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# The Forgotten Right: Section 9 of the Charter, Its Purpose and Meaning

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## I. INTRODUCTION

Ask anyone familiar with criminal procedure in Canada to name a seminal judgment on section 8 of the *Canadian Charter of Rights and Freedoms*[1] ("the right to be secure against unreasonable search or seizure"), and most will undoubtedly respond *Hunter v. Southam*.[2] Alternatively, some might suggest *R. v. Collins*.[3] Either way, virtually everyone you ask will have little difficulty identifying at least one, and probably more, important Supreme Court of Canada decisions on section 8. Ask that same question about section 9 ("the right not to be arbitrarily detained or imprisoned") and compare the results. Chances are most people you ask will struggle to name a single Supreme Court judgment involving section 9, let alone identify a standout.

Unlike section 8 of the Charter, there is no ready parallel to section 9 found in the U.S. *Bill of Rights*.[4] Given an abundance of Fourth Amendment jurisprudence relating to search and seizure,[5] the Supreme

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (U.K.), 1982, c. 11.

[2] *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.) (hereinafter "*Hunter v. Southam*").

[3] *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

[4] U.S. Const. amend. I-X.

[5] U.S. Const. amend. IV ("Fourth Amendment"). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the United States the Fourth Amendment has also been the basis for judicial efforts to constitutionally regulate stops and arrests. In particular, the language that confers the "right of the people to be secure in their persons . . . against unreasonable . . . seizures" extends constitutional

Court of Canada was provided with a crystal ball with which to forecast the implications of taking a variety of different paths under section 8. With the benefit of the American experience the Court acted quickly to identify the protection of reasonable privacy expectations as the *sine qua non* of that constitutional guarantee.[6] Soon after, the Court set down an analytical framework for the adjudication of constitutional claims under section 8.[7] The result was that early in the Charter's history the stage was set for a very constructive dialogue between the Court and Parliament on the subject of police search and seizure powers.[8]

The Supreme Court has dealt with section 9 of the Charter on a number of occasions over the past 25 years. Nevertheless, its jurisprudence involving the guarantee has been marked by extraordinary restraint. Although the Court has supplied some guidance on when a law authorizing detention or imprisonment will run afoul of section 9, it has steered clear of explaining the larger purpose of the section or addressing in any meaningful way the far more common question: when should an individual police officer's decision to detain or arrest be characterized as having been made "arbitrarily"?

Not surprisingly, uncertainty about the purpose and meaning of section 9 has had significant negative consequences. Absent a theoretical framework to guide developments in this important area, many cases are marked by a pronounced reluctance to characterize anything but the most coercive encounters as resulting in a "detention". By refraining from finding a "detention", courts avoid the need to grapple with the equally thorny question of whether an encounter between an individual and the police runs afoul of the Charter guarantee because it took place "arbitrarily".

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protection to so-called "seizures of the person", *i.e.* stops and arrests. Arrests have been held to require probable cause to justify them (see, *e.g.*, *Henry v. United States*, 361 U.S. 98 at 103 (1959)), whereas investigative stops simply require reasonable suspicion (see, *e.g.*, *Terry v. Ohio*, 392 U.S. 1 at 23-24, 27, 30, 32-33 (1968)).

[6] See *Hunter v. Southam*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 159 (S.C.C.) wherein the Supreme Court of Canada relied upon the seminal decision of the U.S. Supreme Court on the purpose of the Fourth Amendment, *Katz v. United States*, 389 U.S. 347 (1967).

[7] In *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at 278 (S.C.C.), the Supreme Court explained that a "search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable". See also *R. v. Evans*, [1996] S.C.J. No. 1, [1996] 1 S.C.R. 8, at 22 (S.C.C.).

[8] On the dialogue that emerged with respect to search and seizure, albeit briefly, see generally James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's L.J. 1, at 61-73. See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), at 176-79; and Kent Roach, "American Constitutional Theory for Canadians (and the Rest of the World)" (2002) 52 U.T.L.J. 503, at 518-23.

The other unfortunate development that is very likely connected to a stagnant section 9 jurisprudence is the rise of judicially created detention powers. During the same period that legislative reform was resulting in more clearly defined search and seizure powers, the law relating to police detention practices became steeped in increased confusion. Without robust section 9 jurisprudence, Parliament was not provided with any real incentive to redress substantial gaps in the formal detention powers possessed by police. Unlike with search and seizure, a dialogue between the courts and Parliament never took place on the subject of police detention powers.

In the absence of legislative intervention, however, the courts came under increased pressure to make up for considerable shortcomings in the lawful authority possessed by police to carry out detentions. The Supreme Court responded to that pressure by transforming an obscure English precedent into a device for the judicial recognition of new "ancillary" police powers at "common law".[9] Initially, this allowed a slim majority of the Supreme Court to recognize a power on the part of police to carry out roadblock stops to check on driver sobriety.[10] This was eventually followed by a police power to detain for investigative purposes[11] and, most recently, just this past year, a power to conduct roadblock stops to further criminal investigative ends.[12]

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[9] In *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.), the Supreme Court relied on a two-part test developed by the English Court of Criminal Appeal for a rather different purpose. See *R. v. Waterfield*, [1963] 3 All E.R. 659, [1964] 1 Q.B. 164 (C.A.), which recognized a two-part test which was intended to be used for determining whether a police officer, whom the accused in that case were charged with obstructing, was acting "in the execution of his duty" — an essential ingredient of the offence charged in that case. The transformation of that test by the Supreme Court of Canada into means by which to recognize new police powers has met with considerable criticism. See Patrick Healy, "Investigative Detention in Canada" [2005] Crim. L. Rev. 98, at 103-107; Tim Quigley, "Brief Investigatory Detentions: A Critique of *R. v. Simpson*" (2004) 41 Alta. L. Rev. 935, at 939; James Stribopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335, at 348-52; James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's L.J. 1, at 18-30.

[10] *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.).

[11] This power was first recognized in *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482 (Ont. C.A.). Virtually every appellate court in the country then followed that judgment before the Supreme Court of Canada finally endorsed the investigative detention power. See *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.). For a critical evaluation of *Mann* based, in part, on the uncertainty that it has served to create, see James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*" (2007) 45 Crim. L.Q. 299. For a consideration of the many gaps left by the judgment along with suggestions as to how to fill them, see Michal Fairburn, "*Mann* Oh Man — We've Only Just Begun" (2005) 17 N.J.C.L. 171.

[12] See *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.).

While the Supreme Court has been busy creating new legal powers by which to justify state interferences with individual liberty, it has said virtually nothing about the purpose behind section 9. Similarly, the Supreme Court has been noticeably coy on the question of what constitutional implications might flow should the authorities fail to abide by the rather uncertain limits the Court has articulated with respect to the "common law" detention powers that it has recently created.

This paper will attempt to do what the jurisprudence has so far managed to avoid: identify both the purpose and meaning of section 9 of the Charter. This is an essential first step in any effort to achieve meaningful constitutional protection for what is arguably the most fundamental right of all: individual liberty.

By drawing on a variety of sources, Part II will attempt to reveal the purpose and meaning of section 9 of the Charter. Part III will revisit the key threshold requirement for triggering the guarantee: a "detention". An "imprisonment" can also engage the provision, but as will be explained below, its meaning is far from controversial.[13] Case law interpreting and applying the "detention" requirement will be closely scrutinized in an effort to evaluate how well the jurisprudence coincides with the purpose of the guarantee.

## II. THE PURPOSE AND MEANING OF SECTION 9[14]

Section 9 of the Charter provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." Over the last 25 years the Supreme Court of Canada has never expressly taken up the challenge of identifying the purpose of the guarantee or supplying anything more than a partial sense of its potential meaning. The Court's rather restrained approach toward section 9 is apparent in even the most superficial quantitative analysis of its cases involving the guarantee.

Section 9 has been raised before the Supreme Court in 24 separate cases.[15] In eight of these the Court resolved the case on some other bases

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[13] See Part III, The Effect of Reading "Detention" Purposively.

[14] This part of the paper expands on ideas first explored elsewhere. See James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill L.J. 225, at 264-73.

[15] I include in this category those cases in which a litigant relied on s. 9 in advancing the merits of their position on appeal or where the Court addressed the guarantee in any substantive way. See *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.) (challenging the use of an investigative roadblock by police); *Charkaoui v. Canada* (*Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) (challenging the security certificate scheme); *R. v. Chaisson*,

and thereby avoided any meaningful consideration of section 9.[16] Of the

[2006] S.C.J. No. 11, [2006] 1 S.C.R. 415 (S.C.C.) (restoring an acquittal ordered by the trial judge who found a violation of ss. 8, 9 and 10(b)); *R. v. Decorte*, [2004] S.C.J. No. 77, [2005] 1 S.C.R. 133 (S.C.C.) (challenging the RIDE program carried out on a Native reserve); *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.) (noting that investigative detentions carried out in accordance with the common law power recognized in this case would not violate s. 9); *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217 (S.C.C.) (challenging the appellant's arrest); *R. v. Jacques*, [1996] S.C.J. No. 88, [1996] 3 S.C.R. 312 (S.C.C.) (challenging the detention of the appellant to investigate suspected smuggling); *R. v. Montour*, [1995] S.C.J. No. 48, [1995] 2 S.C.R. 416 (S.C.C.) (a one-paragraph judgment restoring the appellant's acquittal at trial following the exclusion of evidence as a result of a s. 9 violation); *R. v. Simpson*, [1995] S.C.J. No. 12, 95 C.C.C. (3d) 96 (S.C.C.) (challenging the reversal of a stay ordered at trial due to a delay in bringing the appellant to court for a bail hearing, s. 9 violation conceded — the only issue was the appropriateness of a stay); *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) (challenging the offence of vagrancy by loitering near playgrounds); *R. v. Macooh*, [1993] S.C.J. No. 28, [1993] 2 S.C.R. 802 (S.C.C.) (challenging the appellant's detention and arrest); *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.) (challenging the public safety and public interest bases for denying bail); *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615 (S.C.C.) (challenging a search that took place incidental to a RIDE stop); *R. v. Pearson*, [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 (S.C.C.) (challenging the reversal of the burden on bail hearings for drug offences); *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.) (challenging the automatic committal to custody of those found not guilty by reason of insanity); *R. v. Wilson*, [1990] S.C.J. No. 54, [1990] 1 S.C.R. 1291 (S.C.C.) (challenging a vehicle stop); *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.) (challenging the constitutionality of roving and random stops under the authority of s. 189(a)(1) of the Ontario *Highway Traffic Act*, R.S.O. 1980, c. 198); *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 (S.C.C.) (challenging the mandatory minimum sentence for murder); *R. v. Storrey*, [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241 (S.C.C.) (challenging the delay in bringing the appellant to court following his arrest); *R. v. Duguay*, [1989] S.C.J. No. 4, [1989] 1 S.C.R. 93 (S.C.C.) (s. 9 violation conceded by Crown, the only issue was the remedy); *R. v. Beare*, [1987] S.C.J. No. 92, 45 C.C.C. (3d) 57 (S.C.C.) (challenging the fingerprinting of persons charged or arrested); *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.) (challenging the provision in Ontario's *Highway Traffic Act* that authorized police to stop motorists in the context of a fixed RIDE checkstop); *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) (challenging the mandatory minimum sentence for importing a narcotic); *R. v. Milne*, [1987] S.C.J. No. 73, [1987] 2 S.C.R. 512 (S.C.C.) (challenging the continued detention as a dangerous offender where the index offence has since been repealed); *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 (S.C.C.) (challenging the imposition of indeterminate sentences of imprisonment under the dangerous offender regime).

