

WHAT TO MENTION ABOUT DETENTION: HOW TO USE PURPOSE TO UNDERSTAND AND APPLY DETENTION-BASED *CHARTER* RIGHTS

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This paper is about the important contribution made by the recognition in R. v. Grant of an integrated purposive theory for the Charter's detention and arbitrariness concept.

Specifically, the Grant Court identified a choice-based purpose underlying the detention concept. It held that detention-based Charter rights exist, firstly, to protect the liberty of individuals to choose their movements and actions free from state interference, and secondly, to preserve those choices that the law confers on individuals to control their own movements or actions where state agents have taken their liberty away. Understanding that this is the mission of the detention concepts reveals the coherence of existing detention authority. It also provides guidance on how to resolve difficult, fact-dependent decisions such as whether psychological detention occurred.

Meanwhile the Grant Court used the concept of arbitrariness to identify when a detention that does occur will be prima facie justified. Significantly, it held that the purpose of the arbitrariness concept is to ensure that detentions will be prima facie constitutional only if they comply with the principles of fundamental justice, including the principle of legality. A detention that is not supported by law will breach that principle and therefore be arbitrary. More simply put, an illegal detention is an arbitrary detention. Even where a detention is supported by law, section 9 will be violated if the law permitting the detention does not advance state interests (contrary to the "principle of arbitrariness") or confers more authority than needed to advance those state interests that the law does try to pursue (contrary to the "principle of overbreadth"). Tying arbitrariness to principles of fundamental justice in this way not only furnishes a conceptual foundation for the existing law, it should also guide decisions on difficult questions of investigative detention and the constitutional validity of legislation authorizing detention. These same principles also provide the avenue for using section 9 of the Charter to ensure that state conduct associated with otherwise legal detentions is appropriate.

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Simply put, this paper seeks to demonstrate how an understanding of these purposes as explained in R. v. Grant provides the key to the proper understanding and proper application of the law of detention.

Le présent article porte sur l'importance de la reconnaissance par la Cour, dans l'arrêt R. c. Grant, d'une théorie téléologique intégrale relative aux notions de « détention » et d'« arbitraire » prévues par la Charte.

Plus particulièrement, la Cour, dans l'affaire Grant, a défini un objectif fondé sur le choix qui sous-tend la notion de détention. Elle a statué que les droits relatifs à la détention prévus à la Charte existent, tout d'abord, pour protéger la liberté des personnes de choisir leurs gestes et actions sans interférence de la part de l'État. Ensuite, ces droits existent pour préserver les choix conférés aux individus par la loi afin que ces derniers soient en mesure de contrôler leurs propres gestes ou actions dans les cas où ils sont privés de leur liberté par des agents de l'État. Une meilleure compréhension de la raison d'être des notions sous-tendant la détention laisse entrevoir la cohérence de l'autorité existante en matière de détention. Elle fournit aussi des principes directeurs dans le cadre d'affaires difficiles à trancher, reposant sur des questions de fait, telles l'existence ou non d'une détention psychologique.

En même temps, la Cour, dans l'affaire Grant, s'est fondée sur la notion de l'arbitraire pour déterminer si une détention est justifiée à première vue. Plus important encore, la Cour a statué que l'objectif de la notion de l'arbitraire est de veiller à ce que les détentions soient jugées constitutionnelles à première vue seulement si elles se conforment aux principes de justice fondamentale, notamment le principe de la légalité. La détention qui ne respecte pas la loi est en violation de ce principe et, en conséquence, arbitraire. De façon plus simple, une détention illégale équivaut à une détention arbitraire. Même dans les cas de détentions effectuées conformément à la loi, il y a violation de l'article 9 de la Charte si la loi permettant la détention ne favorise pas les intérêts de l'État (contrairement au « principe de l'arbitraire ») ou si la loi confère une plus grande autorité que nécessaire pour faire avancer les intérêts de l'État visés par la loi (contrairement au principe de « portée excessive »). Le fait de rattacher la notion de l'arbitraire aux principes de justice fondamentale de cette façon fournit non seulement une base conceptuelle de la loi existante, mais sert aussi de guide pour trancher des questions difficiles relatives à la détention aux fins d'enquête et à la validité constitutionnelle des

textes de loi autorisant la détention. Les mêmes principes permettent aussi de se fonder sur l'article 9 de la Charte afin de garantir que la conduite de l'État, dans le cadre d'une détention d'autre part légale, soit appropriée.

Bref, cet article cherche à démontrer que la clé d'une bonne compréhension et d'une application adéquate du droit en matière de détention repose sur le fait de bien saisir ces objectifs, tels qu'ils sont énoncés dans l'affaire R. c. Grant.

1. Introduction

The concept of “detention” is a trigger for two kinds of *Charter* rights. Section 9, the right to be free from arbitrary detention, serves to limit those occasions when state agents can take control over the person of the subject. Section 10 spells out the *Charter* rights that persons who have been taken control of by the state are entitled to enjoy.¹ Even though the *Charter* is to be interpreted purposively, and even though these detention-based rights have frequently been litigated, prior to the decision in *R. v. Grant*² in 2009 the Supreme Court of Canada had not defined the underlying purposes of the law of detention in a way which would assist in the interpretation and application of the law. Indeed, in the case of section 9, the Court was rightly criticized for having failed to describe section 9’s function at all.³ Nor had the law developed an integrated concept of detention that captures each of the related but diverse purposes of section 9 and 10; those courts and commentators who had considered the purpose of the *Charter*’s detention protection tended to focus solely on section 10(b), the right to counsel.⁴ *Grant* has changed all of this. In order to settle outstanding controversies surrounding the law of detention,

¹ Specifically, section 10(a) confers the right to be advised of the reason for detention, section 10(c) the right to apply for release from detention, and section 10(b) the right to consult counsel.

² 2009 SCC 32, [2009] 2 S.C.R. 353 [*Grant*].

³ James Stribopoulos, “The Forgotten Right: Section 9 of the Charter, Its Purpose and Meaning” in Jamie Cameron and James Stribopoulos, eds., *The Charter and Criminal Justice: Twenty Five Years Later* (Toronto: LexisNexis, 2008) at 211.

⁴ See e.g. Stephen Coughlan, *Criminal Procedure* (Toronto: Irwin Law, 2008) at 127 [Coughlan, *Criminal Procedure*]: “The primary purpose of granting *Charter* rights on detention, and in particular the right to counsel, is to protect the detainee from possible self-incrimination.” See generally Steven Penney, “Triggering the Right to Counsel: ‘Detention’ and Section 10 of the Charter” in Cameron and Stribopoulos, *supra* note 3 at 271.

the Court adopted a purposive approach.⁵ The guidance this has provided has succeeded in producing a tidier body of doctrine that can now be explained more coherently than was once the case. More importantly, those principles can be used to assist in the application of the law, which by design often requires a close, contextual analysis of the facts and the exercise of judgment about matters of degree.

2. Using Purpose to Understand the Meaning of Detention

Prior to *Grant* there was no articulated generic definition for detention. The Court has now offered one that applies to both sections 9 and 10:

Detention under ss.9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint.⁶

This definition is, of course, helpful, but in truth it masks the important fact that detention can take three distinct forms: physical restraint; legal compulsion; and psychological detention, each of which has its own meaning that must be applied independently of that generic definition. These three categories of detention were identified a quarter century ago,⁷ but the purposive interpretation achieved in *Grant* has now modified the meaning of detention, most notably in the case of "psychological detention." The place to begin before discussing those categories is with an examination of the purposes now ascribed to the *Charter's* detention-based protection.

3. The Purpose of Constitutional Detention Protection

The challenge of the *Grant* Court was to find a way of understanding the detention concept so it would advance the needs of both sections 9 and 10(b). There are competing views about how this can best be done. Ultimately the *Grant* Court rejected more liberty-regarding conceptions of the purpose of the *Charter's* detention-based protection in favour of a more circumscribed concept that is based on the right to choose. Specifically, it held that the detention-based rights exist, firstly, to protect

⁵ *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460 [*Suberu*] at 474: "In *Grant* [the Court] adopted a purposive approach the definition of detention."

⁶ *Grant*, *supra* note 2 at 384-85.

