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The Law of Racial Profiling

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Special Symposium on Policing, Racial Profiling, and the Canadian Charter of Rights and Freedoms



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The Law of Racial Profiling

Abstract

Racial profiling is one of the most enduring problems in policing. Yet it remains largely under-theorized, which generates important theoretical and practical implications. Racial profiling tends to be construed as an arbitrary detention rather than a form of unconstitutional discrimination. For this reason, the section 15 Charter right to equality plays little to no role in most leading cases on racial profiling. The legal framework that governs racial profiling lacks clarity and can be applied inconsistently. And the remedial landscape associated with racial profiling claims has evolved minimally. This article advances a novel approach to racial profiling that addresses these shortfalls. It demonstrates why racial profiling is wrongful primarily because it embodies discrimination that violates the section 15 Charter right to equality, and secondarily, infringes liberty or privacy interests, and in so doing, breaches other constitutional rights. It offers a simplified legal framework for how courts can better approach racial profiling in constitutional criminal procedure. Drawing on the republican theory of freedom (or republicanism), it shows why racial profiling results in domination—meaning vulnerability to unchecked threats of interference—that courts fail to control. In doing so, it deepens our theoretical understanding of racial profiling and its connection to equality and liberty. The concluding parts of this article contend that courts can incorporate two innovative remedies that can better prevent and address racial profiling: structural injunctions and constitutional settlement agreements. Ultimately, this article offers a new path forward for how racial profiling can be approached in a manner that better safeguards individuals' fundamental rights and interests.

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The Law of Racial Profiling

TERRY SKOLNIK,¹ JEANNE MAYRAND-THIBERT²
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Racial profiling is one of the most enduring problems in policing. Yet it remains largely under-theorized, which generates important theoretical and practical implications. Racial profiling tends to be construed as an arbitrary detention rather than a form of unconstitutional discrimination. For this reason, the section 15 *Charter* right to equality plays little to no role in most leading cases on racial profiling. The legal framework that governs racial profiling lacks clarity and can be applied inconsistently. And the remedial landscape associated with racial profiling claims has evolved minimally.

This article advances a novel approach to racial profiling that addresses these shortfalls. It demonstrates why racial profiling is wrongful primarily because it embodies discrimination that violates the section 15 *Charter* right to equality, and secondarily, infringes liberty or privacy interests, and in so doing, breaches other constitutional rights. It offers a simplified legal framework for how courts can better approach racial profiling in constitutional criminal procedure. Drawing on the republican theory of freedom (or republicanism), it shows why racial profiling results in domination—meaning vulnerability to unchecked threats of interference—that courts fail to control. In doing so, it deepens our theoretical understanding of racial profiling and its connection to equality and liberty.

The concluding parts of this article contend that courts can incorporate two innovative remedies that can better prevent and address racial profiling: structural injunctions and

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constitutional settlement agreements. Ultimately, this article offers a new path forward for how racial profiling can be approached in a manner that better safeguards individuals' fundamental rights and interests.

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RACIAL PROFILING is one of the most enduring problems in policing. Scholars, lawyers, and civil society organizations have criticized prevailing approaches to racial profiling on various grounds. The critiques look something like this. Racial profiling remains notoriously difficult to prove because it is rarely established through direct evidence and because officers may have acted on the basis of subconscious biases.⁴ Courts have also failed to control pretextual police encounters that involve racial profiling.⁵ More specifically, officers exploit lax criminal procedure doctrines to racially profile drivers, invoke low-level traffic violations as an excuse to pull them over, and conduct more intrusive criminal investigations.⁶ Worse yet, courts have created—and upheld the constitutionality

4. Nathan JS Gorham, “Police Discretion, Racial Profiling and Articulate Cause” (2004) 49 *Crim LQ* 50 at 60-61; *Luamba c Procureur général du Québec*, 2022 QCCS 3866 at para 153 [*Luamba* QCCS].

5. David M Tanovich, “Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 *Osgoode Hall LJ* 145 at 168, DOI: <<https://doi.org/10.60082/2817-5069.1446>>.

6. Steven Penney, “Driving While Innocent: Curbing the Excesses the ‘Traffic Stop’ Power” (2019) 24 *Can Crim L Rev* 339 at 341.

of—police powers that encourage racial profiling and facilitate pretextual investigations.⁷ Although courts increasingly recognize the reality of racial profiling, public law and private law remedies largely fail to redress it adequately.⁸ For instance, the exclusionary rule offers no remedy when officers engage in racial profiling yet discover no evidence, and damage awards for discriminatory police conduct tend to be low while attorney fees can be cost prohibitive.⁹

Then there is the constitutional elephant in the room. Although there are exceptions, section 15 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”)—which guarantees the constitutional right to equality—is largely absent from many major criminal procedure decisions that address racial profiling.¹⁰ Instead, racial profiling is construed as an arbitrary detention that violates section 9 of the *Charter* or an unlawful search that breaches section 8 of the *Charter*.¹¹ Yet if racial profiling does not constitute discrimination that violates the constitutional right to equality, it is unclear what does.

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7. David Tanovich, “The *Charter* of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 SCLR 655 at 673, DOI: <<https://doi.org/10.60082/2563-8505.1128>> [Tanovich, “The *Charter* of Whiteness”]. It is unclear whether roving traffic stops will continue to be constitutionally valid. This article was written following a Court of Appeal of Quebec decision that cast aside the 1990 Supreme Court of Canada decision that upheld the validity of the roving traffic stop police power. See *Procureur général du Québec c Luamba*, 2024 QCCA 1387 [Luamba QCCA]; *R v Ladouceur*, 1990 CanLII 108 (SCC) [Ladouceur]. This article expands on the Luamba decision’s significance below.
 8. Sujit Choudhry & Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability” (2003) 41 Osgoode Hall LJ 1 at 6, DOI: <<https://doi.org/10.60082/2817-5069.1429>>; Terry Skolnik, “Rééquilibrer le rôle de la Cour suprême du Canada en procédure criminelle” (2022) 67 McGill LJ 259 at 278-84, DOI: <<https://doi.org/10.7202/1098443ar>> [Skolnik, “Rééquilibrer le rôle de la Cour suprême”]; Kent Roach, “Remedies for Discriminatory Profiling” in Kent Roach & Robert Sharpe, eds, *Taking Remedies Seriously* (Canadian Institute for the Administration of Justice, 2010) at 402, 404 [Roach, “Remedies for Discriminatory Profiling”].
 9. Roach, “Remedies for Discriminatory Profiling,” *supra* note 8 at 402, 404.
 10. David Tanovich, *The Colour of Justice: Policing Race in Canada* (UBC Press, 2006) at 130 [Tanovich, *The Colour of Justice*]; Danardo S Jones, “Lifting the Judicial Embargo on Race-Based *Charter* Litigation: A Comment on *R. v. Le*” (2019) 67 Crim LQ 42 at 42-43; David M Tanovich, “E-Racing Racial Profiling” (2004) 41 Alta L Rev 905 at 929-30, DOI: <<https://doi.org/10.29173/alr1313>> [Tanovich, “E-Racing Racial Profiling”]; Gorham, *supra* note 4 at 61; Terry Skolnik, “Expanding Equality” (2024) 47 Dal LJ 195 at 197 [Skolnik, “Expanding Equality”]. Exceptionally, courts do recognize that racial profiling violates the s 15 right to equality. See *e.g. Luamba QCCA*, *supra* note 7; *R v Neyazi*, 2014 ONSC 6838 at para 205 [Neyazi]; *Elmardy v Toronto Police Services Board*, 2017 ONSC 2074 at para 23; *R v Douglas-Hodgson*, 2023 ONSC 6769 at para 91 [Douglas-Hodgson].
 11. See Part II(C), below.

Each of these criticisms deepens our knowledge about the law of racial profiling's limitations within constitutional criminal procedure. Yet these seemingly distinct critiques reveal a common problem: Racial profiling remains under-theorized in Canadian law. Existing theoretical accounts of racial profiling—and their connection to various constitutional rights and interests—help explain why the right to equality tends to play a minimal role in constitutional criminal procedure.¹² Moreover, this under-theorization contributes to a limited remedial landscape for racial profiling.¹³ Common remedies for racial profiling are individual rather than systemic in nature, such as the exclusion of evidence or a stay of proceedings.¹⁴

This article aims to address these concerns and provides a novel theory of racial profiling in constitutional criminal procedure. It argues that racial profiling's primary and secondary wrongfulness tends to be mischaracterized.¹⁵ Racial profiling is portrayed as wrongful primarily because it exemplifies arbitrary state action that restricts liberty or privacy, and secondarily, impacts dignity and equality.¹⁶ For this reason, racial profiling continues to be conceptualized narrowly as arbitrary detentions or unreasonable searches that violate sections 9 or 8 of the *Charter*, rather than more broadly as unconstitutional discrimination that breaches the section 15 *Charter* right to equality.¹⁷

But this conception of racial profiling's primary and secondary wrongfulness is precisely backwards. Racial profiling is wrong primarily because it exemplifies discrimination that harms equality and dignity interests, and secondarily, infringes interests such as liberty or privacy.¹⁸ Indeed, these secondary harms to liberty or privacy interests occur as a result of—and subsequent to—discriminatory profiling that influences suspect selection or treatment.¹⁹ This article offers a simplified and coherent legal framework for racial profiling that unites its distinct harms and wrongs, and shows why discriminatory policing results in joint constitutional rights violations.²⁰

12. See generally Skolnik, "Expanding Equality," *supra* note 10 at 217-18.

13. See generally Skolnik, "Rééquilibrer le rôle de la Cour suprême," *supra* note 8 at 273-84.

14. *Ibid.*

15. See Parts II and III, below.

16. See Part II(C), below.

17. *Ibid.*

18. *Ibid.*

19. *Ibid.*

20. See Part V(A), below.

Drawing on republicanism (or the republican theory of freedom), this article also offers a more robust theoretical account of racial profiling.²¹ Republicanism construes freedom as non-domination, meaning freedom from the risk of uncontrolled interference by others.²² Individuals are free when they are protected against unilateral and uncontrolled threats of interference by others.²³ Conversely, they are unfree—and suffer domination—when they are unilaterally vulnerable to others’ uncontrolled power.²⁴ In contrast to the negative theory of freedom as non-interference that is associated with classical liberalism, republicanism incorporates the value of political equality into the notion of freedom.²⁵

This article demonstrates why racial profiling is fundamentally a problem of domination: Individuals are unilaterally vulnerable to threats of police interference

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21. Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1999) at 51, 66, DOI: <<https://doi.org/10.1093/0198296428.003.0001>> [Pettit, *Republicanism*]; Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012) at 7, 46, DOI: <<https://doi.org/10.1017/CBO9781139017428>> [Pettit, *On the People’s Terms*]; Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (WW Norton, 2014) at 4-7; Christian Nadeau, “Republicanism” in Gerald Gaust, Fred D’Agostino & Ryan Muldoon, eds, *The Routledge Companion to Social and Political Philosophy* (Routledge, 2012) at 254; Fabian Schuppert, *Freedom, Recognition and Non-Domination: A Republican Theory of (Global) Justice* (Springer, 2014) at 27-29, DOI: <<https://doi.org/10.1007/978-94-007-6806-2>>; Terry Skolnik, “Freedom and Access to Housing: Three Conceptions” (2018) 35 Windsor YB Access Just 226 at 228, DOI: <<https://doi.org/10.22329/wyaj.v35i0.5690>>.
 22. Pettit, *On the People’s Terms*, *supra* note 21 at 7; Philip Pettit, “The General Will, the Common Good, and a Democracy of Standards” in Yiftah Elazar & Geneviève Rousselière, eds, *Republicanism and the Future of Democracy* (Cambridge University Press, 2019) at 14-16, DOI: <<https://doi.org/10.1017/9781108630153>>.
 23. Frank Lovett, “Non-Domination” in David Schmidtz & Carmen Pavel, eds, *The Oxford Handbook of Freedom* (Oxford University Press, 2018) at 112, DOI: <<https://doi.org/10.1093/oxfordhb/9780199989423.001.0001>> [Lovett, “Non-Domination”]. See also Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard University Press, 2009) at 42-43, DOI: <<https://doi.org/10.4159/9780674054516>>.
 24. See Lovett, “Non-Domination,” *supra* note 23. See also Cécile Laborde, “Republicanism” in Michael Freeden & Marc Stears, eds, *The Oxford Handbook of Political Ideologies* (Oxford University Press, 2013) at 519, DOI: <<https://doi.org/10.1093/oxfordhb/9780199585977.013.0029>>.
 25. Marie Garrau & Cécile Laborde, “Relational Equality, Non-Domination, and Vulnerability” in Carina Fourie et al, eds, *Social Equality: What it Means to Be Equal* (Oxford University Press, 2014) at 50-52, DOI: <<https://doi.org/10.1093/acprof:oso/9780199331109.001.0001>>.

due to their race or ethnicity.²⁶ In contrast to prevailing understandings of racial profiling, the republican notion of domination better captures how racial profiling embodies discriminatory rank-ordering, inflicts distinct psychological harms, and undermines both equality and liberty.²⁷ In doing so, republicanism deepens our understanding of the connection between racial profiling, arbitrary detentions that violate section 9 of the *Charter*, and discriminatory policing that infringes section 15 of the *Charter*.

This article also contends that the under-theorization of racial profiling has contributed to a limited number of remedies that have important shortcomings.²⁸ Conventional remedies may fail to provide concrete redress or can suffer from access to justice barriers.²⁹ They may also do little to counteract the systemic and organizational realities that contribute to racial profiling—a problem that tends to be overlooked.³⁰ More specifically, existing remedies may not attempt to improve police transparency and oversight; ameliorate officer education, supervision, or discipline; or impose data-gathering practices that help identify racial profiling.³¹ The concluding parts of this article offer two innovative remedies that can help address these shortcomings: structural injunctions and constitutional settlement agreements.³²

The structure of this article is as follows. Part I provides an overview of racial profiling and its consequences. Part II discusses existing approaches to racial profiling and explores its current characterization as wrongful primarily because it violates liberty or privacy interests. Part III offers a more robust theoretical account

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26. Eric J Miller, “The Warren Court’s Regulatory Revolution in Criminal Procedure” (2010) 43 Conn L Rev 1 at 65, DOI: <<https://doi.org/10.2139/ssrn.1575356>> (drawing a connection between discriminatory policing and domination); Terry Skolnik, *Homelessness, Liberty, and Property* (Cambridge University Press, 2024) at 103-105, DOI: <<https://doi.org/10.1017/9781009392631>> [Skolnik, *Homelessness, Liberty, and Property*].
27. See Part IV, below. See also Matthew Rosati, “Freedom from Domination: The Republican Revival” (2000) 26 Phil & Soc Criticism 83 at 85, DOI: <<https://doi.org/10.1177/019145370002600306>>.
28. See Parts IV(B) and V(B), below. On remedial limitations, see generally Skolnik, “Rééquilibrer le rôle de la Cour suprême,” *supra* note 8 at 273-84.
29. See Part IV(B), below.
30. For a discussion of the access to justice concerns and remedial inapplicability in the context of racial profiling, see Terry Skolnik & Fernando Belton, “*Luamba* et la fin des interceptions routières aléatoires” (2023) 101 Can Bar Rev 671 at 690-94.
31. Parts IV(B) and V(B), below.
32. For an overview of the uses of structural injunctions as remedies, see Russell L Weaver, “The Rise and Decline of Structural Remedies” (2004) 41 San Diego L Rev 1617 at 1617-23. For an example of the use of a constitutional settlement agreement as a remedy, see *Good v Toronto Police Services Board*, 2020 ONSC 6332 [*Good* 2020].

of racial profiling. It shows why racial profiling consists of the primary wrong of discrimination that undermines equality interests and the secondary wrong of arbitrary state conduct that restricts liberty or privacy interests. Part IV deepens our understanding of racial profiling and demonstrates why it results in domination that violates both equality and liberty. Part V provides a simple, systematized, and coherent legal framework for racial profiling that unites its primary and secondary wrongfulness. More specifically, Part V distinguishes between the legal framework that governs racial profiling claims in criminal proceedings on the one hand, and the legal framework that applies to constitutional challenges to laws or practices that result in racial profiling on the other. Its concluding parts explain how existing remedies do not generally attempt to counteract systemic and organizational factors that contribute to racial profiling, and describe how structural injunctions and constitutional settlement agreements can better rectify these deficiencies. Ultimately, this article offers a new path forward to better understand racial profiling, approach racial profiling claims, and improve the remedial landscape associated with discriminatory policing.

I. THE PROBLEM OF RACIAL PROFILING

A. EMPIRICAL RESEARCH ON RACIAL PROFILING

Various studies demonstrate significant racial disparities in proactive police encounters. Begin with traffic stops. Several empirical studies show that racialized drivers are disproportionately pulled over by the police compared to white persons.³³ A 2005 study in Kingston, Ontario, showed that Black drivers were roughly 2.7 times more likely to be pulled over by the police compared to white persons.³⁴ Research conducted in Ottawa between June 2013 and June 2015 reveals similar disparities.³⁵ This empirical study explored the degree to which

33. See *e.g.* Terry Skolnik, “Ancillary Police Powers” (2021) 99 Can B Rev 429 at 436-39 [Skolnik, “Ancillary Police Powers”]. See also The Honourable Michael H Tulloch, *Report of The Independent Street Checks Review* (Queen’s Printer for Ontario, 2018) at 43-44 [“Tulloch Report”].