[16] See *R. v. Chaisson*, [2006] S.C.J. No. 11, [2006] 1 S.C.R. 415 (S.C.C.) and *R. v. Montour*, [1995] S.C.J. No. 48, [1995] 2 S.C.R. 416 (S.C.C.) (both cases restored acquittals ordered by trial judges who found violations of s. 9, the bases for both decisions was the appellate court's failure to show sufficient deference to the trial judge's findings); *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.) (s. 9 not discussed, case resolved based on violation of s. 8); *R. v. Simpson*, [1995] S.C.J. No. 12, 95 C.C.C. (3d) 96 (S.C.C.) (a violation of s. 9 was conceded; the only issue was the appellate court's decision to overturn a stay ordered by the trial judge); *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) (the majority found the offence of vagrancy by loitering near playgrounds unconstitutional under s. 7 and did not address s. 9); *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615 (S.C.C.) (case resolved based on a violation of s. 8); *R. v. Duguay*, [1989] S.C.J. No. 4, [1989] 1 S.C.R. 93 (S.C.C.) (s. 9 violation conceded, analysis turns exclusively on remedy); *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) (minimum sentence for importing narcotics found to violate s. 12, s. 9 not discussed).

remaining 16 cases, in 12 the Court found no violation.[17] In two cases the Court concluded that the impugned provision was contrary to section 9 but upheld the violations as reasonable limits under section 1.[18] The Court concluded that section 9 was violated in only two cases. Both decisions involved challenges to legislation that the Court concluded authorized arbitrary detentions that could not be justified under section 1.[19]

Although the numbers provide some evidence to suggest that the Court's approach to section 9 can be best described as conservative, they tell only a small part of the story. A better understanding of the limitations in the section 9 jurisprudence requires examining the types of cases in which such claims have been raised and what the Court has had to say about the purpose and meaning of the guarantee on these occasions.

Claims under section 9 of the Charter that have made their way before the Supreme Court have generally taken one of two forms. First, the guarantee has been used to challenge the constitutionality of a wide array of legislation that authorizes detention or imprisonment. These cases have ranged from attacks upon provincial laws that authorize the police to stop motorists at organized checkpoints and through roving and random stops,[20] to challenges directed at *Criminal Code*[21] provisions

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[17] See *R. v. Decorte*, [2004] S.C.J. No. 77, [2005] 1 S.C.R. 133 (S.C.C.); *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 21 (S.C.C.); *R. v. Jacques*, [1996] S.C.J. No. 88, [1996] 3 S.C.R. 312 (S.C.C.); *R. v. Macooh*, [1993] S.C.J. No. 28, [1993] 2 S.C.R. 802 (S.C.C.); *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.) (although a s. 9 challenge to the public safety ground for denying bail was rejected, the public interest ground was invalidated for being inconsistent with s. 11(e)); *R. v. Pearson*, [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 (S.C.C.); *R. v. Wilson*, [1990] S.C.J. No. 54, [1990] 1 S.C.R. 1291 (S.C.C.); *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 (S.C.C.); *R. v. Storrey*, [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241 (S.C.C.); *R. v. Beare*, [1987] S.C.J. No. 92, 45 C.C.C. (3d) 57 (S.C.C.); *R. v. Milne*, [1987] S.C.J. No. 73, [1987] 2 S.C.R. 512 (S.C.C.); *R. v. Beare*, [1987] S.C.J. No. 92, 45 C.C.C. (3d) 57 (S.C.C.); *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 (S.C.C.).

[18] See *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.) and *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.) (both cases involved a challenge to s. 189(a)(1) of the Ontario *Highway Traffic Act*, R.S.O. 1980, c. 198, the provision which authorized police to stop motorists but which did not specify any criteria to govern the exercise of this discretion). In *Hufsky*, the Court concluded that the section violated s. 9 but upheld the violation under s. 1 in a case where police were carrying out a fixed roadblock sobriety checkstop under the authority of s. 189(a)(1). In *Ladouceur*, the Court upheld the use of s. 189(a)(1) for the purpose of roving and random vehicle stops, provided that the police limited their inquiries to motor vehicle concerns, *i.e.*, driver sobriety, licensing, insurance and the mechanical fitness of the vehicle.

[19] See *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) (the statutory provision barring those subject to security certificates from seeking judicial review for at least 120 days violated s. 9); *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.) (the automatic committal to custody of those found not guilty by reason of insanity violated s. 9).

[20] See *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.); *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.); and *R. v. Wilson*, [1990] S.C.J. No. 54, [1990]

that allow for the indefinite imprisonment of persons designated as dangerous offenders.[22] In these cases it has usually been the presence of too little or too much discretion in the statutory authority conferred which has proven determinative. Legislation that mandates a loss of liberty without the need to consider any rational criteria or standards has been held to operate "arbitrarily".[23] The Supreme Court has rightly recognized that "it is the absence of discretion which would, in many cases, render arbitrary the law's application."[24] At the same time, the Court has found legislation at odds with section 9 of the Charter when it confers unfettered discretion on state agents to detain individuals. In such circumstances, "[a] discretion is arbitrary . . . [because] . . . there are no criteria, express or implied, which govern its exercise."[25]

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1 S.C.R. 1291 (S.C.C.). In these cases provincial legislation authorizing police to stop motorists was found to be inconsistent with s. 9 as it did not provide any criteria to guide police in deciding whom to stop, effectively granting unfettered discretion. But after citing statistical evidence documenting the catastrophic effect of impaired and unlicensed drivers, the Court upheld the power to conduct organized check-stops and random roving stops as reasonable limits in a free and democratic society under s. 1. However, such stops are only permissible under s. 1 if their purpose is limited to checking licences, insurance, driver sobriety and the mechanical fitness of vehicles. Any probing beyond these limited purposes is, in theory, prohibited (see *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257, at 1287 (S.C.C.); *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615, at 628 (S.C.C.)), and may transform a stop from an encounter which was constitutionally permissible at its inception into an arbitrary detention. But see *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at 16-17 (Ont. C.A.) (holding that an ulterior motivation for such a stop, for instance, the pursuit of other investigative interests, does not automatically render the detention arbitrary provided that the ulterior purpose is not itself unconstitutional — for instance, a stop undertaken for the purpose of effecting an unconstitutional search). Also see *R. v. Duncanson*, [1991] S.J. No. 373, 12 C.R. (4th) 86 (Sask. C.A.), revd [1992] S.C.J. No. 31, 12 C.R. (4th) 98 (S.C.C.) (without addressing this issue). But see *R. v. Guenette*, [1999] J.Q. no 760, 136 C.C.C. (3d) 311 (Que. C.A.).

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

[22] See *R. v. Milne*, [1987] S.C.J. No. 73, [1987] 2 S.C.R. 512 (S.C.C.) and *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 (S.C.C.) (upholding the dangerous offender scheme because it "narrowly defines a class of offenders with respect to whom it may properly be invoked, and prescribes quite specifically the conditions under which an offender may be designated as dangerous": *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 347 (S.C.C.)). Also see *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 at 722-23 (S.C.C.) (upholding the sentencing scheme for first degree murder on a similar basis).

[23] See *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933, at 1013 (S.C.C.) (the *Criminal Code*, R.S.C. 1970, c. C-34 provisions requiring trial judges to automatically commit those found not guilty by reason of insanity to strict custody, without considering their particular mental health circumstances, found to be unconstitutional under s. 9).

[24] *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 348 (S.C.C.).

[25] *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621, at 633 (S.C.C.). See also *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257, at 1276 (S.C.C.); *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711, at 740 (S.C.C.); *R. v. Pearson*, [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665, at 699-700 (S.C.C.) (noting that "detention is arbitrary if it is governed by unstructured discretion").

Beyond identifying minimum constitutional requirements for legislative standards that authorize an interference with liberty, the Supreme Court recently added a procedural layer to section 9.[26] In *Charkaoui*[27] the Court was faced with a constitutional challenge to the security certificate scheme found in the *Immigration and Refugee Protection Act*.[28] The Court found a number of Charter violations, including a breach of section 9. According to the Court, by precluding those subject to security certificates from seeking judicial review of the reasons for their detention for at least 120 days, the legislative scheme ran a foul of section 9. The Court emphasized that there was no compelling reason justifying the delay. This violated section 9 because it amounted to a "complete denial of a timely detention review".[29] The judgment leaves for another day what, if any, additional procedural requirements might be constitutionally mandated in order for a legislative scheme authorizing detention or imprisonment to comply with section 9.

The second category of claims under section 9 of the Charter involves challenges directed at the decision to detain or imprison in individual cases. In the Charter's early years, the struggle to give meaning to the arbitrariness standard, in this context, reduced many Canadian courts to the use of dictionary definitions. In a series of cases, courts across the country held that the decision to detain or imprison will have been undertaken "arbitrarily" if it is made in a "capricious", "despotic", "high-handed", "unreasonable", or "unjustified" manner.[30] In this way much of the

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[26] See *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

[27] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.).

[28] S.C. 2001, c. 27.

[29] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at 403 (S.C.C.).

[30] Initially, these terms were used to describe legislation which would offend s. 9. At that time the Supreme Court had not yet provided more meaningful guidance on the topic: see *R. v. Mitchell*, [1983] O.J. No. 3109, 6 C.C.C. (3d) 193, at 210 (Ont. H.C.J.); *R. v. Konechny*, [1983] B.C.J. No. 2244, 10 C.C.C. (3d) 233, at 254 (B.C.C.A.); *R. v. Smith*, [1984] B.C.J. No. 1506, 11 C.C.C. (3d) 411, at 416-17 (B.C.C.A.), revd on other grounds [1987] S.C.J. No. 36, 34 C.C.C. (3d) 97 (S.C.C.); *R. v. Langevin*, [1984] O.J. No. 3159, 11 C.C.C. (3d) 336, at 358 (Ont. C.A.); *R. v. Slaney*, [1985] N.J. No. 60, 22 C.C.C. (3d) 240, at 248 (Nfld. C.A.). The use of these terms was soon extended to the context of challenges to specific decisions to detain or imprison: see *Belliveau v. Canada*, [1984] A.C.F. no 162, 13 C.C.C. (3d) 138, at 146 (F.C.T.D.); *R. v. McIntosh*, [1984] B.C.J. No. 1866, 29 M.V.R. 50, at 58 (B.C.C.A.); *Maxie v. Canada (National Parole Board)*, [1985] A.C.F. no 138, 47 C.R. (3d) 22, at 33 (F.C.T.D.); *R. v. Williamson*, [1986] A.J. No. 52, 25 C.C.C. (3d) 139, at 144-45 (Alta. Q.B.); *R. v. Cayer*, [1988] O.J. No. 1120, 66 C.R. (3d) 30, at 43 (Ont. C.A.); *R. v. Baker*, [1988] N.S.J. No. 421, 9 M.V.R. (2d) 165, at 167 (N.S.C.A.); *R. v. Sieben*, [1989] A.J. No. 939, 51 C.C.C. (3d) 343, at 364 (Alta. C.A.); *R. v. Scott*, [1990] B.C.J.

jurisprudence served to "shift the search for meaning from one synonym to another".[31] The elusive nature of the arbitrariness standard has been the principal source of uncertainty surrounding the purpose and meaning of the guarantee.

