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"Detention" under the Charter after *R. v. Grant* and *R. v. Suberu*

Steven Penney* **and James Stribopoulos****

I. INTRODUCTION

In *R. v. Grant*[1] and *R. v. Suberu*,[2] the Supreme Court of Canada revisited the relationship between police detention powers and the Charter.[3] In *Grant* it updated the test for deciding whether a "detention" has arisen for Charter purposes. This question is critical for two reasons: first, "detention" is the trigger for the constitutional guarantee forbidding arbitrary detention (section 9[4]); and second, it is one of the two triggers (the other being "arrest") of the right to be informed of the reasons for detention (section 10(a)) and the right to counsel (section 10(b)).[5] In *Suberu* the Court held (in contrast to some lower courts) that absent exigent safety concerns, the section 10(b) caution must be given immediately to persons subject to the common law power of investigative detention.

Grant and *Suberu* have their doctrinal virtues. *Grant*'s multi-factor approach for assessing whether or not there has been a psychological detention is flexible and nuanced. It fails, however, to give police sufficient guidance on the scope of their authority. In our view, this uncertainty is likely to have three unfortunate effects. First, it will cause too many errors, that is, cases where police incorrectly decide (in relation to what the courts will or would have found) that a detention has or has not arisen. Second, in the face of this uncertainty, police will more often than not assume that a detention has *not* occurred and (and when they are

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1 [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353 (S.C.C.) [hereinafter "*Grant*"].

2 [2009] S.C.J. No. 33, [2009] 2 S.C.R. 460 (S.C.C.) [hereinafter "*Suberu*"].

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

4 Section 9 of the Charter states: "Everyone has the right not to be arbitrarily detained or imprisoned."

5 Section 10(a) and (b) of the Charter states: "Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; [and] (b) to retain and instruct counsel without delay and to be informed of that right ...".

wrong) thereby deprive those detained of their rights under sections 9 and 10 of the Charter. Finally, in applying *Grant*, lower courts will too often take an overly deferential approach toward police decision-making.

Suberu's virtue, in contrast, is its simplicity: police now know that they must issue the section 10(b) caution immediately upon any type of detention, including investigative detention. Of course, if it is often uncertain whether a detention has arisen, the benefit of this simplicity will be muted. More troubling, the Court's failure to carve out an exception to the section 10(b) caution requirement for investigative detention will likely have three perverse effects: increasing the length and intrusiveness of detentions, diminishing law enforcement safety and effectiveness, and causing courts to avoid finding that a detention has arisen despite substantial intrusions on individual liberty.

In what follows we first review the jurisprudential history leading to *Grant*'s holding on detention. Next we consider this holding and its application to the facts in *Grant* and *Suberu*. We then outline our thesis regarding *Grant*'s flaws and suggest how the approach to deciding whether there has been a psychological "detention" should be further reformed. Last, we trace the history of the relationship between the common law power to detain for investigative purposes and section 10 of the Charter, and flesh out the case for justifying an override of section 10(b) during such detentions.

II. THE MEANING OF DETENTION UNDER THE CHARTER

1. History and Context

Absent detention, police enjoy considerable freedom in questioning suspects.[6] Questioning may produce evidence of wrongdoing, because the answers are either incriminating or reveal the location of physical evidence. If the detention threshold is crossed, however, the constitutional implications are significant. First, if police lack the requisite legal grounds to detain,[7] section 9 of the Charter is violated.[8] Second, as

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[6] Other than the Charter, the only significant restraint on police questioning of adult suspects stems from the common law voluntary confessions rule. See generally *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.).

[7] In order to lawfully detain, a police officer must have reasonable grounds to suspect a clear nexus between the individual to be detained and a recently committing or still unfolding criminal offence. See *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at paras. 34, 45 (S.C.C.) [hereinafter "*Mann*"].

mentioned, detention also triggers informational duties under section 10 of the Charter. This information may alert suspects to the potential jeopardy faced and cause them to stop talking. As a result, until they are ready to effect an arrest, the police will often want to avoid a detention.[9] It is the courts, however, not the police, who ultimately decide whether and when the detention threshold was crossed in a given case.

It was a case involving section 10(b), the right to counsel, which first raised the meaning of detention before the Supreme Court. In *R. v. Therens*,[10] police subjected a motorist to a breath demand under the *Criminal Code*.[11] He was taken back to the police station, took and failed a breathalyzer test, and was arrested. At the time of the demand, police did not apprise him of his right to counsel, which section 10(b) requires on "detention".

The issue before the Court in *Therens* was whether the motorist was "detained" following the breath demand but before his arrest. The Court

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[8] The Court in *Grant* sensibly recognized that any unlawful interference with an individual's liberty is necessarily arbitrary and violates s. 9 of the Charter. Earlier lower court decisions holding otherwise, the Court confirmed, should no longer be followed. See *Grant*, *supra*, note 1, at paras. 54-55. The Court specifically cited *R. v. Duguay*, [1985] O.J. No. 2492, 18 C.C.C. (3d) 289 (Ont. C.A.), which held that not every unlawful detention is necessarily arbitrary and suggested a need to consider the detaining officer's mindset. For example, an oblique motive would result in finding an arbitrary detention but an honest mistake based on grounds just short of those required by the law might not. *Id*., at 296. Prior to *Grant*, the *Duguay* approach had been widely followed. See *R. v. Brown*, [1987] N.S.J. No. 22, 33 C.C.C. (3d) 54, at 67-68 (N.S.C.A.); *Freeman v. West Vancouver (District)*, [1992] B.C.J. No. 2146, 19 B.C.A.C. 81, at para. 29 (B.C.C.A.); *R. v. Campbell*, [2003] M.J. No. 207, 175 C.C.C. (3d) 452, at paras. 39-42 (Man. C.A.); *R. v. Perello*, [2005] S.J. No. 60, 193 C.C.C. (3d) 151, at para. 40 (Sask. C.A.); *R. v. Pimental*, [2000] M.J. No. 256, 145 Man. R. (2d) 295 (Man. C.A.), leave to appeal refused [2000] S.C.C.A. No. 359 (S.C.C.). But see *R. v. Iron*, [1987] S.J. No. 49, 33 C.C.C. (3d) 157 (Sask. C.A.) (detention necessarily arbitrary if not authorized by either statute or common law); *R. v. Simpson*, [1994] N.J. No. 69, 88 C.C.C. (3d) 377, at 388 (Nfld. C.A.), revd in the result only [1995] S.C.J. No. 12, 95 C.C.C. (3d) 96 (S.C.C.) (implicitly questioning *Duguay* approach but without referring to it). The *Duguay* approach had also been criticized by commentators. See Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough, ON: Carswell, 2001), at 263 [hereinafter "Stuart"]; James Stribopoulos, "The Forgotten Right: Section 9 of the Charter, Its Purpose and Meaning" (2008) 40 S.C.L.R. (2d) 211, at 218-31 [hereinafter "Stribopoulos, 'The Forgotten Right'"].

[9] See Casey Hill, "Investigative Detention: A Search / Seizure by Any Other Name?" (2008) 40 S.C.LR. (2d) 179 [hereinafter "Hill"], who notes that there is

> a situational incentive for the police to provide the suspect less, rather than more, information about the transaction under investigation as the investigator's questions attempt to draw out information about the suspect's recent whereabouts, association with others, route, *etc*., committing the detainee to an account for evaluation against the officer's possessed and incoming information.

Id., at 204.

[10] [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.) [hereinafter "*Therens*"].

[11] R.S.C. 1970, c. C-34, s. 235(1). Today, see *Criminal Code*, R.S.C. 1985, c. C-46, as amended, s. 254(3).

had previously held[12] that breath demands do not trigger a detention under section 2(c)(ii) of the *Canadian Bill of Rights*, which provides the "right to retain and instruct counsel without delay" to persons "arrested *or detained*".[13] The fact that it is an offence to refuse to comply did not mean that a person subject to such a demand was legally detained.[14] Detention, under the *Canadian Bill of Rights*, was limited to situations of "actual physical restraint".[15]

In *Therens*, Le Dain J. concluded that the meaning of detention under the *Canadian Bill of Rights* was not controlling under the Charter. Rather, he reasoned that detention under the Charter should be read more broadly.[16] In addition to physical constraint, he asserted, a detention also arises when police assume "control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel".[17] Given the legal duty on the motorist to accompany the police officer for the purposes of administering a breath test, this would have been enough to dispose of the appeal. But Le Dain J. went a step further, holding that a detention may sometimes arise even when there is neither physical restraint nor "criminal liability for failure to comply" with a legal duty.[18] He explained:

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[12] *R. v. Chromiak*, [1979] S.C.J. No. 116, [1980] 1 S.C.R. 471 (S.C.C.) [hereinafter "*Chromiak*"].

[13] *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2(c)(ii) (emphasis added).

[14] *Chromiak*, *supra*, note 12, at 478.

[15] *Id.*

[16] In so concluding, he emphasized "that the *Charter* must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection". *Therens*, *supra*, note 10, at 638, Le Dain J. dissenting (on other grounds). He also went on to explain two further reasons for rejecting the narrow definition from *Chromiak*. First, he acknowledged that the judiciary had felt rather restrained in its use of the *Canadian Bill of Rights* given that it was simply legislation and therefore lacked constitutional status. *Id.* In addition, given that the *Canadian Bill of Rights* did not include any equivalent to s. 1 of the Charter, a narrow interpretation of "detention" was the only means by which the Court in *Chromiak* could place reasonable limits on the right to counsel. *Id*., at 639. Of course, s. 1 of the Charter now permits the Supreme Court to balance individual and state interests more transparently.

[17] *Therens*, *id.*, at 642, Le Dain J., dissenting (on other grounds). All eight judges in *Therens* agreed that the accused was detained, however only three others expressly adopted Le Dain J.'s reasoning. A unanimous Court subsequently endorsed Le Dain J.'s approach. See *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at 649 (S.C.C.) [hereinafter "*Thomsen*"]. *Therens*' approach to defining detention has since been repeatedly affirmed by the Court. See *R. v. Simmons*, [1988] S.C.J. No. 86, [1988] 2 S.C.R. 495 (S.C.C.); *R. v. Feeney*, [1997] S.C.J. No. 49, [1997] 2 S.C.R. 13, at 55 (S.C.C.); *R. v. Prosper*, [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236, at 272-73 (S.C.C.); *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] S.C.J. No. 38, [1993] 1 S.C.R. 1053, at 1065-66 (S.C.C.).

[18] *Therens*, *id.*, at 644.

> In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not. … Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.[19]

Not long after *Therens* was decided, its definition of "detention" for section 10 Charter purposes was transplanted to section 9. The Supreme Court concluded that there is "no reason in principle why the general approach to the meaning of detention reflected in those cases should not be applied to the meaning of 'detained' in s. 9".[20]

Therens thus had the effect of recognizing three categories of detention, now pertinent for both sections 9 and 10 of the Charter: (i) psychological restraint (with legal compulsion); (ii) psychological restraint (without legal compulsion); and (iii) physical restraint.[21]

The second of these categories — the one addressed in *Grant* — has proved to be the trickiest. On its face, the test is paradoxical: it deems people to be "detained" for Charter purposes even though their liberty is not limited by law. Despite their (reasonable) belief that they must comply with police requests, they actually have no legal obligation to do so. (We thus sometimes refer to this category as "non-legal" psychological detention.) As the Court explained in *Grant*, "an individual confronted by state authority ordinarily has the option to choose simply to walk away".[22]

How has this situation arisen? We can imagine a legal regime requiring police to tell people whether they are legally obliged to cooperate. Before stopping and questioning, for example, police would have to tell

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[19] *Id.* This is in keeping with the Supreme Court's eventual recognition in *Grant* that the purpose of s. 9 is both to protect "physical liberty" as well as "mental liberty". See *Grant*, *supra*, note 1, at para. 20.

[20] *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621, at 632 (S.C.C.). See also *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257, at 1277 (S.C.C.).

[21] See *Therens*, *supra*, note 10, at 641-44, Le Dain J., dissenting; *Thomsen*, *supra*, note 17, at 648-49. In *Grant* the Court specifically reaffirmed these three categories of detention first recognized in *Therens*. See *Grant*, *supra*, note 1, at para. 30.

[22] *Grant*, *id.*, at para. 21.

suspects that they are either: (i) being detained under law for a particular purpose (with an explanation as to what they are legally required to do and what they are free to refuse to do); or (ii) not being detained and free to leave or remain silent.[23]

Neither Parliament nor the courts, however, have seen fit to impose such a regime.[24] Instead, they have sanctioned a state of affairs in which police are permitted (as a general rule) to approach people and ask them questions without any particularized suspicion and without any need to inform them of their legal status or rights. As the Supreme Court explained in *Grant*:

> Section 9 of the *Charter* does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Nor does s. 10 require that the police advise everyone at the outset of any encounter that they have no obligation to speak to them and are entitled to legal counsel.[25]

Given this legal milieu, it is not surprising that the Supreme Court of Canada has recognized that people often assume that they must comply with police requests.[26] Nor is it surprising, given the imbalance of power and potential for abuse inherent in such encounters, that the Court has found that a "detention" may occur for Charter purposes even in circumstances where an individual has no legal obligation to remain in the company of police and would be legally justified in simply walking away.

