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No Exit: Racial Profiling and Canada's War against Terrorism

Reem Bahdi

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Abstract

After September 11, 2001, some scholars and policy-makers promoted the racial profiling of Arabs and Muslims as a means towards greater national security. While racial profiling has not been officially sanctioned in Canada, it attracts popular support and undeniably takes place. The first part of this article identifies three different categories of racial profiling in the context of Canada's War against Terrorism. The second part identifies the problems associated with racial profiling. It argues that racial profiling undermines national security while also heightening the vulnerability and exclusion of Arabs, Muslims, and other racialized groups in Canada.

Keywords

Racial profiling in law enforcement; Terrorism--Prevention--Law and legislation; National security--Law and legislation; Canada

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NO EXIT: RACIAL PROFILING AND CANADA'S WAR AGAINST TERRORISM[©]

BY REEM BAHDİ*

After September 11, 2001, some scholars and policy-makers promoted the racial profiling of Arabs and Muslims as a means towards greater national security. While racial profiling has not been officially sanctioned in Canada, it attracts popular support and undeniably takes place. The first part of this article identifies three different categories of racial profiling in the context of Canada's War against Terrorism. The second part identifies the problems associated with racial profiling. It argues that racial profiling undermines national security while also heightening the vulnerability and exclusion of Arabs, Muslims, and other racialized groups in Canada.

Après le 11 septembre 2001, certains universitaires et faiseurs de politiques ont encouragé le profilage racial des Arabes et des musulmans comme véhicule d'une plus grande sécurité nationale. Tandis que le profilage racial n'a pas été officiellement sanctionné au Canada, il bénéficie du soutien populaire et s'exerce indéniablement. La première partie de cet article identifie trois catégories distinctes de profilage racial dans le contexte de la guerre du Canada Contre le Terrorisme. La deuxième partie identifie les problèmes associés au profilage racial. L'auteur y affirme que le profilage racial mine la sécurité nationale tout en exacerbant la vulnérabilité et l'exclusion des Arabes, des musulmans, et des autres groupes raciaux au Canada.

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I. INTRODUCTION

No Exit, Jean-Paul Sartre's celebrated play, examines the meaning and significance of the self as defined through the gaze of the other. Sartre's characters, three souls damned to Hell, constantly look for mirrors to avoid each other's interrogating gaze as they await the arrival of their torturer. The lack of mirrors in the room and the constant stare of the play's audience underline the futility of the characters' quest to be seen exclusively through their own eyes. As they await their fate in Hell, Sartre's characters try to guess what their torturer will look like. Suddenly, the revelation dawns; *they* are each other's torturers.¹

Torturers, tormentors, and terrorists can sometimes take surprising forms. Following the attacks on the World Trade Center and the Pentagon, and the downing of United Flight 93 in Pennsylvania on September 11, 2001 (9/11), some scholars and policy makers, suggesting that they knew what a terrorist looked like, advocated for the racial profiling of Arabs and Muslims as the means towards greater national security. While racial profiling has not been officially sanctioned in Canada, it still attracts popular support and undeniably takes place. Like Sartre's three souls, at least some Canadians believe that we will know our tormentors when we see them. Yet, racial profiling does not expose potential terrorists and fails to increase national security. On the contrary, it undermines national security while harming Arabs, Muslims, and other racialized groups by heightening their vulnerability and reinforcing their exclusion from Canadian society. Racial profiling acts as our mirror—it reflects an increasingly racialized society that, like Sartre's characters, tries desperately to avoid seeing itself through the gaze of its excluded others.

A. *Racial Profiling and the War against Terrorism*

Controversies over racial profiling are hardly new in Canada. However, 9/11 changed both the tenor and the nature of the debate. Without a doubt, 9/11 generated a hitherto unmarked level of interest in racial profiling on the part of legislators, the media, and scholars.² Prior to September 11, 2001, the racial profiling debate largely focused on African

¹ Jean-Paul Sartre, *No Exit, Four Contemporary French Plays*, trans. by Stuart Gilbert (New York: Random House, 1967).

² See for example, Sujit Choudhry, "Protecting Equality In The Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter" in Ronald J. Daniels, Patrick Macklem, & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 367.

Canadians, usually, though not exclusively, in the context of criminal law.³ While the issue did command sporadic public attention, it did not elicit protracted debate from either popular or scholarly circles. When the participants in the debate did square off, the main point of contention between them was whether officials did in fact resort to racial profiling as an instrument of law enforcement.⁴ After 9/11, however, the racial profiling debate focused more squarely on Arabs and Muslims while it also spilled beyond the criminal law to other contexts such as banking and employment.⁵ Moreover, 9/11 forced a fundamental shift in the racial profiling discourse. The central contention was no longer whether racial profiling was in fact taking place or how to best prevent incidents of racial profiling or even whether the *Charter*⁶ offered adequate remedial measures to address racial profiling. Rather, racial profiling debates in the context of the War against Terrorism focus on whether Canadian society can morally, legally, or politically condone racial profiling.

As a general matter, profiling involves separating a subsection of the population from the larger whole on the basis of specific criteria that purportedly correlates to risk and subjecting the subgroup to special scrutiny for the purposes of preventing violence, crime, or some other undesirable activity.⁷ Racial profiling thus entails the use of race as a proxy for risk either in whole or in part.⁸ In the context of the War against Terrorism, the racial profiling debate centers on whether or not race should substitute for real knowledge about an individual's connection to, or propensity for, terrorist activity. As in the United States, the central question in Canada's War against Terrorism, was whether Arabs and

³ See for example, David M. Tanovich, "Using The Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention"(2002) 40 Osgoode Hall L.J. 145.

⁴ Lynda Hurst, "A Critical Measure of Bias" *The Toronto Star* (12 April 2003) A4. Government lawyers, however, have conceded that racial profiling does take place. See *R v. Brown*, [2003] O.J. No. 1251 (C.A.) at para. 9 [*Brown*].

⁵ See below at Part II.B., "Specific Measures: Freezing Assets of Arabs and Muslims."

⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁷ See Choudhry, *supra* note 2 at 369.

⁸ It is difficult to determine whether race might constitute the sole reason for subjecting someone to heightened scrutiny or whether it constitutes only one factor among a group of factors. This is because a decision-maker can usually always find some basis, independent of race, that might raise suspicion. For example, the U.S. Drug Enforcement Agency uses criteria such as "acting too calm," "acting too nervous," "travelling alone" or "travelling with a companion" as reasons why an individual might raise suspicion of drug smuggling. Sean P. Trende, "Why Modest Proposals Offer the Best Solution for Combating Racial Profiling" (2000) 50 Duke L. J. 331.

Muslims should be treated as more likely to threaten Canada or indeed global security. Within weeks of 9/11, then Premier of Ontario, Mike Harris, announced the formation of a special police unit designed to track down and deport illegal immigrants. While Premier Harris did not explicitly indicate that Arabs or Muslims would be targeted, he did report that the unit's focus would be to prevent terrorism through deportation, thus leaving little doubt in anyone's mind as to the ethnic or religious identity of those who would receive special scrutiny.⁹ Around the same time, 48 per cent of Canadians reported that they approved of racial profiling.¹⁰ Interestingly, despite deep demographic, religious, and other differences between the two groups, both Arabs and Muslims have become the target of popular suspicion, resulting in the "Arabification" of Muslims and the "Muslimification" of Arabs.¹¹

In a bid reportedly designed to secure Canada's national interest and contribute to international efforts to fight terrorism, the Canadian Parliament responded to the 9/11 attacks in the United States with a series of legislative moves that began in early October 2001. The War against Terrorism takes the form of a vast and complex array of laws, regulations, policies, and practices that cut across contexts like the criminal law, tax law, laws regulating financial institutions, employment, intelligence services, and airport security.¹² Significantly, the legislative War against Terrorism is

⁹ Charlie Gillis, "Racial Profiling Inevitable: Law Expert Courts Expected to Permit Practice at Points of Entry" *The National Post* (10 October 2001), online: <<http://www.geocities.com/CapitolHill/2381/CanadaCustomsandRevenueAgency/cdnracialprofileinevitable.html>> (date accessed: May 1, 2003).