Uncertainty regarding the meaning of "arbitrariness" in this second category of cases, those involving decisions by individual police officers to detain or arrest, poses serious problems. The case law now makes clear that an investigative detention that takes place in the absence of objectively justifiable grounds to suspect that the person being detained is involved in recently committed or unfolding criminal activity is unlawful.[32] Similarly, a conventional arrest in the absence of reasonable and probable grounds to believe that an individual has committed an indictable offence is also illegal.[33] Nevertheless, despite 25 years of litigation under section 9 of the Charter, it remains rather unclear as to when an unlawful interference with individual liberty will qualify as arbitrary and run afoul of the Constitution.

To date, the Supreme Court has refrained from expressly resolving the issue. In *Latimer*,[34] for example, the Court acknowledged that there is uncertainty as to whether "unlawful" and "arbitrarily" are necessarily one and the same for section 9 purposes, but carefully refrained from deciding the issue.[35] The clearest guidance from the Court has come in the form of *obiter* suggesting that an arrest will violate section 9 of the Charter if it is undertaken "because a police officer was biased towards a person of a different race, nationality or colour, or that there was a

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No. 2039, 24 M.V.R. (2d) 204, at 210 (B.C.C.A.); *R. v. Madsen*, [1994] B.C.J. No. 709, 21 C.R.R. (2d) 376, at 382 (B.C.C.A.); *R. v. Iron*, [1987] S.J. No. 49, 33 C.C.C. (3d) 157, at 177-78 (Sask. C.A.) ("capriciousness" adopted but "unjustified" considered and then specifically rejected).

[31] *R. v. Smith*, [1984] B.C.J. No. 1506, 11 C.C.C. (3d) 411, at 423 (S.C.C.), Lambert J.A., dissenting (cautioning that while these "words may be illustrative of the meaning of 'arbitrary', . . . they should not be regarded as definitive"). Also see *R. v. Konechny*, [1983] B.C.J. No. 2244, 10 C.C.C. (3d) 233, at 243 (B.C.C.A.), Lambert J.A., dissenting.

[32] See *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.). Unfortunately, although the Court makes clear that "an investigative detention that is carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the *Charter*" (*R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52, at 71 (S.C.C.)) it does not address whether or not an unlawful investigative detention will necessarily violate the guarantee.

[33] See *R. v. Storrey*, [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241, at 250-51 (S.C.C.).

[34] *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217 (S.C.C.).

[35] See *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217, at 232 (S.C.C.) (Lamer C.J.C., on behalf of the majority, indicated "it is not necessary to address that question, because Mr. Latimer's arrest was entirely lawful, and failing an attack against the legislative provision which authorized the arrest, I do not see how a lawful arrest can contravene s. 9 of the *Charter* for being arbitrary").

personal enmity between a police officer directed towards the person arrested".[36] This observation has equal force with respect to all detentions, not just those culminating in arrest. It is difficult to imagine anything more unjustified and arbitrary than a detention undertaken for a discriminatory motive[37] or some other "improper" purpose.[38]

More recently, in *Clayton*,[39] the ancillary powers doctrine was applied by the Court to uphold a criminal investigative roadblock stop and search. In the wee hours of the morning, police responded to a call that there were men in a parking lot brandishing handguns. Police attended the location within minutes and stopped a car the appellants were travelling in just as it exited the parking lot. Both men were searched and a loaded handgun was ultimately seized. Applying the ancillary powers doctrine, the Court concluded that the police acted lawfully and therefore no Charter violation resulted. At the beginning of its judgment, however, in introducing its analysis, the Court said the following:

> If the police conduct in detaining and searching Clayton and Farmer amounted to a lawful exercise of their common law powers, there was no violation of their *Charter* rights. If, on the other hand, the conduct fell outside the scope of these powers, it represented an infringement of the *right* under the *Charter* not to be arbitrarily detained or subjected to an unreasonable search or seizure.[40]
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> (underlining and emphasis added)

Unfortunately, in framing the question as though there was only a single right at issue and then bunching together the constitutional implications of an illegal search and detention, the Court makes it less than clear whether it intended to suggest that an unlawful detention is necessarily a violation of section 9. Especially given the Court's earlier acknowledgment of the issue in *Latimer*[41] and its decision in that case to defer the question until it is ripe for consideration, there is a danger that

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36 *R. v. Storrey*, [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241, at 251-52 (S.C.C.).

37 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.

38 See *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at 17 (Ont. C.A.) (in the "improper purposes" category the Court sensibly includes "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").

39 *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.).

40 *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449, at 459 (S.C.C.).

41 *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217 (S.C.C.).

the quoted passage from *Clayton*[42] will have little effect. Faced with this sort of uncertain *obiter*, trial judges may rather understandably continue to take their lead from the opinions of Canadian appellate courts.

The Ontario Court of Appeal's decision in *R. v. Duguay*[43] remains the leading case on the relationship between unlawful and arbitrary detentions. It came soon after the Charter's enactment. Like many early decisions interpreting "arbitrarily", it imports into the constitutional equation the need for an oblique motive on the part of the arresting officer. According to *Duguay*, someone who is unlawfully arrested is not necessarily "arbitrarily detained". This is because the basis for an arrest may fall "just short" of the reasonable and probable grounds needed to arrest. Given this, as MacKinnon A.C.J.O. explains,

> The person making the arrest may honestly, though mistakenly, believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not be said to be *capricious or arbitrary*. On the other hand, the entire absence of reasonable and probable grounds for the arrest could support an inference that no reasonable person could have genuinely believed that such grounds existed. In such cases, the conclusion would be that the person arrested was arbitrarily detained. Between these two ends of the spectrum, shading from white to grey to black, the issue whether an accused was arbitrarily detained will depend, basically, on two considerations: first, the particular facts of the case, and secondly, the view taken by the court with respect to the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the person making the arrest.[44]
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> (emphasis added)

Subsequently, in *Simpson*,[45] the case that first applied the ancillary powers doctrine to recognize an investigative detention power, the Ontario Court of Appeal suggested that this very same sort of analysis is necessary

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42 *R. v. Clayton*, [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.).

43 [1985] O.J. No. 2492, 18 C.C.C. (3d) 289, at 296 (Ont. C.A.), affd [1989] S.C.J. No. 4, [1989] 1 S.C.R. 93 (S.C.C.) (without addressing this issue) (*Duguay*).

44 *R. v. Duguay*, [1985] O.J. No. 2492, 18 C.C.C. (3d) 289, at 296 (Ont. C.A.). In *Duguay*, the Court held that s. 9 of the Charter was violated because the police "had neither grounds nor an honest belief that they had the necessary grounds" to arrest the three accused. *R. v. Duguay*, [1985] O.J. No. 2492, 18 C.C.C. (3d) 289, at 297 (Ont. C.A.).

45 *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482 (Ont. C.A.).

where a detention for investigative purposes is found to have taken place unlawfully because of a deficiency in a police officer's grounds to detain.[46]

Because of *Duguay*,[47] a police officer's good faith reliance on his or her suspicions may cure the wrong of an unlawful detention or arrest. The analysis in each case will turn on how far off the mark the officer's grounds happened to be when viewed objectively. If the officer's grounds were woefully deficient, then section 9 is violated. But if the officer's grounds fall "just short" of the legally required grounds, then the wrong of an unlawful detention or arrest may not be a matter of constitutional concern.

Over the past 20 years courts across the country have endorsed the unlawful versus arbitrary distinction recognized in *Duguay*.[48] A number of courts have emphasized the distinction in upholding unlawful detentions as nevertheless constitutional under section 9 of the Charter.[49] Some courts have taken the cleansing potential of the unlawful versus arbitrary dichotomy to rather unfortunate extremes.

For example, the Manitoba Court of Appeal has reasoned, in cases involving actual "arrests" (*i.e.*, the use of words of arrest, physical restraint, handcuffs and a probing search for evidence and weapons) that section 9 was not violated because the police in fact had the requisite grounds to carry out an investigative detention.[50] Of course, what this sort of analysis

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[46] *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482, at 504 (Ont. C.A.) where Doherty J.A., after introducing the investigative detention power to Canadian law, noted that: "Following *Duguay, supra*, it may be that a detention although unlawful would not be arbitrary if the officer erroneously believed on reasonable grounds that he had an articulable cause. I need not decide whether such a belief could avoid an infringement of s. 9 of the Charter."

[47] *R. v. Duguay*, [1985] O.J. No. 2492, 18 C.C.C. (3d) 289 (Ont. C.A.), affd [1989] S.C.J. No. 4, [1989] 1 S.C.R. 93 (S.C.C.).

[48] *R. v. Duguay*, [1989] S.C.J. No. 4, [1989] 1 S.C.R. 93 (S.C.C.). For example, 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. Payne*, [2006] N.J. No. 259, 41 C.R. (6th) 234, at para. 26 (Nfld. T.D.).

[49] For some examples, see *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.); *R. v. Capistrano*, [2000] M.J. No. 340, 149 Man. R. (2d) 42 (Man. Q.B.); *R. v. Speller*, [1993] O.J. No. 2324, 47 M.V.R. (2d) 129 (Ont. Prov. Div.); *R. v. Brown*, [1987] N.S.J. No. 22, 33 C.C.C. (3d) 54, at 67-68 (N.S.C.A.). But see *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 this approach but without referring to *R. v. Duguay*, [1989] S.C.J. No. 4, [1989] 1 S.C.R. 93 (S.C.C.)). Also see *R. v. Porquez*, [1991] A.J. No. 103, 114 A.R. 1 (Alta. C.A.), leave refused (1991), 137 N.R. 160*n* (S.C.C.) (holding that an arrest in the absence of reasonable and probable grounds violated s. 9 of the Charter without ever addressing the subjective mind set of the arresting officers).

[50] See *R. v. Campbell*, [2003] M.J. No. 207, 175 C.C.C. (3d) 452, at paras. 39-43 (Man. C.A.); *R. v. Willis*, [2003] M.J. No. 117, 174 C.C.C. (3d) 406, at paras. 18-31 (Man. C.A.).

ignores is that in such cases the police did not merely detain, they *arrested*. To uphold such arrests as constitutional effectively transforms the lower standard that justifies investigative detentions into the *de facto* standard for conventional arrests. In other words, the distinction can all too easily be used to uphold as constitutional, significant and illegal intrusions on individual liberty.

It would seem that uncertainty about the purpose of section 9 has led directly to the birth of unlawful versus arbitrary dichotomy. With the passage of time, the distinction has grown more entrenched and its negative effects have only seemed to spread. This has resulted in a section 9 jurisprudence that can fairly be described as impoverished.

In the remainder of this Part, it will be argued that what *Duguay*[51] has to say about the meaning of "arbitrarily" in section 9 of the Charter is wrong and long overdue for express overruling. By exploring why an unlawful detention should necessarily equate with an "arbitrary" detention under section 9, the larger purpose of this important constitutional guarantee will hopefully become apparent.