⁷ This structure was developed in the right to counsel case of *R. v. Therens*, [1985] 1 S.C.R. 613 at 644, 18 D.L.R. (4th) 655 [*Therens* cited to S.C.R.], and summarized into principles in *R. v. Thomsen*, [1988] 1 S.C.R. 640 at 649, 40 C.C.C. (3d) 411 [*Thomsen* cited to S.C.R.]. It was in *R. v. Hufsky*, [1988] 1 S.C.R. 621 at 623, 40 C.C.C. (3d) 398 [*Hufsky* cited to S.C.R.] that the Court adopted the same definition of detention for section 9 as it had been using in section 10.

the liberty of individuals to control their own movements and actions free from state interference unless fundamentally just laws provide otherwise; and secondly, to preserve those choices that the law does confer on individuals to control their own movements or actions where state agents have taken away their liberty.

The more liberty-regarding ideas about the role of sections 9 and 10(b) that did not find favour with the *Grant* Court are built, in part, on the broad notion that “the individual has a constitutional right to be left alone unless the police have reasonable and probable grounds⁸ that the individual has committed an offence.”⁹ Assigning this role to the

⁸ The reference to “reasonable and probable grounds” in this statement of principle has to be qualified. In both the search and seizure and detention contexts “reasonable suspicion” standards have been accepted in a variety of situations where individuals are not left alone by the state. In the search context this holds true for customs searches (*R. v. Monney*, [1999] 1 S.C.R. 652, 171 D.L.R. (4th) 1); administrative searches (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568); and a number of statutory search powers, including, for example, s. 254(2) (roadside breath and physical co-ordination tests), and s. 487.013 (production orders for financial or commercial information). “Reasonable suspicion” is also the standard for investigative detention (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 [*Mann*]), and the measure for when vehicles can be detained without warrant for the purposes of criminal investigation (*R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494 [*Harrison*]; *R. v. Simpson* (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 (C.A.) [*Simpson*]).

⁹ *R. v. Belnavis*, [1997] 3 S.C.R. 341 at 374-75, 151 D.L.R. (4th) 443, *per* La Forest J. dissenting. La Forest J. dissented in the result in that case, but this statement of principle was not of his own making. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159-60, 11 D.L.R. (4th) 641, Dickson J. spoke of how section 8, the *Charter’s* search and seizure provision, requires “an assessment [to be] made as to whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals, notably those of law enforcement,” and he established for the Court a *prima facie* “reasonable and probable grounds” standard for searches and seizures. La Forest J. rightly remarked in *R. v. Edwards*, [1996] 1 S.C.R. 128 at 151-52, 132 D.L.R. (4th) 31: “The public interest in being left alone, ‘to be secure against unreasonable search or seizure,’ has in fact been determined or asserted in defining, the application of s.8 in a number of cases of this court.” In *Mann*, *supra* note 8 at 69, Iacobucci J. offered a more modest application of the same basic notion in the arbitrary detention context. He commented, “Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly the state) may act only to the extent that they are empowered to do so by law.” As Steve Coughlan points out, this is a recognition that liberty is the default condition, and that state conduct that intrudes upon liberty is the exception that must be grounded in law; see “Arbitrary Detention: Whither – or Wither – Section 9” in Cameron and Stribopolous, *supra* note 3 at 154 [Coughlan, “Arbitrary Detention”]. A corollary not articulated by Professor Coughlan is that absent a law authorizing demands or directions by state agents, individuals have the right to be left alone.

detention concept would have promised extensive protection, potentially even preventing the police from making any demands or giving any directions in order to investigate suspects they do not arrest, including by asking questions. The view that this would have been a fitting purpose underlying the detention concept is not entirely without merit. If this notion of liberty – the right to be left alone – applies in the section 8 search context where it is most commonly expressed, it is reasonable to believe that it is also the protected interest of detention-based rights. After all, search and seizure is often about privacy in places or things whereas detention-based rights are about state interference directly with the person, a context where one would expect an equal or even commensurately greater degree of liberty protection.

Augmenting the general idea that the *Charter*'s detention-based provisions should protect the right of individuals to be left alone by the state is the understandable sense that it is unfair for police officers to exploit the ignorance of suspects about their right to silence by questioning them without advising them of their rights. If the mission of section 10(b)'s right to counsel is to provide individuals with the legal information needed to preserve and enjoy their rights, an aggressive interpretation of detention should arguably be taken.

Not surprisingly this kind of thinking inspired some to contend that those provisions – at the very least section 10(b)'s right to counsel – should be triggered whenever police officers question or take other investigative steps against those they consider to be suspects.¹⁰ After all, suspects who are being questioned or importuned for information are most assuredly not being left alone by the state, and they are sorely in need of the legal advice about their rights. Yet, as indicated, the *Grant* Court did not bite,¹¹ preferring instead to embrace the more modest mission for sections 9 and 10(b) of protecting the notion of “choice.”

¹⁰ See e.g. Don Stuart, “Charter Standards for Investigative Powers: Have the Courts Got the Balance Right” in Cameron and Stribopolous, *supra* note 3 at 18: “The concern would be addressed by an alternative test that detention also occurs whenever the police suspect the person and attempt to obtain incriminating information.” *R. v. Hawkins*, 102 Nfld. & P.E.I.R. 91, 72 C.C.C. (3d) 524 (Nfld. C.A.) [*Hawkins*], rev'd [1993] 2 S.C.R. 157, had advocated such an approach. Steven Penney does so as well; see Penney. *supra* note 3 at 284.

¹¹ *Grant*, *supra* note 2 at 382:

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

4. Choice and Section 9

The notion of “choice” is not alluded to in the *Grant* Court’s generic description of the purpose of section 9; specifically, the Court introduced its discussion of purpose by saying that “[t]he purpose of section 9, broadly put, is to protect individual liberty from unjustified state intrusion.”¹² On its own, however, this umbrella description of purpose has no normative value and is therefore incapable of giving direction as to how the detention concept is to be understood. It says no more than that constitutional protection is a matter of balance,¹³ without offering direction on what it is that requires balancing. It provides no guidance as to what the relevant “liberty” interest consists of, and no direction about when the level of state intrusion is justifiable. The instructive discussion of section 9’s purpose is therefore to be found in the *Grant* Court’s elaboration where it unpacks its generic mission statement by invoking the concept of choice, and gives guidance on when intrusion on that choice may be justifiable. Specifically, on the liberty side of the equation the *Grant* Court invoked the *grundnorm* of the legal rights provisions of the *Charter* – that it is the “notion of choice that underlies our conception of liberty.”¹⁴ Understood contextually, section 9 contributes to the protection of choice by preserving the ability of individuals to make decisions of fundamental importance free from unjustifiable state interference with the dominion over one’s own body. As will be explained, state intrusion into that right to choose is justifiable if undertaken in accordance with the principles of fundamental justice. In effect, the mission of section 9 is to provide a measure of protection to the choice of individuals to “walk away” or to leave when confronted by state agents or state authority. Suffice it to say that nothing in section 9 prevents overtures by state agents that do not deprive the individual of their ability to exercise dominion over their body by choosing when to leave or what to do. What is given protection, essentially, is the right to choose whether to stay or leave when interacting with state agents.

¹² *Ibid.* at 374

¹³ The Court does not shy away from making reference in its reasoning to the normatively empty concept of balance; see *ibid.* at 376:

By setting limits on the power of the state and imposing obligations with regard to the detained person through the concept of detention, the *Charter* seeks to affect a balance between the interests of the detained individual and those of the state.

Such references should be understood not as purposive descriptions, but rather as a general recognition that the needs of fairness and justice collide and need to be brokered when choosing how the law will be defined.

¹⁴ *Ibid.* at 377-78.

5. Purpose and Section 10

The right to be advised of the reason for one's detention in section 10(a) and the right of those who are detained to challenge the legality of their detention in section 10(c) are also about choice. Together they provide mechanisms through which those choices that are available to a person whose liberty has been compromised can be identified and protected judicially. Section 10(a) does this by requiring that information about the reason for the detention be furnished, and section 10(c) contributes by ensuring access to judicial review.