¹⁰ "September 11th in Hindsight: Recovery and Resolve" (2002), online: Canadian Broadcasting Corporation <http://cbc.ca/september11/content_files/text/poll_nw.html#section3> (date accessed: 1 May 2003).

¹¹ Most commentators do not recognize, for example, that based on the last available national census for Canada, approximately 60 per cent of Canadian Arabs are Christian, not Muslim, "A Profile of Arabs in Canada" (1999), online: The Canadian Arab Federation & Arab Community Center of Toronto <<http://ceris.metropolis.net/Virtual%20Library/community/Arab1/arab1.html>> (date accessed: 1 May 2003).

¹² Bill C-55, the proposed *Public Safety Act*, 2002, received first reading in the House of Commons on April 29, 2002 but it died on the *Order Paper* when the first session of the 37th Parliament ended on September 16, 2002. Bill C-55 was intended to replace Bill C-42, which was given first reading on November 22, 2001; it received significant criticism and the government did not proceed with it. On November 28, 2001, the House of Commons unanimously consented to a motion to delete from Bill C-42 section 4.83 in clause 5, amending the *Aeronautics Act*. The same day, that section was introduced as Bill C-44. It received Royal Assent on December 18, 2001 as *An Act To Amend The Aeronautics Act* (2001) c. 38. Bill C-17 replaced Bill C-55 as the proposed *Public Safety Act*, 2002. Bill C-17 received first reading in the House of Commons on October 31, 2002. Bill C-17 amends 23 existing Acts, and enacts a new statute to implement the *Biological and Toxin Weapons Convention*, which entered into force on March 26, 1975. Bill C-36 introduced *An Act to amend the Criminal Code, the Official Secrets Act, the*

silent about racial profiling: it neither explicitly condones nor prohibits racial profiling. Muslims and Arabs in Canada thus assume a different relationship to laws that implicate racial profiling than Japanese Canadians, for example, who were explicitly disenfranchised and interned on the basis of their race after the bombing of Pearl Harbour in 1941.¹³

However, the lack of explicit endorsement of racial profiling in the anti-terrorism legislation does not mean that racial profiling does not take place in Canada. Canadian law no longer targets individuals explicitly on the basis of race but tends to exclude equality-seeking groups through its application.¹⁴ As it currently stands in Canada, it is virtually impossible to gauge the extent to which racial profiling is practised in the War against Terrorism. This is in part because racial profiling takes place "on the ground" and is often the product of discretionary decision-making that is not well-documented.¹⁵ Yet, several indicators suggest that Canadian Arabs and Muslims are subject to racial profiling. First, the silence of the legislature regarding the practice, at best, fails to effectively check racial profiling and, at worst, creates opportunities for racial profiling.¹⁶ Second, a number of high profile cases suggest that racial profiling does take place in Canada's War against Terrorism.¹⁷ Finally, while enacted laws do not explicitly endorse or encourage racial profiling, the same cannot be said of policies and directives developed by the institutions entrusted with fighting the War against Terrorism.¹⁸

Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and To Enact Measures Respecting the Registration of Charities, In Order To Combat Terrorism, 1982, c. 41 [*Anti-Terrorism Act*]. The Act received Royal Assent on December 18, 2001.

¹³ On March 4, 1942, 22,000 Japanese Canadians were given twenty-four hours to pack before being interned. See "From Racism to Redress: The Japanese Canadian Experience," online: The Canadian Race Relations Foundation <http://www.crr.ca/en/MediaCentre/FactSheets/eMedCen_FacShtFromRacismtoRedress.htm> (date accessed: 1 May 2003).

¹⁴ See for example, Denise Réaume, "What's Distinctive About Feminist Analysis of Law? A Conceptual Analysis of Women's Exclusion from Law" (1996) 2 *Legal Theory* 265.

¹⁵ See *Trende*, *supra* note 8 at 350 for a discussion of the kind of evidentiary problems that arise in bringing forward an allegation of racial profiling in American courts. Canadian courts will likely prove more receptive to arguments that one can prove racial profiling based on circumstantial evidence. For example, in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 541-42, the Court noted that there "will frequently be instances in which a court may appropriately take judicial notice of some or all of the facts necessary to underpin a discrimination claim." See also *Brown*, *supra* note 4. The problem of proving profiling will not, however, be easy in all circumstances.

¹⁶ Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41(1) *Osgoode Hall L.J.* 1.

¹⁷ See for example below, especially the discussion related to footnotes 34-37.

¹⁸ See below at Part II.B. and the discussion relating to policies concerning freezing of terrorist assets.

The next section of this article suggests a topography of racial profiling in Canada. It is intended to encourage both scholars and advocates to fully explore racial profiling in all of its manifestations. The objective is not to provide a comprehensive analysis of the laws, policies, and practices that raise the spectre of racial profiling in Canada, but instead to highlight some provisions and practices for the purposes of buttressing the suggested classification. Emphasis is placed on those policies and practices that have not yet been subject to sufficient scrutiny from the perspective of equality law. Although they span across legal lines, it is possible to divide the anti-terrorism measures into three distinct categories with respect to racial profiling: (i) measures aimed at the Arab or Muslim communities in general; (ii) measures aimed at specific members of the Arab or Muslim communities; (iii) and, racially neutral measures aimed at the Canadian public as whole which nonetheless will likely disproportionately impact the Arab and Muslim communities.

II. LEGISLATING THE WAR AGAINST TERRORISM AND RACIAL PROFILING

A. *Measures Aimed at the Arab and Muslim Communities in General*

When scholars and advocates discuss racial profiling in Canada, they tend to focus on practices and policies that target the Arab and Muslim communities in general for heightened security surveillance. Not surprisingly, since the hijackers of 9/11 transformed commercial airliners into weapons of mass destruction, both the public and politicians quickly turned their attention to airport security to query whether the felling of the World Trade Center, the attack on the Pentagon, and the crash of United Flight 93 might have been prevented with better screening of passengers at airports. Since the hijackers were alleged to be Arabs or Muslims, the debate quickly turned to whether Arabs and Muslims should be subject to higher scrutiny at airports.¹⁹

Transport Canada does not officially condone racial profiling, however, employees of commercial airlines and airport security personnel have some discretion to determine if an individual or their belongings

¹⁹ Major-General MacKenzie, for example, argued that it would be appropriate for Canadian airport staff to undertake more thorough checks on passengers arriving from Arab countries. See Sarah Schmidt, "Ontario Denies Anti-Terror Policy is Racist" *The National Post* (5 October 2001), online: < <http://www.recomnetwork.org/articles/01/10/06/231242.shtml> > (date accessed: 1 May 2003).

should be subject to higher scrutiny than other passengers.²⁰ This discretion carries with it the power to remove someone from an aircraft. Hence, individuals are vulnerable to being subjected to higher scrutiny either because they look Arab or Muslim—women who wear the *hejab* for example—or because some other piece of information reveals them to be Arab or Muslim. Since 9/11, Arabs, Muslims, and those who look Arab or Muslim report being subjected to higher scrutiny at Canadian airports allegedly because decision makers consider them a greater security risk than the rest of the population by virtue of their real or perceived Arab or Muslim identity.²¹ Although it took place in the United States, the case of Walid Shater, the Secret Service Agent who was ejected from an American Airlines flight when he was on his way to guard President Bush and his family on Christmas day,²² has some relevance to Canada because it shows the propensity of at least some pilots who operate across national borders to regard Arabs and Muslims as security risks.²³