34. Scot Wortley & Lysandra Marshall, *Bias-Free Policing: The Kingston Data Collection Project: Final Results* (The Kingston Data Collection Project, 2005) at 20, online: <space.library.queensu.ca/server/api/core/bitstreams/9831977f-6af1-43e9-9017-f009f664ffc/content> [perma.cc/U2V6-DBAA] (noting “Odds Ratios, by Type of Stop and Race, City of Kingston Census Benchmark (*Merged Data*)”).

35. Lorne Foster, Les Jacobs & Bobby Siu, *Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts* (Ottawa Police Service, 2016) at 3-4, online: <www.researchgate.net/publication/344906617_Final_OPS_OTTAWA_REPORT_-_2016EN> [perma.cc/9AA3-PL34].

individuals were pulled over compared to what would be expected given their proportion of the city's population.³⁶ The results of the study revealed that Black persons were pulled over by the police roughly 2.3 times more than would be anticipated and Middle Easterners were pulled over approximately 3.3 times more than would be anticipated.³⁷ These disparities were even starker amongst younger drivers. Middle Eastern male drivers aged sixteen to twenty-four were stopped approximately 12 times more than what would be anticipated, while Black male drivers of that age group were stopped approximately 8.3 times more than anticipated.³⁸ More recently, the Ottawa Police Service released the results of a ten-year study conducted between 2013 and 2023.³⁹ The net disparity level decreased only slightly between these years.⁴⁰

Some studies have explored the extent to which Black drivers are pulled over by the police multiple times in a particular period compared to white drivers. In a survey study conducted in 2018 in Halifax, 40.3% of Black respondents indicated that they had been stopped and questioned two or more times in the past five years while driving a motor vehicle, while only 17.5% of white respondents reported similar stop rates during that period.⁴¹ Black passengers were subject to similar disparities.⁴² Although 18.2% of Black passengers indicated that they had been questioned by the police two or more times during the past five years, only 5.6% of white respondents reported that outcome.⁴³

Research has also explored the rates at which racialized persons are disproportionately subject to pedestrian stops or carding. The term "carding" implies that an officer requests an individual's personal information without suspecting them of having committed an offense.⁴⁴ A *Toronto Star* investigation

36. *Ibid.*

37. *Ibid* at 3-4.

38. *Ibid* at 18.

39. Chief of Police, Ottawa Police Service, *10-Year Traffic Stop Data Collection Report* (Ottawa Police Service Board, 2024), online: <pub-ottawa.escribemeetings.com/filestream.ashx?DocumentId=188293> [perma.cc/DK7U-9LSQ].

40. *Ibid* at 5. See also Jenna Legge, "Decade-Long Study Shows Racial Disparities in Ottawa Traffic Stops," *CBC News* (23 June 2024), online: <www.cbc.ca/news/canada/ottawa/decade-long-study-shows-racial-disparities-in-ottawa-traffic-stops-1.7238620> [perma.cc/SEK4-YQC2].

41. Scot Wortley, *Halifax, Nova Scotia: Street Checks Report* (Nova Scotia Human Rights Commission, 2019) at 40, online (pdf): <humanrights.novascotia.ca/sites/default/files/editor-uploads/halifax_street_checks_report_march_2019_0.pdf> [perma.cc/6C2C-UE87].

42. *Ibid.*

43. *Ibid.*

44. "Tulloch Report," *supra* note 33 at xi, xiv.

documented that “Black people were approximately seventeen times more likely to be carded than white people in certain parts of downtown Toronto.”⁴⁵ Research conducted in Montreal also showed racial disparities in pedestrian stop rates.⁴⁶ Results indicated that Black persons and Indigenous persons were between four to five times more likely to be subject to pedestrian stops compared to white persons.⁴⁷ Young Arab men aged fifteen to twenty-four were four times more likely to be subject to a pedestrian stop than white males of the same age.⁴⁸ While Indigenous persons were six times more likely to be subject to a street check than white persons, Indigenous women were eleven times more likely to be subject to a street check compared to white women.⁴⁹

Lastly, some Canadian studies examine stop-and-frisk rate disparities between Black persons and white persons (note that relatively little stop-and-frisk data exists in Canada compared to the United States).⁵⁰ A 2007 Toronto study indicated that 12% of Black respondents reported that they were stopped and searched by the police in the past two years, compared to 3% of white

45. *Ibid* at 43-44.

46. Victor Armony, Mariam Hassaoui & Massimiliano Mulone, *Les interpellations policières à la lumière des identités racisées des personnes interpellées. Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d'indicateurs de suivi en matière de profilage racial: Rapport final* (Service de Police de la Ville de Montréal, 2019), online (pdf): <spvm.qc.ca/upload/Rapport_Armony-Hassaoui-Mulone.pdf> [perma.cc/2WE8-39P2].

47. *Ibid* at 10.

48. *Ibid*.

49. *Ibid* at 11.

50. Scot Wortley & Akwasi Owusu-Bempah, “The Usual Suspects: Police Stop and Search Practices in Canada” (2011) 21 *Policing & Soc’y* 395 at 398, DOI: <doi.org/10.1080/10439463.2011.610198> [Wortley & Owusu-Bempah, “The Usual Suspects”]. Note that other scholars purport to examine disparate “stop and search” rates, but the research does not clearly differentiate between police *stops* on the one hand, and police stops that result in *searches* on the other. See e.g. Yunliang Meng, Sulaimon Giwa & Uzo Anucha, “Is There Racial Discrimination in Police Stop-and-Searches of Black Youth? A Toronto Case Study” (2015) 7 *Can J Family & Youth* 115 at 125, DOI: <doi.org/10.29173/cjfy24301>; Yunliang Meng, “Profiling Minorities: Police Stop and Search Practices in Toronto, Canada” (2017) 11 *Human Geographies* 5 at 12-18, DOI: <doi.org/10.5719/hgeo.2017.111.1>; Scot Wortley & Akwasi Owusu-Bempah, “Race, Police Stops, and Perceptions of Anti-Black Police Discrimination in Toronto, Canada over a Quarter Century” (2022) 45 *Policing* 570 at 577-78, DOI: <doi.org/10.1108/PIJPSM-11-2021-0157>. On US statistics for stop and search disparities, see *Floyd et al v New York (City of) et al*, 959 F Supp (2d) 540 (SDNY 2013) at 559-60 [*Floyd*]; Henry F Fradella, Weston J Morrow & Michael D White, “An Empirical Analysis of the Racial/Ethnic and Sex Differences in NYPD Stop-and-Frisk Practices” (2021) 21 *Nevada LJ* 1151 at 1162-63; David Rudovsky & David A Harris, “Terry Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data” (2018) 79 *Ohio St LJ* 501 at 532.

respondents.⁵¹ Scholars have also conducted survey studies that analyzed stop and search disparities amongst groups of high school-aged students.⁵² The results of the study showed that 15.7% of Black students reported that they had been stopped and searched once by the police in the past two years, while 22.7% had been searched by the police multiple times during that period.⁵³ In contrast, 8.3% of white students had been searched by the police in the past two years, while 7.9% had been subject to multiple searches.⁵⁴ The Ontario Human Rights Commission also notes that Black persons have been subject to stop-and-frisk searches at higher rates than white persons.⁵⁵

Notice three salient features of these policing disparities, which highlight the connection between racial profiling and substantive equality.⁵⁶ First, disparities tend to be *significant*.⁵⁷ More specifically, certain racialized groups are subject to police encounters at much higher rates than their white counterparts: typically double the rate, if not more.⁵⁸ Second, these significant racial disparities tend to be *consistent*.⁵⁹ Studies repeatedly show the same trend: Black persons are disproportionately subject to police encounters, and are more likely to be subject to these encounters repeatedly.⁶⁰ These studies do not demonstrate the inverse problem: that there is a widespread problem where white persons are disproportionately stopped by the police at much higher rates than Black persons.⁶¹ Third, these types of racial disparities are *transnational*. Studies conducted in Canada, the United States, and England and Wales highlight

51. Wortley & Owusu-Bempah, “The Usual Suspects,” *supra* note 50 at 398.

52. Steven Hayle, Scot Wortley & Julian Tanner, “Race, Street Life, and Policing: Implications for Racial Profiling” (2016) 58 Can J Crim & Corr 322 at 328-30, DOI: <<https://doi.org/10.3138/cjccj.2014.E32>>.

53. *Ibid* at 332.

54. *Ibid*.

55. Ontario Human Rights Commission, *From Impact to Action: Final report into anti-Black racism by the Toronto Police Service* (Ontario Human Rights Commission, 2024) at ch 5 [OHRC, *Impact to Action*].

56. Skolnik, “Expanding Equality,” *supra* note 10 at 215-17.

57. See *e.g.* Foster, Jacobs & Siu, *supra* note 35 at 2-3, 18-19; Armony, Hassaoui & Mulone, *supra* note 46 at 10-11; Wortley & Marshall, *supra* note 34 at 20.

58. *Supra* note 57 and the accompanying text.

59. See generally John Burchill et al, *Ancillary Police Powers in Canada: A Critical Reassessment* (UBC Press, 2024) at ch 5.

60. See *e.g.* Foster, Jacobs & Siu, *supra* note 35 at 2-3, 18-19; Wortley, *supra* note 41 at 40.

61. To be clear, some studies have reported that white persons report that they are subject to some proactive police encounters more frequently than Black persons. See *e.g.* Hayle, Wortley & Tanner, *supra* note 52 at 332 (18% of white high school students report being stopped by the police in contrast to 13.3% of Black high school students).

comparable disparities in various types of police encounters, such as traffic stops and stop-and-frisk.⁶²

Low hit rates—and major hit-rate disparities—elucidate why racial profiling is both morally objectionable and ineffective.⁶³ The term “hit rate” connotes the percentage of investigations that uncover drugs, firearms, or other illegal activity.⁶⁴ Studies indicate that highly discretionary proactive police encounters—such as investigatory traffic stops and stop-and-frisk—generally yield low hit rates (more on this below).⁶⁵ Furthermore, although police officers disproportionately pull over Black drivers and search Black persons compared to their white counterparts, studies indicate that hit rates tend to be lower for Black persons than white ones.⁶⁶

Several examples illustrate this point. Consider first New York Police Department statistics of stops-and-searches conducted between January 2004 and June 2012.⁶⁷ Officers conducted approximately 2.3 million frisk searches during that period.⁶⁸ Roughly 98.5% of these searches did not yield a weapon.⁶⁹ Furthermore, of the roughly 4.4 million stops that officers conducted during

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62. Frank Baumgartner, Derek Epp & Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* (Cambridge University Press, 2018) at 65-66, 68-69, DOI: <<https://doi.org/10.1017/9781108553599>> (highlighting that Black persons are disproportionately stopped by the police in North Carolina); Charles Epp et al, *Pulled Over: How Police Stops Define Race and Citizenship* (University of Chicago Press, 2014) at 71-72; *Floyd*, *supra* note 50 at 559-60; Ben Bowling & Coretta Phillips, “Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search” (2007) 70 *Mod L Rev* 936 at 944, DOI: <<https://doi.org/10.1111/j.1468-2230.2007.00671.x>>.
63. Amber A Hawk, “The Dangers of Racial Profiling” (2002-2003) 2 *Law & Soc’y Rev UCSB* 35 at 41.
64. Jeffrey Fagan, “No Runs, Few Hits, and Many Errors: Street Stops, Bias, and Proactive Policing” (2022) 68 *UCLA L Rev* 1584 at 1584, 1598, DOI: <<https://doi.org/10.2139/ssrn.4052926>>.
65. *Ibid* at 1666; Ben Bowling & Leanne Weber, “Stop and Search in Global Context: An Overview” (2011) 21 *Policing & Soc’y* 480 at 483, DOI: <<https://doi.org/10.1080/10439463.2011.618735>>.
66. Kevin Roach et al, “At the Intersection: Race, Gender, and Discretion in Police Traffic Stop Outcomes” (2022) 7 *J Race Ethnicity & Pol* 239 at 242, 256-57, DOI: <<https://doi.org/10.1017/rep.2020.35>>; L Song Richardson, “Police Efficiency and the Fourth Amendment” (2012) 87 *Ind LJ* 1143 at 1145. Note that other studies suggest that hit rates are slightly higher for Black persons than white persons. However, the authors also observe that hit rates may be comparable between both populations. See Nicola Persico & Petra E Todd, “The Hit Rates Test for Racial Bias in Motor-Vehicle Searches” (2008) 25 *Justice Q* 37 at 47, DOI: <<https://doi.org/10.1080/07418820701717201>>.
67. *Floyd*, *supra* note 50 at 558-59.
68. *Ibid*.
69. *Ibid*.

this time, less than 2.5% led to the discovery of drugs.⁷⁰ Roughly 52% of all individuals who were stopped-and-searched during that period were Black persons, 31% were Hispanic persons, and 10% were white persons.⁷¹ Yet despite these disparities, the hit rate was higher for white persons than for Black or Hispanic persons.⁷² Or, consider how other research has shown that although police officers disproportionately search Black drivers during traffic safety stops, contraband hit rates tend to be higher for white drivers than Black drivers in several US jurisdictions.⁷³

Empirical studies of consent search rates demonstrate analogous disparities.⁷⁴ For instance, data from a study in California demonstrated that Black and Hispanic drivers faced higher consent search rates than white drivers.⁷⁵ Similarly, a 2008 study elucidated that Black drivers were three times more likely to be subject to consent searches than their white counterparts.⁷⁶ Yet in this latter study, the consent search hit rate was roughly 24% for white drivers compared to approximately 17% for Black drivers.⁷⁷

B. THE CONSEQUENCES OF RACIAL PROFILING

Scholars, courts, and other institutions increasingly recognize the consequences of racial profiling.⁷⁸ First, racial profiling can adversely impact physical and mental health.⁷⁹ In a survey study conducted by the Ontario Human Rights Commission that was published in 2017, 28% of respondents indicated that racial profiling worsened their mental health, while 15.8% reported that it decreased their physical health.⁸⁰ Studies indicate that racial profiling can

70. *Ibid.*

71. *Ibid.*

72. *Ibid.*

73. Roach et al, *supra* note 66 at 242, 256.

74. Jack Glaser, *Suspect Race: Causes and Consequences of Racial Profiling* (Oxford University Press, 2014) at 36-37, DOI: <<https://doi.org/10.1093/acprof:oso/9780195370409.001.0001>>.

75. *Ibid.*

76. *Ibid.*

77. *Ibid.*

78. For an overview of these arguments, see *R v Le*, 2019 SCC 34 at paras 93-95 [*Le*]; *Luamba QCCS*, *supra* note 4 at paras 49-50, 445, 822; Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling* (Ontario Human Rights Commission, 2017) at 40 [OHRC, *Under Suspicion*]; Skolnik, “Ancillary Police Powers,” *supra* note 33 at 438-42; Skolnik & Belton, *supra* note 30 at 685-89; Skolnik, “Rééquilibrer le rôle de la Cour suprême,” *supra* note 8 at 289-90.

79. Cato T Laurencin & Joanne M Walker, “Racial Profiling Is a Public Health and Health Disparities Issue” (2020) 7 J Racial & Ethnic Health Disparities 393 at 395.

80. OHRC, *Under Suspicion*, *supra* note 78 at 40.

contribute to anxiety, stress, hyper-arousal, depression, sleep disturbances, and feelings of social exclusion.⁸¹ It can also lead to feelings of shame, humiliation, and embarrassment.⁸² Individuals who are subject to racial profiling may also isolate themselves or withdraw socially.⁸³ According to a Halifax research study, approximately 75% of Black respondents indicated that a police stop “made them feel anxious or afraid” and that they were treated unfairly.⁸⁴ Roughly 59% of respondents feared that the stop could escalate into a more serious confrontation.⁸⁵

Second, racial profiling can decrease trust in the police, the justice system, and public institutions more generally.⁸⁶ Research demonstrates that individuals who report that they were racially profiled are less likely to trust law enforcement.⁸⁷ Compared to individuals who face one-off police encounters, those who are repeatedly stopped by the police tend to report higher levels of distrust.⁸⁸ Furthermore, vicarious experiences of racial profiling—such as friends’ or family members’ experience being unfairly targeted by the police—also

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81. Tino Plümecke, Claudia S Wilopo & Tarek Naguib, “Effects of Racial Profiling: The Subjectivation of Discriminatory Police Practices” (2023) 46 *Ethnic & Racial Studies* 811 at 813, DOI: <<https://doi.org/10.1080/01419870.2022.2077124>>; Natalie Slopen, Tené T Lewis & David R Williams, “Discrimination and Sleep: A Systematic Review” (2016) 18 *Sleep Medicine* 88 at 89-92, DOI: <<https://doi.org/10.1016/j.sleep.2015.01.012>>.
 82. Annabelle Lever, “Why Racial Profiling Is Hard to Justify: A Response to Risse and Zeckhauser” (2005) 33 *Phil & Pub Affairs* 94 at 106, DOI: <<https://doi.org/10.1111/j.1088-4963.2005.00026.x>>; Michael Gentithes, “Suspicionless Witness Stops: The New Racial Profiling” (2020) 55 *Harv CR-CLL Rev* 491 at 518-19, DOI: <<https://doi.org/10.2139/ssrn.3420816>>.
 83. Plümecke, Wilopo & Naguib, *supra* note 81 at 819.
 84. Wortley, *supra* note 41 at 36.
 85. *Ibid.*
 86. OHRG, *Under Suspicion*, *supra* note 78 at 40; Charles R Epp, Steven Maynard-Moody & Donald Haider-Markel, “Beyond Profiling: The Institutional Sources of Racial Disparities in Policing” (2016) 77 *Pub Admin Rev* 168 at 169-70, DOI: <<https://doi.org/10.1111/puar.12702>>.
 87. Kevin L Nadal, Kristin C Davidoff & Neil Allicock, “Perceptions of Police, Racial Profiling, and Psychological Outcomes: A Mixed Methodological Study” (2017) 73 *J Soc Issues* 808 at 809-10, DOI: <<https://doi.org/10.1111/josi.12249>>.
 88. Tom R Tyler, Jonathan Jackson & Avital Mentovich, “The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact” (2015) 12 *J Empirical Legal Stud* 602 at 615-16, DOI: <<https://doi.org/10.1111/jels.12086>>.

decrease individuals' trust in law enforcement.⁸⁹ So do highly salient—and widely disseminated—instances of police misconduct on traditional news outlets and via social media.⁹⁰ Racial profiling is especially pernicious given the asymmetric impact of negative versus positive police encounters.⁹¹ More specifically, some research suggests that negative police encounters are between four and fourteen times more impactful than positive ones.⁹² Furthermore, positive encounters may not significantly influence individuals' perception of the police.⁹³

The relationship between racial profiling and distrust in the criminal justice system and its front-line actors matters for other reasons. Perhaps more than in any other area of law, criminal law and procedure jurisprudence underscore the importance of public confidence in the administration of justice.⁹⁴ The Supreme Court of Canada (SCC) notes that public confidence in the administration of justice underpins various legal doctrines and principles, such as proportionality in sentencing, the exclusionary rule under section 24(2) of the *Charter*, the defence of entrapment, jury selection and juror impartiality, the section 11(b) *Charter* right to be tried within a reasonable time, the section 11(e) *Charter* right not to

89. Dennis P Rosenbaum et al, "Attitudes toward the Police: The Effects of Direct and Vicarious Experience" (2005) 8 *Police Q* 343 at 354-61, DOI: <<https://doi.org/10.1177/1098611104271085>>; Scot Wortley & Akwasi Owusu-Bempa, "Unequal Before the Law: Immigrant and Racial Minority Perceptions of the Canadian Criminal Justice System" (2009) 10 *Int Migration & Integration* 447 at 449, 463, DOI: <<https://doi.org/10.1007/s12134-009-0108-x>>.