The *Grant* majority also sees section 10(b) as advancing "choice," albeit in a different sense than in the case of section 9. When someone has been taken control of by the state, the right to counsel is

designed to ensure that the person whose liberty has been curtailed retains an informed and effective *choice* whether to speak to the authorities, consistent with the overarching principle against self-incrimination. They also ensure that the person who is under the control of the state be afforded an opportunity to seek legal advice in order to assist in regaining their liberty.¹⁵

It is important when reading this passage to pay close regard to the expressed link between an "informed and effective choice whether to speak to authorities," on the one hand, and the "curtailment of liberty," on the other. This link reinforces the crucial point that section 10(b) does not offer a self-standing right to counsel to everyone who is approached for information while under investigation. As the language of section 10(b) makes clear, the relevant constitutional right to counsel is triggered by "detention." This observation may seem trite,¹⁶ but its importance can be observed by examining the way the *Charter* reacts to self-incrimination in

¹⁵ *Ibid.* at 375-76. In *Thomsen*, *supra* note 7 at 649, the concern was that detention be interpreted to ensure that those "who may reasonably require the assistance of counsel but might be prevented or impeded from" doing so can secure that assistance. In *R. v. Bartle*, [1994] 3 S.C.R. 173 at 191, 118 D.L.R. (4th) 83 [*Bartle*], the Court described the purpose of section 10(b) as "providing detainees with an opportunity to be informed of their rights and obligations [given] their immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty ... [in order to] ensure that persons who are arrested or detained are treated fairly." The emphasis on "choice" is new in *Grant* and, while it changes little of substance, it assists in integrating the underlying role of sections 9 and 10.

¹⁶ It is certainly not new. As the foregoing passage from *Bartle*, *ibid.* reveals, the Court spoke of the need to get legal advice for those who are disadvantaged because of detention.

non-detention as opposed to detention settings. This is an informative exercise because it has been said that the primary role played by section 10(b)'s right to counsel in application is the protection of the right to silence.¹⁷ Even though the right to silence is enjoyed by individuals whether detained or not, section 10(b) applies only to those who have been detained. It does not matter whether non-detained individuals may be at high risk of self-incrimination without legal advice. Section 10(b) is of no use. Indeed, in non-detention settings the *Charter* allows undercover operatives to dupe non-detained individuals into speaking about their guilt, something it does not tolerate where individuals are detained.¹⁸

Even though this limited contribution for section 10(b) circumscribes its ability to perform effectively its primary function of protecting the right to silence, there is an underlying logic. Simply put, there is no need to extend the constitutional right to counsel to suspects who are not detained. Given their freedom of movement, non-detained suspects are *ex hypothesi* free to leave and access counsel whenever they wish; there is therefore no need to develop an affirmative *Charter* right to make consultation with counsel possible. Moreover, those who are not detained are not subject to the coercive psychological effects of detention that can imperil the ability to exercise voluntary choice over whether to speak. It is believed that they are not as vulnerable to losing choice over whether to speak about their criminal conduct as those who have been taken control of by the state.¹⁹

Whether the product of such logic or the progeny of a simple policy choice about how to best balance individual rights with the public interest in effective law enforcement, what is clear is that neither the principles of fundamental justice in general nor the right to counsel in section 10(b) in particular exist to ensure that suspects have legal advice

¹⁷ *Ibid.*

¹⁸ Under section 7, the bar on the police using undercover techniques to elicit incriminating admissions from the accused applies solely in cases of detention; see *R. v. Hebert*, [1990] 2 S.C.R. 151, 77 C.R. (3d) 145. The voluntariness rule which limits the admission of statements does not even apply to non-detained individuals who are duped into thinking that the undercover officers they are speaking to are criminals; see *R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27, aff'g 2003 ABCA 307, (2004) 28 Alta. L.R. (4th) 92.

¹⁹ As the Hon. Justice Casey Hill notes in "Investigative Detention: A Search/Seizure by Any Other Name?" in Cameron and Stribopolous, *supra* note 3 at 203, "As a matter of common sense, a detained suspect is more likely than an undetained suspect to believe he or she is compelled to respond to police questioning." Again, see *Bartle*, *supra* note 14, where this theory is expressed.

during police investigations; the relevant role of section 10(b) is to ensure that those who are detained have the means to secure legal advice given that they cannot walk away and get it even though they are particularly vulnerable to losing their ability to choose whether to cooperate with the police.

In sum, the constitutional rights related to “detention” do not exist to protect any general right of individuals to be left alone by the state, or to give access to legal information to all who might need it. The detention-based rights exist, firstly, to protect the liberty of individuals to control their own movements and actions free from state interference unless fundamentally just laws provide otherwise and secondly, to preserve those choices that the law does confer on individuals to control their own movements or actions where state agents have taken away their liberty.

6. Purpose and the Degree of Intrusion: The “Significance” Requirement

Before examining how this general statement of purpose informs and influences the three forms of detention, it should be appreciated that the *Grant* Court affirmed that “[d]etention” requires *significant* deprivation of liberty²⁰ or “*significant* physical or psychological restraint.”²¹ The Court reasoned that the purpose underlying the detention concept – the notion of loss of the choice to control movements and actions – necessarily contemplates a meaningful degree of intrusion. “Detention” is not, therefore, about merely being “delayed” or “kept waiting.” Someone held up in traffic by an officer’s direction at an accident scene has not lost meaningful choice over the ability to control their movements. Nor has someone who is inconvenienced when police take control of the situation during a medical emergency²² or when bystanders to an accident or crime are approached for statements²³ or when routine questioning occurs at a customs checkpoint.²⁴ To conclude that such “trivial or insignificant interference[s]” with liberty attract *Charter* protections would “overshoot the mark.” It would not suit the purposes of either section 9 or 10 to find that transitory interferences of

²⁰ *Grant*, supra note 2 at 377-78.

²¹ *Ibid.* at 384-85 [emphasis added].

²² *Ibid.* at 381. The Court used the “medical emergency” example but did not offer a “legal emergency” one. This is no doubt because detentions may well arise when control is taken of a group of individuals during an emergency criminal investigation; see *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725 [*Clayton*].

²³ *Grant*, *ibid.* at 381.

²⁴ *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at 1074, 101 D.L.R. (4th) 654.

no particularized importance to the subject, or general inconvenience as the result of delays caused by officers performing their duties, constitute detentions.²⁵

Although the Court has offered the foregoing examples, it has to be recognized that standing on its own, the general admonition that there must be “significant deprivations of liberty” offers no clear direction as to the measure of significance required to trigger constitutional protection. Given the desire of the *Grant* Court to arrive at a purposive definition of detention, guidance should be found in the purpose of the detention protections just described. As the *Grant* Court commented in explaining the “significance” requirement, “[o]nly the individual whose liberty is meaningfully constrained has genuine need of the additional rights accorded by the *Charter* to people in that situation.”²⁶ Unless the demand or direction either truly interferes with the freedom to choose or control one’s movements, or is of such nature as to make legal advice inaccessible, the purpose of the *Charter* protection would not be served by calling what happened a “detention.” On the other hand, if *either* of those conditions pertains the law should recognize that a detention exists. The influence of these ideas can be seen in each of the three forms of detention.

7. Purpose and the Forms of Detention

A) Significant Physical Restraint

Physical restraint is the paradigm form of detention. If a state agent actually interferes physically with the individual’s freedom of movement in a non-transitory way there will have been a detention. Arrest, in turn, is the paradigm form of physical restraint since arrest, by definition, involves the assumption of control over the person by the party affecting the arrest. Whether the arrest involves physical force, symbolic touching coupled with words of arrest, or words of arrest followed by submission,²⁷ the effect is the same. The officer is taking control over the physical person of the subject, and freedom is surrendered or lost.²⁸

²⁵ *Grant*, *supra* note 2 at 377-78. As the Court pointed out, the language of the provisions also support the need for significant restraint. Section 9 couples “detention” with “imprisonment,” terms which when taken together connote a significant interference with liberty. Even section 10 links “detention” with “arrest,” again suggesting a meaningful assumption of control over the person by the state.

²⁶ *Ibid.* at 377.

²⁷ These are the three forms that an arrest can take; see *R. v. Whitfield*, [1970] S.C.R. 46, 7 D.L.R. (3d) 97.

