# MOVING BEYOND "DRIVING WHILE BLACK": RACE, SUSPECT DESCRIPTION AND SELECTION

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## I. INTRODUCTION

The issue of racial profiling has finally begun to attract the attention of the Canadian media;[2] courts;[3] human rights commissions;[4] the Canadian Bar Association;[5] and, the academy.[6] The focus has been on racial profiling defined as the use of

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[2] See M. Beaudin, "Man Ruled Target Of Racial Profiling" *The Gazette* (2 February 2005) A1; R. Rocha, "Police Admit To Racial Profiling" *The Gazette* (29 January 2005) A1; "U.S. Border Detention Riles Winnipeg Man: Muslim Claims He's Victim Of Racial Profiling" *Edmonton Journal* (24 December 2004) A20; N. Pron, "2nd Case Scrapped For Racial Profiling" *The Toronto Star* (20 October 2004) A19; S. Kari, "Police Used Profiling, Court Rule: 'Driving While Black'" *The National Post* (17 September 2004) A4; "Disturbing Pattern Of Racial Profiling" *The Toronto Star* (19 September 2004) A12; A. Sutherland and R. Bruemmer, "'National Security Threat' Just Taking Photos Of Metro" *The Gazette* (19 May 2004) A7; R. Trichur, "Muslims Distribute Pocket Guide to Civil Rights: What-To-Do Booklet If Detained By Police" *Edmonton Journal* (26 April 2004) A1; "Johnson Receives Police Apology; Chief Admits To Discrimination" *The Toronto Star* (20 January 2004) E1; J. Rankin et. al., "Singled Out" *The Toronto Star* (19 October 2002) A1; and, "Police Target Black Drivers" *The Toronto Star* (20 October 2002) A8.

[3] See *R. v. Campbell,* [2005] Q.J. No. 394 (Court of Quebec (Criminal and Penal Division)) (QL); *R. v. Khan* (2004), 189 C.C.C. (3d) 49 (Ont. S.C.J.) (hereinafter *Khan*); *R. v. Brown* (2003), 173 C.C.C. (3d) 23 (Ont. C.A.) (hereinafter *Brown*); *R. v. Peck*, [2001] O.J. No. 4581 (S.C.J.) (QL) (hereinafter *Peck*); and, *R. v. Richards* (1999), 26 C.R. (5th) 286 (Ont. C.A.).

[4] See *Paying The Price: The Human Cost Of Racial Profiling* (2003) at online: Ontario Human Rights Commission, <http://www.ohrc.on.ca/english/consultations/racial-profiling-report.pdf> (date accessed: 22 November 2004) (hereinafter *Paying The Price*); *Johnson v. Halifax (Regional Municipality) Police Service*, [2003] N.S.H.R.B.I.D. No. 2 (QL); *Troy v. Kemmir Enterprises Inc.*, [2003] B.C.J. No. 2933 (S.C.) (QL); and, *Pieters v. Canada (Department of National Revenue)* (2001), C.H.R.R. Doc. 01-201 (C.H.R.T.). In addition, a recent report suggests that there are between 20 and 25 racial profiling cases currently before the Quebec Human Rights Commission. See S. Banerjee, "Community Leaders Urge Cops To Tackle Racial Profiling" *The Gazette* (3 February 2005) A1.

[5] At its 2005 Annual Meeting, the CBA passed Resolution 04-07-A "Racial Profiling and Law Enforcement" online: Canadian Bar Association, http://www.cba.org/CBA/resolutions/pdf/04-07-A.pdf (date accessed: 9 February 2005). The resolution defines profiling and recognizes the substantial harm it has caused. It further calls upon all levels of government to take steps to define, prohibit and sanction racial profiling and for the CBA to develop and provide racial profiling education for members of the legal profession. To that end, the CBA has provided a web-page with resource material on profiling to help educate lawyers and the judiciary about the scope of the problem and the steps necessary to address it. See "Racial Profiling" at online: Canadian Bar Association, http://www.cba.org/cba/equality/equality/racial_profiling.asp (date accessed: 9 February 2005).

[6] **In the context of domestic policing** see my previous writings: "E-Racing Racial Profiling" (2004), 41 *Alberta Law Review* 905 (hereinafter *E-Racing Racial Profiling*); "The Colourless World Of Mann" (2004), 21 *Criminal Reports* (C.R.) (6th) 1 (hereinafter *The Colourless World Of Mann*); "Annotation To *R. v.*

racialized stereotypes of the usual suspect as the basis for suspect selection.[7] The paradigmatic case has been identified as "driving or walking while Black."[8] As Jacques Lelievre, assistant director of the Montreal Police, candidly admitted "[o]fficers see street gangs ... They see some black people doing wrong. They get used to that, and myths develop. So when they see a black guy in a Lexus, they assume he's in a gang. We're trying to break that."[9]

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*Singh*" (2004), 15 C.R. (6th) 289; "Race and Arbitrary Detention" (2003), 11 C.R. (6th) 149; "Using The *Charter* To Stop Racial Profiling: The Development Of An Equality-Based Conception Of Arbitrary Detention" (2002), 40 *Osgoode Hall L.J.* 145 (hereinafter *Using The Charter*); "Operation Pipeline and Racial Profiling" (2002), 1 C.R. (6th) 52; "Res Ipsa Loquitur and Racial Profiling" (2002), 46 *Criminal Law Quarterly* 329 (hereinafter *Res Ipsa Loquitur*). See also, K. Roach, "Making Progress On Understanding and Remedying Racial Profiling" (2004), 41 *Alberta Law Review* 895; S. Wortley and J. Tanner, "Data, Denials, and Confusion: The Racial Profiling Debate in Toronto" (2003), 45 *Canadian Journal of Criminology and Criminal Justice* 367; and, B. Berger, "Race and Erasure in *R .v. Mann* (2004), 21 C.R. (6th) 58. **In the context of the "war on terrorism"** see R. Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism" (2003), 41 *Osgoode Hall L.J.* 293; S. Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter" in R.J. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); S. Choudhry and K. Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003), 41 *Osgoode Hall L.J.* 1 (hereinafter *Racial and Ethnic Profiling*); and, F.A. Bhabha, "Tracking 'Terrorists' or Solidifying Stereotypes? Canada's Anti-Terrorism Act in Light of the *Charter's* Equality Guarantee" (2003), 16 *Windsor Review of Legal and Social Issues* 95.

[7] In *Paying The Price*, *supra* note 4 at 6, the Ontario Human Rights Commission defined racial profiling as "any action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment." The Commission further recognized that "profiling can occur because of a combination of the above factors and that age and/or gender can influence the experience of profiling."

[8] See *Using The Charter*, *supra* note 6 at 147.

[9] See M. Cernetig, "Looking Over Their Shoulders: Montreal's Visible Minorities Grapple With The Fallout From A Startling Police Admission" *The Toronto Star* (13 February 2005) A8. See also, R. Rocha, "Police Admit To Racial Profiling" *The Gazette* (29 January 2005) A1.

Less attention, however, has been given to cases where race forms part of the description of a suspect provided by the victim or witness (i.e. race-based suspect descriptions).[10] As a result, most definitions of racial profiling have not included the use of race in suspect descriptions. In *Paying The Price*, the Ontario Human Rights Commission, for example, distinguished racial profiling from criminal profiling which it asserted "isn't based on stereotypes but rather ... on actual behaviour or *on information about suspected activity by someone who meets the description of a specific individual*."[11] Similarly, in the recently proposed *An Act To Eliminate Racial Profiling* (Canada), there is a specific exemption for circumstances where race is part of the suspect's description:

> 3.(2) Reliance on criteria such as race, colour, ethnicity, ancestry, religion or place of origin is not considered to be racial profiling if it is used by an enforcement officer in combination with other identifying factors to search for and apprehend a specific suspect whose race, colour, ethnicity, ancestry, religion or place of origin *is part of the description of the suspect*.[12]

It is unclear why we have been so quick to accept that suspect descriptions should be exempt from the general prohibition against using race in policing. It is

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[10] Throughout this article, I use suspect description as a shorthand for race-based suspect description.

[11] *Supra* note 4 at 6 (emphasis added). See also, *Racial and Ethnic Profiling*, *supra* note 6 at 2-3; S.L. Johnson, "Race and the Decision to Detain a Suspect" (1983) 93 *Yale L.J.* 214 at 242-243 (hereinafter *Race and the Decision to Detain a Suspect*); and , D.A. Harris, "Using Race or Ethnicity As A Factor in Assessing The Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No" (2003), 73 *Mississippi L.J.* 423.

[12] See Bill C-296, First Reading, November 18, 2004. This is a Private Member's Bill introduced by Libby Davies (NDP). Available online: <www.libbydavies.ca/pdf/c-296-racial-profiling-bill.pdf> (date accessed 9 February 2005).

ironic, as Richard Banks has pointed out, that "the controversy about racial profiling has generated the staunchest defenses of law enforcement use of race-based suspect descriptions. The effort to delegitimize one form of race-based suspect selection has fortified another."[13] There are a number of possible explanations. First, the use of race in suspect descriptions is related, in theory, to physical appearance rather than the social construction of race or racialization.[14] As such, it is used as an individual identifier rather than as a stereotypical marker of behaviour that leads to the targeting of members of the identifiable group. Consequently, it is seen as more reliable and less likely to result in abuse.

Second, in theory, suspect descriptions apply equally to everyone and, therefore, are consistent with formal equality and its "colourblindness" principle. As Sheri Johnson notes "... [b]ecause suspects in all racial groups will be identified in part by their race, reliance upon the witness's description of the perpetrator's race seems to

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[13] R. Richard Banks, "Race-Based Suspect Selection And Colourblind Equal Protection Doctrine and Discourse" (2000-2001), 48 *U.C.L.A. L. Rev.* 1075 at 1081, n. 16 (hereinafter *Race-Based Suspect Selection*).

[14] Racialization is the process "by which societies construct races as real, different and unequal in ways that matter to economic, political and social life. It involves —

- selecting some human characteristics as meaningful signs of racial differences;
- sorting people into races on the basis of variations in these characteristics;
- attributing personality traits, behaviours and social characteristics to people classified as members of particular races; and
- acting as if race indicates socially significant differences among people."

Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, vol. 1 (Toronto: Queen's Printer for Ontario, 1995) at 40 (hereinafter *Ontario Systemic Racism Commission*).

impose equal burdens on all races."[15] Third, suspect descriptions usually come from victims or witnesses rather than the police and may, therefore, be seen as neutral and free from possible state or police bias.[16] And finally, the use of suspect descriptions almost always arises in cases of completed crimes usually involving violence such as murder or sexual assault. Consequently, "[w]hile the public remains conflicted about the wisdom of the war on drugs, no one doubts the importance of apprehending violent criminals."[17]

This article seeks to begin a dialogue on whether we have too quickly exempted suspect descriptions from the racial profiling prohibition. In particular, the article examines, through the use of narrative, whether the use of race in suspect descriptions has, like the use of racialized profiles, imposed disproportionate burdens on racialized communities given their size relative to the rest of the population and the historical and current baggage that race brings to the table. In other words, while in theory the practice may be consistent with formal equality, this article questions whether it is consistent with substantive equality. As Chief Justice Beverley McLachlin observed in her extra-judicial paper "Racism and The Law":

> [T]he purpose of the *Charter's* guarantee [of equality] is to tangibly improve the situation of members of subordinated and disadvantaged groups and to combat

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[15] *Race and the Decision to Detain a Suspect*, *supra* note 11 at 242-243.