Faisal Joseph's experience at Hamilton International Airport also proves illustrative. Joseph, who is legal counsel to the Canadian Islamic Congress, was on his way from Hamilton to Ottawa when he was pulled aside for a heightened security check and ultimately made to miss his flight. Joseph links the treatment he received to the fact that he was carrying a business card from the Canadian Muslim Congress.²⁴ Ironically, Joseph was

²⁰ *Aeronautics Act*, R.S.C. 1985, c. A-2. Section 4.7 is particularly relevant because it allows "screening officers" to search persons and belonging both prior to (s. 4.7(5)) and after boarding (s.4.7(6)). Bill C-55, the proposed *Public Safety Act*, would amend s. 4.7 of the *Aeronautics Act*. Bill C-55 received first reading in the House of Commons on 29 April 2002. Moreover, Pilot Associations insist that they have the authority to eject someone from their aircraft. See Megan Garvey, "Airline Defends Banning Bush Guard From Flight" (2002), online: <<http://www.latimes.com/news/nationworld/nation/la-010402agent.story>> (date accessed: 30 May 2003).

²¹ An Iranian professor who had come to Canada to study English spent a month in a Canadian jail after asking an Air Canada flight attendant to be careful stuffing his bag under his seat. He said "No, no. Be careful or it might explode." According to the Crown Prosecutor Pierre Garon, "[t]his came to the court because of the sensitivities stemming from Sept. 11." Tu Thanh Ha, "Iranian Professor's Choice of Words 'Careless'" *The Globe and Mail* (23 January, 2003) A3, online: http://www.globeandmail.com/servlet/ArticleNews/PEstory/TGAM/20030123/UBARGN/Headlines/headdex/headdexNational_temp/5/5/35/ (date accessed: 1 May 2003).

²² Garvey, *supra* note 20. In the end, the plane took off without him. The next day, American Airlines rescinded a flight ban they had put on the agent, who was travelling on tickets purchased through the government travel agency and marked as such.

²³ Indeed, American Airlines said that it backed its pilot's decision because, by his account and in his estimation, Shater looked "nervous." *Ibid.*

²⁴ Katherine Janson, "Muslim Londoners Get Unfair Scrutiny At Airports and At The U.S. Border," online: University of Western Ontario, Faculty of Information and New Media Studies <http://www.fims.uwo.ca/newmedia/muslim/muslim_janson_d09_e.htm> (date accessed: 1 May 2003).

on his way to meet the Minister of Justice to voice concerns that Canada's new anti-terrorism legislation promoted racial profiling and discrimination. The singling out of individuals as enhanced security risks by virtue of their membership in a particular racial or religious group also takes place outside of airports. For example, The Canadian Security Intelligence Agency has reportedly targeted its surveillance on the Arab and Muslim communities.²⁵

B. *Specific Measures: Freezing Assets of Arabs and Muslims*

Although most of the public and scholarly debate concerning the War against Terrorism in Canada has focused on Bill C-36,²⁶ Canada's legal response to the events of 9/11 began before the introduction of Bill C-36 in the House of Commons. Indeed, the initial legal reaction to the events of 9/11 came from the executive, not the legislature. In one of its first moves in the War against Terrorism, Cabinet invoked the *United Nations Act*,²⁷ a relatively obscure piece of legislation that allows the Governor in Council to issue regulations giving effect to decisions of the United Nations Security Council taken under Article 41 of the Charter of the United Nations for the purposes of promoting international peace and security. On October 2, 2001, pursuant to the *United Nations Act*, Cabinet issued the *United Nations Suppression of Terrorism Regulations*.²⁸ The *Regulations* ensure that any individuals or groups identified as "terrorist" by the United Nations Security Council are similarly recognized as terrorist for the purposes of Canadian law. The Governor General in Council can also independently designate individuals and entities as terrorists under the *Regulations*.²⁹ These individuals and groups are listed in Schedule One of the

²⁵ Raja Khoury, "Policing In A Multicultural Society Conference," (2003) online: Canadian Arab Federation <http://www.caf.ca/t_publications/Home%20Page/Policing%20with%20a%20national%20security%20agenda%202%5B1%5D.PDF> (date accessed: 1 May 2003). Although CSIS obviously does not provide details about groups or individuals that it is monitoring, it has noted its willingness to target the Arab community in the past for information interviews. See The Canadian Security and Intelligence Service, "1991 Public Report," online: <http://www.csis-scrs.gc.ca/eng/publicrp/pub1991_e.html#canada> (date accessed: 1 May 2003).

²⁶ See for example, Daniels, Macklem, & Roach, *supra* note 2.

²⁷ R.S.C. 1985, c. U-2.

²⁸ SOR/2001-360 [*Regulations*].

²⁹ *Ibid.* See s. 2(1) for the criteria used to list entities.

Regulations.³⁰ This list is regularly updated as names are added or deleted.³¹ Perhaps not surprisingly, most of the individuals and entities listed in Schedule One of the *Regulations* are Arab or Muslim.

Two weeks after the *Regulations* were passed, on October 15, 2001, the Canadian government tabled the highly scrutinized Bill C-36 or the *Anti-Terrorism Act*.³² In many respects, the *Act* duplicates some of the measures introduced in the *United Nations Act Regulations*, particularly with respect to the professed aim of cutting off terrorist financing. The *Act* amended the *Criminal Code* to allow the Governor in Council to issue a list of terrorist entities on the recommendation of the Solicitor General.³³ Partial responsibility for implementing both the *Regulations* and the *Criminal Code* provisions relating to terrorist financing falls to the Office of the Superintendent of Financial Institutions (OSFI) in so far as OSFI issues a consolidated list that includes names of both individuals and organizations suspected of engaging or supporting terrorist activity as identified pursuant to both the *Regulations* and the *Criminal Code*.³⁴ OSFI distributes a consolidated list of named terrorists to financial institutions on a regular basis. Institutions are required, among other things, to freeze the assets of anyone whose name appears on the list.³⁵ It is extremely difficult to obtain information about frozen assets since reports are not public. However, within two months of 9/11, a spokesperson for the Minister of Finance announced that Canada had frozen a total of \$344,000 in assets in twenty-eight accounts.³⁶

³⁰ *Ibid.* See s. 1 for the definition of "listed person"

³¹ "Amendments To The United Nations Suppression of Terrorism Regulations," online: Department of Foreign Affairs and International Trade <http://www.dfait-maeci.gc.ca/trade/amendments_links-en.asp> (date accessed: 1 May 2003) [*Amendments*].

³² R.S.C. 2001, c.41 (Bill C-36) [*Act*].

³³ R.S.C. 1985, c. C-46 [*Criminal Code*].

³⁴ Some names are common to both the *Criminal Code* and the *United Nations Suppression of Terrorism Regulations*, while others will be subject to one piece of legislation or the other. The two lists are combined and made available on OSFI's Web site: "Suppression of Terrorism," online: Office of the Superintendent of Financial Institutions <www.osfi-bsif.gc.ca/eng/publications/advisories/index_supervisory.asp?#Supter> (date accessed: 1 May 2003).

³⁵ Financial institutions are advised that they must determine for themselves if they are in the possession or control of any property owned or controlled by or on behalf of a listed entity, although they may seek advice from either the RCMP or CSIS. See "Frequently Asked Questions," online: Solicitor General Canada <http://www.sgc.gc.ca/national_security/counter-terrorism/FAQs_e.asp> (date accessed: 1 May 2003) [Solicitor General].

³⁶ Reports from financial institutions are sent to FINTRAC, "The Financial Transactions and Reports Analysis Centre of Canada," online: Government of Canada <http://www.fintrac.gc.ca/fintrac-canafe/1_e.asp> (date accessed 1 May 2003).