When it comes to psychological detention, the challenge is demarcating the line between consensual and coerced encounters. This is no easy task. Encounters between individuals and the police are rich in their diversity. Most such experiences are relatively benign, usually involving nothing more than conversation.[27] Such exchanges can become more in-

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[23] See Law Reform Commission of Canada, *Arrest* (Report 29) (Ottawa: The Commission, 1986), at 20; Stephen Coughlan, "Police Detention for Questioning: A Proposal" (1986) 28 Crim. L.Q. 170; Alan D. Gold, "Perspectives on Section 10(*b*): The Right to Counsel under the *Charter*" (1993) 22 C.R. (4th) 370, at 374 [hereinafter "Gold"].

[24] The *Grant* Court did counsel police that if they are "uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go". *Grant*, *supra*, note 1, at para. 32.

[25] *Grant*, *id*., at para. 38. See also *Suberu*, *supra*, note 2, at para. 3.

[26] *Therens*, *supra*, note 10.

[27] See *Mann*, *supra*, note 7, at para. 19 ("the law has not yet reached a point that a compulsion to comply will be inferred whenever a police officer requests information, for that would mean police could never ask questions"). See also *R. v. Grafe*, [1987] O.J. No. 796, 60 C.R. (3d) 242 (Ont. C.A.); *United States of America v. Alfaro*, [1992] J.Q. no 831, 75 C.C.C. (3d) 211, at 236 (Que.

vasive, however, as consent and conversation shade over to coercion and interrogation. As noted, for non-legal psychological detention, the turning point is the moment when the suspect submits to police authority and reasonably believes that the choice to do otherwise does not exist.[28]

Unfortunately, *Therens* failed to provide any concrete guidance to assist lower courts in distinguishing consensual from coerced encounters. Without it, lower courts, almost invariably seeing only cases involving factually guilty claimants,[29] have sometimes refrained from labelling ambiguously coercive encounters as detentions.[30]

2. The *Grant* Standard for Psychological Detention without Legal Compulsion

In *Grant*, the Supreme Court of Canada expressly reaffirmed *Therens*' definition of detention, including the category of psychological restraint without legal compulsion.[31] Under *Grant*, the ultimate question remains "whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand".[32] But recognizing that this form of detention had "proven difficult to define consistently",[33] the Court added a considerable measure of gloss. In so doing, however, it subtly narrowed the definition's scope. Emphasizing a point absent from *Therens*, the Court stated that "not every trivial or insignificant interference with liberty attracts *Charter* scrutiny"; rather, only the person "whose liberty is *meaningfully* constrained has genuine need of the additional rights accorded by the *Charter* to people in that situation".[34] The coupling of

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C.A.); *R. v. Elshaw*, [1991] S.C.J. No. 68, [1991] 3 S.C.R. 24, at 53-70 (S.C.C.), L'Heureux-Dubé J., dissenting.

[28] *Therens*, *supra*, note 10, at 644.

[29] See Stribopoulos, "The Forgotten Right", *supra*, note 8, at 237-39 (discussing selection bias ensuing from the fact that courts are presented only with encounters where evidence is obtained, placing pressure to uphold police actions to ensure conviction of the factually guilty).

[30] *Id.*, at 239-45 (discussing this trend, especially in the Ontario Court of Appeal). See *e.g.*, *R. v. Lawrence*, [1990] O.J. No. 1648, 59 C.C.C. (3d) 55 (Ont. C.A.), where a police officer, investigating a reported break-in, drove his police cruiser onto the sidewalk to block Ms. Lawrence from proceeding further on her bicycle. She was questioned for 25 minutes regarding where she lived. The officer disbelieved her and asked to look in her backpack; she complied, revealing evidence that implicated her in a break-in. She was then placed in the rear of the cruiser. The Court found that she was only detained *after* being placed in the police cruiser.

[31] *Grant*, *supra*, note 1, at paras. 28-32.

[32] *Id.*, at para. 31.

[33] *Id.*

[34] *Id.*, at para. 26 (emphasis added). The Court quoted here with approval from *Mann*, *supra*, note 7, where Iacobucci J. noted (at para. 26) that

"detention" with "imprisonment" in section 9, the Court explained, suggests that detention arises "when the deprivation of liberty may have legal consequences".[35]

The Court in *Grant* also stressed that the *Therens* test is objective, meaning that a police officer's subjective intentions are not relevant in deciding if there was a detention.[36] The suspect's "particular circumstances and perceptions," however, may be relevant "in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive".[37] The claimant's testimony will usually be the best source of such evidence, the Court noted; but since the test is objective a claimant's failure to testify is not fatal to finding a detention.[38]

With this backdrop in place, the Court proceeded to identify a host of factors to consider when deciding whether a non-legal psychological detention occurred. First, it emphasized the importance of determining the police's purpose in approaching or questioning the claimant. If this purpose was non-adversarial, a finding of detention is unlikely. For example, the Court stated that no detention would arise where police respond to an emergency call, even if they assume control over the situation or interfere with a person's freedom of movement.[39] Similarly, there is no detention when police approach bystanders in the wake of an accident or crime to obtain preliminary information for their investigation.[40] Deprivations of liberty that result from such encounters are not "significant enough to attract *Charter* scrutiny because they do not attract legal consequences for the concerned individuals".[41]

According to the Court, neighbourhood policing initiatives (where police focus on meeting community needs and maintaining order) fall in

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> ... the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting." But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

35 *Grant*, *id*., at para. 29.

36 *Id*., at para. 32. The majority acknowledged that the officer's subjective intentions will be relevant in deciding upon the appropriate remedy under s. 24(2) of the Charter if a violation is made out. *Id*. In contrast, Binnie J. emphasized the importance of considering the subjective mindset of the police in deciding whether or not a detention has taken place. See *Grant*, *id.*, Binnie J., concurring.

37 *Id*., at para. 32.

38 *Id*., at para. 50.

39 *Id*., para. 36.

40 *Id*., at para. 37.

41 *Id*., at para. 36.

the non-adversarial category. It rightly acknowledged, however, that this sort of proactive policing can "subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice".[42]

The Court contrasted these kinds of non-adversarial encounters with situations where police have a "[f]ocussed suspicion".[43] While focused suspicion does not in itself give rise to a detention, "police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions".[44]

The second factor the Court identified was the duration of the encounter.[45] The shorter the interaction, the less likely it is to be labelled a detention. The longer the encounter, in contrast, the more likely a reasonable person would feel unable to walk away.

Third, the Court noted that physical contact between the police officer and the individual affected is a relevant consideration. But as with other variables, its significance hinges on context. The Court gave the example of a police officer "placing" his or her hand on someone's arm:

> If sustained, it might well lead a reasonable person to conclude that his or her freedom to choose whether to cooperate or not has been removed. On the other hand, a fleeting touch may not, depending on the circumstances, give rise to a reasonable conclusion that one's liberty has been curtailed.[46]

Finally, the Court recognized that in some situations, "a single forceful act or word may be enough to cause a reasonable person to conclude that his or her right to choose how to respond has been removed".[47] No

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[42] *Id*., at para. 40. This observation by the Court reveals a perceptive appreciation of some of the realities of community policing. See Stephen M. Mastrofski, "Community Policing As Reform: A Cautionary Tale" [hereinafter "Mastrofski"] in Jack R. Green & Stephen D. Mastrofski, eds., *Community Policing: Rhetoric Or Reality* (New York: Praeger, 1988) 46, at 53 (noting that "aggressive order maintenance strategies" are often part and parcel of community policing efforts and can include "rousting and arresting people thought to cause public disorder, field interrogations and roadblock checks, surveillance of suspicious people, vigorous enforcement of public order and nuisance laws, and, in general, much greater attention to the minor crimes and disturbances thought to disrupt and displease the civil public").

[43] *Grant*, *id.*, at para. 41

[44] *Id*.

[45] *Id*., at para. 42.

[46] *Id*. As we discuss *infra*, note 145, anything more than a fleeting touch would likely result in detention by means of physical restraint.

[47] *Id*.

reasonable person, for example, would feel free to walk away after a police officer points at him or her and issues an authoritative command to "get out of your car"![48]

In conclusion, the Court in *Grant* set out the following useful summary:

> … In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
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> (a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.
>
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.[49]

In considering these factors, trial judges must keep in mind "all the circumstances of the case"[50] and engage in "a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements".[51] But while the trial judge's findings of fact are owed deference on appeal, the "application of the law to the facts is a question of law".[52] Given the number of factors that a trial judge must take into account, the potential for reviewable error seems considerable.

3. Applying the *Grant* Factors in *R. v. Grant* and *R. v. Suberu*

Applying the factors discussed above, the Supreme Court concluded that there was a detention in *Grant*. Mr. Grant, a young black man, was

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[48] See, *e.g.*, *R. v. Chaisson*, [2006] S.C.J. No. 11, [2006] 1 S.C.R. 415 (S.C.C.) (restoring trial judge's finding that detention arose when accused complied with police direction to "get out" of his parked car).

[49] *Grant*, *supra*, note 1, at para. 44.

[50] *Id.*, at para. 43.

[51] *Id.*, at para. 32.

[52] *Id.*, at para. 43. See also *id.*, at para. 32.

walking on the sidewalk of a Toronto street at midday when, according to two plainclothes police officers, his manner and clothing attracted their attention. The plainclothes officers requested that a nearby uniformed officer "have a chat" with Mr. Grant. The uniformed officer approached Mr. Grant head-on and stopped directly in his path. The officer asked Mr. Grant "what was going on", and requested his name and address. In response, Mr. Grant produced a provincial health card. At one point, Mr. Grant, behaving nervously, adjusted his jacket, prompting the officer to tell him to "keep his hands in front of him". By this time, the two plainclothes officers had also approached, flashed their badges and stood behind the uniformed officer. Pointed questions followed, with Mr. Grant being asked if he was carrying anything that he "shouldn't have", an exchange that culminated in Mr. Grant admitting that he was in possession of marijuana and a firearm and being arrested.

The preliminary approach and general questioning of Mr. Grant was not enough to trigger a detention, the Court found, because "a reasonable person would not have concluded he or she was being deprived of the right to choose how to act".[53] But a detention arose, the Court ruled, when the uniformed officer told him to "keep his hands in front of him".[54] While in some cases such a statement might be viewed merely as a "precautionary directive",[55] here the encounter was "inherently intimidating".[56] This conclusion was buttressed, the Court reasoned, by the arrival of two additional police officers who flashed their badges before taking up "tactical positions"; the fact that Mr. Grant was being singled out; the posing of probing, interrogative questions; and Mr. Grant's youth and inexperience.

Contrast this with the facts in *Suberu*.[57] There, a police officer attended at a liquor ("LCBO") store in response to reports that two suspects were attempting to use a stolen credit card. On entering the store, the officer saw another police officer speaking with a store employee and another man. At this point, Mr. Suberu walked past the officer towards the exit and told him, "he did this, not me, so I guess I can go." The officer followed Mr. Suberu outside and said, "Wait a minute. I need to talk to you before you go anywhere." While Mr. Suberu was seated in the driver's seat of a van, but turned outwards, facing the officer, there was a brief exchange during which the officer asked about Mr. Suberu's

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53 *Id.*, at para. 47.
54 *Id.*, at paras. 49-52.
55 *Id.*, at para. 48.
56 *Id.*, at para. 50.
57 *Suberu*, *supra*, note 2.

relationship to the man inside the store, where the two men had come from, and who owned the van. As they spoke, the officer received further information over his radio linking the van and Mr. Suberu to the use of a stolen credit card at other locations earlier in the day (a Wal-Mart and an LCBO store). The officer then asked for Mr. Suberu's identification and vehicle ownership. As he did so, he saw shopping bags inside the van from Wal-Mart and the LCBO and arrested Mr. Suberu.

Applying the *Grant* factors, the Supreme Court upheld the trial judge's conclusion that Mr. Suberu was *not* detained before his arrest.[58] The Court began by noting that when police believe a crime has recently been committed, they "may engage in preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the *Charter*".[59] While the "line between general questioning and focused interrogation amounting to detention may be difficult to draw in particular cases", the Court concluded that the trial judge's "findings on the facts, supported by the evidence" lead to the conclusion that the officer's questions were merely "exploratory" and he had "not yet zeroed in on the individual as someone whose movements must be controlled".[60]

The Court also considered the words used by the officer ("wait a minute, I need to talk to you before you go anywhere"). On their face, the Court observed, these words were equivocal. On the one hand, they might mean "I need to talk to you to get more information"; on the other, they could be interpreted "as an order not to leave, suggestive of putting Mr. Suberu under police control".[61] The Court preferred the former interpretation, emphasizing that the officer made no move to obstruct Mr. Suberu's movements, Mr. Suberu remained seated in the van while he spoke with the officer, and the encounter was "very brief".[62]

The trial judge's conclusion, the Court concluded, was also supported by the lack of evidence regarding Mr. Suberu's "personal circumstances, feelings or knowledge".[63] Because he did not testify, "there was no evidence as to whether he subjectively believed that he could not leave".[64] Without such evidence, the Court was left with the evidence of the police officer who testified that he was merely "exploring

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58 *Id*., at para. 35.
59 *Id*., at para. 28.
60 *Id*., at paras. 29-31.
61 *Id*., at para. 33.
62 *Id*., at para. 33.
63 *Id*., at para. 34.
64 *Id*.

the situation", Mr. Suberu never told him he did not wish to speak, and their conversation was not "strained".[65]

The Court thus dismissed the claim that Mr. Suberu's section 10(b) Charter rights were violated by the officer, who had proceeded to question him without apprising him of his right to counsel.