[16] See *Race-Based Suspect Selection*, *supra* note 13 at 1093-1094.

[17] *Ibid.* at 1107-1108.

> disadvantage and discrimination in general. Equality is not merely about treating likes alike or providing equal opportunities, but most fundamentally it is about the attainment of true substantive equality ... [I]n *Law*, the Supreme Court ... refined the equality doctrine by emphasizing human dignity as the concept underlying substantive equality.[18]

In thinking about these questions, we need to be mindful of our history of slavery, de facto segregation and other manifestations of overt or intentional racism.[19] We need to ask ourselves whether we are satisfied that the remnants of overt racism are no longer present. We also need to be cognizant of systemic or unintentional racism.[20] Are we confident, for example, that we can identify and prevent those racialized "usual

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[18] (2002), 1 *Journal of Law & Equality* 7 at 19 (hereinafter *Racism and the Law*).

[19] See J. Walker, "*Race", Rights and the Law in the Supreme Court of Canada* (Canada: Wilfred Laurier Press, 1997) (hereinafter *Race, Rights and the Law*); C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) (hereinafter *Colour-Coded*) and "Racial Segregation in Canadian Legal History: Viola Desmond's Challenge, Nova Scotia, 1946" (1994), 17 *Dalhousie L.J.* 299; *Racism and the Law*, *supra* note 18; "Looking Forward, Looking Back" in *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples (1996)* online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ch/rcap/rpt/lk_e.html> (date accessed: 20 November 2004); J.S. Milloy, *A National Crime: The Canadian Government And The Residential School System - 1879 To 1986* (Winnipeg: University of Manitoba Press, 1999). See also "The Residential School System Historical Overview" online: Indian Residential Schools Resolution Canada <http://www.irsr-rqpi.gc.ca/english/history.html> (date accessed: 21 November 2004); and, R. Miki and C. Kobayashi, *Justice In Our Time: The Japanese Canadian Redress Settlement* (Vancouver: Talonbooks, 1991).

[20] Systemic racism is the "social production of racial inequality in decisions about people and the treatment they receive." It is far more pervasive today than overt racism because it is largely invisible and unintentional. Indeed, we now know that it is present in every social institution in Canadian society. It is precisely because it is invisible and often the consequence of the application of facially neutral laws and policies, that we need a guarantee of substantive equality. See *Ontario Systemic Racism Report*, *supra* note 14 at 39 and Chapter 3; C.R. Lawrence III, "Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1986-1987) 39 *Stanford L. Rev.* 317; "*Anti-Black Racism in Canada: A Report on the Canadian Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination*" (African Canadian Legal Clinic, July 2002) on file with the author; and, Multiculturalism and Citizenship Canada, *Eliminating Racial Discrimination in Canada*, Ottawa: Supply & Services Canada (1989) at pages 3-7. See also the discussion in *R. v. Williams* (1998), 15 C.R. (5th) 227 at 249-250 (S.C.C.) and *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 at 409-416 (S.C.C.).

offender" stereotypes that are at the heart of traditional conceptions of racial profiling from infecting the search for an identified racialized suspect? Is the net of suspicion that is cast when police use stereotypes to guide investigations any less broad in cases of suspect descriptions? Finally, we need to be critically thinking about what harm is caused when race is used to track identified suspects and whether the burden of abuse, ultimately, falls on the shoulders of racialized communities. It is these issues that the article seeks to subject to scrutiny. In doing so, the focus of my analysis is on domestic policing.[21]

This article begins with a discussion of a series of narratives that reveal how race can be abused when it forms part of a suspect's description (Part II). The narratives include, for example, a British Columbia case involving the detention of an individual because he appeared "out of place" (i.e. he was in a racially mixed group);[22] and, the

[21] This is not to suggest that the article has no relevance in thinking about policing in the "war on terrorism." If the situation ever arises where the RCMP receives credible and reliable information that an act of terrorism is about to take place at a specific location, date and time (or has already occurred) and a specific suspect(s) has been identified, it is my view that the analysis presented in this paper would apply to guide whether race or ethnicity could be used (or has been abused) by the police to locate or stop the suspect.

[22] It would appear that being "out of place" is a common yardstick used by the police in assessing the environment in which they are patrolling. For example, in *R. v. Houben*, [2004] S.J. No. 137 (P.C.), (QL) at para. 8, a police officer provided the following testimony about his understanding of the scope of his duties as a police officer:

> A. To respond to police complaints or people calling, basically that gives us most of our power, when somebody calls in and they need help. Other than that, when they're sleeping it's our job to patrol the area and anything that appears to be out of order, *or a person doesn't belong there*, we would check that person, the vehicles, or any other — anybody moving in the area would obviously be checked, if they didn't belong there, or seem to belong there, if it's a weird time of night.

shooting death of J.J. Harper in Winnipeg in 1988. Part III examines a series of variations of the race-based suspect description theme. These include policing racialized gangs and "hot spots."[23] These variations are particularly significant because of the "official" sanctioning of the racialization of gangs in the media, police and government. For example, the findings of a 2002 Canadian Police Survey on Youth Gangs were widely reported in the media as follows:

> ... 44% of Canadian youth gangs are believed to have links to aboriginal and Asian organized crime groups and Outlaw biker gangs, the report found. ...
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> Saskatchewan, with 935 members in 22 gangs, had the highest concentration of youth gang members in Canada, with one per 100,000 people, 96% of those were aboriginal youths, the report found.
>
> More than one-third of British Columbia youth gang members are Asian. Black youths make up more than a third of gang members in Ontario and half in Quebec. In Nova Scotia, gang membership is split roughly between black and white youths.[24]

Similarly, the Federal Government's Public Safety and Emergency Preparedness website states that:

> Street gangs are a relatively new phenomenon in Canada, but their activities can have wide ranging effects on the communities in which they operate. Street gangs are often based on ethnic origin, including Asian and Aboriginal-based gangs. ... Street gangs are often regarded as a youth problem, but this is not always the case.[25]

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[23] Hot spot policing involves the identification of areas or pockets of high crime, often neighbourhoods, and the mobilization of resources to those locations. In many instances, the residents in these areas are predominantly poor and racialized. See the *Colourless World of Mann*, *supra* note 6 at 50.

[24] A. Woods, "Toronto and its gangs" *National Post* (3 June 2004) A4.

[25] See "Organized Crime - National Priorities and Areas of Concern - Street Gangs" online: Public Safety and Emergency Preparedness Canada, <http://www.psepc.gc.ca/policing/organized_crime/Priorities/StreetGangs_e.asp> (date accessed: 21 November 2004). See also the 2004 Annual Report on Organized Crime in Canada prepared by CISC

In addition to the problems that arise with this racialization of gangs by our government, why has it seen fit to qualify age but not race or ethnicity? What does this tell us about the depth of the problem?[26]

Part IV of the article interrogates whether and/or under what circumstances, the *Charter* should sanction the use of race as part of the physical description of a known suspect. It will be argued that, given the dangers and abuses revealed in the narratives presented, the Supreme Court of Canada's tacit constitutional recognition of the use of race-based suspect descriptions in *R. v. Mann*[27] needs to be reconsidered. To that end, the article proposes a "dominant feature" constitutional test for consideration.

## II. SUSPECT DESCRIPTIONS AND SELECTION

### *(a) Being "Out of Place"*

In *R. v. Greaves*,[28] the police were investigating an assault involving a Black victim at a liquor store in an area of Southeast Vancouver. The incident occurred sometime after 7:30 p.m. One of the assailants was described as Black, the other five as White. The

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which is divided into sections entitled "Asian-based Organized Crime" and "Aboriginal-based Organized Crime." Online: Criminal Intelligence Service Canada, <www.cisc.gc.c.a> (date accessed: 21 November 2004).

[26] One wonders how many people have likely read this statement and not thought twice about the absence of a similar qualification for race and ethnicity.

[27] (2004), 21 C.R. (6th) 1 (S.C.C.) [hereinafter *Mann*].

[28] (2004), 189 C.C.C. (3d) 305 (B.C.C.A.) [hereinafter *Greaves*].

police dispatcher further advised that the suspects had fled eastbound. Constable Winters responded to the call and was at the scene within five minutes. He started to drive around the neighbourhood. Winters saw Greaves, a Black male, accompanied by two White males walking out of Central Park, a very large public park that houses a professional soccer stadium and swimming pool.[29] The group was heading in the direction of the liquor store.

Other than the colour of his skin, Greaves did not resemble the suspect. The suspect was described as 18 years old and skinny. Greaves was described as mid-30's with a stocky build. He also had a distinctive appearance - a very prominent gap between his two front teeth. Moreover, none of the other circumstances were consistent with the information that the officer had been provided. As Professor Quigley has pointed out:

> There were only two white males, not five, with him and they were walking towards the liquor store which would be odd behaviour if they were indeed the perpetrators.[30]

Nevertheless, Winters decided to investigate the group. *In his mind, their mixed racial composition was "unique"[31] for the area*. This, along with the fact that they appeared to be carrying beer bottles and tried to avoid him as he approached, led him to believe that

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[29] These additional facts about the location of the stop were provided to me by Eric Gottardi, one of Greaves' appellate counsel.

[30] "Annotation" (2004), 24 Criminal Reports (6th) at ___.

[31] *Greaves, supra* note 28 at para. 9 (emphasis added).

they were involved in the assault. As it turned out, Greaves was not, in fact, the suspect and was never charged with assault. Nevertheless, he was detained for over 40 minutes, interrogated, handcuffed, and repeatedly searched. Eventually, the police discovered a cell phone that linked him with an unsolved robbery and he was arrested for that offence.