Although the definition of terrorism and terrorist activities remains highly contested,³⁷ few would question the desirability of preventing terrorism through freezing assets. However, the system enacted under the *Regulations* and the *Act* is problematic because the lists and instructions issued to financial institutions by OSFI encourage racial profiling. OSFI advises financial institutions to regard with suspicion not only the people whose names are actually on the list, but also anyone whose name *resembles* the name of a listed person.³⁸ Bank managers and employees, working in the shadow of risk of financial and criminal sanction, are thus implicitly encouraged to regard Arabs and Muslims as especially suspect.³⁹ In short, race and religion, through the use of names, becomes a proxy for risk.

Individuals who come under suspicion because of their names must convince their financial institution that they are not the listed entity. In some instances it will prove difficult for an individual to prove that they are not the same person as “their namesake” on the OSFI list because financial institutions often have little information about a listed entity other than a name. For example, Abd Al-Hadi Al-Iraqi is included on the list of suspected individuals with no other identifying information other than his alias “Abu Abdullah,” an extraordinarily common Arab name, and a suggested alternative spelling of his name, Abdal Al-Hadi Al-Iraqi.⁴⁰ Other individuals are simply listed by name along with their title or status within the Taliban.

The discretion on whether to release the assets in cases of mistaken identity lies with the financial institution. However, even if assets are released because an individual has satisfied his or her financial institution of his or her non-terrorist identity, the institution nonetheless remains under legal obligation to provide the name, address, date of birth, and Social Insurance Number of the affected individual to the Canadian Security and Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP).⁴¹ Hence, the mere fact that someone has a certain common

³⁷ For an overview and important analysis of the debate, see Sharryn J. Aiken, “Manufacturing ‘Terrorists’: Refugees, National Security and Canadian Law, Part I” (2000) 19(3) *Refuge* 54 and Sharryn J. Aiken, “Manufacturing ‘Terrorists’: Refugees, National Security and Canadian Law, Part II” (2001) 19(4) *Refuge* 116.

³⁸ “Consolidated List of Names subject to the Regulations Establishing a List of Entities made under subsection 83.05(1) of the *Criminal Code* or the *United Nations Suppression of Terrorism Regulations*. PART A - INDIVIDUALS,” online: Office of the Superintendent of Financial Institutions <<http://www.osfi-bsif.gc.ca/eng/documents/advisories/docs/indstd.txt>> (date accessed: 1 May 2003).

³⁹ *Regulations*, *supra* note 28 at ss. 8-9.

⁴⁰ *Ibid.*

⁴¹ Solicitor General, *supra* note 35.

Arabic name in and of itself makes that person the object of suspicion, requires proof of innocence, and draws the attention of security officials.

If individuals cannot convince their financial institution that they are the victim of mistaken identity, they can seek to have their names cleared through other means. However, the mechanisms established to help individuals clear their names and move on with their lives are not only cumbersome and confusing, but lack accountability mechanisms. For example, in the event that individuals believe themselves to be wrongly included as listed persons under the *Regulations*, they may apply to the Minister of Foreign Affairs for a certificate stating that the Minister has reasonable grounds to believe that the impugned transaction is not prohibited or that the person named in the certificate is not a listed person.⁴² This process is problematic not only because it requires individuals to incur costs to prove their innocence upon being presumed guilty, but also because it fails to stipulate a time limit during which a decision must be made.

C. *Neutral Provisions: Giving Names To Foreign Governments*

A third category of laws, policies, or practices that raises concerns about racial profiling includes seemingly neutral provisions that do not focus on members of the Arab or Muslim communities either individually or collectively but that nonetheless may have an adverse impact on them. This category differs from the first in that Arabs and Muslims are not explicitly targeted in Canadian law or policy. Nevertheless, the effect is the same insofar as Arabs and Muslims bear a disproportionate burden in the War against Terrorism. Analysts and decision makers concerned with racial profiling may miss this category of racial profiling and may fail to consider the equality ramifications of these laws and policies because they appear facially neutral. Recent amendments to the *Aeronautics Act* represent an example of racial profiling within this third category.⁴³ Under section 4.83 of the *Aeronautics Act*, an airline carrier can provide information about any of its passengers if requested to do so by a government of a foreign state.

⁴⁴ The *Aeronautics Act* thus makes Canadians vulnerable to racial profiling

⁴² *Regulations*, *supra* note 28, s. 11. and s. 1 "meaning of 'Minister.'"

⁴³ *Aeronautics Act*, *supra* note 20.

⁴⁴ This provision was added pursuant to Bill C-44. See *supra* note 12. Other examples include s. 13(3) of *The Canadian Security and Intelligence Service Act*, R.S. 1985, c. C-23 [*CSIS Act*] which allows CSIS to make security assessments on behalf of foreign entities and s. 4.82 of Bill C-17, the proposed *Public Safety Act*, 2002 which requires airlines to share passenger information with CSIS and RCMP for the purposes of transportation and national security. CSIS can share such information with foreign

and discriminatory law enforcement in the United States and other countries.

Arabs, Muslims, and those who look Arab and Muslim have been subject to enhanced surveillance and scrutiny in the United States despite holding a Canadian passport. At times, the conduct of American officials has embarrassed their Canadian counterparts and placed a strain on Canadian-American relations. Maher Arar's treatment by American officials, for example, prompted an official complaint from Canadian authorities. Arar was detained and deported by the United States Immigration and Naturalization Service (INS) to Syria. The INS detained him while he was on a stopover in New York. Arar was deported to Syria, his country of birth, even though he is a Canadian citizen, his wife and daughter reside in Canada, and he was traveling on a Canadian passport. Canadian officials were not informed of his fate until after his deportation.⁴⁵

III. PROBLEMS WITH RACIAL PROFILING

The arguments in support of racial profiling represent some variant on the claim that racial profiling constitutes an efficient form of law enforcement because the benefits of profiling outweigh the burdens imposed on the individual and the attendant social costs. Although these claims may appear convincing in the abstract, they lose their persuasiveness once examined. Rather than generating greater national security and deterring terrorism, racial profiling will generate high costs to both society and the individuals who are profiled.

A. *Racial Profiling and Pre-9/11 Images of Arabs and Muslims*

Racial profiling is a problematic weapon in the War against Terrorism because it operates against, and merges with, long-standing and deeply held stereotypes about Arabs and Muslims that threaten to warp rational decision making. Even before 9/11, Arabs and Muslims have historically been the subject of widespread stereotyping. Arabs and Muslims are usually portrayed as fanatical, violence-loving maniacs in the popular presses of both Canada and the United States. This deeply entrenched image of Arabs and Muslims predates 9/11 and has been well

states pursuant to the *CSIS Act*.