90. Ronald Weitzer & Steven A Tuch, "Racially Biased Policing: Determinants of Citizen Perceptions" (2005) 83 *Soc Forces* 1009 at 1026, DOI: <<https://doi.org/10.1353/sof.2005.0050>>; Jonathan Intravia, Andrew J Thompson & Justin T Pickett, "Net Legitimacy: Internet and Social Media Exposure and Attitudes toward the Police" (2020) 40 *Sociological Spectrum* 58 at 72, DOI: <<https://doi.org/10.1080/02732173.2020.1720554>>; Andrew J Baranuskas, "News Media and Public Perceptions of Police Misconduct: Does Racial Empathy Matter?" (2023) 36 *Crim Justice Studies* 331 at 336-37, 345, DOI: <<https://doi.org/10.1080/1478601X.2023.2233675>>; Monica C Bell, "Police Reform and the Dismantling of Legal Estrangement" (2017) 126 *Yale LJ* 2054 at 2108.

91. Wesley G Skogan, "Asymmetry in the Impact of Encounters with Police" (2006) 16 *Policing & Soc'y* 99 at 100, DOI: <<https://doi.org/10.1080/10439460600662098>>.

92. *Ibid.* See also Wesley G Skogan, "Assessing Asymmetry: The Life Course of a Research Project" (2012) 22 *Policing & Soc'y* 270 at 272, DOI: <<https://doi.org/10.1080/10439463.2012.704035>> [Skogan, "Assessing Asymmetry"].

93. Skogan, "Assessing Asymmetry," *supra* note 92 at 272.

94. See *e.g.* Jean-Denis David, "Sources of Public Confidence in the Canadian Criminal Justice System" (2021) 63 *Can J Crim & Corr* 47 at 49-50, DOI: <<https://doi.org/10.3138/cjccj.2020-0059>>; Julian V Roberts, "Public Confidence in Criminal Justice in Canada: A Comparative and Contextual Analysis" (2007) 49 *Can J Corr* 153 at 154, DOI: <<https://doi.org/10.3138/RN84-2371-2482-MR06>>.

be denied reasonable bail without just cause, and more.⁹⁵ Like the presumption of innocence, the need to maintain public confidence in the administration of justice permeates criminal law theory, doctrine, and jurisprudence. Yet racial profiling undermines both of these core principles. Individuals who are racially profiled may be treated as guilty suspects rather than presumptively innocent citizens.⁹⁶ And they may distrust the justice system because they feel targeted and humiliated rather than protected and served.⁹⁷

Third and interrelatedly, racial profiling may result in backlash that hinders the justice system's capacity to detect and prosecute crimes.⁹⁸ Distrust of law enforcement and public institutions raises unique problems in criminal justice-related contexts. The police require individuals' collaboration to call 911, report crimes, identify suspects, and provide witness statements.⁹⁹ The

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95. Beverly McLachlin, "Preserving Public Confidence in the Courts and the Legal Profession" (2003) 29 Man LJ 277 at 278 (noting the importance of public confidence in courts); William Poulos, "Public Confidence in the Administration of Justice" (2020) 68 Crim LQ 309 at 317; *R v Lacasse*, 2015 SCC 64 at para 12 (noting the connection between proportionate sentencing and public confidence in the justice system); Jonathan Avey & Bryton MP Moen, "Breaches, Bargains, and Exclusion of Evidence: Bringing the Administration of Justice into Disrepute" (2022) 59 Alta L Rev 701 at 705; Patrick McGuinty, "Section 24(2) of the *Charter*: Exploring the Role of Police Conduct in the Grant Analysis" (2018) 41 Man LJ 273 at 277-78 (discussing exclusion of evidence under s 24(2) of the *Charter* and public confidence in the administration of justice); *R v Ahmad*, 2020 SCC 11 at para 16 (discussing entrapment and public confidence in the administration of justice); *R v Kokopenace*, 2015 SCC 28 at paras 39, 190 (discussing jury formation and public confidence in the administration of justice); *R v Chouhan*, 2021 SCC 26 at paras 68-69 [*Chouhan*] (same); *R v Jordan*, 2016 SCC 27 at para 22 (discussing the s 11(b) *Charter* right to trial within a reasonable time and public confidence in the administration of justice); *R v St-Cloud*, 2015 SCC 27 at paras 1-2 [*St-Cloud*] (discussing bail and public confidence in the administration of justice).
96. Peter DeAngelis, "Racial Profiling and the Presumption of Innocence" (2014) 43 Netherlands J Leg Phil 43 at 43, 53-57; Jelani Jefferson Exum, "Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives through a Reinvention of the Presumption of Innocence" (2021) 64 How LJ 301 at 303.
97. Skolnik & Belton, *supra* note 30 at 697.
98. See *e.g.* Glaser, *supra* note 74 at 124; Christian Briggs, "The Reasonableness of a Race-Based Suspicion: The Fourth Amendment and the Costs and Benefits of Racial Profiling in Immigration Enforcement" (2015) 88 S Cal L Rev 379 at 391.
99. Skolnik, "Ancillary Police Powers," *supra* note 33 at 439; Tom R Tyler & Jeffrey Fagan, "Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities" (2008) 6 Ohio State J Crim L 231 at 233; Tom R Tyler, Phillip Atiba Goff & Robert J MacCoun, "The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement" (2015) 16 Psychological Sci Pub Interest 75 at 83.

justice system cannot prosecute criminals effectively if individuals are reluctant to collaborate with law enforcement or cooperate as witnesses.¹⁰⁰ And juries cannot represent the community's diversity if a significant portion of individuals are reluctant to act as jurors in criminal proceedings because they distrust the justice system.¹⁰¹

II. JUDICIAL APPROACHES TO RACIAL PROFILING

A. THE GOVERNING LEGAL PRINCIPLES OF RACIAL PROFILING

In the early 2000s, the Court of Appeal for Ontario (ONCA) authored the first major decisions that explored racial profiling and established a set of governing legal principles.¹⁰² Begin with the foundational 2003 decision *R v Brown* ("*Brown*").¹⁰³ The accused, Decovan Brown, was a Black man who played for the Toronto Raptors and was driving a new Ford Expedition.¹⁰⁴ A police officer pulled over the accused for speeding.¹⁰⁵ During the traffic stop, the officer smelled alcohol on the accused's breath and a breathalyzer test revealed that the accused's blood-alcohol content exceeded the legal limit.¹⁰⁶ The accused was charged with driving over the prescribed legal limit of eighty milligrams of alcohol per one-hundred milliliters of blood.¹⁰⁷ The accused argued that he had been arbitrarily detained and alleged a breach of section 9 of the *Charter*.¹⁰⁸ He submitted that he was racially profiled and was pulled over because he was

100. Tom Tyler & Jonathan Jackson, "Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement" (2014) 20 Psychol Pub Pol'y & L 78 at 79-80, DOI: <<https://doi.org/10.1037/a0034514>>.

101. Keith Hogg, "Seeing Justice Done: Increasing Indigenous Representation on Canadian Juries" (2021) 26 Appeal 51 at 68.

102. Chris Rudnicki, "Implicit Bias and Racial Profiling: Why *R. v. Dudhi*'s Novel 'Attitudinal Component' Imposes an Unjustifiable Burden on Claimants" (2020) 68 Crim LQ 410 at 413-14.

103. 2003 CanLII 52142 (ONCA) [*Brown*]. See also Carol Tator & Frances Henry, *Racial Profiling in Canada: Challenging the Myth of "a Few Bad Apples"* (University of Toronto Press, 2006) at 89 (providing an overview of the decision).

104. *Brown*, *supra* note 103 at para 3. See generally Reem Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism" (2003) 41 Osgoode Hall LJ 293 at 306.

105. *Brown*, *supra* note 103 at para 3.

106. *Ibid* at para 4.

107. *Ibid*.

108. *Ibid* at para 6.

Black and drove a luxury vehicle.¹⁰⁹ The officer disagreed and explained that the accused was pulled over because he sped and zigzagged in and out of his lane.¹¹⁰

The ONCA focused on whether the officer had “articulable cause” to stop Mr. Brown.¹¹¹ The court concluded that the evidence adduced at trial supported the finding that the accused was racially profiled.¹¹² The evidentiary record suggested that the officer’s version of events was not truthful for several reasons: the fact that the officer noticed the accused’s race prior to the traffic stop, evidence that the officer revised their notes to refute an allegation of racial profiling, discrepancies between the timing of events and the officer’s notes, and the factual circumstances surrounding the traffic stop.¹¹³

The *Brown* decision also set out a series of legal and evidentiary principles that courts have adopted in subsequent cases.¹¹⁴ The ONCA noted that in the context of racial profiling, police officers resort to stereotypes and use race as a proxy for criminality.¹¹⁵ It observed that racial profiling can stem from conscious or subconscious bias, will rarely be proven by direct evidence, and tends to be established through inferential reasoning.¹¹⁶ The court also noted that racial profiling undermines a detention’s reasonableness, and therefore, its lawfulness.¹¹⁷

Several years later, in *Peart v Peel Regional Police Services* (“*Peart*”), the ONCA further clarified the law of racial profiling in criminal procedure.¹¹⁸ The court observed that racial profiling is unlawful even where the officer’s conduct could be justified by legally relevant considerations, such as the fact that the accused was speeding.¹¹⁹ The court also acknowledged that various indicators established by courts, researchers, and experts can help identify instances of racial profiling despite an officer’s lawful justification for their behaviour.¹²⁰ For instance, the fact

109. *Ibid* at para 5.

110. *Ibid*.

111. *Ibid* at para 10.

112. *Ibid* at para 42.

113. *Ibid* at para 46.

114. See David MacAlister, “The Law Governing Racial Profiling: Implications of Alternative Definitions of the Situation” (2011) 53 Can J Corr 95 at 98-99, DOI: <<https://doi.org/10.3138/cjccj.53.1.95>>.

115. *Brown*, *supra* note 103 at paras 7-8.

116. *Ibid* at paras 8, 44.

117. *Ibid* at para 10. See also James Singh Gill, “Permissibility of Colour and Racial Profiling” (2014) 5 Western J Legal Stud 1 at 4-5.

118. 2006 CanLII 37566 at para 89 (ONCA) [*Peart*].

119. *Ibid* at para 91. As explained more below, later decisions expand upon this concept and refer to it as the “contamination principle.”

120. *Ibid*. See also David M Tanovich, “Applying the Racial Profiling Correspondence Test” (2017) 64 Crim LQ 359 at 361-68 [Tanovich, “Racial Profiling Test”].

that an officer takes steps to identify a driver's skin colour prior to a traffic stop constitutes an indicator of racial profiling.¹²¹ The court also acknowledged that officers may use traffic-related violations as a pretext to engage in racial profiling and conduct criminal investigations.¹²² It explained that racial profiling can be supported by proof that the officer attempted to mislead the court regarding the moment when they noticed the accused's skin colour.¹²³

In the 2019 decision *R v Le* ("*Le*"), the SCC set out the applicable test to determine whether police officers engaged in racial profiling.¹²⁴ The majority of the Court explained that "the concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment."¹²⁵ Appellate courts and trial courts have since applied this legal test to evaluate whether police officers racially profiled the accused.¹²⁶

Some courts have also noted that racial profiling comprises two interrelated components: attitude and causation.¹²⁷ The attitude component implies "the acceptance by a person in authority, such as a police officer, that race or racial stereotypes are relevant in identifying the propensity to offend or to be dangerous."¹²⁸ The causation component, for its part, "requires that this race-based thinking must consciously or unconsciously play a causal role. Meaning, race or the racial stereotype must motivate or influence, to any degree, decisions

121. Tamar Hopkins, "Litigating Racial Profiling: The Use of Statistical Data" (2021) 37 L in Context 37 at 41, DOI: <<https://doi.org/10.26826/law-in-context.v37i2.155>>.

122. *Peart*, *supra* note 118 at para 110; Rudnicki, *supra* note 102 at 414. See also Terry Skolnik, "Policing in the Shadow of Legality: Pretext, Leveraging, and Investigation Cascades" (2023) 60 Osgoode Hall LJ 505 at 519, DOI: <<https://doi.org/10.60082/2817-5069.3923>> [Skolnik, "Policing in the Shadow of Legality"].

123. *Peart*, *supra* note 118 at para 114.

124. *Le*, *supra* note 78 at para 76.

125. *Ibid*. For definitions of racial profiling, see *ibid* at para 77; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 33 [*Bombardier*]; Amar Khoday, "Ending the Erasure?: Writing Race into the Story of Psychological Detentions – Examining *R. v. Le*" (2021) 100 SCLR 165 at 178; OHRC, *Under Suspicion*, *supra* note 78 at 94.

126. See *R v Sitladeen*, 2021 ONCA 303 at paras 50-51; *R v Dudhi*, 2019 ONCA 665 at para 54 [*Dudhi*]; *R v Uthayakumar*, 2024 ONCJ 419 at para 29; *R v Ali*, 2023 SKCA 127 at para 52 [*Ali*].

127. *Dudhi*, *supra* note 126 at para 54; *Ali*, *supra* note 126 at para 89 (per the dissenting opinion). See also Rudnicki, *supra* note 102 at 415.

128. *Dudhi*, *supra* note 126 at para 55.

by persons in authority regarding suspect selection or subject treatment.”¹²⁹ This two-pronged definition acknowledges that racial profiling can occur even where the officer’s decision was not motivated solely or primarily by race or racial stereotyping.

Several leading decisions recognize the contamination principle within criminal law and procedure.¹³⁰ The “contamination principle” implies that the lawfulness of a police encounter is tainted when race or racial stereotypes influence suspect selection or treatment to any degree. Additionally, the contamination principle affirms that a police encounter is unlawful even where the officer’s conduct could have been justified by objectively discernible facts given the totality of the circumstances.¹³¹ Citing the ONCA’s decision in *Peart*, the Saskatchewan Court of Appeal recently observed that “racial profiling can exist, ‘regardless of whether the police conduct that racial profiling precipitates could be justified apart from resort to negative stereotyping based on race.’”¹³²

B. RACIAL PROFILING AS A LIBERTY-VIOLATING WRONG

Courts tend to construe racial profiling as arbitrary government action that is wrongful primarily because it limits liberty or privacy interests. Although some courts acknowledge the connection between racial profiling and discrimination, judges tend to conclude that racial profiling violates the section 9 *Charter* right to be free from arbitrary detentions or the section 8 *Charter* right to be free from unreasonable searches rather than the section 15 *Charter* right to equality.

In detention-related contexts, courts have decided that officers act unreasonably when they resort to racial profiling that influences suspect selection or treatment.¹³³ The officer’s use of race as a proxy for criminality poisons a detention’s lawfulness and exemplifies arbitrary state action.¹³⁴ Although discrimination logically and temporally precedes a detention’s arbitrariness in racial profiling contexts, officers also violate section 9 of the *Charter* because they arbitrarily detain individuals in a manner that infringes their liberty-related

129. *Ibid.*

130. See e.g. *Le*, *supra* note 78 at para 76; *Dudhi*, *supra* note 126 at para 55.

131. Fernando Belton, “La preuve du profilage racial et son impact en droit criminel” in *Développements récents en droit criminel* (Éditions Yvon Blais, 2023) at 163-64.

132. *Ali*, *supra* note 126 at para 108, citing *Peart*, *supra* note 118 at para 91.

133. Rudnicki, *supra* note 102 at 412. See *Brown v Regional Municipality of Durham Police Service Board*, 1998 CanLII 7198 (ONCA); *R v Storrey*, 1990 CanLII 125 at 251-52 (SCC).

