RACIAL PROFILING AND THE PERILS OF ANCILLARY POLICE POWERS

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This article argues that the Supreme Court of Canada generally overlooks the reality of racial profiling when it creates or authorizes police powers. This oversight results in important problems. First, the Court does not adequately consider how racial profiling is a unique harm that breeds distrust of the police and of the justice system. Second, the Court does not impose sufficient oversight mechanisms that foster transparency and accountability. Third, when creating or authorizing police powers, the Court does not conduct a rigorous proportionality analysis that evaluates the harms of racial profiling. The article offers proposals to help address these problems.

L'auteur soutient que la Cour suprême du Canada néglige généralement la réalité du profilage racial lorsqu'elle crée ou autorise des pouvoirs de police. Cette omission entraîne d'importants problèmes. D'abord, la Cour ne tient pas suffisamment compte de la façon dont le profilage racial constitue un préjudice unique qui engendre la méfiance à l'égard de la police et du système de justice. Ensuite, la Cour n'impose pas de mécanismes de contrôle suffisants pour favoriser la transparence et la responsabilité. Enfin, lorsqu'elle crée ou autorise des pouvoirs de police, la Cour ne procède pas à une analyse de proportionnalité rigoureuse qui évalue les préjudices du profilage racial. L'auteur présente des propositions pour aider à résoudre ces problèmes.

Contents

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1. Introduction

Police officers in Canada have more legally authorized powers than ever. Within the past several decades, the police have been granted the authority to conduct random vehicle stops, frisk searches, and investigative detentions.[1] The vast majority of these routinely exercised police powers were not created by elected lawmakers. Nor were these police powers subject to normal democratic processess. Instead, the Supreme Court of Canada increasingly created new police powers through the ancillary powers doctrine.[2] The term "ancillary powers doctrine"—and its accompanying *Waterfield* test—refers to the judicially devised legal doctrine that grants courts the authority to create new police powers that Parliament has not legislated.[3]

Scholars criticize the ancillary powers doctrine on various grounds. Some argue that the doctrine raises rule of law concerns because judges retroactively condone police action that was not previously authorized by statute.[4] Others posit that the ancillary powers doctrine is inconsistent

1 See e.g. Richard Jochelson, "Ancillary Issues with Oakes: The Development of the Waterfield Test and the Problem of Fundamental Constitutional Theory" (2013) 43:3 Ottawa L Rev 355 at 360–365 [Jochelson, "Ancillary Issues"]; *R v Ladouceur*, [1990] 1 SCR 1257, 41 DLR (4th) 682 [*Ladouceur* cited to SCR]; *R v Mann*, 2004 SCC 52 [*Mann*].

2 James Stribopoulos, "Has Everything Been Decided? Certainty, the *Charter* and Criminal Justice" (2006) 34 SCLR (2d) 381 at 399–401 [Stribopoulos, "Certainty"].

3 *Fleming v* Ontario (AG), 2019 SCC 45 at paras 42–43 [*Fleming*]; *R v Waterfield*, [1963] 3 All ER 659, (1946) 48 Cr App R 42 (Eng (Crim App)) [*Waterfield*].

4 James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's LJ 1 at 54–55 [Stribopoulos, "In Search of Dialogue"]; Steve Coughlan, "Common Law Police Powers and the Rule of Law" (2007) 47 CR (6th) 266 at 267 [Coughlan, "Common Law Police Powers and the Rule of Law"].

with the separation of powers, because judges usurp the legislator's role.[5] Some point out that the exercise of ancillary powers results in racial and social profiling, which undermines liberty, dignity, and equality.[6]

Building on this scholarship, this article argues that the ancillary powers doctrine is objectionable because the Supreme Court of Canada largely failed to consider how new police powers result in racial profiling. It shows how this failure undermines the ancillary powers doctrine's legitimacy, the legitimacy of common law police powers, and the legitimacy of certain judicially authorized powers (meaning statutory powers that the Court upheld as constitutional). It demonstrates how this failure also undermines the public's confidence in the justice system. Courts recognize new common law police powers so that officers can achieve valid law enforcement objectives: preserving the peace, preventing crime, and protecting life and property.[7] Yet judges tend to disregard how the disparate enforcement of police powers decreases public confidence in the justice system, and disincentivizes individuals from cooperating with the police and with courts.[8] By drawing on the interdisciplinary insights of criminal law, criminology, and social psychology, this article highlights why ancillary police powers and some judicially authorized powers suffer from two democratic deficits: lack of transparency and lack of accountability. These democratic deficits can undermine the very law enforcement objectives that police powers aim to achieve.[9] Compared to courts, lawmakers generally have greater institutional competence to develop and impose strong police oversight mechanisms that promote transparency and public confidence in the justice system.[10] This partly explains why Parliament should create police powers rather than courts.

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5 Tim Quigley, "Brief Investigatory Detentions: A Critique of *R. v. Simpson*" (2004) 41:4 Alta L Rev 935 at 950 [Quigley, "Critique of Simpson"].

6 David M Tanovich, "Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 145 at 168 [Tanovich, "Arbitrary Detention"].

7 *Fleming*, *supra* note 3 at para 69.

8 Tom Tyler, Phillip Atiba Goff & Robert J MacCoun, "The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement" (2015) 16:3 Psychological Science in Public Interest 75 at 85 [Tyler, Goff & MacCoun, "Impact of Psychological Science"].

9 Amanda Geller & Jeffrey Fagan, "Police Contact and the Legal Socialization of Urban Teens" (2019) 5:1 RSF: Russell Sage Foundation J Soc Sciences 26 at 30; Jonathan Blanks, "Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy" (2016) 66:4 Case W Res L Rev 931 at 942.

10 Daphna Renan, "The Fourth Amendment as Administrative Governance" (2016) 68:5 Stan L Rev 1039 at 1110–1111 [Renan, "Administrative Governance"].

This article demonstrates why the Supreme Court of Canada must revisit the ancillary powers doctrine for several interconnected reasons. First, the ancillary powers doctrine does not adequately consider the realities of systemic discrimination and racial profiling. The same is true for certain judicially authorized police powers. Second, the Court is primarily responsible for creating routine law enforcement powers that suffer from major democratic deficits. As a result, certain police powers can be exercised arbitrarily, discriminatorily, and with impunity. Third, the ancillary powers doctrine disincentivized Parliament from addressing these democratic deficits. Judicially created police powers signal to Parliament that these powers respect the Constitution (otherwise, why would courts recognize these powers in the first place?). This leads to a form of constitutional stalemate. Courts and lawmakers see no pressing need to revisit ancillary police powers and fix their shortcomings. This article concludes by advancing three potential ways to reform the ancillary powers doctrine, and explores the advantages and disadvantages of each approach.

The structure of this article is as follows. Section 2 provides an overview of the ancillary powers doctrine in Canadian criminal law. Section 3 examines empirical evidence of racial profiling in Canada and explains its devastating consequences. Section 4 explores why public confidence in the justice system is crucial in a democracy,[11] and sets out how racial profiling destroys trust in law enforcement and in the justice system.[12] Section 5 discusses the democratic deficits of ancillary powers and certain judicially authorized police powers. Section 6 describes why the Supreme Court of Canada does not conduct a rigorous proportionality analysis when creating or authorizing police powers. Section 7 concludes this article. It analyzes three approaches to addressing the *Waterfield* test's deficiencies and the common law police powers that it has created: the "constitutional reset," a modified *Waterfield* test, and the "scrap and signal" framework. It argues that the Supreme Court of Canada should adopt this third approach. Courts should scrap the ancillary powers doctrine and signal to Parliament that police powers are constitutionally suspect insofar as they lack adequate oversight mechanisms to prevent and combat racial profiling. To be clear, these proposals cannot eliminate racial profiling. Nor can they eradicate systemic discrimination that permeates policing and the broader criminal justice system. However, this article shows why the Supreme Court of Canada must revisit the ancillary powers doctrine and certain police powers, and explains how it can do so.

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[11] Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) at 109–110, 304.

[12] Jacinta M Gau & Rod K Brunson, "Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy" (2010) 27:2 Justice Q 255 at 272–274.

2. The ancillary powers doctrine

The Supreme Court of Canada has affirmed that the "ancillary powers doctrine" allows judges to create new common law police powers.[13] When deciding whether to create a novel police power, courts employ the two-part *Waterfield* test that stems from an English Court of Appeal decision.[14] The first part of that test assesses whether the purported power is consistent with police officers' duties to preserve the peace, prevent crime, and protect people and property from harm.[15] The second part of the test evaluates whether the interference with individual liberty is reasonable and necessary.[16] The Supreme Court of Canada has explained that the ancillary powers doctrine empowers the judiciary to create police powers that fill legislative gaps or respond to legislative inaction.[17]

Since the doctrine's inception in Canadian criminal law, the Supreme Court of Canada created a range of common law police powers that are not provided by statute.[18] Within the past three decades, the judiciary affirmed that police officers have a common law power to set up roadblocks,[19] enter a dwelling house to investigate a 9-1-1 call without a warrant,[20] perform investigative detentions,[21] engage in preventive pat-down searches for officer safety,[22] search individuals incident to arrest,[23] deploy police sniffer dogs,[24] search cellphones incident to arrest without warrant,[25] conduct warrantless strip-searches incident to arrest,[26] and take penile swabs from a defendant incident to arrest without their consent.[27] Many

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13 Glen Luther, "Police Power and the Charter of Rights and Freedoms: Creation or Control" (1986) 51:2 Sask L Rev 217 at 217.

14 *Waterfield*, *supra* note 3; James Stribopoulos "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41:2 Alta L Rev 335 at 348–349.

15 *Fleming*, *supra* note 3 at para 69.

16 *Ibid* at para 75.

17 *Ibid* at para 42; *R v Kang-Brown*, 2008 SCC 18 at para 6 [*Kang-Brown*].