⁴⁵ Available information indicates that Arar remains in prison at the time of writing of this paper. See "The Plight of Maher Arar," online: Edelson & Associates <<http://www.edelsonandassociates.com/news/Maher%20Arar/Maher%20Arar.htm>> (date accessed: 1 May 2003).

documented.⁴⁶ In his book, *The TV Arab*, for example, Jack Shaheen examined more than one hundred different television shows that featured Arab characters between 1975-1976 and 1983-1984. He found that the image of Arab as terrorist was all-pervasive.⁴⁷

Willard Oxtoby's study of American perceptions of Arabs confirms that Arabs are commonly depicted as violent, fanatical, irrational, immoral, untrustworthy, and incorrigible barbarians bent on destroying peace. Oxtoby cites a 1976 issue of *Harpers Magazine* as an example: "Arabs are religious fanatics devoted to a non-Western warrior religion. Their bequest to us include the words *assassin* and *jihad* ... the Arab draws his blade with gusto, and when he is finished butchering he is always that much closer to Allah."⁴⁸ Canadians receive this stereotype of the Arab as terrorist, or potential terrorist, though American media as well as Canadian sources.⁴⁹ On June 14, 2003, for example, *The Globe and Mail* printed a cartoon honouring Father's Day. The cartoon depicted an Arab man with stereotypical features gleefully receiving a belt of explosives from his young son.⁵⁰

⁴⁶ See for example Jack G. Shaheen, *The TV Arab* (Ohio: Bowling Green State University Popular Press, 1984); Edmund Ghareeb, *Split Vision: The Portrayal of Arabs in the American Media* (Washington D.C.: American-Arab Affairs Council, 1983); Ronald Stockton, "Ethnic Archetypes and the Arab Image" in Ernest McCamus, ed., *The Development of the Arab-American Identity* (Ann Arbor: University of Michigan Press, 1994); Willard Oxtoby, "Western Perceptions of Islam and the Arabs" in *The American Media and the Arabs*, ed. by Michael C. Hudson & Ronald G. Wolfe (Washington, D.C.: Center for Contemporary Studies, Georgetown University, 1980); Edward Said, *Covering Islam: How The Media and the Experts Determine How We See The Rest of the World* (New York: Vintage Books, 1981); Mary Ann Weston & Marda Dunskey, "One Culture, Two Frameworks: U.S. Media Coverage of Arabs at Home and Abroad" 7 J. Islamic L. & Culture 129 For another list of resources, see "A Bibliography of Anti-Arab Discrimination, Stereotyping, and Media Bias," online: Arab Anti-Discrimination Committee <<http://www.adc.org/index.php?id=505>> (date accessed: 1 May 2003).

⁴⁷ Shaheen, *ibid.*

⁴⁸ Oxtoby, *supra* note 46.

⁴⁹ See also Andre Mayer, "The Usual Suspects," online: Ryerson Review of Journalism <<http://www.ryerson.ca/rj/content/print/backissues/Muslim.html>> (date accessed: 1 May 2003). In June of 1998, pamphlets were disseminated at Toronto's Weston Collegiate bearing titles like "Islam: A Religion of Darkness and Deception ..." and "Are All the Muslims Living in Canada Today TERRORISTS? [sic] This Is a Warning to all Canadians and Their Families." Metropolitan Toronto Police arrested Mark Harding, operator of the Christian Standard, a hate group based north of Toronto, and charged him with three counts of willful promotion of hatred. Harding was incensed that Muslim students were using the school's auditorium for their prayers. "Since when is it okay to turn our schools into Mosques?" he wrote, arguing that "the Muslim religion is full of hate and violence as we in Canada can see by the national headlines."

⁵⁰ *The Globe and Mail* (14 June 2003) A20.

When decision makers operate against a backdrop of ingrained, but often unconscious stereotypes, they are likely to filter and interpret facts or events through the lens of stereotypes rather than by making an individual and rational assessment based on the particular facts of a given case. Philosophers⁵¹ and thoughtful decision makers⁵² have long recognized that there is no pure, unmediated gaze. We are always interpreting facts through a situated lens—one that reflects the commonly held assumptions of our day. Consequently, our assessment of things beyond ourselves are shaped by our preconceptions and prejudices.⁵³

Accordingly, Canadian jurisprudence is replete with cautions about the need to ensure individualized decision making rather than judgments on the basis of purported group characteristics.⁵⁴ Indeed, the denunciation of stereotyping represents the one constant in an otherwise confusing and sometimes tortured section 15 *Charter* jurisprudence.⁵⁵ Canadian courts have recognized that stereotyping pollutes rational decision making.⁵⁶ In *R. v. Brown*, the Ontario Court of Appeal ruled that a trial judge displayed a reasonable apprehension of bias when he rejected the submissions that an officer who pulled over Toronto Raptors guard Decovan Brown may have been motivated by racial profiling.⁵⁷ The trial judge in question noted on several occasions that he found the line of questioning “serious,” “nasty,” “malicious,” and “based on nothing.” Reviewing the judge’s comments, the Ontario Court of Appeal noted that the judge’s comments “arguably showed a failure to appreciate that racial profiling can be a subconscious

⁵¹ See for example, Hans-Georg Gadamer, *Truth and Method*, trans. by Garrett Barden & John Cumming (New York: Seabury Press, 1975) at 358.

⁵² See for example, Bertha Wilson, “Will Women Judges Really Make a Difference?” (1990) 28(3) Osgoode Hall L.J. 507; Audrey Macklin, “Truth and Consequences: Credibility in Refugee Determination,” in *International Association of Refugee Law Judges, The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary* (Haarlem: IARLJ 1999).

⁵³ For an interesting analysis of how and why the heroes of 9/11 are portrayed as white men, see Robert S. Chang, “(Racial) Profiles in Courage, Or Can We Be Heroes Too?” (2003) 66 Alb. L. Rev. 349.

⁵⁴ See for example *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at 144: “Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination ...”

⁵⁵ See for example *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, L’Heureux-Dube & Gonthier, J.J. [Ewanchuk].

⁵⁶ *Ibid.*

⁵⁷ *Brown*, *supra* note 4.

factor impacting on the exercise of a discretionary power in a multicultural society.”⁵⁸

The point is not that we are perpetually and inevitably trapped within our preconceptions. It is possible to move beyond prejudice. However, such a transformation project requires self-scrutiny and introspection: we must examine ourselves and examine our assumptions. Therein lies the problem. Rather than making plain our preconceived assumptions and invalidating stereotypes in decision making, racial profiling does the opposite: it instructs decision makers to operate on the basis of an ingrained assumption that Arabs and Muslims are terrorists, thus perpetuating decision making on the basis of stereotypes.

Perhaps the concern that profiling will lapse into stereotyping is most obvious in relation to justifications for profiling that rely on the claim that Arab and Muslims are culturally⁵⁹ or statistically⁶⁰ more inclined to violence and terrorism than other members of Canadian society. However, it also applies to the narrower claim that racial profiling is justified because individuals responsible for 9/11 remain at large and that it is thus reasonable to focus investigations and prevention efforts on Arab and Muslim communities for the purpose of identifying those within the community who may be connected to Al Qaeda.⁶¹ Regardless of the justification advanced, decision makers are still given permission to single out Arabs and Muslims for special scrutiny. If a woman wearing *hejab* approaches airport security, for example, racial profiling instructs security personnel to ask themselves questions like “Is this Muslim woman linked to Al Qaeda? Does she have information about Al Qaeda? Is she more of a security risk than the Danish woman standing behind her? Was she involved in 9/11? Does she have information about 9/11?” While different

⁵⁸ *Ibid.* at 81.

⁵⁹ See for example Daniel Pipes, “Counting Mosques,” online: Middle East Forum <<http://www.meforum.org/article/pipes/1018>> (date accessed: 1 May 2003): “It’s known that some mosques throughout the West have been used as a base for terror, filling a variety of roles.” Daniel Pipes & Khalid Duran, “Faces of American Islam,” online: Middle East Forum <<http://www.meforum.org/article/pipes/441>> (date accessed: 1 May 2003), which implies the fungibility of Muslim by arguing that Islamists will use violence to change America into a majority Muslim country.

⁶⁰ For an argument in support of racial profiling based on statistics, see Brandon del Pozo, “Guided By Race: An Ethical and Policy Analysis of Racial Profiling In Law Enforcement Decision Making” (2001) 1(2) QUT L. & Just. J. 266 at 271. Del Pozo does not deal with 9/11 but focuses on the criminal context.

⁶¹ Samuel R. Gross & Debra Livingston, “Racial Profiling Under Attack” (2002) 102 Colum. L. Rev. 1413 argue against racial profiling, however, they contend that it is not profiling for authorities to focus their attention on members of the Arab and Muslim community in the United States looking for information about Al Qaeda.

proponents of racial profiling suggest different reasons to justify these questions in the decision maker's mind, in the end, they all require that the Muslim woman be treated with heightened suspicion.