134. See e.g. *Brown*, *supra* note 103 at paras 10; *Dudhi*, *supra* note 126 at para 60; *Sitladeen*, *supra* note 126 at para 52.

interests.¹³⁵ Similar concerns account for why officers violate section 8 of the *Charter* when racial profiling influences their decision to search an individual or shapes how the search is conducted.¹³⁶ Here too, racial discrimination corrodes the objective reasonableness of state conduct and renders a search unlawful.¹³⁷

The 2019 SCC decision *Le* provides an example of how courts tend to approach racial profiling primarily through the lens of arbitrariness and unreasonable police conduct rather than equality rights.¹³⁸ In *Le*, security guards explained to a police officer that a specific unit within a housing cooperative was a “problem address” that may have been involved in drug trafficking.¹³⁹ Other officers arrived on scene and they went to investigate the unit that the security guards identified.¹⁴⁰ A group of racialized men were sitting in the unit’s backyard and were having a conversation.¹⁴¹ The officers entered the backyard without a warrant, questioned the men, and ordered them to produce identification.¹⁴² One of the officers noticed that the accused was holding a satchel and inquired about its contents.¹⁴³ The accused fled and was eventually arrested by one of the officers.¹⁴⁴ The officers searched the accused and found a loaded firearm and cash. Upon a subsequent search at the police station, drugs were also found.¹⁴⁵ The majority of the SCC concluded that the officers arbitrarily detained the accused.¹⁴⁶ The justices explained that the officers lacked reasonable suspicion that the accused was involved in recent or ongoing criminal activity—the constitutional threshold to detain an individual lawfully.¹⁴⁷

Although the majority of the Court thoroughly examined racial profiling in *Le*, the section 15 *Charter* right to equality is neither mentioned nor discussed in

135. See *Le*, *supra* note 78 at para 20; Steve Coughlan, “Arbitrary Detention: Whither — or Wither?: Section 9” (2008) 40 SCLR 147 at 154, DOI: <<https://doi.org/10.60082/2563-8505.1113>>; *R v Grant*, 2009 SCC 32 at paras 19-20 [*Grant*].

136. *Douglas-Hodgson*, *supra* note 10 at paras 134-39.

137. *Ibid.*

138. See *supra* note 78 at paras 76, 78; Khoday, *supra* note 125 at 178.

139. *Supra* note 78 at para 8.

140. *Ibid* at para 9.

141. *Ibid.*

142. *Ibid* at para 10.

143. *Ibid* at para 14.

144. *Ibid.*

145. *Ibid.*

146. *Ibid* at paras 28-30, 133.

147. *Ibid* at para 133. See also *R v Mann*, 2004 SCC 52 at para 45 [*Mann*]; Terry Skolnik, “The Suspicious Distinction between Reasonable Suspicion and Reasonable Grounds to Believe” (2016) 47 Ottawa L Rev 223 at 234, DOI: <<https://doi.org/10.2139/ssrn.2680362>>.

the decision.¹⁴⁸ The Court's analysis gravitates nearly entirely around the concepts of individual liberty and the arbitrariness of police conduct.¹⁴⁹ For instance, the decision mentions the term "liberty" twenty-eight times, and the terms "arbitrary," "arbitrarily," and "arbitrariness" fifty-six times.¹⁵⁰ In contrast, the term "equality" is mentioned once, while the term "discrimination" is mentioned three times in the body of the decision.¹⁵¹ The Court's most thorough analysis of racial profiling overlooks any connection between discriminatory policing and the section 15 *Charter* right to equality. Instead, the majority emphasizes that officers fail to satisfy the reasonable suspicion requirement for an investigative detention when they resort to racial profiling, and that the accused's race plays a role in identifying the moment of a psychological detention.¹⁵² Like other leading decisions discussed more below, *Le* construes racial profiling as wrongful primarily because it exemplifies arbitrary governmental conduct and violates liberty interests.

Much of criminal procedure case law on racial profiling looks similar. Many leading appellate court decisions on racial profiling focus on individual liberty interests and note that discriminatory police action violates section 9 of the *Charter*. In *R v Dudhi* ("*Dudhi*"), for example, the ONCA held that "[t]he case law that relates racial profiling to the absence of reasonable suspicion or reasonable grounds must be understood in the context of the principle that policing decisions based on race or racial stereotypes are not, by definition, objectively reasonable decisions."¹⁵³ Such decisions affirm that racial profiling underpins a detention's arbitrariness.¹⁵⁴ A leading Quebec Human Rights Commission decision notes that racial profiling is a "mental process" that vitiates

148. See *supra* note 78 at paras 74-97.

149. See generally Elsa Kaka, "The Supreme Court of Canada's Justification of Charter Breaches and its Effect on Black and Indigenous Communities" (2020) 43 *Man LJ* 117 at 135-38, DOI: <<https://doi.org/10.29173/mlj1225>>.

150. A keyword search (ctrl+F) was used to identify the number of times that each of these words were used. See *Le*, *supra* note 78.

151. *Ibid* at paras 60, 90-91.

152. *Ibid* at paras 78-79.

153. *Supra* note 126 at para 60.

154. *Ibid* at paras 1, 31, 44, 56, 64. See also *Sitladeen*, *supra* note 126 at paras 32, 52-54; *Ali*, *supra* note 126 at paras 27-67. However, for the ONCA's references to equality and discrimination in the context of racial profiling, see *Dudhi*, *supra* note 126 at para 65; *Brown*, *supra* note 103 at para 10; *Peart*, *supra* note 118 at paras 35-79 (although the decision mentions equality and discrimination extensively, it explores these notions in the context of an application for reasonable apprehension of bias rather than racial profiling).

the reasonable suspicion requirement and results in an arbitrary detention.¹⁵⁵ In many appellate decisions that examine allegations of discriminatory police encounters, the section 15 *Charter* right to equality—and its connection to racial profiling and discrimination—are either absent or mentioned in passing.¹⁵⁶

To be clear, some courts do discuss the connection between racial profiling, discrimination, and the section 15 right to equality.¹⁵⁷ In *Procureur général du Québec c Luamba* (“*Luamba*”), the Court of Appeal of Quebec (QCCA) concluded that roving vehicle traffic stops violate sections 9 and 15 of the *Charter*.¹⁵⁸ The court noted that Black persons are disproportionately subject to roving vehicle stops, and that such stops undermine the section 15 right to equality.¹⁵⁹ Moreover, some lower court decisions implicitly draw the connection between racial profiling’s harms and wrongs, and conclude that racial profiling breaches some combination of sections 7, 8, 9, and 15 of the *Charter*. In the 2004 Ontario Superior Court of Justice decision *R v Smith* (“*Smith*”), the trial judge noted that racial profiling violates dignity interests associated with section 7 of the *Charter*.¹⁶⁰ Similarly, in *R v Tutu* (“*Tutu*”), the trial judge analyzed racial profiling under sections 9 and 8 of the *Charter* and concluded that “Mr. Tutu’s arrest was partly on account of racial profiling. As a result, his rights under sections 8, 9 and indeed, the equality provisions under section 15 of the *Charter*, were violated.”¹⁶¹ Yet the courts failed to conduct a complete section 15 analysis in *Tutu* and *Smith*.

Although it may seem strange that courts ignore the equality-violating dimension of racial profiling, it is also understandable. Leaving aside the recent QCCA *Luamba* decision, the leading appellate court decisions affirm that racial profiling violates the section 9 *Charter* right to be free from arbitrary detentions

155. *Commission des droits de la personne et des droits de la jeunesse (Nyembwe) c Ville de Gatineau*, 2021 QCTDP 1 at para 306 [Nyembwe]. This decision was later confirmed. See *Ville de Gatineau c Commission des droits de la personne et des droits de la jeunesse*, 2021 QCCA 339.

156. See *supra* note 10 and the accompanying text; Skolnik, “Expanding Equality,” *supra* note 10 at 197.

157. See *Luamba* QCCA, *supra* note 7.

158. *Ibid* at paras 103-104, 203.

159. *Ibid* at paras 71, 203.

160. CanLII 46666 at paras 30-40. See also *Neyazi*, *supra* note 10 at para 174. Note that the Crown conceded that customs officials violated s 7 of the *Charter* if they directed the accused to secondary inspection due to racial profiling. The court did not conduct a s 15 analysis because it decided that a s 15 breach would have been encompassed within the Crown’s concession regarding the s 7 breach.

161. 2021 ONSC 5375 at para 69. See also *R v Chase*, 2022 ONCJ 253; *Longueuil (Ville de) c Debellefeuille*, 2012 QCCM 235.

and do not consider the section 15 *Charter* right to equality.¹⁶² The phenomenon of path dependency in common law systems helps explain why constitutional criminal procedure approaches racial profiling as an arbitrary detention rather than an instance of unconstitutional discrimination.¹⁶³ The term “path dependency” refers to how legal principles become increasingly entrenched through *stare decisis* and the gravitational pull of precedent.¹⁶⁴ As a result of path dependency, courts and litigants rely heavily on existing legal principles to guide their conduct and decision-making, and are discouraged from deviating from them.¹⁶⁵ Trial and appellate-level judges may adhere to case law and legal principles so that they are not reversed on appeal, while litigants may follow pre-existing legal paths to maximize their prospect of success.¹⁶⁶ Given that most leading decisions conceptualize racial profiling as an arbitrary detention, path dependency pushes litigants to advance section 9 rather than section 15 *Charter* claims in racial profiling contexts, and explains why judges approach racial profiling through the lens of section 9 instead of section 15 of the *Charter*.¹⁶⁷ And because courts do not explore section 15 arguments that the parties did not advance, judges do

162. See *e.g. Le*, *supra* note 78 at paras 28-30, 133; *Dudhi*, *supra* note 126 at paras 54-66; *Sitladeen*, *supra* note 126 at paras 52-53; *Brown*, *supra* note 103 at para 10.

163. On the notion of path dependency, see Oona A Hathaway, “Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System” (2001) 86 *Iowa L Rev* 601 at 603-604, DOI: <<https://doi.org/10.2139/ssrn.239332>>; Terry Skolnik, “Three Stages of Criminal Justice Remedies” (2024) 57 *UBC L Rev* 565 at 591-92 [Skolnik, “Criminal Justice Remedies”]; John Burchill et al, *supra* note 59 at 176.

164. Hathaway, *supra* note 163 at 602, 605.

165. *Ibid* at 628. For example, in *Le*, the accused’s factum to the SCC made no express submissions related to racial profiling, s 15 of the *Charter*, or the violation of equality rights. Rather, their submissions focused on the fact that the police had violated Mr. Le’s reasonable expectation of privacy and that he was arbitrarily detained. Out of the nine interveners who submitted a factum, only the Canadian Civil Liberties Association (CCLA) mentioned s 15 in a passing comment on its main submission on s 8. The CCLA states that “[t]o delineate s. 8 protection in accordance with *Charter* values, it is important to recognize the intersectionality between economic inequality and the historical disadvantage that is experienced by groups protected by s. 15 of the *Charter*, including racialized communities.” See *Le*, *supra* note 78 (Factum of the Intervener, CCLA at para 6).

166. See Hathaway, *supra* note 163 at 628; Kevin M Scott, “Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges” (2006) 40 *Law & Soc’y Rev* 163 at 164, DOI: <<https://doi.org/10.1111/j.1540-5893.2006.00249.x>> (noting that judges may follow precedent because they do not wish to be reversed on appeal).

167. Skolnik, “Expanding Equality,” *supra* note 10 at 214-15.

not generally discuss section 15's relationship with racial profiling.¹⁶⁸ The result is a self-perpetuating cycle: Litigants and courts rely increasingly on section 9 in racial profiling contexts and do not explore section 15's role and value.¹⁶⁹

The phenomenon of path dependency may also encourage courts and litigants to compartmentalize section 9 and section 15 *Charter* claims, which further guides behaviour and judicial decision-making. Although there are some exceptions, leading precedents on section 15 involve constitutional challenges to laws or regulations that result in discrimination, not unconstitutional action by state actors that is discriminatory in nature.¹⁷⁰ Conversely, many of the controlling section 9 cases involve unlawful state action in a particular context rather than a broader constitutional challenge to laws or regulations (here too, there are exceptions).¹⁷¹ For this reason, most racial profiling cases—decisions that involve police action rather than legislation—are framed as section 9 *Charter* claims that contest arbitrary detentions instead of section 15 *Charter* claims of unconstitutional discrimination.¹⁷²

Litigants' and courts' approaches are both understandable and logical for another reason: Section 9 and section 15 *Charter* claims often involve different types of evidence that aim to substantiate different conclusions. Accused persons can benefit from a re-trial, stay of proceedings, or suppression of evidence when they prove that they were detained arbitrarily and that officers acted

168. See e.g. Cass R Sunstein, "Foreword: Leaving Things Undecided" (1996) 110 Harv L Rev 4 at 15-20 (discussing why judges tend to decide cases narrowly rather than broadly); Thomas P Schmidt, "Judicial Minimalism in the Lower Courts" (2022) 108 Va L Rev 829 at 841, DOI: <<http://doi.org/10.2139/ssrn.2781624>>.

169. Skolnik, "Expanding Equality," *supra* note 10 at 214-15.

170. See e.g. *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC) [*Andrews*]; *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC) [*Law*]; *Quebec (Attorney General) v A*, 2013 SCC 5 ["A"]; *Withler v Canada (Attorney General)*, 2011 SCC 12; *Egan v Canada*, 1995 CanLII 98 (SCC). To be clear, s 15's scope is not limited to statutes or regulations. Section 15 has been applied to common law rules and to exercises of discretion conferred by statutes. For an application of s 15 to common law rules, see *R v Swain*, 1991 CanLII 104 (SCC). For applications of s 15 to exercises of discretion conferred by statutes, see *Lovelace v Ontario*, 2000 SCC 37; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 [*Little Sisters*].

171. See e.g. *Grant*, *supra* note 135; *Mann*, *supra* note 147; *Le*, *supra* note 78; *R v Lafrance*, 2022 SCC 32. For examples where litigants challenge a law that authorizes an arbitrary detention, see *Ladouceur*, *supra* note 7; *Luamba QCCA*, *supra* note 7. See also Gabriella Jamieson, "Using Section 24(1) *Charter* Damages to Remedy Racial Discrimination in the Criminal Justice System" (2017) 22 Appeal 71 at 82.

172. See e.g. *Le*, *supra* note 78; *Dudhi*, *supra* note 126; *Sitladeen*, *supra* note 126.

unlawfully.¹⁷³ These claims generally succeed without having to present intricate empirical studies, call experts to testify, or demonstrate disparate impact against constitutionally protected groups.¹⁷⁴ The opposite tends to be true for section 15 *Charter* challenges that contest laws or widespread police practices, and seek to demonstrate disparate impact across a constitutionally protected class.¹⁷⁵ Indeed, these section 15 claims may involve complex scientific studies and experts to demonstrate how a facially neutral law disproportionately impacts certain individuals or groups.¹⁷⁶

However, as discussed further below, the primary wrong of discrimination—the violation of equality and dignity interests—necessarily precedes the secondary wrong of restricting liberty or autonomy for a simple reason. In the context of racial profiling, the individual’s race or ethnicity is the normatively relevant trait that shapes an individual’s initial selection or treatment by the police, and leads to the subsequent restriction of liberty or autonomy.

III. THE HARMS AND WRONGS OF RACIAL PROFILING

Racial profiling is a normatively unique phenomenon and primarily violates individuals’ equality and dignity interests.¹⁷⁷ Racial profiling’s distinct moral wrongfulness differentiates it from other types of police misconduct that involve no racial element, such as excessive force, arbitrary detentions, and unlawful searches. But prevailing approaches to racial profiling do not capture its special harms and wrongs and fail to situate it within constitutional theory.¹⁷⁸ As a result, constitutional criminal procedure obscures how racial profiling is fundamentally a problem of discrimination that violates the section 15 *Charter* right to equality.

173. See *Dudhi*, *supra* note 126 at paras 54-93 (setting aside the accused’s conviction and ordering a re-trial because the trial judge erred in their analysis of the accused’s racial profiling claim); *Nicely c Director of Criminal and Penal Prosecutions*, 2024 QCCQ 3594 at paras 18-31 [*Nicely*] (ordering a stay of proceedings due to racial profiling); *R v Elawad*, 2025 ONSC 1298 at paras 113-219 [*Elawad*] (excluding evidence due to racial profiling that stemmed from an arbitrary detention).

174. See *e.g. Elawad*, *supra* note 173 at paras 129-41; *Nicely*, *supra* note 173 at paras 18-26.

175. See *e.g. Luamba QCCS*, *supra* note 4 at paras 152-463; *Ligue des Noirs du Québec c Ville de Montréal*, 2024 QCCS 3241 at paras 35-135 [*Ligue des Noirs du Québec*]. See also Skolnik & Belton, *supra* note 30 at 692 (noting that expert evidence may help support racial profiling claims).

176. *Ibid.*

177. See Andreas Mogensen, “Racial Profiling and Cumulative Injustice” (2019) 98 *Phil & Phenomen Research* 452 at 460-65, DOI: <<https://doi.org/10.1111/phpr.12451>>.

