RACIAL AND ETHNIC PROFILING: STATUTORY DISCRETION, CONSTITUTIONAL REMEDIES, AND DEMOCRATIC ACCOUNTABILITY©

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Given the prominence of the issue of racial, ethnic, and religious profiling in the public debate about terrorism, it is significant that Canada's two legislative responses to September 11 – the *Anti-terrorism Act* and the proposed *Public Safety Act* – are silent on the issue, neither explicitly authorizing profiling nor expressly banning it. In this article, we focus on the constitutional remedies available for profiling in the face of these statutory silences, and the implication that the choice of remedies holds for both remedial efficacy and democratic accountability. Contrary to the position held by the majority of the Supreme Court in *Little Sisters v. Canada*, we argue that if profiling were to take place pursuant to an exercise of statutory discretion, the statute itself should be constitutionally challenged and struck down because the infringement of the right to equality is not "prescribed by law." The result would be to force the issue of profiling back onto the legislative and democratic agenda. By contrast, focusing the challenge on the exercise of discretion would trigger remedies under section 24 that would be largely ineffective and retrospective, which would not trigger democratic debate.

Étant donné la prépondérance de la question du profilage racial, ethnique et religieux dans le débat public sur le terrorisme, il est révélateur de constater que les deux réactions législatives du Canada au 11 septembre - La *Loi antiterrorisme* et la proposition de *Loi sur la sécurité publique* - ne disent mot sur la question, n'autorisant pas plus explicitement le profilage qu'elles ne l'interdisent. Dans cet article, et face à ce silence du législateur, nous nous intéressons aux recours constitutionnels possibles contre le profilage, ainsi qu'aux implications qu'aura le choix de recours sur l'efficacité corrective et sur la responsabilité démocratique. Contrairement à l'optique de la majorité des magistrats de la Cour Suprême dans l'affaire *Little Sisters contre le Canada*, nous arguons que si le profilage se produisait à la suite de l'exercice d'un pouvoir discrétionnaire fixé par la loi, cette loi même devrait faire l'objet d'une objection constitutionnelle et être abrogée, car l'aliénation du droit à l'égalité n'est pas "prescrite par la loi." Ainsi, la question du profilage reviendrait de force sur le calendrier législatif et démocratique. En revanche, se cantonner à faire objection à l'exercice du pouvoir discrétionnaire ne ferait qu'occasionner des recours en vertu de l'article 24, recours qui seraient largement inefficaces et rétrospectifs, et ne susciteraient pas de véritable débat démocratique.

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* Faculty of Law, University of Toronto. The authors wish to thank Les Jacobs, Ira Parghi, Lorne Sossin, Don Stuart, Joseph Arvay, and an anonymous reviewer for helpful comments; Tom Archibald, Rebecca Jones, Roy Lee, and Jagjit Singh for speedy research assistance; Bernadette Mount for superb editorial assistance, and the Faculty of Law, University of Toronto for financial support. An earlier version of this paper was presented at "The *Charter* at Twenty: A Conference Commemorating the Twentieth Anniversary of the *Canadian Charter of Rights and Freedoms*," at York University, in April 2002. The usual disclaimer applies.

I. INTRODUCTION: EQUALITY IN THE FACE OF TERROR

It has often been said that the central challenge for liberal democracies in the "war on terror" is how best to strike a balance between the need to protect security and maintaining respect for the very freedoms that that war seeks to defend. But just as history teaches us the chilling lesson that freedom is often the first victim of war, it also reminds us that equality is frequently an early casualty. Indeed, to a considerable extent, the threats to equality and freedom are linked. Deprivations of liberty and privacy, although felt to some extent by the populace as a whole, are often distributed unevenly along lines of race, class, and religion. History demonstrates a yawning gap between the rhetoric of common sacrifice and solidarity and the lived experience of inequality on the ground. The forcible internment of Japanese Canadians during the Second World War—an indelible stain on the national conscience—is a tragic case in point.

Fortunately, the forcible internment of vast numbers of North American residents is not on the agenda in the wake of the horrific events of September 11, 2001. However, racial, religious, and ethnic profiling[1] has entered into the jargon of some parties most supportive of the war on terrorism. In brief, profiling is the use of race, religious, or ethnicity either as the sole reason, or as one factor among many, in a decision to detain or arrest an individual, or to subject an individual to further investigation. Whether used as the sole factor, or one factor among many, profiling allows race, religion, or ethnicity to play a determinative factor in investigative decisions.[2] Profiling likely contravenes section 15 of the *Charter*[3] and faces significant hurdles under the minimal

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[1] For the remainder of this article, "profiling" refers to racial, ethnic, and religious profiling.

[2] For a detailed definition of profiling that explains the different uses to which ethnicity and race can be put in the investigative context, see 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 at 368-70.

[3] *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 [*Charter*].

impairment branch of the *Oakes*[4] test for section 1.[5] This article focuses on a different issue: the constitutional remedies available for profiling, and the implications that the choice of remedies holds for both remedial efficacy and democratic accountability.

Given the prominence of profiling in public debate, it is stunning that Canada's two legislative responses to September 11—Bill C-36, the *Anti-terrorism Act*[6] and Bill C-17, the proposed *Public Safety Act*[7]—are absolutely silent on this issue. The bills neither explicitly authorize profiling nor expressly ban it. Moreover, opportunities for clarification were available but not seized upon. For example, during the debates surrounding the enactment of Bill C-36, both the Special Senate Committee on Bill C-36 and Liberal Member of Parliament and constitutional scholar Irwin Cotler proposed that the bill be amended to include a non–discrimination clause that would have had the effect of banning profiling.[8] Unfortunately, such a clause did not form part of the government's amendments.

Should profiling be held to violate a *Charter* right, the absence of an explicit authorization of profiling in Bills C-36 and C-17 has important legal implications with respect to possible attempts to justify profiling under section 1 of the *Charter*, as well as the remedies available should profiling fail the test of justification. In broad strokes, there are two different tracks available depending on the source of the constitutional violation—which we term "track 1" and "track 2." The two tracks differ dramatically both in terms of their remedial efficacy and their ability to enhance democratic accountability for constitutionally controversial policies.[9]

In cases where a right is violated by a "law" (legislation or regulations), track 1 is the route that must be followed. The government may first argue that the violation can be justified under section 1 of the *Charter*. The threshold requirement that the limitation be "prescribed by law" would be easily met if the law itself violates a constitutional right. The heart of the section 1 analysis turns

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[4] *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*].

[5] *Charter*, *supra* note 3, s. 1. The constitutionality of profiling is discussed in Choudhry, *supra* note 2.

[6] S.C. 2001, c. 41 [Bill C-36].

[7] Bill C-17, *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety*, 2nd Sess., 37th Parl., 2002 (2nd Reading 31 October 2002) [Bill C-17].

[8] Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in Daniels, Macklem & Roach, *supra* note 2, 111 at 119; Canada, Senate, Special Senate Committee on the Subject Matter of Bill C-36, *First Report* (1 November 2001).

[9] This framework was first set out by Justice Lamer in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 [*Slaight*], and was subsequently applied by the Court in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 and *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

on whether that limitation is a "reasonable limit that is demonstrably justified in a free and democratic society." If the law fails the test of justification, then a range of remedies anchored in section 52(1) becomes available. These include declarations of invalidity (perhaps subject to a period of delay), narrowing the scope of the law through reading down, severance of the offending portion of the legislation, a constitutional exemption, or extending the law through reading-in or through severance. Although diverse, section 52(1) remedies share one feature in common—they change the law that has been found to be unconstitutional. Moreover, a section 52(1) remedy is usually not the last word, because a full or partial declaration of invalidity quite frequently prompts a legislative "reply."[10]

If profiling were explicitly authorized by Bills C-36 or C-17, track 1 would apply. However, since both pieces of legislation are silent on profiling, if such practices were to take place, they would occur through the exercise of law enforcement discretion, and would proceed down track 2. Track 2 covers both unconstitutional decisions taken pursuant to a law that itself raises no constitutional objections (for example, a law granting a general discretion), as well as unconstitutional acts without any statutory or common law basis (for example, an unauthorized warrantless search). Although the latter type of unauthorized administrative act typically does not allow the government a section 1 defence, the courts have held that administrative acts taken under a general statutory discretion satisfy the "prescribed by law" requirement of section 1. Should the violation nonetheless fail the test of justification, the relevant remedial provision is not section 52(1), but section 24. A broad range of remedies is available under section 24, including the exclusion of evidence, stays of proceedings, damages, declarations, and even injunctions in exceptional circumstances. Section 24 remedies are generally designed to provide an appropriate and just response to a past *Charter* violation. However, because these remedies do not affect the law pursuant to which the unconstitutional decision has been made, section 24 remedies do not generally prompt democratic debate and legislative replies, unlike declarations of invalidity under section 52(1).

The choice between track 1 and track 2 flows from an initial classification: whether the unjustifiable violation of the right can be attributed to a law or to a decision taken pursuant to a law or outside of it. The silence of Bills C-36 and C-17 on profiling suggests that track 2 should apply. This

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[10] Commentators agree that many cases declaring laws to be invalid result in legislative replies, but disagree as to the exact number. See Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513; Peter W. Hogg & Allison A. Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37 Osgoode Hall L.J. 529.

position finds support in the Supreme Court's recent decision in *Little Sisters v. Canada*.[11] In that case, customs officials targeted materials imported by a gay and lesbian bookstore on the grounds that those imports were disproportionately likely to be obscene. In other words, customs officials engaged in profiling, but on the basis of sexual orientation, as opposed to race, ethnicity, or religion. A majority of the Court held that a track 1, section 52(1) challenge to customs legislation was misdirected, because profiling on the basis of sexual orientation was neither authorized nor contemplated by the impugned legislation. Accordingly, track 2 applied, and the appropriate remedy was a section 24(1) declaration that the applicant's rights to freedom of expression and equality had been violated by customs officials.