4. Problems with the *Grant* Test

While appellate courts undoubtedly appreciate their nuance, the kind of open-ended, multi-factored standards developed in *Grant* create at least three problems. First, compared to bright-line rules, they give insufficient guidance to police, who must often make snap decisions in quickly unfolding (and sometimes dangerous) circumstances.[66] It is simply unrealistic to expect police to consider a host of situationally variable factors in deciding whether they have crossed the detention threshold. As a consequence, their decisions will frequently be wrong (in relation to what a court will or would have decided *ex ante*).[67] In some cases, they will incorrectly decide that they have not detained an individual. In many of these cases, these mistakes will cause Charter violations, because police either had no legal authority to detain (thereby violating section 9) or failed to issue the required section 10 cautions. Indeed, as noted above, if police are (wrongly) confident that they have not detained a suspect, they have little reason to comply with section 10 (especially section 10(b)). If the Charter is violated in one of these ways, harm is caused to both detainees and the state. Detainees suffer the liberty and self-incrimination harms that these Charter rights are meant to protect against, and the state suffers from the diminished probability that factually guilty suspects will be convicted (because unconstitutionally obtained evidence may be excluded at trial under section 24(2) of the Charter).

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[65] *Id*.

[66] See James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*" (2007) 52 Crim. L.Q. 299, at 314-15 [hereinafter "Stribopoulos, 'Limits of Judicially Created Police Powers'"]; David M. Tanovich, "*Elshaw* — Rethinking the Meaning of Detention: The Doctrine of 'Preliminary Investigatory Detention' is not Appropriate" (1992) 7 C.R. (4th) 374, at 380 [hereinafter "Tanovich, '*Elshaw*'"]; Kenneth C. Davis, *Police Discretion* (St. Paul: West Publishing Co., 1975), at 170; Kenneth C. Davis, *Discretionary Justice: A Preliminary Report* (Baton Rouge: Louisiana State University, 1969), at 25-26, 42, 94-95 [hereinafter "Davis, *Discretionary Justice*"].

[67] See Steven Penney, "Triggering the Right to Counsel: 'Detention' and Section 10 of the Charter" (2008) 40 S.C.L.R. (2d) 271, at 283-85 [hereinafter "Penney, 'Triggering the Right'"]; Gold, *supra*, note 23.

A complete account of the harm to detainees generated by Charter violations of this kind must also acknowledge the phenomenon of discriminatory profiling.[68] It is now widely recognized that the exercise of police discretion may sometimes be motivated, consciously or subconsciously, by nefarious considerations, like an individual's age, economic circumstances, ethnicity or race.[69] For example, in recent years a growing body of evidence has emerged strongly suggesting that both Aboriginals[70] and African Canadians[71] are stopped by police at disproportionately higher rates than members of other racial groups.[72]

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[68] See generally *R. v. Storrey*, [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241, at 251-52 (S.C.C.) (s. 9 of the Charter is violated if an arrest is undertaken "because a police officer was biased towards a person of a different race, nationality or colour, or that there was a personal enmity between a police officer directed towards the person arrested."). Of course, if a police officer is motivated by some bias that implicates one of the prohibited grounds of discrimination under s. 15(1) of the Charter, then that section would also be violated. See also *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at 116-17 (Ont. C.A.) (s. 9 violated by detentions carried out for "improper purposes", including "purposes which are illegal, purposes which involve the infringement of a person's constitutional rights and purposes which have nothing to do with the execution of a police officer's public duty").

[69] See Richard V. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982), at 16-17, 200-201 (noting that the police tend to proactively stop young males of lower socio-economic status and that, depending on the region, race may also play a role — for example, blacks in certain urban areas or Native Canadians in rural areas on the Prairies).

[70] See Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba. Volume 1: The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), at 595; Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, *Justice on Trial* (Edmonton: Task Force, 1991), at 2-5, 2-46 to 2-51.

[71] See Ontario, *Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995), at 349-60; Carl E. James, "'Up To No Good': Black on the Streets and Encountering Police" in Vic Satzewich, ed., *Racism & Social Inequality in Canada: Concepts, Controversies and Strategies of Resistance* (Toronto: Thompson, 1998) 157; Robynne Neugebauer, "Kids, Cops, and Colour: The Social Organization of Police-Minority Youth Relations" in Robynne Neugebauer, ed., *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars Press, 2000); Jim Rankin *et al.*, "Police Target Black Drivers," *Toronto Star* (October 20, 2002), online: <http://www.thestar.com/specialsections/raceandcrime/article/761200--police-target-black-drivers>. But see Ron Melchers, "Do Toronto Police Engage in Racial Profiling?"(2003) 45 Can. J. Crim. 347. But see also Scot Wortley, "Data, Denials, and Confusion: The Racial Profiling Debate in Toronto" (2003) 45 Can. J. Crim. 367. More recently, see Jim Rankin, "Race Matters: Blacks documented by police at high rate" *Toronto Star* (February 6, 2010), online: <http://www.thestar.com/specialsections/raceandcrime/article/761343--race-matters-blacks-documented-by-police-at-high-rate>.

[72] For an excellent summary of the compelling evidence that racial profiling is a reality in Canada, see David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin, 2006).

Responding to this evidence, two provincial appellate courts have recently acknowledged the existence of racial profiling,[73] which the Ontario Court of Appeal has defined as

> that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group. The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping.[74]

Of course, in the individual case, establishing that race improperly[75] influenced a police officer's decision to detain or arrest is no easy task.[76] As a result, successful claims of discriminatory profiling remain extraordinarily rare in criminal proceedings.[77] Nevertheless, the empirical evidence makes plain that the impact of erroneous police decisions that have not triggered a detention will fall disproportionately on visible minorities. In other words, the inherent uncertainty of the *Grant* approach to detention unfortunately tends to make racial profiling more, not less, likely.[78]

The second problem with *Grant*'s open-ended approach is that it will likely be applied in a manner that, on average, undervalues individuals' Charter-protected interests. As mentioned, police have a strong incentive to avoid warning suspects of their right to counsel.[79] Because the line

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[73] See *R. v. Brown*, [2003] O.J. No. 1251, 64 O.R. (3d) 161, at paras. 7-9 (Ont. C.A.); *R. v. H. (C.R.)*, [2003] M.J. No. 90, 173 Man. R. (2d) 113, at para. 49 (Man. C.A.).

[74] *R. v. Brown*, *id*., at paras. 7-8.

[75] In some circumstances police may legitimately rely on an individual's race in deciding whether to investigate a suspect. See Samuel R. Gross & Debra Livingston, "Racial Profiling Under Attack" (2002) 102 Colum. L. Rev. 1413 ("it is not racial profiling for an officer to question, stop, search, arrest, or otherwise investigate a person because his race or ethnicity matches information about a perpetrator of a specific crime that the officer is investigating"). But see David Tanovich, "Moving Beyond 'Driving While Black': Race, Suspect Description and Selection" (2004-2005) 36 Ottawa L. Rev. 315 (cautioning against placing too much weight on generic racial descriptors).

[76] See generally David Tanovich, "E-Racing Racial Profiling" (2004) 41 Alta. L. Rev. 905 (chronicling many of the practical obstacles to proving such claims and suggesting ways in which they might be overcome).

[77] See, *e.g.*, *R. v. Peck*, [2001] O.J. No. 4581 (Ont. S.C.J.).

[78] See Tracey Maclin, "*Terry v. Ohio's* Fourth Amendment Legacy: Black Men And Police Discretion" (1998) 72 St. John's L. Rev. 1271, at 1320 ("[h]istory teaches us that when law enforcement personnel are given loosely supervised discretionary powers, police behaviour will reflect biases and prejudices of individual officers"). In *Grant*, only Binnie J. explicitly acknowledged the disproportionate impact of unjustified stops on racial minorities and other marginalized persons: *Grant*, *supra*, note 1, at paras. 154, 169, Binnie J., concurring.

[79] Hill, *supra*, note 9.

between detention and non-detention is blurry, and the prospect of evidentiary exclusion distant and uncertain, this incentive will often tempt police to stretch the boundary of non-detention past its breaking point.[80] That risk will be especially great when police are engaged in community policing efforts and their primary concern is the maintenance of order rather than collecting admissible evidence for prosecution.[81]

Finally, in the few cases that do go to trial, judges also have strong incentives to avoid evidentiary exclusion. As discussed above, an inherent selection bias presents mostly factually guilty defendants to the courts. The benefits of evidentiary exclusion (encouraging police compliance with Charter norms, protecting individual liberty against unjustified state interference, and disassociating courts from police malfeasance) are distant, systemic and ephemeral. The cost (the potential acquittal of the factually guilty), in contrast, is immediate, direct and visceral. In this milieu, the flexibility of the *Grant* factors will most often inure to the benefit of the state. With a reviewing court's focus dispersed over a long list of relevant considerations, the coercive nature of a dynamic encounter can easily become obscured.[82]

In our view, this is precisely what happened in *Suberu*, where the Court arguably ignored *Grant*'s admonition to engage in "a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements".[83] Recall that the majority interpreted the statement "wait a minute, I need to talk to you before you go any-

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[80] See Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: MacMillan, 1994), at 12 (noting that "whenever rules of constraint are ambiguous, they strengthen the very conduct they are intended to restrain").

[81] See Mastrofski, *supra*, note 42. See also Jeffrey Fagan & Garth Davies, "Street Stops and Broken Windows: Terry, Race, and Disorder in New York City" (2000) 28 Fordham Urb. L.J. 457, at 476-77 (presenting data suggesting that many arrests under "Broken Windows" initiative undertaken with little concern about constitutional compliance because getting guns off the street rather than successful prosecutions was in fact the objective). Of course, if police are wholly unconcerned with obtaining such evidence, the prospect of exclusion will not deter overreaching even when the constitutional limitations on their powers are clearly delineated.

[82] See William J. Stuntz, "Warrants and Fourth Amendment Remedies" (1991) 77 Va. L. Rev. 881, at 912-13; Carole S. Steiker, "Second Thoughts About First Principles" (1994) 107 Harv. L. Rev. 820, at 852-53. More generally, the influence of "hindsight bias" is extraordinarily well documented within psychology. For a review of the literature, see Scott A. Hawkins & Reid Hastie, "Hindsight: Biased Judgment of Past Events After the Outcomes are Known" (1990) 107 Psychological Bulletin 311. Some studies have specifically linked this phenomenon to legal decision-making, although each such study has necessarily involved simulations. See Jonathan D. Casper, Kennette Benedict & Janice R. Kelly, "Cognitions, Attitudes, and Decision-Making in Search and Seizure Cases" (1988) 18 J. Applied Social Psychology 93; Jennifer K. Robbennolt & Mark S. Sobus, "An Integration of Hindsight Bias and Counterfactual Thinking: Decision-Making and Drug Courier Profiles" (1997) 21 Law & Hum. Behav. 539.

[83] *Grant*, *supra*, note 1, at para. 32.

where" as a mere request for information.[84] However, as Binnie J. persuasively argued in dissent, viewing that comment in context makes the officer's meaning plain:

> The verbal exchange between Constable Roughley and Mr. Suberu clearly established an unambiguous police order. When Mr. Suberu walked past Constable Roughley, saying, "He did this, not me, so I guess I can go", and Constable Roughley replied, "Wait a minute. I need to talk to you before you go anywhere", it was a command to stay put. Constable Roughley's words were only ambiguous if one ignores the preceding remark from Mr. Suberu. Constable Roughley was replying to Mr. Suberu, who had essentially said, "Can I leave?", by essentially saying, "No". It was clear to Mr. Suberu that he was not free to go "anywhere" and any reasonable person in that position would have come to the same conclusion.[85]

The majority's approach was no doubt motivated by the practical difficulties of implementing the right to counsel incidental to investigation detention.[86] But the Court's solution to this problem — defining detention so amorphously that it need not capture all situations where reasonable people would believe that they were "not free to go and had to comply with the police direction or demand"[87] — it is akin to killing the patient to cure a cold. While it avoids the impracticality of complying with section 10(b) of the Charter, in the process it immunizes a host of highly coercive encounters from scrutiny under section 9. As we discuss below, there are other solutions to the section 10(b) problem that would allow police to engage in brief, preliminary questioning without issuing the section 10(b) caution.