²⁸ In an oft-cited passage in *Thomsen*, *supra* note 7 at 649, the Court spoke of

Properly understood, physical restraint also occurs when a state agent is interacting with a subject who the state agent has decided to arrest, even though the actual arrest has yet to take place. This is because where an officer has resolved to arrest a subject, the subject's "option to walk away"²⁹ has been removed; if he or she tries to leave they will be prevented from doing so. In *R. v. Suberu* "it was [when] the officer received additional information indicating that Mr. Suberu was probably involved in the commission of an offence and determined that he could not let him leave, that the detention crystallized...."³⁰

Physical restraint can, of course, occur short of formal or even pending arrest, such as by handcuffing subjects without arresting them, or placing them in locked rooms or locked police vehicles. Drivers whose automobiles are pulled over by the police are detained, since by signaling the vehicle to stop the officer is impeding the right to proceed.³¹ Those against whom DNA blood or bodily sample warrants are executed are also physically restrained since those warrants are judicial orders authorizing the police to take control over the person for forensic purposes, and they inherently require physical restraint or submission of the person.³² Indeed, as cases of submission to words of arrest illustrate, significant physical restraint can also occur as a result of threats of physical force that produce compliance.³³

detention as a "restraint of liberty other than arrest" but this comment must be viewed with caution. The Court was speaking in the context of section 10 where the terms "arrest" and "detention" are both used. As Professor Quigley explains, "Arrest is a form of detention even though it is mentioned separately in section 10 of the Charter;" see Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed., looseleaf (Toronto: Carswell, 2005) at Chapter 5.2. Section 9 does not distinguish between arrest and detention, and in that context detention is understood to include arrest; see *R. v. Storrey*, [1990] 1 S.C.R. 241 at 251-52, 53 C.C.C. (3d) 316 [*Storrey*]. This is not to say, of course, that all detentions are arrests. The point requires making because, in *R. v. Campbell*, 2003 MBCA 76, 175 C.C.C. (3d) 452 at 467-68, the Manitoba Court of Appeal held that section 9 was not violated when a subject was arrested unlawfully because the police had the lawful authority to conduct an investigative detention. As James Stribopoulos, points out, the man was not simply detained; he was arrested and his detention fell to be determined by the rules fitting that form of detention; see Stribopoulos, *supra* note 3 at 222-23.

²⁹ This is an expression found in *Grant*, *supra* note 2 at 374-75.

³⁰ *Suberu*, *supra* note 5 at 468.

³¹ *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3 at 20 [*Orbanski*].

³² *Criminal Code*, R.S.C. 1985, c. C-46, ss. 487.05, 487.06, 487.071.

³³ In *Therens*, *supra* note 7 at 644, Le Dain J. implicitly recognized this. When explaining that there are other forms of detention that do not require physical detention he commented, "Detention may be affected without the application or *threat* of application of physical restraint [emphasis added]."

In keeping with the notion that detentions involve significant enough intrusions to cause a meaningful loss of control over one's movements, even physical forms of detention must be "significant" to warrant protection.³⁴ Trivial or transient physical interference will not suffice. Put another way, there must be actual "physical *restraint*." It has been suggested, for example, that "if a police officer grasps an individual's arm ... a [physical] detention would seem to result."³⁵ Whether this is true in fact depends on the circumstances. In *Grant*, the majority of the Court commented that the act of placing a hand on an individual's arm or shoulder may or may not support a detention, depending on whether the touching is fleeting or sustained and on all other relevant circumstances.³⁶ Notably, the majority raised this point while discussing "psychological detention," a concept about to be described that focuses not on the reality of what is happening but on what the subject reasonably understands to be happening. If actual physical control has been taken over the person's freedom to choose his or her movements, then there will be physical restraint. The impact of transient forms of physical contact short of a clear assertion of dominion over the body of the individual by the state, however, should be considered under the "psychological detention" category.

"Significant physical restraint" serves perfectly the purposes articulated for sections 9 and 10. Where meaningful control is taken over a person, choice is gone. Moreover, the need for a constitutional right to secure legal advice to empower the detainee to learn about their legal choices – their rights and obligations – is obvious given that they have been taken control of by the state and, *ex hypothesi*, are not free to leave to obtain it.

B) Legal Compulsion

The concept of legal compulsion is straightforward. If a law requires an individual to comply with the demand or direction of a police officer, those who are subjected to such demands or directions are detained. As the Court put it in *R. v. Thomsen*:³⁷

³⁴ *Mann*, *supra* note 8 at 71.

³⁵ Stribopoulos, *supra* note 3 at 235.

³⁶ *Grant*, *supra* note 2 at 384. Indeed, McLachlin C.J.C. and Charron J. would analyze some such cases as instances of psychological detention.

³⁷ *Thomsen*, *supra* note 7 at 649. The reference to "a demand or direction ... which prevents or impedes access to counsel" must be read with caution. Even if the accused is not physically prevented from making a telephone call he may still be detained; see *R. v. Schmutz*, [1990] 1 S.C.R. 398, 53 C.C.C. (3d) 556. See also Coughlan, *Criminal Procedure*, *supra* note 4 at 127.

When a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel [that person is detained].... The necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction.

In keeping with the practice of not capturing trivial or insignificant encounters, the *Grant* majority referred to “restrictive or coercive” demands;³⁸ a legal demand or direction which does not meaningfully restrict the choice of movement of the subject is not a detention. For example, a police officer who gives a driver twenty-four hours to attend at the police station with a driver’s license and proof of insurance so that the driver can avoid being ticketed for not possessing those documents while operating the motor vehicle is surely not detaining the driver. By contrast, persons subject to roadside³⁹ and evidential breath demands,⁴⁰ or to blood demands, or to demands to perform “physical coordination tests,”⁴¹ or who are directed to participate in drug evaluations conducted by a qualified “evaluating officer,”⁴² are “detained” because complying with these demands is restrictive, non-trivial and under the immediate control of the officer. Persons made subject to such demands are forced to surrender control over their movements while they comply. Moreover, such demands are coercive. After all, “it is not realistic to speak of a person who is liable to arrest and prosecution for refusal to comply with a demand which a peace officer is empowered by statute to make as being free to refuse to comply.”⁴³

³⁸ *Grant*, *supra* note 2 at 378-79.

³⁹ *Thomsen*, *supra* note 7 at 649.

⁴⁰ *Therens*, *supra* note 7.

⁴¹ Once optional (see *Orbanski*, *supra* note 31), subjects are now obliged to perform sobriety tests demanded by peace officers: *Criminal Code*, *supra* note 32, s.19.

⁴² *Criminal Code*, *ibid.*, s. 254(3.3).

⁴³ *Therens*, *supra* note 7 at 643, quoted in *Grant*, *supra* note 2 at 380-81. This latter point is captured by the caveat that is usually expressed as part of the legal detention test, namely, that the “demand or direction ... have significant legal consequences.” This precondition was coined in the context of section 10(b) jurisprudence and is no doubt intended to mesh with the underlying purpose of that provision – as indicated, if the demand or direction has significant legal consequences legal advice is needed to learn about legal obligations and rights. Analytically, this “significant legal consequence” caveat is unimportant to the underlying purpose of section 9 and should not be required; to fulfill its purpose the detention concept should be triggered by any demand or direction that removes the right to choose or control one’s movements, full stop. In fact, the “significant legal consequence” caveat has always been redundant; by its nature legal compulsion can exist only where there is a legal obligation to comply, and legal obligations always carry consequences for disobedience. The bottom line is that anyone who is subject to a legally enforceable demand or direction by a peace

It is evident that the “legal compulsion” detention concept is well-structured to meet the underlying mission of sections 9 and 10. Those who are legally obliged to comply lose control over their freedom of movement and are in obvious need of legal advice about what their legal rights and obligations are.

C) Psychological Detention

As the label suggests, “psychological detention” applies where detention is not real but is instead based on mistaken beliefs about compulsion and freedom of movement.⁴⁴ A complete description of psychological detention can fairly be expressed as follows:

Psychological detention is established where [there is no lawful authority requiring the subject to comply with a demand or direction by a state agent, but the subject complies believing that they are compelled to do so, and circumstances known to them are such that] “a reasonable person in their position would conclude by reason of the state conduct that he or she had no choice but to comply.”⁴⁵

As this definition suggests, “psychological detention” has both a subjective component consisting of the finding that the subject complied with the demand or direction because they felt compelled to do so, and an objective component that requires the belief by the subject to be tested against standards of reasonableness. As will be explained, the objective component operates using a “modified-objective standard” that takes into account those personal characteristics and experiences of the subject

officer that demands anything more than transient or incidental control over their movements will be detained. There is no need to attempt to measure the legal consequences of non-compliance.