178. Skolnik, “Expanding Equality,” *supra* note 10 at 215-22.

A. RACIAL PROFILING, SUBSTANTIVE EQUALITY, AND DIGNITARY HARMS

Racial profiling results in equality- and dignity- related harms that are different from those related to liberty or privacy.¹⁷⁹ Consider equality-related harms first. The SCC observes that section 15 of the *Charter*—which guarantees the right to equal protection—is violated where an “impugned law or state action: (a) on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.”¹⁸⁰

Racial profiling by police officers in the contexts of street checks and traffic stops embodies these criteria. At its root, racial profiling exemplifies a form of indirect discrimination (or adverse impact discrimination), meaning that neutrally-worded laws or police powers disproportionately impact certain groups.¹⁸¹ In the context of racial profiling, police officers engage in law enforcement tactics that disparately single out individuals—or subject them to worse treatment—based on an immutable personal characteristic: race.¹⁸² This adverse treatment stems from race-based stereotypes or prejudices that racialized persons are dangerous or have a propensity to commit crimes.¹⁸³ Furthermore, racial profiling imposes disadvantages on individuals who are part of historically

179. Fareed Nassor Hayat, “Dignity or Death: The Black Male Assertion of the Fourth Amendment” (2022) 83 Ohio St LJ 857 at 870-71; Skolnik, “Policing in the Shadow of Legality,” *supra* note 122 at 539.

180. *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 188, citing *R v Sharma*, 2022 SCC 39 at para 28 [*Sharma*].

181. See *e.g.* 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* (University of Toronto Press, 2001) at 371-77; Skolnik, “Expanding Equality,” *supra* note 10 at 225.

182. See Aaron Haas, “Profiling and Immigration” (2011) 18 Wash & Lee J Civ Rights & Soc Justice 3 at 3.

183. See Kelly Welch, “Black Criminal Stereotypes and Racial Profiling” (2007) 23 J Contemporary Crim J 276 at 276-77, DOI: <<https://doi.org/10.1177/1043986207306870>>; David A Harris, “Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops” (1997) 87 J Crim L & Criminology 544 at 572, DOI: <<https://doi.org/10.2307/1143954>>.

marginalized groups.¹⁸⁴ These disadvantages include unwanted police encounters that restrict freedom, invade privacy, and demean human dignity.¹⁸⁵ Unwanted police encounters reinforce and perpetuate the historical disadvantages that Black persons face and that contribute to social exclusion, such as decreased employment and educational opportunities.¹⁸⁶ These concerns highlight how racial profiling is a textbook example of unconstitutional discrimination.¹⁸⁷

Racial profiling also demeans human dignity: a constitutional interest associated with the section 15 right to equality.¹⁸⁸ For instance, racial profiling exemplifies a form of social rank-ordering that treats racialized persons as inferior, lesser than, or subordinate.¹⁸⁹ The fact that racialized persons are disproportionately subject to proactive police encounters suggests that their shared interests in freedom, dignity, and privacy matter less than others' same interests.¹⁹⁰ This disparity conveys that certain individuals are second-class citizens who are not entitled to the same freedoms that others enjoy, and do not merit

184. See Reginald T Shuford, "Any Way You Slice It: Why Racial Profiling Is Wrong" (1999) 18 St Louis U Pub L Rev 371 at 372; Akwasi Owusu-Bempah et al, "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada" (2023) 13 Race & Just 530 at 532, DOI: <<https://doi.org/10.1177/21533687211006461>> [Owusu-Bempah et al, "Race and Incarceration"]. See also Maria C Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43 Dal LJ 103 at 127; *R v Morris*, 2021 ONCA 680 at paras 39-43.

185. See Tom R Tyler, Jeffrey Fagan & Amanda Geller, "Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization" (2014) 11 J Empirical Leg Stud 751 at 756, DOI: <<https://doi.org/10.1111/jels.12055>>.

186. "Tulloch Report," *supra* note 33 at 43-45.

187. Skolnik, "Expanding Equality," *supra* note 10 at 215-18; Skolnik & Belton, *supra* note 30 at 698-703.

188. See *e.g.* A, *supra* note 170 at para 138, citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 77; *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 20; *Miron v Trudel*, 1995 CanLII 97 at paras 145-46 (SCC); *Law*, *supra* note 170 at paras 52, 54.

189. See Catharine A MacKinnon, "Substantive Equality: A Perspective" (2011) 96 Minn L Rev 1 at 11.

190. See *e.g.* Mario L Barnes, "Criminal Justice for Those (Still) at the Margins—Addressing Hidden Forms of Bias and the Politics of Which Lives Matter" (2015) 5 UC Irvine LR 711 at 730, citing George Yancy & Judith Butler, Opinion, "What's Wrong with 'All Lives Matter?'," *The New York Times* (12 January 2015), online: <archive.nytimes.com/opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/> [perma.cc/CQ5B-3ZXX]. See also Eliana Machefsky, "The California Act to Save [Black] Lives? Race, Policing, and the Interest-Convergence Dilemma in the State of California" (2021) 109 Cal L Rev 1959 at 1983.

the same concern and respect that others receive.¹⁹¹ Institutionalized practices of racial profiling also express that it is morally acceptable for racialized persons to disproportionately bear most of the physical, psychological, and systemic costs of proactive police encounters.¹⁹² Quebec courts have also concluded that racial profiling violates the provision of the *Quebec Charter of Human Rights and Freedoms* that safeguards human dignity.¹⁹³

Racial profiling also demeans human dignity because it instrumentalizes individuals.¹⁹⁴ The Kantian conception of human dignity helps illustrate this point.¹⁹⁵ Kant argued that each individual has dignity as a form of inherent worth, which entails that each individual has an innate right to be their own master in a manner that is consistent with others' same right.¹⁹⁶ Respect for human dignity commands that individuals are treated as an end in and of themselves, rather than as a means to an end.¹⁹⁷ Yet racial profiling violates this constraint.¹⁹⁸ Officers who engage in racial profiling stop, question, or search racialized persons—most of whom are factually innocent and have not engaged in wrongdoing—as a means to protect others' safety.¹⁹⁹ This form of instrumentalization is especially objectionable given the racial composition of many communities where racialized groups form a small demographic minority.²⁰⁰ Such contexts aggregate

191. See Catalina Carpan, “Racial Profiling and Second-Class Citizenship” (2024) 72 *Pol Stud* 249 at 250, DOI: <<https://doi.org/10.1177/00323217221099101>>.

192. Skolnik, “Expanding Equality,” *supra* note 10 at 217-19 (providing an overview of expressive theories of law).

193. CQLR c C-12, s 4 (“[e]very person has a right to the safeguard of his dignity, honour and reputation”). See also *Ligue des Noirs du Québec*, *supra* note 175 at paras 198-200.

194. See Terry Skolnik, “Two Cultures of Justification in Constitutional Law” *Intl J Const L* [forthcoming in 2025] [Skolnik, “Two Cultures”]. See also Daniel Susser, “Predictive Policing and the Ethics of Preemption” in Ben Jones & Eduardo Mendieta, eds, *The Ethics of Policing: New Perspectives on Law Enforcement* (NYU Press, 2021) 268 at 268, 284, DOI: <<https://doi.org/10.18574/nyu/9781479803729.003.0013>>.

195. See Neomi Rao, “Three Concepts of Dignity in Constitutional Law” (2011) 86 *Notre Dame L Rev* 183 at 196-202 (describing Kantian conceptions of dignity). See also Kristi Giselsso, “Rethinking Dignity” (2018) 19 *Human Rights Rev* 331 at 332, DOI: <<https://doi.org/10.1007/s12142-018-0501-y>>.

196. See Oliver Sensen, “Kant’s Conception of Human Dignity” (2009) 100 *Kant-Studien* 309 at 311, DOI: <<https://doi.org/10.1515/KANT.2009.018>>; Thomas Christiano, “Two Conceptions of the Dignity of Persons” (2008) 16 *Jahrbuch für Recht und Ethik* 101 at 101-102; George Fletcher, “Human Dignity as a Constitutional Value” (1984) 22 *UWO L Rev* 171 at 175.

197. Rao, *supra* note 195 at 200.

198. See Terry Skolnik, “Two Cultures,” *supra* note 194.

199. *Ibid.*

200. See *e.g.* Foster, Jacobs & Siu, *supra* note 35 at 3-4.

various moral wrongs associated with racial profiling. In many jurisdictions, proactive police encounters combine the moral wrongs of discrimination and instrumentalization: Officers disproportionately violate racialized persons' freedom, dignity, and privacy to protect the white majority's security.²⁰¹

B. RACIAL PROFILING'S PRIMARY AND SECONDARY WRONGFULNESS

Racial profiling involves two interrelated moral wrongs: the primary wrong of discrimination that violates equality and dignity interests, and a secondary wrong that sets back liberty or privacy interests.²⁰² Yet constitutional criminal procedure jurisprudence largely fails to identify, let alone distinguish between, racial profiling's primary and secondary wrongfulness. And when courts *do* recognize these two interconnected wrongs, they may conceptualize them backwards.²⁰³ As discussed above, courts tend to treat racial profiling as state conduct that primarily violates liberty or privacy interests, and incidentally, involves an element of discrimination.²⁰⁴ This conventional approach largely fails to capture racial profiling's wrongfulness, misidentifies the particular constitutional rights violation, and contributes to remedial inadequacy in constitutional criminal procedure.²⁰⁵ This article offers a new legal framework that recognizes the primary and secondary harms of racial profiling, their connection to constitutional rights, and their role within a robust remedial framework to better address discrimination and domination in policing.

To illustrate these points, consider first the primary and secondary wrongs of racial profiling and their relationship to one another. The primary, or predominant, wrong of racial profiling is discrimination that undermines substantive equality: the wrong of treating individuals as inferior, lesser than, or subordinate.²⁰⁶ Several considerations underpin discrimination as the primary wrongfulness of racial profiling: normative, historical and sociological, and temporal.

Normatively, individuals who are racially profiled are subject to distinct disadvantages based on their race: a personal characteristic that is expressly

201. See Rinat Kitai, "Presuming Innocence" (2002) 55 Okla L Rev 257 at 288, DOI: <https://doi.org/10.1007/3-540-47993-7_12> (noting the connection between the presumption of innocence and equality).

202. As discussed below, primary wrongs violate interests that are associated with s 15 of the *Charter*, such as dignity and equality-based interests. Secondary wrongs violate interests that are associated with other legal rights, such as ss 7, 8, and 9 of the *Charter*.

203. See Part II(B), above.

204. *Ibid.*

205. Skolnik, "Expanding Equality," *supra* note 10 at 215-19, 225-27.

206. See MacKinnon, *supra* note 189 at 11.

protected by section 15 of the *Charter*.²⁰⁷ These disadvantages include unwanted police encounters that infringe liberty, privacy, and dignity interests, a form of racial tax that individuals must pay on account of their race or skin colour.²⁰⁸ This article has previously demonstrated how the imposition of such disadvantages exacerbates prejudices, stereotypes, and marginalization.²⁰⁹ The normative role of race and skin colour connects racial profiling to the distinct wrong of discrimination that undermines section 15 of the *Charter*.²¹⁰ Generalizations regarding an individual's immutable characteristics, such as race or skin colour, account for why officers consciously or subconsciously target them or subject them to worse treatment.²¹¹ All other things equal, the individual would avoid—or would be significantly less likely to experience—the relevant disadvantages if they were white.²¹² This explains why the secondary wrongs of racial profiling—namely, restrictions to freedom, privacy, and autonomy—are parasitic wrongs that are conditional to the primary wrong of discrimination. In other words, the individual would not be profiled and suffer the brunt of secondary wrongs (hindrances to freedom, privacy, or autonomy) without the primary wrong of discrimination.

Historical and sociological considerations also underpin discrimination as racial profiling's primary wrongfulness. Throughout Canada's history, racialized persons have suffered numerous forms of discrimination in the public and private

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207. See Rosalind Dixon, "The Supreme Court of Canada and Constitutional (Equality) Baselines" (2013) 50 Osgoode Hall LJ 637 at 640, DOI: <<https://doi.org/10.60082/2817-5069.1019>>. The constitutional right to equality provision specifies that race and colour are grounds of discrimination. More specifically, s 15 of the *Charter* states "[e]very 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." See Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
208. See Part IV(A), below. See also Randall Kennedy, *Race, Crime, and the Law* (Random House, 1997) at 158-59; Albert W Alschuler, "Racial Profiling and the Constitution" (2002) U Chicago Legal F 163 at 213-14.
209. See Part IV(A), below.
210. See e.g. Kent Roach, "Making Progress on Understanding and Remediating Racial Profiling" (2004) 41 Alta L Rev 895 at 896. Choudhry & Roach, *supra* note 8 at 3, 8, DOI: <<https://doi.org/10.29173/alr1312>>.
211. See Yoram Margalioth & Tomer Blumkin, "Targeting the Majority: Redesigning Racial Profiling" (2006) 24 Yale L & Pol'y Rev 317 at 330-31; David A Harris, "Racial Profiling" in Erik Luna, ed, *Reforming Criminal Justice, Volume 2: Policing* (The Academy for Justice, 2017) at 125; *Dudhi*, *supra* note 126 at para 55.
212. See e.g. Harris, "Racial Profiling," *supra* note 211 at 131. Annabelle Lever, "Review of *White Privilege and Black Rights: The Injustice of U.S. Police Racial Profiling and Homicide by Naomi Zack*" (2016) 126 Ethics 1129 at 1129, DOI: <<https://doi.org/10.1086/686066>>.

spheres.²¹³ For instance, racial discrimination has permeated the domains of education, child protection, immigration, housing, commerce, transportation, and more.²¹⁴ Racism also influences different aspects of the criminal justice process: proactive police encounters, use of force, charging decisions, bail, jury trials, and incarceration rates.²¹⁵ Racial profiling is intimately connected to—and inseparable from—the history of racism in Canada and within the criminal justice system. This normative throughline bridges past policies of discrimination with present-day practices of racial profiling.²¹⁶ Sociologically, racial profiling exists within this vast web of discriminatory practices that structure the vertical

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213. See *e.g.* Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination* (Government of Ontario, 2007) at 7-10 [OHRC, *Policy and Guidelines on Racism and Racial Discrimination*]; Delores V Mullings, Anthony Morgan & Heather Kere Quelleng, “Canada the Great White North where Anti-Black Racism Thrives: Kicking Down the Doors and Exposing the Realities” (2016) 53 *Phylon* 20 at 21; Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (University of Toronto Press, 2007) at 14-17; Jeffrey G Reitz & Rupa Benarjee, “Racial Inequality, Social Cohesion and Policy Issues in Canada” (Institute for Research on Public Policy, 2007) at 12-15.
214. See Carol Tator & Frances Smith, *Racial Profiling in Canada: Challenging the Myth of “a Few Bad Apples”* (University of Toronto Press, 2006) at 39-54 [Tator & Smith, *Racial Profiling*]; OHRC, *Policy and Guidelines on Racism and Racial Discrimination*, *supra* note 213 at 7-10. See also OHRC, *Under Suspicion*, *supra* note 78 at 30-63.
215. See *e.g.* Akwasi Owusu-Bempah & Scot Wortley, “Race, Crime, and Criminal Justice in Canada” in Sandra M Bucerius & Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford University Press, 2014) 281 at 301-10, DOI: <<https://doi.org/10.1093/oxfordhb/9780199859016.013.020>> [Owusu-Bempah & Wortley, “Criminal Justice”]; OHRC, *Under Suspicion*, *supra* note 78 at 30-52; Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Government of Ontario, 1995) at 183-85 [CSROCJS, *Systemic Racism*] (noting various disparities in charging decisions); Owusu-Bempah et al, “Race and Incarceration,” *supra* note 184 at 533 (disparities in sentencing); Toronto Police Service, *Race & Identity Based Data Collection Strategy: Understanding Use of Force & Strip Searches in 2020 Detailed Report* (Toronto Police Service Board, 2022) at 48-49 (disparities in use of force); OHRC, *Impact to Action*, *supra* note 55 at ch 6 (disparities in charging decisions); Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, “The Impact of Jury Race in Criminal Trials” (2012) 127 *QJ Econs* 1017 at 1019-20 (describing conviction rates for all white juries versus more diverse juries), DOI: <<https://doi.org/10.1093/qje/qjs014>>; Andrea S Anderson, “Analysis: Considering Social Context Evidence in the Sentencing of Black Canadian Offenders” (2022) 45 *Man LJ* 152 at 153 (noting incarceration disparities), DOI: <<https://doi.org/10.29173/mlj1355>>; Ontario Human Rights Commission, *A Disparate Impact: Second Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Government of Ontario, 2020) at 2-10; Kaka, “Justification of Charter Breaches,” *supra* note 149 at 119-24.
216. Tator & Smith, *Racial Profiling*, *supra* note 214 at 55; *Le*, *supra* note 78 at paras 93-94; Tanovich, “E-Racing Racial Profiling,” *supra* note 10 at 911-12.

relationship between racialized individuals and the government, and the horizontal relationship between private individuals.²¹⁷ In certain survey studies, a significant portion of racialized respondents report that they have been victims of racial profiling or know someone who has been racially profiled.²¹⁸ These historical and sociological considerations help explain why racialized persons report lower levels of trust in law enforcement.²¹⁹

Lastly, *temporal* considerations further illuminate how racial profiling's primary moral wrong is discrimination. In the context of racial profiling, the primary wrong of racial discrimination explains why individuals are initially singled out or treated worse by law enforcement.²²⁰ The secondary wrong, hindering freedom or privacy, occurs *after* individuals are selected or subject to adverse treatment given their personal characteristics.²²¹ For this reason, the primary wrong of discrimination both *occurs prior* to the secondary wrong and *causes* the secondary wrong.²²²

Notice how other areas of law more adequately capture the moral significance of identity or personal characteristics to understand the distinct harms and wrongs of certain conduct. Many SCC decisions acknowledge that sexual assault is wrongful because it tends to involve gender-based violence that is part of the broader historical and sociological context of misogyny.²²³ In many cases,

217. OHRC, *Under Suspicion*, *supra* note 78 at 30-63; Kevin R Johnson, "The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement" (2003) 55 Fla L Rev 341 at 353.