The final problem posed by the *Grant* factors is that, even if judges do find a detention, the flexibility of the exclusionary discretion under section 24(2) of the Charter (also reformulated by the Court in *Grant*) provides ample opportunity to excuse police mistakes. Certainly deliberate and negligent Charter violations are likely to result in exclusion.[88] Where police

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[84] *Suberu*, *supra*, note 2, at paras. 33-34.

[85] *Id.*, at para. 56, Binnie J., dissenting. In separate reasons Fish J. also dissented, agreeing with Binnie J. that Mr. Suberu was detained. See *Suberu*, *id.*, Fish J., dissenting.

[86] See *Suberu*, *id.*, at paras. 47-48, Binnie J. dissenting.

[87] *Grant*, *supra*, note 1, at para. 31.

[88] *Id.*, at para. 75 ("It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence."); *R. v. Harrison*, [2009] S.C.J. No. 34, [2009] 2 S.C.R. 494, at para. 22 (S.C.C.) (violation considered serious when "departure from *Charter* standards was major in degree, or where the police knew (or should have known) that their conduct was not *Charter*-compliant").

(unintentionally) err in applying indeterminate legal standards, however, courts often decline to exclude under section 24(2). In *Grant*, the Court noted that "the point at which an encounter becomes a detention is not always clear, and is something with which courts have struggled".[89] Since police there were "operating in circumstances of considerable legal uncertainty," their failure to comply with section 10(b) was "understandable", tipping the "balance in favour of admission".[90] Making the rules clearer for police will reduce that uncertainty; police compliance with Charter standards would then become more likely,[91] as would the potential for a remedy in those cases where an individual's rights are violated.

5. Reform

How might this situation be improved? In short, the courts should interpret and apply *Grant* in a manner that provides as much *ex ante* certainty to police as possible. In that regard, the experience in provincial appellate courts after *Therens*[92] is instructive. Shortly after *Therens* was decided, the Ontario Court of Appeal articulated a test for detention that is similar in many ways to the approach in *Grant*. In *R. v. Moran*, Martin J.A. set out a list of relevant criteria in a case involving an accused interviewed by police at the station-house on two separate occasions during the course of a homicide investigation.[93] The *Moran*

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[89] *Grant*, *id.*, at para. 133.

[90] *Id.*, at paras. 133, 140.

[91] See Steven Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the *Charter*" (2004) 49 McGill L.J. 105, at 136-38.

[92] See *R. v. Moran*, [1987] O.J. No. 794, 36 C.C.C. (3d) 225, at 258-59 (Ont. C.A.), leave to appeal refused [1988] S.C.C.A. No. 213, [1988] 1 S.C.R. xi (S.C.C.) [hereinafter "*Moran*"]. This approach is similar to that taken in the United States in determining whether the suspect is in "custody" for the purposes of the *Miranda* warning. See *Miranda v. Arizona*, 384 U.S. 437 (1966); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Stansbury v. California*, 511 U.S. 318, at 323 (1994); Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure*, 3d ed. (St. Paul, Minn.: West, 2000) § 6.6.

[93] See *Moran*, *id.*, at 258-59, where Martin J.A. identified the following criteria:

1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home;
2. Whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;
3. Whether the accused left at the conclusion of the interview or whether he or she was arrested;
4. The stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its

criteria were adopted by most courts of appeal[94] and applied to many different types of police-suspect encounters, including the questioning of pedestrians.[95]

At first glance, the *Moran* approach appears at least as open-ended and indeterminate as *Grant*. A close look at the jurisprudence, however, reveals that most often (including in *Moran* itself) detention turned on the (related) fourth, fifth and sixth factors, namely, the stage of the investigation, the degree of suspicion attaching to the accused and the nature of the questioning.[96]

Before *Grant*, a detention was usually found when police identified the accused as the likely perpetrator and conducted questioning with a view to inducing self-incriminating statements.[97] When both of these

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commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;

5. Whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;
6. The nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;
7. The subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.

[94] See *R. v. Johns*, [1998] O.J. No. 445, 14 C.R. (5th) 302, at para. 23 (Ont. C.A.); *R. v. Voss*, [1989] O.J. No. 1124, 33 O.A.C. 190 (Ont. C.A.); *R. v. Caputo*, [1997] O.J. No. 857, 114 C.C.C. (3d) 1, at 11 (Ont. C.A.); *R. v. H. (C.R.)*, [2003] M.J. No. 90, 174 C.C.C. (3d) 67, at paras. 27-30 (Man. C.A.); *R. v. Amyot*, [1990] J.Q. no 1067, 58 C.C.C. (3d) 312 (Que. C.A.); *R. v. V. (T.A.)*, [2001] A.J. No. 1679, 48 C.R. (5th) 366, at para. 18 (Alta. C.A.); *R. v. Gaudette*, [2006] J.Q. no 8112, 2006 QCCA 1004, at para. 37 (Que. C.A.); *R. v. C. (S.)*, [1989] N.J. No. 81, 74 Nfld. & P.E.I.R. 252 (Nfld. C.A.); *R. v. Groat*, [2006] B.C.J. No. 109, 2006 BCCA 27 (B.C.C.A.); *R. v. Priddle*, [2003] B.C.J. No. 2671, 2003 BCCA 637 (B.C.C.A.).

[95] See, *e.g.*, *R. v. B. (L.)*, [2007] O.J. No. 3290, 227 C.C.C. (3d) 70 (Ont. C.A.); *R. v. H. (C.R.)*, *id.*; *R. v. Grafe*, *supra*, note 27; *R. v. Hall*, [1995] O.J. No. 544, 22 O.R. (3d) 289 (Ont. C.A.); *R. v. V. (T.A.)*, *id.*

[96] For example, writing for the Manitoba Court of Appeal in *H. (C.R.)*, Steele J. held that police did not detain a pedestrian even though they asked for his identification and checked his name against a computer database. See *R. v. H. (C.R.)*, *supra*, note 94. See also *R. v. B. (L.)*, *id.*, at para. 67 (request for pedestrian's identity and running of database check did not trigger detention). Subsequently, Steele J. concluded for the same court in *R. v. Dolynchuck*, [2004] M.J. No. 135, 184 C.C.C. (3d) 214, at para. 32 (Man. C.A.) that police did detain the accused when they questioned him in a parking lot after receiving a tip that he had been driving while impaired. Police had more than a mere suspicion that he had committed this offence, indicated that they would have detained him for investigative purposes after they confirmed his identity, and asked him a question ("were you driving?"), the answer to which provided proof of an element of the offence. Police had "already decided that a crime had been committed and that the accused was the perpetrator" and their question was designed to obtain "incriminating statements".

[97] See, *e.g.*, *R. v. Voss*, *supra*, note 94, at 204 ("the police investigation changed from one of trying to determine a cause of death to one of trying to get information from a man who is alleged to

conditions were present, a detention was usually triggered even when suspects were told that they were free to leave or to decline answering questions.[98] Conversely, when one of these conditions was *not* present (such as accusatory questioning), a detention was usually not found even if police had grounds to detain or arrest at the conclusion of questioning.[99] It thus appeared that while courts formally applied an open-ended, "totality of the circumstances" approach, like that endorsed in *Grant*, the results in actual cases were dictated by a (relatively) "bright-line" standard. In all but a few cases, detention was found when (and only when), police attempted to elicit incriminating statements from the likely perpetrator of the offence under investigation.[100]

To be clear, we do not mean to argue that the *Moran* criteria, as narrowed and refined in subsequent cases, should be resurrected to replace the various factors identified in *Grant*. In fact, as we detail below, the controlling considerations that emerged in *Moran* are under-inclusive because they fail to provide any protection where the police have no offence in mind but are instead engaged in an invasive fishing expedition, as they were in *Grant*.[101] The *Moran* factors were developed with section

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have and has admitted to having assaulted his wife in order to determine if he was implicated in the death"); *R. v. Pomeroy*, [2008] O.J. No. 2550, 2008 ONCA 521, at para. 37 (Ont. C.A.) ("The focus of the interview was to gain general information as part of the investigation of the 'suspicious death'; the questioning was not conducted for the purpose of obtaining incriminating statements from the appellant"); *R. v. Caputo*, *supra*, note 94, at para. 27 ("The questioning up to that point appears to have been general in nature and directed toward obtaining a witness statement from the appellant. He had not yet been confronted with evidence pointing to his guilt or to the contradictions between his statements and the other evidence that was being gathered as the investigation continued").

[98] See *R. v. Johns*, *supra*, note 94, at para. 28 (Ont. C.A.); *R. v. Teske*, [2005] O.J. No. 3759, 202 O.A.C. 239, at para. 55 (Ont. C.A.); *R. v. Rajaratnam*, [2006] A.J. No. 1373, 214 C.C.C. (3d) 547, at para. 17 (Alta. C.A.); *R. v. Lee*, [2007] A.J. No. 1183, 2007 ABCA 337 (Alta. C.A.).

[99] See *R. v. Pomeroy*, *supra*, note 97, at para. 37; *R. v. Hall*, [2004] O.J. No. 5007, 193 O.A.C. 7, at para. 22 (Ont. C.A.); *R. v. B. (L.)*, *supra*, note 95, at paras. 56-57.

[100] This test is similar to that set out in *R. v. Hawkins*, [1992] N.J. No. 147, 14 C.R. (4th) 286 (Nfld. C.A.), revd [1993] S.C.J. No. 50, [1993] 2 S.C.R. 157 (S.C.C.), but without reference to the intention of police to arrest or charge suspects. See also Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed. (looseleaf) (Toronto: Thomson Carswell, 2006) § 5.3(c)(ii) [hereinafter "Quigley"]; Tanovich, "*Elshaw*", *supra*, note 66, at 380; Stuart, *supra*, note 8, at 326-27; Penney, "Triggering the Right, *supra*, note 67, at 284-85; Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era, Part 2: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280, at 320-21 [hereinafter "Penney, 'What's Wrong?'"].

[101] This is the principal reason why we also disagree with Binnie J.'s proposed approach for defining detention, which would emphasize the perception and intention of police. See *Grant*, *supra*, note 1, at para. 180, Binnie J., concurring. We worry that in the hands of lower court judges, a police officer's assertion that "I didn't suspect the accused of anything, I was just having a chat" would too easily allow highly coercive encounters to avoid being labelled detentions. We are especially concerned about certain so-called "community policing programs", like the Toronto Anti-Violence

10 of the Charter in mind and are most relevant to formal, "sit down" interviews conducted at the police station or other suitable location. They were not designed to address the section 9 liberty interests implicated by impromptu, "in the field" inquiries of pedestrians, motorists, and the like. We reference *Moran*'s treatment only to stress that not all factors under a multi-factor approach are deserving of equal emphasis. By focusing on

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Intervention Strategy ("TAVIS"). TAVIS is a relatively recent initiative of the Toronto Police Service. Its stated purpose ("an intensive, violence reduction and community mobilization strategy intended to reduce crime and increase safety in our neighbourhoods") is laudable. See Toronto Police Service, TAVIS, available online: <http://www.torontopolice.on.ca/tavis>. In practice, however, it involves large teams of police officers proactively policing "high-crime" neighbourhoods and engaging in aggressive stop and frisk practices. Those stopped are asked to produce identification and routinely searched. Individuals who are in possession of drugs or weapons are arrested, as are those for whom there are outstanding warrants or who happen to be breaching the terms of a bail or probation order. For others, the encounter often only ends after the police have completed a "contact card", known within the Toronto Police Service as a "208 card". See Timothy Appleby, "New police strategy designed to blanket high-violence areas", *The Globe and Mail*, February 13, 2006, A1; Moira Welsh, "Elite Toronto police squad goes looking for trouble", *Toronto Star* (February 8, 2010) available online: <http://www.thestar.com/specialsections/raceandcrime/article/761310--elite-toronto-police-squad-goes-looking-for-trouble>.

The use of these cards was explained by LaForme J. in *R. v. Ferdinand*, [2004] O.J. No. 3209, 21 C.R. (6th) 65, at paras. 12, 16 (Ont. S.C.J.):

> A 208 card is approximately 3" by 5" and is printed on both sides, commencing with the words, "Person Investigated". It records information obtained from a person who is stopped by the police that includes information such as, "name, aliases, date of birth, colour, address, and contact location including the time". On the back it has entries for things such as: "associates" and "associated with: gang, motorcycle club, Drug Treatment Court". The police then input the information from the completed 208 cards into a police computer database for their future reference.
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> . . . . .
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> There is no evidence that any police officer advises, or has ever advised, any person stopped that they have a right not to answer any questions from this card and that they are free to leave if they wish. The testimony of the two young men from the neighbourhood is that: The police "always stop them, and always search them", and they are not told they do not have to answer. They add that, persons stopped by these two officers always answer questions and submit to searches because they believe they have to, and that it does not do any good not to.

It is fair to say that LaForme J. was troubled by the way in which these cards were being used. In a rather prescient comment, he noted that the "impression that one could draw from the information sought on these 208 cards — along with the current manner in which they are being used — is that they could be a tool utilized for racial profiling". *Id*., at para. 21.

