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Racial Profiling and the Rule of Law: A Reply

Terry Skolnik
Arizona State University, Sandra Day O'Connor College of Law

Jeanne Mayrand-Thibert

Fernando Belton
Belton Avocats

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Abstract

THIS VOLUME OF THE OSGOODE HALL LAW JOURNAL (OHLJ) contains two articles—and two replies—that explore racial profiling and the law. This academic exchange comes at a crucial moment. In Attorney General of Québec v Luamba ("Luamba"), the Court of Appeal of Quebec affirmed that the statutory police power to conduct roving traffic stops is unconstitutional because it results in arbitrary detentions and unconstitutional discrimination, neither of which were justifiable in a free and democratic society.

Racial Profiling and the Rule of Law: A Reply

TERRY SKOLNIK[1], JEANNE MAYRAND-THIBERT[2] & FERNANDO BELTON[3]

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THIS VOLUME OF THE OSGOODE HALL LAW JOURNAL (OHLJ) contains two articles—and two replies—that explore racial profiling and the law. This academic exchange comes at a crucial moment. In *Attorney General of Québec v Luamba* ("*Luamba*"), the Court of Appeal of Quebec affirmed that the statutory police power to conduct roving traffic stops is unconstitutional because it results in arbitrary detentions and unconstitutional discrimination, neither of which were

1. Research professor, Sandra Day O'Connor College of Law, Arizona State University (ASU). Executive director of ASU's Academy for Justice. Associate professor (on leave) at the University of Ottawa, Faculty of Law, Civil Law Section.
2. SJD student, University of Toronto, Faculty of Law.
3. Criminal defense lawyer at Belton Avocats and Executive Director of the Clinique juridique de Saint-Michel. He has taught the law of racial profiling at the University of Ottawa and at every law school in the province of Quebec. He also represents victims of racial profiling. We thank Anna Maria Konewka and Michelle Biddulph for comments or discussion on prior drafts, and François Tanguay-Renaud for discussions that helped shape our article and reply.

justifiable in a free and democratic society.[4] A combination of empirical data, expert evidence, and witness testimony elucidated how the roving traffic stop power resulted in racial profiling, and highlighted how racialized drivers were disproportionately pulled over by the police.[5] The Supreme Court of Canada (SCC) will soon hear the appeal. The *Luamba* decision can generate broad repercussions that shape police officers' powers, the judicial conception of racial profiling, the section 15 *Canadian Charter of Rights and Freedoms* ("*Charter*") right to equality's role within criminal law and procedure, and constitutional remedies, among others. At the same time, courts and tribunals are increasingly confronted with racial profiling claims, which they may approach in distinct ways. Together, our article and Professor Tanguay-Renaud's offer two very different accounts of how courts should approach racial profiling, both of which aim to deepen our collective understanding of this phenomenon, and offer new paths forward for how courts can better protect individuals against discriminatory policing.

Canadian legal academia too rarely involves these types of academic conversations, which allow scholars to directly engage with each other's arguments, highlight their strengths and weaknesses, discover points of agreement, and mutually improve one another's scholarship. We are grateful that the OHLJ afforded this opportunity, especially on such a crucial topic that requires greater academic and judicial attention. We hope that these types of exchanges become more frequent, and that our respective articles and replies offer a model of civil discourse (and disagreement).

Professor Tanguay-Renaud's article, "Doing Away with Racial Profiling in Policing Without Doing Away with the Rule of Law," offers an original critique of the legal test that governs racial profiling, and raises concerns about an overbroad judicial approach to this problem. He also provides an innovative account of the nexus between racial profiling, the right to be free from arbitrary detentions, and the rule of law.

