

Working Paper: Critical Racial Profiling

*Joshua Sealy-Harrington**

... the unwritten law of the back districts and small towns of the South, that the character of all Negroes unknown to the mass of the community must be vouched for by some white man ... the refusal of whole communities to recognize the right of a Negro to change his habitation and to be master of his own fortunes. A black stranger in Baker County, Georgia, for instance, is liable to be stopped anywhere on the public highway and made to state his business to the satisfaction of any white interrogator. If he fails to give a suitable answer, or seems too independent or “sassy,” he may be arrested or summarily driven away.

W. E. B. Du Bois, *The Souls of Black Folk* (1903)

... as I smoked a cigarette outside a local community centre on Bloor West near Dufferin, a police officer sat parked in his car, glaring at me and scribbling notes. After five minutes of this, I walked over to his cruiser. “Is there a problem, officer?” I asked. The cop, a 30-something white guy, asked, “Oh, are you lost? You look like you’re lost.” His response was so ridiculous I almost laughed in exasperation, but instead I just repeated that I was fine. After a brief pause the officer rejoined, “Really? ’Cause you seemed lost.” I had to remind myself that I wasn’t going crazy. “I know why you’re doing this,” I told him before dashing my cigarette and going back inside. Whether it was motivated by ignorance, training, police culture or something else, the officer’s behaviour sent a clear message: I didn’t belong.

Desmond Cole, *The Skin I’m In* (2015)

This working paper briefly outlines a Critical Race Theory (CRT) analysis of police racial profiling.

Racial profiling is a way in which racism manifests in policing. Accordingly, to understand what “racial profiling” means, we must first understand what “racism” means.

Racism can be understood, broadly speaking, in two ways: liberal (i.e., the traditional civil rights discourse definition) and critical (i.e., the CRT definition).¹

* Lawyer at Power Law and J.S.D. student at Columbia Law School.

¹ Khiara M Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019) at 36-37.

The liberal—or, narrow—conception of racism limits it to discrete, identifiable, intentional, and irrational acts by bad actors.² For example, if an individual police officer pulls over a driver simply because he is Black, then it satisfies the liberal definition of racism. This is often what one thinks of when racial profiling is discussed—a liberal definition that presupposes a just system, which is occasionally undermined by specific racist acts committed by, as the saying goes, “bad apples.”³

In stark contrast, the critical—or, broad—conception of racism defines it as widespread, often subtle, often unintentional, and often “rational” acts (i.e., acts that are logically understandable, if not morally problematic).⁴ A system of policing that concentrates police forces within low-income communities such that Black people are disproportionately pulled over for minor traffic infractions satisfies the critical definition of racism. This is what some progressive scholars would include within the scope of racial profiling—a critical definition that recognizes how the system itself has racially disparate consequences, such that individual racist acts continue, rather than contradict, the pre-existing racism of that system. This is what I will call “critical racial profiling”, and it must be within our frame of reference when we theorize racist policing.

As CRT scholar Khiara M. Bridges notes, the liberal definition of racism is incomplete:

When racism is only understood as bias or prejudice practiced by a bad actor, it puts outside of the field of vision all of the institutions and structures that function to maintain what critical thinkers perceive to be the nation’s current racial hierarchy.⁵

Indeed, the liberal and critical definitions of racism delineate two distinct inquiries for our theoretical understanding of racial profiling. Liberal profiling asks: was the individual officer motivated by racism? (A largely subjective inquiry.) In contrast, critical profiling asks: does the policing system disparately impact racialized communities? (A largely objective inquiry.) These are fundamentally different questions, generating profoundly different understandings of what “racial profiling” means.

At first blush, critical racial profiling may appear overbroad, even unworkable. But some basic examples complicate this claim:

Scenario	Liberal Racial Profiling?	Critical Racial Profiling?
A police officer pulling over a driver because the driver is Black	Yes	Yes
A sting operation that posts exclusively on social media platforms that happen to be frequented by Black people	Maybe?	Yes

² Khiara M Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019) at 36.

³ See e.g. Frances Henry and Carol Tator, “Racial Profiling in Canada: Challenging the Myth of ‘A Few Bad Apples’” (2006: UT Press).

⁴ Khiara M Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019) at 37.

⁵ Khiara M Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019) at 38.