In giving "arbitrarily" meaning, the *Duguay*[52] Court did not have the benefit of later Supreme Court decisions that explained the need for a "purposive" approach in the interpretation of the Charter's guarantees.[53] Under this method, dictionary definitions are to be avoided.[54] Instead, the words used are to be read in a manner that best achieves the purpose underlying the guarantee. In identifying that purpose, the court may look to the larger objects of the Charter, the actual language used to express the right, the historical origins of the guarantee (including its drafting history) and its interrelationship to the other constitutional provisions. Ultimately, the interpretation "should be a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection".[55] These factors each point

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[51] *R. v. Duguay*, [1985] O.J. No. 2492, 18 C.C.C. (3d) 289 (Ont. C.A.).

[52] *R. v. Duguay*, [1985] O.J. No. 2492, 18 C.C.C. (3d) 289 (Ont. C.A.).

[53] See *Hunter v. Southam*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 156 (S.C.C.); *R. v. Big M Drug Mart Ltd*., [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 344 (S.C.C.); *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 499 (S.C.C.); *R. v. Therens*, [1985] 1 S.C.R. 613, at 641 (S.C.C.), Le Dain J., dissenting in the result only.

[54] *Hunter v. Southam*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155 (S.C.C.) (instructing that the meaning of the Charter's guarantees should not "be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute").

[55] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 344 (S.C.C.). Also see S.R. Peck, "An Analytical Framework for the Application of the *Canadian Charter of Rights and Freedoms*" (1987) 25 Osgoode Hall L.J. 1, at 6-30; P.W. Hogg, "The Charter of Rights

toward an interpretation that treats any unlawful detention as necessarily arbitrary and therefore a violation of section 9 of the Charter.

Any effort to reconcile the *Duguay*[56] decision with the purposive approach runs into immediate difficulty. Like most early judgments interpreting section 9, the case is based on dictionary definitions that transform a malevolent motivation into the touchstone for arbitrariness. Such a reading is inconsistent with the larger objects of the Charter and its *legal rights* guarantees.[57] By subordinating legality and individual liberty interests to the subjective mindset of an arresting officer, this interpretation cuts against the very purpose of the Charter. If protecting the individual *vis-à-vis* the state is the primary objective, it makes little sense to view the encounter from the perspective of the responsible state official rather than from the perspective of the individual whose liberty has been *unlawfully* suspended. For the person aggrieved it is cold comfort that a state official's grounds to detain or arrest fall "just short" of what the law requires. A "generous" interpretation would recognize that an unlawful detention or arrest is necessarily arbitrary and contrary to section 9 of the Charter.[58]

This interpretation is made more compelling by its connection to the historic approach for protecting liberty in Canada. The Anglo-Canadian common law constitution has long required that any interference with individual liberty be based on lawful authority. This proposition, known as the "principle of legality"[59] requires that "every official act must be

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and American Theories of Interpretation" (1987) 25 Osgoode Hall L.J. 87, at 97-103 (explaining the "purposive" approach).

[56] *R. v. Duguay*, [1985] O.J. No. 2492, 18 C.C.C. (3d) 289 (Ont. C.A.).

[57] See *Hunter v. Southam*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155 (S.C.C.) (the purpose of the Charter is "the unremitting protection of individual rights and liberties"); *R. v. Debot*, [1989] S.C.J. No. 118, [1989] 2 S.C.R. 1140, at 1173 (S.C.C.) ("The legal rights guaranteed by the Charter are designed *inter alia* to circumscribe these coercive powers of the state within boundaries of justice and fairness to the individual."); *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151, at 179 (S.C.C.) ("[I]t is to the control of the superior power of the state *vis-à-vis* the individual who has been detained by the state, and thus placed in its power, that s. 7 and the related provisions that follow are primarily directed."). For a discussion regarding the purpose of the legal rights guarantees, see James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's L.J. 1, at 6-12.

[58] See P.W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough, ON: Carswell, 1997-) at 46-5 (after acknowledging the effect of *R. v. Duguay*, [1985] O.J. No. 2492, 18 C.C.C. (3d) 289 (Ont. C.A.), affd [1989] S.C.J. No. 4, [1989] 1 S.C.R. 93 (S.C.C.), the author writes that "[p]robably, . . . strict compliance with the law is a necessary (although not a sufficient) condition for compliance with s. 9").

[59] See Leonard Herschel Leigh, *Police Powers in England and Wales*, 2d ed. (London: Butterworths, 1985), at 32-33. Professor Hogg refers to this idea as the "principle of validity". See

justified by law".[60] This idea has an extraordinarily long history: it can be traced back to Blackstone,[61] *Entick v. Carrington*,[62] and even the *Magna Carta*.[63]

Not surprisingly then, Dicey characterized this concept as central to the "rule of law". For him the antithesis of this "fundamental principle of the constitution" was the exercise of "arbitrary power"[64] Of specific interest, given our interpretive task, is one of the ways in which Dicey illustrated this point in his seminal text on English constitutional law, noting that the English constitution forbids "arbitrary arrest".[65] This evidences a long history of equating illegality with arbitrariness. But looking this far back is not essential. The drafting history also provides a compelling and more contemporary justification for choosing this interpretation.

At least on a superficial level, section 9 of the Charter seems capable of being traced to section 2(a) of the *Canadian Bill of Rights*[66] of 1960. That section provided that "no law of Canada shall be construed or applied so as to authorize or effect the arbitrary detention, imprisonment or exile of any person[.]" Unfortunately that section, like much of the federally legislated *Bill of Rights*, had no practical impact, never proving decisive before any appellate court.[67] Nevertheless, the fact that "arbitrariness"

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P.W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough, ON: Carswell, 1997-), at 31-4.

60 P.W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough, ON: Carswell, 1997-).

61 See William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Chicago: University of Chicago Press, 1979), at 130-31.

62 (1765), 19 State Trials 1029 at 1067, 95 E.R. 807 (Ct. Common Pleas).

63 See *Magna Carta*, 9 Hen. III, c. 29, art. 39.

64 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), at 198. He elaborates upon this by explaining that,

> [t]he right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. . . . personal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law, *i.e.* . . . under some legal warrant or authority . . ."

See also at 203-204.

65 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915), at 193, 196.

66 S.C. 1960, c. 44; R.S.C. 1985, App. III.

67 Professor Tarnopolsky noted that "[t]here are only a few reported cases in which this clause was raised but it did not directly affect the result in any instance." See Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2d rev. ed. (Toronto: McClelland & Stewart, 1975), at 235. That said, Professor Tarnopolsky was of the view that:

figures prominently in both provisions is no accident. Both seem to have been influenced by article 9 of the *Universal Declaration of Human Rights*,[68] which provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile."[69] There was, however, another international influence helping to shape the drafting of section 9. In 1966, after the *Bill of Rights*[70] but long before the Charter, the *International Covenant on Civil and Political Rights*[71] came into effect. It included an article that was undoubtedly instrumental in shaping the language that ultimately made its way into what would become section 9 of the Charter.[72] Its influence is best considered in the context of other developments that shaped the ultimate wording of section 9, and also served to influence the wording of what would become section 8. As a result, it is sensible to consider earlier versions of both guarantees in tandem.

During the constitutional negotiations between the provincial and federal governments in 1980, the criminal process was not at the top of anyone's agenda. The October 1980 draft of the Charter, placed before the Special Joint Committee of the Senate and the House of Commons, included a section designed to foreclose the exclusion of evidence as a remedy for constitutional violations.[73] Like earlier drafts, it contained a series of legal rights guarantees.[74] In response to strong objections from the provinces to the wording in the August 1980 draft,[75] the federal government significantly reworded what would become sections 8 and 9:

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> . . . the proscription here is against detention, imprisonment or exile without specific authorization under existing law. And further, that a law giving power to detain, imprison or exile, cannot grant such a power to be exercised "unreasonably" or "without reasonable cause".

[68] G.A. Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

[69] *Universal Declaration of Human Rights*, G.A. Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, art. 9.

[70] *Canadian Bill of Rights*, S.C. 1960, c. 44.

[71] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A(XXI), 21 UN GAOR, Supp. (No. 16) 52, UN Doc. A/6316 (1966).

[72] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A(XXI), 21 UN GAOR, Supp. (No. 16) 52, UN Doc. A/6316 (1966), art. 9(1).

[73] See October 1980 Draft of the Charter, s. 26, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989), at 751.

[74] October 1980 Draft of the Charter, ss. 7-14, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989).

[75] See Provincial Proposal, August 29, 1980, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989), at 683-85. The provinces unanimously sought the deletion of s. 7, and — with the exception of New Brunswick and Newfoundland — sought changes to the wording of ss. 8 and 9.

| August 1980 Draft[76] | October 1980 Draft[77] |
|---|---|
| 7. Everyone has the right to be secure against unreasonable search and seizure. | 8. Everyone has the right not to be subjected to search or seizure except on grounds, and in accordance with procedures, established by law. |
| 8. Everyone has the right not to be arbitrarily detained or imprisoned. | 9. Everyone has the right not to be detained or imprisoned except on grounds, and in accordance with procedures, established by law. |

For the provinces, the goal of these changes was to "clarify and limit the scope of legal rights".[78] This led to modifications in the language of both sections 8 and 9 that would have done little more than codify the principle of legality ("except on grounds, and in accordance with procedures, established by law").

A number of organizations that made representations before the Special Joint Committee were critical of the October 1980 draft. They feared that without a remedies provision, the Charter would prove ineffective. As a result, they urged the Special Joint Committee to add a provision that would at least allow for the exclusion of unconstitutionally obtained evidence. These same groups also expressed grave doubts about the wording found in the October 1980 draft of sections 8 and 9.[79] For example, the Canadian Civil Liberties Association observed that the two provisions were little more than "a verbal illusion"; they "pretend to give us something" while granting "us nothing more than we already have".[80] They pointed out, correctly, that these sections still left open the potential

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[76] See August 1980 Draft of the Charter, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989), at 669.

[77] See October 1980 Draft of the Charter, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989), at 743.

[78] Provincial Proposal, August 29, 1980, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989), at 681.

[79] See Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, vol. 1, No. 7, at 11-12, 15-16, 27-29 (November 18, 1980) (Canadian Civil Liberties Association), vol. 1, No. 7, at 89-90, 92 (November 18, 1980) (Canadian Jewish Congress), vol. 1, No. 15, at 8, 15, 18 (November 28, 1980) (Canadian Bar Association).

[80] Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, vol. 1, No. 7, at 12 (November 18, 1980) (Mr. Alan Borovoy, General Counsel, Canadian Civil Liberties Association).

for legislation authorizing searches and seizures or detentions and imprisonments on the most arbitrary of bases. The federal government took these concerns seriously, responding with amendments that — with some refinement by the Special Joint Committee — ultimately became sections 8, 9 and 24 of the Charter.[81] In putting forward these "major changes", Jean Chrétien (then federal Minister of Justice and Attorney General) explained that the changes to sections 8 and 9 meant that:

> . . . the fact that procedures are established by law will not be conclusive proof that search and seizure or detention is legal. Such procedures and the laws on which they are based will have to meet the tests of being reasonable and not being arbitrary.[82]

The goal of the changes following the October 1980 draft were clear — to strengthen, not weaken — the protection afforded by sections 8 and 9.[83] Later, when questions were raised as to whether legality should be specifically mentioned in section 9, a Deputy Minister of Justice assured the Committee that such a change was unnecessary because if a detention "were illegal, . . . against the law, then it would be annulled by the courts for that very reason".[84] To the limited extent that the "framers' intent" may be gleaned from such historical materials,[85] it would appear to have been assumed that illegal detentions would be subsumed by the arbitrariness standard contained in section 9 of the Charter.