Although we disagree with many of Professor Tanguay-Renaud's premises, arguments, and conclusions, we agree on certain important points. More specifically, we concur that section 15 of the *Charter* should play a larger role in criminal law and procedure, and that it captures the distinct harms and wrongs

4. *Procureur général du Québec c Luamba*, 2024 QCCA 1387 at para 222; Terry Skolnik & Fernando Belton, "*Luamba* et la Fin des Interceptions Routières Aléatoires" (2023) 101 Can Bar Rev 671 at 679-85 (discussing the *Luamba* trial court decision); Terry Skolnik, Jeanne Mayrand-Thibert & Fernando Belton, "The Law of Racial Profiling" (2025) 62 Osgoode Hall LJ 365 at 386 (providing an overview of the Court of Appeal's conclusions).
5. See also *Luamba c Procureur général du Québec,* 2022 QCCS 3866 at paras 161-577 (providing an overview of this evidence) [*Luamba* (trial decision)].

of racial profiling in ways that section 9 of the *Charter* cannot. We share the view that courts should embrace broader structural remedies—such as constitutional class action lawsuits and structural injunctions—that seek to counteract racial profiling more effectively than traditional remedies. Despite our significant disagreements, and notwithstanding the very different ways that we analyze racial profiling, we agree that current theoretical and remedial approaches to racial profiling can (and should) be improved. We disagree on three main points: (1) that section 9 of the *Charter*'s underlying purpose is to advance the rule of law; (2) that the section 9 racial profiling test framework is overbroad in the ways Professor Tanguay-Renaud suggests; and (3) that the legal framework for racial profiling normatively entrenches the under-policing of racialized persons. This reply will focus primarily on where—and why—we part ways.

I. ARBITRARY DETENTIONS, REMEDIES, AND THE RULE OF LAW

Professor Tanguay-Renaud's arguments can be summarized as follows. His foundational claim is that section 9 of the *Charter*'s role is to advance the rule of law.[6] He notes that: "The SCC has expressly interpreted the underlying purpose of section 9 as the advancement of the rule of law—or, more precisely, as ensuring that the state does not deprive people of their liberty without justification that coheres with the advancement of the rule of law."[7] He observes that the rule of law not only requires the police to act in accordance with it, but also encompasses several other elements.[8] Drawing on passages from several SCC decisions, he states that the rule of law also "imports 'a sense of orderliness, of subjection to known legal rules,'" "that the law [be] supreme over officials of the government as well as private individuals," and that "subjection of all to law, and the social order that flows from it, are no less than 'indispensable elements of civilized life.'"[9] Against this backdrop, he further argues that the purpose behind police powers "is to further the rule of law," and that crime control "matters to the advancement of the rule of law."[10] He then suggests that the current legal framework for racial

6. François Tanguay-Renaud, "Doing Away with Racial Profiling in Policing Without Doing Away with the Rule of Law" (2025) 62 Osgoode Hall LJ 309 at 322.
7. *Ibid.* He also notes at 311-12: "the rule of law, the advancement of which is the very purpose of section 9."
8. *Ibid* at 322.
9. *Ibid* at 322-23.
10. *Ibid* at 323.

profiling is overbroad and undermines the rule of law because it: (1) "radically curtail[s] the police's normative ability to arrest and detain people of colour even when officers clearly have reasonable grounds or suspicions to proceed" and (2) "entrenches a normative corrective according to which BIPOC individuals are to be systematically under-policed."[11]

Although Professor Tanguay-Renaud advances an illuminating theory of the relationship between section 9 of the *Charter* and the rule of law, we disagree with his characterization of section 9's primary purpose as the advancement of the rule of law. The sources that he cites do not seem to support his claim. He cites two paragraphs from the *R v Grant* ("*Grant*") decision, one of which does not mention the rule of law, and another of which is under the decision's sub-heading "Was the Detention Authorized by Law?" and not the sub-heading "The Purpose of the Rights Linked to Detention" (more on this below). He also cites a sentence from the *Charkaoui v Canada (Citizenship and Immigration)* ("*Charkaoui*") decision that the Court cited in *Grant* and is reproduced in this reply's next paragraph. Additionally, he cites one of his other law review articles. The main support for his thesis stems from paragraph 54 of *Grant,* which states:

> The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated [in *Charkaoui*]: 'This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law.'[12]

In our view, this sentence does not "expressly interpre[t] the underlying purpose of section 9 as the advancement of the rule of law" as he claims. Rather, the Court notes that section 9 expresses one important norm associated with the rule of law amongst many: that detentions and arrests must be in accordance with the law.