A police department that concentrates its surveillance efforts on low-income neighbourhoods	No	Yes
---	----	-----

The table above is deliberately oversimplified, of course. Given the distinct inquiries listed above the table, whether something qualifies as “liberal” or “critical” racial profiling depends on how one defines fluid concepts like “race”, “motive”, and “disparate.” Further, those distinct inquiries rely on a false—yet still instructive—dichotomy between individuals and systems which are, on closer examination, mutually informing. Nevertheless, the table above helps to illustrate how, while liberal racial profiling tends to be concerned with “malicious actors”, critical racial profiling tends to be concerned, not only with those individual actors, but more importantly, with “systems and structures”⁶—that is, how policing itself can be understood as the institutionalization of racial profiling.

Analyzing the propriety of policing structures is undoubtedly complex. At a minimum, it is certainly more complex than simply assessing whether an individual officer was motivated by racism in a particular case. And that analysis is only further complicated by the inevitable overlap of race with class. For example, if cities overpolice gentrifying neighbourhoods,⁷ that pattern will not only disparately target low-income people. Rather, given the overrepresentation of racialized people in lower income brackets, the overpolicing of gentrifying communities will necessarily target racialized people as well. In this way, classist policing is, by necessity, racist policing.

Despite this complexity, though, interrogating systems of subordination is integral to racial justice. Indeed, limiting one’s conception of racism and racial profiling to a liberal vision is “woefully inadequate.”⁸ This is because the liberal vision of profiling—i.e., intentional and individual racist police stops—only explains a fraction of how policing disparately impacts racialized communities, and in particular, Black and Indigenous communities. This disparate impact is a complex phenomenon, beyond the scope of this brief essay. But one important aspect of this phenomenon is that it persists even in contexts where racialized people commit similar rates of crime. As Michelle Alexander writes, in the American context:

Studies show that people of all colors use and sell illegal drugs at remarkably similar rates. ... That is not what one would guess, however, when entering our nation’s prisons and jails, which are overflowing with black and brown drug offenders. In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men.⁹

While some of this disparity is the result of liberal racial profiling, much of this disparity is the consequence of critical racial profiling—that is, broader policing structures, which

⁶ Khiara M Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019) at 39 [emphasis removed].

⁷ Abdallah Fayyad, “The Criminalization of Gentrifying Neighbourhoods” (2017) *The Atlantic*, online: <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.

⁸ Khiara M Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019) at 37.

⁹ Michelle Alexander, *The New Jim Crow* (2012) at 7.

disproportionately target racialized communities across the United States. As scholar Paul Butler notes: “If the police patrolled white communities with the same violence that they patrol poor black neighborhoods, there would be a revolution.”¹⁰ And as scholars Rose Brewer and Nancy Heitzeg observe, this fundamentally racist policing is sanitized through coded forms of racial profiling:

[T]he reliance on the criminal system provides the color-blind racist regime the perfect set of codes to describe racialized patterns of alleged crime and actual punishment without ever referring to race. ... There is no discussion of race and racism; there is only public discourse about crime, criminals, gangs, and drug-infested neighborhoods.”¹¹

Canada, too, deploys racist policing strategies,¹² which Robyn Maynard has explored in detail in *Policing Black Lives*,¹³ and which the *Hidden Racial Profiling Project* will hopefully shed further light on.¹⁴ Consider, for example, the police practice of “carding” (a euphemism for racist police stops). In his moving essay *The Skin I’m In*, Desmond Cole defined carding as “a controversial practice that disproportionately targets young black men and documents our activities across the city ... Cops stop us on the street, demand identification, and catalogue our race, height, weight and eye colour.”¹⁵ The rate of disproportion astounds—based on 2013 statistics, Black men like Cole were *17 times* more likely than a white person to be carded in Toronto’s downtown core.¹⁶ By 2015, Cole recounted that he had been stopped “at least 50 times by the police in Toronto, Kingston and across southern Ontario.”¹⁷ The cumulative effect of these stops was appalling:

I expect it could happen in any neighbourhood, day or night, whether I am alone or with friends. These interactions don’t scare me anymore. They make

¹⁰ Paul Butler, *Chokehold: Policing Black Men* (2017) at 3.

¹¹ Rose M. Brewer & Nancy A. Heitzeg, “The Racialization of Crime and Punishment” (2008) 51 *Am. Behav. Scientist* 625 at 633.

¹² See e.g. “A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service” (2020) *Ontario Human Rights Commission*, online: <http://www.ohrc.on.ca/sites/default/files/A%20Disparate%20Impact%20Second%20interim%20report%20on%20the%20TPS%20inquiry%20executive%20summary.pdf#overlay-context=en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>.

¹³ Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to Present* (2017).

¹⁴ Aidan Macnab, “Western Law racial profiling research project to connect Charter breaches to race factor” (2020) *Law Times News*, online: <https://www.lawtimesnews.com/practice-areas/human-rights/western-law-racial-profiling-research-project-to-connect-charter-breaches-to-race-factor/332871>.