In this article, we challenge this view. Our argument is that both democratic accountability and remedial efficacy are better served by Justice Iacobucci's dissent in *Little Sisters*, which concluded that the legislative scheme *itself* must be struck down under section 52(1) because it failed to take adequate measures to ensure respect for *Charter* rights that were violated by exercises of statutory discretion. The democratic reasons for preferring track 1 revolve around the need to promote public debate regarding, and accountability for, the violation of *Charter* rights. The *Charter* is best understood as a document that promotes dialogue between courts and legislatures over the interpretation and application of the rights protected in that document. Judicial review is a means whereby courts force legislatures explicitly to state in legislation, via "clear statements," whether constitutional norms are to be departed from.[12] Under the *Charter* the textual cue for legislative clear statements is the "prescribed by law" requirement in section 1. The failure of Bills C-36 and C-17 expressly to limit the equality rights of individuals of Middle Eastern appearance or the Muslim faith who may be subject to profiling in the wake of September 11, in our view, should mean that no profiling under these statutes could be justified under section 1. If such a ruling were coupled with a declaration of invalidity, the issue of profiling would be forced back on the legislative and democratic agenda. We recognize that the availability of a declaration of invalidity under section 52(1) in such circumstances is a matter of some controversy and that courts could move directly to a more limited remedy under section 24(1) of the *Charter*. Nevertheless, we will argue that there are precedents in support of the

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[11] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 [*Little Sisters*]. For commentary, see Janine Benedet, "*Little Sisters Book and Art Emporium v. Minister of Justice*: Sex Equality and the Attack on *R. v. Butler*" (2001) 39 Osgoode Hall L.J. 187; Jo-Anne Pickel, "Taking Big Brother to Court: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*" (2001) 59 U.T. Fac. L. Rev. 349; Bruce Ryder, "The *Little Sisters* Case, Administrative Censorship, and Obscenity Law" (2001) 39 Osgoode Hall L.J. 207.

[12] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) [Roach, *Judicial Activism*].

more drastic, and in our view, more democratic, remedy of a declaration of invalidity. By contrast, a section 24(1) remedy under track 2 would not prompt a legislative reconsideration of the issue, because the law pursuant to which the decision was made would not be at issue. While a section 24(1) remedy could play a valuable and necessary role in providing some compensation for an aggrieved individual, it would be unlikely to provoke sustained democratic debate on the unconstitutional practice that prompted it.

Concerns regarding remedial efficacy turn on the limitations of section 24 to provide adequate redress for victims of profiling. The strongest remedies that are potentially available under section 24 (which are far from guaranteed) are those that apply in cases in which profiling has resulted in the discovery of incriminating evidence. It is only in this limited category of cases that evidence can be excluded under section 24(2) or proceedings stayed under section 24(1). By contrast, the completely innocent victim of profiling will face significant obstacles in seeking relief. The Canadian experience of awarding damages under section 24(1) is not very promising, especially when severe consequential damage has not been suffered. Moreover, few will commence expensive litigation against the government if the prospect of damage awards is measured in the hundreds or even thousands of dollars. To be sure, a victim of profiling may also be motivated to seek a remedy that will help prevent others from suffering from profiling. But again, the Canadian experience does not provide grounds for optimism: courts have relied on general declarations, as opposed to the large damage awards or injunctions sometimes used by courts in the United States, to deter police from engaging in profiling.

Shifting profiling from track 2 to track 1 yields significant gains in terms of democratic accountability, and sacrifices little in the way of remedial efficacy. To permit profiling to remain on track 2 would create the incentive for governments to "go underground" and implement many of their constitutionally controversial measures through discretionary decision making, out of sight of the democratic process. Indeed, the relative inattention to the constitutional concerns raised by profiling, in sharp contrast to the enormous public attention given to the overbreadth of the definition of terrorist activities in Bill C-36, bears testimony to the impact of the *forms* of public decision making on the *content* and *quality* of democratic discourse. If governments wish to discriminate on the basis of race and ethnicity, they should be prepared to justify that practice to the Canadian public, even before they are required to do so to the courts.

II. SHIFTING EXERCISES OF STATUTORY DISCRETION FROM TRACK 2 TO TRACK 1: *THERENS* AND "PRESCRIBED BY LAW"

In the war on terrorism, discretionary powers take centre stage. These powers fall into two categories. First, there are those powers created by the legislative responses to the attacks of September 11. The most notorious of these is the new investigative hearing provision inserted into the *Criminal Code*[13] by Bill C-36.[14] The new section 83.28 authorizes a peace officer with the prior consent of the Attorney-General to request, and a judge to order, individuals to attend a hearing at which they are obliged to answer questions, even if those answers are self-incriminatory. The key point to note is that the triggering event for a section 83.28 hearing is replete with discretion, since section 83.28(2) provides that a peace officer "may" request an investigative hearing. But the new discretionary powers are not confined to the *Criminal Code*. The new *Immigration Act*[15] authorizes an immigration officer to make a warrantless arrest of any foreign national, other than a refugee, if that person cannot establish his or her identity to the satisfaction of the officer.[16] Again, this power is discretionary—the new section 55(2) provides that the officer "may," but need not, order the arrest.

Second, although it is tempting to concentrate on controversial new powers, there are existing powers that will play an important role in investigating and preventing terror. Indeed, these provisions apply in contexts where every individual must present himself or herself to a state agent, thus making it much easier to select individuals for heightened investigation. For example, the *Aeronautics Act* addresses airport security, a central concern after September 11.[17] Section 4.7 authorizes screening officers to search persons and their belongings both before boarding aircraft[18] and on board the aircraft.[19] The *Aeronautics Act* does not specify circumstances under which searches can be conducted, other than to say the search must be "authorized." Regulations made under the *Aeronautics Act*[20] simply provide that a search is authorized if it is "carried out by a screening officer during the screening of persons and goods."[21] The absence of any language requiring all passengers to be searched is the

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[13] R.S.C. 1985, c. C-46.

[14] Bill C-36, *supra* note 6, s. 4.

[15] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*Immigration Act*].

[16] *Ibid.*, s. 55(2)(b), proclaimed in force 28 June 2002, C. Gaz. 2002.II.1637.

[17] *Aeronautics Act*, R.S.C. 1985, c. A-2 [*Aeronautics Act*]. Section 4.7 would be repealed by Bill C-17, *supra* note 7, s. 5. Going forward, the screening of passengers would be addressed in regulations. At the time of writing, draft regulations had not been released to the public.

[18] *Ibid.* at s. 4.7(5).

[19] *Ibid*. at s 4.7(6).

[20] *Canadian Aviation Security Regulations*, S.O.R./2000-111.

[21] *Aeronautics Act*, supra note 17 at s. 5.

implicit incorporation of a discretionary power. Advocates of profiling have also suggested that profiling be employed at the border. Section 23 of the new *Immigration Act* confers a discretion on immigration officers to refer a person for secondary examination.[22] This is not a new power; rather, the same power was conferred by a nearly identical provision in the old *Immigration Act* via section 12(3)(1)(a).[23]

Assuming that the discriminatory exercise of a discretionary power—which is what profiling amounts to—contravenes section 15, the next question is whether that decision could be upheld under section 1. The principal issue is whether such a decision would meet the threshold requirement in section 1 that limitations of *Charter* rights be "prescribed by law," even before it is determined whether those limits meet the test of proportionality. The "prescribed by law" requirement has been interpreted to have two limbs. The first is that the limitation be made by *law*, which imposes a requirement of *form*. The Supreme Court has adopted a rather generous interpretation of this limb, holding that not only statutes, but also regulations and even common law rules, count as laws that can, in principle, justifiably limit *Charter* rights. What remains unresolved is whether internal departmental directives which cannot be tied to a statutory anchor count as law despite their lack of formal legal character.

Our focus is on the second limb—that a law of the appropriate form actually prescribes the limitation in question.[24] The principal question here is the requisite degree of precision or explicitness that a law must have in order to prescribe the limitation of *Charter* rights. The Court has adopted a generous interpretation of this limb as well. After initially holding that limitations on constitutional rights must be express or arise by necessary implication in a law that limits a constitutional right,[25] the Court later went on to hold that broad grants of discretion that make no express or implicit reference to even the possibility of rights-limiting activities are sufficiently precise to satisfy section 1.[26] Those grants of discretion are read down so as to require that they be exercised in accordance with the *Charter*. It follows that actions taken pursuant to a statutory discretion that on its face permits violations of the *Charter* are capable of justification under section 1, unlike legally unauthorized state

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[22] *Supra* note 15.

[23] *Immigration Act*, R.S.C. 1985, c. I-2, as rep. by *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[24] For a useful discussion, see June M. Ross, "Applying the *Charter* to Discretionary Authority" (1991) 29 Alta. L. Rev. 382.

[25] *R. v. Therens*, [1985] 1 S.C.R. 613 [*Therens*].

[26] *Slaight*, *supra* note 9.

conduct, which is not.

The case law has reached this position by following a tortured path. In the law enforcement context, the leading cases on statutory discretions and the "prescribed by law" requirement are *R. v. Hufsky*[27] and *R. v. Ladouceur*.[28] Both cases concerned challenges to a provision of the Ontario *Highway Traffic Act* that stipulates that a police officer "may" stop a driver, if so doing is "in the lawful execution of his duties and responsibilities."[29] The Court held in both cases that the provision violated the right against arbitrary detention or arrest guaranteed by section 9 of the *Charter*, because those stops constituted detentions, and the provision specified "no criteria for the selection of the drivers to be stopped."[30] In the Court's words, the officer possessed "absolute discretion."[31] *Hufsky* involved a challenge to the operation of that provision in the context of stationary spot checks; *Ladouceur* involved a challenge to the provision in the context of random spot checks. In both decisions, the section 1 analyses focused on the issue of minimal impairment, with the Court finding that the section 9 violation was justified. But the Court also found that the discretionary provision met the "prescribed by law" requirement, even though the provision did not explicitly authorize the random stopping of drivers, which had given rise to the *Charter* breach. Nevertheless, in *Hufsky*, the Court simply stated that the random stopping of drivers arose by necessary implication from the legislation itself. This holding was cited by the majority in *Ladouceur* (although the dissent declined to rule on the issue).

What is remarkable about these holdings is that they did not attempt to grapple with the Court's earlier "prescribed by law" jurisprudence. The seminal case is *Therens*, in which Justice Le Dain stated that a "limit will be 'prescribed by law' ... if it is expressly provided for by statute or regulation, or results by necessary implication" from the law that limits the right.[32] The accused in that case had been ordered by a police officer to give a breathalyzer sample pursuant to the *Criminal Code*, and had been denied his right to counsel in contravention of section 10(b) of the *Charter*. Justice Le Dain (who was in the majority on this point) held that the violation of the right was not "prescribed by law" because the provision neither "expressly purport[ed] to limit the right to counsel," nor

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[27] *R. v. Hufsky*, [1988] 1 S.C.R. 621 [*Hufsky*].