⁴⁴ Curiously, the *Grant* Court treats legal compulsion – cases where there really is a legal obligation to comply that I have just described above – as a form of psychological detention; see *Grant, ibid.* at 383-85. So, too, does Penney, *supra* note 3 at 274. This is curious given that the loss of freedom in cases of legal compulsion comes from the law and not from any psychological state. Perhaps the thinking is that individuals who are faced with legal compulsion retain the choice to refuse to break the law but that, psychologically, fear of the consequences of doing so effectively deprives them of that choice. In the end, categorization does not matter. Still, it is ambiguous to have a general category of “psychological detention” that includes “legal compulsion” and “psychological detention.” It is analytically clearer to confine the “psychological detention” label to the form of detention about to be described,

⁴⁵ The portion of this description of psychological detention framed in quotations is found in *Grant, ibid.* at 384-85. As explained below, the balance of the definition expresses components of psychological detention that are arguably implicit, even though not expressed by the *Grant* Court.

that are relevant to how the police conduct would be understood by the subject. Only facts known to the subject are to be considered; the intentions or perspectives of the police that are concealed from the subject can have no bearing on a finding of psychological detention.

As can be seen, the concept of “psychological detention” turns on findings of fact – the factual state of belief on the part of the subject, and the factual reality of what reasonable people in the position of the subject would believe. As a result, determinations of “psychological detention” are not to be made as matters of policy based on broader considerations about whether *Charter* obligations should be operate in a particular case; policy has already done its work in defining the psychological detention concept, which will operate as the trigger for *Charter* rights in many cases. This is because early in the development of the concept of psychological detention, in a passage cited with approval by the *Grant* Court, Le Dain J. provided a realistic template for determining the factual reality of what reasonable people tend to do when faced with police demands and directions. He said:

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 when there is in fact a lack of statutory or common law authority for the demand or direction ... 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.⁴⁶

Accordingly, findings of psychological detention should not be rare. Given the layers of complexity in the concept, however, determinations about psychological detention will not be easy. It is the most complex of the detention concepts, and the most difficult to apply.

1) The Subjective Component of Psychological Detention: Is There Really One?

Although *Grant* provides tremendous guidance on a number of important points, the challenges posed by the “psychological detention” concept have not been made easier by an important ambiguity created by *Grant* and its companion decision, *Suberu*.⁴⁷ Specifically, is “psychological detention” actually a “subjective/objective” standard that requires both a belief by the subject that he is detained as well as an objective conclusion

⁴⁶ *Therens*, *supra* note 7 at 644, quoted in *Grant*, *ibid.* at 378-79.

⁴⁷ *Suberu*, *supra* note 5.

that a reasonable person would have formed that same belief (as claimed in the definition offered above), or is “psychological detention” in fact a purely objective standard that is disinterested in what the subject actually believed or thought? Unfortunately, the decisions send mixed signals.

For their part, the language and the expressed reasoning in the *Grant* decision lean heavily in favour of a purely objective evaluation that cares not whether the subjects of the putative “detention” thought they were detained, so long as a reasonable person would have formed that conclusion. On those occasions when the *Grant* Court set out the legal standards for “psychological detention,” it did so in purely objective terms. Specifically, it said that “psychological detention is established where ... a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.”⁴⁸ That pure objective standard is repeated throughout the decision, using a formula that pays no regard to what the subject believed.⁴⁹ Indeed, when the *Grant* Court applied the law to the facts of the case all of the discussion was about what reasonable people would conclude. No expressed findings were made about whether young Grant personally complied with the demand or directions of the officers because he actually believed himself to be compelled to do so. Perhaps most significantly, the Court said:

Mr. Grant did not testify, so we do not know what his perceptions of the interaction actually were. However, because the test is a purely objective one, this is not fatal to his argument that there was a detention.⁵⁰

That comment was repeated in generic terms in *Suberu*:

The test is an objective one and the failure of the applicant to testify as to his or her perception is not fatal to the application.⁵¹

All of this appears to mount an imposing case in favour of a purely objective standard inconsistent with the definition of “psychological detention” offered here; after all, what can be clearer in signaling the

⁴⁸ *Grant*, *supra* note 2 at 384-85.

⁴⁹ *Ibid.* at 378-79: “The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person would feel so obliged;” at 379: “The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand;” and at 384-85: “Psychological detention is established either where the individual has a legal obligation to comply with the restrictive demand or direction, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.”

⁵⁰ *Ibid.* at 386-87.

⁵¹ *Supra* note 5 at 476-77.

intention of the Court about what the law is than what the Court says and does? Yet things are not so clear. Indeed, Binnie J. in his concurring decision in *Grant* interpreted the majority of the Court as applying a subjective/objective approach that requires inquiry into the belief's of the accused; "I agree [with the majority]," he said, "there can be no detention unless the liberty of the person stopped is (*or is reasonably perceived by that person to be*) significantly constrained."⁵² There are good reasons for reading the decision of the *Grant* majority as Binnie J. does.

First, prior to *Grant* it was broadly understood that "psychological detention" consisted of "[c]ompliance with a demand or direction of a police officer by a person who reasonably believes that he has no choice to do otherwise."⁵³ Absent a basis for inferring that the subject held such belief, there could be no psychological detention.⁵⁴ It is doubtful the Supreme Court of Canada would have rejected this central subjective belief component of the existing "psychological detention" concept without dealing with it expressly and explaining why it is no longer required.

Second, the Court's point of departure in introducing the concept of "psychological detention" was the following passage from *R. v. Therens*, which appears three times in the majority judgment:

Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.⁵⁵

⁵² *Grant*, *supra* note 2 at 421-22 [emphasis added].

⁵³ *R. v. Moran* (1987), 21 O.A.C. 257, 36 C.C.C.(3d) 225 at 258 (Ont. C.A.) [*Moran* cited to C.C.C.] was prior to *Grant* the leading decision on psychological detention. This is how the law is expressed by legal academics. See e.g. Stuart, *supra* note 3 at 17: "where the person confronted by the police reasonably believes there is no choice but to comply." See also Stribopolous, *supra* note 3 at 235: "Compulsion can also be of a psychological or mental nature... 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.'" And see Penney, *supra* note 3 at 274: "The category of psychological detention [includes] situations where, despite the absence of [legal liability for refusing to comply] they reasonably believe that compliance is mandatory."

⁵⁴ See *R. v. Esposito* (1985), 53 O.R. (2d) 356, 49 C.R. (3d) 193 at 204-05 (C.A.) [*Esposito* cited to C.R.]; *R. v. Bazinet* (1986), 54 O.R. (2d) 129, 25 C.C.C. (3d) 273 at 283 (C.A.); *R. v. D.M.F.*, 1999 ABCA 267, 244 A.R. 146; and *R. v. B.(L.)*, 2007 ONCA 596, 86 O.R. (3d) 730. See *contra*, *Hawkins*, *supra* note 10, a decision that was ultimately reversed: [1993] 2 S.C.R. 157.

⁵⁵ *Therens*, *supra* note 7 at 644, cited in *Grant*, *supra* note 2 at 375 and 377-78.

This passage, of course, features the subjective belief components of the psychological detention concept – that the accused must comply with the demand or direction and do so out of a sense of compulsion. It is most unlikely the Court would have cited this passage with evident approval while intending to reject those core components.

Third, sections 9 and 10 confer *Charter* rights on individuals. As Binnie J. put it in his concurring decision in *Grant*, “it is *that person’s* liberty that is at issue.”⁵⁶ There is little sense in treating those who are not in fact detained and who do not believe themselves to be detained as having been detained simply because a hypothetical reasonable person in their position would form that conclusion. The requirement that there be focus given to the choice of the actual individual rather than solely to the reaction of a hypothetical reasonable person is arguably revealed in the *Grant* majority’s decision when they spoke of detention occurring “where this choice ... has been removed *from the individual ...*”⁵⁷

Finally, and most importantly, the mission of the *Grant* Court was to achieve a purposive interpretation of the detention concept, and the purpose identified for detention-based protections, properly applied, requires the subjective element of psychological detention.