18 James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*" (2007) 52:3/4 Crim LQ 299 at 300–301 [Stribopoulos, "Limits of Police Powers"].

19 See *R v Dedman*, [1985] 2 SCR 2, 20 DLR (4th) 321 (authorizing a police power to set up roadblocks to screen for drunk driving). See also *R v* Clayton, 2007 SCC 32 (authorizing a police power to establish blockades in order to investigate crimes) [*Clayton*].

20 *R v Godoy*, [1999] 1 SCR 311, 168 DLR (4th) 257.

21 *Mann*, *supra* note 1.

22 *Ibid*; R *v MacDonald*, 2014 SCC 3 (recognizing a common law power to conduct safety searches) [*MacDonald*].

23 *Cloutier v Langlois*, [1990] 1 SCR 158, 1990 CanLII 122.

24 *Kang-Brown*, *supra* note 17; *R v AM*, 2008 SCC 19.

25 *R v Fearon*, 2014 SCC 77 [*Fearon*].

26 *R v Golden*, 2001 SCC 83 [*Golden*].

27 *R v Saeed*, 2016 SCC 24 [*Saeed*].

police powers that were once recognized as "ancillary" are now exercised routinely by the police.[28] The Court also affirmed that certain statutory police powers—such as the power to conduct random traffic stops—are constitutional.[29]

Theorists generally advance three arguments against the ancillary powers doctrine. First, some posit that the doctrine raises rule of law concerns because courts create police powers retroactively.[30] According to this view, the doctrine allows judges to condone police action that is otherwise arbitrary, and undermines crucial rule of law values such as predictability, certainty, and prospectivity in the law.[31]

Second, some argue that the ancillary powers doctrine is inconsistent with the separation of powers.[32] Certain scholars remark that the judiciary usurps Parliament's role by creating new police powers.[33] Although the judiciary is supposed to protect individuals' rights and interests, courts instead create police powers that undermine these same rights and interests.[34] James Stribopoulos notes that the ancillary powers doctrine disincentivizes Parliament from codifying existing common law police powers and from legislating new ones.[35] Others observe that courts generally lack the institutional competence to impose adequate police oversight measures.[36] Since courts are limited to a case's factual matrix and cannot gather information like other branches of government, the judiciary is ill-suited to devise police powers that involve complex policy issues.[37]

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28 Terry Skolnik & Vanessa MacDonnell, "Policing Arbitrariness: *Fleming v. Ontario* and the Ancillary Powers Doctrine" (2021) 100 SCLR (2d) 187 at 192.

29 *Ladouceur*, *supra* note 1.

30 Stribopoulos, "In Search of Dialogue", *supra* note 4 at 54–55; Don Stuart, "The *Charter* and Criminal Justice" in Oliver, Macklem & Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 800–801; Coughlan, "Common Law Police Powers and the Rule of Law", *supra* note 4 at 266–267.

31 Tim Quigley, "The Impact of the *Charter* on the Law of Search and Seizure" (2008) 40:2 SCLR 117 at 140 [Quigley, "Search and Seizure"].

32 Jochelson, "Ancillary Issues", *supra* note 1 at 371.

33 *Ibid*; Quigley, "Critique of Simpson", *supra* note 5 at 950.

34 Quigley, "Critique of Simpson", *supra* note 5 at 950; Stribopoulos, "In Search of Dialogue", *supra* note 4 at 54–55.

35 Stribopoulos, "In Search of Dialogue", *supra* note 4 at 70–71.

36 Martin L Friedland, "Criminal Justice in Canada Revisited" (2004) 48:4 Crim LQ 419 at 446, 448–450 [Friedland, "Criminal Justice"].

37 *Ibid*, at 448–450; Cass R Sunstein, "The Most Knowledgeable Branch" (2016) 164:7 U Pa L Rev 1607 at 1613–1616 [Sunstein, "Knowledgeable Branch"].

The third objection to the ancillary powers doctrine is that courts create police powers that result in racial and social profiling—concerns that apply equally to judicially authorized police powers.[38] David Tanovich argues that the judiciary gave officers the implicit authority to engage in racial profiling by affirming that random vehicle stops are constitutional.[39] Furthermore, officers may stop a vehicle to conduct a criminal investigation, yet invoke randomness or a traffic violation as the justification for the stop.[40] Others argue that the ancillary powers doctrine results in racial profiling because the judiciary fails to control unlawful police interventions adequately. Most routine police interactions are low-visibility and do not result in judicial review.[41] For this reason, courts cannot control a meaningful portion of police misconduct.[42]

Judicial review of ancillary powers remains elusive for other reasons. Some individuals will not contest a police intervention because they are unsure about the breadth of their rights nor the scope of police powers.[43] Disadvantaged persons may not seek legal redress, and may lack political power to effectuate broader legal change.[44] Some individuals may consent to unlawful police action out of fear, or due to concerns about retaliation.[45] A person may also consent to otherwise unlawful police investigations because they believe it is necessary to prevent police violence.[46] These considerations explain in part why it is difficult to hold police accountable for unlawful and discriminatory action.[47]

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38 Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41:1 Osgoode Hall LJ 1 at 11; David M Tanovich, "The Colourless World of *Mann*" (2004) 21 CR (6th) 47 [Tanovich, "Colourless World"].

39 Tanovich, "Arbitrary Detention", *supra* note 6 at 168.

40 David M Tanovich, "Res Ipsa Loquitur and Racial Profiling" (2002) 46:3/4 Crim LQ 329 at 331 [Tanovich, "Racial Profiling"].

41 Stribopoulos, "Limits of Police Powers", *supra* note 18 at 304, 321.

42 *Ibid*.

43 Aziz Huq, Jonathan Jackson & Rick Trinkner, "Legitimating Practices: Revisiting the Predicates of Police Legitimacy" (2017) 57:5 Brit J Crim 1101 at 1118 [Huq, Jackson & Trinkner, "Legitimating Practices"].

44 Debra Livingston, "Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing" (1997) 97:3 Colum L Rev 551 at 596; *R v Landry*, [1986] 1 SCR 145 at 186, 26 DLR (4th) 368; *Ladouceur*, *supra* note 1 at 1267.

45 I Bennett Capers, "Criminal Procedure and the Good Citizen" (2018) 118:2 Colum L Rev 678 at 696–698 [Capers, "Good Citizen"].

46 Devon W Carbado, "Race, Pedestrian Checks, and the Fourth Amendment" in Lave & Miller, eds, *The Cambridge Handbook of Policing in the United States* (Cambridge: Cambridge University Press, 2019) 309 at 314.

47 Alan Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29:2 Osgoode Hall LJ 329 at 330.

3. Policing and racial profiling

Empirical research shows that police powers are exercised disproportionately against racialized and Indigenous persons. Although there are many definitions of racial profiling,[48] this article adopts the Ontario Human Rights Commission's definition which defines racial profiling as: "[A]ny action undertaken for reasons of safety, security or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment."[49] Consistent with the Ontario Human Rights Commission's terminology, this article employs the term "racialized person" to designate persons who are not Indigenous or white.[50] Although this article focuses primarily on racial profiling, many of its core arguments also apply to the context of social profiling, meaning police action that is motivated by an individual's perceived social or economic status, such as poverty or homelessness.[51]

Various studies demonstrate how police powers are exercised disparately against certain individuals. Researchers conducted a quantitative study that examined the extent to which racialized persons are pulled over by the police in Ottawa.[52] The study examined police records from roughly 81,900 traffic stops that took place between June 2013 and June 2015.[53] The results show that Arab/West Asian persons,[54]

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48 Kent Roach, "Making Progress on Understanding and Remedying Racial Profiling" (2004) 41:4 Alta L Rev 895 at 896; *R v Le*, 2019 SCC 34 at paras 76–78 [*Le*].

49 Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario*, (Toronto: OHRC, 2017) at 16 [OHRC].

50 *Ibid* at 15 (The OHRC explains: "The term 'racialized' is widely preferred over descriptions such as 'racial minority,' 'visible minority' or 'person of colour' as it expresses race as a social construct rather than a description of people based on perceived characteristics").

51 Bill O'Grady, Stephen Gaetz & Kristy Buccieri, *Can I See Your ID? The Policing of Youth Homelessness in Toronto* (Toronto: Canadian Foundation for Children & Youth and the Law & Justice for Children and Youth, 2011) at 13; Commission des droits de la personne et des droits de la jeunesse , *The Judiciarisation of the Homeless in Montreal: A Case of Social Profiling*, (Montreal: CDPDJ, 2009) at 3; Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JL & Equality 69 (homelessness and discrimination).

52 Dr Lorne Foster, Dr Les Jacobs & Dr Bobby Siu, "Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts" (Ottawa: Ottawa Police Service, 2016) at 3–5 .

53 *Ibid* at 3.

54 *Ibid* at 3, 46 (the Ottawa police employs the term "Middle Easterner", whereas the authors of the study suggest the term "Arab/West Asian").

and Black persons were subject to a disproportionately high number of vehicle stops compared to their white counterparts.[55]

A recent study analyzed the incidence of police "street checks" in Montreal between 2014 and 2017, meaning that officers asked individuals to identify themselves.[56] Indigenous persons, Black persons, and Arab/West Asian individuals aged 15-24 years old[57] were at least four times more likely to be subject to street checks compared to white persons.[58] Indigenous women were approximately eleven times more likely to be subject to street checks compared to white women.[59] This disparity grew between 2014 and 2017. During that time, the frequency by which Indigenous persons were asked to identify themselves tripled, while that frequency doubled for Arab/West Asian persons.[60]

Scholars conducted a survey study that examined the extent to which high school students were stopped by the police and subject to frisk searches.[61] Compared to white counterparts, Black high school students were more likely to be both stopped multiple times and frisk-searched multiple times.[62] Similarly, a Nova Scotia Human Rights Commission study shows that Black respondents in Halifax report being stopped by police on three or more occasions at roughly three times the rate of white respondents.[63]

Although systemic racism and biases permeate all spheres of society, their effects are particularly pronounced in policing contexts. In 2017, the Ontario Human Rights Commission conducted a public consultation

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55 *Ibid* at 17–19.