Greaves challenged the constitutionality of his detention and search. The primary issue was whether there were reasonable grounds to suspect that he was involved in the assault. At trial, the judge accepted, as objectively reasonable, the police officer's "out of place" thinking and relied, in support, on *R. v. Yamanaka*, an earlier decision wherein the British Columbia Court of Appeal gave constitutional imprimatur to the use of "out of place" or incongruity reasoning in the suspicion calculus.[32] As the trial judge in *Greaves* held:

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[32] In *R. v. Yamanaka* (1998), 128 C.C.C. (3d) 570 (B.C.C.A.) (hereinafter *Yamanaka*), the police were investigating reports of loud noises described as gunfire in the early morning hours in an affluent neighbourhood in West Vancouver. The first officer at the scene saw Jon Alan Yamanaka, a young Japanese-Canadian, and a friend standing by an "old model vehicle." When asked if they had heard any gunfire, they advised the officer that they had not but that their car had broken down and had backfired several times. A second officer arrived at the scene. He became suspicious because he did not think that Yamanaka and his companion *"belonged"* in the neighbourhood. After being told that there were "electrical tools" in the athletic bag that Yamanaka was holding, the officer asked to look inside to ensure that it did not contain any firearms. No firearms were found. The police did apparently find other items and Yamanaka was charged with being in possession of instruments suitable for the purpose of breaking into a coin-operated device. On the appeal from his conviction, Chief Justice McEachern, for the British Columbia Court of Appeal, held that the detention and search complied with the *Charter* because, in part:

> The appellant and his co-accused seemed to be *out of place* in the neighbourhood at 5:30 a.m.

*Ibid.* at 575-576 (emphasis added).

> The detention was also justifiable from an objective point of view. ... A black male with white male suspects in the area of the liquor store within five minutes of this report was sufficient to attract the officer's attention.
>
> *It is not dissimilar to the West Vancouver officer in R. v. Yamanaka ... who, by considering that the suspects did not 'belong' in the area along with other factors, justified detention.*[33]

On appeal, the British Columbia Court of Appeal affirmed the trial judge's "out of place" reasoning and conclusion. Justice Lowry, for the Court, held:

> It is clear that Cst. Winters was acting on more than an intuitive hunch. His suspicion that the persons detained may have been involved in the assault was supported by objective facts and was reasonable in the circumstances. Although there may not be objective data to support his belief that the combination of one black and two white males was "unique" in this area, the testimony of both he and Cst. Law was consistent with the fact that this was the *only* group of males – whether black, white or some combination of the two – observed in the area at the time. After hearing the testimony of Cst. Winters, the trial judge was satisfied that his conduct was not racially motivated.[34]

So many questions are left unanswered by this very troubling decision. Why did the officer think it was "unique" for Greaves to have been in the company of Whites? Was it because he thought that Whites and Blacks should not mix? Or was it because for him, it was unusual to see a Black person in this area of Vancouver?[35] As a matter of

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[33] *Greaves, supra* note at 28 para. 39 (emphasis added).

[34] *Greaves*, *supra* note 28 at para. 42. *Greaves* has now been cited in three cases: *R. v. Poplett*, [2004] A.J. No. 1308 (P.C.) (QL); *R. v. Nguyen*, [2004] B.C.J. No. 2289 (C.A.), (QL) and *R. v. Martens*, [2004] B.C.J. No. 2300 (C.A.), (QL).

[35] While the officers in *Yamanaka* and *Greaves* were open about their thought process, one wonders how many other cases exist where the police consciously use similar reasoning but do not articulate it because they recognize, or at least are concerned that others will think, that it is the product of racist thinking. There are likely even more cases where "out of place" reasoning is not articulated because the police do not realize that they are using it as a basis for the exercise of discretion.

pure logic, since Greaves did not match the description of the suspect, how does the mixed racial composition of the group add to the reasonable suspicion calculus? How could either the trial judge or Court of Appeal say that the detention was not racially motivated when the officer explicitly articulated that he used race and "out of place" reasoning as one of the factors in deciding to detain Greaves? Do the courts not realize that statements that a racialized individual does not "belong" or is "out of place" or that a group's mixed racial composition is "unique" are assumptions or moral judgments grounded in stereotypes and distorted views of the world.[36]

While the Court of Appeal did begin to interrogate the use of race by the police officer, it nevertheless seemed satisfied to leave the issue once it determined that he was not acting as an overt racist.[37] This, however, ignores the larger problem of systemic racism and the unconscious differential treatment of racialized individuals. By failing to

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[36] Ironically, a case where "out of place" reasoning was condemned occurred where the tables were turned. In other words, where the suspect was White. In *People v. Bower* (1979), 24 Cal. 3d 638 (S.C.) a police officer detained and frisked the accused, who was White, because he was together with a group of Black men in a Black neighbourhood. In his testimony, the officer stated (at 642) that he had "never observed a white person in the projects or around the projects on foot in the hours of darkness or ... for innocent purpose." The officer, further, stated that "something was wrong and ... thought [that] either narcotics or weapons were involved, due to the hour ... and a white male being in the projects with these other people." In rejecting being "out of place" as a ground of suspicion, a majority of the California Supreme Court held (at 644-645):

> ... the fact that appellant was a white man could raise no reasonable suspicion of crime. A person's racial status is not an "unusual" circumstance and the presence of an individual of one race in an area inhabited primarily by members of another race is not a sufficient basis to suggest that crime is afoot. Freedom to travel and to associate are fundamental rights in this state, and the suggestion that their exercise can contribute to a lawful seizure of one's person under these circumstances is both illogical and intolerable.

[37] *Greaves, supra* note 28 at para. 42.

interrogate the implications of what was said by the officers, the Court of Appeal has legitimated racist thinking, conscious or otherwise. This will only serve to perpetuate the problem. For example, consider the number of times that *Yamanaka* and *Greaves* have been uncritically cited and obviously read by law students, lawyers and judges.[38] While none of the cases specifically cite *Yamanaka* and *Greaves* for the "out of place" doctrine, one would have thought that a court would be loathe to associate itself with a decision that endorsed this kind of reasoning. What should shock and jump out from the page has not; either because it accords with the reader's own view of the world or because judicial approval has led to internalization of the reasoning. Indeed, a newspaper report on *Greaves* failed to even refer to the racial elements of the case.[39] The fact that no one, other than Greaves, seemed troubled by the officer's thinking reveals just how difficult it will be for counsel, in other cases, to themselves identify and, where they do, to convince a trier of fact, that the officer improperly relied on race.

Finally, one cannot leave a discussion of *Greaves* without emphasizing the offensive nature, generally speaking, of "out of place" reasoning. As a matter of policy,

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[38] *Yamanaka* has been cited with approval in 11 decisions (including *Greaves*) and *Greaves* has been cited in three decisions (see note 34). With respect to *Yamanaka*, see *R. v. Cooke* (2002), 2 C.R. (6th) 35 (B.C.C.A.); *R. v. Richardson* (2001), 43 C.R. (5th) 371 (B.C.C.A.); *R. v. Ellrodt* (1998), 130 C.C.C. (3d) 97 (B.C.C.A.); *R. v. Sandover-Sly*, [1999] B.C.J. No. 142 (S.C.), (QL); *R. v. Rai*, [1998] B.C.J. No. 2187 (S.C.), (QL); *R. v. V.(T.A.)* (2001), 48 C.R. (5th) 366 (Alta. C.A.); *R. v. Kanak*, [2003] A.J. No. 871 (P.C.),(QL); *R. v. Sloan*, [2001] A.J. No. 1713 (P.C.), (QL); *R. v. Stewart*, [2000] M.J. No. 116 (P.C.), (QL); and, *R. v. Calderon*, [2002] O.J. No. 2583 (S.C.J.), (QL).

[39] See K. Fraser, "Rights Violation Not Serious Enough To Overturn Convictions, Appeal Court Rules" *The Province* (24 September 2004) A19.

to suggest that shared use of public spaces in Canada by members of racialized communities or that a racially diverse group is inherently suspicious is shocking and violates all of the fundamental principles underlying the *Charter* and our system of justice. Like all forms of racism, this particular manifestation harms the dignity of members of racialized communities. It promotes exclusionary thinking, limits the ability of individuals to move freely within our cities, and, as Erika Johnson has pointed out, leads to "fear, paranoia, or hatred ... result[ing] from the feeling of being under constant surveillance in the majority of areas in this country."[40] It can also lead to violence.[41]

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[40] "'A Menace To Society:' The Use Of Criminal Profiles And Its Effects On Black Males" (1995) 38 *Howard L.J.* 629 at 655-657.

[41] In 1986, three Black men entered Howard Beach, a predominantly White community in Queen's, New York, after their car broke down. While seeking help, the men were confronted and severely beaten by a group of Whites armed with baseball bats and shouting racial slurs. The attack left one of the men dead. See "Three Teenagers Face Murder Charges In 'Hellish' Beating and Death of New York Man" *The Ottawa Citizen* (23 December 1986) A10. Three of the assailants were eventually convicted of manslaughter. See H. Kurtz, "Howard Park Verdict Leaves Racial Wounds Unhealed" *The Gazette* (24 December 1987) B5.

In her discussion of the case in *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991), Patricia Williams notes that (at 58-79):

> ... [There] was a veritable Greek chorus ... repeating and repeating that the mere presence of three black men in that part of town at that time of night was reason enough to drive them out: "They had to be starting trouble"; "We're a strictly white neighbourhood"; "What were they doing here in the first pace?" The pinnacle of legitimacy to which these particular questions rose is, to me, the most frightening aspect of the case. ...
>
> Although the immensely segregationist instincts between such statements [is clear], it is worth making explicit some of the presuppositions behind them:
>
> > Everyone who lives here is white.
> > No black could live here.
> > No one here has a black friend.
> > No white would employ a black here.
> > No black is permitted to shop here.
> > No black is ever up to any good.

Tragically, both *Yamanaka* and *Greaves* suggest that we have not escaped the legacy of Jim Crow segregation in this country.[42]

*(b) J.J. Harper*

In the early morning of March 9, 1988, John Joseph Harper, an innocent man, was shot and killed by Constable Robert Cross in Winnipeg, Manitoba.[43] Harper was a member of the Wasagamack Indian Band. He was executive director of the Island Lake

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[42] Although the origin of the name "Jim Crow" is not free from doubt, many believe that it became part of the American lexicon in 1832 when Thomas Rice, a white ministrel show performer, performed a song in New York called "Jump Jim Crow." Rice would blacken his face and sing and dance in a mocking fashion. For more than a century, Jim Crow came to symbolize discriminatory laws and practices in the United States, most notably legalized segregation. See H. Smythe, "The Concept of 'Jim Crow'" (1948-1949) 27 *Soc. F.* 45 at 45; R. Davis, "Creating Jim Crow: In-Depth Essay" online: <http://w ww.jimcrowhistory.org/history/creating2.htm> (date accessed: 20 November 2004). See also C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University, 1955).

Jim Crow did not, however, stop at the border. Legal historians like James Walker (see *Race, Rights and the Law*, *supra* note 19) and Constance Backhouse (see *Colour-Coded*, *supra* note 19) have documented Canada's long history of de-facto racial segregation in housing, employment, social services, recreation and education. For example, as Walker writes:

> Most Canadian cities had a district where the majority of black residents lived, with boundaries enforced by racially restrictive covenants or more usually by consent among the white homeowners and real estate agents.

See *Race, Rights and the Law*, *supra* note 19 at 130.