Where there is a perceived link between an individual's race and the particular crime, or incident under consideration, a public policy that grants decision makers permission to regard members of that race with heightened suspicion proves highly problematic.⁶² Given the long-standing belief that existed well before 9/11 that Arabs and Muslims are generally more inclined towards violence than other groups, racial profiling of Arabs and Muslims as risks to national security are not easily disentangled from stereotyping. A decision maker's perceptions of a particular group's propensity towards crime impacts upon their analysis of who reasonably should be considered a suspect in any particular case. Numerous studies of racial profiling of African Americans illustrate this point.⁶³

Where racial profiling is employed in "Driving While Black" cases, virtually all male members of the community driving in a given area become possible suspects in the quest to solve a specific crime.⁶⁴ In many instances, it is difficult to determine with any precision the extent to which law enforcement officers single out an individual member of a given community out of a conviction that the individual, as a member of the community, has a propensity towards crime, or whether officials have sufficient information to link the individual to a specific crime.⁶⁵ This problem is compounded in cases involving international investigations, sleeper cells, amorphous actors, and global terrorist networks. Ultimately, the irrational stereotype overtakes the purportedly rational profile.

Those who argue in favour of racial profiling fail to adequately take ingrained social stereotypes into consideration. While they might acknowledge that the racism of individual decision makers may impede rational decision making, they cannot account for widespread societal bias.⁶⁶ Profiling may be an important part of law enforcement and officials may use some statistical profiles (men are more likely to commit violent

⁶² *R. v. Williams*, [1998] 1 S.C.R. 1128.

⁶³ Jack Kearney, "Racial Profiling: A Disgrace at the Intersection of Race and the Criminal Justice System" (2001) 36 Ark. Law. 20. Kearney describes how former White House Personnel Director Bob Nash became a suspected car thief because he was "Driving While Black". See also Regina Waynes Joseph, "Testimony Before the New Jersey Senate Judiciary Committee Special Investigation into Racial Profiling" (2001) 209 N.J. Law. 44.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ del Pozo, *supra* note 60 at 284.

crimes than women, for example) without controversy, however, racial profiling represents a different problem altogether.

While some supporters of profiling contend that members of a targeted community have nothing to fear from profiling because they will be exonerated if they are innocent, this is not necessarily the case.⁶⁷ The risk is that decision makers who believe themselves faced with sleeper cells and international conspiracies will interpret the facts before them through the lens of fear and will adopt a "better safe than sorry"⁶⁸ mentality whereby it is better to violate someone's rights than risk a terrorist incident. Over time, we become comfortable with our prejudices and determinations of risk become even more inextricably linked with stereotypes about Arabs and Muslims so that Arabness and Muslimness itself becomes a substitute for risk. The case of Walid Shater demonstrates the distorting impact of fear. Shater was ejected from American Airlines Flight 363 by the flight's pilot. There was very little that Walid Shater could do or say to convince the pilot that Shater was a secret service agent. Shater's case illustrates that there are significant parallels between Arab and Muslim experiences in the modern War against Terrorism and the experiences of Japanese Canadians during World War II. In both cases, decision makers have found themselves unable to screen loyal citizens individually from perilous enemies because the one category became psychologically, socially, and legally mingled with the other.⁶⁹

B. *Racial Profiling is Overinclusive or Generates False Positives*

Racial profiling is also over-inclusive by definition and thus generates false positives. By its nature, racial profiling requires law enforcement officials and others to cast a wide net of suspicion that entangles and harms those who are innocent of any wrongdoing. Often, those who face intersecting discrimination in society become most vulnerable in light of the over-inclusiveness problem. A study of racial profiling by the United States Customs Service reveals that African-American women were more likely to be detained for intrusive searches including strip searches and probes of their bodies, but were least likely of

⁶⁷ Ewanchuk, *supra* note 55.

⁶⁸ Commenting on the pervasiveness of this reasoning by those who justify anti-black racism, Patricia Williams notes that "to be safe is not to be sorry, and that to be safe is to be white and to be sorry is to be associated with blacks." Patricia Williams, "Spirit-Murdering The Messenger: The Discourse of Fingerprinting as the Law's Response to Racism" (1987) 42 U. Miami L. Rev. 127 at 137 [*Spirit-Murdering*].

⁶⁹ Leti Volpp, "The Citizen and the Terrorist" (2002) 49 UCLA L. Rev. 1575 at 1591.

those examined to be found with contraband. A black woman was twenty times more likely to be intensively searched than a white woman.⁷⁰

Over-inclusiveness in the context of the War against Terrorism takes various manifestations. For example, individuals who are wrongly identified as terrorists on the lists distributed by OSFI can suffer irreparable harm. Liban Hussein of Ottawa proves the case in point. A resident of Ottawa, Hussein is a Somali immigrant who ran a money-wiring business that sent funds to Somalia. On October 2, 2001, he was added to Canada's list of terrorist entities pursuant to the *United Nations Regulations*. Hussein was eventually cleared of any wrongdoing and taken off the list on June 3, 2002, following an RCMP investigation.⁷¹ Despite having his name officially removed from the list of terrorist entities, Hussein lost his home and his business. Consequently, he was forced to move his family to his mother's house. Moreover, due to out-of-date internet resources, he is still identified as a member of a terrorist organization.⁷² His reputation has been sullied beyond repair.⁷³

In addition to bearing losses because of frozen bank accounts, lost businesses, and ruined reputations, Arab and Muslims (and those who look like them) have reported other costs—such as being unable to fly to a dying relative's bedside because of racial profiling by airlines.⁷⁴ Individuals have missed job interviews and been declined opportunities to attend career-enhancing conferences. Arab employers in Windsor, Ontario, for example, have reportedly discriminated against Arab job candidates in favour of "[w]hite or Canadian" looking individuals because they do not want goods that they are transporting to the United States to be delayed at the borders.⁷⁵

The psychological harms that potentially accompany racial profiling are just as real and perhaps more lasting, than losing a business or missing a flight. Studies of "Driving While Black" cases in the United States have confirmed that individuals who are subjected to this practice feel fear and

⁷⁰ Letter of Alan Zaslavsky, Associate Professor of Statistics, Harvard Medical School, Department of Health Care Policy, to John Lewis, U.S. House of Representatives (19 May 1999) (on file with the author).

⁷¹ *Amendments*, *supra* note 31. Hussein's name was removed on June 3, 2002 (SOR/2002-210).

⁷² See for example "Fact Sheet: State Dept. Updates List of Terrorist Individuals and Groups," online: U.S. Department of State <<http://usinfo.state.gov/topical/pol/terror/02101506.htm>> (date accessed: 1 May 2003).

⁷³ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1175.

⁷⁴ Interview by Reem Bahdi, (April 2002) Burlington, Ontario. Name of interviewee withheld.

⁷⁵ Interview by Reem Bahdi, (December 2002) Windsor, Ontario. Name of interviewee withheld.

humiliation.⁷⁶ A study of the Arab and Muslim community during the Gulf War demonstrated that children in particular faced psychological harm when they and their community are under scrutiny as potential enemies.⁷⁷ There is no reason to assume that the psychological harms visited upon individuals as a result of post 9/11 racial profiling would be any different than the harms experienced during the Gulf War.