There are good reasons to believe that section 9's underlying purpose is not what Professor Tanguay-Renaud describes. Perhaps most importantly, the SCC has repeatedly stated that section 9's role is to "protect individuals' liberty against unjustified state interference" rather than to advance the rule of law.[13] The Court has further noted that section 9 strives to protect individuals' freedom of choice to comply with the police, and to safeguard individuals against self-incrimination.[14] Several examples illustrate this point. In *Grant*, under the sub-heading titled

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11. *Ibid* at 324.
12. *R v Grant*, 2009 SCC 32 at para 54 [*Grant*]. See Tanguay-Renaud, *supra* note 6 at 322, n 59.
13. *Grant*, *supra* note 12 at para 20.
14. *Ibid*; *R v Le*, 2019 SCC 34 at para 25 [*Le*]; *R v Tim*, 2022 SCC 12 at para 21 [*Tim*].

"The Purpose of the Rights Linked to Detention" the majority of the SCC observed that "[t]he purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference" and did not mention the rule of law in that part of the decision.[15] The SCC repeated this same liberty-protecting rationale in subsequent decisions, such as *R v Le* ("*Le*") and *R v Tim*—neither of which discuss the rule of law when analyzing section 9.[16]

Admittedly, some of these foundational section 9 decisions *do* discuss the rule of law, but in reference to section 24(2) of the *Charter* rather than section 9. The *Grant* decision references the "rule of law" once when applying section 9 to the facts, but mentions it nine times when discussing section 24(2): the exclusionary rule.[17] Other judicial decisions look similar: They reference the rule of law primarily in relation to section 24(2) rather than 9 (note that *Le does* refer to the rule of law once when the Court majority analyzes section 9, but only to support an objective standard for psychological detentions).[18]

Indeed, in assessing section 24(2), the SCC has mentioned numerous rule of law considerations, including that courts dissociate themselves from *Charter*-infringing conduct, that the judiciary must strive to maintain public confidence in courts, that state authorities uphold *Charter* rights, and that "adjudication [is] grounded in legality and respect for longstanding constitutional norms."[19] In *Le,* the SCC mentioned an especially important consideration that ties section 24(2) to racial profiling and the rule of law: "Requiring the police to comply with the *Charter* in all neighbourhoods and to respect the rights of all people upholds the rule of law, promotes public confidence in the police, and provides safer communities."[20] The Court added: "The police will not be demoralized by this decision: they, better than anyone, understand that with extensive powers come great responsibilities."[21] But Professor Tanguay-Renaud only briefly discusses the nexus between the rule of law and section 24(2)—which empowers courts to exclude evidence whose admission would bring the

15. *Grant, supra* note 13 at paras 20-23.
16. *Le*, *supra* note 14 at para 25 (noting: "Section 9's prohibition of 'arbitrary detention' is meant to protect individual liberty against unjustified state interference"); *Tim*, *supra* note 14 at para 21 ("The purpose of s. 9, broadly stated, is to protect individual liberty from unjustified state interference").
17. *Grant, supra* note 13 at paras 54, 67, 72-74, 124, 133.
18. *Le*, *supra* note 14 at paras 115, 143, 152, 158, 165; *Tim, supra* note 14 at para 82; *R v Lafrance*, 2022 SCC 32 at paras 93, 98.
19. *Grant, supra* note 13 at paras 72-73; *Le*, *supra* note 14 at para 158.
20. *Le*, *supra* note 14 at para 165.
21. *Ibid.*

administration of justice into disrepute—near the end of his article.[22] Yet as discussed in the next Part, constitutional remedies, and the ways they seek to advance the rule of law, mitigate many of the overbreadth concerns that he raises.