56 Victor Armony, Mariam Hassaoui & Massimiliano Mulone, *Les interpellations policières à la lumière des identités racisées des personnes interpellées Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d'indicateurs de suivi en matière de profilage racial*, (Montreal: SPVM, 2019) at 9–11 [Armony, Hassaoui & Mulone, *Les interpellations policières*].

57 *Ibid.* See OHRC, *supra* note 49 at 29 (In the interests of consistency in this article, and in line with the Ontario Human Rights Commission, this article employs the language of "Arab/West Asian persons").

58 Armony, Hassaoui & Mulone, *Les interpellations policières*, *supra* note 56 at 10 (Indigenous persons and Black persons were between four to five times more likely to be subject to street checks compared to white persons).

59 *Ibid* at 11.

60 *Ibid.*

61 Steven Hayle, Scot Wortley & Julian Tanner, "Race, Street Life, and Policing: Implications for Racial Profiling" (2016) 58 Can J Corr 322 at 328–329 (describing an overview of the study).

62 *Ibid* at 332.

63 Scot Wortley, *Halifax, Nova Scotia: Street Checks Report*, (Halifax: Nova Scotia Human Rights Commission, 2019) at 33 [Wortley, *Street Checks Report*].

to study racial profiling, which involved surveys and interviews.[64] The study examined racial profiling in various sectors, such as policing, courts, housing, healthcare, education, and employment, amongst others.[65] Respondents experienced racial profiling most frequently in the context of private business (retail) and policing.[66] Moreover, of the survey respondents who reported that they knew someone who was subject to racial profiling, 73% indicated that it occurred in the context of policing.[67] Many racialized and Indigenous participants reported being pulled over for random or routine traffic stops, while others reported being followed by the police while driving.[68] Many racialized and Indigenous respondents also reported being subject to carding and street checks.[69]

Racial profiling harms individuals and communities significantly.[70] Numerous studies confirm that it negatively impacts mental health.[71] Research demonstrates that racial profiling increases the likelihood of anxiety, depression, hypervigilance, and substance abuse.[72] Racial profiling can decrease individuals' sense of safety and willingness to frequent certain spaces.[73] It also contributes to community fragmentation and poor health.[74] Monica Bell points out that racial profiling results in a form of "legal estrangement" that is characterized by systemic feelings of exclusion, disillusionment, and marginalization.[75]

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64 OHRC, *supra* note 49 at 11–12.

65 *Ibid* at 27.

66 *Ibid.*

67 *Ibid* at 28.

68 *Ibid* at 34–36.

69 *Ibid* at 37–39.

70 *Ibid* at 40.

71 *Ibid*; See generally Abigail A Sewell, Kevin A Jefferson & Hedwig Lee, "Living Under Surveillance: Gender, Psychological Distress, and Stop-Question-and-Frisk Policing in New York City" (2016) 159 Soc Science & Medicine 1 at 2 (provides an overview of studies that confirm that racial profiling negatively impacts mental health).

72 Shervin Assari et al, "Racial Discrimination during Adolescence Predicts Mental Health Deterioration in Adulthood: Gender Differences among Blacks" (2017) 5 Frontiers Public Health 1 at 2, 5–8.

73 Stephanie Wallace, James Nazroo & Laia Bécares, "Cumulative Effect of Racial Discrimination on the Mental Health of Ethnic Minorities in the United Kingdom" (2016) 106:7 American J Public Health 1294 at 1298–1299.

74 Marisela B Gomez, "Policing, Community Fragmentation, and Public Health: Observations from Baltimore" (2016) 93:1 J Urban Health S154 at S164–S165.

75 Monica C Bell, "Police Reform and the Dismantling of Legal Estrangement" (2017) 126:7 Yale LJ 2054 at 2066–2067, 2086–2089

Racial profiling also decreases trust in law enforcement and willingness to cooperate with the police.[76] Individuals are less likely collaborate with the police when they are subject to racial profiling directly or vicariously through others' experiences.[77] Highly publicized instances of racial profiling or police brutality generate particularly negative and lasting effects on police legitimacy and communities' willingness to cooperate with law enforcement.[78] Yet cooperation between law enforcement and the community is crucial. The police cannot solve crimes without collaboration from members of the public who are willing to call 9-1-1 in order to report crimes, make statements to the police, and testify at trials.[79]

4. Policing and public confidence in the justice system

A) Public confidence in the police and in the justice system: an overview

There are several problems with the ancillary powers doctrine, common law police powers, and certain judicially authorized police powers. First, the *Waterfield* test overlooks how police powers result in the distinct harm of racial profiling, which undermines liberty, dignity, and equality. Discriminatory policing also corrodes public confidence in the police and in the criminal justice system.[80] Consequently, when creating new police powers, courts also fail to incorporate proper oversight measures that can prevent and counteract discrimination. As explained more below, since Parliament has greater institutional capacity to create police powers

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[76] Tom R Tyler, "Policing in Black and White: Ethnic Group Differences in Trust and Confidence in the Police" (2005) 8:3 Police Q 322 at 339 [Tyler, "Policing in Black and White"]; Tom R Tyler & Jeffrey Fagan, "Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities" (2008) 6 Ohio State J Crim L 231 at 265; Rod K Brunson, "'Police Don't Like Black People': African-American Young Men's Accumulated Police Experiences" (2007) 6:1 Criminology & Public Policy 71 at 92–93; Tom Tyler, Jonathan Jackson & Avital Mentovich, "The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact" (2015) 12:4 J Empirical Leg Stud 602 at 629–630.

[77] Tom R Tyler & Cheryl J Wakslak, "Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority" (2004) 42:2 Criminol 253 at 276–277 [Tyler & Wakslak, "Profiling and Police Legitimacy"].

[78] Valerie J Callanan & Jared S Rosenberger, "Media and Public Perceptions of the Police: Examining the Impact of Race and Personal Experience" (2011) 21:2 Policing & Society 167 at 173–174 (overview of studies looking at the negative and lasting effects of racial profiling or police brutality on police legitimacy and communities' willingness to cooperate with law enforcement).

[79] Tyler, Goff & MacCoun, "Impact of Psychological Science", *supra* note 8 at 85.

[80] Janet Chan, "Racial Profiling and Police Subculture" (2011) 53:1 Can J Corr 75 at 75.

with strong oversight measures, the legislative branch should create these powers and not courts.[81]

It is surprising that the ancillary powers framework overlooks how police powers can undermine public confidence in law enforcement and in the justice system. The Supreme Court of Canada has held that public confidence in the criminal justice system is fundamental within a democracy.[82] When courts decide whether to exclude unconstitutionally obtained evidence under s. 24(2) of the *Canadian Charter,* they evaluate how excluding the evidence affects the public's faith in the justice system.[83] Similar concerns animate courts' decisions to grant bail.[84] The s. 11(b) *Canadian Charter* right to be tried within a reasonable time is also premised on the need to maintain public confidence in the justice system.[85] The need for judicial independence shares that rationale, too.[86] Furthermore, the Court emphasizes the importance of the public's long-term faith in the justice system.[87]

Public confidence in the justice system matters for a variety of reasons. Former Justices Beverley McLachlin, Sandra Day O'Connor, and Aharon Barak note that it is a crucial aspect of the rule of law.[88] If individuals' rights are violated and they do not seek legal redress because they distrust courts, judges cannot protect these rights.[89] Public confidence in the justice system legitimizes the State's authority over individuals, because it shapes individuals' willingness to obey the law, accept authority, and

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81 Renan, "Administrative Governance", *supra* note 10 at 1110–1111.

82 *Valente v The Queen*, [1985] 2 SCR 673 at 689, 24 DLR (4th) 161; Julian V Roberts, "Public Confidence in Criminal Justice in Canada: A Comparative and Contextual Analysis" (2007) 49:2 Can J Corr 153 at 154.

83 *R v* Grant, 2009 SCC 32 at para 68 [*Grant*].

84 *Criminal Code*, RSC 1985, c C-46, s 515(10)(c); *R v* St-Cloud, 2015 SCC 27 at paras 77–79; *R v* Myers, 2019 SCC 18 at paras 50–53.

85 *R v* Jordan, 2016 SCC 27 at para 26.

86 *Ell v Alberta (AG)*, 2003 SCC 35 at para 23; *R v S (RD)*, [1997] 3 SCR 484 at 523, 151 DLR (4th) 193.

87 *Grant*, *supra* note 83 at para 68; Beverly McLachlin, "Preserving Public Confidence in the Courts and the Legal Profession" (2003) 29:3 Man LJ 277 at 286–287 [McLachlin, "Preserving Public Confidence"]; Frederick Schumann, "The Appearance of Justice: Public Justification in the Legal Relations" (2008) 66 UT Fac L Rev 189 at 200.

88 Beverley McLachlin, "Courts, Transparency and Public Confidence—To the Better Administration of Justice" (2003) 8:1 Deakin L Rev 1 at 9–10 [McLachlin, "Transparency and Public Confidence"]; Sandra Day O'Connor, "Vindicating the Rule of Law: The Role of the Judiciary" (2003) 2:1 Chinese J Intl L 1 at 6; Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116:1 Harv L Rev 19 at 136.