In 2010, the *Toronto Star* gained access, by means of a freedom of information request, to the data compiled by Toronto police using the 208 cards. See *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 90, 93 O.R. (3d) 563 (Ont. C.A.). After analyzing the data, which includes racial descriptors of the persons stopped and questioned, the *Toronto Star* reported that black males between the ages of 15 and 24 are 2.5 times more likely to be stopped and documented than white males the same age. See Jim Rankin, "Race Matters: Blacks documented by police at high rate" *Toronto Star* (February 6, 2010), online: <http://www.thestar.com/specialsections/raceandcrime/article/761343--race-matters-blacks-documented-by-police-at-high-rate>.

the key variables identified in *Grant*, courts can both give police clear guidance and achieve a more optimal accommodation between the conflicting interests implicated by police-citizen encounters.

Of course, this raises the questions: which of the *Grant* factors are most important to achieving this accommodation and what guidance should courts give to the police in future cases? In the aftermath of *Grant*, we would emphasize two variables:

(1) *The language used to initiate the encounter*. Permissive language would be far less likely to result in a detention than obligatory language. For example, in the context of a street stop, "I'd like to speak with you" or "Would you mind if I asked you some questions?" would be unlikely to result in a detention. A detention would likely arise, in contrast, from "Stay right there!", "Freeze!", or "Show me some identification!"[102] Similarly, for "sit down" interviews, "I'd like to speak with you at a time and place of your choosing" is less likely to trigger detention than, "We want you to come with us to the police station to talk about this right now."[103]

(2) *The nature of any ensuing questioning*. Purely exploratory questions are unlikely to trigger detention. By this we would include situations such as a police officer approaching a pedestrian and asking, "How are things?" or an officer responding to an emergency call and asking someone present, "What's going on?" In contrast, detention is much more likely to be found when police approach a pedestrian, ask for identification, and ask questions like, "Where are you coming from?", "What are you doing?", "Where are you going?" or "Do you have any

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[102] Unfortunately, *Grant* did not address whether a police demand for identification results in a detention. When police asked Mr. Grant for his name and address, he produced his provincial health card without a police request, so the question did not arise. A number of pre-*Grant* cases suggest that such a request does not result in a detention. See *R. v. B. (L.)*, *supra*, note 95; *R. v. Hall*, *supra*, note 95, at paras. 21-23; *R. v. H. (C.R.)*, *supra*, note 94, at paras. 33-36. Post-*Grant*, it remains to be seen how this question will be resolved. Obviously, police must be free to approach people and engage them in conversation, which includes the social pleasantry of asking someone's name. Few would feel compelled to remain in a police officer's presence because of such a routine and benign question. But a police request for identification is undoubtedly different. Given a police officer's position of authority, most people would not hesitate in complying with what they would reasonably perceive as a demand. And, surely, once a police officer is holding your identification (especially if while doing so simultaneously peppering you with questions regarding where you are coming from, where you are going, whether you have anything in your possession that you shouldn't, *etc*.), most people would not think that they are free to leave.

[103] See *Moran*, *supra*, note 92, at 258 (stressing scrutiny of language used in requesting person to come to the police station and "whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home").

> weapons or drugs?" In the latter circumstances, few reasonable people would feel free to walk away. Similarly, in a more formal interview context, a detention would not likely arise from open-ended, non-accusatory questions designed to gather preliminary information; questions designed to elicit self-incriminating evidence from someone strongly suspected of committing a crime likely would.

The first of these variables targets the liberty interests inhering in section 9,[104] the second aims to protect the interests inhering in section 10(b) — preventing inquisitorial abuses and compelled self-incrimination.[105] Each also allows police to seek preliminary investigative information without significant restraint. It follows that a detention should usually be found when *either* of these factors points in that direction. If courts were to require both, one of these Charter-protected interests would frequently be left unprotected. Without factor (1), as long as they do not engage in interrogation-like questioning, police could coercively restrain people's freedom without reasonable suspicion that they have committed a crime. And without factor (2), as long as they do not coercively restrain people's freedom, police could conduct accusatory (and potentially abusive) interrogations, again without reasonable suspicion and without extending the protections of the right to counsel.

In addition to enabling a better balance between individual and law enforcement interests, our proposal gives police much more concrete guidance than the open-ended *Grant* factors. In short, it tells them that if they do not want to detain, they should *use permissive language and refrain from interrogating*. Conversely, it warns them that if they use compulsory language to initiate encounters with suspects or engage in the functional equivalent of an interrogation, they will likely have triggered a detention and must thus comply with sections 9, 10(a) and (subject to any changes to the law that we advocate for below) 10(b) of the Charter. In other words, they must have reasonable grounds to suspect an individual of being involved in a recently committed or unfolding criminal offence, tell that person why he or she has been detained, and

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[104] In *Grant*, *supra*, note 1, at para. 20, the Court finally took the opportunity to expressly acknowledge the purpose underlying this important Charter right, which it recognized as being, "broadly put … to protect individual liberty from unjustified state interference". Rather remarkably, even though s. 9 of the Charter had been before the Court on 24 prior occasions, it has never before expressly identified its purpose. See Stribopoulos, "The Forgotten Right", *supra*, note 8, at 214-23.

[105] See *Suberu*, *supra*, note 2, at para. 40; *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233, at 1242-43 (S.C.C.); *R. v. Brydges*, [1990] S.C.J. No. 8, [1990] 1 S.C.R. 190, at 203, 206, 215 (S.C.C.); *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173, at 191 (S.C.C.); *R. v. Prosper*, *supra*, note 17, at 271.

inform the person of the right to retain and instruct counsel without delay.

As mentioned, the Court suggested in *Grant* that if the police want to avoid engaging these various Charter rights, there is a relatively simple solution: tell the affected individual in unambiguous terms that he or she is under no obligation to answer questions and is free to go. This suggestion, we caution, should be read very strictly. In the context of brief "in the field" inquiries, such a statement would likely be enough to convey to most people that they are truly not required to cooperate. In the context of accusatory questioning at the police station (and perhaps other "sit down" interviews), something more may be required to impress upon suspects that they are not under legal constraint.[106] It would be prudent, for example, to require suspects in such circumstances to read, understand and sign a statement (perhaps repeatedly in the case of lengthy interviews) clearly explaining that they are legally entitled to leave or remain silent.

III. INVESTIGATIVE DETENTION AND SECTION 10 OF THE CHARTER

1. History and Context

As noted, the reforms to *Grant*'s conception of non-legal psychological detention that we have proposed do not address the problem of applying the section 10(b) right to counsel to suspects lawfully detained for investigative purposes. Before 1993, police had no power to detain short of carrying out a formal arrest.[107] All this changed with the Court of

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[106] See the cases cited *supra*, note 98 (finding detention in the context of accusatory "sit down" interviews despite police statements that suspects were free to leave or remain silent).

[107] See *R. v. Hicks*, [1988] O.J. No. 957, 42 C.C.C. (3d) 394, at 400 (Ont. C.A.), affd on other grounds [1990] S.C.J. No. 7, 54 C.C.C. (3d) 575 (S.C.C.); *R. v. Moran*, *supra*, note 92, at 258; *R. v. Esposito*, [1985] O.J. No. 1002, 24 C.C.C. (3d) 88, at 94 (Ont. C.A.), leave to appeal refused [1986] S.C.C.A. No. 63, [1986] 1 S.C.R. viii (S.C.C.); *R. v. Dedman*, [1981] O.J. No. 2993, 59 C.C.C. (2d) 97, at 108-109 (Ont. C.A.), affd on other grounds [1985] S.C.J. No. 45, 20 C.C.C. (3d) 97 (S.C.C.); *R. v. Cluett*, [1982] N.S.J. No. 542, 3 C.C.C. (3d) 333, at 347-48 (Ont. C.A.), revd on other grounds [1985] S.C.J. No. 54, 21 C.C.C. (3d) 318 (S.C.C.); *R. v. Guthrie*, [1982] A.J. No. 29, 69 C.C.C. (2d) 216, at 218-19 (Alta. C.A.); *R. v. Moore*, [1978] S.C.J. No. 82, 43 C.C.C. (2d) 83, at 89-90 (S.C.C.); *Rice v. Connolly*, [1966] 2 Q.B. 414, at 419 (C.A.); *Kenlin v. Gardner*, [1967] 2 Q.B. 510 (C.A.); *Koechlin v. Waugh*, [1957] O.J. No. 105, 118 C.C.C. 24, at 26-27 (Ont. C.A.); Alan Young, "All Along The Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall L.J. 329, at 330, 343; David C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989), at 303-304; Law Reform Commission of Canada, *Arrest* (Working Paper 41) (Ottawa: Supply & Services Canada, 1985), at 33, 37; Steve Coughlan, "Police Detention: A Proposal" (1985) 28 Crim. L.Q. 64, at 66, 77.

Appeal for Ontario's decision in *Simpson*.[108] The *Simpson* court used the ancillary powers doctrine to recognize a power to briefly detain when police have "articulable cause" to believe that the person is involved in criminal activity.[109]

The investigative detention power recognized in *Simpson* was ultimately endorsed by appellate courts across the country.[110] It took 11 years, however, for the Supreme Court of Canada to finally give it its stamp of approval. Acknowledging that "police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing", in *R. v. Mann* the Court applied the ancillary powers doctrine to recognize an investigative detention power.[111]

In *Mann*, the Court held that an individual may be briefly detained where police have reasonable grounds to suspect a clear nexus between the individual being detained and a recently committed or still unfolding criminal offence.[112] An investigative detention that is carried out in accordance with this common law power, the Court explained, is not "arbitrary" and thus does not infringe section 9 of the Charter.[113]

The Court also held that where suspects are lawfully detained for investigative purposes, police may conduct a limited protective pat-down search. "Such a search power does not exist as a matter of course", the Court explained, "the officer must believe on reasonable grounds that his

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[108] *Supra*, note 8.

[109] *Id.*, at 499-502.

[110] See *R. v. Ferris*, [1998] B.C.J. No. 1415, 126 C.C.C. (3d) 298 (B.C.C.A.); *R. v. Dupuis*, [1994] A.J. No. 1011, 162 A.R. 197 (Alta. C.A.); *R. v. Lake*, [1996] S.J. No. 886, 113 C.C.C. (3d) 208 (Sask. C.A.); *R. v. G. (C.M.)*, [1996] M.J. No. 428, 113 Man. R. (2d) 76 (Man. C.A.); *R. v. Pigeon*, [1993] J.Q. no 1683, 59 Q.A.C. 103 (Que. C.A.); *R. v. Carson*, [1998] N.B.J. No. 482, 39 M.V.R. (3d) 55 (N.B.C.A.); *R. v. Chabot*, [1993] N.S.J. No. 465, 86 C.C.C. (3d) 309 (N.S.C.A.); *R. v. Burke*, [1997] N.J. No. 187, 118 C.C.C. (3d) 59 (Nfld. C.A.).

[111] *R. v. Mann*, *supra*, note 7, at para. 16.

[112] *Id.*, at paras. 34, 45. Unfortunately, the Court could have been clearer on whether the investigative detention power identified was limited to crimes actually known to police or whether it also extends to crimes that are reasonably suspected. The latter explanation makes much more sense as it allows police to respond to events that they observe while on patrol giving rise to a reasonably based suspicion that criminality may be afoot. See *R. v. Nesbeth*, [2008] O.J. No. 3086, 238 C.C.C. (3d) 567, at para. 18 (Ont. C.A.) ("While the court in *Mann* speaks of reasonable grounds to suspect that the individual is connected to 'a particular crime', in my view, it is not necessary that the officers be able to pinpoint the crime with absolute precision."); *R. v. Yeh*, [2009] S.J. No. 582, 2009 SKCA 112, [2009] 11 W.W.R. 193, at para. 84 (Sask. C.A.) ("a 'particular crime,' read in context, reflects the idea that the police may not detain an individual out of a general sense he or she might be doing something unlawful. … police suspicions must relate to specific criminal wrongdoing").

[113] *Mann*, *id.*, at para. 20.

or her own safety, or the safety of others, is at risk".[114] Accordingly, police are not permitted (as they did in *Mann*) to search for evidence.[115]

Before *Mann*, there was no clear and consistent answer as to whether section 10(a) and (b) of the Charter apply when an individual is subject to investigative detention.[116] In *Mann*, the Supreme Court thankfully made clear that section 10(a) of the Charter does apply. The Court explained that the police must tell the person "in clear and simple language" of the reasons for the detention.[117] Unfortunately, the same was not true for section 10(b). Although the Supreme Court cautioned in *Mann* that the police should not use compliance with that right as an excuse to unduly and artificially prolong an investigative detention, it deliberately deferred for another day the more pressing question of whether or not the right applies.[118] It took five more years of uncertainty before that day arrived.