On such a reading section 9 would operate very much like article 9(1) of the *International Covenant on Civil and Political Rights*. In part, that provision indicates that: "[n]o one shall be subjected to arbitrary arrest or detention [and that] [n]o one shall be deprived of his liberty

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[81] See January 1981 draft of the Charter, ss. 8, 9 and 24, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989), at 771.

[82] Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, vol. 3, No. 36, at 10-11 (January 12, 1981) (Hon. Jean Chrétien, Minister of Justice).

[83] See January 1981 Draft, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989), at 768.

[84] Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 46, at 116-17 (January 27, 1981) (see questions by Senator Asselin and the responses of the Deputy Minister of Justice, Mr. Tassé).

[85] See *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 504-509 (S.C.C.) (holding that courts may consider testimony before the Special Joint Committee in interpreting the Charter, but cautioning that because of the multiplicity of actors involved in negotiation, drafting and adoption, the words of a few civil servants cannot be considered determinative and should therefore be given "minimal weight").

except on such grounds and in accordance with such procedure as are established by law."[86] This wording looks like an amalgam of section 9 and its earlier drafts. As Canada is a signatory to the Covenant, having agreed to implement its provisions into its domestic law, a reading of section 9 that equates arbitrariness with illegality would better serve to fulfil Canada's international treaty obligations. Although not a conclusive interpretive consideration, this is an additional reason for reading "arbitrarily" to include "unlawful".[87]

Finally, if the Supreme Court chooses to expressly endorse this approach, it would bring consistency to the interpretation of the *legal rights* guarantees. Legality, for instance, is a precondition for a search or seizure to be "reasonable" under section 8 of the Charter.[88] Even a commendable motive on the part of the police or grounds that fall "just short" of the legal standard cannot cure the wrong of an unlawful intrusion upon reasonable privacy expectations. That said, it is worth noting that this was not always the case. Much as with section 9 and unlawful detentions, early appellate court judgments had concluded that not every unlawful search or seizure would necessarily be "unreasonable" and violate section 8.[89] Thankfully, however, the Supreme Court did away with this

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[86] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A(XXI), 21 UN GAOR, Supp. (No. 16) 52, UN Doc. A/6316 (1966), art. 9(1).

[87] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A(XXI), 21 UN GAOR, Supp. (No. 16) 52, UN Doc. A/6316 (1966), art. 2(2) (obligating signatories to implement the Covenant's guarantees). See *Reference re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313, at 349 (S.C.C.), Dickson C.J.C., dissenting ("the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified . . . [such international norms are a] . . . persuasive source for interpretation of the provisions of the *Charter*"). This view was later adopted by a majority of the Court: see *Slaight Communications v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038, at 1056-57 (S.C.C.). Also see W.A. Schabas, *International Human Rights Law & The Canadian Charter*, 2d ed. (Scarborough, ON: Carswell, 1996), at 34-49 (discussing the use of international right instruments to interpret the Charter).

[88] See *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at 278 (S.C.C.) (holding that, in addition to other requirements, to be "reasonable" a search or seizure "must be authorized by law"); *R. v. Wiley*, [1993] S.C.J. No. 96, [1993] 3 S.C.R. 263, at 273 (S.C.C.) (holding that the required authority may come from "common law principles or statutory provisions"). Also see Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough, ON: Carswell, 2001), at 263 (noting the dissimilarity and arguing that viewing unlawful detentions as necessarily arbitrary would make s. 9 "a far more powerful protection").

[89] See *R. v. Heisler*, [1984] A.J. No. 1008, 11 C.C.C. (3d) 475 (Alta. C.A.); *R. v. Cameron*, [1984] B.C.J. No. 3158, 16 C.C.C. (3d) 240 (B.C.C.A.); *R. v. Noble*, [1984] O.J. No. 3395, 16 C.C.C. (3d) 146, at 167 (Ont. C.A.); *R. v. Benz*, [1986] O.J. No. 227, 27 C.C.C. (3d) 454, at 466-67 (Ont. C.A.).

impossible distinction.[90] In the relatively early years of the Charter, the Court held that the first essential precondition for any search or seizure to be considered "reasonable" under section 8 is that it be "authorized by law".[91] In other words, given the long-standing importance of the principle of legality, the Supreme Court rather sensibly read it as the starting point for any "reasonable" search or seizure.

Strangely, the Supreme Court has carefully avoided doing the same for section 9. The closest the Court has come is a recent and rather overdue acknowledgment that the guarantee "expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with law".[92] Unfortunately, this statement came in a case involving a challenge to a legislative scheme, not in the context of a challenge to the decision to detain in an individual case. Be that as it may, this observation seems entirely in keeping with an interpretation of section 9 that would equate any unlawful interference with individual liberty as an arbitrary and unconstitutional one.

None of this is to suggest that the good intentions of law enforcement are irrelevant to constitutional outcomes. To the contrary, as the Supreme Court's seminal decision under section 24(2) of the Charter makes clear, in deciding whether or not to exclude unconstitutionally obtained evidence, among other factors, a court must consider if a violation occurred "in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant".[93] This provides further support for reconsidering what "arbitrarily" means. It makes little sense to count a police officer's good intentions twice in the constitutional analysis, especially when an interest as fundamental as individual liberty is at stake.

As this review hopefully makes plain, the ultimate purpose of the guarantee would appear to be the protection of individual liberty interests from *unjustified* state interference. It was this idea that the drafters were attempting to capture in the language chosen to articulate the guarantee.

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[90] The unworkable nature of this distinction has sometimes been acknowledged by judges forced to grapple with it. See, *e.g.*, *Ontario v. Spencer*, [1999] O.J. No. 3165, 66 C.R.R. (2d) 362, at 372 (Ont. C.J.) where the trial judge conceded that: "Despite the finding in *Duguay*, I have great difficulty in determining how in such circumstances an arrest so unlawful as to not meet any of the important codified criteria could be found to be anything but arbitrary."

[91] *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at 278 (S.C.C.).

[92] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at 400 (S.C.C.).

[93] *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265, at 285 (S.C.C.) (quoting from *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 652 (S.C.C.), Le Dain J. dissenting).

The October 1980 draft only went part way by employing phrasing that would entrench the principle of legality. The drafters quickly realized that this was inadequate given their aspiration for a constitutional guarantee that would safeguard individual liberty against unjustified state interference. This far more ambitious goal also required the use of wording that would entitle courts to measure the adequacy of the standards and protections included in any legislated scheme that authorizes a deprivation of liberty. Unfortunately, experience has shown that without timely guidance from the Supreme Court, the word chosen — arbitrarily — has leant itself to a narrow interpretation that is not in keeping with the true purpose of section 9. A purposive reading reveals the true object of this constitutional right and lays bare the means by which its fundamentally important purpose can be realized.

First, section 9 serves to entrench the long-standing Anglo-Canadian constitutional principle that government cannot interfere with individual liberty absent lawful authority to the contrary. In order for this important constitutional principle to have practical meaning, any unlawful interference with individual liberty must necessarily be treated as "arbitrary" and a violation of section 9 of the Charter.

Second, the guarantee supplements that historic safeguard by empowering courts to scrutinize laws authorizing detention or imprisonment and to invalidate those that would operate "arbitrarily". The Supreme Court has already put the second aspect of the guarantee into action — developing section 9 standards for assessing the constitutional adequacy of criteria and procedures governing state authority to interfere with individual liberty.

In recent years there have been mixed signals from the courts on whether or not unlawful detentions will be viewed as inherently arbitrary and a violation of section 9.[94] In maintaining this distinction, the courts

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[94] See *R. v. Calderon*, [2004] O.J. No. 3474, 188 C.C.C. (3d) 481, at 505-506 (Ont. C.A.), wherein the Court concluded that an investigative detention based on deficient grounds "was not justified and therefore breached the appellants' rights under s. 9 of the *Charter*". See also *R. v. Monney*, [1997] O.J. No. 4806, 120 C.C.C. (3d) 97, at 148-49 (Ont. C.A.) (focusing upon "unjustifiable" from amongst the available synonyms), revd [1999] S.C.J. No. 18, 133 C.C.C. (3d) 129 (S.C.C.) (finding the detention at issue lawful thereby avoiding this issue); *R. v. Mitchell*, [1987] N.S.J. No. 430, 39 C.C.C. (3d) 141, at 152 (N.S.C.A.) (holding that s. 9 is violated when "a person is detained or imprisoned without any legal justification"). But see *Brown v. Durham (Regional Municipality) Police Force*, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at 11-12 (Ont. C.A.) (repeating a principle that keeps the *ratio* from *R. v. Duguay*, [1985] O.J. No. 2492, 18 C.C.C. (3d) 289 (Ont. C.A.) alive — "not all unlawful detentions are necessarily arbitrary"). See also *Collins v. Brantford Police Services Board*, [2001] O.J. No. 3778, 158 C.C.C. (3d) 405, at paras. 11, 19

are no doubt concerned about all of the potential ramifications of equating illegality with arbitrariness. A conclusion that each is synonymous would have far-reaching implications beyond unjustified detentions and arrests. For instance, if it were established that a police officer arrested in circumstances where he or she was obligated not to under the *Criminal Code*,[95] or failed to release someone following an arrest as the Code required,[96] the resulting unlawful detention would be characterized as arbitrary and unconstitutional.[97] Similarly, a failure on the part of police to bring an accused before a justice within 24 hours of an arrest[98] would necessarily be unconstitutional — regardless of any good explanation for the delay.[99] No doubt, these ripple effects are a strong incentive for courts to maintain their commitment to the *Duguay* approach. They fear being required to characterize as "arbitrary" — and unconstitutional — unlawful detentions resulting from "a technical error of process".[100]

To date, a major mistake under section 9 of the Charter has been the muddying of conceptual waters through the creation of an unnecessary dichotomy between unlawful and arbitrary detentions. Although, as noted above, a similar trend emerged under the early section 8 Charter jurisprudence, as to whether "unlawful" searches or seizures were necessarily "unreasonable", the Supreme Court quickly put an end to this debate by making lawful authority a precondition for reasonableness.[101] The result has been much clearer constitutional standards and more

(Ont. C.A.) (citing *R. v. Duguay* with approval in reiterating that an unlawful detention does not necessarily result in an arbitrary detention that violates s. 9).

95 R.S.C. 1985, c. C-46, s. 495(2).

96 *Criminal Code*, R.S.C. 1985, c. C-46, ss. 497, 498.

97 It is quite difficult to establish an unlawful detention on this basis. Usually, cases where an unlawful and arbitrary detention is made out are those in which police have applied a policy to arrest and hold anyone charged with a certain type of offence, irrespective of their personal circumstances. See, for example, *R. v. Ware*, [1987] B.C.J. No. 492, 49 M.V.R. 97 (B.C. Co. Ct.); *R. v. Christiensen*, [1987] B.C.J. No. 1786, 3 M.V.R. (2d) 116 (B.C. Co. Ct.); *R. v. Pithart*, [1987] B.C.J. No. 633, 34 C.C.C. (3d) 150 (B.C. Co. Ct.).