89 McLachlin, "Preserving Public Confidence", *supra* note 87 at 9.

collaborate with public institutions.[90] Individuals who lose faith in the justice system are less willing to report crimes and collaborate with justice system actors.[91] Although racial profiling generates distrust in the justice system, this distrust can spill over to other areas of civic life. The criminal justice system must aim to respect certain core societal values, such as fairness, equality, and justice.[92] When individuals lose confidence in a justice system that should reflect those values, they may also lose confidence in other areas of society.[93] Indeed, some studies suggest that lack of confidence in the police may dissuade individuals from voting and participating in other areas of civic life.[94]

It is a mistake, though, to believe that racial profiling leads to distrust only in individuals and communities who are subject to it.[95] Racial profiling breeds wide-spread cynicism about the legitimacy of police action, raises the likelihood of wrongful convictions, reveals inappropriate exercises of police discretion, and undermines equality.[96] By downplaying racial profiling's incidence and effects, inequalities become normalized and more deeply entrenched within society.[97] Racial profiling and systemic racism undermine the rule of law.[98]

Over-policing and selective law enforcement practices have other consequences. Human rights commission reports detail how the exercise of various police powers has driven down racialized and Indigenous persons' trust in the police. The Nova Scotia Human Rights Commission shows that approximately 65% of Black respondents who were pulled over

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90 Jonathan Jackson et al, "Why Do People Comply with the Law? Legitimacy and the Effect of Institutions" (2012) 52:6 Brit J Crim 1051 at 1062–1064; Tom R Tyler & Jonathan Jackson, "Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement" (2014) 20 Psychol Pub Pol'y & L 78 at 89 [Tyler & Jackson, "Popular Legitimacy"].

91 David M Paciocco, *Getting Away With Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999) at 4–5.

92 *R v Oakes*, [1986] 1 SCR 103 at 119–20, 26 DLR (4th) 200.

93 Tyler & Jackson, "Popular Legitimacy", *supra* note 90 at 89.

94 *Ibid*; Aziz Z Huq, "The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing" (2017) 101 Minn L Rev 2397 at 2437–2438.

95 David A Harris, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters" (1999) 84:2 Minn L Rev 265 at 298–299 [Harris, "Driving While Black Matters"].

96 *Ibid* at 298–305; Megan Quattlebaum, "Let's Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer" (2018) 14:1 Stanford J Civ Rights & Civ Liberties 1 at 9 [Quattlebaum, "Let's Get Real"].

97 Liqun Cao, "Visible Minorities and Confidence in the Police" (2011) 53:1 Can J Corr 1 at 16.

98 David A Harris, "Racial Profiling Redux" (2003) 22:1 St. Louis U Pub L Rev 73 at 83–84 [Harris, "Redux"].

by the police within the past five years expressed concern that they were stopped due to racism, while 74.1% of that cohort responded that they were subject to unfair treatment during the stop.[99] Of that cohort, 70.9% of Black respondents indicated that they did not believe the police officer's justification for the stop.[100] Some participants also indicated that they did not trust the police and were reluctant to report crimes to law enforcement and cooperate with the justice system.[101]

The Ontario Human Rights Commission evaluated the effects of being stopped and questioned by the police. The Commission's survey study shows that 61.7% of respondents indicated that those encounters decreased their trust in the police, and 47.8% of respondents reported that those encounters reduced their trust in the justice system.[102] Racial profiling affects the legitimacy of public institutions and undermines their effectiveness.[103]

To be clear, individuals will also lose confidence in a justice system that does not provide police officers with sufficient powers to prevent and solve crimes, protect life and property, and preserve peace. Individuals who believe that the police cannot protect them may feel helpless, unsafe, and in the worst cases, resort to violent self-help or vigilantism.[104] Law enforcement is necessary to prevent domination through private violence.[105] It does, however, also result in public domination through undemocratic and abusive policing.[106] Though law enforcement powers are necessary to deter private violence, prevent and solve crimes, and ensure public peace, these powers require transparency, accountability, and fair application.[107]

When judges overlook how a purported police power can lead to racial profiling and lower public confidence in the justice system, they also overlook the need for oversight measures that aim to counteract racial profiling and maintain public trust in the justice system. As a result, some

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99 Wortley, *Street Checks Report*, *supra* note 63 at 35.

100 *Ibid* at 41.

101 *Ibid* at 16–17.

102 OHRC, *supra* note 49 at 40.

103 *Ibid* at 10.

104 Justice Tankebe, "Self-Help, Policing, and Procedural Justice: Ghanaian Vigilantism and the Rule of Law" (2009) 43:2 Law & Soc'y Rev 245 at 259–260.

105 David Alan Sklansky, "Police and Democracy" (2005) 103:7 Mich L Rev 1699 ("the police are both a uniquely powerful weapon against private systems of domination and a uniquely frightening tool of official domination" at 1808).

106 *Ibid.*

107 *Ibid* at 1789, citing Jerome H Skolnick, "On Democratic Policing" (August 1999) at 2–5, online (pdf): *Police Foundation* <www.policefoundation.org>.

common law police powers and certain judicially authorized police powers become counterproductive over time. When police powers lack oversight measures and result in racial profiling, over-policed individuals may be less willing to cooperate with law enforcement and the justice system.[108] This makes it more difficult for the police to prevent and solve crimes—the primary law enforcement objectives that justify why courts create new police powers in the first place. Indeed, various police powers that lead to chronic distrust and resentment amongst community members were created or authorized by courts and continue to lack proper accountability mechanisms.

In response to this argument, one might contend that recent Supreme Court of Canada decisions demonstrate that the justices are increasingly acknowledging the realities of systemic racism and racial profiling.[109] For instance, in *R v Le,* four Black men and one Asian man (the accused) were in a backyard together and were speaking with one another.[110] As the Supreme Court of Canada notes, the individuals "appeared to be doing nothing wrong" and "were just talking."[111] Three police officers entered the backyard without a warrant and without consent and started questioning the individuals.[112] The officers demanded that the individuals identify themselves and yelled at one of them to show their hands.[113] One of the officers approached Mr. Le, asked him to identify himself, and inquired about the contents of his satchel.[114] Mr. Le fled, was arrested on a nearby street, and was searched incident to arrest and at the police station.[115] The officers found a handgun, cash, and drugs during these searches.[116] At issue was whether the entry into the backyard, investigative detention, and searches were lawful. The majority of the Court concluded that the detention was arbitrary, excluded the unconstitutionally obtained evidence, and acquitted the accused.[117] In arriving at this decision, the Court examined various sources of information and observed that racial

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108 Scot Wortley & Akwasi Owusu-Bempah, "The Usual Suspects: Police Stop and Search Practices in Canada" (2011) 21:4 Policing & Society 395 at 403.

109 *R v Ipeelee*, 2012 SCC 13 at para 67; *R v* Kokopenace, 2015 SCC 28 at paras 191–194, Justice Cromwell, dissenting. See *Le, supra* note 48 at paras 89–97 (systemic racism in the exercise of police powers).

110 *Le*, *supra* note 48 at para 1.

111 *Ibid.*

112 *Ibid.*

113 *Ibid* at paras 1–2.

114 *Ibid* at para 2.

115 *Ibid* at para 14.

116 *Ibid.*

117 *Ibid* at paras 124–137, 160–166.

profiling impacts physical and mental health, results in social exclusion, and decreases trust in the police and in the justice system.[118]

To be clear, the Court's greater acknowledgement of systemic racism and racial profiling within the justice system is a positive step forward. Yet in *Le,* the Court did not consider how the omnipresence of racial profiling might militate in favour of higher legal thresholds for investigative detentions, require more stringent police oversight mechanisms, or mandate mandatory data-gathering schemes that afford greater information about policing practices.

B) Legality, bounded authority, and public confidence in the police

It is not only arbitrary or unlawful exercises of police powers that harm public confidence in the justice system. Even when the police exercise these powers lawfully, it may still decrease individuals' faith in courts, law enforcement, and other public institutions. One major shortfall of the ancillary powers doctrine is that it does not consider how police officers and individuals understand the legitimacy of police interactions differently. This distinction accounts for why individuals distrust the police and courts even when officers act lawfully. Scholars have shown that officers tend to understand routine police encounters in terms of their *legality:* did officers act lawfully?[119] Yet many individuals understand police interactions in terms of *bounded authority*, which alludes to whether officers "seem to respect the limits of their power and authority" even if individuals do not know these limits."[120]

The concept of bounded authority implies that individuals evaluate police legitimacy in terms of their beliefs about what the police should be able and unable to do.[121] As part of that mental process, individuals also evaluate procedural justice considerations, such as whether they are treated

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118 *Ibid* at paras 93–97. See Amar Khoday, "Ending The Erasure?: Writing Race Into The Story of Psychological Detentions—Examining *R v Le*" (2021) 100 SCLR (2d) 165 at 180 [Khoday].

119 Rick Trinkner, Jonathan Jackson & Tom R Tyler, "Bounded Authority: Expanding 'Appropriate' Police Behavior Beyond Procedural Justice" (2018) 42:3 L & Human Behavior 280 at 282–283; Rick Trinkner & Tom R Tyler, "Legal Socialization: Coercion Versus Consent in an Era of Mistrust" (2016) 12 Annual Rev L & Soc Science 417 at 428.

120 Huq, Jackson & Trinkner, "Legitimating Practices", *supra* note 43 at 1104.

121 *Ibid*; Monica M Gerber & Jonathan Jackson, "Justifying Violence: Legitimacy, Ideology and Public Support for Police Use of Force" (2017) 23:1 Psychology Crime & L 79 at 83.

with fairness, dignity, impartiality, and respect.[122] Since individuals may not know whether police action is lawful—and officers do not overtly state that their interventions are motivated by racial profiling—individuals resort to bounded authority as a heuristic to gauge the justness of police conduct.[123]

The core difference between legality and bounded authority is this: bounded authority recognizes that being repeatedly stopped, searched, or detained by the police can drive down public confidence in law enforcement, even if the police exercise these powers lawfully and courteously in each individual case.[124] Research indicates that Black persons who are pulled over by the police for investigative stops experience greater distrust towards law enforcement compared to their white counterparts, even when officers are polite and the stop is lawful.[125] Individuals may still feel targeted even when officers exercise their authority lawfully.[126] The ancillary powers framework, however, discounts how bounded authority affects individuals' perceptions of the police and of the justice system.