[28] *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 [*Ladouceur*].

[29] R.S.O. 1980, c. 198, s. 189a, as am. by 1981, c. 72, s. 2.

[30] *Hufsky*, *supra* note 27 at 633.

[31] *Ibid.*

[32] *Supra* note 25 at 645.

did so by necessary implication.[33] Of central importance was the possibility in the *Criminal Code* for a two hour delay before the breathalyzer was administered, and this, as opposed to a requirement that a roadside breath test be supplied forthwith, would allow enough time for the detainee to contact counsel. As a consequence, the violation of section 10(b) could not be justified under section 1, and the case turned on the exclusion of evidence under section 24(2).

In light of *Therens*, the question in *Hufsky* and *Ladouceur* was whether the very terms of the statutory discretion precluded it from being exercised in a manner that comported with section 9. And as the dissent in *Ladouceur* suggested, this was not so, because it was open to the Court to read down the discretion to incorporate a requirement that random stops only be conducted at organized spot checks. It is noteworthy that Justice Sopinka in his dissent (with the concurrence of Chief Justice Dickson and Justices Wilson and La Forest) observed with some frustration that random spot checks could be used in conjunction with racial profiling:

> This case may be viewed as the last straw. … The roving random stop would permit any individual officer to stop any vehicle, at any time, at any place. The decision may be based on any whim. Individual officers will have different reasons. Some may tend to stop younger drivers, others older cars, and so on. Indeed, as pointed out by Tarnopolsky J.A., *racial considerations may be a factor too.* My colleague states that in such circumstances, a *Charter* violation may be made out. If, however, no reason need be given nor is necessary, how will we ever know? The officer need only say, "I stopped the vehicle because I have the right to stop it for no reason. I am seeking unlicensed drivers." If there are bound to be instances where admittedly *Charter* violations which cannot be justified will occur, can we overlook these and approve a practice even if in its general application *Charter* breaches can be justified?[34]

Unfortunately, the Court's relaxation of the "prescribed by law" standard continued in other cases, most notably *Slaight*, which involved a challenge to the order of a labour arbitrator on the basis of section 2(b). Without any reference to earlier case law, Justice Lamer held (for the Court on this point) that in challenges to exercises of discretion where a law neither expressly nor implicitly limited constitutional rights, it would be the individual decision, rather than the statute pursuant to which it was made, that would be the focus of section 1. Although the judgment does not squarely address the point, the proposition that emerges from it is that as long as individual decisions can be traced to a statutory discretion, they meet the "prescribed by law" requirement and indeed may be justified under section 1 of the *Charter*. Any remedy for abuse of such discretion would lie not through a track 1, section 52(1) remedy that would fix the statute and likely provoke democratic debate, but through a

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[33] *Ibid.*

[34] *Ladouceur*, *supra* note 28 at 1264-67 [emphasis added].

more limited track 2, section 24 remedy that would provide an appropriate and just remedy for the particular violation. Although foreseeable because of the unfettered discretion provided in the legislation, *Charter* violations would be attributed to aberrational official conduct and not to the systemic flaws of the discretionary legislative scheme.

This is where the Court's jurisprudence on "prescribed by law" and statutory discretion rests. The implications for unconstitutional exercises of discretion in the war on terror—for example, to profile passengers— are clear. Individual exercises of discretion, as opposed to the statutes pursuant to which discretionary decisions are made, could only be challenged under section 24(1) of the *Charter* and not section 52(1), leaving the statutes themselves immune from constitutional attack. But this resting point is unstable not only because of *Therens*, but also because of cases from *outside* the "prescribed by law" context that have attributed the unconstitutional administration of a statute to that statute itself.[35]

In *Hunter v. Southam*,[36] the Court found that searches carried out pursuant to federal competition legislation were unconstitutional.[37] Notwithstanding the fact that the statute was capable of being administered in compliance with the *Charter*, the Court unanimously attached the finding of unconstitutionality to the statute itself, and struck it down. A similar analysis was relied on by Chief Justice Dickson and Justice Beetz in *R. v. Morgentaler*[38] to find the abortion provisions of the *Criminal Code*[39] to be unconstitutional because of the considerable delay in access to abortions. They arrived at this conclusion even though the extensive social science evidence before the Court suggested that the source of delay was not just the *Code* itself, but rather the failure of many hospitals to establish therapeutic abortion committees, and the use by some committees of quotas, all exercises of discretion which were not required by the *Code*. Chief Justice Dickson actually cited *Therens* in support of this conclusion.[40] The most recent example of this approach is *R. v. Bain*,[41] in which the Court (per Justices Cory and Stevens) accepted a constitutional challenge to the *Criminal Code* provision on peremptory challenges by the

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[35] These cases were cited by Justice Iacobucci in dissent in *Little Sisters*, *supra* note 11 at 1226-29.

[36] [1984] 2 S.C.R. 145 [*Hunter*].

[37] *Combines Investigation Act*, R.S.C. 1970, c. C-23, ss. 10(1) and (3).

[38] [1988] 1 S.C.R. 30 [*Morgentaler*].

[39] *Supra* note 13, s.251, as rep. by *Criminal Code*, 1993, S.C. 1993, c. 28, s. 78.

[40] *Morgentaler*, *supra* note 38 at 62.

[41] [1992] 1 S.C.R. 91 [*Bain*].

Crown,[42] even though that discretion need not be exercised in a constitutional manner. To be sure, the treatment of the "prescribed by law" requirement in these three cases was confused. Because it was an early *Charter* judgment, *Hunter* failed to mention it; in *Bain*, both Justices Cory and Stevens addressed section 1 in a cursory fashion. In *Morgentaler*, both Chief Justice Dickson and Justice Beetz appear to have assumed that the "prescribed by law" test was met, which was correct given that the *Code* was partially at fault. However, the point remains that in several cases, the unconstitutional exercise of administrative discretion has been traced back to the statute that confers the discretion itself.

We can make sense of these holdings if we closely examine *Therens*. At the heart of that judgment lies a distinction between those violations of rights whose pedigree can be traced back to a law, and those which can only be traced to the decision of an agent of the state. Thus, Justice Lamer (concurring on this point) stated that "the violation of the respondent's rights is not the result of the operation of law but of the police action" and as such could not be justified under section 1.[43] A later judgment, *R. v. Simmons*,[44] relied on the same distinction—between those violations of rights attributable to law and those attributable to the decisions of a state agent—in the context of a discretion to conduct a search under the *Customs Act*.[45]

Therens and the cases that have followed it offer an alternative framework through which to analyze statutory discretion under section 1. Unlike *Slaight*, *Therens* makes an *institutional* distinction between two different kinds of governmental decisions that violate *Charter* rights: (a) those whose pedigree can be directly traced to legislatures, and (b) those that terminate in particular agents of the state. Although both (a) and (b) fall within the ambit of *Charter* scrutiny under section 32, only the former passes the threshold "prescribed by law" requirement under section 1 and is capable of meeting the test of justification. The operative difference between (a) and (b) is the existence of a legislative mandate (either explicit or arising by necessary implication) for certain violations of constitutional rights, which implies a conscious decision by the legislature to limit *Charter* rights. Justice Sopinka made this point in his concurring judgment in *R. v. Hebert*,[46] where he drew a distinction between the actions of officials that were "prescribed by law," and those that were simply "not proscribed by law."[47] Although both actions were legal, only the former

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[42] *Supra* note 13, s. 634(2).

[43] *Therens*, *supra* note 25 at 623.

[44] [1988] 2 S.C.R. 495.

[45] R.S.C. 1985 (2nd Supp.), c. 1.

[46] [1990] 2 S.C.R. 151.

[47] *Ibid.* at 205.

met the requirements of section 1, because "[t]he word 'prescribe' connotes a mandate for specific action, not merely permission for that which is not prohibited."[48] This more rigorous understanding of the "prescribed by law" requirement under section 1 of the *Charter* is consistent with a democratic model of judicial review with roots in the common law, which requires legislatures to make clear statements before they will be allowed to infringe constitutional rights.

Built into *Therens*' interpretation of the "prescribed by law" requirement, then, is the appropriate allocation of institutional responsibility with respect to decisions to violate *Charter* rights. By emphasizing the importance of a mandate traceable to the decision of a legislature, the "prescribed by law" requirement reflects the importance of political accountability for decisions to breach the *Charter*. In other words, *Therens*, unlike *Slaight*, is premised upon a democratic rationale for the "prescribed by law" requirement. This rationale has been lost in the Court's subsequent jurisprudence.

The result has been a relaxed "prescribed by law" requirement that arguably does not do justice to the values that underlie section 1 of the *Charter*. In *Oakes*, the Court recognized the idea that "Canadian society is to be free and democratic" was an important contextual element informing the interpretation of section 1.[49] Chief Justice Dickson stated that "[t]he Court must be guided by the values and principles essential to a free and democratic society," which included "faith in social and political institutions which enhance the participation of individuals and groups in society."[50] A relaxed "prescribed by law" requirement, which allows limits on *Charter* rights to be enacted without clear legislative statements and consequent opportunities for democratic debate and accountability, runs contrary to the idea that democratic values must support limitations on *Charter* rights.

A relaxed "prescribed by law" requirement also offends the values that underlie the "void for vagueness" doctrine under section 7, which the Court has recognized should inform the interpretation of the "prescribed by law" requirement under section 1. As articulated in the leading case of *R. v. Nova Scotia Pharmaceutical Society*, these common values include the need to provide fair notice to the individual and to limit law enforcement discretion.[51] To this list we would add a third value: the promotion of democratic

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[48] *Ibid*. at 205.

[49] *Supra* note 4 at 136.

[50] *Ibid.*

[51] [1992] 2 S.C.R. 606 [*Nova Scotia Pharmaceutical*] where Justice Gonthier recognized for the Court that "the justifications invoked for the doctrine of vagueness under both s. 7 and s. 1 are similar": *ibid*. at 631.

accountability for limitations on *Charter* rights. Specificity or explicitness promotes all three of these values. Moreover, it is possible to give a democratic interpretation to both the need to provide fair notice and the need to limit law enforcement discretion. Thus, the need to provide fair notice is designed to ensure fairness to a potential accused, but it also provides an opportunity for democratic debate and accountability as the legislature notifies the citizenry of potential liability. And the need to limit law enforcement discretion reflects the fact that the police and other state officials are not as directly accountable as legislators. However, it is important to understand how these three values are different. Inasmuch as the Court's stated rationales for the "prescribed by law" requirement are informed by a liberal conception of the rule of law that is primarily concerned with protecting individuals from public power, they ignore the fact that the *Charter* is very much part of a liberal *democratic* constitutional order. Accordingly, a democratic conception of the rule of law should also inform the interpretation of the *Charter*.