Jim Crow continued well into this century in Canada. In 1940, for example, the Supreme Court of Canada upheld the right of the York Tavern, a bar in the Montreal Forum, to refuse to serve Fred Christie because he was Black. See *Christie v. York Corporation*, [1940] S.C.R. 139; *Rogers v. Clarence Hotel*, [1940] 3 D.L.R. 583 (B.C.C.A.); *Franklin v. Evans* (1924), O.J. No. 33 (S.C. (H.C. Div.) and *Loew's Montreal Theatres Ltd. v. Reynolds* (1919), Q.R. 30 K.B. 459. As late as the 1960s, there were challenges to the exclusion of Blacks from golf clubs and beaches in Windsor, Ontario. See "Submission To The Honourable Dave Cooke, Minister of Education for Ontario" (August, 1994) on-line: Canadian Civil Liberties Association, <http://www.ccla.org/pos/briefs/educate.html> (date accessed: 20 November 2004) at 10.

[43] Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 2 (Winnipeg: Queens Printer, 1991) at 5 (hereinafter *Aboriginal Justice Inquiry of Manitoba*).

Tribal Council and a leader in Manitoba's Aboriginal community. Harper and his wife had three children.[44] The deadly encounter began when Cross decided to stop and question Harper even after learning that the suspect he and his partner were pursuing in relation to a stolen vehicle had been arrested. Apparently, Cross wanted to make sure that the right suspect had been arrested. The problem was that other than being Aboriginal, Harper did not resemble the description of the suspect. As the Aboriginal Justice Inquiry of Manitoba found:

> It was obvious that Harper didn't fit major elements of the description of the suspect. Cross and Hodgins described the man whom they had seen fleeing from the stolen car as a "native male, 22 years of age, wearing dark clothing." Harper was a native male wearing dark clothing, but he was 37 years of age, considerably heavier than [the suspect] and of much stockier build. [The suspect] had outrun the police, while Harper was walking and apparently not breathing heavily.[45]

Cross would later testify that he became even more suspicious when Harper refused to identify himself and walked away.[46] As he walked away, Cross grabbed Harper's arm. Harper responded by shoving Cross who then pulled Harper on top of him. Within seconds, Harper was dead.

Although the Inquiry was unable to conclude what happened once the men were on the ground, the commissioners were satisfied that, contrary to Cross's claim, "Harper

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[44] *Ibid.*

[45] *Ibid.* at 30.

[46] *Ibid.*

never had any significant control over [his] revolver."[47] They were also satisfied that race was the reason that Harper was stopped and ultimately killed:

> We believe that [Cross] decided to stop and question Harper simply because Harper was a male Aboriginal person in his path. We are unable to find any other reasonable explanation for his being stopped. We do not accept Cross' explanation. It was clearly a retroactive attempt to justify stopping Harper. We believe that Cross had no basis to connect him to any crime in the area and that his refusal or unwillingness to permit Harper to pass freely was ... racially motivated.
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> ... Racial stereotyping motivated the conduct of Cross. He stopped a "native" person walking peaceably along a sidewalk merely because the suspect he was seeking was native. This then leads to the conclusion that race was a major contributing factor in the death of J.J. Harper. Race was one of the facts included in the description broadcast of the car-theft suspect for whom the police were looking. If Harper had not been a native person, Cross would have ignored him.[48]

Constable Cross was never charged criminally and did not even lose his job.[49]

*(c) Marcellus Francois*

On July 3, 1991, the Montreal police were trying to locate two suspects in an attempted murder investigation. One of the suspects, Kirt Haywood, was described as Black, six feet tall, 160 pounds and with Rastafarian-style braids down to his knees.[50] Tragically, Marcellus Francois, who was 24 years old, was mistaken for Haywood as he left an apartment building that the police had under surveillance because they believed

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[47] *Ibid*. at 39.

[48] *Ibid.* at 32, 94.

[49] G. Cheater, "Constable Who Shot Harper Keeps Job" *The Gazette* (4 November 1992) B1.

[50] "Case Based On Fatal Shooting In July 1991" *The Gazette* (21 February 1997) A8.

that this was a location the suspects frequented. The officers were using a photocopy of a faxed colour mug shot to help identify the suspects.[51] Francois, however, looked nothing like Haywood. He was short-haired, 5'7 feet tall, and 130 pounds. Francois got into a red Pontiac Bonneville with three other Black individuals.[52] The surveillance officers radioed for the SWAT team and began to tail the vehicle with Francois in it. The officers referred to the occupants over the police radio as "niggers" and "darkies."[53] They also stated "[t]here's a possibility he's one of the guys we're looking for" and "they appear to be nervous, they're looking everywhere."[54]

Upon their arrival, the SWAT team was able to box in the vehicle. Shortly thereafter, Sgt. Michel Tremblay fired through the car's windshield. The bullet struck Francois in the head. He died a few days later. Tremblay, who was actually familiar with Haywood having arrested him on an earlier occasion, stated that he did not look at Francois' face.[55] According to Tremblay, Francois did not respond to his shouts of "police", "don't move" and "freeze" and moved his hands in such a way that he thought

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[51] E. Siblin, "Police Racism Endangers Lives, Coroner Says" *The Ottawa Citizen* (8 May 1992) A3 (hereinafter *Police Racism Endangers Lives*).

[52] B. Kasowski, "The Shooting Of Marcelus Francois: Chronology Tells Tale Of A Case of Mistaken Identity" *The Gazette* (13 July 1991) B5.

[53] G. Baker and T.T. Ha, "Police Racist Toward Blacks" *The Gazette* (7 May 1992) A1.

[54] "Police Lost Suspect's Car Before Francois Was Shot: Tape" *The Gazette* (21 May 1993).

[55] A. Noel, "I Never Saw His Face, Cop Who Shot Francois Says" *The Gazette* (21 September 1993) A3. See also, "Cop Tells Inquest Why He Shot Wrong Man Dead" *Calgary Herald* (24 October 1991) (A13).

that Francois was reaching for a gun.[56] No gun was found in the car.[57] In addition, there was reason to doubt Tremblay's account as their was conflicting evidence from another officer present as to whether anything had been said before the shot was fired.[58] Following the shooting, another officer ordered the arrest and detention of the other occupants in the car, two of whom were women, even though he now knew that they were not involved in the attempted murder investigation.[59] Tremblay was not criminally charged and like Harper's killer did not lose his job.[60] The officer who ordered the arrest of the vehicle's occupants was suspended without pay for 10 days.[61]

Harper and Francois are not the only unarmed racialized individuals in Canada who have been shot by the police. For example, in her book *When Police Kill*,[62] Gabriella Pedicelli discovered that between 1987 and 1993, two other unarmed men were shot by

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[56] "Good Reason To Stop Car With Francois In It: Cop; Detective Sure Suspect Was In Vehicle" *The Gazette* (22 October 1993) A.3. "Cop Contradicts Officer" *Edmonton Journal* (26 October 1991) E11 (hereinafter *Cop Contradicts Officer*).

[57] *Police Racism Endangers Lives, supra* note 51.

[58] See *Cop Contradicts Officer*, *supra* note 56.

[59] A. Noel, "2 Cops Suspended For Abusing Authority In Francois Case" *The Gazette* (15 September 1994) A3 (hereinafter *Cops Suspended For Abusing Authority*).

[60] I. Block and L. Fitterman, "18 Police Officers Found Blameless In Francois Shooting" *The Gazette* (15 June 1994) A1. The MUC did eventually agree to settle a civil suit for $218,000. See See I. Block, "MUC To Pay Francois Family $218,000" *The Gazette* (21 February 1997) (hereinafter *MUC To Pay*).

[61] *Cops Suspended For Abusing Authority, supra* note 59.

[62] (Montreal: Vehicule Press, 1998) at 64-75 (hereinafter *When Police Kill*).

the police in Montreal (Anthony Griffin)[63] and Toronto (Wade Lawson).[64] They were both Black.[65] As Pedicelli put it "[these cases] suggest that the black population is perceived by the police as being a greater threat than the white population."[66]

*(d) The "Hurricane"*

As was chronicled in the Hollywood movie "The Hurricane", Rubin Carter came to Canada after having spent close to 20 years in a New Jersey prison for a crime that he did not commit. On April 11, 1996, Carter was enjoying dinner with his friends at a restaurant in Toronto. After dinner, he went to get his car in the parking lot. Suddenly, four unmarked cruisers surrounded him. The police were looking for a suspect described as Black, "thirty-ish", without glasses and wearing a brown and white jacket. Carter was handcuffed, arrested and put in the back of the police cruiser. As one of the officers put it, "[i]t was a drug buy in a dark area and he resembled the suspect." The

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[63] Griffin, who was 19 years old, was shot by Constable Allan Gosset. See *When Police Kill*, *supra* note 62 at Chapter 5.

[64] Lawson, who was 17 years old, was shot in the back of the head by one of the six bullets fired at the car he was driving. The officers involved were Constables Anthony Melaragni and Darren Longpre. See F. Cook, "Officers Shot Fleeing Lawson Deliberately, Prosecutor Says" *The Toronto Star* (3 April 1992) A30.

[65] Gosset, Melaragni and Longpre were all eventually acquitted of all criminal charges. See *R. v. Gosset*, [1993] 3 S.C.R. 76 and "Crown Won't Appeal Gosset's Acquittal" *The Gazette* (30 April 1994) A3. See also, P. Todd, "Province Decides Against Appealing Officers' Acquittals" *The Toronto Star* (9 May 1992) A.4. Griffin's mother, Gloria Augustus, civilly sued the MUC and eventually settled for $25,000, the amount suggested by Justice L'Heureux-Dube writing for the Court in *Augustus v. Gosset*, [1996] 3 S.C.R. 268. See *MUC To Pay*, *supra* note 60.

[66] *When Police Kill*, *supra* note 62 at 76.

problem was that, other than the colour of his skin and his jacket, Carter did not look anything like the suspect. Carter was in his sixties and he was wearing glasses. He was understandably shaken by the incident and as he put it, "[i]t was like a nightmare ... the last time I was told I was under arrest I didn't see the light of day for 20 years."[67]

*(e) Peter Owusu-Ansah*

In *R. v. Moosvi*,[68] two police officers were charged with assault. The complainant was Peter Owusu-Ansah. The officers had reportedly received word of a robbery involving upwards of twenty Black men in an affluent neighbourhood in mid-town Toronto. No other physical characteristics were identified. Approximately fifteen to twenty minutes later, Owusu-Ansah, and seven or eight of his friends were waiting at a bus stop many blocks away from the scene of the robbery. They had been playing basketball and had just finished a late snack at McDonalds. Even though they had nothing to do with the incident, they were Black and this attracted the attention of the police who likely saw them as "out of place." Owusu-Ansah and his friends were also hearing impaired and this created significant confusion as the police attempted to

[67] T. Tyler, "Hurricane Carter Arrested By Mistake" *The Toronto Star* (12 April 1996) A22; T. Tyler, "Ex-Boxer 'Hurricane' Carter Angered By 2nd False Arrest" *The Toronto Star* (13 April 1996) SA2; and, T. Tyler, "Ex-Boxer Fights Police 'Disrespect' 'Gangsterism Prompted False Arrest' He Says" *The Toronto Star* (16 April 1996) A6.