There are other problems with the *Waterfield* test. It does not analyze how disparate enforcement affects the necessity and reasonableness of a purported police power. Nor does the test evaluate how this disparate impact drives down the population's trust in the police, in courts, and in public institutions. Admittedly, in some cases, such as *R v Golden,* the Supreme Court of Canada considered how a common law strip search power might be enforced disparately against racialized persons.[127] Yet in decisions such as *R v Mann* and *R v Clayton*—cases which involved an accused who was either an Indigenous or racialized person—the Court overlooked how police powers might result in racial profiling that undermines public confidence in the justice system.[128]

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122 Tom R Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law" (2003) 30 Crime & Justice 283 at 284, 327–328.

123 Huq, Jackson & Trinkner, "Legitimating Practices", *supra* note 43 at 1118, citing Tracey L Meares, Tom R Tyler & Jacob Gardener, "Lawful or Fair? How Cops and Laypeople Perceive Good Policing" (2015) 105:2 J Crim L & Criminology 297 at 307, 315; Tracey L Meares & Peter Neyroud, "Rightful Policing" (February 2015) at 5, online (pdf): *National Institute of Justice* <www.ojp.gov>.

124 Charles R Epp, Steven Maynard-Moody & Donald P Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago: University of Chicago Press, 2014) at 120–133.

125 *Ibid* at 125, 143.

126 Jeffrey Fagan et al, "Stops and Stares: Street Stops, Surveillance, and Race in the New Policing" (2016) 43:3 Fordham Urb LJ 539 at 559.

127 *Golden*, *supra* note 26 at para 83.

128 *Mann*, *supra* note 1; *Clayton*, *supra* note 19; Tanovich, "Colourless World", *supra* note 38.

5. The democratic deficits of police powers

A) Police oversight mechanisms in other jurisdictions

Another major problem with the ancillary powers framework is that courts create new police powers without imposing adequate oversight mechanisms. This generates important implications for the rule of law. Since many police encounters are low-visibility and escape judicial review, officers are primarily responsible for adjudicating the lawfulness of their own conduct.[129] The Supreme Court of Canada's failure to impose adequate accountability mechanisms both demonstrates the ancillary powers doctrine's shortcomings and shows why courts are ill-suited to devise new police powers.

David Tanovich notes that in certain countries, police officers must record data related to proactive police encounters, such as frisk searches and vehicle stops.[130] England and Wales' *Police and Criminal Evidence Act* requires officers to respect various requirements when conducting stop-and-frisk searches.[131] The officers must record certain details related to the search, such as the searching officer's name, the ethnicity of the person who is searched, and the reason for the search.[132] Individuals are entitled to a record of the search.[133] Data from these searches is compiled, entered into a database, and made freely accessible to the public.[134] According to that data, between April 2019 and March 2020, 6 white persons per 1,000 white persons were stopped and searched by the police, while 54 Black persons per 1,000 Black persons were stopped and searched by the police.[135]

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129 Jocelyn Simonson, "Copwatching" (2016) 104:2 Cal L Rev 391 at 395, citing Jerome H Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: John Wiley & Sons, 1966) at 14.

130 David M Tanovich, "E-Racing Racial Profiling" (2004) 41:4 Alta L Rev 905 at 921–924 [Tanovich, "E-Racing Racial Profiling"]; Carol Tator & Frances Henry, *Racial Profiling in Canada: Challenging the Myth of 'A Few Bad Apples'* (Toronto: University of Toronto Press, 2006) at 66–68.

131 *Police and Criminal Evidence Act 1984* (UK), c 60, s 3(1).

132 *Ibid.*

133 *Ibid.*

134 *Ibid*, s 5; See e.g. UK, Home Office, *Police Powers and Procedures: England and Wales, Year Ending 31 March 2019* (Statistics Report) (London: Home Office, 2019).

135 Government Race Disparity Unit, "Stop and Search" (22 February 2021), online: *Ethnicity facts and figures* <www.ethnicity-facts-figures.service.gov.uk>.

Some US states require police forces to collect certain data regarding proactive police encounters, such as vehicle stops.[136] As part of their investigations, the US Department of Justice collects and analyzes data regarding policing disparities amongst different law enforcement agencies.[137] Different US government databases also contain information regarding the prevalence of stop-and-frisk searches and arrests amongst various populations.[138]

Certain US jurisdictions employ Early Intervention Systems (or Early Warning Systems) that detect officers who are more at risk of various forms of misconduct: excessive force, inappropriate behaviour, and dangerous driving, amongst others.[139] These systems aim to identify and prevent inappropriate police behaviour rather than merely address it after-the-fact.[140] Police forces provide additional training, counselling, and other resources to officers who are flagged as problematic by an Early Intervention System.[141] More recently, some studies have compared the effectiveness of machine learning-based Early Intervention Systems with other models.[142] Some preliminary results suggest that the advent of machine learning may help predict and identify police misconduct more effectively than other types of Early Intervention Systems.[143]

As Akwasi Owusu-Bempah, Scot Wortley, and David Tanovich point out, Canadian law does not require police forces to collect data about the ethnicity of individuals who are subject to proactive police encounters.[144]

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136 Melissa Whitney, "The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent" (2008) 49:1 BCLR 263 at 275–276.

137 *Ibid*; US Department of Justice, Civil Rights Division, *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present* (Washington, DC: 2017) at 10–11; Rachel Harmon, "Why Do We (Still) Lack Data on Policing?" (2013) 96:4 Marq L Rev 1119 at 1133-1134 [Harmon, "Data on Policing"].

138 Wayne A Logan & Andrew Guthrie Ferguson, "Policing Criminal Justice Data" (2016) 101:2 Minn L Rev 541 at 556–557.

139 Mary D Fan, *Police Power and the Video Revolution* (Cambridge: Cambridge University Press, 2019) at 123–125.

140 Tim Prenzler, *Police Corruption: Preventing Misconduct and Maintaining Integrity* (New York: Routledge, 2019) at 113.

141 Jennifer Helsby et al, "Early Intervention Systems: Predicting Adverse Interactions Between Police and the Public" (2018) 29:2 Crim Justice Policy Rev 190 at 193.

142 *Ibid*.

143 *Ibid* at 192, 205–206.

144 Akwasi Owusu-Bempah & Scot Wortley, "Race, Crime, and Criminal Justice in Canada" in Sandra Bucerius & Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford: Oxford University Press, 2014) at 287–289 [Owusu-Bempah & Wortley, "Race, Crime, and Ciminal Justice"]; David M Tanovich, *The Colour*

Many Canadian police do not report ethnicity-based data on policing.[145] Without such data, the pervasiveness of racial profiling in certain cities is unknown.[146] The lack of police accountability is compounded by other factors: limited judicial review of police action, defendants' difficult burden to prove racial profiling, and the gulf between how courts describe police powers and how officers apply them.[147]

B) Police powers and lack of transparency

Although the Supreme Court of Canada enlarged the scope of law enforcement powers considerably over the past several decades, these powers continue to lack oversight measures that help track, prevent, and address police impropriety. Without such oversight mechanisms, police powers result in two major democratic deficits: lack of transparency and lack of accountability.[148]

Since neither legislators nor courts require the police to gather publicly accessible data regarding the prevalence of disparate policing practices, the exercise of certain police powers is shrouded in opacity.[149] This is particularly objectionable, given transparency's fundamental role within a democracy.[150] Transparency allows individuals to evaluate the legitimacy of State action, improve governmental services, and ensure that public officials do not abuse their power, all of which are key ingredients for developing trust in law enforcement and public institutions.[151] Democracy's emphasis on transparency is also tied to the requirement that justice is both done and seen to be done.[152] Since individuals often cannot

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of Justice: Policing Race in Canada (Toronto: Irwin Law, 2006) at 173–178 [Tanovich, *Colour of Justice*].

145 Paul Millar & Akwasi Owusu-Bempah, "Whitewashing Criminal Justice in Canada: Preventing Research through Data Suppression" (2011) 26:3 CJLS 653 at 657–658.

146 *Ibid* at 661.

147 Tanovich, "Arbitrary Detention", *supra* note 6 at 176–178; Ekow N Yankah, "Pretext and Justification: Republicanism, Policing, and Race" (2019) 40:4 Cardozo L Rev 1543 at 1600.

148 Jeffrey Fagan & Garth Davies, "Street Stops and Broken Windows: *Terry*, Race, and Disorder in New York City" (2000) 28:2 Fordham Urb LJ 457 at 502.

149 Erik Luna, "Transparent Policing" (2000) 85:4 Iowa L Rev 1107 at 1170 [Luna, "Transparent Policing"]; Harmon, "Data on Policing", *supra* note 137 at 1125.

150 Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation* (Cambridge: Cambridge University Press, 2009) at 25, 176.

151 Archon Fung, Mary Graham & David Weil, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge: Cambridge University Press, 2007) at 5.

152 Deborah Hellman, "Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem" (2001) 60:3 Md L Rev 653 at 663 [Hellman, "Judging by Appearances"]. See also *R v Teskey,* 2007 SCC 25 at para 17.

know the true motives behind proactive police encounters, opacity breeds suspicion. Lack of transparency undermines the appearance of justice.[153]

Transparency also produces a range of instrumental benefits. Greater transparency provides informal checks and balances, deters wrongdoing, and reduces the likelihood that officials appeal to improper considerations when making choices.[154] It also promotes better quality policies and decisions.[155] Secrecy can amplify prejudices, promote confirmation bias, and exclude public participation that normally ensures viewpoint diversity by exposing the pros and cons of certain policies.[156] Opacity is objectionable because it prevents police forces from conducting proper cost-benefit analyses when devising law enforcement policies, and encourages officers to discount the negative consequences of their actions in individual cases.[157]

Transparency prevents organizations from consolidating power, because they cannot insulate their practices from external democratic controls that expose and rectify wrongdoing.[158] It ensures that unauthorized exercises of police authority—such as carding and arbitrary street checks—are brought to light, scrutinized, and reprimanded.[159] Transparency can dissuade officers from flouting legal norms under the guise that their actions control crime more effectively or are in society's bests interests.[160]

C) Police powers and lack of accountability

The Supreme Court of Canada also failed to incorporate adequate accountability measures into certain judicially created and judicially authorized police powers. Many of these powers lack proper checks and balances that control police wrongdoing. Democratic accountability—meaning the capacity to hold public officials to account and exercise control over their actions—is necessary to promote the rule of law, foster the

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153 Stephanos Bibas, "Transparency and Participation in Criminal Procedure" (2006) 81:3 NYUL Rev 911 at 949–950 [Bibas, "Transparency and Participation"].