The idea that "prescribed by law" should be interpreted to promote democratic accountability for limitations of constitutional rights fits into a broader conception of judicial review under the *Charter*.[52] Rather than establishing a regime of judicial supremacy, like the American Bill of Rights, or of legislative supremacy, the *Charter* gives both courts and legislatures complementary but distinct roles in the protection of constitutional rights and the balancing of those rights against important social goals. The task of the courts is to bring attention to constitutional interests that are vulnerable to being overlooked or downgraded in democratic debate. Faced with an unfavourable court judgment, legislatures can respond, either through section 1 or section 33.

Viewed through the lens of institutional dialogue, *Therens*' stance on the "prescribed by law" requirement forces legislatures to be explicit regarding their intentions to limit constitutional rights. The need for legislative "clear statements" under section 1, in our view, has its roots in a common law model of democratic constitutionalism and adherence to the rule of law that is continued by and enriched under the *Charter*. At common law, it is a rule of statutory interpretation to construe ambiguous statutory language so as to preserve certain fundamental rights. What is required to displace these rights is clear statutory language. A famous example is the presumption of subjective

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[52] Our argument raises the question of whether common law rules, given their lack of democratic pedigree, should be permitted to meet the "prescribed by law" requirement. Regulations also pose a problem because of the limited role of legislative oversight in the formulation of regulations. Our position is that, although legislation is preferable from a democratic standpoint, at least common law rules and regulations with "clear statements" would publicly articulate the violation of a constitutional right and would prevent "invisible" violations of *Charter* rights through internal department policies. For a similar point, see Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Supreme Court L.R. 469 at 477, n. 21.

fault for criminal cases established in *R. v. Sault Ste. Marie*.[53] Clear statement rules promote democratic accountability for decisions to limit rights, because these rules require legislatures to deliberate upon and make these decisions in public. The failure to rigorously enforce clear statement rules—perhaps out of a misguided but well-intentioned desire to defer to legislatures—undermines democracy instead of honouring it, because it creates perverse incentives for governments to avoid democratic accountability for controversial decisions by implementing them not in public through legislative mandates, but through less visible exercises of statutory discretion. As Justice Wilson put it in *McKinney v. University of Guelph*, only instruments which "have survived the rigours of the law-making process"[54] suffice for section 1, because governments were forced to defend their decisions to the public.

The potential for implementing policies through exercises of discretion, and hence beyond the easy reach of parliamentary and public scrutiny, is significant and should not be underestimated. Indeed, exercises of discretion can be highly formalized, approximating what could be achieved through legislation and regulations, but through sub-legal means that escape democratic debate and accountability. The RIDE drunk driving spot check program in *Hufsky* is one example. Another example is provided in the *Little Sisters* decision, where the Court held that customs agents had discriminated on the basis of sexual orientation by targeting their enforcement efforts at homosexual erotic materials being imported by a lesbian bookshop, while adopting a relatively lax attitude to the importation of heterosexual materials by mainstream booksellers. A remarkable feature of the factual record is that Customs Canada had been acting pursuant to a departmental policy centred on the now infamous "Memorandum D9-1-1," a document that purported to define what was "obscene" for the purposes of the *Customs Tariff*,[55] but which lacked any formal legal character and was not publicly distributed. In the context of profiling, the exercise of discretion could likewise be formalized through a variety of means, ranging from internally distributed departmental memoranda to informal word-of-mouth directives from superiors. None of these forms of "law," however, would be debated and defended in the legislature or be accessible in books of statutes or regulations.

In sum, we suggest that the Court should tighten its understanding of the "prescribed by law" requirement. There are two strands of the existing case law which support our proposal. The first are the "vagueness" cases. To be

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[53] [1978] 2 S.C.R. 1299.

[54] [1990] 3 S.C.R. 229 at 386 [*McKinney*].

[55] R.S.C. 1985, c. C-41 (3d Supp.), Sch. VII, Code 9956(a), as rep. by *Customs Tariff*, S.C. 1997, c. C-36, s. 213.

"prescribed by law," the Court has held in many cases that limitations on rights need not be absolutely precise, but that they must contain an "intelligible standard" that both provides sufficient notice and fetters or constrains discretion.[56] Although some may despair at the Court's reluctance to strike down laws as void for vagueness, the functional concerns of this jurisprudence in providing fair notice and limiting law enforcement discretion should be brought to bear on the "prescribed by law" requirement, as contemplated by the Court in its leading vagueness case.[57] There are some encouraging cases. In *Committee for the Commonwealth of Canada v. Canada*,[58] Justice L'Heureux-Dubé held that an absolute discretion did not satisfy the "prescribed by law" requirement because it did not provide an intelligible standard. But the need for an intelligible standard also reflects an allocation of institutional responsibility, requiring the legislature expressly to provide standards to guide administrative discretion. Our proposal builds on this, by requiring not just an intelligible standard for administrative decision makers, but also an express or necessarily implicit statement that rights-limiting activities may be undertaken.

The second strand of case law is the requirement of form, again under section 1. In *Therens*, the list of varieties of law that count as "law" share one common feature— they are all accessible to the public, albeit to differing degrees. By contrast, internal departmental policies, even those that are sufficiently formal to be nearly identical to laws, but which are generated pursuant to exercises of statutory discretion, are not. Although the Supreme Court has not definitively ruled on this issue (members of the Court disagreed in *Commonwealth*), in *Little Sisters* the Attorney-General of Canada conceded, and dissenting judges (but not dissenting on this point) held, that Memorandum D9-1-1 did not constitute "law" for the purposes of section 1. To hold that statutory discretions are sufficiently precise to prescribe the limitation of constitutional rights would undermine the demands of publicity and make nonsense of the requirement that rights be limited by laws that are accessible to all.[59]

Finally, the need for clear statements in relation to profiling is critical

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[56] *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69. Also see *Suresh v. Canada (Minister of Citizenship and Immigration)* (2002), 208 D.L.R. (4th) 1.

[57] *Nova Scotia Pharmaceutical*, *supra* note 51.

[58] [1991] 1 S.C.R. 139 [*Commonwealth*]

[59] For the argument that departmental guidelines that have not been formally promulgated should nonetheless count as "law" for the purposes of s. 1 under certain circumstances, see Lorne Sossin & Charles Smith, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government" 40 Alta. L. Rev. [forthcoming in 2003]; and Lorne Sossin, "Discretion Unbound: Reconciling the *Charter* and Soft Law" (*Canadian Charter of Rights and Freedoms*: 20 Years Under the *Charter* Conference, Association for Canadian Studies, Ottawa, 19 April 2002) [unpublished].

because of the difficulties of proving discrimination. In his dissent in *Ladouceur*, Justice Sopinka suggested that the danger posed by an unfettered discretion to stop motorists is the possibility that it could be exercised in a discriminatory fashion on the basis of race. In response to the view that individuals who suspected that they had been the victims of discrimination could seek a section 24(1) remedy after the fact, Justice Sopinka was candid, stating that a discriminatory exercise of discretion is incredibly difficult to prove, because it is always possible to offer a legitimate explanation afterward for that decision. By contrast, an explicit policy either prohibiting or authorizing profiling in legislation enhances the possibilities for political (and legal) accountability. Inasmuch as vulnerable minorities lack the political power to secure a statutory ban on profiling or to secure effective legislative oversight of the ability of officials to use their discretion to engage in profiling, courts should interpret the "prescribed by law" requirement narrowly—in the name of democracy—to correct for those deficiencies in the legislative process.[60]

III. SECTION 52(1) REMEDIES AND DEMOCRATIC ACCOUNTABILITY

In the absence of a clear legislative statement authorizing profiling, according to *Therens*, the statute pursuant to which profiling took place would not be "prescribed by law" under section 1. A court would then move immediately to the question of remedy without considering the question of whether the statute satisfied the test of proportionality. A legislature that refused to take responsibility for profiling would not be allowed to justify law enforcement powers that permit profiling on the basis that the law enforcement discretion could be exercised in a constitutional manner. Here, the democratic advantages of track 1 and section 52(1) over track 2 and section 24 become evident. The case that vividly illustrates this point is *Little Sisters*. In that case, the successful *Charter* applicants sought a section 52(1), track 1 remedy that would have struck down the customs legislation under which its shipments were seized. But a majority of the Supreme Court found that such a remedy was inappropriate on the ground that the disproportionate targeting of gay and lesbian erotica was not caused by the legislation, but by the exercise of discretion by customs officials under the legislation.[61] In other words, because

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[60] The importance of interpreting the *Charter* to protect the interests of the politically powerless was made by Justice Wilson in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[61] *Little Sisters*, *supra* note 11. *Ibid*. at 1189, Justice Binnie concluded that "there is nothing on the face of the Customs legislation, or in its necessary effects, which contemplates or encourages differential treatment based on sexual orientation." He also stated, *ibid*. at 1168, that: "Parliament is entitled to proceed on the basis that its enactments 'will be applied constitutionally' by the public service."

of *Slaight*, track 1 and section 52(1) were rendered inaccessible to the litigants. As a result, they were shunted into track 2 and section 24(1). And because the successful *Charter* applicant had not requested extensive injunctive relief or damages under section 24(1), the only remedy was a declaration that custom officials had violated the *Charter* in the past.