[68] Unreported (October 13, 2004) [hereinafter *Moosvi*]. A transcript of the judgment is on file with the author. See also G. Abbate, "Two Constables Found Not Guilty Of Assaulting Deaf Man In 2002" *The Globe and Mail* (14 October 2004) A2 and P. Small, "Officers Acquitted Of Beating Deaf Man" *The Toronto Star* (14 October 2004).

question the group.

Owusu-Ansah was eventually arrested for failing to co-operate and driven to a deserted school yard where, on his evidence, he was assaulted. The officers were acquitted even though the trial judge rejected most, if not all, of Moosvi's evidence including the reason he took Owusu-Ansah to a deserted location in the middle of the night. The difficulty was that the trial judge also rejected much of the complainant's evidence. The manner in which he did so reflects a real problem of cultural competence in judging. For example, the trial judge treated the complainant's understandable anger at having been stopped 17 times in two years by the police as evidence of animus. He also treated the complainant's lawsuit against the police as evidence of a motive to lie. As the trial judge put it in his reasons:

> Like Cst. Moosvi, I do not accept much of Peter's [the complainant] evidence. I find Peter portrayed himself as attempting to assist his friends and the police. He was anything but co-operative. He was aggressive, confrontational and argumentative. He has a pre-existing animus for the police that dictated his dealings with Csts. Posen and Reynolds and for that matter, Moosvi. He has a financial interest in the outcome of this trial, which makes the Court approach his testimony with caution.[69]

*(f) Devon Murray*[70]

On July 24, 2002, William Walker, a police officer, reviewed a Crime Analyst

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[69] *Moosvi, supra* note 68 at 45.

[70] (October 18, 2004) Unreported [hereinafter *Walker*]. A transcript of the judgment is on file with the author.

Report before leaving the police station. In the Report was a photograph of Joseph Coker, an African American male, who was wanted on a warrant for failing to appear in court. The last known address of Coker was apparently within the area that Walker was responsible for patrolling.[71] As the trial judge observed "[t]his area was designated a crime management initiative with a high gang presence, drug dealing and prostitution."[72] On his patrol, Walker saw, the complainant, Devon Murray, wearing a "dark coloured bandana tied in a knot on his head and wearing loose baggy clothing."[73] This was clothing that Walker typically associated with gang members. According to Walker, Murray failed to make eye contact and "quickly looked away."[74] Based on a quick glance, Walker also thought that Murray looked like Coker. Based on these circumstances, Walker decided to approach and question Murray in his cruiser.[75]

After talking to Murray, Walker realized that he was not Coker. Nevertheless, he got out of his cruiser and ordered Murray to identify himself. Murray was understandably upset at having been detained without cause and was letting Walker know it. When some neighbours came out of their house, Walker arrested Murray for

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[71] This area was described as encompassing the Keele and Eglinton corridor, extending to Tretheway Drive and towards Caledonia, as far north as Lawrence Avenue. *Ibid* at 5.

[72] *Ibid*.

[73] *Ibid*.

[74] *Ibid*.

[75] *Ibid* at 12.

causing a disturbance. During the arrest, Walker assaulted Murray. In addition, his pepper spray "accidentally" discharged and spilled on Murray's jacket.[76] The arrest left Murray with a fractured cheekbone. Justice Bonkalo convicted Walker of assault causing bodily harm. However, she did not conclude that Walker had misused race in his initial reason for approaching Murray:

> Constable Walker's attention was drawn to Mr. Murray, because Mr. Murray from a distance resembled the African-American Mr. Coker, who was wanted on a bench warrant. It was reasonable under the circumstances for Constable Walker to approach him. I am not satisfied that there was racial profiling in this case.[77]

With respect, this reasoning strains all credulity. On any reasonable reading of the record, Murray was stopped because he was a Black man walking in a so-called high crime area. The Coker issue was likely an after the fact feeble attempt by Walker to justify what he had done. The fact that he continued to investigate Murray is the best evidence of what his true intentions were.

*(g) Investigative Dragnets*

Indiscriminate use of race-based suspect descriptions has led to a number of high profile and egregious cases in the United States involving police dragnets.[78] In the most

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[76] *Ibid* at 7.

[77] *Ibid* at 10.

[78] For example, in Miami and Charlottesville, the police were recently looking for a serial rapist described, in part, as Hispanic and Black, respectively. As part of their investigation, the police conducted a DNA dragnet detaining 120 mostly Hispanic men in Miami and 197 Black men in Charlottesville. In each case, the police requested a saliva sample. See See M. Glod, "'DNA Dragnet' Makes Charlottesville Uneasy: Racial Profiling Suspected in Hunt for Rapist" *The Washington Post* (14 April 2003); M. Glod, "Police In Charlottesville Suspend 'DNA Dragnet'" *The Washington Post* (15 April 2003); and, "DNA

infamous case, *Brown v. City of Oneonta*[79], the police received a complaint from an elderly woman that a young Black man had broken into her apartment and that he had cut his hand with the knife during the struggle. Following the complaint, the police ordered the local university to provide a list of all its Black male students (approximately 150) all of whom were interrogated. When the interviews failed to produce a suspect, the police conducted a "sweep" of Oneonta during which more than two hundred African Americans, including at least one woman, were stopped, questioned and ordered to show their hands.[80] No arrest was ever made.

The judgment is significant because, in upholding the constitutionality of the racially based dragnet under the Equal Protection Clause, the Second Circuit drew a distinction between policing based on racial profiles and suspect descriptions:

> Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black. Nor do they allege that the defendant law enforcement agencies have a regular policy based upon racial stereotypes that all black Oneonta residents must be questioned whenever a violent crime is reported. In short, plaintifs' factual premise is not supported by the pleadings: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendant's policy was race-neutral on its face; their policy was to investigate

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Dragnet Raises Concerns" *St. Petersburg Times* (17 June 2003). See also the general discussion of racialized dragnets in J.S. Grand, "Note, The Blooding of America: Privacy and the DNA Dragnet" (2002), 23 *Cardozo L. Rev.* 2277 at 2278-2283; and, T. Maclin, "'Black and Blue Encounters' — Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?" (1991), 26 *Val. U. L. Rev.* 243 at 251-252.

[79] (1999), 221 F.3d 329 (2nd Cir.) [hereinafter *Oneonta*].

[80] These additional facts come from *Brown v. City of Oneonta* (2000), 235 F.3d 769 at 779-780 (2nd Cir.) [hereinafter *Oneonta#2*]. This was a request for an *in banc* or rehearing of the initial appeal.

> crimes by interviewing the victim, getting a description of the assailant and seeking out persons who matched that description. This description contained not only race, but also gender and age, as well as the possibility of a cut on the hand. In acting on the description provided by the victim of the assault — a description that included race as one of several elements – defendants did not engage in a suspect racial classification that would draw strict scrutiny. The description, which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found.[81]

What is so disappointing about the decision is its failure to factor in the effects of the dragnet not only on the dignity and psychological well-being on all those stopped and questioned (including one African-American woman) but also how it served to further perpetuate stereotypes about race and violent crime. And finally, the decision failed to give sufficient weight to the fact that if the suspect had been described as White, the Oneonta police would not have stopped all of the White citizens.

*(h) Racial Hoaxes*

In a number of very troubling and high profile cases in the United States, a "fictional Black criminal" has been created in an effort to deflect suspicion away from the actual perpetrator. A number of these cases have involved White men who had killed their wives. In another case, Susan Smith, the mother who drowned her two children, told the police that she was the victim of a car-jacking. She described the perpetrator as a young Black male. These racial hoaxes, ultimately, led the police to detain countless

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[81] *Oneonta*, *supra* note 79 at 337-338. A majority of the Court later rejected the request for the *in banc* hearing. See *Oneonta#2*, *supra* note 80. See the discussion of *Oneonta* in D.W. Roberts, "Crime, Race, and Reproduction" (1993), 67 *Tulane L. Rev.* 1945 at 1947-1948 and in *Race-Based Suspect Selection*, *supra* note 13 at 1078-1079; 1090-1095.

innocent African Americans.[82]

Canada has not been immune from racial hoaxes. In Montreal, a 64-year-old man recently claimed that four Black teenagers attacked and robbed him in a subway train. The police immediately broadcast that they were looking for four Black youths. The descriptions were picked up by a number of media outlets. In a public statement, a police spokesperson stated "[t]he description of suspects always comes from witnesses and victims. We have to trust what they say. ... Even the vaguest descriptions can help solve a crime." After an investigation which included viewing a videotape of the subway, the police expressed doubt about whether the incident had occurred.[83]

## III. VARIATIONS ON THE SUSPECT DESCRIPTION THEME

### *(a) Tracking Gangs*

#### (i) The Winnipeg Police Gang Unit and "Spot Checks"

Having identified Aboriginal membership in certain street gangs like the "Indian Posse", "Ruthless Posse" and "Manitoba Warriors", a number of police officers in Manitoba appear to be routinely conducting "spot checks" based on nothing more than race and sometimes clothing or the presence of a known "gang" member in the group. In *R. v. B.(K.)*, for example, the court heard the following testimony:

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[82] See the discussion of all of these cases in K.K. Russell, "The Racial Hoax As Crime: The Law A Affirmation" (1995-1996), 71 *Ind. L.J.* 593.

[83] R. Rocha, "Police Descriptions Called 'Criminal'" *The Gazette* (28 January 2005) A7.

> One of the officers, Constable Grant Goulet, was at the time the District 3 liaison with the Winnipeg Police Service Gang Unit. *He testified that he spot-checked 5 to 20 suspected gang members a day*, and that the wearing of gang colours was a "show of force", and often meant that members had just committed, or were about to commit, a crime.[84]

K.B., who is Aboriginal, was with a group that included a known gang member. The accused and the others were also wearing red clothing (i.e. supposed gang colours). He was detained and a search revealed a folding-knife and K.B. challenged the constitutionality of the stop and search.

The trial judge concluded that the detention and search were unconstitutional because there was insufficient cause to suspect that the group was involved in criminal activity. Justice Elliot held:

> Although it was not stated as policy, given that one officer [Goulet] testified that he regularly spot-checked up to 20 gang members a day, it appears that such checks were a regular practice of at least some members of the Winnipeg Police Service. There was no evidence that such checks were confined to nighttime hours or to times when gang colours were being worn.
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> ... [T]he decision of Justice Krindle in *Pangman* ... appears to have condoned spot-checks of gang members.
>
> ... But what is the "objective standard" here? That anyone wearing gang colours can be stopped, questioned and have their names put through a computer search at any hour of the day or night, with no other grounds for suspicion?[85]

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[84] [2003] M.J. No. 248 (P.C.) at para. 1 (QL) [hereinafter *B.(K.)*]. See also *R. v. Flett*, [2002] M.J. No. 439 (P.C.), (QL) (hereinafter *Flett*).