Legal doctrine and discourse, however, does not always comprehend psychological suffering and those who support racial profiling tend to trivialize the humiliation, fear, and loss of dignity that flow from racial profiling.⁷⁸ In an attempt to help widen understanding, feminist authors use the terms "spirit murder" and "spirit injury" to speak about the psychological harms perpetrated by racism and other forms of systematic oppression.⁷⁹ Patricia Williams defines spirit-murder as "a disregard for others whose lives qualitatively depend on our regard ... it is a system of formalized distortions of thought. It produces social structures centered around fear and hate."⁸⁰ Williams, now Professor of Law at Columbia University, recounts how a young white male clerk's refusal to let her into a store to buy a gift for her mother brought back a familiar rage, one borne of racism that she had first experienced in her childhood.⁸¹ Of course, some children can withstand racial slurs ("little terrorist," "sand nigger," or "camel jockey")⁸² even when these slurs come from teachers and authority figures who help define their world and are entrusted with giving children a sense of themselves. Others will remain scarred, however, and will

⁷⁶ See "Driving While Black: Racial Profiling On Our Nation's Highways" (June 1999) <<http://www.aclu.org/profiling/report/index.html>> at 21-22 (date accessed: 11 June 2003). Christopher Darden, prosecutor of the O.J. Simpson case, cautions that in order to survive a traffic stop, "Don't move. Don't turn around. Don't give some rookie an excuse to shoot you."

⁷⁷ Zuhair Kashmeri, *The Gulf Within: Canadian Arabs, Racism, and the Gulf War* (Toronto: J. Lorimer, 1991).

⁷⁸ For a discussion of law's treatment of suffering, see William E. Conklin, *The Phenomenology of Modern Legal Discourse: The Juridical Production and the Disclosure of Suffering* (Aldershot: Ashgate/Dartmouth Applied Legal Philosophy, 1998).

⁷⁹ Spirit-Murdering, *supra* note 68 at 151.

⁸⁰ Patricia J. Williams, *Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) at 73.

⁸¹ Spirit-Murdering, *supra* note 68 at 128-29.

⁸² Canadian Arab Federation, "Arabs in Canada: Proudly Canadian and Marginalized" at 18, online: Canadian Arab Federation <http://www.caf.ca/t_publications/Home%20Page/Full%20report%20final%20pdf.pdf> (date accessed: 1 May 2003).

struggle throughout their lifetimes with the image of themselves that others have helped create.⁸³

Over-inclusiveness not only generates harms for innocent people, it also risks alienating the Arab and Muslim communities in the War against Terrorism.⁸⁴ The point is not that Arabs and Muslims support terrorism by default or that they do not want to contribute to national and international anti-terrorism efforts. Rather, the point is that if the laws, policies, and practices that are in place to reach the professed end of fighting terrorism are perceived as ineffective and unjust, then individuals who hold such perceptions will be less likely to turn to them. Justice, as the old adage goes, must not only be done, but must be seen to be done.

Those who support racial profiling despite the over-inclusiveness problem tend to assume that more security necessarily entails less human rights. That is, racial profiling implicitly relies on a philosophical and policy framework that pits human rights and security.⁸⁵ Thus, if individuals suffer a loss of civil liberties, this is just the price we have to pay for the War against Terrorism: fewer human rights means more security. Thus, according to traditional security theorists, American Airline's decision to eject Walid Shater from his flight and denial of his rights are justified because individual rights must be traded-off for collective security. Some commentators, however, reject this zero-sum relationship between human rights and security. Mariana Valverde, for example, argues that security derives from the relationships that we cultivate with other people.⁸⁶ Application of this premise to the War against Terrorism has the potential to force a fundamental shift in security strategies. The relational theory of security brings back into view the vast majority of Arabs and Muslims in Canada who are not connected to terrorism. At the very least, the relational theory of security suggests that a person like Walid Shater, a secret service agent trained to identify and fight terrorists, is exactly the kind of person one would want on a flight if one is concerned about terrorism.

⁸³ See *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at 855. The Court emphasized the importance of a teacher's words in defining the self-image of children.

⁸⁴ David Harris, "Flying While Arab," Immigration Issues, and Lessons From The Racial Profiling Controversy," online: United States Commission on Civil Rights <<http://www.usccr.gov/pubs/tragedy/imm1012/harris.htm>> (date accessed: 1 May 2003).

⁸⁵ Mariana Valverde, "Governing Security, Governing Through Security," in Daniels, Macklem, & Roach, *supra* note 2, 83 at 83.

⁸⁶ *Ibid.*

C. *Racial Profiling Is Underinclusive or Generates False Negatives*

At its root, racial profiling allows decision makers to focus their time and resources on a particular segment of the population that purportedly poses a higher risk than another segment of the population.⁸⁷ Such an approach may make sense if the world of terrorism were a frozen laboratory where past events could be relied upon as indicators of future risk. Terrorism, however, thrives on surprises. The focus on Al Qaeda in the War against Terrorism proves understandable from a psychological perspective given the devastation caused by Osama Bin Laden on 9/11 alone and given his reported connection to other terrorist attacks. However, Osama Bin Laden does not hold a monopoly on violence. Although Al Qaeda perpetrated the events of 9/11, Al Qaeda is but one of wider number of organizations designated as terrorist groups by the Office of Counter Terrorism in the United States and CSIS prior to the 9/11 attacks.⁸⁸

Threats of domestic terrorism, for example, have been all but forgotten in the current flurry of public interest over global terrorism even though the threat of domestic terrorism, including terrorism perpetrated by former and active American military personnel, remains on the horizon. Of course, prior to 9/11, Timothy McVeigh launched the single most devastating terrorist attack on American soil when he helped blow up the Murrah Federal Building on April 19, 1995 in Oklahoma City, killing 169 people, including children from a daycare inside the building. However, as Leti Volpp notes, "Timothy McVeigh did not produce a discourse about good whites and bad whites because we think of him as an individual deviant, a bad actor. We do not think of his actions as representative of an entire racial group."⁸⁹

Even if Al Qaeda and Arab terrorists did represent the only terrorist threat, racial profiling would not prove effective. Simply judging someone on the basis of their looks, religion, or nationality can be misleading simply because neither race, religion, nor nationality assume a quintessential form. Those who advocate in favour of racial profiling assume that racial identifiers are easy to locate. But, the popular image of

⁸⁷ *Supra* note 60.

⁸⁸ See for example, U.S. Department of State, "Background Information on Foreign Terrorist Organizations," (8 October 1999) online: Department of State <http://www.state.gov/www/global/terrorism/fto_info_1999.html#kach> (date accessed: 1 May 2003), and the annual public reports of CSIS available online: <http://www.csis-scrs.gc.ca/eng/publicrp/pubreps_e.html> (date accessed: 1 May 2003).

⁸⁹ *Supra* note 69 at 1585.

the Arab or Muslim man—olive-skinned, brown-eyed, curly-haired, often moustache-sporting—is a stereotype and fails to appreciate that only approximately 20 per cent of Muslims are Arabs.⁹⁰ Terrorists, moreover, will not likely travel on their own documents nor will they carry documents such as texts written in Arabic or business cards that may raise suspicion or may associate them with Muslim groups. Nor will a terrorist likely present herself in *hejab*.

Yet, profiling relies to a large extent on the way an individual looks and the documents they are carrying. The one true lesson of 9/11 is that those who perpetrated the attacks were organized and well-informed. They must know about racial profiling. Would they not know how to circumvent racial profiling? In planning the next terrorist attack, if there is to be one, would Al Qaeda not simply send in someone who does not fit the profile? These questions are simple ones to ask. Like the child in Hans Christian Anderson's story, we must be willing to declare when the security emperors have no clothes.⁹¹ As Professor Nelson Lund has put it, "It should be obvious by now that it is perfectly conceivable that Al Qaeda can even recruit the occasional white youth from Marin County, California."⁹²

IV. RACIAL PROFILING AND RACISM

While racial profiling differs from hate crimes and racial harassment, it is also constitutive of hate crimes and harassment.⁹³ In some instances, one can draw a direct link between racial profiling and hate or harassment. Although "Driving While Black" cases only began to capture scholarly and popular attention relatively recently in the United States, the practice is quite established. In the civil rights era, for example, traffic offences were used constantly as a pretext to stop and detain black activists.⁹⁴ Such incidents illustrate that racial profiling can be a direct instrument of hatred and harassment.