Justice Iacobucci dissented, on the ground that the declaration was inadequate given the systemic nature of the *Charter* violation. He argued that the "Court's precedents demand sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights"[62] (although curiously, he did not cite *Therens*). One would have expected, then, that he would have ordered injunctive relief under section 24. Indeed, the case was a missed opportunity for ordering and developing the legal framework surrounding structural remedies under section 24(1). Justice Iacobucci's preference, however, was not for a stronger section 24 remedy, but for a remedy under section 52(1)—a declaration of invalidity. Unfortunately, what was absent in his reasons was the rationale for his choice of section 52(1), particularly in light of *Slaight*.[63]

The best defence of Justice Iacobucci's dissent lies in the realization that, unlike even the strongest section 24 remedies, striking down the relevant customs legislation would have by necessity precipitated a dialogue between the Court and Parliament, culminating in the adoption of new legislation that would employ precautions to prevent the discriminatory targeting of homosexual erotica by law enforcement officials. *Little Sisters* illustrates that the choice between track 1 and track 2, and hence between section 24 and section 52(1) remedies, is not simply a strategic one for litigants. Rather, the choice of remedy has larger institutional dimensions that speak to the liberal democratic nature of our constitutional system. A section 52(1) remedy, as evidenced by Justice Iacobucci's dissent, is a component of a democratic conception of the rule of law that is centred on constitutional dialogue between the courts and legislatures. As with *Therens*' interpretation of the "prescribed by law" requirement, the goal is enhanced democratic accountability for limitations of rights, by forcing governments to state publicly and defend decisions that collide with our fundamental constitutional values. In other words, section 52(1) creates not just a legal remedy for violations of constitutional rights, but a political remedy as well.[64] It enables those without sufficient power to place

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[62] *Ibid.* at 1225-26.

[63] The majority relied on this precedent, *ibid*. at 1193.

[64] We recognize that the section 52 remedy would have also been preferable from a rights-protecting perspective. While section 24 remedies have usually been geared to providing compensation for violations *after* they have occurred, the section 52 remedy contemplated by Justice Iacobucci in *Little Sisters* is a remedial route that encourages the government to take precautions to *prevent* future violations of the *Charter*.

issues on the legislative agenda through political means via constitutional litigation. To the extent that profiling targets those without political power, section 52(1) ensures that their concerns will be heard by legislatures.[65]

What Justice Iacobucci failed to realize, unfortunately, is that track 1 and section 52(1) were unavailable to him because of the *Slaight* decision. This oversight is a deeply puzzling aspect of his otherwise tightly argued reasons, not the least because Justice Iacobucci devoted considerable attention to the question of why it was the legislation itself, as opposed to the decisions taken pursuant to it, that was the source of the unconstitutional government conduct. As the majority correctly noted, *Slaight* had settled this point in favour of the federal government, shunting the case decisively off track 1, and away from section 52(1). Justice Iacobucci attempted to overcome this doctrinal obstacle by attributing the violation of *Charter* rights to the existence of a prior restraint of expressive activity in the *Customs Act*. But even this line of argument only addressed the systematic violation of section 2(b) in the case, and could not assist in tracing the violation of the claimant's section 15 rights to the *Customs Act* itself, as opposed to Memorandum D9-1-1. To force the matter back on the legislative agenda, Justice Iacobucci's only option was to confront and overrule *Slaight* itself, which he did not do. *Little Sisters* accordingly illustrates the interdependence between the appropriate remedy for unjustified violations of constitutional rights and the prior question of the threshold test for justifiable limits of constitutional rights under section 1.

It is important to be clear that there are a range of remedies available under section 52(1), not all of which equally promote dialogue and clear statements.[66] Reading-in, recently employed in *R. v. Sharpe*,[67] and severance result in courts essentially correcting the constitutional defects in legislation without any need for subsequent legislative intervention or public debate.[68] A court that reads-in restrictions on profiling to legislation that could possibly authorize such practices, for example, would be making a strong statement that

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Although it is possible to craft section 24(1) remedies that aim to prevent *Charter* violations in the future, there is little Canadian experience with such remedies.

[65] For a similar point, see Pickel, *supra* note 11 at 358, and Ryder, *supra* note 11 at 227.

[66] Conversely, some section 24(1) remedies such as the general declaration of constitutional entitlement in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, and *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, may promote dialogue by allowing the government to select the precise means to implement the entitlement. See generally Kent Roach, "Remedial Consensus and Dialogue Under the *Charter*: General Declarations and Delayed Declarations of Invalidity" (2002) 35 U.B.C. L. Rev. 211 [Roach, "Remedial Consensus and Dialogue"].

[67] [2001] 1 S.C.R. 45.

[68] In this sense, constitutional minimalism, which avoids declarations of invalidity, may not promote democratic dialogue between the courts and the legislatures to the same extent as a s. 52(1) approach which results in a declaration of invalidity. See Roach, *Judicial Activism*, *supra* note 12 at 63-65, 147-152.

such practices could not be justified under the *Charter*, but would not necessarily prompt legislative intervention and controls to prevent profiling. Parliament could, however, respond with new legislation that specifically authorized and attempted to justify such practices. However, it need not do so.

The section 52(1) remedy that most clearly promotes legislative clear statements is the declaration of invalidity. Courts that found that a provision in anti-terrorism legislation constituted an unjustified violation of a *Charter* right could strike down the offending section. While Parliament could respond to this remedy with new and better-tailored legislation, the use of an immediate declaration of invalidity would raise concerns that the government might be deprived of a valuable law enforcement technique with which to combat terrorism. It is worth noting that when Parliament decided to place five-year sunset provisions on two of the most controversial parts of Bill C-36, the provisions for investigative hearings and preventive arrests, it also took care to provide for some transitional measures designed to ensure that ongoing investigations are not disrupted by the possible expiry of the law.[69] The transitional measures suggest a public interest in the continued operation of the law. If a court found a statutory discretion that had been used for profiling to be unconstitutional, it would likely order a suspended or a delayed declaration of invalidity that would allow the unconstitutional provision to remain in force for a set and perhaps renewable period of time. Concerns about threats to public safety that would be caused by an immediate declaration of invalidity are a well-recognized reason for suspending a declaration of invalidity.[70] These concerns would only be amplified in the anti-terrorism context. At the same time, a court should make clear that even during the period of delay, the discretionary law enforcement powers should not be used to engage in profiling, and that the court could provide remedies during this period.[71]

A delayed declaration of invalidity does not require the legislature to respond before the delay or suspension expires, but it often has that effect. An invalidation of a significant part of any legislative provision useful in combating terrorism would likely generate sustained debate about the need for such a measure, and Parliament would be able to redraft legislation that authorized a *Charter* violation in an attempt to ensure that it would survive a section 1 review. The timing of the delayed declaration of invalidity might also affect the quality of public and legislative debate. The Court has not been consistent with respect to the period of delay, and has authorized delays of six, twelve, and

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[69] Bill C-36, *supra* note 6 at s.83.33.

[70] *R. v. Swain*, [1991] 1 S.C.R. 933 [*Swain*]; *Schachter v. Canada*, [1992] 2 S.C.R. 679 [*Schachter*].

[71] In *Bain*, *supra* note 41 at 104, Justice Cory stated: "The suspended declaration does not leave the defence without a remedy during the interim. The accused may always attempt to demonstrate that there has been an abuse of the stand by provisions by the prosecution."

eighteen months, without stating any principled basis for these variations. Another issue would be whether the successful *Charter* applicant should be exempted from this period of delay. In most criminal law cases, the successful applicant has been exempted from the period of delay in order to ensure that he or she was not prosecuted or convicted under an unconstitutional law. This exemption may, however, cause some unfairness to other similarly situated individuals who would not be similarly exempted.[72]

In sum, the possibilities for democratic dialogue are significant under track 1. A robust "prescribed by law" requirement that incorporates the need for clear statements promotes democratic debate and accountability for the violation of *Charter* rights. And declarations of invalidity under section 52(1) ensure that laws that confer discretionary powers that have been exercised in a discriminatory fashion, but which lack clear legislative statements authorizing the violation of *Charter* rights, are placed back onto the legislative agenda. In the next section, we discuss the civil and criminal remedies available to victims of profiling under sections 24(1) and 24(2). As we will explain, section 24 offers little in the way of democratic accountability and does not guarantee effective remedies for victims of profiling.

IV. SECTION 24 REMEDIES FOR UNCONSTITUTIONAL EXERCISES OF STATUTORY DISCRETION

A. *Damages*

After more than two decades of experience with the *Charter*, very little can be said with confidence about the structure of the damage claim under section 24(1). Basic matters still remain unsettled, such as the appropriate defendant, whether statutes of limitations apply to *Charter* damage claims,[73] the extent to which governments are immune from damage claims, whether fault independent of a violation of a *Charter* right must be established, and what, if any, damages are available for the violation of a *Charter* right in the absence of consequential damages that could be assessed under the common law. This uncertainty, as well as the loser-pays-costs rule used in civil litigation, may well deter victims of profiling from bringing civil actions. This would be unfortunate because it would allow profiling that does not discover incriminating evidence

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[72] See Anthony J. Duggan & Kent Roach, "A Further Note on *Final Note*: The Scope and Limits of Judicial Law Making" (2001) 36 Can. Bus. L.J. 115 at 135-38.

[73] For example, the Ontario Court of Appeal has held that statutes of limitations do not apply to *Charter* damage claims, but this decision has not been followed by other courts of appeal (compare *Prete v. Ontario (Attorney-General)* (1993), 110 D.L.R. (4th) 94 (O.C.A.), with *McGillivary v. New Brunswick* (1994), 111 D.L.R. (4th) 483 (N.B.C.A.), and *Nagy v. Phillips* (1996), 137 D.L.R. (4th) 715 (A.C.A.).

to remain a low visibility law enforcement practice not subject to legal accountability.

In the context of a damages remedy for profiling, an important preliminary consideration is the interrelationship between sections 24(1) and 52(1). The Supreme Court has, in a number of cases, indicated that damages as a remedy under section 24(1) may be difficult to obtain in conjunction with a remedy under section 52(1), such as a declaration of invalidity. Thus, in *Schachter* the Court declared that "[a]n individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*."[74] Four years later, in *Guimond v. Quebec (Attorney-General)*,[75] the Court affirmed that, as a general rule, section 24(1) damages could not be combined with a section 52(1) declaration. The Court noted that in the particular case before it, the applicant had made "a bare allegation of unconstitutionality. The facts did not warrant a departure from the general rule."[76] In the recently decided case of *Mackin v. New Brunswick (Minister of Finance)*[77], the Court once again indicated that "as a rule, an action for damages brought under section 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52(1) of the *Constitution Act, 1982*".[78] The Court stated that so long as the:

> government and its representatives … act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable [for damages under s. 24(1)]. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded. [79]

Mackin appears to yield the following proposition: government and its officials enjoy a robust good faith immunity from damage claims provided that

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[74] *Supra* note 70 at 720.

[75] [1996] 3 S.C.R. 347 [*Guimond*].