This claim should be non-controversial with *Charter* sections 9, 10(a) and 10(c). Insofar as section 9’s right not to be arbitrarily detained is concerned, subjects who are not physically restrained or legally compelled and who believe that they are free to leave is not in any sense deprived of their ability to choose or control their movements. By the same token, a person who is not in fact detained and who correctly believes he or she can leave is in no need of the section 10(a) right to be advised of the reason for detention, or of the right to apply for the right to be released under section 10(c). Accordingly, the purpose of sections 9, 10(a) and 10(c) would not be advanced by extending the detention definition to those who are not actually detained and who do not believe themselves to be detained, regardless of what a reasonable person in the same situation may have concluded.

Things are slightly more complex with section 10(b). In the since-overturned decision in *R. v. Hawkins*,⁵⁸ for example, the Newfoundland

⁵⁶ *Grant, ibid.* at 421-22 [emphasis in original].

⁵⁷ *Ibid.* at 375 [emphasis added]. Indeed, as will be explained below, even when examining the objective component of “psychological detention” the purposes underlying *Charter*-based detention protection require a “complainant-centred” approach that looks only at those things known or evident to the accused.

⁵⁸ *Hawkins*, *supra* note 10, rev’d [1993] 2 S.C.R. 157.

Court of Appeal reasoned that the role that section 10(b) plays in protecting the right to silence is *inconsistent* with requiring a subjective component in the detention concept since individuals who are suspects, subject to the coercive power of a state-based investigation, may not subjectively appreciate that they truly need legal advice.⁵⁹ In other words the Newfoundland Court of Appeal reasoned that “detention” should be interpreted in a way that will makes section 10(b) protection available to those who are put in need of legal advice by the actions of the state. Given the description of the purpose of the detention-based *Charter* protection now embraced by the Supreme Court of Canada the focus in such reasoning is misplaced. As explained above, the purpose of section 10(b) is not to provide legal advice to those who can use it; it is intended to secure legal advice to those who cannot access it because their freedom to leave and secure that legal advice has been lost. In other words, the definition of detention should be driven not by the need for legal advice, but by the inability to secure it. A purposive interpretation of “detention” in section 10(b) therefore requires either actual detention, or a subjective belief by the subject that he cannot walk away and secure legal advice.

The best and correct reading of the *Grant* and *Suberu* decisions, therefore, is that “psychological detention” continues to require, *as one of its components*, that the subject comply with the demand or direction because they believe they are compelled to do so. The reason the *Grant* Court and the *Suberu* Court do not feature these requirements can be understood as the product of context. In *Grant*’s case it was obvious that he probably remained where he was when surrounded by three burly officers who were subjecting him to adversarial questioning because he believed he had no choice but to do so.⁶⁰ By contrast a majority of the Supreme Court of Canada in *Suberu* concluded that the facts “did not support the contention that *his* [Mr. Suberu’s] freedom to choose whether or not to cooperate with the police was removed,”⁶¹ leaving it unnecessary to say more about *Suberu*’s actual state of mind.

But what about the Court’s comment in *Grant* and *Suberu* that the failure to testify is not fatal to a detention-based application because the test is an objective one?⁶² This is indeed awkward but those comments

⁵⁹ See also Penney, *supra* note at 284, who argues that the goal of giving the right to counsel to those who really need it is best served by disregarding the subjective state of mind of the subject.

⁶⁰ *Grant*, *supra* note 2 at 386-87, describing the basis for the psychological detention finding.

⁶¹ *Suberu*, *supra* note 5 at 468 and 479-80.

⁶² *Grant*, *supra* note 2 at 386-87; *Suberu*, *ibid.* at 476-77.

are best understood as referring solely to the “objective component” of the test. It is noteworthy that in *Suberu* the Court in fact found Suberu’s failure to testify to be important, commenting that “Mr. Suberu did not testify on the application and there was no evidence as to whether he subjectively believed that he could not leave.”⁶³ Why would the Court have made that comment if Suberu’s subjective belief was immaterial?

Although the continued fortunes of the subjective component of the “psychological detention” standard depend ultimately on future clarification by the Court, context and purpose therefore strongly support a reading of *Grant* and *Suberu* in which the Court left the subjective component of “psychological detention” implicit, without rejecting it. Simply put, individuals who are not actually detained by law or by actual or threatened physical restraint⁶⁴ but who submit because they themselves reasonably and mistakenly believe that they are compelled to comply are “psychologically detained.”

8. *The Objective Inquiry: Using a Claimant-Centred, “Modified-Objective Test” in Psychological Detention Cases*

A) *The Modified Objective Approach*

The thing that makes “psychological detention” the most difficult form of detention to recognize and apply is the requisite evaluation of whether the belief by the accused was reasonable. Whereas “physical restraint” and “legal compulsion” are purely objective states of fact, the “reasonable belief” requirement of psychological detention requires the application of an imprecise legal “standard.” The law offers no definitive scale for measuring “reasonableness,” as there is none. The law is therefore left to resort to the familiar yet controversial notion that there is a “reasonable person” whose standards can be recognized and applied to “the state of conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable

⁶³ *Suberu, ibid.* at 479-80.

⁶⁴ Courts and commentators tend to speak of psychological detention as applying only to those who mistakenly believe that they are detained by the operation of law. In fact, an individual who mistakenly believes that physical force will be used if they attempt to leave may be psychologically detained, regardless of whether they think that force will be lawful or not. This sensible conclusion is supported by the reasoning in *Grant*. Grant was found to be psychologically detained not because a reasonable person would believe they were legally obliged to stay and answer the questions of the police but because the young and inexperienced Grant was “surrounded by three physically larger police officers in adversarial positions;” see *Grant, supra* note 2 at 386-87.

person in the situation as it develops.”⁶⁵ When the law resorts to standards of reasonableness, as it frequently must, precision suffers and the risk is raised that individual judges will decide cases according to their own sense of reasonableness, or in this context, when they believe that a “detention” should be declared.⁶⁶

Things become even less settled when the concept of the reasonable person is recognized to be a variable one. This occurs when the law applies what are commonly referred to as “modified objective standards.” Where the law does so it is no longer a case of simply imagining how a “reasonable person” would react if placed in the same situation as the subject (told to wait, or surrounded by burly officers who are asking accusatory questions). Instead, the character of the reasonable person adapts to the subject. In other words, the “reasonable person” is to take on the relevant characteristics and experiences of the subject so that things can be understood from the perspective of the subject. In *Grant* the Supreme Court of Canada affirmed that in “psychological detention” cases a modified objective test of this kind is to be employed; the “individual’s particular circumstances or perceptions at the time”⁶⁷ are to be factored into the evaluation.⁶⁸ Accordingly, in *Grant* the youth and small stature of Grant feature large in the Court’s conclusion that a similarly situated reasonable person would feel detained. Although the *Grant* majority did not mention that Grant was black, Binnie J. did. He remarked that psychological detention findings may be more appropriate where vulnerability is evident as in the case of “visible minorities who may, because of their background and experience, feel especially unable to disregard police directions.”⁶⁹ In other words, everything about the

⁶⁵ *Ibid.* at 379.

⁶⁶ See the comments of Binnie J. in *ibid.* at 433.

⁶⁷ *Ibid.* at 380.

⁶⁸ Unfortunately the admonition to include the perceptions of the individual among the characteristics of the reasonable person is potentially misleading. It would be circular and defeat the purpose of an objective evaluation were the reasonable person to be imbued with the perception held by the accused that he had no choice but to comply since, by definition, the perceptions held by a reasonable person are reasonable ones. The direction to consider the perceptions of the individual is intended to ensure that the objective evaluation is undertaken in light of those subjective experiences that the individual has had that can reasonably influence how he or she might see things. I have written more extensively about the perils and uncertainties of modified objective tests as applied to defences in “Applying the Law of Self-Defence” (2008) 12 Can. Crim. L. Rev. 26 at 36-50.

