Racial Profiling: Racism in Practice?

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"History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure"

– Thurgood Marshall

Racial profiling has been much in the news in Canada lately. While for Americans the acronym DWB[1] needs little explanation, it has not been until recent high-profile cases in Canada[2] and the events of Sept. 11 that racial profiling has hit the consciousness of the Canadian public at large.

For a term that is so overloaded, it is understandable that racial profiling has several definitions. In "The New Face Of Racial Profiling: How Terrorism Affects The Debate," author Sherry F. Colb states the following:

> **"When I refer to 'racial profiling,' I mean the law enforcement practice of taking the race of a potential suspect into account in deciding whether to initiate investigation of that suspect. One need not consider race to the exclusion of all other factors to be engaged in racial profiling. Rather a 'profile' will often contain a variety of factors: if one or more of them are race, then we have a racial profile."[3]**

Harvard law professor Randall Kennedy simply notes that racial profiling "should be defined as the policy or practice of using race as a factor in selecting whom to place under special surveillance."[4]

In the recent significant decision of the Ontario Court of Appeal, *R. v. Brown*, the court defined racial profiling as follows:

> **[7] There is no dispute about what racial profiling means. In its factum, the appellant defined it compendiously: "Racial profiling involves the targeting of individual members of a particular racial group, on the basis of supposed criminal propensity of the entire group" and then quoted a longer definition offered by the African Canadian Legal Clinic in an earlier case, *R. v. Richards* (1999), 26 C.R. (5th) 286 (Ont. C.A.), as set forth in the reasons of Rosenberg J.A. as p. 295:**

> **Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.**

> **[8] The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping.**

Relying on the reasoning in *R. v. Brown*, in the 2004 case *R. v. Khan*, Justice Molloy found that police officers in Toronto had engaged in racial profiling by stopping Mr. Khan "…for an improper purpose. Mr. Khan was targeted for this stop because of racial profiling, because he was a black man with an expensive car." The police officers in *R. v. Khan* were found to have violated Mr. Khan's s.9 (arbitrary detention) and s.8 (unreasonable search) *Charter* rights.

I am not aware of cases in the Canadian immigration or refugee law context that have applied the growing jurisprudence that racial profiling constitutes a breach of *Charter* and human rights.

In the Canadian context, the main elements of the arguments in favour of the use of racial profiling can be found, in their basic form, in a *National Post* newspaper editorial "Profiles In Prudence."[5] The editorial responds to charges by Arab-Canadians that they were being subjected to racial profiling by Air Canada employees in the post-Sept. 11 period.

The gist of the editorial published on Sept. 20, 2001 is the following: that "the 19 suicide terrorists who killed more than 5,000 people on Sept. 11 were all -- or mostly all -- Arabs. There are credible reports that the same terrorist cells plan more hijackings. Given this, it would be criminally negligent if Air Canada did not engage in racial profiling." The risk factor which "binds" the hijackers is their race; and that given limited resources it would be a waste to pretend "that ethnicity is irrelevant."

This is not a position embraced by only a few. While I am not aware of polling results in Canada on whether or not Canadians favour racial profiling as a security measure post-Sept. 11, in the U.S., polls suggest that 66 per cent of whites and 71 per cent of African Americans support racial profiling of "people who look to be of Middle-Eastern descent."[6]

The arguments opposed to the use of racial profiling are made eloquently by law professor David A. Harris, who is one of the acknowledged experts on racial profiling in the U.S. In his written testimonial before the United States Commission on Civil Rights, "Flying While Arab: Immigration Issues, and Lessons from the Racial Profiling

Controversy,"[7] he notes that while it is a natural human reaction to fear, to make judgements based on "broad categories," such fears can translate into the denial of the civil liberties of those targeted. He writes:

> **"….as we embark in this new world, a world changed so drastically by the events of Sept. 11, we need to be conscious of some of the things that we have learned over the last few years in the ongoing racial profiling controversy. Using race or ethnic appearance as a part of a descriptor of particular suspects may indeed help an investigation; using race or ethnic appearance as a broad predictor of who is involved in crime or terrorism will likely hurt our investigative efforts. All evidence indicates that profiling Arab-Americans or Muslims would be an ineffective waste of law enforcement resources that would damage our intelligence efforts while it compromises basic civil liberties. If we want to do everything we can to secure our country, we have to be smart about the steps we take."**

This same theme of acting smartly is echoed in a *Newsweek* article entitled "Freedom vs. Security,"[8] in which the authors note that racial profiling is too blunt an instrument. What is required, the authors argue, is "smart profiling," by making use of existing criminal databases and by building relationships with certain groups to acquire information.

In the Canadian privacy law context, this tension between the proponents and opponents of racial profiling also finds some convergence in the idea of using information more intelligently.

George Radwanski, the former privacy commissioner of Canada, pointed out that the Canadian government's proposed "Big Brother" passenger database poses a threat to the privacy rights of Canadians. In his comments, he notes that "genuine anti-terrorism measures, even if they result in some infringement of privacy" must meet a four-part test of justification:[9] (1) the measure must be demonstrably necessary in order to meet some specific need; (2) it must be likely to be effective in achieving its intended purpose; (3) the intrusion on privacy must be proportional to the security benefit to be derived; and (4) it must be demonstrable that no other, less privacy-intrusive, measure would suffice to achieve the same purpose.[10]

In a recent speech, delivered April 27, 2004, Jennifer Stoddart, the current Privacy Commissioner of Canada, noted that:

> **As law enforcement and national security agencies collect more information about more individuals and use that information, there is an increasing possibility that people will be subjected to unnecessary scrutiny, that more people will be singled out, and that more people will be treated unfairly. The other issue is that you simply cannot rely on stereotypes to make judgments about security risks posed by an individual, but there is a general belief that the alternative to doing so is to collect more information on everyone. I don't see that as an appropriate answer.**

A nuanced consideration of the two positions, pro and con, is undertaken by Prof. Randall Kennedy, and he points out that both sides have some merit to their arguments; however, the argument about racial profiling should begin with "an insistence upon the special social significance of racial distinctions in American life and law."[11] Prof. Kennedy points out that the courts in the U.S. have ruled that more than mere reasonableness is required to discriminate on racial grounds.

He also notes that there is a disturbing trend in the debate over racial profiling which suggests that people, including judges, "are suggesting that decisions distinguishing between persons on a racial basis do not constitute unlawful racial discrimination when race is not the sole consideration prompting disparate treatment." He goes on to note "[t]aking race into account at all means engaging in racial discrimination."

Echoes of this argument can also be found in the Ontario Court of Appeal's reasons in *Brown* and the recent decision in *R. v. Khan*.

Of course, in the Canadian context there is also a realization that racial profiling, if utilized, is discriminatory. The central issue in the Canadian debate on racial profiling is whether or not it could withstand *Charter* scrutiny. Clearly, in the criminal law context, racial profiling cannot withstand *Charter* scrutiny, and has been found to breach sections 8 and 9 of the *Charter* in *R. v. Khan*. But what about in the administrative context, where most, if not all, immigration and refugee law decision-making takes place?

Two publications which are at the forefront of assessing these issues (at present) are: (1) Between Crime and War: Terrorism, Democracy and the Constitution, *National Journal of Constitutional Law*, Volume 14.1, Thomson/Carswell, 2002, Editors: Professor Errol P. Mendes and Debra M. McAllister (from now on "Between Crime and War"); and (2) The Security of Freedom: Essays on Canada's Anti-Terrorism Bill, University of Toronto Press, 2001, Editors: Professors Ronald J. Daniels, Patrick Macklem and Kent Roach (from now on "Security of Freedom"). I refer those who are more interested in this topic to two of the articles contained in these publications since a full discussion of the ideas raised in these publications cannot be dealt with in the space provided.