2. *Suberu*, Investigative Detention and Section 10(b) of the Charter

As mentioned, in *Suberu* the Supreme Court of Canada definitively held that, "subject to concerns for officer or public safety", police must tell people subject to investigative detention about their right to retain and instruct counsel immediately upon detention and must do everything required under section 10(b) to facilitate that right.[119] It summarily dismissed the suggestion that a suspension of the right to counsel during such detentions was justified under section 1 of the Charter, which subjects section 10(b) and other Charter rights to "reasonable limits prescribed by law

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[114] *Id.*, at para. 40.

[115] *Id.*, at paras. 40-45 (any probing beyond a pat-down for weapons is only justifiable where a police officer feels something during the initial protective search that raises reasonably based safety concerns). See also *R. v. Duong*, [2006] B.C.J. No. 1452, 142 C.R.R. (2d) 261, at para. 56 (B.C.C.A.); *R. v. Greaves*, [2004] B.C.J. No. 1953, 189 C.C.C. (3d) 305 (B.C.C.A.); *R. v. White*, [2007] O.J. No. 1605, 85 O.R. (3d) 407 (Ont. C.A.).

[116] See, *e.g.*, *R. v. V. (T.A.)*, *supra*, note 94, at para. 32 (Alta. C.A.) ("When a brief search is conducted to ensure the safety of the officers involved, it seems implausible that this must be preceded by a 10(*b*) warning"); *R. v. Lewis*, [1998] O.J. No. 376, 122 C.C.C. (3d) 481, at para. 28 (Ont. C.A.) ("Without deciding whether every investigative detention requires compliance with s. 10(*b*), I would hold that this investigative detention, which encompassed a search of the respondent's luggage, gave rise to an obligation that the police inform the respondent of his right to counsel.")

[117] *Mann*, *supra*, note 7, at para. 21.

[118] *Id.*, at para. 22.

[119] *Suberu*, *supra*, note 2, at paras. 2, 42. See also *R. v. Strachan*, [1988] S.C.J. No. 94, [1988] 2 S.C.R. 980, at 998-99 (S.C.C.) (s. 10 warnings must be given immediately upon detention but may be delayed in situations where police need to gain control over a dangerous situation); *R. v. Debot*, [1989] S.C.J. No. 118, [1989] 2 S.C.R. 1140, at 1163-64 (S.C.C.), Wilson J. (same).

as can be demonstrably justified in a free and democratic society". "Because the definition of detention, as understood in these reasons, gives the police leeway to engage members of the public in non-coercive, exploratory questioning without necessarily triggering their *Charter* rights relating to detention," the Court reasoned, "s. 1 need not be invoked in order to allow the police to effectively fulfill their investigative duties."[120]

Similarly, the Court rejected the view of the court below that the reference to "without delay" in section 10(b) contemplated a "brief interlude" between the initial investigative detention and the point at which police must advise suspects of the right to counsel.[121] During this period, the Court of Appeal had concluded, police may make "a quick assessment of the situation to decide whether anything more than a brief detention of the individual may be warranted".[122] The Supreme Court explained:

> To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(*b*) creates an ill-defined and unworkable test of the application of the s. 10(*b*) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police.[123]

3. Problems with the *Suberu* Approach

As the Supreme Court emphasized in *Mann*, investigative detention "should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police".[124] It further warned that it cannot be allowed to "become a *de facto* arrest".[125] In light of these directives, the Court hinted (though as mentioned it expressly declined to decide the issue) that applying section 10(b) of the Charter to investigative detention might not be appropriate. "Mandatory compliance with [section 10(b)'s] requirements," it stated, "cannot be transformed

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[120] *Suberu*, *id*., at para. 45.

[121] *R. v. Suberu*, [2007] O.J. No. 317, 218 C.C.C. (3d) 27, at para. 50 (Ont. C.A.), affd [2009] S.C.J. No. 33, [2009] 2 S.C.R. 460 (S.C.C.).

[122] *Id*.

[123] *Suberu*, *supra*, note 2, at para. 42.

[124] *Mann*, *supra*, note 7, at para. 45.

[125] *Id*., at para. 35.

into an excuse for prolonging, unduly and artificially, a detention that, as I later mention, must be of brief duration."[126]

These *dicta* were seemingly ignored in *Suberu*. In our view, applying section 10(b) to investigative detention will have bad effects for both law enforcement and individual liberty. For law enforcement, complying with section 10(b) involves much more than reading a caution card.[127] After doing so, police must also ensure that detainees understand the caution, and if there is any indication that they do not, take steps to facilitate understanding.[128] Critically, police may not question or otherwise seek to obtain self-incriminating information from detainees until this understanding is achieved.[129]

Further, if detainees invoke their right to counsel,[130] police must do a number of things to facilitate it. They must allow detainees to telephone a lawyer in private[131] as soon as reasonably possible.[132] If private telephone

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[126] *Id.,* at para. 22.

[127] In addition to telling those detained that they have a right to talk to a lawyer, as interpreted by the Supreme Court of Canada, s. 10(b) also requires police to inform them of any legal aid or duty counsel services available in the jurisdiction and provide information on how to contact duty counsel. See *R. v. Brydges*, *supra*, note 105, at 209-10, 212, 215; *R. v. Bartle*, *supra*, note 105, at 195-97. This information must be conveyed again whenever the nature of questioning changes in a way that alters the individual's potential jeopardy. See *R. v. Black*, [1989] S.C.J. No. 81, [1989] 2 S.C.R. 138, at 155 (S.C.C.); *R. v. Evans*, [1991] S.C.J. No. 31, [1991] 1 S.C.R. 869, at 890-93 (S.C.C.).

[128] See *R. v. Evans*, *id.*, at 891 ("where … there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding"). The degree of understanding required, however, is modest. See *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 933, 939, 941-42 (S.C.C.) (detainees must have "sufficient cognitive capacity to understand what he or she is saying and what is said", including "the ability to understand a caution that the evidence can be used against the accused"; they need not be capable of exercising "analytical reasoning", or making "a good or wise choice or one that is in his or her interest".).

[129] See, *e.g.*, *R. v. Evans*, *id.* (police violated section 10(b) by failing to do anything to explain the right to counsel to a cognitively limited detainee who indicated that he did not understand it).

[130] Invocation requires a positive assertion of the right to speak to a lawyer. See *R. v. Tremblay*, [1987] S.C.J. No. 59, [1987] 2 S.C.R. 435, at 439 (S.C.C.); *R. v. Hollis*, [1992] B.C.J. No. 2066, 76 C.C.C. (3d) 421, at 435 (B.C.C.A.). The Supreme Court has also implicitly required police to give detainees a reasonable opportunity to ask to speak to a lawyer. See *R. v. Feeney*, *supra*, note 17, at para. 58. See also *R. v. Woods*, [1989] O.J. No. 532, 70 C.R. (3d) 45 (Ont. C.A.); *R. v. Hollis*, *id.*, *per* Wood J.A.

[131] The courts have typically held that s. 10(b) requires an environment "where the conversation cannot be overhead and there is no reasonable apprehension … of being overheard": *R. v. Miller*, [1990] N.J. No. 305, 87 Nfld. & P.E.I.R. 55, at 58 (Nfld. C.A.). See also *R. v. Kelly*, [1996] N.J. No. 110, 140 Nfld. & P.E.I.R. 14 (Nfld. C.A.); *R. v. LePage*, [1986] N.S.J. No. 371, 32 C.C.C. (3d) 171 (N.S.C.A.); *R. v. Kennedy*, [1995] N.J. No. 340, 103 C.C.C. (3d) 161 (Nfld. C.A.); *R. v. Playford*, [1987] O.J. No. 1107, 40 C.C.C. (3d) 142, at 158 (Ont. C.A.); *R. v. Young*, [1987] N.B.J. No. 826, 6 M.V.R. (2d) 295 (N.B.C.A.); *R. v. Cairns*, [2004] O.J. No. 210, 182 O.A.C. 181, at para. 10 (Ont. C.A.); *R. v. Panchyshyn*, [1985] S.J. No. 411, 38 Sask. R. 239 (Sask. C.A.). Privacy must be

consultation is possible at the place of initial detention (or anywhere a detainee is taken before a police station), it must be provided there.[133] If not, it must be provided at the station.[134] Again, police may not elicit any evidence from the detainee before such access is provided.[135]

Once police provide private telephone access, they must give detainees a "reasonable opportunity" to talk to a lawyer of their choosing.[136] The duration of this reasonable opportunity is uncertain, but in many cases it may extend for several hours. It may turn on (among other things), the availability of duty counsel,[137] an urgent need to obtain evidence[138] and whether detainees were "diligent" in exercising their rights.[139] Once again, police may not question or obtain self-incriminating information from detainees until this reasonable opportunity has expired.[140] Further, if a

provided even if the accused does not request it. See *R. v. Jackson*, [1983] O.J. No. 2511, 86 C.C.C. (3d) 233 (Ont. C.A.); *R. v. Parrill*, [1998] N.J. No. 322, 58 C.R.R. (2d) 56 (Nfld. C.A.); *R. v. Butler*, [1995] B.C.J. No. 2716, 104 C.C.C. (3d) 198, at para. 45 (B.C.C.A.), leave to appeal refused [1996] S.C.C.A. No. 90, 105 C.C.C. (3d) vi (S.C.C.); *R. v. McKane*, [1987] O.J. No. 557, 58 C.R. (3d) 130 (Ont. C.A.).

[132] See *R. v. Manninen*, *supra*, note 105, at 1242 ("there may be circumstances in which it is particularly urgent that the police continue with an investigation before it is possible to facilitate a detainee's communication with counsel"); *R. v. Burley*, [2004] O.J. No. 319, 181 C.C.C. (3d) 463, at para. 16 (Ont. C.A.).

[133] See *R. v. Manninen*, *id.*, at 1242-43; *R. v. Burley*, *id.*

[134] See *R. v. Lewis*, [2007] N.S.J. No. 18, 2007 NSCA 2 (N.S.C.A.) (public phone in railway station did not provide sufficient privacy; police justified in transporting accused almost immediately to police station to use telephone there).

[135] *R. v. Lewis*, *id.*, at para. 32.

[136] See *R. v. Ross*, [1989] S.C.J. No. 2, [1989] 1 S.C.R. 3, at 11 (S.C.C.) (detainees only expected to have access to another lawyer, such as one provided by a duty counsel service, if chosen lawyer "cannot be available within a reasonable time").

[137] See *R. v. Prosper*, *supra*, note 17, at 269-70 ("the existence of duty counsel services may affect what constitutes 'reasonable diligence' of a detainee in pursuing the right to counsel, which will in turn affect the length of the period during which the state authorities' s. 10(b) implementational duties will require them to 'hold off' from trying to elicit incriminatory evidence from the detainee").

[138] See *R. v. Smith*, [1989] S.C.J. No. 89, [1989] 2 S.C.R. 368, at 386-88 (S.C.C.); *R. v. Prosper*, *id.*, at 270, 275 ("the fact that the evidence may cease to be available as a result of a long delay" as well as the existence of "compelling and urgent circumstances" must be considered, however such circumstances do not arise from "mere investigatory and evidentiary expediency"); *R. v. Brydges*, *supra*, note 105, at 216; *R. v. Basko*, [2007] S.J. No. 564, 2007 SKCA 111, at para. 16 (Sask. C.A.).

[139] *R. v. Prosper*, *supra*, note 17, at 269.

[140] See *R. v. Manninen*, *supra*, note 105, at 1242; *R. v. Prosper*, *supra*, note 17, at 269. As a rule, this bar does not apply to evidence that is not self-incriminating. Police are thus not obliged to defer most types of searches until a reasonable opportunity to talk to a lawyer has been provided. See *R. v. Debot*, *supra*, note 119, at 1146; *R. v. Lewis*, *supra*, note 134, at para. 34. But see *R. v. Simmons*, *supra*, note 17 (s. 10(b) rights violated when accused was subjected to a customs strip search; had she been given the right to consult counsel, counsel could have informed her of her statutory right to request higher authorization for the search); *R. v. Debot*, *id.* (where legality of search of a detained individual contingent on consent, compliance with s. 10(b) condition precedent to a valid search).

detainee who wants to talk to a lawyer changes his or her mind before doing so, police must advise him or her of the right "to a reasonable opportunity to contact counsel" and of the obligation on police during this time frame "not to elicit incriminating evidence".[141]

In many cases, complying with these requirements will dramatically increase the duration and intrusiveness of an investigative detention. Indeed, when detainees invoke their right to counsel, it will frequently be impossible to comply with section 10(b) within the "brief" period permitted by investigative detention. Despite the ubiquity of mobile phones and 24-hour duty counsel, the private consultation and "lawyer of choice" requirements will necessitate prolonged detention on the street or at the police station in a great many cases. Contrary to the Supreme Court's warning in *Mann*, applying section 10(b) would go a long way to transforming investigative detention into "*de facto* arrest".[142] Many people would consequently be subjected to prolonged, custodial detention on the basis of a standard (reasonable suspicion) that is markedly lower than the grounds required for arrest (reasonable and probable grounds).[143]

A further cost of applying section 10(b) to investigative detention is the loss of valuable investigative information. Some detainees who exercise their rights (and who would otherwise have cooperated with police) will heed their lawyers' advice to remain silent. As the purpose of investigative detention is to obtain preliminary information from people reasonably suspected of committing criminal offences, and as such information will often justify the use of further investigative tools (such as arrest, searches incident to arrest and the obtaining of search warrants), the loss of this information is no small matter.