98 The police are obligated to bring those they arrest before a justice "without unreasonable delay" and "in any event" within 24 hours. See *Criminal Code*, R.S.C. 1985, c. C-46, s. 503.

99 See *R. v. Simpson*, [1994] N.J. No. 69, 88 C.C.C. (3d) 377 (Nfld. C.A.), affd in part and revd in part [1995] S.C.J. No. 12, 95 C.C.C. (3d) 96 (S.C.C.) (accused brought before justice 48 hours after her arrest, characterized as a "major violation of a statutory provision . . . [that] . . . must be viewed as arbitrary"). But see *R. v. Tam*, [1995] B.C.J. No. 1428, 100 C.C.C. (3d) 196 (B.C.C.A.) (where the requirement was missed by an hour and a half with good logistical reasons for the delay — although unlawful — the officer's good faith caused the Court to refrain from finding an arbitrary detention).

100 *R. v. Simpson*, [1994] N.J. No. 69, 88 C.C.C. (3d) 377, at 388 (Nfld. C.A.) (offered to explain why an "an unlawful detention is not necessarily an arbitrary detention").

101 See notes 90 and 91 and accompanying text.

well-defined statutory search and seizure powers.[102] The technical or inadvertent nature of a constitutional violation is best dealt with when fashioning the appropriate remedy. This is the great benefit of a discretionary exclusionary rule. It permits the courts to interpret the constitution's guarantees purposively, free from concerns that an overly generous approach might have an unfair exclusionary effect in some unforeseeable future case.[103]

Recognizing that unlawful detentions or arrests — those undertaken without the legally required grounds — are necessarily unconstitutional under section 9 of the Charter does not bring an end to our task. You will remember that our goal was to also revisit the meaning of "detention" from a perspective that openly takes into account the purpose of section 9, which we have now identified as being the protection of individual liberty from unjustified state interference.

## III. The Effect of Reading "Detention" Purposively

To engage section 9's protection, the interaction between an individual and a state actor must first qualify either as a "detention" or as an "imprisonment". Unlike "detention", the objective indicators of "imprisonment" are much more obvious and not at all controversial. The presence of prison bars, locked doors, prison uniforms and jail guards clearly signify a deprivation of liberty that is sufficiently prolonged to warrant the more severe label of "imprisonment". Unfortunately, "detention" provides a far less certain and therefore much more controversial standard for engaging the protection of the constitutional guarantee.

Beyond section 9, "detention" also appears as one of the threshold requirements for triggering the protections found in section 10, which is engaged "on arrest or *detention*". It was a case involving section 10(b), the right to counsel, which first raised the meaning of this important term before the Supreme Court.

In *R. v. Therens*,[104] a motorist involved in a single-vehicle car accident accompanied a police officer back to the police division, in response to a breath demand, for the purpose of taking a breathalyzer test. The

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

[103] See James Stribopoulos, "Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate" (1999) 22 B.C. Int'l & Comp. L. Rev. 77, at 136-38.

[104] [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613.

motorist was not told about his right to counsel. One of the issues before the Supreme Court was whether the motorist was "detained" during the period following the breath demand but preceding his arrest.

Although the Court divided on the ultimate result, Le Dain J.'s opinion represented the views of the majority on the issue of detention. In concluding that there was indeed a "detention" in this case, Le Dain J. persuasively reasoned that the very narrow construction given to that term under the *Canadian Bill of Rights*[105] should not be controlling of its meaning under the Charter.[106] In coming to this conclusion on behalf of the Court, Le Dain J. pointed out "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".[107] Beyond the general purpose of the Charter, Le Dain J.'s interpretation of "detention" was also informed by the more specific purpose of section 10.[108] Bearing in mind these considerations, Le Dain J. identified the existence of "compulsory restraint" as being the key to the

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[105] S.C. 1960, c. 44.

[106] In *R. v. Chromiak*, [1979] S.C.J. No. 116, [1980] 1 S.C.R. 471 (S.C.C.), the Supreme Court read the term "detention" found in s. 2(c) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 very narrowly, refusing to characterize circumstances virtually identical to those presented in *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.) as anything other than voluntary compliance. On this view "detention" was reserved for cases of "compulsory restraint", in other words , actual "physical constraint", situations where an individual is being "held in custody": *R. v. Chromiak*, [1979] S.C.J. No. 116, [1980] 1 S.C.R. 471, at 478 (S.C.C.).

[107] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 638 (S.C.C.). Justice Le Dain also went on to explain two further reasons for rejecting the narrow definition from *R. v. Chromiak*, [1979] S.C.J. No. 116, [1980] 1 S.C.R. 471 (S.C.C.). First, he acknowledged that the judiciary had felt rather restrained in its use of the *Canadian Bill of Rights*, S.C. 1960, c. 44 given that it was simply legislation and therefore lacked constitutional status. 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. *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 639 (S.C.C.). Of course, s. 1 of the Charter allows the Supreme Court to balance individual and state interests in a much more transparent way.

[108] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 641-42 (S.C.C.), where he noted that:

> The purpose of s. 10 of the Charter is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. The situations specified by s. 10 — arrest and detention — are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.

meaning of "detention".[109] He acknowledged that such restraint might take varying forms.

Compulsory restraint may involve physical interference with the individual's freedom of movement.[110] So, for example, if a police officer grasps an individual's arm, uses handcuffs or confines someone in the back seat of a police cruiser, a "detention" would obviously seem to result.

Compulsion can also be of a psychological or mental nature, noted Le Dain J. So, for example, where an individual acquiesces in response to a demand or direction by a police officer and reasonably believes that the choice to do otherwise does not exist, that person is "detained". On this view of things, where non-compliance with a demand or direction would constitute an offence, as it would have in *Therens*,[111] given the statutory duty to furnish a breath sample, Le Dain J. reasoned that acquiescence cannot be considered voluntary and should be viewed as sufficiently compelled to result in a "detention".[112]

In a passage that is arguably *obiter*,[113] Le Dain J. went on to make a rather important observation about the reality of most interactions between members of the public and the police. He indicated:

> Although it is not strictly necessary for purposes of this case, I would go further. 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, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. 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

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109 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 642 (S.C.C.).

110 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 642 (S.C.C.)

111 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

112 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 642-43 (S.C.C.).

113 Strictly speaking, the *ratio* of the case is tied closely to its actual circumstances, *i.e.*, that a "detention" results where an individual is subject to and acquiesces in a breath demand, given that non-compliance is an offence.

> submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.[114]

On a number of subsequent occasions the Supreme Court has unconditionally endorsed what *Therens*[115] had to say about the meaning of "detention" both of the physical and psychological kind.[116] This has periodically included express approval of Le Dain J.'s *obiter* comments about the reality of how a police demand or direction will tend to compel compliance on the part of most reasonable members of the community.[117]

Not long after *Therens*[118] was decided, its definition of "detention" was transplanted from section 10 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".[119] This threshold requirement for engaging section 9 therefore took shape without any express reference to the purpose underlying this important Charter guarantee.

Because of statutory obligations, when motorists comply with a direction to stop their vehicles[120] or agree to provide a breath sample in response to a breath demand,[121] they are clearly "detained" for section 9

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[114] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 644 (S.C.C.).

[115] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

[116] See *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at 648 (S.C.C.); *R. v. Simmons*, [1988] S.C.J. No. 86, 45 C.C.C. (3d) 296, at 312-15 (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.).

[117] See ***R. v. Nolan***, [1987] S.C.J. No. 43, 34 C.C.C. (3d) 289, at 300 (S.C.C.) where the Court cited this passage before expressly agreeing that: "when a citizen is confronted with police authority, there is always a strong element of 'psychological compulsion' in any police demand". See also *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] S.C.J. No. 38, [1993] 1 S.C.R. 1053, at 1066 (S.C.C.).

[118] *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

[119] *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.).

[120] See *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.) wherein the Court indicated, at 631-32:

> . . . the random stop of the appellant for the purposes of the spot check procedure, although of relatively brief duration, resulted in a detention of the appellant within the meaning of s. 9 of the Charter. It fell within the general concept of detention that was applied in *R. v. Therens*. . . . By the random stop for the purposes of the spot check procedure the police officer assumed control over the movement of the appellant by a demand or direction that might have significant legal consequence, and there was penal liability for refusal to comply with the demand or direction.

[121] See *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

purposes. In almost all other circumstances, however, whether an encounter between a police officer and an individual constitutes a "detention" ultimately depends on the particular facts of a given case.

In most cases that come before the courts, the facts are invariably viewed through the distorting influence of hindsight, where the court is being asked to grant Charter relief for the benefit of a *factually* guilty accused. In other words, these are the cases in which police suspicions and perseverance have paid off, yielding evidence of criminality in the form of either a confession or contraband, and sometimes both. To date, these cases have been adjudicated without any express acknowledgment of the purpose of section 9. That purpose, it will be remembered, is to protect everyone, innocent or guilty, from unjustified state interferences with individual liberty. Unfortunately, in actual cases that important objective can sometimes become obscured from view by the factual guilt of the claimant who seeks redress for an alleged constitutional wrong through the exclusion of incriminating evidence. From this vantage point, the cases of innocent individuals who are subjected to unjustified state interference with their liberty, either in the form of an unlawful detention or arrest, are out of sight. These are the individuals who are ultimately released by police because their detention or arrest failed to yield evidence of wrongdoing.[122]

The fact that an individual proves to be innocent does not, however, necessarily mean that his or her detention was unjustified. Police officers are legally entitled to detain and even arrest based on probabilities, not certainties. The very purpose of allowing the police to detain for investigative purposes where they possess reasonable suspicion that someone is involved in recently committed or unfolding criminal activity

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[122] Some American legal scholars have theorized that hindsight may distort judicial reasoning in this very way. See William J. Stuntz, "Warrants and Fourth Amendment Remedies" (1991) 77 Va. L. Rev. 881, at 912-13, making this point in the American context. See also Carole S. Steiker, "Second Thoughts About First Principles" (1994) 107 Harv. L. Rev. 820, at 852-53. More generally, the potential influence of so-called "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) 107:3 Psychological Bulletin 311. Some studies have specifically linked this phenomenon to legal decision-making, although each such study has necessarily involved simulations. See J.D. Casper, K. Benedict & J.R. Kelly, "Cognitions, attitudes, and decision making in search and seizure cases" (1988) 18 J. App. Soc. Psych. 93; Jennifer K. Robbennolt & Mark S. Sobus, "An Integration of Hindsight Bias and Counterfactual Thinking: Decision-Making and Drug Courier Profiles" (1997) 21:5 Law and Human Behaviour 539. In Canada, given the existence of a discretionary exclusionary rule, the influence of hindsight should in theory be diminished. See James Stribopoulos, "Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate" (1999) 22 B.C. Int'l & Comp. L. Rev. 77, at 131-38. Whether it is, in fact, seems incapable of empirical verification.

is to allow that officer to get to the bottom of things and ascertain whether or not an arrest is warranted.[123] As a result, a great many innocents may very well get swept up in the net of reasonable suspicion. These are not the cases that I mean to capture when I use the term "unjustified detention".