154 Cass R Sunstein, "Government Control of Information" (1986) 74:3 Cal L Rev 889 at 897–8.

155 David E Pozen, "Deep Secrecy" (2010) 62:2 Stan L Rev 257 at 278 [Pozen, "Deep Secrecy"].

156 *Ibid*.

157 Barry Friedman & Maria Ponomarenko, "Democratic Policing" (2015) 90:6 NYUL Rev 1827 at 1850 [Friedman & Ponomarenko, "Democratic Policing"].

158 Pozen, "Deep Secrecy", *supra* note 155.

159 Luna, "Transparent Policing", *supra* note 149 at 1144.

160 *Ibid*.

State's legitimacy, and instill confidence in public institutions.[161] Within democracies, public officials and institutions are entitled to act on behalf of individuals.[162] This places individuals in a position of vulnerability to State power.[163] Since the population grants public officials and institutions that power, accountability ensures that public officials respect their fiduciary duties towards the public and act in its best interests.[164]

Accountability is particularly important in democracies due to the perpetual risk of a tyranny of the majority, where majoritarian preferences repress the political minority's rights and interests.[165] Proper checks and balances are necessary in a democracy in order to promote political equality and safeguard individual liberty.[166] Proper accountability ensures that democracy remains a system of government "of the people, by the people, and for the people".[167]

Several examples illustrate how courts failed to impose proper accountability mechanisms when they created or authorized police powers. In *R v Mann*, two police officers responded to a call for a break and enter in progress.[168] They stopped the accused, a young Indigenous man, who matched the suspect's description and was near the scene of the crime.[169] The officers detained the accused. While conducting a pat-down search for officer safety, one officer felt a soft object in the accused's pocket and removed it.[170] The soft object was a bag of marijuana and the defendant was accused of possession of marijuana for the purposes of trafficking.[171] At issue was whether the police had common law powers to conduct investigative detentions and undertake preventive pat-down

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161 Mark Philp, "Delimiting Democratic Accountability" (2009) 57:1 Political Studies 28 at 29—30, 32; Guillermo A O'Donnell, "Why the Rule of Law Matters" (2004) 15:4 J Democracy 32 at 32.

162 D Theodore Rave, "Politicians as Fiduciaries" (2013) 126:3 Harv L Rev 671 at 676.

163 *Ibid* at 712.

164 *Ibid.*

165 Philip Pettit, "Republican Freedom and Contestatory Democracy" in Ian Shapiro & Casiano Hacker-Cordòn, eds, *Democracy's Value* (Cambridge: Cambridge University Press, 1999) 163 at 175–177; Rebecca L Brown, "Accountability, Liberty, and the Constitution" (1998) 98:3 Colum L Rev 531 at 536 [Brown, "Accountability"].

166 Brown, "Accountability", *supra* note 165 at 535; Larry Diamond & Leonardo Morlino, "The Quality of Democracy: An Overview" (2004) 15:4 J Democracy 20 at 22.

167 Friedman & Ponomarenko, "Democratic Policing", *supra* note 157 at 1837, n 35, citing President Lincoln, The Gettysburg Address (Nov 19, 1863).

168 *Mann*, *supra* note 1 at paras 4–5.

169 *Ibid.*

170 *Ibid.*

171 *Ibid.*

searches. Although the Court created these novel common law powers, the justices decided that the officer seized the marijuana illegally. More specifically, the seizure could not be justified by concerns about officer safety.[172] The Court applied the s. 24(2) *Charter* analysis and ultimately excluded the unconstitutionally obtained evidence.[173]

When *Mann* was decided, various commissions of inquiry had already noted that racism is pervasive in the Canadian criminal justice system, and that racialized and Indigenous persons are disproportionately targeted by police.[174] However, in *Mann*, the justices did not mention these findings.[175] The Court did not consider how such a broad power might disparately impact certain individuals.[176] Although the Court recognized a stop-and-frisk power, it neither required officers to record these searches, nor provide a receipt of the search to individuals.[177] The Court did not compel police forces to compile statistics regarding how these searches are carried out and on whom. The *Mann* decision also failed to consider how individuals may feel pressured to consent to otherwise unlawful searches out of fear, or, in order to prevent police interactions from escalating.[178] Although some US jurisdictions require written permission for consent searches without probable cause, the Court mandated no such requirement in *Mann*.[179]

The Supreme Court of Canada failed to impose similar oversight measures when it authorized a police power to conduct random vehicle stops in *R v Ladouceur*.[180] The Court decided that officers did not have to meet any legal threshold whatsoever to conduct these stops and that they were inherently arbitrary. The Justices did not require officers to record traffic-stop data or provide drivers with a receipt of the stop. Yet there is a major difference between someone showing up to court and explaining that they were stopped by the police ten times, versus providing ten

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172 *Ibid* at paras 46–50.

173 *Ibid* at paras 51–60.

174 Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: Aboriginal Justice Implementation Commission, 1999) at ch 16; Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1995) at x–xi, 349–359, 409.

175 Tanovich, "Colourless World", *supra* note 38.

176 *Ibid.*

177 Tanovich, "E-Racing Racial Profiling", *supra* note 130 at 919, 921–924.

178 Capers, "Good Citizen", *supra* note 45 at 655, 663.

179 Friedman & Ponomarenko, "Democratic Policing", *supra* note 157 at 1853–1854.

180 *Ladouceur*, *supra* note 1.

receipts of vehicle stops to substantiate their claims. Proper accountability mechanisms can facilitate burdens of proof and better protect rights.

In other contexts, courts did not impose basic notice requirements that would ensure defendants are informed that their property was searched by police. In *R v Fearon*, the Justices recognized a common law power to search cellphones incidental to arrest.[181] Yet there is no requirement that officers inform a person that their cellphone was searched.[182] Individuals who are intoxicated, asleep, or otherwise incapacitated while in police custody may have their cellphones searched unknowingly and without being informed.[183] If the police do not lay charges, individuals cannot vindicate a *Charter* right that they did not know was violated.

The Supreme Court of Canada generally lacks the policy expertise to devise certain accountability mechanisms, and the Justices have stated that it is open to Parliament to constrain these powers through statute.[184] Yet the legislative branch has not imposed oversight measures for many police powers, especially those created within the past decade. Furthermore, various political realities—majoritarianism, desire for re-election, inertia, costs—may actively discourage lawmakers from modifying or constraining police powers.[185]

The ancillary powers doctrine also suffers from insufficient accountability measures regarding the *process* for how police powers are created. The *Waterfield* test circumvents normal democratic procedures that ensure accountability in the lawmaking process.[186] Courts recognize ancillary powers without robust democratic debate by elected officials, without notice-and-comment procedures, and without legislative scrutiny by specialized committees and sub-committees.[187] Interveners contribute to view-point diversity before the Supreme Court of Canada. But the number of interveners may be small even when the stakes of a particular case are high. In *R v Mann*, the only defendant-centric interveners were the Ontario Criminal Lawyers' Association and the Canadian Civil

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181 *Fearon*, *supra* note 25.

182 Terry Skolnik, "Improving the Law of Warrantless Cellphone Searches After *R. v. Fearon*" (201) 49 RJTUM 825 at 830–831.

183 *Ibid.*

184 Rachel A Harmon, "The Problem of Policing" (2012) 110:5 Mich L Rev 761 at 764, 775–776 [Harmon, "Problem of Policing"]; *Mann*, *supra* note 1 at para 18.

185 William J Stuntz, "The Pathological Politics of Criminal Law" (2001) 100:3 Mich L Rev 505 at 529–530 [Stuntz, "Pathological Politics"].

186 Friedman & Ponomarenko, "Democratic Policing", *supra* note 157 at 1845–1846.

187 *Ibid* at 1834.

Liberties Association.[188] In the 2019 decision *Fleming v Ontario (AG)*, the State argued that the common law empowers officers to preventatively arrest individuals for their own protection and without any suspicion of wrongdoing—one of the few Supreme Court decisions where the justices refused to create a new common law police power.[189] Despite how this decision could have massively broadened police powers, there were only four defendant-centric interveners.[190] Supreme Court of Canada appeals involve far less democratic input compared to what typically takes place in the legislative process.

6. Police powers and proportionality

The third problem with the ancillary powers doctrine is that it lacks a rigorous proportionality analysis that would consider the harms of racial profiling when deciding whether to create a new police power. In other contexts where State action potentially violates a constitutional right, courts conduct a two-step process to determine whether the infringement is reasonable and justifiable in a free and democratic society.[191] First, the court assesses whether the constitutionally-protected right is infringed.[192] Second, the court employs a proportionality analysis to evaluate whether the infringement is reasonable and justifiable in a free and democratic society according to s. 1 of the *Canadian Charter*.[193]

The Supreme Court of Canada's *Oakes* decision provides a four-part framework (the *Oakes* test) that governs the s. 1 *Charter* proportionality analysis.[194] In order to justify a constitutional right infringement, the State must demonstrate: (1) a pressing and substantial objective that rationalizes the restriction of a *Charter* right, (2) a rational connection between the State's objective and the measure that it employs to limit a constitutional right, (3) that the State's measure impacts the *Charter* right as little as possible in order to achieve its objective, and (4) proportionality between the beneficial effects of State action and its deleterious effect on individual rights.[195]

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188 *Mann*, *supra* note 1.