⁶⁹ *Grant*, *supra* note 2 at 431. Perhaps the majority did not consider this because Grant offered no testimony as to what his experiences as a black youth were. Whatever the reason, courts have frequently been criticized for their tendency to ignore the effects

subject that could reasonably affect his or her perceptions of what is happening is relevant and ought to be considered. In summarizing the factors to be considered in the objective evaluation, the *Grant* majority said:

To determine whether a reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

- a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence, or singling out the individual for focused investigation;
- b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter;
- c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status and level of sophistication.⁷⁰

B) Using the "Claimant-Centred" Analysis

The *Grant* Court's list of factors to be considered reflects another key point about how the "reasonableness standard" of the psychological detention concept is to be analyzed. Conspicuously absent from this list is the police perspective, including their sense of whether reasonable and probable grounds for arrest exist, or their views on whether the subject is a suspect, or their intention to arrest the subject later. The intentions and perspectives of the police are to be considered *in psychological detention cases* only where those intentions or perceptions are made known to the subject. The focus of the inquiry in applying the objective component of the test is to be on what the subject would think.

The irrelevance of the police perspective when not known by the subject is the most significant and controversial modification of the detention concept undertaken in *Grant*. Prior to *Grant*, most courts considered questions of psychological detention to be influenced by

of race in detention cases, both when judging reasonable perceptions, and when assessing the purpose for police stops. See e.g. David M. Tanovich, "The Colourless World of *Mann*" (2004) 21 C.R. (6th) 47; Benjamin L. Berger, "Race and Erasure in *R. v. Mann*" (2004) 21 C.R. (6th) 58; Tim Quigley, "*Mann*: It's a Disappointing Decision" (2004) 21 C.R. (6th) 41; Stuart, *supra* note 3 at 27; James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention after *Mann*" (2007) 52 Crim. L.Q. 299; and generally, David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) [Tanovich, *Colour of Justice*].

⁷⁰ *Grant*, *ibid.* at 384-85.

police intentions.⁷¹ Indeed, a number of appeal courts found the point in time at which the police considered the subject to be a suspect to be critical⁷² without regard to how the subject may have perceived things.

The majority's decision that "police-related" factors unknown to the accused have no bearing on "psychological detention" provoked strong disagreement from Binnie J. Factors which the subject might not be aware of, he urged, can affect the liberty interests of the subject and should therefore be considered.⁷³ Binnie J. felt that unless the intention and state of knowledge of the police is to be considered, individuals may reasonably perceive themselves to be compelled to comply with a demand or direction in circumstances where there will be no reasonable basis for triggering the right to counsel because the police do not consider those persons to be suspects. He gave the example of police officers arriving at a crime scene who issue a general "stay put" direction.⁷⁴ In essence, he feared that a "claimant-centred" approach to detention will unnecessarily give rise to a *Charter* right to counsel in some cases.

The more conventional concern, also expressed by Binnie J. but stated most forcefully by Professor Stuart, is that unless police-related factors unknown to the accused are considered this "may encourage the police to defer arrests until after interrogation without the need to advise of the right to counsel." It will also encourage the police to lie to accused persons by falsely telling them that they are free to go in order to set them at ease.⁷⁵ The concern, of course, is that by keeping the subject ignorant of his or her real jeopardy, the police can delay the need to comply with the *Charter*. Like Binnie J., Professor Stuart therefore argued that "the focus should not be exclusively on the state of mind of the accused ... but take into account the perceptions of the police" even where the accused is naïve to those perceptions.⁷⁶

⁷¹ See e.g. *Moran*, *supra* note 53 at 258-59; *R. v. Johns* (1998), 106 O.A.C. 291, 123 C.C.C. (3d) 190 (Ont. C.A.); *R. v. Voss* (1989), 33 O.A.C. 190, 50 C.C.C. (3d) 58 (Ont. C.A.).

⁷² See Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed (Toronto: Carswell, 2005) at 325-26 [Stuart, *Charter Justice*], citing *R. v. Mickey* (1988), 46 C.C.C. (3d) 278, 6 W.C.B. (2d) 209 (B.C.C.A.); *R. v. Keats* (1987), 48 D.L.R. (4th) 87, 67 Nfld. & P.E.I.R. 116 (Nfld. C.A.); *R. v. Amyot*, [1991] R.J.Q. 954, 58 C.C.C. (3d) 312 (Que. C.A.), and *Hawkins*, *supra* note 10, rev'd [1993] 2 S.C.R. 157.

⁷³ *Grant*, *supra* note 2 at 421-22.

⁷⁴ *Ibid.* at 429-30.

⁷⁵ Stuart, *Charter Justice*, *supra* note 71 at 324; *Grant*, *ibid.* at 429-30.

⁷⁶ Stuart, *ibid.* at 327; *Grant*, *ibid.* at 436-37. For his part, Professor Penney argues that, in the interests of bright line certainty, the best measure of detention is to ask "when police identify a suspect as the likely perpetrator and attempt to elicit incriminating statements;" see Penney, *supra* note 23 at 284.

Were it possible for officers to delay or lie about impending arrests in such cases as a stratagem to delay *Charter* rights, the law would indeed be deeply problematic. *Charter* rights should not be so fragile that they can be circumscribed by police tactics. In fact, although there is no “psychological detention” in such cases, if an officer has a hidden intention to keep the subject over whom they have effective control from leaving, there will be detention in the form of “physical restraint.” As explained, in *Suberu* the detention crystallized when the officer who had been questioning Suberu “determined that he could not let [Suberu] leave.”⁷⁷ Finding detention in such cases is in keeping with the underlying purpose of section 9 since a subject in this situation will have lost the choice to control his movements.⁷⁸ This means that while the state of mind of the police officers unknown to the accused is not material in determining “psychological detention,” the state of mind of the officers about “reasonable and probable grounds for arrest” and about the status of the subject as *the* suspect in an investigation, may be relevant in determining whether an intention to arrest had in fact crystallized.

Like its subjective component, the “claimant-centred” approach to determining “psychological detention” serves the stated, underlying purpose of the *Charter* detention protection identified in *Grant*. As indicated, those claimants who are not physically restrained or legally compelled and who understand that they are free to leave have not lost the ability to choose their movements or to decide whether to consult counsel. Given the role of the detention concept in preserving the ability to choose, police-related factors short of a settled intention to arrest the subject are immaterial to the concept of detention, and only claimant-based factors matter only in psychological detention cases. Things would have been different had the *Charter*’s detention-based protections been intended to define the limits on police conduct; had that been the case the motivation of the police in acting would take on prominence if not paramouncy.⁷⁹ The purpose though, is to preserve

⁷⁷ *Suberu*, *supra* note 5 at 468.

⁷⁸ It is this conception of “physical restraint” that gives integrity to the comment by the *Grant* majority that in unclear cases, officers can forestall findings of “psychological detention” by informing the subject that he has no obligation to speak to them and is free to go; see *Grant*, *supra* note 2 at 380, 382-83. What officers cannot do, however, is forestall *Charter* rights by delaying an intended arrest, or lying to subjects about their ability to leave.

⁷⁹ Professor Coughlan, in spite of urging that “the *Charter* is meant to protect individuals from the excessive power of the state,” supports a claimant-centred approach. This is because his explanation features the “protection of individuals” component of the purpose as he has described it rather than the state control aspect: “A person who feels

choice, a thing that is entirely subjectively experienced in the absence of actual restraint.

C) The Objective Component of Psychological Detention and Fidelity to Purpose

At a basic level there is an apparent disconnect between the underlying purposes of the *Charter*'s detention protection and the insistence in psychological detention cases on an objective standard of reasonableness. If the purpose of *Charter*-based detention protection is to secure the right to choose, why should psychological detention be treated as confined to cases where the mistaken belief in legal compulsion or physical restraint is reasonable? Individuals who honestly but unreasonably believe they have no choice but to comply with a police demand or direction lose control over their movements and are every bit as much in need of facilitation to obtain legal advice as those who reasonably arrive at that same mistaken belief. A perfect "purposive interpretation" would not inquire into the reasonableness of mistaken beliefs.

In fact, the promise of a purposive interpretation is not a commitment to the construction that most aggressively advances the underlying purposes of the *Charter* right; the promise of a purposive interpretation is a commitment to finding a *workable interpretation* that best fulfils the relevant underlying purpose.⁸⁰ Treating unreasonable mistakes about detention as amounting to detention for *Charter* purposes would not be workable. It would be unrealistic if not unfair to expect *Charter* warnings and *Charter* restraint from police officers who would have no reason to believe that *Charter* rights are engaged. And it would be unrealistic to consider officers to have violated the *Charter* by arbitrarily detaining those who only unreasonably imagine that they are being detained. On

detained, who feels he is not able to leave, has had his freedom constrained by the state, whether any legal power to do so existed or not; the detainee centred approach captures this. On the other hand, a person who genuinely feels free to leave but does not do so is acting voluntarily in staying;" see Stephen Coughlan, "Great Strides in Section 9 Jurisprudence" (2009) 66 C.R. (6th) 75 at 79 [Coughlan, "Great Strides"].