Instead, our concern is deservedly on those cases of innocent individuals who are subject to detention or arrest in the absence of objectively justifiable grounds. Some of these detentions may result from errors made in good faith on the part of the police, for example, where a police officer honestly but mistakenly concludes that she has sufficient grounds to either detain for investigative purposes or arrest.[124] There is also the very real risk that some such detentions may be motivated either consciously or, much more likely, subconsciously, by nefarious considerations, for example by an individual's age, economic circumstances, ethnicity or race. For example, in recent years a growing body of evidence has emerged which strongly suggests that both Aboriginals[125] and African Canadians[126] are stopped by police at disproportionately higher rates

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[123] This is the standard that controls whether the police are legally entitled to detain an individual for criminal investigative purposes. See *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

[124] That said, some have argued that claims of "good faith" should be considered in a broader context, to take into account how well police forces are fulfilling their obligations to provide rank and file officers with adequate training regarding the parameters of their legal powers. See Casey Hill, "The Role of Fault in Section 24(2) of the Charter" in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1993) 57, at 73. See also *R. v. Clayton*, [2005] O.J. No. 1078, 194 C.C.C. (3d) 289, at paras. 82-91 (Ont. C.A.), revd [2007] S.C.J. No. 32, 220 C.C.C. (3d) 449 (S.C.C.). In *Clayton*, at the Supreme Court, the Court, rather remarkably, counselled against close scrutiny of police training in individual cases, indicating at para. 51:

> In their testimony, the police did not expressly advert to the factors relevant to the exercise of their ancillary powers or explain the way they balanced the pros and cons of deciding whether to set up the perimeter surveillance. What is under constitutional scrutiny is the police conduct, not police training. The officers' good faith in carrying out their duties is the issue in this case. To go further and examine the training behind such conduct would risk transforming the inquiry into a protracted pedagogical review of marginal relevance to whether the police conduct itself represented a breach of sufficient severity to warrant excluding the evidence.

This conclusion unfortunately provides police organizations with little practical incentive to provide rank and file officers with proper training regarding the legal parameters of their powers.

[125] 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.

[126] See Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995), at 349-60. See Scot Wortley, "The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice" (Paper Presented at the 48th Annual Conference of the American Society of Criminology, Chicago, November, 1997); 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*

than members of other racial groups.[127] Responding to this evidence, two provincial appellate courts recently acknowledged the reality of racial profiling in Canada.[128]

Beyond the racial profiling context, it remains difficult to gauge how real the problem of unjustified police detentions might be on a more general level. The law reports are simply incapable of providing a fair representation of all cases involving police and citizen encounters. This judicial blind spot can fairly be characterized as a form of selection bias.[129] In other words, a representative sampling of all cases involving what may arguably constitute "detentions" is not what the courts see. Although the potential size of the problem is unknown, what is clear is the potential toll that unjustified detentions can have on those who experience them.[130]

This detour to consider the potential distorting influence of selection bias was deliberate. When one considers how far Canadian courts have veered from Le Dain J.'s commonsensical observation about the realities of most individual and police encounters, it is the court's narrow vantage point, coupled with an absence of any clear sense of the overarching purpose of section 9, that seems to best explain the rather artificial way in which many courts have approached their analysis of whether or not an individual was "detained" for Charter purposes. A few examples involving the judgments of Canadian appellate courts will serve to illustrate this point.

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(Toronto: Thompson Educational Pub., 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), first page of the article; Jim Rankin *et al.*, "Police Target Black Drivers" *Toronto Star* (October 20, 2002), online: Toronto Star <http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_PrintFriendly&c=Article&cid=1026146624189>. But see Ron Melchers, "Do Toronto Police Engage in Racial Profiling?" (2003) 45 Can. J. Crim. 347 and also Scot Wortley & Julian Tanner, "Data, Denials, and Confusion: The Racial Profiling Debate in Toronto" (2003) 45 Can. J. Crim. 367.

[127] See also William J. Closs, "Bias Free Policing: The Kingston Police Data Collection Project — A Preliminary Report to the Kingston Police Services Board" (March 17, 2005), online: <http://www.police.kingston.on.ca/Bias%20Free%20Policing.pdf>, the most recent and, arguably, most comprehensive Canadian study. 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 Law, 2006).

[128] 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.).

[129] On the topic of selection bias in the law reports, see generally George L. Priest & Benjamin Klein, "The Selection of Disputes for Litigation" (1984) 13 J. Legal Stud. 1.

[130] For insight into the human toll of unjustified stops that are motivated by racial bias, see Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003).

Arguably, *R. v. Lawrence*[131] represents one of the worst examples of this strained analytical approach. In *Lawrence*, a police officer was responding to a complaint from a caller who reported that a neighbour's home had just been broken into. As the officer approached the scene, he saw Ms. Lawrence riding her bicycle on the sidewalk some 10 houses away from the reported break-in. The neighbour had described the suspect as male, and gave a detailed description of his clothing. Ms. Lawrence was obviously not male, nor did her clothing match that of the suspect. Nevertheless, the officer decided to intercept her. The officer did this by pulling his police vehicle directly in front of the bicycle that Ms. Lawrence happened to be riding at the time. This rather understandably caused Ms. Lawrence to stop. The officer then exited his vehicle and, we are told, "asked if he could speak to her". The questioning was directed to where Ms. Lawrence lived. The officer reported that he did not believe her answers and eventually asked to look inside her knapsack. She complied with the request and inside he found house-breaking instruments and jewellery from the house that had been broken into. The judgment reports that the questioning and search lasted some 25 minutes before Ms. Lawrence was directed to sit in the police cruiser. She was arrested five minutes after that.

Remarkably, the Court concluded that Ms. Lawrence was only detained at the point when she was directed to sit in the police cruiser. Most troubling is the Court's considerable effort to de-contextualize what so obviously seems to have been an entirely compelled encounter. The rather tortured explanation of why the police cruiser blocking Ms. Lawrence's bicycle did not result in a "detention" best illustrates this shortcoming in the Court's analysis:

> Such action certainly starts to take on the aspects of a physical detention and brings this case closer to the line separating legitimate police investigation from detention. However, detention involves either physical or psychological restraint from leaving. *Here there could have been some physical inconvenience in driving the bicycle around the police cruiser, but that would have been slight and certainly did not constitute an impossibility*.
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> Considering the interference with the appellant's bicycle passage by the cruiser, one might have concluded that there was a psychological

[131] [1990] O.J. No. 1648, 59 C.C.C. (3d) 55 (Ont. C.A.).

> detention. There was, however, no evidence that the appellant felt compelled to remain at the police officer's cruiser.[132]
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> (emphasis added)

On this approach, facts that objectively scream out for a finding of "detention" are dismissed. An applicant's failure to take the stand and testify to the obvious — that she did not feel free to leave — becomes controlling.

The decision of the Ontario Court of Appeal in *R. v. Grafe*[133] provides another unfortunate example of the same sort of reasoning. One early evening in downtown Kitchener, Mr. Grafe was observed by the police to be walking down the sidewalk with a second man. The attention of the officers was drawn to the two men because they apparently kept looking at the police cruiser, a fact that left one of the officers with the impression that there was "something not quite kosher". As a result, the officers turned their police cruiser around and drove to an area on the road adjacent to Mr. Grafe and his companion. There was conflicting evidence as to what happened next.

On the police account, the officers exited their vehicle and approached the two men, at which point Grafe and his companion were asked to identify themselves. Both men complied and were permitted to go on their way. In contrast, Mr. Grafe testified that neither officer ever exited the police cruiser. Rather, he claimed that he had been walking on the sidewalk when the officers stopped their vehicle, rolled down the window and summoned them over by saying: "Yous guys, would you please come over here." Mr. Grafe was the subject of an outstanding arrest warrant, so he gave the police a false name. The police subsequently discovered his true identity and he was eventually charged with impersonation.

On these facts, the trial judge found that Mr. Grafe felt sufficiently compelled by the police request that he was "detained" by the time he was asked to identify himself. The failure to apprise him of his right to counsel was found to have violated section 10(b), resulting in the exclusion of the evidence and his acquittal. In allowing the Crown appeal, the Ontario Court of Appeal viewed the circumstances rather differently.

> … the evidence does not support a finding that the respondent reasonably believed that he was detained. His conversation with the police occurred on the sidewalk of a downtown city street in daylight. The respondent

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132 *R. v. Lawrence*, [1990] O.J. No. 1648, 59 C.C.C. (3d) 55 (Ont. C.A.).

133 [1987] O.J. No. 796, 36 C.C.C. (3d) 267 (Ont. C.A.).

> was not required to sit in the back seat of the cruiser. On the respondent's own evidence the police officers treated him politely and used language of courtesy. The discussion was of short duration and the respondent left when it ended. The police officers could do nothing if the respondent had refused to talk to them because, again in Constable Kalan's words, "I had nothing to . . . Nothing I could hold them with or detain them on." In the light of the reasoning and result in *R. v. Moran*, *supra*, where the inconvenience to the accused was considerably greater than that experienced by the respondent, it is impossible to characterize the respondent's condition during the conversation as one of detention.
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> The *Charter* does not seek to insulate all members of society from all contact with constituted authority, no matter how trivial the contact may be. When one considers the full range of contacts in modern society between state and citizen that which took place between the respondent and Constables Kalan and Waite on the first occasion cannot be characterized otherwise than as innocuous. Its occurrence was not an invasion of any of the respondent's Charter rights. Accordingly, the evidence should not have been excluded.[134]

What this analysis seems to ignore is the rather obvious point that if Mr. Grafe did not feel compelled to come to the police cruiser and answer the questions posed, then why would he have proceeded to provide the police with a false name? Most reasonable people, placed in the very position of Mr. Grafe, would feel obligated to attend at the window of the police cruiser and identify themselves if instructed to do so by a uniformed police officer in a marked cruiser. This is so, regardless of how politely a police officer later claims she was when making the "request". For most members of the public, such a "request" will be quite reasonably perceived as a "direction" of the kind that no one, other than a seasoned defence lawyer, might reasonably think they have the option to refuse.

A more recent example is provided by the Ontario Court of Appeal's judgment in *R. v. B. (L.)*.[135] In *B. (L.)*, the police were driving past a high school when they observed L.B., along with a second youth, apparently engaging in a conversation with one another, even though both young men were physically separated by a considerable distance, with one located at the top of a hill and the other near the bottom. This struck the officers as suspicious, so they turned their police cruiser around and returned to the location in order to investigate. L.B. did not testify on the

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134 *R. v. Grafe*, [1987] O.J. No. 796, 36 C.C.C. (3d) 267, at 274 (Ont. C.A.).

135 [2007] O.J. No. 3290, 2007 ONCA 596 (Ont. C.A.).

Charter application. The police officers did. They gave evidence that soon after they exited their vehicle, L.B. descended from the top of the hill and intercepted them. The police officers claimed that they proceeded to strike up a casual conversation with the two young men, that culminated in both being asked for their names and dates of birth. Each complied, and their particulars were then passed along by radio to be cross-checked with the Canadian Police Information Computer (CPIC) database. While waiting for the results, one of the officers located a knapsack that L.B. had been carrying when police first observed him. Neither young man claimed ownership of the bag. The officer therefore decided to treat the knapsack as abandoned and proceeded to search it. Inside, the officer found a loaded handgun. Both young men were then immediately arrested at gunpoint.