218. Wortley, *supra* note 41 at 36, 38; OHRC, *Under Suspicion*, *supra* note 78 at 24. See also Statistics Canada, *Half of Racialized People Have Experienced Discrimination or Unfair Treatment in the Past Five Years* (Statistics Canada, 2024) at 1-5.

219. See Statistics Canada, *Black and Indigenous People's Confidence in Police and Experiences of Discrimination in Their Daily Lives* (Statistics Canada, 2022) at 1-3; Owusu-Bempah & Wortley, "Criminal Justice," *supra* note 215 at 298-301.

220. See *e.g.* *Bombardier*, *supra* note 125 at para 39 (noting that the personal characteristic "results in" adverse selection or treatment). This account elucidates how the primary wrong of discrimination results in the secondary wrong of setting back interests, such as freedom, autonomy, or privacy. See also Sheri Lynn Johnson, "Race and the Decision to Detain a Suspect" (1983) 93 Yale LJ 214 at 236, DOI: <<https://doi.org/10.2307/796306>>; Randall Kennedy, "Racial Trends in the Administration of Criminal Justice" in Neil J Smelser, William Julius Wilson & Faith Mitchell, eds, *America Becoming: Racial Trends and Their Consequences: Volume 2* (National Academy Press, 2001) 1 at 3.

221. See Kennedy, "Racial Trends in the Administration of Criminal Justice," *supra* note 220 at 3.

222. *Ibid.*

223. See *e.g.* *R v Ewanchuk*, 1999 CanLII 711 at para 69 (SCC); *R v Kirkpatrick*, 2022 SCC 33 at para 62; *R v Friesen*, 2020 SCC 9 at para 68; Melanie Randall, "Sexual Assault Law, Credibility, and Ideal Victims: Consent, Resistance, and Victim Blaming" (2010) 22 CJWL 397 at 433, DOI: <<https://doi.org/10.3138/cjwl.22.2.397>>.

the personal characteristics of sex and gender, as well as the asymmetric power dynamic between perpetrator and victim, account for what makes sexual assault wrong in unique ways that differentiate it from simple assault.²²⁴ These personal characteristics are core to understanding what makes most cases of sexual violence harmful and wrongful in ways that differentiate it from other forms of physical aggression.²²⁵ Unlike the law of racial profiling in policing contexts, case law better captures how morally relevant identitarian traits shape the unique harms and wrongs of sexual assault.

IV. RACIAL PROFILING AND DOMINATION

While they are distinct, the primary and secondary wrongs of racial profiling are intimately related. Conceptualizing racial profiling as domination allows for a coherent framework that links its liberty-violating and equality-violating aspects. Indeed, racial profiling exemplifies domination: a distinct form of unfreedom that undercuts substantive equality and liberty.²²⁶

A. AN OVERVIEW OF DOMINATION

The concept of “domination” is associated with the republican theory of freedom (or republicanism) which dates to the Roman republic.²²⁷ In the republican tradition, individuals are unfree when they suffer “domination,” meaning that they are unilaterally vulnerable to others’ uncontrolled power of interference.²²⁸ Republican theorists construe freedom more broadly than negative liberty theorists.

224. See Susan A Lentz & Robert H Chaires, “Sexual Assault Statutes Targeting Authority & Power Imbalances: A Step Forward in Rape Law Reform” (2011) 3 Freedom Center J 1 at 12-16. To be clear, this does not suggest that sexual assault occurs only between heterosexual persons; perpetrators and victims of sexual assault can be the same sex or gender. Nor does this argument discount the fact that sexual assaults occur in a broad array of circumstances, and involve perpetrators and victims with an array of different personal traits.

225. See e.g. Lise Gotell, “Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R. v J.A.*” (2012) 24 CJWL 359 at 363, DOI: <<https://doi.org/10.3138/cjwl.24.2.359>>.

226. Ekow N Yankah, “Pretext and Justification: Republicanism, Policing, and Race” (2019) 40 Cardozo L Rev 1543 at 1597, 1619-20, DOI: <<https://doi.org/10.1017/9781108354721.007>>; Eric J Miller, “Challenging Police Discretion” (2015) 58 Howard LJ 521 at 537, 540; Burchill et al, *supra* note 59 at 180-85 (discussing the relationship between police powers and domination).

227. See e.g. Pettit, *Republicanism*, *supra* note 21 at 51, 66. Note that the terms “freedom” and “liberty” are used interchangeably throughout this article.

228. Pettit, *On the People’s Terms*, *supra* note 21 at 7, 46.

Negative and republican conceptions of freedom differ in important respects. First, whereas negative liberty theorists suggest that concrete interference is necessary to restrict freedom, republican theorists acknowledge that individuals who suffer domination without interference are unfree.²²⁹ Domination without interference undermines freedom because individuals may adopt different liberty-limiting coping mechanisms to avoid interference.²³⁰ For instance, individuals may abandon their preferences, change their behaviour, act deferentially, or ingratiate themselves to others to avoid interference—all of which corrode freedom.²³¹ This explains why others' unilateral power to interfere limits liberty even when no concrete interference occurs.²³²

Second, republican conceptions of liberty acknowledge that domination carries important psychological harms that negative liberty theory overlooks.²³³ One of domination's psychological evils is that interference can strike at unpredictable moments.²³⁴ Individuals who suffer domination may become hyper-vigilant to better detect and avoid interference.²³⁵ Or, they may modify their conduct because they are intimidated or afraid of the dominating party.²³⁶

Third, republican liberty is closely connected to political equality.²³⁷ Domination is present in a range of relationships that are characterized by an asymmetric power dynamic that undermines both freedom and equality.²³⁸ Examples include abusive relationships where one spouse is physically or psychologically abusive to the other, employers who can fire their employees at will, and prison wardens who exert control over inmates' lives.²³⁹ Republican

229. See Fabian Wendt, "Slaves, Prisoners, and Republican Freedom" (2011) 17 Res Publica 175 at 177-78, DOI: <<https://doi.org/10.1007/s11158-011-9151-5>>.

230. Pettit, *On the People's Terms*, *supra* note 21 at 64.

231. *Ibid.* See also Eoin Daly, "Freedom as Non-Domination in the Jurisprudence of Constitutional Rights" (2015) 28 Can JL & Jur 289 at 291, DOI: <<https://doi.org/10.1017/cjlj.2015.29>>.

232. See Laborde, "Republicanism," *supra* note 24 at 519.

233. Pettit, *On the People's Terms*, *supra* note 21 at 48-49; Frank Lovett, "Domination and Distributive Justice" (2009) 71 J Politics 817 at 821, DOI: <<https://doi.org/10.1017/s0022381609090732>>.

234. Christopher McCammon, "Domination: A Rethinking" (2015) 125 Ethics 1028 at 1043, DOI: <<https://doi.org/10.1086/680906>>.

235. Pettit, *On the People's Terms*, *supra* note 21 at 61.

236. *Ibid.* at 61-2.

237. Garrau & Laborde, *supra* note 25 at 151-52; Frank Lovett & Philip Pettit, "Neorepublicanism: A Normative and Institutional Research Program" (2019) 12 Ann Rev Pol Sci 11 at 17-18, DOI: <<https://doi.org/10.1146/annurev.polisci.12.040907.120952>>.

238. Pettit, *Republicanism*, *supra* note 21 at 57-58, 60-61.

239. *Ibid.* at 60-61.

theorists acknowledge that domination involves a subjective, inter-subjective, and objective component that exemplifies inequality.²⁴⁰ Subjectively, the dominated party knows that they are vulnerable to others' power of interference and adjusts their behaviour, while inter-subjectively, the dominating party is aware that they wield that power and act accordingly.²⁴¹ Objectively, this asymmetric power dynamic is a matter of common knowledge that community members internalize.²⁴²

The broad police discretion that underpins racial profiling exemplifies a form of domination that courts fail to control.²⁴³ More specifically, racialized persons are unilaterally vulnerable to an array of proactive law enforcement encounters, such as traffic stops, street checks, stop-and-frisk, and police use of force, that undermine freedom yet are difficult for individuals to contest (more on this below).²⁴⁴ Case law, human rights commission reports, empirical studies, and media reports all highlight the psychological harms that such dominating encounters generate.²⁴⁵ Individuals who are victims of racial profiling may fear subsequent police interactions and change their behaviour.²⁴⁶ Some racialized persons who are victims of racial profiling may be reluctant to drive, alter their driving habits, or feel afraid when they see a police vehicle.²⁴⁷ Others note how they suffer a form of hyper-vigilance where they seek to avoid interference by police officers.²⁴⁸ Justice Sotomayor of the Supreme Court of the United States has noted how racialized parents may give their children "the talk": instructions on

240. *Ibid.*

241. *Ibid.*

242. *Ibid.*

243. See e.g. Kasper Lippert-Rasmussen, "Pluralist Republicanism: Race, Gender and Domination" (2024) 98 *Aristotelian Soc'y* 47 at 63, DOI: <<https://doi.org/10.1093/arisup/akae006>>; Eric J Miller, "Police Encounters with Race and Gender" (2015) 5 *UC Irvine L Rev* 735 at 743-44; William Smith, "Republican Policing: From Consent to Contestation" (2025) 23 *Perspectives on Politics* 270 at 271-73, DOI: <<https://doi.org/10.1017/S1537592724000574>>; Skolnik, *Homelessness, Liberty, and Property*, *supra* note 26 at 103-104 (describing "non-egalitarian enforcement" as a form of vertical domination).

244. Yankah, *supra* note 226 at 1592, 1597.

245. See e.g. OHRC, *Under Suspicion*, *supra* note 78 at 40; Wortley, *supra* note 41 at 36; *Le*, *supra* note 78 at para 95; *Luamba QCCS*, *supra* note 4 at para 737.

246. See Harris, "Driving While Black and All Other Traffic Offenses," *supra* note 183 at 570; *Luamba QCCS*, *supra* note 4 at para 209.

247. See Harris, "Driving While Black and All Other Traffic Offenses," *supra* note 183 at 570; *Luamba QCCS*, *supra* note 4 at paras 209, 268.

248. *Ibid* at para 268.

how to act deferentially towards officers to avoid escalation and police violence.²⁴⁹ These realities exemplify how racial profiling results in a form of domination against which the republican tradition aims to guard.

B. WHY CRIMINAL PROCEDURE FAILS TO CONTROL DOMINATION AND RACIAL PROFILING

Criminal procedure fails to control domination and racial profiling for various reasons. Many police interactions are low-visibility in nature and do not result in a fine, arrest, criminal charge, or trial.²⁵⁰ For this reason, courts will never adjudicate their lawfulness.²⁵¹ As discussed more below, existing public law and private law remedies fail to adequately prevent or redress the domination associated with racial profiling.²⁵²

Additional considerations limit individuals' capacity to contest discriminatory police action that embodies domination. Since officers do not concede that they stopped or searched individuals based on their race, individuals cannot establish racial profiling through direct evidence.²⁵³ Instead, racial profiling is typically proven through inferences or circumstantial evidence.²⁵⁴ Financial considerations also explain why racial profiling and domination are difficult to control.²⁵⁵ Given the high costs of civil suits and low damage awards, individuals who are subject to

249. *Utah v Strieff*, 579 US 232 (2016) at 2070 (per Sotomayor J); Sherri Lee Keene, "Teaching Dissents" (2023) 107 Minn L Rev 2619 at 2654-55; Josh Bowers, "Annoy No Cop" (2017) 166 U Pa L Rev 129 at 171-72. For an example of a Canadian court's use of this expression, see *Nyembwe*, *supra* note 155 at para 471.

250. Bennett Capers, "Policing, Technology, and Doctrinal Assists" (2018) 69 Fla L Rev 723 at 744; James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill LJ 225 at 262; James Stribopoulos, "Packer's Blind Spot: Low Visibility Encounters and the Limits of Due Process versus Crime Control" in François Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Hart, 2012) at 201, DOI: <<https://doi.org/10.5040/9781472561091>>; Terry Skolnik, "Policing, Technology, and the Erosion of Constitutional Rights" (2023) 49 Queen's LJ 40 at 53; Belton, "La preuve du profilage racial et son impact en droit criminel," *supra* note 131 at 171.

251. Capers, *supra* note 250 at 744.

252. See Part IV(B), below; Skolnik & Belton, *supra* note 30 at 690.

253. *Dudhi*, *supra* note 126 at para 78; *Brown*, *supra* note 103 at para 44; *Peart*, *supra* note 118 at para 95.

254. *Dudhi*, *supra* note 126 at paras 75-78; *Ali*, *supra* note 126 at para 95. See also Tanovich, "Racial Profiling Test," *supra* note 120 at 361-62; Tanovich, *The Colour of Justice*, *supra* note 10 at 130-34; Tanovich, "E-Racing Racial Profiling," *supra* note 10 at 929-30.

255. Skolnik, "Rééquilibrer le rôle de la Cour suprême," *supra* note 8 at 281-85.

police misconduct may be reluctant to sue officers to hold them accountable.²⁵⁶ And individuals who are racially profiled yet fail to substantiate their civil claim may lose thousands of dollars in legal fees.²⁵⁷

Worse yet, courts have created—and upheld the constitutionality of—police powers that result in racial profiling and domination.²⁵⁸ In the 1990 decision *R v Ladouceur*, the SCC decided that police officers can lawfully pull over drivers who are not suspected of having committed an offence.²⁵⁹ The majority of the Court held that such roving vehicle stops result in arbitrary detentions that violate section 9 of the *Charter*, but are demonstrably justified in a free and democratic society.²⁶⁰ The majority concluded that these stops are necessary to detect unlicensed or drunk drivers, and to prevent driving-related injuries and fatalities.²⁶¹ The majority of the justices observed that such stops caused “minimal inconveniences” to drivers.²⁶² They dismissed concerns that the traffic stop power would be abused.²⁶³ And they noted that such preoccupations were “unfounded” due to the power’s limited scope and available remedies.²⁶⁴ Yet, as discussed above, police traffic stops are disproportionately exercised against racialized persons, lack adequate oversight mechanisms, and can result in profound psychological harms and indignities.²⁶⁵ Rather than protect individuals against discriminatory law enforcement practices, the Court upheld the constitutionality of a police power that results in widespread racial profiling and exemplifies domination.²⁶⁶

Similarly, in *R v Mann*, the SCC recognized a common law power to undertake stop-and-frisk searches, yet failed to impose oversight mechanisms that could reduce racial profiling and mitigate domination.²⁶⁷ Although the defendant was a young Indigenous man, the Court failed to consider how the stop-and-frisk power could result in racial profiling and did not impose sufficient safeguards

256. *Ibid.*

257. *Ibid.*

258. See Skolnik, “Ancillary Police Powers,” *supra* note 33 at 446-53.

259. *Supra* note 7 at 1288-89. See also Coughlin, *supra* note 135 at 149, 164.

260. *Ladouceur*, *supra* note 7 at 1288-89.

261. *Ibid.* at 1279-88.

262. *Ibid.* at 1286.

263. *Ibid.*

264. *Ibid.* at 1287.

265. See Part I, above.

266. *Ibid.* Tanovich noted that *Ladouceur* constituted a writ of assistance for racial profiling in “E-Racing Racial Profiling,” *supra* note 10 at 928; Tanovitch, “The *Charter* of Whiteness,” *supra* note 7 at 673.

267. *Supra* note 147. See also Skolnik, “Ancillary Police Powers,” *supra* note 33 at 450-51.

that could better deter discriminatory police encounters.²⁶⁸ For instance, the Court did not require officers to document stops and searches, gather data that can highlight racial disparities, or provide receipts to individuals that indicate the reason for the encounter and prove that they were searched—oversight mechanisms that exist in other jurisdictions.²⁶⁹ Here, too, the Court authorized a police power that leads to discriminatory enforcement practices, lacks adequate legal constraints, and exacerbates domination.

These two examples, which upheld the constitutionality of roving traffic stops and created a common law stop-and-frisk power, highlight some of constitutional criminal procedure's most pervasive oversights. Many scholars rightfully critique that the right to equality plays a minimal role in criminal law and procedure.²⁷⁰ This may be surprising given how courts, commissions of inquiry, and human rights commissions all observe that racial discrimination pervades the criminal justice system.²⁷¹ But there is a greater problem that continues to simmer below the surface of constitutional criminal procedure. Courts—the primary institutions that are supposed to safeguard individuals' constitutional rights and freedoms—have instead authorized police powers that result in racial profiling, discrimination, and domination.²⁷² The *Luamba* decision marks an opportunity for the SCC to right the wrongs associated with roving traffic stops.²⁷³ Both the Superior Court of Quebec and the QCCA have ruled that this power in itself is discriminatory, leading to abuses that are unjustifiable in a free and democratic society.²⁷⁴

268. See e.g. Benjamin Berger, "Race and Erasure in *R. v. Mann*" (2004) 21 CR (6th) 58; David Tanovich, "The Colourless World of *Mann*" (2004) 21 CR (6th) 47; David Tanovich, "The Further Erasure of Race in *Charter* Cases" (2006) 38 CR (6th) 84.

269. *Ibid.*; Tanovich, "E-Racing Racial Profiling," *supra* note 10 at 921-22.