¹⁵ Desmond Cole, “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black” (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

¹⁶ Desmond Cole, “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black” (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

¹⁷ Desmond Cole, “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black” (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

me angry. Because of that unwanted scrutiny, that discriminatory surveillance, I'm a prisoner in my own city.¹⁸

Indeed, racist police practices have profound consequences. One might argue that carding, for example, results in nothing more than the inconvenience of presenting the police with your ID. This view is, however, demonstrably false.

First, racist policing strategies have significant carceral consequences. For instance, in the Ontario Human Rights Commission's latest report, Black people represented 37.6% of cannabis charges despite many studies demonstrating that Black people use cannabis at similar rates to white people.¹⁹ Policing, then, must be unevenly distributed in a manner that disproportionately targets racialized people. As Robyn Maynard astutely notes, this asymmetric policing not only detects criminals, but creates them: "It is Black people who will be made into criminals by the very policing strategies that target them."²⁰ And, of course, various social and economic disadvantages result from this increased criminalization (e.g., economic hardship, social stigmatization, childhood trauma and underdevelopment, and family dissolution).²¹

But racist policing also results in significant psychological consequences, separate and apart from increased risk of incarceration. Specifically, racist police stops create a "climate of constant surveillance" in low-income and racialized communities.²² In turn, carding performs a "ritual of dominance and submission"²³ that serves a pernicious pedagogical function:

[T]hey are designed to teach the people of color who must be obsequious, as well as the people of color who bear witness to this obsequiousness, that the state is powerful and everywhere and that the individual is insignificant and easily destroyed.²⁴

This 'surveillance theatre' is not trivial—rather, it results in a host of mental health consequences (e.g., humiliation, fear, anger, depression, frustration, helplessness, nervousness, worthlessness, anxiety, trauma, and distress).²⁵ Indeed, Cole's harrowing account is suggestive of many of these

¹⁸ Desmond Cole, "The Skin I'm In: I've been interrogated by police more than 50 times—all because I'm black" (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/> [emphasis added].

¹⁹ *Ibid* at 6.

²⁰ Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to Present* (2017) at 87.

²¹ Scot Wortley & Akwasi Owusu-Bempah, "Steet Checks, Racial Profiling and Police-Community Relations: A Review of the Research Literature" (2019) *Report for the Nova Scotia Human Rights Commission*, online: <https://humanrights.novascotia.ca/sites/default/files/editor-uploads/appendixab.docx> at 114.

²² Desmond Cole, "The Skin I'm In: I've been interrogated by police more than 50 times—all because I'm black" (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

²³ Michelle Alexander, *The New Jim Crow* (2012) at 136.

²⁴ Khiara M Bridges, *Critical Race Theory: A Primer* (St. Paul, MN: Foundation Press, 2019) at 402 referring to Paul Butler, *Chokehold: Policing Black Men* (2017) at 108.

²⁵ Scot Wortley & Akwasi Owusu-Bempah, "Steet Checks, Racial Profiling and Police-Community Relations: A Review of the Research Literature" (2019) *Report for the Nova Scotia Human Rights Commission*, online: <https://humanrights.novascotia.ca/sites/default/files/editor-uploads/appendixab.docx> at 110-117.

documented harms,²⁶ which Maynard calls “a form of violence” that “infringes on Black people’s ability to move freely and without fear in public space.”²⁷ Moreover, Cole’s account describes how small intra-community rituals—like affectionately greeting Black strangers he comes across to acknowledge a certain shared experience—can, in direct contrast, create non-trivial comfort and reassurance.²⁸ I have, likewise, participated in such rituals (what I have long called the “Black Man Head Nod”) throughout my life as a subtle form of resistance to racial exclusion in majority white spaces.

In one sense, racial profiling draws on racist tropes and narratives,²⁹ which, of course, is enough to refute its legitimacy as a practice. As I have previously observed: “race is a story.”³⁰ And profiling often functions through the use of dominant cultural narratives as a means of manufacturing a “foggy lens of suspicion”,³¹ supposedly warranting police investigation: the Black man in the nice car he could not possibly afford; the Black woman in the wealthy suburb she could not possibly live in; the Black man walking with a white woman who he could not possibly be friends with; even just Black folks existing in a city where some think they simply do not belong.³² And, of course, the overarching narrative of Black criminality—the “public associations between Blackness and crime”³³—can mean that any Black person, no matter their circumstance, is a presumed suspect (which Cole’s serial stops clearly reveal in his case).³⁴

The role of narrative in policing can be seen in how gentrification brings increased police presence. This is because, as more white high-income people move into racially diverse spaces, “activity that was previously considered normal becomes suspicious”, a consequence of “newcomers refusing to assimilate to longstanding neighborhood norms.”³⁵ Indeed, a racist roommate I was unfortunately compelled to live with at the beginning of the COVID-19 pandemic often lamented innocuous practices of Black people in our community (e.g., loitering, music), despite moving to—and gentrifying—the majority Black neighbourhood where we all lived (Flatbush, Brooklyn).