⁹⁰ "Arab World Studies Notebook: Muslims Worldwide," online: Middle East Policy Council <http://www.mepec.org/public_asp/workshops/musworld.asp> (date accessed: 1 May 2003).

⁹¹ Valverde, *supra* note 85, argues that Canadians should be willing to question our security experts.

⁹² Nelson Lund, "The Conservative Case Against Racial Profiling In The War Against Terrorism" (2003) 66 Alb. L. Rev. 329 at 339. Lund also discusses the problems that racial profiling created for police hunting the Washington D.C. sniper.

⁹³ Muneer Ahmad, "Homeland Insecurities: Racial Violence the Day After September 11" (2002) 72 (20:3) Soc. Text 101.

⁹⁴ Trende, *supra* note 8 at 334.

In other instances, racial profiling and hate share a more complex relationship wherein racial profiling lowers a society's tolerance for certain forms of hate and harassment. Racial profiling makes people feel comfortable with their prejudices and grants those who hold pre-existing racist attitudes permission to express those attitudes and expect them to be taken seriously. It empowers individual prejudices and fuels popular fear. Thus, for example, the flight attendant who reported Walid Shater to the American Air Lines pilot found Shater's presence alarming because she thought he was reading a book with Arabic script. The passenger sitting next to Shater on the flight from which he was ejected, however, found his conduct completely innocuous.

Almost immediately following 9/11, anti-Arab and anti-Muslim sentiment rose in Canada, likely fueled by speculation that the Canada represented a weak link in the North American "security perimeter."⁹⁵ The Council on American-Islamic Relations and the Canadian Muslim Civil Liberties Association, recorded 110 incidents of harassment, threats, death threats, attacks on personal property, physical assaults, and attempts to burn down Islamic centres and places of worship in the two months following 9/11.⁹⁶ Police in Ottawa and Calgary reported that 'hate crimes doubled in the thirty-day period after the terrorist attacks while police in Montreal, Calgary, and Ottawa reported forty, twenty-four, and forty-four hate-related incidents, respectively.⁹⁷

Increases in public suspicion of Arabs and Muslim in Canada are undoubtedly spurred by the rising anti-Arab animus in the United States. In the weeks following 9/11, the United States Commission on Civil Rights set up a hotline to handle claims of discrimination and harassment. Shortly after the hotline's installation, the number of calls reached approximately seventy per hour.⁹⁸ The FBI reported that anti-Muslim hate crimes rose by a dramatic 1,600 per cent between 2001 and 2003.⁹⁹ Louisiana Congressman John Cooksey perhaps best expressed Arab- and Muslim-phobia in the

⁹⁵ See Audrey Macklin, "Borderline Security" in Daniels, Macklem, & Roach, *supra* note 2, 383 for a discussion of understandings of the border in the context of the perceived link between immigration and terrorism.

⁹⁶ "Interim Report Card on Anti-Muslim Hate, Warns of Racial Profiling Under Bill C-36," online: Council on American-Islamic Relations <http://www.ottawamuslim.net/Feature_cair_reportcard.htm> (date accessed: 1 May 2003).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ See "Report on Hate Crimes & Discrimination Against Arab Americans: The Post-September 11 Backlash," online: American-Arab Anti-Discrimination Committee <http://www.adc.org/hate_crimes.htm> (date accessed: 1 May 2003).

United States when made the following remarks in a in a state-wide radio address.

The terrorist had a different look, a different face If I see someone (who) comes in that's got a diaper on his head and a fan belt wrapped around the diaper on his head, that guy needs to be pulled over ...¹⁰⁰

Those people who argue in favour of profiling on the basis of nationality or citizenship as opposed to race tend to miss the connection between profiling and hate crime.¹⁰¹ True, there is an important legal distinction to be made between nationality or citizenship and race in some context. For example, section 6 of *Charter* limits mobility rights to citizens. However, this distinction in the context of the war against terrorism appears rather flimsy because national profiling still requires that individuals from a certain racial group remain the focus of scrutiny and suspicion.¹⁰² As the Supreme Court of Canada has said in another context: Whether all members of the group attract special scrutiny proves irrelevant just as pregnancy discrimination constitutes gender discrimination regardless of whether all women are subject to it.¹⁰³ National profiling is still racial profiling, albeit in allegedly scaled down form, and there is no reason to assume that ethnic profiling will be any less implicated in a cycle of hate and stereotyping than racial profiling of Arabs and Muslims regardless of citizenship.

To some people, the harms faced by individuals may be justified as an appropriate price to pay in the War against Terrorism. Indeed, the harms may appear insignificant in relation to the objective of fighting terrorism. However, consequences that may appear insignificant when viewed in isolation or from an abstract individual perspective become deeply problematic when viewed from a community perspective of systematic exclusion.¹⁰⁴ Racial profiling fuels the conviction that Arabs and Muslims represent the foreigner within, regardless of their citizenship

¹⁰⁰ Cooksey later apologized for his comments. "Politician Apologises For 'Diaper On His Head' Remark," (21 September 2001) online: Ananova <http://www.ananova.com/news/story/sm_404894.html> (date accessed: 1 May 2003).

¹⁰¹ See Gross & Livingston, *supra* note 61 at 1419 for a brief discussion of this argument.

¹⁰² *Supra* note 52 at 195 (per La Forest J.).

¹⁰³ See *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

¹⁰⁴ See for example, *Law*, *supra* note 15 at 533-34 where the Court observes that "[e]quality analysis under the *Charter* is concerned with the perspective of a person in circumstances similar to those of the claimant."

status.¹⁰⁵ Racial profiling excludes Arabs and Muslims from “those who are imagined by the community as belonging to the community.”¹⁰⁶ “The subtext is that Muslims are a foreign element, aliens ... with no tenure to citizenship, that they are here as sleeper terrorists ...”¹⁰⁷ Ultimately, the relationship between racial profiling and racism casts serious doubt on both the wisdom and efficacy of racial profiling as an arsenal in the War against Terrorism.

V. CONCLUSION

Racial profiling represents a quest for simple answers to immensely complicated questions. Unfortunately, there are no easy ways to prevent terrorism.¹⁰⁸ We will continue to live with some level of uncertainty in a post 9/11 world, perhaps reaffirming Jean-Paul Sartre’s claim that “hell is other people.”¹⁰⁹ Yet, those who turn to racial profiling as an anecdote for uncertainty will find neither solutions nor comfort. Racial profiling will produce only illusions of security while heightening the disempowerment and sense of vulnerability of racialized groups in Canada. There is no exit.

¹⁰⁵ Transnationality represents a double-edged sword. “We should remember that the idea of transnationality is not solely one where immigrants function as agents in maintaining diasporic ties, but can be one where a state or its people brands its citizens with foreign membership, extraterritorializing them into internment camps, or ejecting them from membership through violence against their bodies.” *Supra* note 69 at 1597-98.

¹⁰⁶ *Ibid* at 1592.

¹⁰⁷ Michelle MacAfee, “Arab and Muslim Canadians Endure Year of Collective Blame” (24 September 2002) online: The Canadian Press <<http://cnews.canoe.ca/CNEWSSept11/arab-cp.html>> (date accessed: 1 May 2003).

¹⁰⁸ My article should not be interpreted to mean that there should be no War against Terrorism if that means finding those who were directly responsible for the events of September and preventing further attacks. My point is simply that racial profiling is neither rational nor necessary in the War against Terrorism.

¹⁰⁹ *Supra* note 1 at 111..