[85] *B.(K.)*, *supra* note 84 at paras. 43-44.

While the trial judge appeared concerned about the unjustified harassment of actual gang members, she failed, by ignoring the likely influence of race, to identify a bigger concern - the number of innocent Aboriginals who have been falsely harassed because they fit the Winnipeg police profile of the typical gang member. Notice how the trial judge was able to use language to erase race from the narrative. In her reasons, she removed the word "suspected" in her summary of the testimony of Constable Goulet. And so instead of "he regularly spot-checked up to 5 to 20 *suspected* gang members a day", the trial judge stated in her reasons that "he regularly spot-checked up to 20 gang members a day."

Since the clear inference from Goulet's testimony is that being Aboriginal and, in some cases, wearing certain coloured clothing is the reason that unknown individuals become constructed as "suspected" gang members, suspected is synonymous with being Aboriginal. Removing "suspected" thus removed race from the analysis. By not addressing race, the trial judge was able to conclude that the administration of justice would not be brought into disrepute by admitting the evidence found during the unconstitutional stop and search. More significantly, though, the trial judge's erasure of race denied K.B. the opportunity to have his dignity restored.

The trial judge's decision was upheld by the Manitoba Court of Appeal. Justice Freedman, for the Court, held:

> ... [T]here is nothing in any of the evidence to suggest that the police officers were motivated by improper considerations, such as race or ethnicity.
>
> Whatever one might think of the practice of stopping up to 20 gang members a day for spot-checking, in this particular case, the evidence discloses that the wearing of colours - the flashing of red - with what that meant to Const. Goulet, was one of the reasons for the police intervention.
>
> But where is the evidence which could reasonably lead Const. Goulet and his partner to believe that K.B. was "criminally implicated"? ... What was there to lead a police officer to have reasonable cause to suspect K.B. of criminal activity? Judging from the evidence of the officers, it could only be that K.B. was "walking with a ... member of the Ruthless Posse at that time of the morning ... [and with] the other three fellows [including K.B.] were dressed mostly in red attire ..." This evidence, which amounts to little more than *guilt by association*, falls very far short of reasonable cause to suspect that K.B. was involved in criminal activity.[86]

In light of the Court's conclusion that K.B. was stopped because of "guilt by association" reasoning, it is hard to understand why it did not also conclude that he was investigated because he was Aboriginal. When Justice Freedman states that the detention was not motivated by race, is he speaking only of overt and conscious racism? What about unconscious racism? Moreover, the fact that Goulet testified that he regularly stopped so many Aboriginal young men as "suspected" gang members is compelling direct evidence that he targeted based on race.

*(b) Tracking Neighbourhoods*

(i) Community Policing and the "208s"

In *R. v. Ferdinand*[87], two Community Response Unit police officers were

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[86] *R. v. B.(K.)* (2004), 186 C.C.C. (3d) 491 at 507-508 (Man. C.A.) (emphasis added).

[87] (2004), 21 C.R. (6th) 65 (S.C.J.) (hereinafter *Ferdinand*).

responsible for patrolling a "designated" area known as Humbermede in the west-end of Toronto. It is a neighbourhood with a significant racialized population.[88] The officers testified that "[t]hey are, generally speaking, foot patrol police officers that traverse a designated neighbourhood ... [a place where] the residents want a police presence -- and the police want to decrease crime -- within that given neighbourhood."[89] The officers testified that as part of their proactive policing function, they fill out what are called "208" cards. The information on these cards include contact location and time, name, aliases, date of birth, colour, and address. Once collected, the data is inputted on the police computer. What is so startling is that the officers testified that they *"complete anywhere between 15 and 45 each shift."*[90] In commenting on the use of this tracking mechanism, Justice LaForme, as he then was, stated:

> ... These cards are currently being used by the police to track the movements – in some cases on a daily basis – of persons who must include innocent law-abiding residents.
>
> One reasonable — although very unfortunate — impression that one could draw from the information sought on these 208 cards — along with the manner in which they are being used — is that they could be a tool utilized for racial profiling. ...
>
> This kind of daily tracking of the whereabouts of persons – including many innocent law-abiding persons – has an aspect to it that reminds me of former

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[88] Ferdinand was detained in the vicinity of Lindy Lu Park and 3400 Weston Road. *Ibid.* at 69. The name of the neighbourhood and its ethnic and racial make-up were obtained from online: City of Toronto <http://www.city.toronto.on.ca/demographics/pdf2/cpa22.pdf> (date accessed: 15 February 2005). In an earlier annotation to the case, I mistakenly stated that the stop occurred in a predominantly Black neighbourhood in the Jane-Finch corridor. Humbermede is near the Jane-Finch corridor but not part of it. See "Annotation to *R. v. Ferdinand*" (2004), 21 C.R. (6th) 65 at 66.

[89] *Ferdinand*, *supra* note 87 at 69-70.

[90] *Ibid.* at 70 (emphasis added).

> government regimes that I am certain all of us would prefer not to replicate.[91]

In the case itself, the police testified that they approached a group "just hanging out" with the intention of asking them to answer "208" card questions. When the police approached, Ferdinand, who is Black, began to walk away.[92] This triggered what the officer called his "Spidey sense"[93] and he detained, questioned and searched him. The officer found a gun. While Justice LaForme correctly concluded that there were no reasonable grounds to detain Ferdinand and that the evidence had to be excluded under section 24(2), he did not go further and find that Ferdinand was investigated because he was Black. This is yet another indication of how reluctant courts are to make this finding even in the face of the kind of evidence that Justice LaForme had before him.[94]

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[91] *Ibid.* at 71-72.

[92] Since there is no explicit mention in the judgment that Ferdinand is Black, I confirmed this with his trial counsel Patrick Clement (18 February 2005). It can also be inferred from the following part of the judgment:

> Given his experience with the police in being regularly searched and responding to 208 cards, *and his witnessing other young black youth* in the neighbourhood experience the same, Mr. Ferdinand might simply not have wanted to participate in this yet again.

*Ibid.* at 77 (emphasis added).

[93] *Ibid.* at 78.

[94] *Ibid.* at 69-73, 77-79.

(ii) Designated "Target Areas"

In *R. v. Sterling*,[95] drug enforcement officers from the Toronto Drug Squad East were patrolling a designated drug trafficking "target area" in the east end of Toronto.[96] Part of the patrol involved using "opportunity buys" to entrap drug traffickers. The "target area" designation is significant because it relieves the police of the need for individualized suspicion. In other words, it gives them a licence to stop anyone in the zone. On October 1, 2001, Constable Scherk saw the accused in the "target area." He was Black and wearing a football shirt with the number twenty on it. Justice LaForme, as he then was, summarized the officer's reasons for targeting the accused:

> The possible suspect was a "young black male with baggy clothes." And that, this was consistent with some complaints about drug activity he had heard previously from area residents.
>
> The young black male was "meandering around, looking around, and looked approachable." By "approachable", he means "a possible suspect."[97]

When approached, the accused was not in possession of any drugs. However, he told the officer to meet him later at which time he sold him some drugs and was arrested. In dismissing the entrapment motion, Justice LaForme held that the police could lawfully conduct opportunity buys in these targeted areas without any need for

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[95] (2004), 23 C.R. (6th) 54 (Ont. S.C.J.) (hereinafter *Sterling*).

[96] *Ibid.* at 56. The evidence disclosed that a designated "target area" is one where the police have reasonable suspicion that drug trafficking is a problem. In this case, the basis of the suspicion originated from (i) information received from confidential informants; (ii) the personal experience of police officers in the area; (iii) complaints of drug activity from area residents; and (iv) Crime-Stopper tips. *Ibid.* at 59-60.

[97] *Ibid.* at 56-57.

individualized suspicion because the area was defined with sufficient precision and the difficulty of policing drug trafficking through traditional means of law enforcement.[98] This conclusion is very troubling. First, the accused was clearly targeted, in part, because he was Black. Second, while Justice LaForme recognized that he needed to be mindful of the "principles of fairness and justice", he failed to factor into his analysis that the "war on drugs" has had a disparate impact on the Black community in this country.[99] Finally, the decision has, in effect, made the police legally "untouchable" in certain residential zones.

## VI. RE-THINKING THE RACE-BASED SUSPECT DESCRIPTION EXEMPTION

### *(a) The Dangers Of Using Race In Suspect Descriptions*

As noted earlier, the general assumption has been that using race when it forms part of a suspect's description is not improper and does not constitute racial profiling.[100] In my view, we have failed to critically assess this assumption. The narratives confirm this. The use of race in suspect descriptions is problematic for a number of reasons. First, it is an open invitation to engage in overt discrimination - the intentional stopping of all members of the identified group on the pretext that the police are looking for a specific

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[98] *Ibid.* at 57-58, 60-63.

[99] See the discussion in D.M. Tanovich, "Race, Sentencing and the 'War on Drugs'" (2004), 22 C.R. (6th) 45 at 53-55. See also the concern expressed by Professor Quigley in relation to Justice LaForme's failure to consider race and profiling in "Annotation to *R. v. Sterling*" (2004), 23 C.R. (6th) 54 at 55.

[100] But see the concerns expressed by B.A. Walker, "The Color Of Crime: The Case Against Race-Based Suspect Descriptions" (2003) 664 *Columbia Law Review* 662 (hereinafter *The Color Of Crime*) and by R.R. Banks in *Race-Based Suspect Description*, *supra* note 13.

suspect. This is what appears to have led to J.J. Harper's death.

Second, race is an inherently unreliable physical identifier. When a suspect is described as "non-White" or a "person of colour", who is included? Moreover, how competent is a victim or police officer, particularly where they are White, in identifying the race of a suspect from a racialized group? Bela Walker persuasively makes this point:

> ... it can be extremely difficult to distinguish someone's racial identity based on appearance alone, particularly as a member of another racial group. ... [T]he ability to differentiate based on race does not provide validation for the categories themselves. The concept of "looking white" or "looking Black", and its correlate, the use of "white" and "Black" as fundamental categories to establish identity, are fundamentally problematic given the degree to which to which the white and Black populations vary physically ...
>
> Additionally, the likelihood of a white police officer – and the majority of police officers are still white — confusing a person of color with another person of color is also greater than the risk of the same officer confusing a white person with another white person, as "[p]eople are better at recognizing faces of their own race than faces of other races."[101]

A similar observation was made by the Manitoba Aboriginal Justice Inquiry:

> ... Asking police to search for a "native" calls upon officers to reach conclusions about how the person they are searching for looks, or talks or behaves. There is no commonality among Aboriginal people in their appearance, manner of speaking or behaviour.
>
> Mentioning a suspect's race does little to assist the officers on the street, in our opinion. If they are to look for people with a certain skin colouring, then we believe that the description of the suspect's complexion should suffice. Aboriginal people come in all shapes and sizes, and have skin colouring that can range from dark to fair. It seems illogical, therefore, to assume that by stating that a person is

[101] See *The Color Of Crime*, *supra* note 100 at 669-670. See also the discussion in D.A. Ramirez, J. Hoopes, and T.L. Quinlan, "Defining Racial Profiling in a Post-September 11 World" (2003), 40 *Am .Crim. L. Rev.* 1195 at 1229-1230. The problem of cross-racial identification has been recognized in *R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 at 394-396 (Ont. C.A.) and *R. v. Richards* (2004), 186 C.C.C. (3d) 333 at 342-343 (Ont. C.A.).