In reversing the trial judge's finding that L.B. had been detained "when he was asked for identification and waited for the results of the CPIC search",[136] the Court of Appeal relied on *Grafe*,[137] and a handful of subsequent judgments,[138] that have read that decision as rejecting the notion that such requests result in a Charter "detention".[139] Beyond this, however, the Court never deals directly with the implications of the request for names and identification made in this case, which involved two police officers interacting with a couple of 15-year-old boys. Instead, in reversing the trial judge's ruling, the Court indicated:

> I do not suggest that the respondent did not feel some stress in the situation. No doubt, he felt somewhat intimidated by the police given the obvious power imbalance that existed. He may also have felt some anxiety by reason of the positioning of the police car, the fact that both officers got out of the car and the manner in which Officer Reimer attempted to prevent him and F from communicating with each other. The trial judge quite properly took those factors into account in assessing the issue of detention. But respectfully, he went wrong on the legal test. In my view, had he applied the correct legal test to the uncontradicted evidence of the officers and placed the onus on the respondent, where it belonged, he would have found that psychological compulsion had not been made out, at least not on a balance of probabilities. In the

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136 *R. v. B. (L.)*, [2007] O.J. No. 3290, 2007 ONCA 596, at para. 30 (S.C.C.).

137 *R. v. Grafe*, [1987] O.J. No. 796, 36 C.C.C. (3d) 267 (Ont. C.A.).

138 See *R. v. Hall*, [1995] O.J. No. 544, 22 O.R. (3d) 289, at paras. 21-23 (Ont. C.A.); *R. v. H. (C.R.)*, [2003] M.J. No. 90, 174 C.C.C. (3d) 67, at paras. 33-36 (Man. C.A.).

139 See *R. v. B. (L.)*, [2007] O.J. No. 3290, 2007 ONCA 596, at paras. 47-55 (Ont. C.A.).

> circumstances, evidence from the respondent was a virtual must, and it was not forthcoming.[140]

Decisions like *Lawrence*,[141] *Grafe*[142] and *B. (L.)*[143] are difficult to reconcile with the realities of how most people would reasonably perceive inquisitorial questioning by police officers. Not surprisingly, none of these cases reproduce the key passages from *Therens*,[144] wherein Le Dain J. recognizes the obvious but important point that: "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."[145] Over the last 20 years the cases seem to have drifted away from this realistic view of how most reasonable individuals will experience police requests.

In partial defence of the Ontario Court of Appeal in *B. (L.)*,[146] as of late the Supreme Court itself has seemed to signal that the time to revisit the meaning of "detention" may have arrived. No doubt anticipating the impracticality of requiring full compliance with the right to counsel found in section 10(b) during investigative detentions, the Supreme Court in *Mann*[147] suggested that "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."[148] Of course, these comments are difficult to square with the Court's prior decisions that set a relatively low bar for "detention", cases like *Therens*[149] in which rather brief and comparatively unobtrusive stops of motorists qualified.[150]

To be clear, I do not mean to suggest that an applicant's failure to testify that she felt compelled to remain should not be important. In marginal cases, where the objective indicators of "detention" are weak, the applicant's failure to testify can quite justifiably provide the decisive

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140 *R. v. B. (L.)*, [2007] O.J. No. 3290, 2007 ONCA 596, at para. 64 (Ont. C.A.).

141 *R. v. Lawrence*, [1990] O.J. No. 1648, 59 C.C.C. (3d) 55 (Ont. C.A.).

142 *R. v. Grafe*, [1987] O.J. No. 796, 36 C.C.C. (3d) 267 (Ont. C.A.).

143 *R. v. B. (L.)*, [2007] O.J. No. 3290, 2007 ONCA 596 (Ont. C.A.).

144 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

145 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 644 (S.C.C.).

146 *R. v. B. (L.)*, [2007] O.J. No. 3290, 2007 ONCA 596 (Ont. C.A.).

147 *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

148 *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52, at 71 (S.C.C.).

149 *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

150 See *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.). See also *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C.); *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.).

factor against finding that there has been a "detention".[151] The difficulty is with cases like *Lawrence*[152] and *B. (L.)*,[153] where an applicant's failure to testify seems like little more than an excuse for not characterizing an encounter as compelled that objectively screams out for a finding of "detention". Take *B. (L.)* for example. In all seriousness, can it fairly be claimed that two teenage boys who are approached by police after a police vehicle is spun around and driven toward them for the very purpose of intercepting them for questioning, physically separated by police, asked to account for their presence in a particular location, asked to identify themselves and subjected to a CPIC check, would feel entitled to walk away before the police inform them that they are free to do so?

I do not mean to argue that every time a police officer interacts with a member of the public, a section 9 "detention" results. Encounters between individuals and the police are rich in their diversity. Most such experiences are relatively benign, usually involving nothing more than conversation. Such exchanges can become more invasive, however, as conversation turns to questioning that increasingly resembles interrogation. Coercion can replace consent if a police officer assumes control over an individual's movements through either physical or psychological compulsion. In assessing whether an individual has been detained from a psychological standpoint, the language used by a police officer will usually provide the most obvious clue. If an officer directs an individual to "stop" or to "come here" or to even "*please* come here", and the target of such a demand or direction obeys, the fact that there has been a "detention" seems plainly obvious.

At the same time, it is also important to recognize that a great many coercive encounters between the police and members of the public are far subtler, but nevertheless just as compelled. Beyond the legal powers that accompany a police officer's status, there are also the physical signs of his or her authority, the uniform, the baton and the gun. With very little effort, a police officer can use these symbols of authority to create an atmosphere of compulsion without ever making any overt "demand" or issuing an express "direction". A police officer's tone of voice, body language and physical positioning can communicate to an individual that he or she is not free to leave just as effectively as any authoritative

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[151] See, *e.g.*, *R. v. Esposito*, [1985] O.J. No. 1002, 24 C.C.C. (3d) 88, at 101 (Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. viii (S.C.C.).

[152] *R. v. Lawrence*, [1990] O.J. No. 1648, 59 C.C.C. (3d) 55 (Ont. C.A.).

[153] *R. v. B. (L.)*, [2007] O.J. No. 3290, 2007 ONCA 596 (Ont. C.A.).

command or direction. In other words, a police officer's "direction" can come in the form of a stern look and a raised finger that would make plain, both to the subject and anyone who happens to be watching, that non-compliance is simply not an option.

No doubt, there is much deliberate ambiguity that marks a great many police and citizen interactions. Leaving an individual's legal status less than clear works to the benefit of the police, who are able to advance their inquiries relatively free from concern that their actions will subsequently be characterized as resulting in a "detention" and therefore run afoul of section 9 should a court later conclude that they lacked the legal grounds to detain at the time. Avoiding a "detention" also brings with it the added benefit of not engaging the informational duties created by subsections 10(a) and 10(b) of the Charter. For example, an individual who is told in express terms why he or she is being detained may very well decide to stop talking, thereby scuttling police efforts to quickly get to the bottom of things.

Our current approach in deciding whether or not a police-citizen encounter is sufficiently coercive to constitute a "detention" leaves the police much room to navigate their difficult responsibilities. It must be frankly acknowledged, however, that at the same time it does very little to protect individuals from unjustified state interferences with their liberty. The purpose of section 9 seems conspicuously absent from the analytical approach currently employed by Canadian courts in deciding whether or not an individual was "detained".

If protecting individuals from unjustified state intrusions on freedom of movement is our actual goal, an approach that openly acknowledges and accounts for the profound power disparity that exists between the police and most individuals seems far more appropriate.

When an individual remains in the presence of the police while questions are being posed, he or she should be truly *choosing* to do so. Allowing such encounters to remain steeped in uncertainty may do a great deal to facilitate the important functions of law enforcement, but does very little to ensure that such encounters are truly voluntary.

In the context of search and seizure, our courts have demonstrated a clear reluctance to characterize an individual's acquiescence to police authority as truly "consensual" unless the individual said to be consenting is aware of the right to refuse and is also aware of the potential

consequences of giving up the right.[154] This high standard for waiver does not necessarily impose an informational duty on law enforcement. It does mean, however, that factual ambiguity surrounding the circumstances of a "consent" search will often mean that the waiver of the right will be considered wanting. As a result, if the police wish to ensure that "consent" is subsequently determined to be valid they will take the time to inform the target of his or her right to refuse.

In stark contrast, ambiguity about an individual's right to walk away has tended to weigh against a finding of "detention". If a purposive reading of section 9 is what the Charter actually requires,[155] then a different approach to evaluating whether or not an encounter between an individual and the police qualifies as a "detention" seems in order. If we truly want to protect individuals from unjustified state interferences with their liberty, then the police should be expected to make clear to individuals the *true* nature of their interactions.

I do not mean to suggest that police officers should be required to preface every interaction with members of the public with a formal legal caution, for example, by explaining that "it is my duty to inform you that you have the right to walk away". Nevertheless, police officers should be expected to use language that makes clear to those with whom they are interacting when an interaction is in fact voluntary. If a police officer fails to use permissive language that would make apparent the option to refuse[156] or says nothing at all, then the subject's acquiescence should be characterized for what it most probably is: compelled, a "detention" for Charter purposes.

## IV. CONCLUSION

Although the Charter has led to many positive changes within the Canadian criminal justice system, section 9 has so far proven to be an unfortunate exception. The key concepts that are central to the protection

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[154] See *R. v. Borden*, [1994] S.C.J. No. 82, [1994] 3 S.C.R. 145, at 161 (S.C.C.); *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615, at 624 (S.C.C.); *R. v. Wills*, [1992] O.J. No. 294, 70 C.C.C. (3d) 529, at 541 (Ont. C.A.).

[155] See notes 53 to 55 and accompanying text.

[156] To provide some concrete examples of what I have in mind, language like: "excuse me, would you mind coming over here" or "would it be alright if I had a word with you", or "it would really assist me if I could ask you some questions, would you be willing to answer them?" would all seem sufficient to bring home to the individual involved that his or her cooperation is being requested and not required.

afforded by this constitutional guarantee, the meaning of "detention" and "arbitrarily" have both been steeped in considerable confusion.

The source of that confusion would seem to be the absence of a seminal judgment interpreting the guarantee from our Supreme Court. Because of this, the purpose of section 9 has never consciously formed a part of how the guarantee has been read. The result has been a rather legalistic approach, with lower courts interpreting and applying its two key terms ("detention" and "arbitrarily") in an extraordinarily narrow and restrictive fashion.

A purposive approach to the interpretation of the guarantee reveals that its object is relatively straightforward: protecting the individual from unjustified state interference with his or her liberty. Realizing the potential of section 9 depends on revisiting how its key terms are read in light of that overarching objective.

First, a purposive reading of "arbitrarily" would seem to dictate that any unlawful interference with individual liberty should be considered arbitrary and a violation of section 9. To the extent that this might result in violations of section 9 based on minor or technical breaches of the law, the appropriate place to deal with such mitigating circumstances would seem to be section 24(2). The time has come to recognize that under our constitutional system, legal authority is an essential precondition for any interference with individual liberty. The flipside of this long-standing constitutional requirement is that when liberty is interfered with in the absence of legal authority, the detention that results is necessarily unconstitutional.

In addition, we must also begin to recognize that the important purpose of section 9 is not served when uncertainty about an individual's status is allowed to control the constitutional outcome. If we are going to take seriously the right to be free from unjustified state interference with our liberty, then we must begin to insist on greater clarity in encounters between citizens and police. Ambiguous encounters should be labelled just as Justice Le Dain suggested, for what they most likely are, "detentions".