189 *Fleming*, *supra* note 3; Richard Jochelson at al, "Generation and Deployment of Common Law Police Powers by Canadian Courts and the Double-Edged *Charter*" (2020) 28 Crit Criminol 107 at 116 (on the acceptance of police powers).

190 These groups are: the Canadian Civil Liberties Association, the Criminal Lawyers' Association (Ontario), the Canadian Association for Progress in Justice, and the Canadian Constitution Foundation.

191 Jochelson, "Ancillary Issues", *supra* note 1 at 366.

192 *Ibid.*

193 *Ibid.*

194 *Oakes*, *supra* note 92.

195 *R v* Morrison, 2019 SCC 15 at para 63 (provides a summary of the test).

In the *Fleming v Ontario (AG)* decision discussed above, the Supreme Court of Canada observed that there are important parallels between the *Waterfield* test that governs the ancillary powers doctrine and the *Oakes* test that governs proportionality analysis under s. 1 of the *Charter.*[196] In the Court's view, both approaches "require a proportionality assessment" and require the State's conduct to minimally impact individual rights in order to achieve a law enforcement objective.[197] Several scholars observe that there are similarities between the ancillary powers doctrine and the *Oakes* test.[198]

There are, however, significant differences between these two tests. For one, the *Waterfield* test focuses primarily on how a police power impacts an individual's rights in a particular case, rather than how this power can be employed more broadly against certain individuals. The test thus overlooks how a new police power may disparately impact racialized and Indigenous persons on a more systemic level.[199] This risk is heightened in contexts where the defendant is white, because criminal justice system actors may overlook how a purported police power may result in racial profiling.[200] While a proportionality analysis can better analyse the systemic deleterious effects of State action on certain individuals in the final part of the *Oakes* test, the current ancillary powers framework largely overlooks this consideration.

These concerns illustrate why the ancillary powers doctrine suffers from critical shortcomings that put the constitutionality of routine police practices—and the legitimacy of the doctrine itself—into question. It is unclear whether many common law police powers would satisfy a more rigorous proportionality under s. 1 of the *Charter,* especially given the deleterious effects of these powers on certain communities and on the public's confidence in the criminal justice system.[201] The Supreme Court of Canada's failure to conduct a broader proportionality analysis also entrenches a lack of democratic accountability within the criminal justice

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196 *Fleming*, *supra* note 3 at para 54.

197 *Ibid*.

198 John Burchill, "A Horse Gallops Down a Street … Policing and the Resilience of the Common Law" (2018) 41:1 Man LJ 161 at 175; Jochelson, "Ancillary Issues", *supra* note 1 at 365–370. See also Richard Jochelson, "Crossing the Rubicon: Of Sniffer Dogs, Justifications, and Pre-emptive Deference" (2008) 13:2 Rev Const Stud 209 at 219–224.

199 David M Tanovich, "The *Charter* of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR 655 at 681.

200 *Ibid* at 675.

201 Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012) 57 SCLR 225 at 235–236 [MacDonnell, "Impact of Doctrine"].

system. The current *Waterfield* framework disincentivizes courts and Parliament from modifying or constraining common law police powers in ways that ensure normal democratic controls over the police.[202]

Courts are reticent to constrain powers that they previously recognized because of path dependence in adjudication.[203] Oona Hathaway explains that "path dependence" implies that individual judicial decisions build on one another to eventually "lock in" certain legal rules and principles.[204] As a result, these rules and principles become difficult for courts to modify subsequently. Michael Gerhardt observes that path dependence is "a basic expectation in common law systems."[205] The phenomenon of path dependence partly stems from judges' desire to maintain stability, predictability, and confidence in the legal system, which generally militates in favour of maintaining rather than overruling precedent.[206]

Path dependence explains why each new common law police power strengthens the ancillary power doctrine's role in Canadian law and increases the precedential value of common law police powers. Path dependence results in a judicial feedback loop.[207] When creating a new police power, courts cite prior jurisprudence that created police powers in order to justify their decision.[208] This reliance makes it difficult for courts to revisit and overrule precedents that have been progressively cemented into Canadian law. Path dependence also affects lower court judges. Since trial judges do not want to be overruled by appellate courts, they may neither depart from precedent nor restrict the scope of existing common law police powers.[209]

The reality of path dependence also shapes the legislative branch's conduct. Parliament's unwillingness to enact statutory police powers has been normalized within the past several decades. This inaction creates its own form of legislative path dependence: Parliament does nothing

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202 Stribopoulos, "In Search of Dialogue", *supra* note 4 at 70–71.

203 Oona A Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86 Iowa L Rev 601 at 605 [Hathaway, "Path Dependence"].

204 *Ibid* (in her words: "[C]ourts' early resolutions of legal issues can become locked-in and resistant to change").

205 Michael J Gerhardt, "The Limited Path Dependency of Precedent" (2005) 7:4 U Pa J Const L 903 at 942.

206 Aharon Barak, "Overruling Precedent" (1986) 21:3/4 Israel L Rev 269 at 272.

207 Eugene Volokh, "The Mechanisms of the Slippery Slope" (2003) 116:4 Harv L Rev 1026 at 1044.

208 *Saeed*, *supra* note 27; *Fearon*, *supra* note 25 at paras 16–26; *MacDonald*, *supra* note 22 at para 37.

209 Hathaway, "Path Dependence", *supra* note 203 at 625.

in response to new judicially created police powers, because that is what Parliament has done in the past. Judges pick up on these tendencies, too. By now, courts realize that if they create or authorize police powers, Parliament will probably do nothing to limit these powers in the future.[210] Conversely, in some contexts where courts refused to create new common law police powers, Parliament intervened by enacting new *Criminal Code* provisions.[211]

There are other reasons why Parliament does not constrain police powers. Because the judiciary is supposed to protect individual rights, it is unclear why lawmakers would limit police powers that presumably respect these rights. Moreover, broad police powers may align with majoritarian interests—and lawmakers' desires to be re-elected—which further dissuades Parliament from curbing police powers.[212] The rise of populist criminal policies magnifies these concerns, and may further disincentivize legislative action.[213]

7. Judicial Reform of Police Powers

The ancillary powers doctrine is unique in that judges created law enforcement powers that suffer from major democratic deficits, are enforced by the police disparately, and have not been subject to a thorough proportionality analysis under s. 1 of the *Charter*. These flaws vitiate the *Waterfield* test's legitimacy. They also undermine the legitimacy of judicially created and judicially authorized police powers that characteristically result in racial profiling. Many police powers—and the lax constitutional standards that they impose—only exist because judges created them.

Since courts devised the ancillary powers doctrine and authorized police powers without adequate safeguards, courts must also take responsibility for revisiting the *Waterfield* test and its accompanying powers. There are three approaches for how the Supreme Court of Canada can do so. These three approaches are: (A) the "constitutional reset", (B) the modified *Waterfield* test, and (C) the "scrap and signal" framework. As explained more below, only the latter approach is feasible.

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210 Stribopoulos, "In Search of Dialogue", *supra* note 4 at 69–70.

211 Michal Fairburn, "Twenty-Five Years in Search of a Reasonable Approach" (2008) 40 SCLR 55 at 60–70.

212 Stuntz, "Pathological Politics", *supra* note 185 at 529–531.

213 David Alan Sklansky, "Populism, Pluralism, and Criminal Justice" (2019) 107 Cal L Rev 2009 at 2010–2011.

A) The "constitutional reset"

The first and most revolutionary option would be for the Supreme Court of Canada to perform a "constitutional reset". One might argue that the Court should both renounce the *Waterfield* test and conclude that all existing ancillary powers are invalid insofar as Parliament does not codify them in conjunction with adequate oversight measures. This first approach would re-calibrate the roles of Parliament and the judiciary with respect to the development of police powers. It would also reset common law powers that lack sufficient transparency and accountability mechanisms. Furthermore, one might contend that as part of a constitutional reset, the Court should suspend this declaration of invalidity for a period of one or two years in order to give Parliament sufficient time to review these powers and impose sufficient oversight measures. This first approach would aim to simultaneously correct the ancillary powers framework and existing common law police powers.

However, this remedy suffers from two main shortcomings that explain why it cannot be implemented. First, there are no existing remedial mechanisms that empower courts to invalidate several previously recognized common law powers simultaneously. A court can modify a particular ancillary power that is before the Court by overruling precedent. Yet the justiciability doctrine bars courts from reviewing issues where the subject matter is not directly before the Court, or, is otherwise unsuitable for judicial determination.[214] More specifically, the ripeness doctrine precludes courts from deciding the legitimacy of legal rules where the defendant's rights or interests have not been impacted by the relevant rule in the immediate case.[215] The justiciability doctrine largely prevents the Court from invalidating existing police powers that are not squarely before it.

Second, a constitutional reset is largely inconsistent with the tenets of judicial minimalism.[216] Cass Sunstein notes that judicial minimalism implies that judges "decide no more than they have to decide" and introduce

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214 Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada,* 2nd ed (Toronto: Carswell, 2012) at 7 [Sossin, *Boundaries*], cited in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at paras 32–34.

215 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 235–36, 161 DLR (4th) 385; Gerald J Kennedy & Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45:4 Federal L Rev 707 at 709; Sossin, *Boundaries, supra* note 214 at 32.