> "native", one can conclude how that person looks. If a police officer is directed to look for a "native" male, the question arises: What type of person is he or she looking for? The facial characteristics of Aboriginal people are not sufficiently distinctive from those of other racial groups to justify the use of the category in police broadcasts. The retention of such a practice will continue to lead to situations, we believe, where Aboriginal people are confronted by police officers solely or primarily because of their race.
>
> To advise police officers that a suspect in an offence is a native is a licence to commit racism. That should not be condoned.[102]

Consequently, neither law enforcement nor equality interests are necessarily advanced by using race to track known suspects. The police will sometimes waste valuable resources in uncovering a large number of false positives and will miss the real perpetrator because the person does not accord with the police officer's conception of a Black or Aboriginal person. And because of the dangers of overbroad application, the equality interests of the racialized community are jeopardized. In this sense, as pointed out by Walker, the use of race in suspect descriptions suffers from being "over-broad" and "overly restrictive."[103]

Third, given our history of overt and systemic racism, there is always the danger that anytime race is permitted to influence the exercise of discretion, the decision maker is invited to rely on unconscious stereotypes. "Out of place" thinking, clothing or vehicle

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[102] *Aboriginal Justice Inquiry of Manitoba*, *supra* note 43 at 94-95. See also the discussion in *Race-Based Suspect Selection*, *supra* note 13 at 1111-1112.

[103] *The Color Of Crime, supra* note 100 at 675.

preferences become justifications for investigating suspects who only vaguely can be said to resemble the known suspect. Indeed, being "out of place" is one of a growing list of neutral behaviours that is frequently deemed suspicious by police. Included on the list are young Black men driving an expensive vehicle;[104] being present in a purported "high crime" area;[105] wearing "baggy" clothing;[106] or, failing to make eye contact or quickly leaving the scene of an approaching officer.[107] Related to this third concern is the danger that the use of race by police tends to reinforce the stereotypical belief that there is a link between race and crime.

And finally, the misuse of race by the police has had devastating consequences for racialized communities. In the United States, for example, a recent Amnesty International report documents that 32 million Americans have reported being victimized by racial profiling and that approximately 87 million are at risk of becoming victims.[108] Although there is no comparable data in Canada, the evidence that we do

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[104] *Khan*, *supra* note 3; and, *Brown*, *supra* note 3.

[105] See *Peck*, *supra* note 3; and, *R. v. Griffiths* (2003), 11 C.R. (6th) 136 (Ont. C.J.).

[106] See *Sterling*, *supra* note 95.

[107] See *Ferdinand*, *supra* note 87. See also *Flett*, *supra* note 84.

[108] See Amnesty International (U.S. Domestic Human Rights Program), *Threat and Humiliation (Racial Profiling, Domestic Security, and Human Rights in the United States*) (2004) at 1-2, online: Amnesty International USA, <http://www.amnestyusa.org/racial_profiling/report/> (date accessed: 22 November 2004).

have suggests that profiling is a grave problem.[109] In addition, the misuse of race has led to widespread harassment, intimidation, false arrests, violence, death, stigmatization, an engendering of a mistrust of the police and criminal justice system, wrongful convictions, and mass detention and incarceration.[110]

These dangers are substantial and are, in part, the reasons that Bela Walker argues against using race as part of a suspect's description. As she puts it "race has limited use as a physical descriptor, while being so deeply imbedded with social signifiers as to have discriminatory effects."[111] The Aboriginal Justice Inquiry of Manitoba similarly recommended that "[t]he Winnipeg Police Department cease the practice of using race as a description in police broadcasts" in its report on the J.J. Harper shooting.[112]

Is the banning of race in suspect descriptions, however, a workable recommendation? A complete ban on the use of race is unlikely to find political, public, police or judicial support.[113] Moreover, there is no denying that skin colour or complexion is a relevant physical identifier that is useful in guiding police

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[109] See *E-Racing Racial Profiling*, *supra* note 6 at 907-909 and *Res Ipsa Loquitur*, *supra* note 6 at 334-339.

[110] See *Paying The Price*, *supra* note 4 at 54-64. See also *Using The Charter*, *supra* note 6 at 161-165.

[111] See *The Color Of Crime*, *supra* note 100 at 664.

[112] *Aboriginal Justice Inquiry of Manitoba*, *supra* note 43 at 95.

[113] The struggle to get recognition of the problem of traditional racial profiling is evidence of this fact.

investigations. This is precisely why even the Manitoba Aboriginal Justice Inquiry recognized that the police should still be able to use skin colouring or complexion as part of the description.[114] This recommendation may not, however, prevent misuse. There is always the danger that even more racialized individuals may get entangled in the web of suspicion if the suspect is described, for example, as having a dark complexion. Moreover, given the relevance of race in our society, it will inevitably be constructed through complexion, name, or eye colour.[115]

Instead of a ban, the answer may lie in identifying a zone of misuse and recognizing that this zone should fall within the racial profiling prohibition. The narratives presented in this article suggest that abuse is likely (or perhaps more

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[114] Walker comes to a similar conclusion in *The Color of Crime*, *supra* note 100 at 682-683. Walker develops a detailed Universal Color Complexion Chart to replace using racial classifications (at 683):

> Such a chart would consist of ten to twenty skin tones covering the spectrum of human coloring, with a swatch for each color, in a manner similar to a paint chart. The skin tones could also be keyed to a number designate (i.e., one to twenty) so as to be useful when presented solely orally. As part of their preliminary training, law enforcement officers would be instructed in use of the chart and familiarized with the skin tones presented. The officer would then carry the color chart around with her as another piece of standard equipment. When the situation called for a physical description, the officer could quickly consult the chart and pick the most accurate designation. If gathering information from bystanders, the officer would allow the eyewitness to pick from the color chart. As all law enforcement members would have access to the chart, officers could call in a physical description accompanied by the appropriate number designate. Unlike racial descriptors, the number designate would not depend on an individual's personal belief of race, could be easily conveyed to countless others without any decrease in accuracy, and would create greater conformity in suspect descriptions as a whole. The officer who received a suspect description over the radio could quickly consult his personal color chart and instantly know what he was looking for, instead of having to worry that his conception of Black or Latino might be different from that of the previous officer.

[115] See *Race-Based Suspect Selection*, *supra* note 13 at 1117-1118.

accurately will occur) where race is used as the dominant feature of the suspect description. When this occurs, it is often difficult to determine whether the victim was stopped because of stereotypical thinking or whether the suspect description was negligently used. The cases of J.J. Harper, Peter Owusu-Ansah, and, Devon Murray reveal this grey area. Moreover, the variations on the theme presented are, in effect, general suspect descriptions rather than specific suspect descriptions. They are not aimed at investigating behaviour but rather status and thus look more like traditional racial profiling than suspect description cases. And so, it would appear logical to refer to this zone of abuse as racial profiling. Indeed, as Banks points out, there are many similarities between the use of racial profiles and racialized suspect descriptions:

> ...these two forms of race-based suspect selection are functionally similar; both are ... especially burdensome to innocent members of certain minority groups. Profiles and suspect descriptions both couple race and suspicion, burdening individuals on account of race in a manner that violates the usual nondiscrimination norm. Second, both types of suspect selection are subject to misuse and error. Third, the placement of actual practices into one category or the other is often riddled with uncertainty. The categories do not neatly and unambiguously map onto discrete sets of actual practices.[116]

And finally, given the disapprobation now linked to the term racial profiling, it is appropriate to use it as a normative concept to capture all misuse and abuse of race in policing. Having identified a risk zone and having placed it within the racial profiling prohibition, the next step is to see what minimum constitutional standards currently exist and which ones need to be created in order to proactively stop the negligent misuse

[116] *Race-Based Suspect Selection*, *supra* note 13 at 1096. See further Banks' discussion at 1096-1108.

of suspect descriptions and to assist courts in determining, after the fact, when a particular stop was the product of this particular manifestation of racial profiling.

*(b) The Current Constitutional Standards Governing The Use Of Race By The Police*

In Ontario, the Court of Appeal has repeatedly held that subjective reliance on race violates section 9 of the *Charter's* protection against arbitrary detention. In *Brown v. Durham Regional Police Force*,[117] a case which challenged the ability of the police to use traffic enforcement as an opportunity to detain suspected motorcycle gang members, Justice Doherty held:

> While I can find no sound reason for invalidating an otherwise proper stop because the police used the opportunity afforded to further some legitimate interest, I do see strong policy reasons for invalidating a stop where the police have an additional improper purpose. ... For example, it would be unacceptable to allow a police officer who has valid highway safety concerns to give effect to those concerns by stopping only vehicles driven by persons of colour. Section 216(1) of the HTA does not, in my view, authorize discriminatory stops even where there is a highway safety purpose behind those stops.
>
> When I refer to improper police purposes, I include purposes which are illegal, purposes which involve the infringement of a person's constitutional rights and purposes which have nothing to do with the execution of a police officer's duty. Officers who stop persons intending to conduct unauthorized searches, or who select persons to be stopped based on their sex or colour, or who stop someone to vent their personal animosity toward that person, all act for an improper purpose.
>
> The police purposes, when effecting a stop and detention, must be ascertained from the evidence of the officers involved, the persons detained, and other evidence concerning the conduct of the stops.[118]

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[117] (1998), 131 C.C.C. (3d) 1 (Ont. C.A.) [hereinafter *Durham Regional Police Force*].

[118] *Ibid.* at 17-18.

*Durham Regional Police Force* was applied in *Richards*[119] and *Brown*[120] in the context of an alleged race-based licence demand and traffic stop.

Have the courts, however, treated race and suspect descriptions as an exception to the general rule prohibiting the use of race in policing? The recent Supreme Court of Canada decision in *Mann*[121] suggests that the answer is yes.[122] This is significant because it is now the *Mann* power which will be most commonly used as the basis to stop individuals who purportedly "match" the description of the suspect.[123]

In *Mann*, the police received a call shortly before midnight that a break and enter was in progress in a neighbouring district of downtown Winnipeg. The suspect was

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[119] *Supra* note 3 at 293-294.

[120] *Supra* note 3 at 246.

[121] *Supra* note 27 .