As mentioned, the Court's response to these difficulties was to note in *Suberu* that its definition of detention "gives the police leeway to engage members of the public in non-coercive, exploratory questioning without necessarily triggering their *Charter* rights".[144] However, as we have argued, the very flexibility of this definition permits police to impose considerable restraints on individual liberty.

Further, even if we concede (for the sake of argument) that *Grant* demarcates the optimal line between coercive and non-coercive restraint for the category of non-legal psychological detention, there is still the matter of detention by physical restraint. There is little jurisprudence on

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141 *R. v. Prosper*, *supra*, note 17, at 274.

142 *Mann*, *supra*, note 7, at para. 35.

143 See Penney, "Triggering the Right", *supra*, note 67, at 289.

144 *Suberu*, *supra*, note 2, at para. 45.

the meaning of this category of detention, likely because it is usually obvious. Though no court has ventured to define it, it appears to encompass situations where police take physical control over suspects by handling them in a manner that is more than fleeting or trifling.[145] So, for example, if police grasp an individual's arms,[146] use handcuffs[147] or direct a suspect into the back seat of a police cruiser,[148] a physical detention obviously results. Detention similarly ensues from searching suspects' bodies or clothing, or searching their personal belongings while in their presence.[149] In any of these circumstances, an analysis as to whether there was a psychological detention is unnecessary. Once a police officer takes physical control of a suspect, no reasonable person could possibly conclude that he or she is still free to walk away.[150]

It is therefore clear that if police conduct a protective pat-down search, they have triggered a detention and must comply with section 10(b) of the Charter. The same occurs any time police touch a suspect[151] in a non-trivial way.[152] We take no issue with the need for police to have reasonable suspicion and otherwise comply with the requirements for lawful investi-

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[145] As mentioned, in *Grant*, *supra*, note 1, at para. 42, the Court noted that a fleeting touch is probably not enough to result in a non-legal psychological detention. Any physical contact that is more sustained or significant, however, should undoubtedly be characterized as a physical detention. See, *e.g.*, *R. v. Debot*, *supra*, note 119, at 1152, 1161 (suspect ordered to stand "spread eagle" against a wall and empty his pockets was detained); *R. v. Feeney*, *supra*, note 17, at para. 56 (accused detained when police shook his leg and told him to get out of bed).

[146] See, *e.g.*, *R. v. Hanano*, [2007] M.J. No. 11, 2007 MBQB 9, at para. 6 (Man. Q.B.).

[147] See, *e.g.*, *R. v. Greaves*, *supra*, note 115, at para. 18.

[148] See, *e.g.*, *R. v. Elshaw*, *supra*, note 27; *R. v. Lawrence*, *supra*, note 30.

[149] See *R. v. Greffe*, [1990] S.C.J. No. 32, [1990] 1 S.C.R. 755, at 793-94 (S.C.C.); *R. v. Simmons*, *supra*, note 17, at 521; *R. v. V. (T.A.)*, *supra*, note 94, at para. 21 (Alta. C.A.); *R. v. Rube*, [1992] B.C.J. No. 105, 10 B.C.A.C. 48 (B.C.C.A.).

[150] See *R. v. Feeney*, *supra*, note 17, at para. 56 (accused detained when police shook his leg and told him to get out of bed).

[151] As noted above, in *Grant*, *supra*, note 1, at para. 36, the Court stated that no detention arises when police "interfere with a person's freedom of movement" in the context of a "non-adversarial role and assisting members of the public in circumstances commonly accepted as lacking the essential character of a detention".

[152] Unfortunately, the case law provides little direction as to the sort of force that police are permitted to use incidental to an investigative detention. On more than a few occasions, the courts have noted (uncritically) that police used physical force to restrain an uncooperative detainee. See *R. v. Clayton*, [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725, at paras. 10-12 (S.C.C.); *R. v. Duong*, *supra*, note 115, at paras. 30-32; *R. v. Greaves*, *supra*, note 115, at paras. 18, 55, 59. Provided that police use only as much force as "necessary," s. 25(1) of the *Criminal Code* would provide a justification for police in such circumstances. For example, in a pre-*Mann* case, the Ontario Court of Appeal held that if a suspect does not "submit to lawful detention", then the officer is entitled to "pursue him" and, when caught, to "physically restrain" him: *R. v. Wainwright*, [1999] O.J. No. 3539, 68 C.R.R. (2d) 29, at 30 (Ont. C.A.). Courts have also approved the use of handcuffs during investigative detentions for reasonable safety reasons. See *R. v. O. (N.)*, [2009] A.J. No. 213, 2 Alta. L.R. (5th) 72, at paras. 9-10, 45 (Alta. C.A.); *R. v. Greaves*, *id.*, at paras. 55, 59; *Duong*, *id.*, at paras. 28, 57.

gative detention before intruding on suspects' bodily integrity in these ways. Requiring them to comply with section 10(b) of the Charter in all such cases, however, would be unwise. Consider a police officer who has reasonable suspicion (but not reasonable and probable grounds) that a pedestrian has committed an offence. Assume as well that the officer reasonably believes that the suspect might be carrying a weapon. The officer has three choices: (i) approach the suspect to make preliminary inquiries without triggering a detention; (ii) effect an investigative detention; or (iii) leave the suspect alone. Under option (i), the officer would not be permitted to conduct a protective pat-down search, thereby risking the officer's own (and perhaps others') safety. Under option (ii), the officer would be forced to comply with section 10(b), thereby risking losing valuable evidence and prolonging a potentially innocent person's detention. And under option (iii), an opportunity to obtain evidence of a potential crime and apprehend its perpetrator would be lost.

These and all the other costs of applying section 10(b) of the Charter to investigative detention that we have discussed might be worth incurring if they were outweighed by the benefits. In *Suberu*, the Court outlined its concerns about suspending the right to counsel for investigative detention as follows:

> A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(*b*) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that result from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase "without delay" must be interpreted as "immediately". If the s. 10(*b*) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.[153]

This argument is not convincing. The Court itself has recognized in many analogous situations that brief detentions accompanied by non-accusatory questioning do not imperil the interests protected by section 10(b) of the Charter. It has held that police need not comply with section 10(b) in exercising powers to briefly detain motorists to investigate driving-related offences. In *Thomsen*, it concluded that the right to

[153] *Suberu*, *supra*, note 2, at para. 41.

counsel may be denied to drivers subject to breath alcohol screening demands.[154] It has similarly upheld the denial of the right to counsel to drivers questioned about their alcohol consumption or asked to perform physical sobriety tests.[155] Courts of appeal have also exempted police from cautioning drivers[156] and passengers[157] subject to brief, lawful, roadside detentions for general vehicle offence investigations. Similarly, the Court has held that customs officials need not comply with section 10(b) when conducting brief, preliminary questioning of people entering and leaving Canada.[158]

The rationale behind these exemptions from section 10(b) is simple: complying with section 10(b) in these circumstances would often needlessly prolong an individual's detention and also frustrate investi-

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[154] *Thomsen*, *supra*, note 17, at 650-56. Section 254(2) of the *Criminal Code* permits police, on the basis of reasonable suspicion, to demand that a motorist provide a sample of breath for analysis by an "approved screening device" ("ASD"). To be legally effective and constitutionally sound, this demand must generally be made immediately, *i.e.*, before there is a reasonable opportunity to contact counsel. A positive result does not prove liability, but will typically give police the reasonable and probable grounds they require to demand a breathalyzer sample, which precisely determines the alcohol concentration in a person's blood. See *Criminal Code*, s. 254(3); *R. v. Woods*, [2005] S.C.J. No. 42, [2005] 2 S.C.R. 205, at paras. 13-15, 30-32, 43-44 (S.C.C.); *R. v. Latour*, [1997] O.J. No. 2445, 116 C.C.C. (3d) 279 (Ont. C.A.).

[155] *R. v. Orbanski*; *R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3, at paras. 54-60 (S.C.C.) [hereinafter "*Orbanski & Elias*"]. See also *Berkemer v. McCarty*, *supra*, note 92 (*Miranda* does not apply to motorists subject to brief roadside questioning as such questioning does not constitute "custodial interrogation"). At the time the offences were committed in *Orbanksi; Elias*, police did not have the power to compel motorists to answer questions or perform sobriety tests. They must have therefore sought motorists' voluntary cooperation. However, they could randomly stop motorists to investigate driving offences (which is a form of legal psychological detention) and in the course of such an investigation ask motorists to voluntarily answer questions or voluntarily perform sobriety tests. See *R. v. Hufsky*, *supra*, note 20; *R. v. Ladouceur*, *supra*, note 20. The *Criminal Code* has since been amended to empower police to demand that motorists perform roadside physical coordination tests based on reasonable suspicion. *Criminal Code*, s. 254(2)(a).

[156] *R. v. MacLennan*, [1995] N.S.J. No. 77, 138 N.S.R. (2d) 369, at para. 61 (N.S.C.A.) (driver is not entitled to right to counsel during period between detention and conclusion of the inspection of documents, which must be as brief as possible); *R. v. Campbell*, *supra*, note 8, at para. 49 (no violation when police obtained driver's licence during roadside detention without first advising driver of right to counsel).

[157] *R. v. Harris*, [2007] O.J. No. 3185, 87 O.R. (3d) 214, at paras. 45-49 (Ont. C.A.); *R. v. Bradley*, [2008] N.S.J. No. 268, 266 N.S.R. (2d) 126, at para. 16 (N.S.C.A.) (vehicle passengers not automatically detained when vehicle pulled over by police).

[158] See *R. v. Simmons*, *supra*, note 17; *R. v. Jacoy*, [1988] S.C.J. No. 83, [1988] 2 S.C.R. 548 (S.C.C.); *Dehghani v. Canada (Minister of Employment and Immigration)*, *supra*, note 17 (detention not arising from secondary examination). See also *R. v. Sekhon*, [2009] B.C.J. No. 855, 2009 BCCA 187, at paras. 69-77 (B.C.C.A.) (no detention arising from routine questioning and routine search of vehicle); *R. v. Hardy*, [1995] B.C.J. No. 2570, 103 C.C.C. (3d) 289, at paras. 28-52 (B.C.C.A.) (detention not arising from secondary examination or destructive luggage search). See also *R. v. Vandenbosch*, [2007] M.J. No. 346, 2007 MBCA 113 (Man. C.A.) (applying customs detention jurisprudence to prison visitors).

gations[159] while doing little to advance the objectives of the right. In the case of roadside screening demands, so long as police follow the rules, suspects must either comply or risk criminal punishment for refusal.[160] In the vast majority of cases, talking to a lawyer would not change this situation.

More importantly, affording a right to counsel at this point would do little to deter abusive interrogation practices. Brief roadside stops are not likely to involve coercive interrogation methods or generate false confessions. As the United States Supreme Court has observed, the brevity and public nature of most traffic stops substantially mitigates the risk of this kind of abuse.[161] The same logic applies to preliminary customs and immigration questioning. There is little to be gained (and much to be lost) in providing the right to counsel to people subject to routine questioning at border crossings.

So it is for investigative detention. As long as such detentions remain limited to their intended scope (brief questioning to quickly confirm or refute the reasonably based suspicion that led to the stop), there is no need for section 10(b)'s protections. Imposing the right to counsel in these circumstances would instead increase the duration and intrusiveness of detentions, compromise police and public safety, and deprive police of valuable preliminary investigative information. Further, in an effort to avoid these consequences, courts will be strongly tempted (as the Supreme Court was in *Suberu*) to avoid finding that a detention has arisen despite a substantial intrusion on a person's liberty.

4. Reform

If we are correct that the best policy is to exempt investigative detention from section 10(b), the question becomes how to apply it in a manner consistent with the Charter. We agree with the Supreme Court in *Suberu* that the approach taken in the court below was ill-advised. Not only did it require a strained reading of "without delay",[162] but the uncertain duration of the "brief interlude" contemplated by the Court of Appeal would cause

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[159] *Thomsen*, *supra*, note 17, at 650-56 (noting that conferring a right to counsel at this stage would unduly diminish the deterrence of impaired driving). See also *R. v. Grant*, [1991] S.C.J. No. 78, [1991] 3 S.C.R. 139 (S.C.C.).

[160] See *Criminal Code*, s. 254(5).

[161] *Berkemer v. McCarty*, *supra*, note 92, at 438-39.

[162] See *Suberu*, *supra*, note 2, at para. 47, Binnie J., dissenting (noting that the Court of Appeal's proposal "sits uncomfortably with the constitutional text").

many police officers to issue the caution prematurely, thereby prolonging the detention of the innocent (on the minimal standard of reasonable suspicion) and make it more difficult to obtain reliable, incriminating evidence from the guilty.[163] In other cases, police would wait too long, depriving suspects of their rights in precisely the circumstances when they are most needed to protect against inquisitorial overreaching.