270. See e.g. Rosemary Cairns Way, "Attending to Equality: Criminal Law, the *Charter* and Competitive Truths" (2012) 57 SCLR (2d) 39 at 49, DOI: <<https://doi.org/10.60082/2563-8505.1231>>; Rosemary Cairns Way, "An Opportunity for Equality: *Kokopenace* and *Nur* at the Supreme Court of Canada" (2014) 61 Crim LQ 465 at 466-67; Skolnik, "Rééquilibrer le rôle de la Cour suprême," *supra* note 8 at 290-93.

271. House of Commons, *Systemic Racism in Policing in Canada: Report of the Standing Committee on Public Safety and National Security* (June 2021) (Chair Hon Jon McKay) at 54-57; *Le*, *supra* note 78 at paras 84-97; *R v Morris*, 2021 ONCA 680 at para 1; CSROCJS, *Systemic Racism*, *supra* note 215 at i-vii; OHRC, *Under Suspicion*, *supra* note 78 at 31-51.

272. Skolnik, "Rééquilibrer le rôle de la Cour suprême," *supra* note 8 at 261.

273. Skolnik & Belton, *supra* note 30 at 685-89.

274. The Supreme Court of Canada has granted leave to appeal in *Luamba*.

V. A NOVEL APPROACH TO RACIAL PROFILING

The primary and secondary wrongfulness of racial profiling—and their connection to domination—offer a new path forward for how courts can better counteract discriminatory policing in constitutional criminal procedure. As discussed more in this Part, this article’s theory of racial profiling underpins a new and more concise legal framework for how courts can better identify and redress racially discriminatory police practices in constitutional criminal procedure. It offers a more compelling and unified account of why racial profiling violates the section 15 *Charter* right to equality and breaches the section 9 *Charter* right to be free from arbitrary detentions—a conclusion that some courts of appeal have recently reached.²⁷⁵ And it justifies two novel remedies that aim to counteract racial profiling and its accompanying domination: structural injunctions and constitutional settlement agreements.

A. RACIAL PROFILING’S WRONGFULNESS: UNIFYING SECTION 9 AND 15 *CHARTER* VIOLATIONS

Racial profiling’s primary and secondary wrongfulness generate important theoretical and practical implications for constitutional criminal procedure. Officers who engage in racial profiling violate the right to equality and infringe other constitutional rights, such as the section 9 *Charter* right to be free from arbitrary detentions, or the section 8 *Charter* right to be free from unreasonable searches or seizures.²⁷⁶ As discussed above, racial profiling exemplifies unconstitutional discrimination that violates the section 15 *Charter* right to equality.²⁷⁷ Racial profiling also undermines the reasonableness of police conduct that is necessary to legitimize searches, seizures, and detentions.²⁷⁸ These considerations highlight how racial profiling should be construed as a joint *Charter* violation that recognizes its primary and secondary wrongfulness (more on this below).

Various legal doctrines further support the argument that racial profiling embodies discrimination that violates the right to equality *and* constitutes arbitrary police conduct that infringes other legal rights. Judicial decisions acknowledge that racial profiling undermines the objective reasonableness of

275. See *e.g.* *Luamba* QCCA, *supra* note 7 at para 222.

276. *Ibid.*

277. See Part III(A).

278. Choudhry, *supra* note 181 at 377.

officers' conduct in several contexts, such as detentions, arrests, and searches.²⁷⁹ Courts also recognize that the reasonableness standard is shaped by *Charter* values, which encompass commitments to dignity and equality, and respect for minority groups—all of which are violated by racial profiling.²⁸⁰ And more recently, the QCCA decided that racial profiling violates both sections 9 and 15 of the *Charter*.²⁸¹

Together, the unique nature of racial profiling in policing, and the fact that racial profiling violates the right to equality and other constitutional rights, necessitate a systemized and bifurcated legal framework. This framework distinguishes between two types of claims associated with racial profiling: *Charter* challenges to discriminatory state action in a discrete case on the one hand, and *Charter* challenges to laws or practices that result in widespread discrimination on the other. Differentiating between these two types of racial profiling claims also accounts for why they can result in distinct constitutional remedies. This legal framework also recognizes that racial profiling constitutes a form of unconstitutional discrimination that jointly violates section 15 of the *Charter* and other interrelated rights, such as sections 9 or 8.²⁸²

Consider first the framework that applies in contexts where an accused person argues that they were racially profiled by the police and seeks a remedy. Most of the leading racial profiling cases, such as *Brown, R v Grant, Dudhi, R v Sitladeen*, and *Le* fall within this category. In such contexts, accused persons must satisfy the *Le* test to substantiate a claim of racial profiling.²⁸³ More specifically, they must demonstrate on the balance of probabilities that race consciously or unconsciously shaped officers' selection or treatment of an individual to any degree.²⁸⁴ Where this burden is met, officers committed the primary wrong of discrimination that infringes equality interests, and the secondary wrong of arbitrarily limiting individuals' liberty or privacy interests—conduct that jointly violates sections 15 and 9 of the *Charter*. Racial profiling undermines the reasonableness of officers'

279. *Brown*, *supra* note 103 at para 10; *Dudhi*, *supra* note 126 at para 60; *Sitladeen*, *supra* note 126 at para 52; *Douglas-Hodgson*, *supra* note 10 at paras 134-39.

280. See *R v Khill*, 2021 SCC 37 at para 56; Noah Weisbord, "Who's Afraid of the Lucky Moose? Canada's Dangerous Self-Defence Innovation" (2018) 64 McGill LJ 349 at 395; *R v Tran*, 2010 SCC 58 at para 34; *St-Cloud*, *supra* note 95 at paras 78-79; *Chouhan*, *supra* note 95 at para 116.

281. *Luamba* QCCA, *supra* note 7 at para 222.

282. *Ibid.*

283. *Le*, *supra* note 78 at para 76.

284. *Ibid.*

conduct and renders the detention arbitrary.²⁸⁵ Racial profiling also violates section 15 of the *Charter* because it satisfies the two-part section 15 framework.²⁸⁶ Racial profiling (a) creates a distinction based on race; and (b) imposes a burden in a manner that has the effect of reinforcing disadvantage.²⁸⁷ In such contexts, the problem is that the police power is *exercised* discriminatorily by an officer in a discrete case. Typical remedies for such police misconduct include the exclusion of evidence or stays of proceedings.²⁸⁸ One of the hallmarks of such remedies is that they are individual rather than systemic in nature.

The second framework applies in contexts where an individual challenges the constitutionality of a law or police practice that results in widespread racial profiling. Examples include the recent *Luamba* decision that attacked the constitutionality of roving traffic stops, and class action *Charter* challenges against carding practices.²⁸⁹ Individuals must satisfy the two-part section 15 framework described above for these types of claims to succeed.²⁹⁰ More specifically, they must prove that “the impugned law or state action (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.”²⁹¹ In such contexts, the problem is that the *police power* or *police practice* itself is constitutionally problematic because of its disparate impact on racialized persons. Claimants tend to seek systemic remedies that aim to redress widespread racial profiling, such as constitutional class actions, or the invalidation of a law under section 52(1) of the *Constitution Act, 1982*.²⁹²

285. *Ibid* at para 78.

286. For an overview of the test, see *Sharma*, *supra* note 180 at para 28.

287. *Ibid*. We are not aware of any decisions that have applied the two-part s 15 framework to individual instances of racial profiling. However, a court could do so in the future. The SCC has recognized that the exercise of common law police powers must comply with the *Charter*. See *e.g. R v Golden*, 2001 SCC 83 at paras 87-113; *Mann*, *supra* note 147 at paras 20, 34. Courts have recognized that the common law power to detain individuals can be exercised arbitrarily due to racial profiling, which violates s 9 of the *Charter*. See *Le*, *supra* note 78 at para 78 (noting that suspicion based on racial profiling is unreasonable). Similarly, a common law power to detain individuals can be exercised discriminatorily due to racial profiling, which could violate s 15 of the *Charter*.

288. See *e.g. Elawad*, *supra* note 173 at paras 113-219 (excluding evidence due to racial profiling that stemmed from an arbitrary detention); *Nicely*, *supra* note 173 at paras 18-31 (ordering a stay of proceedings due to racial profiling).

289. *Luamba* QCCA, *supra* note 7; *Ligue des Noirs du Québec*, *supra* note 175.

290. *Sharma*, *supra* note 180 at para 28.

291. *Ibid*.

292. See *e.g. Luamba* QCCA, *supra* note 7; *Ligue des Noirs du Québec*, *supra* note 175.

This second category of racial profiling claim also involves joint section 15 and section 9 *Charter* violations that unify the primary wrongfulness of discrimination and the secondary wrongfulness of arbitrarily limiting liberty or privacy. These claims are especially compelling in contexts where legislation authorizes arbitrary detentions in a manner that results in racial profiling, such as by granting a statutory power to conduct roving traffic stops, or where officers exercise an arbitrary power that was not expressly authorized by law, such as carding.²⁹³ In both contexts, the lack of a legal threshold (such as reasonable suspicion or reasonable and probable grounds) underpins the arbitrariness of state action that infringes section 9.²⁹⁴ The widespread and disparate exercise of the arbitrary police power against constitutionally protected groups, in turn, violates the section 15 right to equality.²⁹⁵

This second framework recognizes how unconstitutional state action can flow from different sources. In some cases, such as random traffic stops, *legislation* authorizes arbitrary detentions that result in racial profiling and discrimination.²⁹⁶ Claimants can successfully challenge the legal source of such widespread unconstitutional state action: legislation that authorizes arbitrary detentions.²⁹⁷ In other cases, such as carding or street checks, officers may engage in a widespread police practice that is *not* expressly authorized by statute and results in widespread discrimination.²⁹⁸ Police policies or practices—rather than legislation—give rise to systemic forms of racial discrimination.²⁹⁹ Claimants may bring constitutional class action lawsuits to redress policies or practices that lead to racial profiling.³⁰⁰

There are several advantages to this systematized legal framework that distinguishes between *Charter* challenges involving discrete instances of racial profiling in a criminal case on the one hand, and broader *Charter* challenges to laws or policies that generate systemic racial discrimination on the other. Both frameworks capture the primary and secondary wrongfulness of racial profiling and situate it within the appropriate constitutional rights. They provide a rational

293. *Ibid.*

294. See Skolnik & Belton, *supra* note 30 at 678; Skolnik, “Ancillary Police Powers,” *supra* note 33 at 451.

295. See *Luamba QCCA*, *supra* note 7 at paras 775-829; Skolnik & Belton, *supra* note 30 at 681-82, 695.

296. See *Luamba QCCA*, *supra* note 7 at paras 601-705, 775-832.

297. *Ibid.*

298. See *Ligue des Noirs du Québec*, *supra* note 175 at paras 11, 31-39.

299. *Ibid.* at paras 44-91.

300. *Ibid.* at paras 1-14.

account of the connection between the violation of equality rights and other constitutional rights in the context of racial profiling. They demonstrate why racial profiling jointly violates section 15 and section 9 or 8 of the *Charter*. Lastly, this systematized legal framework also explains how and why different constitutional remedies apply in criminal cases that involve racial profiling versus challenges to laws or policies that result in systemic racial profiling.

B. THE NEED FOR NOVEL REMEDIES TO COUNTERACT RACIAL PROFILING AND DOMINATION

Together, racial profiling's distinct wrongfulness and its connection to domination also justify novel constitutional remedies that can better redress the systemic aspects of discriminatory policing. Conventional remedies largely fail to prevent or counteract domination, and these shortcomings highlight the need for stronger remedies to prevent and address racial profiling.³⁰¹

Some remedies—such as the exclusionary rule and stays of proceedings—are inapplicable where officers racially profile an individual but find no evidence or do not charge the individual with a crime.³⁰² Other remedies, such as declarations of invalidity that strike down an unconstitutional law or provision, do not apply in contexts where officers act outside the scope of their statutory powers, such that there is no law to invalidate (discriminatory carding practices and street checks are an example).³⁰³ *Charter* damages, for their part, raise access to justice concerns.³⁰⁴ Claimants may not request *Charter* damages because awards are generally low while attorney fees tend to be high (note that tort claims in private law face similar limitations).³⁰⁵ Furthermore, although over 95% of criminal

301. See generally Charles F Sabel & William H Simon, “The Duty for Responsible Administration and the Problem of Police Accountability” (2016) 33 *Yale J Reg* 165 at 173-74; Skolnik, “Criminal Justice Remedies,” *supra* note 163 at 566; Skolnik, “Rééquilibrer le rôle de la Cour suprême,” *supra* note 44 at 278-84.

302. See Skolnik, “Criminal Justice Remedies,” *supra* note 163 at 566.

303. *Ibid.*

304. *Ibid.* See also Kent Roach, “The Disappointing Remedy? Damages as a Remedy for Violations of Human Rights” (2019) 69 *UTLJ* 33 at 38, DOI: <<https://doi.org/10.3138/utlj.69.s1.002>>; Nancy Sarmiento Barkhordari, “Palpable & Enforceable: A Normative Framework for a Stronger Damages Remedy under Section 24(1) of the *Charter*” (2024) 50 *Queen's LJ* 32 at 49, DOI: <<https://doi.org/10.2139/ssrn.4744088>>.

305. See Ranjan Agarwal & Joseph Marcus, “Where There is No Remedy, There is No Right: Using *Charter* Damages to Compensate Victims of Racial Profiling” (2015) 34 *NJCL* 75 at 82-84; Kent Roach, *Canadian Policing: Why and How it Must Change* (Irwin Law, 2022) at 61-62 [Roach, “Canadian Policing”].

cases are adjudicated in provincial court, only superior courts have jurisdiction to grant *Charter* damages.³⁰⁶

Constitutional class action lawsuits, which combine elements of public and private law, have their own limitations.³⁰⁷ Courts may reject proposed class actions that require individualized assessments into the lawfulness of officers' conduct.³⁰⁸ This explains why courts have rejected class action lawsuits associated with discriminatory strip-searches.³⁰⁹ Yet many aspects of policing, such as arbitrary detentions and searches and seizures, tend to require these types of individualized assessments and may fail to satisfy the commonality requirement to certify a class action.³¹⁰ Moreover, some class action awards may only address past instances of systemic police wrongdoing but do not lead to improved police governance, transparency, or oversight measures.³¹¹

But conventional remedies are plagued by a broader problem: They do not address structural or organizational factors that can contribute to racial profiling, worsen domination, and undermine substantive equality.³¹² For instance, current remedies do not impose mechanisms that seek to enhance police transparency and accountability, such as obligations to improve civilian oversight boards or complaint processes, gather and publish data that identifies racial disparities in policing, or improve officer education or supervision.³¹³ Nor do existing remedies oblige police departments to implement Early Intervention Systems that can identify officers who present higher risks of discriminatory conduct, police violence, or unethical behaviour so that police forces can take corrective action

306. See Skolnik, "Criminal Justice Remedies," *supra* note 163 at 594-95; *Vancouver (City) v Ward*, 2010 SCC 27 at para 58.

307. See Skolnik, "Criminal Justice Remedies," *supra* note 163 at 608-12.

308. Iryna Ponomarenko, "The Devil Is in the Scale: Revisiting the Commonality Requirement in Charter Class Actions" (2019) 57 *Alta L Rev* 69 at 70, DOI: <<https://doi.org/10.29173/alr2565>>, citing *Thorburn v British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at paras 48-52 [*Thorburn*].

309. See *e.g.* *Thorburn*, *supra* note 308 at paras 48-52.

310. See Skolnik, "Criminal Justice Remedies," *supra* note 163 at 608.

311. Roach, "Canadian Policing," *supra* note 305 at 62-63.

312. *Ibid* at 6.

313. *Ibid* at 6, 23. Although judicial remedies do not generally address these types of shortcomings, public inquiries or coroners' investigations may lead to non-binding recommendations. See Kent Roach, "Models of Civilian Police Review: The Objectives and Mechanisms of Legal and Political Regulation of the Police" (2014) 61 *Crim LQ* 29 at 70-71.

before officers engage in wrongdoing.³¹⁴ Additionally, current remedies do not impose any form of continued supervision by courts or independent monitors, which aims to ensure that police departments take long-term steps to counteract discrimination.³¹⁵ As discussed next, structural injunctions and constitutional settlement agreements are novel remedies that can better redress racial profiling, catalyze police reform, and counteract domination.³¹⁶

C. STRUCTURAL INJUNCTIONS AND CONSTITUTIONAL SETTLEMENT AGREEMENTS

Structural injunctions are the first type of remedy that aims to better counteract and redress racial profiling. The term “structural injunction” connotes a judicial order whereby courts continually supervise a government actor to ensure that it respects constitutional rights and complies with its remedial obligations.³¹⁷ In contrast to prohibitive injunctions in private law that are narrower in scope, structural injunctions aim to reform institutions and ensure that they respect individuals’ constitutional rights.³¹⁸ Rather than simply prohibit some form of unconstitutional state conduct, a structural injunction may oblige government actors to take positive steps to protect or actualize individuals’ rights.³¹⁹ Historically, structural injunctions targeted state institutions that are resistant to change, such as prisons, mental hospitals, and schools.³²⁰ They have been a remedial tool that attempts to promote political equality, counteract discrimination, and protect

314. See Skolnik, “Ancillary Police Powers,” *supra* note 33 at 447, 459; Christi L Gullion & William R King, “Early Intervention Systems for Police: A State-of-the-Art Review” (2020) 43 Policing 643 at 644-47, DOI: <<https://doi.org/10.1108/PIJPSM-02-2020-0027>>.

315. Choudhry & Roach, *supra* note 8 at 29-30.

316. Some scholars have argued for structural injunctions to address systemic forms of police wrongdoing or civil rights violations in the criminal justice system. See *e.g.* Roach, “Remedies for Discriminatory Profiling,” *supra* note 8 at 397.