Addressing this relationship would strengthen his theory significantly, and enrich our understanding of the rule of law's role in constitutional criminal procedure. Currently, his article offers new insight into the tripartite relationship between the rule of law, section 9, and law enforcement, and this is an important contribution. Extending this analysis to section 24(2) and constitutional remedies more generally would shed additional—and much needed—light on the connections between racial profiling, the rule of law, and maintaining public confidence in the administration of justice.[23] His article lays the groundwork to explore these fundamental questions.

II. OVERBREADTH AND UNDER-POLICING ARGUMENTS: A REJOINDER

We also disagree with several aspects of Professor Tanguay-Renaud's argument that the racial profiling test is overbroad and normatively entrenches the under-policing of racialized individuals and communities. He contends that the legal framework for racial profiling may be interpreted in such an all-encompassing fashion that it risks leading to legal determinations of racial profiling in virtually all cases that involve a racialized suspect, which, in his view, undermines legal consistency and the rule of law.

The basis for his claims can be summarized as follows.[24] Some scholars posit that all individuals have subconscious biases. The *Le* test recognizes that conscious or subconscious biases that impact suspect selection or treatment to *any* degree amount to racial profiling. Since all police officers have subconscious biases that can impact suspect selection or treatment to any degree, all police encounters that involve a racialized suspect risk legal findings of racial profiling that can generate downstream consequences: unlawful detentions and arrests, excluded evidence, and acquittals. At their root, Professor Tanguay-Renaud's arguments exemplify concerns about slippery slopes and floodgate-type problems, both of which *do* happen, and are legitimate concerns. For instance, the incremental expansion

22. *Canadian Charter of Rights and Freedoms*, s 24(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
23. See *e.g. R v Robert Cameron,* 2025 ONSC 2621 at paras 49-59 [*Robert Cameron*] (applying the s 24(2) exclusionary rule in the context of racial profiling).
24. Tanguay-Renaud, *supra* note 6 at 325-29.

of judicially created police powers exemplifies a slippery slope that significantly expanded police officers' powers and restricted individuals' freedom.[25]

But there are several important rejoinders to Professor Tanguay-Renaud's concerns that the racial profiling framework is overbroad in these ways. First, racial profiling claims operate according to normal rules of proof—they require evidence to be substantiated, and oblige the defendant to prove such claims on a balance of probabilities.[26] Additionally, racial profiling claims are highly factual, context-specific, and "require proper framing and evidence."[27] These claims must generally be proven through circumstantial evidence and inferential reasoning because officers do not concede that they engaged in racial profiling, or may not recognize that their actions were motivated by subconscious biases.[28] And courts frequently reject racial profiling claims.[29] These realities reveal that the racial profiling framework is less broad than Professor Tanguay-Renaud asserts.

Second, even when officers violate section 9, courts must still apply the section 24(2) remedial framework rather than exclude evidence or acquit defendants automatically, an assessment that addresses some of Professor Tanguay-Renaud's overbreadth concerns.[30] More recently, in *R v Zacharias* ("*Zacharias*"), the SCC affirmed that consequential breaches—such as obtaining proof based on an initial *Charter* violation—do not automatically lead to the suppression of evidence.[31] Instead, courts must apply the three-part multi-factor balancing test set out in *Grant* to determine whether the evidence should be admitted or excluded.[32] The burden of proof associated with section 24(2) furnishes additional guardrails against the overbreadth that he describes. Applicants who establish racial profiling and seek to exclude unconstitutionally obtained evidence must still prove on the