The better solution is to justify a brief override of section 10(b) under section 1 of the Charter. This is the approach that the Supreme Court has taken for roadside investigations relating to motor vehicle safety. In each of these cases, the courts have found that the claimant was detained but that the failure to comply with section 10(b) was justified under section 1 of the Charter.[164] The Court did not take this approach in the customs and immigration cases. Despite the fact that failure to cooperate in these circumstances is an offence,[165] the Court found that people stopped for routine questioning and searches at border crossings are not detained for Charter purposes.[166] This approach is plainly inconsistent with the *Therens/Grant* definition of psychological detention with legal compulsion.[167] The same result could have more sensibly been achieved, however, by applying section 1 of the Charter.

Justifying non-compliance with section 10(b) for investigative detention will help ensure that questioning remains *brief* and *preliminary* and thus limit the tendency of courts to increasingly expand the boundaries of

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[163] Penney, "Triggering the Right", *supra*, note 67, at 288-89.

[164] See *Thomsen*, *supra*, note 17, at 650-56; *Orbanski; Elias*, *supra*, note 155, at paras. 54-60. See also *R. v. Woods*, *supra*, note 154, at paras. 13-15, 30-32, 43-44; *R. v. Latour*, *supra*, note 154; *R. v. Smith*, [1996] O.J. No. 372, 105 C.C.C. (3d) 58 (Ont. C.A.) (denial of right to counsel at roadside stop for brief period for purposes of questioning motorist about alcohol consumption and performing physical sobriety test is reasonable limit justified under s. 1); *R. v. Sadlon*, [1992] O.J. No. 912, 36 M.V.R. (2d) 127 (Ont. C.A.), leave to appeal refused [1992] S.C.C.A. No. 191, [1992] 3 S.C.R. viii (S.C.C.) (availability of a telephone is irrelevant in finding that denial of right to counsel in roadside detention for purposes of breath demand is reasonable limit justified by s. 1); *R. v. Saunders*, [1988] O.J. No. 397, 41 C.C.C. (3d) 532 (Ont. C.A.) (justification under s. 1 for denial of right to counsel prior to breath demand also applies to statutory provision authorizing demand for coordination testing).

[165] See *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 153.1; *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 127, 128. See *Customs Act*, ss. 98, 99.1, 99.2, 99.3; *Immigration and Refugee Protection Act*, s. 16.

[166] See *R. v. Simmons*, *supra*, note 17; *R. v. Jacoy*, *supra*, note 158; *Dehghani v. Canada (Minister of Employment and Immigration)*, *supra*, note 17. See also *R. v. Sekhon*, *supra*, note 158, at paras. 69-77; *R. v. Hardy*, *supra*, note 158, at paras. 28-52.

[167] See generally Eric Colvin & Tim Quigley, "Developments in Criminal Law and Procedure: The 1988-89 Term" (1990) 1 S.C.L.R. 187, at 224-25; Quigley, *supra*, note 100, § 5.3(c)(i).

the common law power.[168] As in the contexts of vehicle stops[169] and border crossings,[170] police seeking to investigate further would have to issue the caution immediately. Further, because such questioning *by definition* exceeds the scope of the investigative detention power, police would either have to make an arrest or make it absolutely clear that the suspect is free to leave.

What precisely do we mean by "brief" and "preliminary"? Courts have been reluctant to impose a quantitative limit on the length of investigative detentions,[171] and we do not propose one here. However, absent exceptional circumstances, a detention lasting longer than 20 minutes would seem to be excessive.[172] The scope of investigative detention would also be exceeded by questioning that is the functional equivalent of an interrogation. As under the *Moran* approach to detention discussed above, an investigative detention (and the accompanying suspension of the right to counsel) would expire when police decide that the individual probably committed an offence and ask questions designed to induce self-incriminating answers. These are precisely the circumstances when suspects need the protection of the right to counsel.[173]

To summarize, under *Mann* police may detain for investigative purposes when they reasonably suspect that a person has recently committed (or is still committing) a criminal offence.[174] Investigative detention can be triggered by either physical or (non-legal) psychological detention. Under our proposal, in the latter case detention arises from constraints on

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[168] See James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335, at 373-76 [hereinafter "Stribopoulos, 'A Failed Experiment?'"] (noting the lack of guidance that courts have provided in defining the maximum duration of investigative detentions).

[169] *Therens*, *supra*, note 10. See also *Orbanski; Elias*, *supra*, note 155, at para. 57 ("there is no question that the motorist who is not allowed to continue on his way but, rather, is requested to provide a breath or blood sample, is entitled to the full protection of the *Charter* right to counsel"). See also *R. v. Woods*, *supra*, note 154, at paras. 35-36.

[170] See, *R. v. Simmons*, *supra*, note 17, at 521 (detention arose when suspect strip-searched); *R. v. Jacoy*, *supra*, note 158, at 557-58 (detention arose when decision made to strip-search suspect if necessary).

[171] See, *e.g.*, *R. v. Greaves*, *supra*, note 115, at paras. 50-55 (40-minute detention lawful as accused's evasive and inconsistent responses regarding his identity gave rise to reasonable grounds to suspect him of attempting to obstruct justice). See also *United States v. Place*, 462 U.S. 696, at 709, n. 10 (1983) (a time limit would interfere with the ability of the "authorities to graduate their responses to the demands of any particular situation").

[172] In its Model Code the Institute adopts a 20-minute rule. See American Law Institute, *A Model Code of Pre-Arraignment Procedure* (Philadelphia: American Law Institute, 1975), at 283 [hereinafter "*Model Code*"].

[173] See Penney, "What's Wrong?, *supra*, note 100, at 321.

[174] *Mann*, *supra*, note 7, at paras. 34, 45.

liberty and is decided with reference only to the first variable of the test we proposed above ("the language used to initiate the encounter"). Police effecting such detentions need not comply with section 10(b) of the Charter. In contrast, police triggering a detention by means of the second variable ("the nature of any ensuing questioning") exceeds the scope of investigative detention and must therefore comply with section 10(b) of the Charter. Police wishing to interrogate likely perpetrators without issuing the Charter caution must therefore make it clear that they are not being detained and are free to leave.

Ideally, this proposal would be effected by legislation upheld by the courts under section 1 of the Charter.[175] If the courts apply *Grant* in the way that we have proposed, police may become legitimately frustrated with their obligation under the current law to comply with section 10(b) during investigative detention and lobby Parliament for a statutory response.

What is at least as likely, however, is that courts will strain to avoid finding detention, permitting police to substantially curtail suspects' liberty without reasonable suspicion. In this scenario, Parliament may conclude (as it often does) that there is little to be gained from legislative intervention.[176]

Though in principle a second-best solution, the most realistic one may thus be for the Supreme Court to reconsider *Suberu* and uphold under section 1 the denial of the right to counsel during lawful common law investigative detentions.[177] Indeed, as long as the courts are prepared to recognize new common law police powers, some may inevitably have to be justified under section 1 of the Charter. The Supreme Court has held that common law rules are "prescribed by law" within the meaning of that provision.[178] It has also upheld Charter-limiting common law rules

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[175] See Stribopoulos, "A Failed Experiment?", *supra*, note 167, at 376-78, suggesting that an override of the right to counsel incidental to investigative detention could be upheld as a reasonable limit under s. 1 of the Charter but arguing that the overriding of constitutional rights is something that should come from Parliament and not the courts. For a model legislative response, see, *Model Code*, *supra*, note 172, § 110.2(1).

[176] See generally James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's L.J. 1.

[177] Penney, "Triggering the Right", *supra*, note 67, at 289-90. The Court in *Suberu*, *supra*, note 2, at para. 45, may have planted the seed for such a reappraisal in noting that it was "not persuaded, *on this appeal*, that a case has been made out for a general suspension of the s. 10(b) right to counsel for investigatory purposes ..." (emphasis added).

[178] *Therens*, *supra*, note 10, at 645.

(including newly recognized ones) in many other contexts.[179] And unlike in any of these cases, justifying the limitation of section 10(b) for investigative detention would benefit both the state and the individual. Police would find it easier to obtain preliminary investigative information from persons reasonably suspected of criminal activity, and such persons (if not arrested) would on average spend less time in custody. Of course, applying section 10(b) to investigative detention would benefit factually guilty suspects who exercised their rights and remained silent as a consequence of talking to a lawyer. But given the limited, inherently non-coercive nature of the questioning permitted for investigative detentions, this loss of protection against self-incrimination is not worthy of consideration under section 1 of the Charter.[180]

IV. CONCLUSION

Unfortunately, the Court's judgment in *Grant* on the meaning of non-legal psychological detention seems to be written exclusively for one audience: lower courts. A second, and equally important, audience (the police) is ignored, encouraging a troubling division between law in the courtroom and law on the streets. For those most likely to be victims of

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[179] See *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214 (S.C.C.) (upholding common law of criminal contempt); *R. v. Daviault*, [1994] S.C.J. No. 77, [1994] 3 S.C.R. 63 (S.C.C.) (upholding judicially created reverse onus for defence of extreme intoxication); *R. v. Stone*, [1999] S.C.J. No. 27, [1999] 2 S.C.R. 290 (S.C.C.) (upholding judicially created reverse onus for automatism defence).

[180] The Supreme Court suggested in *Orbanski; Elias*, *supra*, note 155, at paras. 58-59, that, as a result of concerns over compelled self-incrimination, the violation of s. 10(b) during roadside detentions might not be justified if the Crown attempted to prove impairment by adducing evidence created by the accused such as the results of alcohol screening tests and answers to questions about consumption. See also *R. v. Milne*, [1996] O.J. No. 1728, 107 C.C.C. (3d) 118, at 121 (Ont. C.A.); *R. v. Coutts*, [1999] O.J. No. 2013, 136 C.C.C. (3d) 225, at paras. 15-18 (Ont. C.A.). Similarly, Suberu's counsel argued on appeal that a s. 1 exemption for investigative detention would only be warranted if "any incriminating evidence gathered prior to informing an individual of his or her s. 10(b) right to counsel is inadmissible against him or her": *Suberu*, *supra*, note 2, at para. 44.

This position is curious. If evidence created by drivers during roadside detentions is admissible for the purpose of demonstrating the existence of reasonable and probable grounds (which it is), and such grounds provide the basis for breathalyzer demands (the results of which are admissible), then this evidence must be "self-incriminating" in any realistic sense of the phrase. It is thus difficult to understand why evidence collected from drivers during roadside detentions should not be admissible to prove impairment or, putting the same point slightly differently, why s. 1 of the Charter justifies denying the right to counsel when such evidence is admitted to establish grounds for the breathalyzer demand on the *voir dire* but not when it is admitted to prove impairment at trial. Similarly, immunizing self-incriminating statements made before the right to counsel is afforded would greatly frustrate the purpose of investigative detention. If such statements, or if any further information "derived" from them, were not admissible, police would have little reason to use the power.

unjustified police stops, this division can only worsen existing cynicism toward the law, the police and the criminal justice system.[181] If the purpose of section 9 of the Charter is to protect people from unjustified state interference, the constitutional safeguard must meaningfully regulate the countless daily interactions between police and members of the public. The starting point for such an endeavour must be clear guidance for the police. We hope that in years to come Canadian courts will interpret and apply *Grant* to provide just that.

We also hope that Parliament and the Supreme Court, ideally working in constructive dialogue, revisit the application of section 10(b) of the Charter to investigative detention. It is a rare occasion indeed when the interests of the individual and state coincide in constitutional criminal procedure. This is one of them. Justifying non-compliance with section 10(b) as a reasonable limit under section 1 of the Charter would help police obtain valuable evidence of crime, protect innocent suspects from lengthy and intrusive detention, and prompt courts to confine the investigative detention power to its proper, limited scope.

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[181] See Janet E. Mosher, "Lessons in Access to Justice: Racialized Youths and Ontario's Safe Schools" (2008) 46 Osgoode Hall L.J. 807, at 812. In reporting on the results of a study involving Black youth living in the Jane-Finch area of Toronto, Mosher explained that:

> … for the youths, law was regarded as inextricably connected to power, and thus to the powerful. In their accounts, the law is simply what the powerful authority figures in their lives — the police officers … — command at any given moment. This lesson regarding law and power is repeated for them over and over again in their interactions with … criminal justice personnel. The law is not something that generates entitlements or protections; rather, it is invoked by those with power against those without. The youths describe a reality in which there is no rule of law — a reality in which the law does not operate to check state power or apply equally to all. Predictably, these experiences and understandings of the way law works lead to a deep scepticism regarding the ability of the legal system to dispense justice.

See also Hon. Roy McMurtry & Alvin Curling, *Roots of Youth Violence*, vol. 1 (Toronto: Queen's Printer, 2008), at 77-79, cautioning that "if police stops or interventions are done discriminatorily or aggressively in a degrading manner … a deep sense of grievance and frustration can result … [Y]outh must be treated with respect and dignity; they cannot be expected to respect a system that does not respect them."