It is unclear at present if racial profiling is used in the implementation of IRPA. While there is much anecdotal information about the use of racial profiling, the government has denied that racial profiling takes place. The type of transparency that is required to make such a determination simply does not exist. In order for the racial profiling debate to take on more depth and a uniquely Canadian texture (as opposed to one influenced by U.S. jurisprudence), it is important that data gathering, the training of officers, and transparency/oversight mechanisms be implemented.

Currently there is a private member's bill, sponsored by MP Libby Davies, before Parliament (Bill C-296 – *An Act to Eliminate Racial Profiling*) which would require, amongst others, decision-makers (immigration officers, CBSA officers, etc.) to record and collect data on the racial, ethnic, and other characteristics of those individuals who are subject to screening, enforcement, and other processes. Such data collection may well represent the first step in the fight against racial profiling.

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[1] "Driving While Black" – shorthand for African-Americans being stopped for police checks. See also, "Threat and Humiliation – Racial Profiling, Domestic Security and Human Rights in the United States," Amnesty International, U.S. Domestic Rights Program, 2004.

[2] "Black traveler calls search racial profiling: rights body to hear Selwyn Pieter's case involving two Canada Customs agents over train incident," *Globe and Mail*, June 4, 2001; "Settlement In Racial Profiling Case Lauded," Canadian Race Relations Foundation, News Release, Feb, 6, 2002; *R. v. Brown* (Ontario Court of Appeal) (Docket: C37818)(April 16, 2003)(from now on "*Brown*"); and *R. v. Khan* (Ontario Superior Court of Justice) [2004] O.J. No. 3811(from now on "*Khan*").

[3] Colb, Sherry F., "The New Face Of Racial Profiling: How Terrorism Affects The Debate," accessed on Feb. 2, 2003 at http://writ.news.findlaw.com/colb/20011010.html

[4] Kennedy, Randall, "Blind spot: racial profiling meet your alter ego: affirmative action," *Atlantic Monthly*, April 2002, vol. 289 no. 4, p. 24.

[5] "Profiles in Prudence," *National Post*, Editorial, Sept. 20, 2001.

[6] The source for these figures is: Siggins, Peter, "Racial Profiling in an Age of Terrorism," accessed on Feb. 1, 2003 at http://www.scu.edu/ethics/publications/ethicalperspectives/profiling.html

[7] Harris, David A., "Flying While Arab:" Immigration Issues, and Lessons from the Racial Profiling Controversy," Oct. 12, 2001, written testimony before the United States Commission on Civil Rights. Prof. Harris is the Balk Professor of Law and Values, University of Toledo College of Law and Soros Senior Justice Fellow. He is also the author of "Profiles In Injustice: Why Racial Profiling Cannot Work," The New Press, February 2002.

[8] Zakaria, Fareed, et al., "Freedom vs. Security," *Newsweek*, Aug. 7, 2002, vol. 140 Issue 2, p. 26.

[9] Radwanski, George, Privacy Commissioner of Canada, speech made on Feb. 13, 2003 at the "The Frontiers of Privacy and Security: New Challenges for a New Century" conference in Victoria, B.C. (accessed on Feb. 19, 2003 at http://www.privcom.gc.ca/speech/2003/02_05_a_030213_e.asp

[10] It is interesting to note the Privacy Commissioner's response to the oft-used comment that "if you have nothing to hide, you have nothing to fear." He replies, "the truth is that we all do have something to hide, not because it's criminal or shameful, but because it's private."

[11] Kennedy, Randall, "Suspect policy: racial profiling usually isn't racist. It can help stop crime. And it should be abolished," *New Republic*, Sept. 13, 1999, vol. 221 no. 11, p. 31-35. See also, Tanovich, David M., "Using the *Charter* to Stop Racial Profiling: The Development of an Equality-based Conception of Arbitrary Detention," (2002) 40 *Osgood Hall Law Journal* 145-187