25. Terry Skolnik, "Racial Profiling and the Perils of Ancillary Police Powers" (2021) 99 Can Bar Rev 429 at 455; Terry Skolnik & Vanessa MacDonnell, "Policing Arbitrariness: *Fleming v Ontario* and the Ancillary Powers Doctrine" (2021) 100 SCLR 187 at 200-201.
26. *R v Ali,* 2023 SKCA 127 at paras 54-55 (noting that racial profiling must be proven on the balance of probabilities); *R v Tutu,* 2021 ONCA 805 at para 38 [*Tutu*] (noting that racial profiling claims require evidence and proper framing); *R v Zaragoza*, 2025 ONSC 2077 at para 104 [*Zaragoza*] (same).
27. *Tutu, supra* note 26 at para 38.
28. *R v Sitladeen*, 2021 ONCA 303 at para 43 [*Sitladeen*]; *R v Brown*, 2003 CanLII 52142 at para 44 (ONCA); *Luamba* (trial decision), *supra* note 5 at para 153.
29. See *e.g. R v Alipourobati,* 2025 ONCA 64 at paras 19-29 (rejecting a claim of racial profiling); *R v Justin Dyer and Ivor Shawn Young*, 2024 ONSC 4767 at paras 47-64 (same); *R v Kamara*, 2024 ONCJ 406 at paras 92-112 (same); *R v Bell,* 2024 ONCJ 692 at para 43 (same).
30. See *Grant, supra* note 13 at paras 59, 72-86.
31. *R v Zacharias*, 2023 SCC 30 at paras 59, 94-97 [*Zacharias*].
32. *Grant, supra* note 13 at paras 59, 72-86.

balance of probabilities that its admission would bring the administration of justice into disrepute.[33]

To be clear, some trial courts have concluded that judges *must* automatically exclude evidence that stems from police encounters that involve racial profiling (note that the Crown conceded that the evidence should be excluded in one of these cases).[34] But the automatic exclusion of evidence is inconsistent with the express wording of section 24(2), which requires courts to assess the totality of the circumstances when they apply the exclusionary rule.[35] Additionally, one of the main reasons why the SCC abandoned the section 24(2) test established in *R v Collins* ("*Collins*") in 1987—and developed the section 24(2) framework in *Grant* in 2009—was because the *Collins* test led to the automatic exclusion of evidence in certain cases. The abandonment of *Collins* in *Grant* was reinforced in *Zacharias*.[36] Lastly, as the SCC set out in *Grant*, courts must apply section 24(2) to determine whether to exclude evidence that was obtained "in violation of a *Charter* right," an analysis that extends to section 9 violations based on racial profiling.[37] As in other contexts, courts may admit unconstitutionally obtained evidence given the totality of the circumstances provided it will not bring the administration of justice into disrepute. Furthermore, in response to *Charter* right violations, courts may allocate other remedies, such as *Charter* damages or a mitigated sentence, if they are deemed more appropriate in the circumstances.[38]

The fact that courts must conduct a section 24(2) analysis—or a section 24(1) remedial assessment—when evidence is obtained due to racial profiling or discrimination largely addresses the hypothetical cases Professor Tanguay-Renaud raises in his article. He offers the example of officers who otherwise had reasonable and probable grounds to arrest a defendant for a serious crime but also held discriminatory beliefs that minimally impacted suspect selection or treatment.[39] His analysis focuses nearly exclusively on whether the arrests are unlawful, and

33. *R v Collins,* 1987 CanLII 84 at para 30 (SCC). See also *R v Elawad,* 2025 ONSC 1298 at para 195.
34. See *R v Morgan,* 2023 ONSC 6855 at para 92; *R v Murray,* 2025 ONSC 4127 at para 361.
35. *Charter, supra* note 22. Section 24(2) states:

> Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

36. *Grant, supra* note 13 at paras 64-65.
37. *Ibid* at para 59. See *e.g. Robert Cameron, supra* note 23 at paras 49-59.
38. See *Ville de Québec c Niyokwizera,* 2024 QCCM 72 at para 74.
39. Tanguay-Renaud, *supra* note 6 at 329-31.

minimally on the remedial response. He observes that "the crucial evidence thus acquired *is susceptible to be excluded* under section 24(2) of the *Charter*."[40] But will this evidence be excluded? And should it be? And how will the court's remedial approach impact the very rule of law considerations that are central to his article? His article does not address these vital questions, even though they may lead him to different conclusions. Professor Tanguay-Renaud should explore precisely these types of questions that would reinforce his account, and would offer a more holistic theory of the relationship between racial profiling, constitutional remedies, and the rule of law.