²⁶ Desmond Cole, “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black” (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

²⁷ Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to Present* (2017) at 88.

²⁸ Desmond Cole, “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black” (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

²⁹ Relatedly, the legal scrutiny of racial profiling, too, turns on “the narrative presented to the court”; see David Tanovich, “The Further Erasure of Race in *Charter* Cases” (2006) 38 CR (6th) 84.

³⁰ Joshua Sealy-Harrington, “Untelling the Story of Race” (2020) *The Walrus*, online: <https://thewalrus.ca/untelling-the-story-of-race/>.

³¹ Desmond Cole, “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black” (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

³² For a real-life account including many of these narratives in action prompting unwarranted intervention, see Desmond Cole, “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black” (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

³³ Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to Present* (2017) at 85.

³⁴ Desmond Cole, “The Skin I’m In: I’ve been interrogated by police more than 50 times—all because I’m black” (2015) *Toronto Life*, online: <https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

³⁵ Abdallah Fayyad, “The Criminalization of Gentrifying Neighbourhoods” (2017) *The Atlantic*, online: <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.

But the injustice of racial profiling is not simply how it reflects pernicious racial narratives in society. Rather, on a more profound level, racial profiling is unjust because it creates those narratives—that is, how profiling racializes crime itself. This occurs through various feedback loops, which transition from racial profiling, to racial arrests, to racial incarceration. In this respect, Butler is, again, instructive: “It’s not a question of how many people are committing the crime—it’s a question of where the police are directing their law-enforcement resources . . . Because wherever they direct the resources, they can find the crime.”³⁶ In this way, “racial profiling can become a self-fulfilling prophesy”³⁷—the social construction of crime as a racial object in and of itself.

Elements of both liberal and critical profiling are present in Canadian jurisprudence, such that both should be considered from the standpoint of legal advocacy. For this reason, I would urge practitioners to broadly imagine what they name “racial profiling.” Only an expansive interpretation of profiling can comprehensively address the racial inequities in our criminal justice system—inequities which, as the opening quote from W. E. B. Du Bois makes painfully clear, remains largely in tact after over a century. With that in mind, the social context, not only of the specific police encounter, but the broader policing strategy behind that encounter, are, in my view, both essential to a comprehensive analysis of racial profiling in any given case.

Charter challenges are typically individual in nature. In this way, there are certain structural limitations on what the law can do in terms of advancing systemic racial justice and resisting racist police strategies. But it is nonetheless critical to expand our understanding of what racial profiling means, and how to respond to it. Narrowly construing racial profiling fundamentally misunderstands its location in the broader architecture of white supremacy. In Andray Domise’s words:³⁸

When people see racial profiling as a benign accident at best, and bad actors tainting an otherwise good system at worst, its intended purpose is so obscured that we must discuss every offense, every case, every murder, every denial of our humanity as a one-off incident that forms no recognizable pattern of behaviour. Much less a structural tool of a system predicated on keeping Black people in a state of forced obsequiousness, no matter how high we rise within that system, or how powerful we may appear to be.

³⁶ Abdallah Fayyad, “The Criminalization of Gentrifying Neighbourhoods” (2017) *The Atlantic*, online: <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.

³⁷ Scot Wortley & Akwasi Owusu-Bempah, “Street Checks, Racial Profiling and Police-Community Relations: A Review of the Research Literature” (2019) *Report for the Nova Scotia Human Rights Commission*, online: <https://humanrights.novascotia.ca/sites/default/files/editor-uploads/appendixab.docx> at 113.

³⁸ Andray Domise, “The racial profiling of Masai Ujiri” (17 June 2019) *Macleans*, online: <https://www.macleans.ca/opinion/the-racial-profiling-of-masai-ujiri/>.

The *Charter* forbids unreasonable searches;³⁹ but critical racial profiling is unreasonable. The *Charter* forbids arbitrary detention;⁴⁰ but critical racial profiling is arbitrary. The *Charter* forbids racial discrimination;⁴¹ but critical racial profiling is discriminatory. It follows that the constitution's promises cannot be secured without a critical mass of justice system participants seeking to hold the government to account.

³⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 s 8.

⁴⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 s 9.

⁴¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 s 15.