[76] *Ibid*. at 360. Lower courts have also demonstrated reluctance to combine the two types of remedies. See, for example, *Walsh v. Bona* (2000), 186 D.L.R. (4th) 50 at 84 (N.S.C.A.). But see *Lucas v. Toronto Police Service Board* (2000), 51 O.R. (3d) 783 (Ont. S.C.J.) [*Lucas*]. In *Lucas*, the court held that the rule that damages and a constitutional declaration should not be issued together is "not an absolute one. The general reason for the principle is that the state should not be retrospectively liable for damages caused prior to the declaration of invalidity." But this rationale does not apply when damages are sought for a prosecution under a law already declared unconstitutional.

[77] (2002), 209 D.L.R. (4th) 564 [*Mackin*].

[78] *Ibid*. at 569.

[79] *Ibid.* at 598-99. Justice Gonthier later seems to hint that negligence as well as abuse of power might be sufficient for a damage award when he concludes, *ibid.* at 600, "I do not find any evidence that might suggest that the government of New Brunswick acted negligently, in bad faith or by abusing its powers."

their acts are authorized by legislation that is found for the *first* time to be unconstitutional in an action seeking both a remedy against the legislation under section 52(1) and a damage remedy under section 24(1).

The Court's stance on the interrelationship between sections 24(1) and 52(1) would be crucial in the context of a damages remedy for profiling. The issue would be whether the unconstitutional practice was authorized by law, and, if so, whether the *Charter* applicant was in effect seeking to combine a section 52(1) remedy with the section 24 (1) damages remedy. The government would have strong incentives to avail itself of *Mackin* immunity. However, this argument raises a number of complications. To invoke *Mackin* immunity, the government would have to argue that profiling was authorized by law. But given that profiling would likely occur through the exercise of statutory discretion, this would in turn require the government to concede that, notwithstanding *Slaight*, the case should nonetheless be handled under track 1 instead of track 2. In short, asserting *Mackin* immunity in this context runs head on into *Slaight*, a case that generally benefits governments, and which they may be reluctant to circumvent. The central problem is the absence of a clear legislative statement authorizing profiling by Bills C-36 and C-17 or any other legislation of which we are aware. In our view, the absence of a specific authorization should preclude the operation of *Mackin* immunity, because the legislature has not addressed its mind to the issue of profiling, and as a consequence could not have formed in good faith an opinion that profiling is either necessary or justified under the *Charter*. Thus in our view, the government and its officials should not enjoy the good faith immunity contemplated in *Mackin* in any case involving a claim of profiling. They should only be able to claim this immunity if Parliament actually made clear statements authorizing profiling.

Without the sort of good faith immunity stemming from legislation contemplated in *Mackin*, how should courts approach the issue of damages for profiling? Courts would have to proceed from first principles. Section 24(1) contemplates a range of appropriate and just remedies, which should in principle include damages. The ultimate issue should be what is required to provide an appropriate and just remedy for a *Charter* violation. It follows that in order to vindicate the purposes of *Charter* rights and section 24(1), there should be a role for *Charter* damages that is independent of the common law. Moreover, there is no particular magic in governmental fault, although it may influence what amount of damages is appropriate in the circumstances. The causal connection between the violation and harm may be relevant in determining what damages are just, but courts must not ignore clear evidence that an individual's interaction with state officials was tainted by profiling. Justice Wilson's dissent in *McKinney* may be an appropriate starting point. Her dissent suggests that "[c]ompensation for losses which flow as a direct result of

the infringement of constitutional rights should generally be awarded unless compelling reasons dictate otherwise."[80]

In many cases, compensatory damages arising from profiling might be minimal. The indignity of being subjected to heightened investigative scrutiny because of one's race, culture, or religion may be profound, but the pecuniary damages may often be limited as the act of profiling may only involve a few minutes of the target's time.[81] David Rudovsky has commented in the American context that "[a]bsent particularly harsh or malicious conduct, the damages that flow from a relatively short stop and incidental frisk or search, may appear to be nominal to some juries."[82] Larger awards and settlements have, however, been reached in some American cases, particularly class actions, something which may now be an option in a growing number of Canadian jurisdictions.[83] If compensatory damages are nil or minimal, courts will then be faced with the issue of how to value a violation of a *Charter* right independent of any proven pecuniary or compensatory damages. In other words, what is the conventional cost for violating a *Charter* right such as the right to equality?

The trend until quite recently was towards only awarding nominal damages of about five hundred dollars for the violation of a *Charter* right.[84] However, a more robust approach to conventional awards for violation of *Charter* rights was recently taken in *Auton (Guardian ad Litem of) v. British Columbia (Attorney General),*[85] in which the trial judge awarded a "symbolic sum of damages of $20,000"[86] to four successful petitioners who had established that the government had violated the equality rights of their autistic children. Justice Allan defended the damages on the basis that:

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[80] McKinney, *supra* note 54 at 410-11.

[81] At the same time, there may be some cases such as wrongful dismissals resulting from profiling where pecuniary damages may be extensive.

[82] David Rudovsky, "Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause" (2001) 3 U. Pa. J. Const. L. 296 at 354.

[83] See *Price v. Kramer*, 200 F.3d 1237 (9th Cir. 2000), where $245,000 in damages was awarded for racially motivated arrest and use of excessive force. See also, *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987), where $375,000 in damages was awarded for racially motivated police misconduct. One famous class action commenced by African-American lawyer Robert Wilkins, who was stopped on returning from a family funeral, led to a settlement with the Maryland police that they not engage in profiling and that they keep statistics concerning stops. These statistics indicated that 80 per cent of those detained and searched were African-American or Hispanic. This result has led to fresh litigation. See Maria V. Morris, "Racial Profiling and International Human Rights Law: Illegal Discrimination in the United States" (2001) 15 Emory Int'l L. Rev. 207 at 239-40.

[84] *Crossman v. The Queen* (1984), 9 D.L.R. (4th) 588 at 600 (F.C.T.D.); *Lord v. Allison* (1986), 3 B.C.L.R. (2d) 300 at 316 (S.C.); *Chrispen v. Kalinowski* (1997), 117 C.C.C. (3d) 176 at 191 (Sask. Q.B.).

[85] (2001), 197 D.L.R. (4th) 165 (B.C.S.C.).

[86] *Ibid.* at 185.

> [t]hese relatively modest awards make no attempt to quantify any damages suffered by the petitioners and do not reflect actual costs incurred for autism treatment to the infant petitioners. They symbolize, in some tangible fashion, the fact that the petitioners have achieved a real victory on behalf of all autistic children whose rights were infringed. A symbolic figure also avoids an inquiry into what expenses the government would have funded had it complied with its constitutional requirements to treat the infant petitioners' disability.[87]

The damages were thus clearly conventional awards for the violation of the *Charter* right and were not compensatory awards. At the same time, it must be acknowledged that the damages were not a windfall to the successful *Charter* applicants, who had spent much greater sums than twenty thousand dollars in providing early treatment for their autistic children—treatment that the court found that the children were constitutionally entitled to under section 15 of the *Charter*. In another case in which a section 15 violation was established in a governmental hiring process, $7,5000 in damages were awarded despite the absence of any evidence quantifying the award or any actions justifying punitive damages.[88] Ten thousand dollars in "moral damages" were awarded by the Federal Court of Appeal for an arrest by military police that was an unlawful and unjustified violation of the applicant's rights, but resulted in no material damages or actions justifying punitive damages.[89] Justice Letourneau stressed that "financial compensation for the moral injury sustained is the proper remedy in the circumstances" and indicated that "pre-*Charter* decisions are of limited use and value" because of their age.[90] Such meaningful conventional awards for violations of *Charter* rights should be considered in the profiling context, given both the societal and individual harm caused by the practice. Without such conventional or even "symbolic" awards, it may be financially irrational for individuals to seek damages as a remedy for profiling. Even conventional awards in the range of $10,000 to &20,000 may not make such litigation financially viable, especially if a successful litigant is only partially indemnified with an award of party-and-party costs.[91]

Punitive damages may also be available in cases of profiling.[92] It has

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[87] *Ibid.* at 186.

[88] *Ayangma v. Prince Edward Island* (2000), 194 Nfld. & P.E.I.R. 254 at 290-91 (P.E.I.S.C. (T.D.)).

[89] *Du-Lude v. Canada*, [2001] 1 F.C. 545.

[90] *Ibid.* at 557-58.

[91] In *Mackin, supra* note 77 at 600, the Supreme Court sounded a note of caution about awarding the fuller indemnity of solicitor and client costs. See Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 2002 as updated) at para. 11.970 [Roach, *Constitutional Remedies*].

[92] Punitive damages against municipalities are not allowed in the United States. For a persuasive argument that such damages may best deter constitutional violations, see *Ciraolo v. New York (City of)* 216 F.3d 236 at 242-50 (2d Cir. 2000), Justice Calabresi concurring. See also Peter H. Schuck, *Suing Government: Citizen Remedies For Official Wrongs* (New Haven: Yale University Press, 1983). For the Canadian context,

long been recognized that "if public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offence"[93] and that punitive damages can be justified by "oppressive, arbitrary and unconstitutional conduct by the servants of the government."[94] Punitive damages have been awarded under the *Charter* with respect to assaults, and planned and deliberate *Charter* violations that resulted in death.[95] The Supreme Court has indicated that exemplary damages, which are specifically contemplated under the Quebec *Charter of Human Rights and Freedoms*,[96] should only be awarded if the official acts with "a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct" or "with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause."[97] Although this is a restrictive test that has been used to exclude exemplary damages stemming from "standard police practice,"[98] it may nevertheless be satisfied in a profiling context where it is clear that the officer intentionally singled a person out because of her race or ethnicity.

In summary, damages may often be the only remedy available for victims of profiling who do not face subsequent criminal or perhaps administrative proceedings. Unfortunately, the availability of damage awards remains unclear, with even recent cases suggesting that increased quantums of conventional damage awards may not be enough to make such litigation worthwhile. In addition, the government is likely to argue that it and its officials enjoy the type of good faith immunity contemplated in *Mackin*. But, as we have argued above, the better position is that the failure of legislation to authorize profiling should deprive the government and its officials of such a robust immunity. Because damages for profiling would be a track 2 strategy, the restrictions on combining damages and section 52(1) remedies should not apply.

B. *Injunctions and Declarations*

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see Lorne Sossin, "Crown Prosecutors and Constitutional Torts: The Promise and Politics of *Charter* Damages" (1993) 19 Queen's L.J. 372.

[93] *Ashby v. White* (1703), 2 Ld.Raym. 938 at 956.