216 Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999) at 47–50.

incremental developments into the common law.[217] Judicial minimalism aims to reduce error costs in adjudication, promote agreement on a multi-member court, respect the separation of powers, protect expectations, and decrease judicial hubris.[218] A constitutional reset is maximalist in several respects. It would require the Court to devise and implement a revolutionary common law remedial mechanism. The justices would have to disregard the justiciability doctrine by invalidating police powers not squarely before the Court. The Court would also expand its doctrine on overruling precedents. Moreover, the Court would be unable to predict the effects of such a maximalist decision on future cases. Nor would the Supreme Court of Canada be able to forecast how lower courts will interpret these changes.[219] In short, a constitutional reset would have a sweeping effect on common law reasoning, the justiciability doctrine, overruling precedent, and the law of remedies.

B) The modified Waterfield framework

The second approach is that courts modify the *Waterfield* test, to expressly consider how the purported power risks being enforced disparately against racialized and Indigenous persons. The judiciary would incorporate this consideration into their proportionality analysis. As a result, judges might impose more demanding legal thresholds for police powers and mandate stronger oversight measures to detect, address, and prevent racial profiling. The ancillary powers framework would more closely resemble the proportionality analysis under s. 1 of the *Charter* and *R v Oakes*.[220]

There are several drawbacks to this second approach. First, it will not enhance accountability for the many routine powers that courts have created or authorized in the past. Since courts have already authorized various police powers that are the bread and butter of law enforcement, a revised *Waterfield* test would likely matter most in contexts where it matters the least.

Second, a modified *Waterfield* test fails to address the undemocratic aspects of the ancillary powers doctrine that imperil its legitimacy. Unelected judges would still create police powers rather than democratically elected lawmakers.[221] Furthermore, the judicial creation of these powers would

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217 Cass R Sunstein, "The Supreme Court 1995 Term Foreword: Leaving Things Undecided" (1996) 110 Harv L Rev 4 at 6.

218 *Ibid* at 15–20.

219 *Ibid* at 18.

220 *Oakes*, *supra* note 92.

221 Frank B Cross, "The Error of Positive Rights" (2001) 48:4 UCLA L Rev 857 at 914; Kelsey Sitar, "*Gladue* as A Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial" (2016) 20:3 Can Crim L Rev 247 at 250.

continue to run against courts' counter-majoritarian role in a democracy. The ancillary powers doctrine would still generate rule of law concerns as courts create new police powers after-the-fact.

Third, courts would still lack the institutional competence to create police powers that contain adequate oversight measures.[222] While the constitutional reset raises concerns regarding judicial maximalism and overreach, a modified *Waterfield* test will likely accomplish very little in terms of addressing systemic racism and discriminatory policing.

C) The "scrap and signal" framework

The third proposal constitutes a midway point between the constitutional reset and the modified *Waterfield* test. In a future decision that involves existing or purported police powers, courts would expressly *scrap* (or abandon) the ancillary powers doctrine altogether. The Court would require Parliament to legislate new police powers in the future—powers that would later be subject to constitutional review.

The Court would also *signal* that existing common law police powers are constitutionally suspect insofar as they fail to incorporate proper transparency and oversight measures that prevent and combat racial profiling. From the legislator's standpoint, accountability measures might include mandatory data-gathering schemes that document the extent to which various police powers are exercised against racialized and Indigenous persons. This data would be made publicly available in a manner that respects privacy interests. Parliament can also require the police to issue receipts to individuals whom they stop or investigate. Lawmakers could also mandate that police forces incorporate Early Intervention Systems.

In response to the scrap and signal framework, the State would implement measures to address the core problems with street-level policing. Parliament might also codify existing common law police powers. Litigants would then challenge the constitutionality of individual police powers on various grounds: lack of transparency and oversight mechanisms, disparate enforcement, breaching the right to equality, and so on. Incrementally, courts would determine whether the State's measures were sufficient to respect the *Charter,* and conduct a robust proportionality analysis as part of that process.

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222 Renan, "Administrative Governance", *supra* note 10 at 1110–1111; Harmon, "Problem of Policing", *supra* note 184 at 764, cited in Quattlebaum, "Let's Get Real", *supra* note 96 at 36.

The scrap and signal approach would be consistent with recent Supreme Court of Canada decisions that increasingly recognize the unique harms of racial profiling. In *R v Le*, for instance, the Court noted that over-policing can impact racialized persons' perceptions that they are psychologically detained by the police.[223] The majority of the Court concluded that some racialized persons may reason that walking away from the police can be interpreted as evasive.[224] The Court explained that some persons may believe that they have no choice but to comply with police demands or answer officers' questions.[225] Similarly, in the 2020 decision *R v Ahmad,* the Court examined the defence of entrapment.[226] The Justices acknowledged that poor persons and racialized individuals are disproportionately entrapped by the police.[227] The majority of the Court also remarked that in assessing that defence, judges should consider "whether racial profiling, stereotyping or reliance on vulnerabilities played a part in the selection of the location" that was investigated by the police.[228]

Notice how the scrap and signal framework also avoids many of the pitfalls of both the constitutional reset and the modified *Waterfield* test. Moreover, it has many advantages that these two others approaches lack. First, unlike the constitutional reset, the scrap and signal approach conforms with judicial minimalism and the incremental development of the common law. Courts lack remedial mechanisms to invalidate common law powers that are not before the Court and cannot generally suspend the invalidity of common law powers. Yet, in contexts where courts revisit a common law power that is squarely before it, judges can (and sometimes do) overrule precedent while sending a strong warning to Parliament about what makes State action constitutional.[229]

Second, the scrap and signal approach promotes the separation of powers in criminal procedure. It ensures that Parliament enacts police

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223 See e.g. *Le*, *supra* note 48 at paras 89–97; Khoday, *supra* note 118.

224 *Le*, *supra* note 48 at paras 72–73, citing *Grant*, *supra* note 83 at paras 154–155, 169, per Justice Binnie.

225 *Ibid*.

226 *R v Ahmad*, 2020 SCC 11 [*Ahmad*].

227 *Ibid* at para 25, citing David M Tanovich, "Rethinking the *Bona Fides* of Entrapment" (2011) 43 UBC L Rev 417 at 417–418, 432.

228 *Ahmad*, *supra* note 226 at para 41.

229 Debra L Parkes, "Precedent Unbound - Contemporary Approaches to Precedent in Canada" (2006) 32 Man LJ 135 at 150–152. See e.g. *R v Feeney*, [1997] 2 SCR 13, 146 DLR (4th) 609 (In *Feeney,* the Supreme Court of Canada decided that police officers require an entry warrant to arrest an individual in a dwelling house, unless there are exigent circumstances that justify a warrantless entry. The Court overturned its prior holding in *R v Landry*, [1986] 1 SCR 145, 26 DLR (4th) 368 that imposed no such warrant requirement).

powers with proper oversight mechanisms in a prospective manner, while courts assess the constitutionality of these powers. This approach also ensures that each branch of government optimally exercises its institutional capacities. Compared to courts, Parliament can devise better legal regimes and oversight measures that govern street-level policing.[230] Lawmakers can work in conjunction with a broader array of stakeholders and impacted communities, refine legal proposals through committees and multiple readings, draw on the expertise of bureaucrats and technocrats, evaluate competing data gathering proposals, devise ways to ensure that such data is publicly available, and impose more stringent oversight mechanisms on the police.[231]

Third and interrelatedly, the scrap and signal approach re-establishes constitutional dialogue in the domain of police powers. Going forward, lawmakers would be required to clearly legislate police powers that contain accountability mechanisms. Courts would have the opportunity to assess the constitutionality of both past and future law enforcement powers through a robust s. 1 *Charter* analysis. This approach would also recalibrate the burden of proof in policing contexts; the State would be required to justify State incursions on individual liberty under the *Oakes* framework, rather than require courts to justify new police powers under the *Waterfield* test.[232]

Fourth, the scrap and signal approach could alleviate various rule of law concerns inherent to the *Waterfield* test. Courts would not recognize new police powers after-the-fact. Parliament would publicly promulgate police powers. This approach is particularly advantageous for the general public. It is difficult for individuals to find and analyze complex police power decisions that can be lengthy and involve plurality opinions. It is simpler for individuals to locate police powers that are contained in the *Criminal Code*.

The fifth advantage to the scrap and signal approach is that it may result in quicker and more efficient police reform compared to both the constitutional reset and the modified *Waterfield* test. Suppose that courts provide a sufficiently strong signal that existing common law police powers are constitutionally suspect. Lawmakers may react by modifying them through a comprehensive criminal procedure bill. Furthermore,

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230 Harmon, "Problem of Policing", *supra* note 184 at 763–764.

231 Sunstein, "Knowledgeable Branch", *supra* note 37 at 1616–1617; Terry Skolnik, "Hot Bench: A Theory of Appellate Adjudication" (2020) 61:4 Boston College L Rev 1271 at 1306–1307.

232 MacDonnell, "Impact of Doctrine", *supra* note 201 at 237.

Parliament may act more quickly than if courts suspended the invalidity of these powers for a period of one to two years.

8. Conclusion

This article argued that the ancillary powers framework largely overlooks how racial profiling is a unique harm that undermines liberty, dignity, and equality. It showed how racial profiling decreases the public's confidence in the police and in the justice system. This article also explained how the failure to consider racial profiling leads judges to create police powers that lack proper transparency and oversight measures. It elucidated how courts create police powers without conducting a rigorous proportionality analysis that considers the harms of racial profiling.

For these reasons, the Supreme Court of Canada must revisit the ancillary powers doctrine, existing common law police powers, and judicially authorized police powers. This article discussed why the Court should abandon the *Waterfield* test. The Court should also send a strong signal to Parliament that police powers are constitutionally suspect if they lack adequate oversight measures that prevent and combat racial profiling.

Insofar as the State is committed towards core democratic values such as dignity, equality, the rule of law, and the separation of powers, Parliament and courts must each play a role in addressing systemic discrimination in policing and in the criminal justice system. Going forward, only Parliament should have the jurisdiction to create police powers, while courts review their constitutionality. It is time for Parliament and the judiciary to collaborate together and address the perils of police powers. And they must do so in a manner that reflects their respective roles in a constitutional democracy.