggest here that Bou-Habib inadvertently lends support to the widely-held that racial profiling is condemnable when examined through an equality-focused lens. Through aiming to demonstrate that one interpretation of the ideal of equality (*ex ante*) permits racial

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<sup>465</sup> *Ibid.* at 157.

<sup>466</sup> John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971.)

<sup>467</sup> *Ibid.*

profiling, Bou-Habib's analysis reveals that under most interpretations of equality (*strict egalitarianism* and *prioritarianism*), racial profiling cannot indeed be justified.

Addressing and refuting two potential conclusions that could be drawn from the racial profiling paradox has confirmed that we have not engaged in a category error or misdiagnosed racial profiling as an equality issue. Racial profiling is a violation of equality that section 15 of the Canadian *Charter* should be able to deal with in the 'war on terror' context. The severity and bareness of the racial profiling/section 15 paradox of Canada's 'war on terror' exposes a yawning chasm in our commitments that should trouble us deeply.

### **The Whole Picture**

One of the most concerning aspects of the racial profiling/section 15 paradox is that it ensures that the expressive harm of racial profiling is completely missed. I have argued at various points in this thesis that the current legal apparatus for dealing with racial profiling dodges the graveness of the problem. So long as racial profiling claims are filtered through other constitutional provisions, the true nature of the harms caused by contemporary profiling will never be acknowledged. By contrast, a finding of racial profiling under section 15 would have tremendous symbolic force and underline the severity of the problem. Obscuring the expressive harm caused by racial profiling is especially bothersome when one considers the Canadian government's outright and sustained denial that racial profiling is a serious problem in this country.<sup>468</sup> If one understands the state's policy of denial to be at least partially based on certain flawed assumptions about what degree of harm, or what type of harm, is caused by racial profiling, then a finding of racial profiling under section 15 may have the additional effect of

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<sup>468</sup> See Smith, *supra* note 44 at 135.

challenging this denial and demanding an urgent and adequate response from the Canadian government. Neatly put, there is a link between the racial profiling/section 15 paradox and how the state and society respond to the problem of racial profiling. Viewed in this light, the paradox is troublesome because it hinders efforts to ensure that the problem is paid due attention (including efforts to eradicate the practice altogether) and therefore prevents victims of discrimination from having their experiences properly recognized and responded to.

The enormous gap between what Canada's equality guarantee should be able to do in theory and what it can do in practice would perhaps not be so concerning if racial profiling was dealt with effectively elsewhere, or if there were more signs that the state is ready and willing to address the problem. Similarly, the paradox would likely be less alarming if contemporary racial profiling discourse was not defined by a speedy and sharp rise in arguments that racial profiling can and should be justified in the post-9/11 context, or if religious equality concerns were absent. But this is not the case. Victims of discriminatory law enforcement are offered little legal redress regardless of what legal route they take; the state has maintained a policy of denial with respect to racial profiling in the face of compelling evidence and judicial recognition that racial profiling is a serious concern; there has been a dramatic and obvious shift to racial profiling discourse in recent years, and the post-9/11 environment has thrust concerns about religious freedom, tolerance and equality into the spotlight. The stakes have never been so high.

This complex and troubling state of affairs is compounded by the unfortunate reality that, through its interpretation of section 15 and seeming reluctance to directly address the issue of racial profiling, Canada's highest court is enabling rather than preventing state divergences from the *Charter's* guarantee of equality. Indeed, the paradox has helped us to see the exact way in which the doctrinal limits placed on section 15 by the Supreme Court directly translate into

limits on social equality. This point is reflected most clearly in chapter two in which I draw attention to the formal, choice-based, individualistic and deferential ‘actual’ logics of section 15 and explain how these logics dramatically curtail the possibility of section 15 being used to reduce systemic inequality. The very fact that the failures of Canada’s purportedly sacred equality provision are so expansive and so deep reflects unfavorably on Canadian constitutional culture as a whole and should force us to question the sincerity of our own commitments, as well as the value of the *Charter* itself.

The racial profiling/section 15 paradox of the ‘war on terror’ has led us to a crossroads. The first road we can take is to continue to live in a hypocritical state in which we accept the uncomfortable fact about ourselves that we treat section 15 and norms of anti-discrimination as a luxury to be enjoyed only when ‘we’ feel safe. This first road is a road paved with denial and intolerance and one that may ultimately lead us to a more vulnerable place. The protection of equality will advance, not hinder, state terrorism prevention efforts. The second road in front of us is to commit fully and wholeheartedly to section 15, attempt to close the gap between what the provision can do in theory and in practice, and stand up to racial profiling in all contexts and all forms. If we value the integrity of our ideals, this second road is our only real option.

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