[94] *Rookes v. Barnard*, [1964] A.C. 1129 at 1226 (H.L.).

[95] See *Bauder v. Wilson* (1988), 43 C.R.R. 149 (B.C.S.C.); *Patenaude v. Roy* (1994), 123 D.L.R. (4th) 78 (Q.C.A.).

[96] R.S.Q. c. C-12.

[97] *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at 262.

[98] *Augustus v. Gosset*, [1996] 3 S.C.R. 268 at 311.

With the possible exception of punitive damage awards, which may be designed to deter similar violations in the future, the damage remedy under section 24(1) of the *Charter* is mainly an individualistic and compensatory remedy. Damages for profiling, particularly low awards that are easily absorbed by the government or for which officials are indemnified, may not change law enforcement behaviour in the future. The question of ensuring future compliance with *Charter* standards will in many cases be left to the court crafting declaratory or injunctive relief for profiling. The current consensus is in favour of general declarations, so that a *Charter* applicant who sought a systemic remedy against profiling in a law enforcement agency would most likely receive a declaration that the agency had engaged in profiling in the past and should not do so in the future, as opposed to a more detailed mandatory order that could subsequently be enforced through the court retaining jurisdiction and perhaps even using its contempt powers to ensure compliance.[99]

The Supreme Court's distinct preference for reliance on general declaratory relief, as opposed to the detailed structural injunctions that have been used in the United States in cases dealing with unconstitutional conditions in various institutions including public schools, prisons, and police forces, has been set out in a series of cases.[100] In the equality rights case of *Eldridge v. British Columbia*, the Court concluded that a "declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished."[101] In *Little Sisters*, a majority of the Court relied on a declaration that customs officials had administered legislation in a manner that had infringed freedom of expression and equality rights under the

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[99] Indeed, victims of profiling may receive more effective relief by making human rights complaints against the officials who engaged in profiling. Human rights commissions may be more prepared to order or negotiate settlements that result in complex mandatory relief. A recent human rights complaint by African-Canadian law student Selwyn Pieters about profiling by the Canada Customs and Revenue Agency (CCRA) resulted in a settlement that included not only an apology and a cash payment of an undisclosed amount, but also commitments by the CCRA to "implement a pilot project intended to develop statistics on referrals to secondary examination, based on race, colour, national and ethnic origin and gender of referrals," to consider collecting such data on a permanent basis, and to provide anti-racism and cultural diversity training for customs officers. See Minutes of Settlement Between Selwyn Pieters and Department of National Revenue (now Canada Customs and Revenue Agency), 30 January 2002 [unpublished]. Similar settlements and consent decrees have been negotiated in the United States. See Rudovsky, *supra* note 82 at 359-63.

[100] Even in the context of the explicitly positive rights to instruction and institutions under s. 23 of the *Charter*, the Supreme Court has stressed its preference for reliance on declaratory as opposed to injunctive relief: *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 392-93; *Re Public Schools Act*, [1993] 1 S.C.R. 839 at 860-61. This remedial consensus is explored in greater depth in Roach, "Remedial Consensus and Dialogue", *supra* note 66.

[101] [1997] 3 S.C.R. 624 at 631.

Charter. Despite finding evidence that there had been improper targeting of imports destined for the gay and lesbian book store and that customs officials had insufficient resources and legal training, the majority of the Court concluded, "with some hesitation, that it is not practicable" to order "a more structured section 24(1) remedy."[102] Although the Court did admit that such a remedy may be "helpful," it held that the remedy was not available in that particular case, because the appeal had taken six years and there was no evidence as to the present state of customs enforcement, and the applicant had not made precise remedial requests for structural relief.

But *Little Sisters* suggests that if a trial judge were faced with clear evidence of systemic profiling, a structural injunction to prevent such profiling might be appropriate and just. As Justice Iacobucci recognized in his dissent in *Little Sisters*, declarations will be "simply inadequate" in those cases where there are clear findings of grave systemic problems and evidence that administrators "have proven themselves unworthy of trust."[103] A declaration might also require victims of profiling to bear what Justice Iacobucci recognized as the "heavy" and "unfair ... burden"[104] of undergoing further expense and delay by starting new proceedings, should the government continue to engage in an unconstitutional practice such as profiling, as the Little Sisters bookstore now alleges.[105] An injunction, by contrast, could be structured to respond to the systemic deficiencies that produced profiling and to allow the judge to retain jurisdiction over the institution until profiling has ceased.[106] Both applicants and trial judges would be well advised to propose and structure injunctive relief in a manner that is clear, enforceable, and realistic, and does not simply repeat the vague and often less than helpful edict to obey the Constitution or not to engage in a violation of section 15 of the *Charter*. A robust section 24(1) injunctive remedy might address systemic deficiencies in an organization that has engaged in profiling. For example, an injunction could require law enforcement officials to keep statistics to determine if profiling was occurring, and to adopt a variety of educational and administrative measures to help ensure that individual

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[102] *Little Sisters*, *supra* note 11 at 1203.

[103] *Ibid.* at 1252.

[104] *Ibid.* at 1254.

[105] Roach, "Remedial Consensus and Dialogue", *supra* note 66 at 233.

[106] A less intrusive alternative would be for the court to issue declaratory relief but to retain jurisdiction and allow or require the successful *Charter* applicant to return to the court to seek further relief. A majority of the Nova Scotia Court of Appeal recently held that this approach was unavailable in a minority language education case under section 23 of the *Charter*, on the formalistic basis that the trial judge had become *functus* once he had issued the requested declaratory relief. *Doucet-Boudreau v. Nova Scotia (Dept. of Education)* (2000), 185 N.S.R. (2d) 246 (T.D.), rev'd with respect to remedies (2001), 203 D.L.R. (4th) 128 (N.S.C.A.), leave to appeal to S.C.C. granted, [2001] S.C.C.A. No. 459 (QL).

officials did not engage in profiling. Structural injunctions are the strongest section 24(1) remedy, and they may be justified to respond to an institution that has engaged in a pattern of unconstitutional profiling.

But even the strongest possible section 24(1) remedy may fail to promote democratic accountability for profiling. As discussed above, our own preference would be for a section 52(1) declaration in cases where there is a real risk that legislation will be enforced through profiling. The Court in *Little Sisters*, however, refused to order a section 52(1) remedy or an injunction enjoining the enforcement of customs legislation. Justice Iacobucci in dissent seemed prepared to entertain structural relief under section 24(1) because he feared that customs officials would continue to engage in unconstitutional profiling. In the end, however, he relied on a section 52(1) remedy that would have declared the authorizing customs legislation to be invalid. Justice Iacobucci gave Parliament eighteen months to reconsider the best procedure for ensuring that imported goods were not obscene. The options open to Parliament included the creation of a specialized tribunal and reliance on *ex post* criminal prosecution after the imported goods had been received in Canada. In the context of profiling, such a remedial approach would promote a dialogue with Parliament about the proper response to profiling. However, it would not necessarily provide a tangible remedy for the victims and potential victims of such practices.

Another remedial issue is whether a victim or potential victim of profiling could secure an interlocutory injunction or stay of the legislation that could be used to engage in profiling. As with section 24(1) damages, we believe that the failure of Bills C-36 or C-17 to explicitly authorize explicitly or prohibit profiling would be significant to the choice of remedies. A statutory ban on profiling would suggest that attempts to obtain interlocutory relief against profiling were premature and that the applicants might have adequate statutory or administrative remedies. On the other hand, the failure of the legislation to authorize profiling suggests that an interlocutory injunction against profiling, or perhaps even an interlocutory stay of a particular statutory provision that is likely to be used to engage in profiling, should be characterized as a less intrusive exemption from the legislation as opposed to a more intrusive suspension of the legislation. The exemption/suspension distinction in the jurisprudence of interlocutory *Charter* remedies should be administered in a way that makes it easier for vulnerable minorities to obtain such relief.[107] It would be inequitable to allow a government that refused to take responsibility for authorizing profiling in legislation to then use a public interest defence for profiling.

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[107] Roach, *Constitutional Remedies*, *supra* note 91 at para. 7.350.

Two final issues that may arise in the context of civil remedies for profiling are standing and ripeness. The United States Supreme Court has taken a very restrictive approach to standing and held that a person who suffered an unconstitutional chokehold by the police did not have standing to request an injunction against the use of such chokeholds in the future because it was not likely that he would suffer another chokehold from the police.[108] Canadian courts should avoid such a restrictive approach, especially given the clear availability of remedies under section 24(1) in anticipation of *Charter* violations.[109] At the same time, however, Canadian courts have insisted that a person requesting a remedy under section 24(1) must have had his or her own rights violated.[110] Thus it is unclear whether an organization would have standing under section 24(1) to seek an injunction or a declaration that a practice of profiling was unconstitutional.[111] The possible refusal of standing under section 24(1) to a public interest group representing those vulnerable to profiling also lends support to our arguments that the most effective and democratic remedies against profiling will be found under section 52(1). A public interest group could more easily be granted discretionary public interest standing to challenge the constitutionality of legislation that may authorize or fail to prohibit profiling.[112]

C. *Criminal Law Remedies: Exclusion of Evidence and Stays of Proceedings*

Although the focus of this section has been on civil challenges to profiling, a few comments about the criminal law remedies that are available for profiling are relevant. A person who has been subject to profiling that has resulted in a criminal charge may have a greater chance at receiving a tangible

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[108] *City of Los Angeles v. Lyons*, 103 S. Ct. 1660 (1983).

[109] See *e.g. New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at 66.

[110] *R. v. Edwards*, [1996] 1 S.C.R. 128.

[111] At the same time, even American courts have found that organizations such as the NAACP may have standing to challenge profiling on the basis that the rights of their members would be infringed by such practices. See *Maryland Conference of NAACP Branches v. Maryland Dept. of State Police*, 72 F.Supp. 2d 560 (D.Md. 1999); *Rodriguez v. California Highway Patrol*, 89 F.Supp. 2d 1131 (N.D. Cal. 2000).