[122] A more explicit articulation that race-based suspect descriptions are not constitutionally infirm comes from *R. v. Smith*, [2004] O.J. No. 4979 (S.C.J.) (QL) where Justice Dawson stated (at para. 36):

> The use of race as a descriptor of an individual or group of individuals, where there are other reasons to differentiate or select on the basis of race, may or may not contravene the principles of fundamental justice. This will depend on whether there are legitimate reasons which arise from the combination of race and other factors which make it legitimate to use race as a descriptor in the course of selecting a person, or groups of persons, for scrutiny. *An obvious example would be where the victim of a crime describes the perpetrator in part by reference to the perpetrator's race.* Another example might be where there is solid evidence to link a group, defined in part by their race, to a legitimate state interest or concern. (Emphasis added)

[123] The other power the police may rely upon is their statutory power to arrest on reasonable and probable grounds. See section 495(1) of the *Criminal Code*. However, as will be seen *infra* the exercise of this power requires a higher standard of belief than the exercise of the *Mann* power which will serve as an additional safeguard against the abuse of suspect descriptions.

described as 21 years old, Aboriginal, male, 5'8, 165 pounds and wearing a black jacket with white sleeves. He was thought to be someone named "Zachary Parisienne."[124] Ten minutes after receiving the call, the police saw Mann, who is Aboriginal, walking within the general vicinity of the reported break and enter. The area was described as a "high crime area." The police decided to detain Mann because in their words, he matched the description of the suspect to a "tee". Following a search, they found a small quantity of marijuana and charged him with a drug offence.

In deciding whether the detention of Mann complied with section 9 of the *Charter*, the Supreme Court had to address, for the first time, whether there is lawful authority for a detention on reasonable suspicion, a standard of belief which is lower than the traditional reasonable and probable grounds required for an arrest. Some hoped that the Supreme Court would reject the existence of such a power or declare it unconstitutional because of the problems of discriminatory policing.[125] Reasonable suspicion is such a low standard that it invites the use of experience and intuition that may be distorted by unconscious racism. Some might say that the deck was stacked, however, because by the time this issue finally reached the Supreme Court, almost every appellate court had, over

[124] *Supra* note 27 at 8-9.

[125] See, for example, T. Quigley, "Brief Investigatory Detentions: A Critique of *R. v. Simpson*" (2004) 41 *Alberta Law Review* 935 at 946-949.

the last decade, recognized such a power.[126] Indeed, *R. v. Simpson*,[127] the decision that first recognized a power of investigative detention in 1993, has been one of the most cited criminal law decisions.[128]

In *Mann*, the Court did indeed recognize a constitutional common law investigative power to both detain and search short of arrest. Justice Iacobucci, for the majority, held:

> The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the crime under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference ...
>
> ... In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained person.[129]

In concluding that the police had reasonable grounds to detain Mann (i.e. reasonable suspicion to believe he was involved in the break and enter), Justice Iacobucci

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[126] See generally, J. Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 *Alberta Law Review* 335.

[127] (1993), 20 C.R. (4th) 1 (Ont. C.A.). See also *R. v. Ferris* (1998), 126 C.C.C. (3d) 298 (B.C.C.A.).

[128] A Quicklaw (QL) search revealed that *Simpson* has been cited in more than 400 cases since 1993 (17 February 2005).

[129] *Supra* note 27 at 15-16, 18.

held that "[h]e closely matched the description of the suspect given by radio dispatch, and was only two or three blocks from the scene of the reported crime."[130] Although it did not specifically address the issue of race, it would appear that the Court was content with the fact that the officer properly used that part of the physical description. The problem, however, was that by not explicitly addressing the issue, the Court failed to seize on an opportunity to place some limits on the use of race-based suspect descriptions. And there appeared to be good reason in *Mann* for the Court to have tackled this issue. As Professor Quigley points out:

> ... it is far from clear whether Mann simply fit the physical description – young male Aboriginal, approximately five feet eight inches tall, weighing 165 pounds – a description that would fit many people or whether a description of clothing was part of the assessment. If the latter were true, there is an apparent discrepancy in that the police where looking for someone wearing a black jacket with white sleeves, whereas Mann was actually wearing a pullover sweater with a kangaroo pouch pocket. Thus, there is a serious concern that being Aboriginal (or any other minority) and fitting a rather general description while in an inner-city area is sufficient to amount to a reasonable suspicion.[131]

Moreover, Mann was not carrying anything which suggested that he was involved in a break and enter; and, the officers continued to investigate him even after he had identified himself as Phil Mann.

While there is good reason to be concerned about the *Mann* power and the Court's failure to address the issue of race, the Court did provide some important

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[130] *Ibid* at 19.

[131] See "*R. v. Mann*: It's A Disappointing Decision" (2004), 21 C.R. (6th) 41 at 44-45.

general limitations on the exercise of the power that will impact on the use of suspect descriptions. First, it recognized that reasonable suspicion is only part of the threshold test and that courts still have to consider the overall reasonableness of the decision to detain. This opens the door for courts to read in additional rules governing the use of race-based suspect descriptions in suspect selection.

Second, the majority limited the power to the investigation of identified crimes and suspects. According to Justice Iacobucci, there must be a "clear nexus between the individual to be detained and a *recent or on-going criminal offence*."[132] In other words, the power is largely a reactive one.[133] This is consistent with how Justice Doherty, the creator of the power in *Simpson*, articulated it's outer limits in *Durham Regional Police*:

> The "investigative detention" power recognized in *Simpson* ... is a reactive power dependent on a reasonable belief that the detained person is implicated in a prior criminal act. The protection against police excess rests not only in the standard itself, but in its retrospective application. It is self-evident that assessments of what has happened and an individual's involvement in those past events are much more likely to be reliable than are assessments of what may happen in the future and the involvement that the individual may have in those events should they occur. ...
>
> To properly invoke ... [their crime prevention function], the police must have reasonable grounds for believing that the anticipated conduct, be it a breach of the peace or the commission of an indictable offence, will likely occur if the person is

[132] *Mann*, *supra* note 27 at 15.

[133] See the discussion of this issue in *The Colourless World of Mann*, *supra* note 6 at 54-55; and, S. Coughlan, "Annotation To *R. v. Calderon*" (2004), 23 C.R. (6th) 3 at 5-6 and "Annotation To *R. v. Aldridge*" (2004), 23 C.R. (6th) 33 at 33-34.

not detained.[134]

*Durham Regional Police* thus recognizes a power to investigate future crimes but limits that power to serious crimes and reasonable grounds to believe that the crime is likely to occur without intervention.

Finally, Justice Iacobucci recognized that "[t]he presence of an individual in a so-called high crime area is relevant only so far as it reflects his or her proximity to a particular crime. The high crime nature of a neighbourhood is not by itself a basis for detaining individuals."[135] *Mann*'s prohibition on using the status of a neighbourhood as a basis for the detention and its requirement that the police have information relating to a specific and identifiable crime committed in the past or in progress adds constitutional authority for not allowing the police, as a matter of policy, to use race when policing "target areas" or high-crime neighbourhoods or in identifying gang members.

*(c) Developing A Dominant Feature Constitutional Test*

However, as evidenced by the cases discussed earlier, even with these limits imposed in *Mann*, there is considerable room for abuse. *Mann* does, however, leave open the door for a modification of the stop and search jurisdiction where the circumstances warrant it. In addition, the *Mann* power must be consistent with section 15 equality

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[134] *Supra* note 117 at 25, 28 (emphasis added).

[135] *Mann*, *supra* note 25 at 19.

principles including substantive equality.[136] As we have seen, although the theoretical use of suspect descriptions may be consistent with formal equality, they have had devastating consequences for racialized communities where race is used as the dominant feature of the description. Therefore, in order to give effect to substantive equality, an additional minimum standard in addition to those provided in *Mann* should be considered. One possibility would be to hold that section 8 (the right to be free from unreasonable searches and seizures) and section 9 (the right to be free from arbitrary detention) of the *Charter* are violated when race is used as the dominant characteristic of the suspect's description.

How can we identify when race has become the dominant characteristic both to prevent discriminatory treatment before it occurs and to provide a remedy when it does, in fact, occur?[137] The key is to examine the degree of detail, specificity, and significance of the non-racial attributes of the suspect description given to the police. The less detailed, specific and significant the non-racial identifiers, the more likely it is that race will be used as the dominant feature. A detailed description should include:

- gender;
- approximate age, height, build, and weight;

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[136] See *Using The Charter*, *supra* note 6 at 179-181. See also, *R. v. Golden* (2001), 207 D.L.R. (4th) 18 at para. 83 (S.C.C.) and *R. v. Mills*, [1999] 3 S.C.R. 668 at 727-728.

[137] See also the discussion in Justice Calabresi's dissenting opinion in *Oneonta#2, supra* note 80 at 785-786.

- complexion;
- hair length, style and colour;
- presence or absence of facial hair;
- presence or absence of eyeglasses;
- any distinguishing features such as a scar or tattoo, large nose or ears;
- colour, type and nature of clothing; and,
- location and time of offence.[138]

In addition, we need to develop standards and protocols on just how specific and detailed the description needs to be in order to prevent race from becoming the dominant feature.

In civil, criminal or disciplinary cases where there is an allegation of a discriminatory stop, there are three additional factors that can help identify whether race was used as the dominant feature. These include (i) whether there is a significant discrepancy between the description of the suspect and the victim; (ii) the extent to which the police attempted to obtain a detailed description from the victim or witness; and (iii) whether there were any additional circumstances that may have invited the police to engage in stereotyping (e.g. the individual's presence in an expensive car or "high-crime" neighbourhood; the wearing of baggy or so-called distinctive clothing).

[138] See also the discussion at "Race" online at: <www.dailypress.com/services/sitdp-race.htmlstory> (date accessed: 14 February 2005).

## VI. CONCLUSION

As the stories told in this article reveal, it is imperative that we be vigilant and cognizant of our history of overt racism and current crisis of systemic racism whenever we think about race and policing. This history and series narratives reveal that because race is socially constructed, we can never think about race without also thinking about racism. Consequently, in race cases, we need to continually interrogate whether our judicial approach to deciding cases and the rules we create and apply will perpetuate systemic racism. Are they open to abuse? Will they serve to stigmatize? Are they an open invitation for the use of racialized stereotypes? Will they result in a large number of false positives? Unfortunately, these questions have all but been ignored when race is used in suspect descriptions.

This article has attempted to investigate that oft-ignored question of whether race should be used by the police to select suspects when it forms part of the description of an identified suspect. Since it is not clear that an outright ban would work at either a political or practical level, it is proposed that we recognize egregious uses of race-based descriptions as incidents of racial profiling. In addition, we should also consider imposing a dominant feature constitutional test to serve both as a proactive and reactive means of identifying when abuse is likely or has occurred. While I am similarly not confident that this will end the misuse of race, I am mindful of the fact that, as Banks so aptly puts it, "[t]here is no policy choice that would avoid the imposition of racial

inequality. Any choice is a choice among inequalities. That is the tragedy of race."[139]

[139] *Race-Based Suspect Selection*, *supra* note 13 at 1123.