317. Owen Fiss, *The Civil Rights Injunction* (Indiana University Press, 1978) at 7.

318. *Ibid.* See also John C Jeffries Jr & George A Rutherglen, “Structural Reform Revisited” (2007) 95 Cal L Rev 1387 at 1399-1400; Robert E Easton, “The Dual Role of the Structural Injunction” (1990) 99 Yale LJ 1983 at 1993, DOI: <<https://doi.org/10.2307/796680>>; Kamina Aliya Pinder, “Reconciling Race-Neutral Strategies and Race-Conscious Objectives: The Potential Resurgence of the Structural Injunction in Education Litigation” (2013) 9 Stan JCR-CL 247 at 250-51; Ghislain Otis, “La Charte et la modification des programmes gouvernementaux: l’exemple de l’injonction structurelle en droit Américain” (1991) 36 McGill LJ 1348 at 1351.

319. Cass R Sunstein, “Suing Government” (1983) 92 Yale LJ 749 at 750, DOI: <<https://doi.org/10.2307/796327>>.

320. See Easton, *supra* note 318 at 1983-84; Nora Gillespie, “Charter Remedies: The Structural Injunction” (1990) 11 Adv Q 190 at 190.

vulnerable minorities.³²¹ For instance, in the United States, structural injunctions were developed by courts to desegregate schools following the *Brown v Board of Education* decision.³²² Structural injunctions are also used in other countries, such as South Africa and India.³²³

Canadian courts have issued structural injunctions in landmark cases that involve language and education rights.³²⁴ For instance, in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, the province of Nova Scotia failed to provide French language facilities and instruction to the province's Francophone linguistic minority, which violated section 23 of the *Charter*.³²⁵ The trial court issued a structural injunction that ordered the province to make its best efforts to respect its constitutional duties associated with minority language education rights and fulfill its remedial obligations.³²⁶ As part of its continued supervisory jurisdiction, the Supreme Court of Nova Scotia ordered the government to build French language schools and provide French language programs to the province's linguistic minority.³²⁷ The court also ordered the government to participate in hearings and issue reports that demonstrated their compliance with the structural injunction's requirements.³²⁸

Compared to traditional remedies in constitutional criminal procedure, structural injunctions may more effectively protect and actualize constitutional rights. First, in contrast to other forms of relief, structural injunctions may

321. See John Geoffrey Howard, "Civil Remedies under the *Charter*: Options and Issues" (1989) 11 Adv Q 47 at 61.

322. Karla Grossenbacher, "Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist" (1992) 80 Geo LJ 2227 at 2228-29; Russell L Weaver, "The Rise and Decline of Structural Remedies" (2004) 41 San Diego L Rev 1617 at 1619.

323. See Danielle Elyce Hirsch, "A Defense of Structural Injunctive Remedies in South African Law" (2007) 9 Or Rev Int'l L 1 at 5-6; Chintan Chandrachud, "Anticorruption by Fiat: Structural Injunctions and Public Interest Litigation in the Supreme Court of India" (2018) 14 Socio-Legal Rev 170 at 172-75, DOI: <<https://doi.org/10.55496/ARBC3995>>.

324. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 55-58 [*Doucet-Boudreau*]. For an overview of the decision and the structural injunction, see Paul S Rouleau & Linsey Sherman, "*Doucet-Boudreau*, Dialogue and Judicial Activism: Tempest in a Teapot" (2009) 41 Ottawa L Rev 171 at 173-78.

325. *Doucet-Boudreau*, *supra* note 324 at paras 60-88; Debra M McAllister, "*Charter* Remedies and Jurisdiction to Grant Them: The Evolution of Section 24(1) and Section 52(1)" (2004) 25 SCLR 1 at 46-53.

326. *Doucet-Boudreau*, *supra* note 324 at para 7.

327. *Ibid.*

328. *Ibid.* See also Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights" (2008) 39 Colum HRLR 351 at 387-89.

empower courts to respond more quickly and efficiently to remedial failures.³²⁹ Rather than require new proceedings, claimants can seek rapid redress from the court given its ongoing supervisory jurisdiction.³³⁰ Although courts tend to require the government to report on its compliance with constitutional duties, courts may also appoint independent third parties or experts to provide a plan in contexts where the government actor's remedial proposal is inadequate.³³¹ Second, a structural injunction's long-term nature—which tends to last for years—helps ensure that the government actor instantiates sufficient reforms to comply with its constitutional duties in an enduring way.³³² Third, unlike other remedies, structural injunctions may improve institutional transparency and oversight in how they impose reporting requirements, data-gathering obligations, enhanced monitoring, and more—all of which can help identify and counteract patterns of racial profiling.³³³ Fourth, like American consent decrees (a form of settlement agreement that is reached following a Department of Justice (DOJ) Pattern-or-Practice Investigation), structural injunctions can apply in contexts where a police department systematically engages in unconstitutional police practices.³³⁴ Structural injunctions are also useful in circumstances where other remedies have failed to deter a police force's pattern or practice of unconstitutional conduct. Lastly, in contrast to other remedies, a structural injunction may mandate reforms that aim to improve deficits in officer education, oversight, or supervision that can contribute to discriminatory policing. Much like consent decrees in the United States, structural injunctions could impose requirements to reform these aspects of policing.³³⁵

329. Choudhry & Roach, *supra* note 8 at 30.

330. *Ibid.*, citing *Little Sisters*, *supra* note 170 at para 261.

331. Robert J Sharpe, "Injunctions and the Charter" (1984) 22 *Osgoode Hall LJ* 473 at 478-79, DOI: <<https://doi.org/10.60082/2817-5069.1926>>.

332. *Ibid.*

333. See Samuel Buckberry Joyce, "Climate Injunctions: The Power of Courts to Award Structural Relief against Federal Agencies" (2023) 42 *Stan Env'tl LJ* 241 at 262; Pinder, *supra* note 318 at 260-61.

334. Allan Y Jiao, "Federal Consent Decrees: A Review of Policies, Processes, and Outcomes" (2021) 22 *Police Prac & Research* 793 at 794, DOI: <<https://doi.org/10.1080/15614263.2020.1722664>>.

335. David L Douglass, "Department of Justice Consent Decrees as the Foundation for Community-Initiated Collaborative Police Reform" (2017) 20 *Police Q* 322 at 326, DOI: <<https://doi.org/10.1177/1098611117712237>>. See also Zachary A Powell, Michele Bisaccia Meitl & John L Worrall, "Police Consent Decrees and Section 1983 Civil Rights Litigation" (2017) 16 *Crim & Pub Pol'y* 575 at 578, DOI: <<https://doi.org/10.1111/1745-9133.12295>>.

Constitutional settlement agreements offer a second novel remedy that can better address racial profiling.³³⁶ A constitutional settlement agreement is a remedy that arises in the context of a *Charter* class action lawsuit that alleges multiple civil rights violations. The agreement constitutes a binding contract between the parties that is supervised by courts on an ongoing basis.³³⁷ Here too, courts retain supervisory jurisdiction to ensure that the constitutional settlement agreement's terms and conditions are implemented.³³⁸

Settlement agreements can be beneficial for several reasons. First, they may promote access to justice because they are quicker, more efficient, simpler, and cheaper than protracted litigation.³³⁹ Second, settlement agreements are advantageous for defendants who can resolve many claims simultaneously and insulate themselves against further lawsuits associated with the same conduct.³⁴⁰ Third, in contrast to judicial decisions and the remedies that flow from them, settlement agreements may resolve legal disputes in a manner that better reconciles the opposing parties' interests.³⁴¹

The recent rise of *Charter* class action lawsuits supports the use of constitutional settlement agreements to remedy systemic civil rights violations.³⁴² Courts

336. For an example of a constitutional settlement agreement, see *Good* 2020, *supra* note 32; Roach, "Canadian Policing," *supra* note 305 at 62. See also *Good v Toronto (Police Services Board)*, 2016 ONCA 250 at paras 38-39, 87 [*Good* 2016].

337. Catherine Piche, "Judging Fairness in Class Action Settlements" (2010) 28 Windsor YB Access Just 111 at 112, 129; Howard M Erichson & Ethan J Leib, "Class Action Settlements as Contracts?" (2023) 102 NCL Rev 73 at 74-75.

338. Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, 2018) at 115, DOI: <<https://doi.org/10.59962/9780774837903>>.

339. *Ibid* at 95-96; S Arthur Spiegel, "Settling Class Actions" (1994) 62 U Cin L Rev 1565 at 1570, 1579; Vince Morabito, "Judicial Supervision of Individual Settlements with Class Members in Australia, Canada, and the United States" (2003) 38 Tex Intl LJ 663 at 679, DOI: <<https://doi.org/10.29173/alr1327>>.

340. D Theodore Rave, "When Peace Is Not the Goal of a Class Action Settlement" (2016) 50 Ga L Rev 475 at 483-84.

341. Erichson & Leib, *supra* note 337 at 79 (noting that courts conceptualize settlement agreements as a compromise).

342. See Skolnik, "Criminal Justice Remedies," *supra* note 163 at 608. In Quebec, three class action lawsuits for racial profiling are currently before the courts. See *Ligue des Noirs du Québec*, *supra* note 175; *Ligue des Noirs du Québec et Gregory Luzincourt c Procureur Général du Québec* (11 November 2022), Montreal, QCCS 500-06-001206-222 (application for authorization to institute a class action); *Papa Ndiako Gueye c Ville de Longueuil et Ville de Repentigny et Ville de Laval et Ville de Blainville et Ville de Québec et Ville de Gatineau et Ville de Montréal et Ville de Terrebonne et Procureur général du Québec* (9 November 2022), Montreal, QCCS 500-06-001205-224 (application for authorization to institute a class action).

have increasingly embraced *Charter* class actions to respond to pervasive and continuous unconstitutional state conduct.³⁴³ Constitutional class action lawsuits have been brought in various contexts. For instance, claimants have brought successful *Charter* class actions in response to administrative segregation practices that disproportionately impacted individuals with mental health challenges and exemplified cruel and unusual treatment.³⁴⁴ Individuals have brought successful class actions for arbitrary detentions in contexts where they were held in pre-trial custody for excessive periods while they awaited their bail hearing.³⁴⁵

Some Canadian courts have accepted constitutional settlement agreements that aimed to reform police policies and practices that resulted in *Charter* rights violations.³⁴⁶ In *Good v Toronto Police Services Board*, the claimants brought a constitutional class action and argued that they were arbitrarily detained by police officers during the G20 protests.³⁴⁷ The ONCA upheld the class action certification.³⁴⁸ The parties eventually reached a settlement agreement that awarded sixteen million dollars of damages and catalyzed a series of police reforms.³⁴⁹ As part of the settlement agreement, the Toronto Police Services Board acknowledged its wrongdoing.³⁵⁰ It also committed to expunge the criminal records of class members and to reform policing strategies and tactics for public demonstrations.³⁵¹

343. See e.g. *Brazeau v Canada (Attorney General)*, 2023 ONSC 7240 [*Brazeau*]; *Francis v Ontario*, 2021 ONCA 197 [*Francis*]; *Good* 2016, *supra* note 336 at paras 38-39, 87; *Carrier c Attorney General of Québec*, 2022 QCCA 77 [*Carrier*]; *Picard c Ville de Gatineau*, 2024 QCCS 4897. For an overview of the recent rise of class action lawsuits, see Allan Cocunato, “And (Judicially Economical) Justice for All: The Case for Class Proceedings as the Preferable Procedure in Mass Claims for Charter Damages” (2019) 14 *Can Class Action Rev* 339 at 348-49.

344. See e.g. *Brazeau*, *supra* note 343; *Francis*, *supra* note 343; Lisa Kerr, “The End Stage of Solitary Confinement” (2019) 55 *CR* (7th) 382 at 392-93.

345. *Carrier*, *supra* note 343.

346. *Good* 2020, *supra* note 32; Wendy Gillis & Jim Rankin, “Toronto Police Board Agrees to \$16.5 Million Settlement over Mass Arrests at 2010 G20 Summit,” *Toronto Star* (17 August 2020), online: <www.thestar.com/news/gta/toronto-police-board-agrees-to-16-5-million-settlement-over-mass-arrests-at-2010-g20/article_3242127e-c07a-54c1-8197-f25c9f3f3328.html> [perma.cc/SZZ6-RZ5X].

347. 2013 ONSC 3026.

348. *Good* 2016, *supra* note 336. For an overview of the issues and procedural history, see Elizabeth Emery, “A Wrench in the Social Justice Toolbox: Assessing the Constitutional Class Action as a Tool for Addressing Racial Discrimination” (2021) 17 *Can Class Action Rev* 159 at 177-79.

349. *Good* 2020, *supra* note 32 at para 22.

350. *Ibid* at para 29.

351. *Ibid* at para 4.

Similar to American contexts, constitutional settlement agreements could be expanded to include a broader range of reforms that aim to address the systemic and organizational factors that contribute to racial profiling and, ultimately, counteract domination. Claimants could request that such settlement agreements impose better data-gathering practices, improve police education and supervision, and enhance law enforcement oversight.³⁵² The agreements could also aim to address broader issues within policing, such as use of force training, law enforcement strategies, and civilian complaint processes.³⁵³ In the United States, these reforms tend to be implemented as part of a consent decree following a DOJ investigation of a police department's pattern or practice of violating constitutional rights.³⁵⁴ Yet the terms of a class settlement agreement could incorporate similar reforms. Together, structural injunctions and constitutional settlement agreements can catalyze a novel remedial approach to racial profiling that may instantiate lasting positive change.

VI. CONCLUSION

This article argued that existing judicial approaches to racial profiling tend to be under-theorized and suffer from important limitations. It showed how racial profiling is misconstrued as a wrong that interferes primarily with individuals' liberty and privacy interests, such as the right to be free from arbitrary detentions and unreasonable searches. This article demonstrated why racial profiling is wrongful primarily because it embodies discrimination that undermines individuals' right to equality and dignitary interests and, secondarily, because it limits individual freedom or privacy. The republican notion of freedom, for its part, deepens our understanding of racial profiling as a form of domination: unfreedom that undermines individuals' equality and liberty. Conceptualizing racial profiling as a wrong that violates equality and liberty also aligns with the recent QCCA decision in *Luamba*.³⁵⁵

352. See Ayesha Bell Hardaway, "Time Is Not on Our Side: Why Specious Claims of Collective Bargaining Rights Should Not Be Allowed to Delay Police Reform Efforts" (2019) 15 Stan J CR-CL 137 at 159, 162; Joshua Chanin, "On the Implementation of Pattern or Practice Police Reform" (2014) 15 Criminology, Crim Just, L & Soc'y 38 at 39-40. Note that these settlement agreements tend to be imposed pursuant to DOJ Pattern-or-Practice Investigations under the *Law Enforcement Misconduct Statute*, 42 USC §14141.

353. Stephen Rushin, "Structural Reform Litigation in American Police Departments" (2015) 99 Minn L Rev 1343 at 1378-87.

354. *Ibid.*

355. *Supra* note 7.

The core arguments of this article also offered a systematized and bifurcated legal framework that governs racial profiling. First, in the context of a criminal proceeding, an accused person can substantiate a claim of racial profiling where they satisfy the *Le* test.³⁵⁶ They must demonstrate that officers used race “consciously or unconsciously, to any degree in suspect selection or subject treatment.”³⁵⁷ Successful proof of racial profiling, in turn, results in joint section 15 and sections 9 or 8 *Charter* violations. Second, in contexts where an individual challenges the constitutionality of a law or police practice because it results in widespread racial profiling, the applicant must satisfy the two-part section 15 test set out in *R v Sharma*.³⁵⁸ They must prove that the law or police practice “(a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.”³⁵⁹

The final parts of this article elucidated how conventional remedies for racial profiling may not address structural and organizational factors that contribute to it. These final parts also offered two novel remedies that aim to provide stronger redress and more effectively counteract domination: structural injunctions and constitutional settlement agreements.

This article also offered a range of important new insights that extend beyond criminal procedure. First, it highlighted the value of republicanism in constitutional theory. For instance, as others have argued, the concept of domination can enhance our understanding of the nexus between religious freedom and the right to equality for minority groups.³⁶⁰ Second, in line with other scholars’ work, it deepened our comprehension of the relationship between the right to equality and various constitutional rights.³⁶¹ Third, it enhanced

356. *Supra* note 78 at para 76.

357. *Ibid.*

358. *Sharma, supra* note 180 at para 28.

359. *Ibid.*

360. On the distinction between s 2(a) and s 15 under the *Charter*, see Shannon Ishiyama Smithey, “Religious Freedom and Equality Concerns under the *Canadian Charter of Rights and Freedoms*” (2001) 34 Can J Pol Sci 85, DOI: <<https://doi.org/10.1017/S0008423901777827>>; Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford University Press, 2008) at 15-18.

361. See e.g. Jennifer Koshan, “Redressing the Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown” (2013) 22 Const Forum Const 31, DOI: <<https://doi.org/10.21991/C9D962>>; C Tess Sheldon, Karen R Spector & Mercedes Perez, “Re-Centering Equality: The Interplay between Sections 7 and 15 of the *Charter* in Challenges to Psychiatric Detention” (2016) 35 NJCL 193; Timothy Zick, “The Dynamic Relationship Between Freedom of Speech and Equality” (2016) 12 Duke J Constitutional L & Pub Pol’y 13, DOI: <<https://doi.org/10.2139/ssrn.2705509>>.

our collective knowledge of the nature of multidimensional wrongs and the multifaceted harms that they generate. Together, these contributions generate important theoretical and practical implications that extend beyond the boundaries of constitutional criminal procedure.