[112] Courts should consider the difficulties that individuals would face bringing *Charter* challenges to profiling and should not mechanically deny public interest standing to a group on the basis that more directly affected individual victims of profiling could bring a challenge. But see *Canadian Council of Churches v. Canada (Ministry of Employment and Immigration)*, [1992] 1 S.C.R. 236.

remedy than one who faces no criminal proceedings.[113] Legal aid may often be available to assist in the defence and the accused can argue that the violation of her *Charter* rights requires the exclusion of incriminating evidence under section 24(2), or even a stay of proceedings under section 24(1). In both cases, courts will examine the entire transaction resulting in the accused's prosecution. Thus, incriminating evidence may be obtained in a manner that violates the *Charter* and be subject to exclusion under section 24(2), even in the absence of a direct causal connection between the act of profiling and the discovery of the evidence.[114] Similarly, courts routinely examine all the circumstances of an investigation and a prosecution in determining whether a stay of proceedings is appropriate and just.

Although the criminal courts are not likely to ignore an established *Charter* violation stemming from profiling, it would be a serious mistake to assume that in every case they will exclude evidence or stay proceedings. Evidence obtained in a manner that involves profiling may well be evidence that is not conscripted[115] directly from the accused but found by the authorities without the accused's assistance. In such cases of non-conscriptive evidence, the courts will only exclude the evidence after balancing the seriousness of the *Charter* violation against the harms of excluding the evidence as measured by its importance to the case and the seriousness of the offence charged. The seriousness of the violation often depends on whether the court finds that it was committed in a deliberate or flagrant manner. Even then, however, courts consider most offences, and certainly terrorism offences, to be serious. Much will depend on the court's perceptions of the relative harms of profiling and terrorism. Although some courts have excluded narcotic evidence possibly obtained through profiling,[116] it is not clear that the same will occur in the terrorism context.

The chance of obtaining a stay of proceedings under section 24(1) because of profiling is even slimmer than that of obtaining the exclusion of non-conscriptive evidence. In such cases, as under section 24(2), the Supreme Court is primarily concerned with whether refusing to stay proceedings will result in

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[113] The same cannot be said of those who face subsequent administrative proceedings, because administrative boards and tribunals may be found not to have jurisdiction to exclude unconstitutionally obtained evidence. See *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75.

[114] *R v. Strachan* [1988] 2 S.C.R. 980; *R. v. Grant*, [1993] 3 S.C.R. 223. There may be some limits if the relation between the impugned evidence and the *Charter* violation is remote and tenuous. *R. v. Goldhart*, [1996] 2 S.C.R. 463.

[115] If the evidence is a statement or bodily substance conscripted from the accused, it will be excluded to protect the accused's fair trial, with little consideration of the seriousness of the *Charter* violation: *R. v. Stillman*, [1997] 1 S.C.R. 607.

[116] *R. v. Simpson* (1993), 12 O.R. (3d) 182 (C.A.).

an unfair trial or a continuing abuse of process that will bring the administration of justice into disrepute. Most acts of profiling will not in themselves affect the fairness of the trial. Thus the issue is whether a stay will be required to prevent a continued abuse of authority. The Supreme Court has been extremely reluctant to sanction stays of proceedings in this context, indicating that only "in 'exceptional', 'relatively very rare' cases will the past misconduct be 'so egregious that the mere fact of going forward in the light of it will be offensive.'"[117] Even then a stay should not be ordered until the seriousness of the offence charged has been considered.[118] The availability of less drastic remedies, such as a subsequent damage action against the government, must also be considered. Even a criminal accused who has established a *Charter* violation in relation to profiling may not receive a tangible remedy at her criminal trial in the form of the exclusion of evidence or a stay of proceedings. This underlines for us the limited efficacy of section 24(1) remedies as presently conceived by the courts and the attendant need to focus on section 52(1) remedies.

V. CONCLUSION: THE NEED FOR A CLEAR LEGISLATIVE STATEMENT BY PARLIAMENT ON PROFILING

Although profiling has been advocated as a tool to detect and prevent terrorist acts, it is a practice that at present lacks explicit statutory authorization. However, this does not mean that it is illegal. Rather, the statutory silence on profiling, both in Canada's legislative response to September 11, as well as in pre-September 11 legislation, means that profiling would be achieved through exercises of statutory discretion, outside the glare of public scrutiny and democratic debate. In this article, we argue that the current framework of *Charter* jurisprudence creates the perverse incentive for governments to implement constitutionally controversial policies in secret through sub-legal means, because of the interrelationship between the "prescribed by law" requirement under section one and the remedies available for unjustified violations of *Charter* rights. *Charter* violations that can be traced to legislation trigger the operation of section 52(1) (track 1) and hence are forced onto the legislative agenda. By contrast, violations that terminate in the actions of individual agents of the state, even when they exercise a discretion granted by statute, engage section 24 (track 2). We have also argued that section 24 remedies in this context are doubly flawed. First, they are less able to force democratic debate on limitations of constitutional rights than are declarations

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[117] *R. v. Regan* (2002), 209 D.L.R. (4th) 41 at 67.

[118] *Ibid.* at 91, 94.

of invalidity under section 52(1). Second, they are ineffective. In particular, section 24 remedies will benefit the factually guilty more than innocent victims of profiling. Also, Canadian courts do not have much experience with the large damage awards or supervised relief that would place pressure on law enforcement agencies to take active steps to prevent profiling. Put another way, forcing litigants onto track 2 denies them a political remedy for violations of *Charter* rights and gives them legal remedies that are not up to the task.

Because the *Charter* is an integral component of a liberal democratic constitutional order, it should be interpreted to ensure that important public policies that implicate our fundamental constitutional values are deliberated and decided upon in public by legislatures, even before they come before the courts. In short, we are talking about nothing less than legislative oversight for *Charter* compliance, not just *after* legislation is found constitutionally wanting by the courts (through reply legislation), but also *during* the framing of legislation itself. The legal tool through which this can be achieved is the requirement that limits on *Charter* rights be "prescribed by law." Our proposal is that in the context of profiling and other activities that present a clear danger to *Charter* rights, courts require that exercises of statutory discretion have a mandate to limit *Charter* rights that is explicit or which arises by necessary implication from the legislation. In this way, the forms of law would strengthen the direction and depth of democratic debate. To do otherwise would punish the politically powerless twice—first, by omitting effective constraints on discretionary decision making in the legislation itself, and second, after their rights have been violated, by denying them access to a political remedy. In the context of Bill C-36, the failure of groups representing Muslim and Arab Canadians to secure amendments that would have banned profiling makes it all the more important that constitutional litigation operate to correct, rather than compound, deficiencies in the political process.

If government agencies engage in profiling in the war on terror, the courts should find the statute that confers the discretion to engage in profiling to be unconstitutional. The appropriate remedy would be a declaration of invalidity under section 52(1), perhaps accompanied by a delay that would allow the law to remain in place for legitimate law enforcement activity but not unconstitutional profiling. At that point, Parliament would have a choice— it could explicitly authorize profiling or explicitly ban it. Whatever Parliament would do, it would be obliged to employ a clear statement, as opposed to punting the issue to the executive. Parliament would have to take a stand on whether it was for or against profiling.

Some argue that our preference for provoking a democratic debate on profiling, as well as for theories of judicial review which promote dialogue

between courts and legislatures, leaves vulnerable minorities at risk.[119] To be sure, profiling has its supporters, particularly in the conservative press. And we are saddened that the majority of legal scholars who made submissions to the House and Senate Committees in Parliament did not address racial and ethnic profiling, which in our view is one of the gravest threats to *Charter* rights posed by the war on terror.[120] Nevertheless, given the multiracial, multi-ethnic, and multicultural nation that Canada has become, we very much doubt that an express policy of profiling could withstand the scrutiny of legislative and public debate.[121] Canada is now a very different country than when it turned against its residents of Japanese descent.

Our strong sense is that no government would be willing to withstand the political controversy that would be generated by explicit legislative authorization of racial or ethnic profiling. Perhaps for that reason, the government has chosen to duck the issue such that profiling remains neither authorized nor prohibited by legislation enacted by Parliament. For example, in our brief to the Special Senate Committee on Bill C-36, we proposed a *Criminal Code* amendment that would have banned profiling by law enforcement officials.[122] While the government did not accept this amendment, it did not use this opportunity to come out in favour of profiling, thereby refusing to address the issue head on. Should profiling take place, we hope that constitutional litigation would require the government and Parliament to confront an issue of

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[119] See Jean Leclair, "Réflexions critiques au sujet de la métaphore du dialogue en droit constitutionnel canadien" Revue du Barreau [forthcoming in 2003].

[120] Of the dozen legal scholars who testified before the House of Commons Standing Committee on Justice and Human Rights, and the Senate Special Committee on Bill C-36, the hearing transcripts show that only three squarely addressed racial and ethnic profiling in their oral testimony, with a fourth discussing the overlapping, but distinct, phenomenon of ideological profiling: Errol Mendes (Special Senate Committee on Bill C-36, Proceedings, Issue 8 (5 December 2001), online: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36-e/08eva e.htm?Language=E&Parl=37&Ses=1&comm_id=90>, House of Commons, Standing Committee on Justice and Human Rights, Evidence (6 November 2001), online: Parliamentary Internet <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev44-e.htm>(racial profiling)), Don Stuart (Special Senate Committee on Bill C-36, Proceedings, Issue 8 (5 December 2001), online: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/sm36-e/08evb-e.htm?Language=E&Parl=37&Ses=1&comm_id=90>(racial profiling); Kent Roach, *ibid.* (racial profiling), and Jamie Cameron (House of Commons, Standing Committee on Justice and Human Rights, Evidence (6 November 2001), online: <http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Meetings/Evidence/justev44-e.htm>(ideological profiling)).

[121] For example, Herb Dhaliwal (then Minister of Fisheries and Oceans, now Minister of Natural Resources) having once been profiled himself, denounced the practice during the debates leading to the enactment of Bill C-36. See Choudhry, *supra* note 2 at 368 and Kent Roach, *September 11 Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003) at 64-66, 70-74.

[122] Kent Roach & Sujit Choudhry, "Brief to the Special Senate Committee on Bill C-36" (5 December 2001) [unpublished]. This brief was excerpted by *The Toronto Star* (6 December 2001) A36.

profiling they have thus far avoided. Parliament would have a choice of explicitly authorizing and accepting democratic responsibility for profiling,[123] or, preferably, adopting a statutory ban on this discriminatory law enforcement practice. Either way, profiling would no longer be allowed to remain underground. In our view, democracy requires no less.

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[123] If our views that profiling violates the equality rights of the racial and ethnic groups targeted and cannot be justified under section 1 as an effective and proportionate law enforcement technique are accepted, explicit authorization of profiling would require that the legislation be enacted notwithstanding section 15 of the *Charter*.