There is a third rejoinder to Professor Tanguay-Renaud's claims surrounding subconscious biases and the racial profiling test's purported overbreadth. More specifically, he worries that courts may conclude that all law enforcement encounters with racialized persons involve racial profiling if we recognize that all individuals—including police officers—have subconscious racial biases.[41] Since subconscious bias would impact all police encounters with racialized persons to *some* degree, courts could conclude that officers engaged in racial profiling in all cases that involve a racialized defendant. In our view, this suggestion discounts the fact that racial profiling must be proven by evidence as discussed above. Indeed, courts have not embraced the approach that he describes. Instead, they have rejected a presumption of racial profiling that would view all police encounters as inherently discriminatory based on the existence of subconscious biases in society, and instead, require individuals to prove racial profiling on a balance of probabilities and based on the evidence.[42]

Professor Tanguay-Renaud raises a final concern associated with the racial profiling test with which we disagree. He contends that the systematic risk that officers will be found to have engaged in racial profiling can produce a de-policing effect that normatively entrenches the under-policing of racialized individuals and communities.[43] But there is an objection to his argument. Namely, it largely ignores the low-visibility nature of police encounters, and the fact that most instances of racial profiling are never adjudicated by courts. This significantly limits how frequently courts will apply the *Le* racial profiling framework.[44]

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40. *Ibid* at 331.
41. *Ibid* at 326-27.
42. *Peart v Peel Regional Police Services*, 2006 CanLII 37566 at para 135 (ONCA); *Sitladeen*, *supra* note 28 at para 67; *R v Chenjelani*, 2025 ONSC 2207 at para 28; *R v Uthayakumar*, 2024 ONCJ 419 at para 33.
43. Tanguay-Renaud, *supra* note 6 at 323.
44. Terry Skolnik, "Policing in the Shadow of Legality: Pretext, Leveraging, and Investigation Cascades" (2023) 60 Osgoode Hall LJ 505 at 517-18.

Many—if not most—individuals who are victims of racial profiling are not fined, arrested, or charged with a crime.[45] Nor will they challenge the lawfulness of the police encounter before a court or tribunal for various reasons. Individuals may not bring racial profiling claims in civil or criminal contexts because it is expensive, time-consuming, emotionally painful, or humiliating, and may not lead to adequate remedies.[46] Moreover, in criminal contexts, over ninety per cent of cases are plea bargained, such that many defendants who were subject to discriminatory policing will not advance a racial profiling claim.[47] Although he does not state this expressly, Professor Tanguay-Renaud's arguments seem to suggest that trials with racial profiling claims are the rule, not the exception. But it is the other way around. The fact that most instances of racial profiling will not be litigated—and those that *are* litigated frequently fail—offers an important rebuttal to his claim that the racial profiling test normatively entrenches the under-policing of racialized persons.

III. CONCLUSION

Despite our disagreements, Professor Tanguay-Renaud's article is original and insightful in numerous respects. It offers an innovative and interesting account of the relationship between the rule of law, racial profiling, and arbitrary detentions, one that will only be strengthened by a deeper analysis of the relationship between the rule of law and constitutional remedies. He advances novel concerns regarding potential slippery slopes and floodgates that may occur if courts misinterpret the legal framework for racial profiling. He also offers compelling justifications to expand section 15's role to instances of racial profiling, and highlights the value of novel constitutional remedies—arguments with which we strongly agree. We disagree with his arguments concerning section 9's underlying purpose, the legal framework for racial profiling's purported overbreadth, and the normative entrenchment of under-policing. We are grateful to have this robust and respectful academic exchange at such an important moment. And we hope that our articles and replies improve how courts approach racial profiling, and catalyze additional—and much needed—scholarship on this crucial issue.

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45. Terry Skolnik, "Rééquilibrer le Rôle de la Cour Supreme de Canada en Procédure Criminelle" (2022) 67 McGill LJ 259 at 278.
46. Skolnik & Belton, "*Luamba* et la Fin des Interceptions Routières Aléatoires," *supra* note 5 at 690-92.
47. Terry Skolnik, "Three Stages of Criminal Justice Remedies" (2024) 57 UBC L Rev 565 at 583.