⁸⁰ Although this reality generally goes unstated it is easy to demonstrate. The section 11(b) right to be free from overlong exposure to the vexations and vicissitudes of trial delay operates not by guaranteeing trials as soon as the parties can be ready, but by using realistic measures in light of inevitable systemic delay. Similarly, the section 10(b) right to consult counsel of one's choice has to give way in breath sample cases if the delay in waiting for one's counsel of choice would cause the Crown to lose the benefit of the presumption of identity in the *Criminal Code*. These and other rules compromise on the perfect attainment of the relevant *Charter* purpose were achieving perfect attainment would be unworkable.

the other hand, it is workable to expect officers to recognize what other reasonable people would see and to act accordingly.⁸¹ As the *Grant* Court put it, a pragmatic and workable law “recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the *Charter* and to afford the individual its added protections.”⁸² The closest the law can reasonably come to flattering the perceptions of the accused is therefore to apply the modified objective test which expects police officers to take into account who they are dealing with when determining when to comply with the *Charter*. The concept of psychological detention is therefore well-structured to advance the underlying purposes of the *Charter*’s detention protection.

D) Purpose Breaking Down: The Risk and Rewards of Instrumental Conclusions about “Psychological Detention”

While “psychological detention” is well designed to achieve the constitutional purpose assigned to it, the fit between purpose and the law breaks down in application when judges set the bar too high on either the subjective or objective components of the legal standard. Where this occurs, uncertainty is created, *Charter* protection is weakened and the law as stated is misapplied.

As indicated, the subjective component of psychological detention requires a finding that the subject probably complied with the demand or direction out of a feeling of compulsion. The law does not require definitive proof of this causal relationship; the standard it uses to achieve its constitutional purpose is to require a finding that the accused probably complied out of a feeling of compulsion.⁸³ The converse of probably feeling compelled, of course, is that the subject probably freely chose to comply. In spite of all of this it has not been uncommon for courts to reject detention-based *Charter* claims because of the failure by the subject to testify to his sense of compulsion, even when circumstantially it is more probable that the subject complied as a result of a feeling of compulsion rather than choice. Professor Stribopoulos cites, by way of

⁸¹ When there is a risk that this will occur, the police can typically avoid a finding of detention by honestly “inform[ing] the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go;” see *Grant*, *supra* note 2 at 380.

⁸² *Ibid.*

⁸³ The conventional view is that the onus of establishing detention under both sections 9 and 10 is on the *Charter* claimant; see *R. v. Iseler* (2004), 191 O.A.C. 80, 190 C.C.C. (3d) 11 (Ont. C.A.); *R. v. Willis*, 2003 MBCA 54, 10 W.W.R. 18. For a discussion of the onus in the context of section 9, see “*Prima Facie* Violations and Burdens of Proof,” *infra* at 108.

example, *R. v. Lawrence*⁸⁴ where the Court rejected Lawrence's *Charter* claim on the footing that she failed to testify that she felt compelled to remain at the police officer's cruiser.⁸⁵ The police had stopped her progress by pulling a police cruiser in front of her bicycle and then questioned her and ultimately searched her bag over the twenty-five minute period that she remained with them before her arrest. This was a woman who the evidence showed to have been carrying house-breaking tools. With respect, whether she testified or not, the suggestion that in those circumstances she probably chose to remain with the officers was unrealistic.

Similarly, in *R. v. B.(L.)*⁸⁶ the Court held that detention had not been established, commenting that "evidence from the respondent was a virtual must," even though two police officers stopped to investigate the 15-year-old respondent and his friend, asked them for identification, and ran a CPIC check on them while they waited. As Professor Stribopoulos puts it:

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 towards 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?⁸⁷

Although it was already the case, the *Grant* decision makes it clear that the testimony of the subject about why they complied is not required where circumstantial evidence supports a finding that compliance was probably not voluntary. Cases where the failure to testify is featured to reject detention findings where the circumstances inherently suggest probable compulsion are not in keeping with the purpose identified by the *Grant* Court.⁸⁸

By the same token, the purpose identified for the detention-based *Charter* protection can be undermined by the way the objective standard of reasonableness is applied. As indicated, Le Dain J. offered a realistic

⁸⁴ 46 O.A.C. 345, 59 C.C.C. (3d) 55 (Ont. C.A.) [*Lawrence*].

⁸⁵ Stribopoulos, *supra* note 3 at 241.

⁸⁶ 2007 ONCA 596, 86 O.R. (3d) 730 [*B.(L.)*].

⁸⁷ Stribopoulos, *supra* note 3 at 245.

⁸⁸ The development of "investigative detention" should discourage this kind of thinking. As will be explained, where the police have reasonable suspicion that individuals may be connected to specific criminal conduct, they can be detained.

template for examining reasonable compliance based on the obvious logic that, given their authority, citizens will tend to believe that they are obliged to do what police officers demand or direct.⁸⁹ In spite of this, as Professor Stribopoulos points out, “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.” Binnie J. in his comments in *Grant* verified this tendency:

[E]ncounters with the police that average citizens would consider left them with no choice but to comply are denied the status of “detentions” through the device of putting in their place an artificially robust and assertive “reasonable person.”⁹⁰

Unfortunately, even the Supreme Court of Canada’s decision in *Suberu*,⁹¹ the companion case to *Grant*, seems to fit this pattern. The police had been called to an LCBO outlet because of the suspected fraudulent use of a credit card. Suberu was with the primary suspect when the police arrived.⁹² After the police engaged that suspect, Suberu began to walk away saying words to the effect, “He did this, not me, so I guess I can go.” An officer followed Suberu outside and said to him while he was entering the driver’s seat of a vehicle, “Wait a minute. I need to talk to you before you go anywhere.” The officer then questioned Suberu about his association with the suspect and about ownership of the vehicle, while Suberu remained in the vehicle.⁹³ At this point the officer discovered further information from observations he made and from a police dispatch and he proceeded to arrest Suberu. The *Suberu* majority concluded that, in spite of the direction to Suberu not to leave and the obvious investigative questioning, no detention had taken place prior to the officer making the decision to arrest him. Binnie J. disagreed, saying “No rational person in Mr. Suberu’s position would have thought he was free to walk away,”⁹⁴ a decision that Professor Coughlan suggests, with good reason, “is difficult not to agree with.”⁹⁵

What can explain the temptation in some cases to employ unreasonably high standards in identifying detention? Professor Stribopoulos has suggested this may be the result of “hindsight bias” in

⁸⁹ Again, the relevant passage is from *Therens*, *supra* note 7 at 644, and is quoted with apparent approval in *Grant*, *supra* note 5 at 378-79.

⁹⁰ *Grant*, *ibid.* at 431.

⁹¹ *Suberu*, *supra* note 5.

⁹² *Ibid.* The majority’s recitation of facts does not disclose that Suberu was standing with the suspect when the police arrived, but Binnie J.’s recitation does, at 487.

⁹³ *Ibid.* at 469-71.

⁹⁴ *Ibid.* at 487.

⁹⁵ Coughlan, “Great Strides,” *supra* note 79 at 80.

which courts, aware that the questioned police tactics actually produced good forensic results, are consciously or unconsciously loath to find *Charter* breaches.⁹⁶ In *Lawrence*⁹⁷ the police caught their burglar, in *B.(L.)*⁹⁸ the officers discovered a handgun as a result of their inquiries, and in *Suberu* they ultimately arrested a party in joint possession of stolen credit cards and goods. Without suggesting that outcome drove the analysis in these cases, all jurists understand that outcome should never drive legal analysis. Not only does it unsettle the law to apply it instrumentally, but by devaluing the currency of the *Charter*'s detention protections it also diminishes the protection the *Charter* can afford to those who are detained but not arrested. In other words, weakening *Charter* protections to catch those who are evidently guilty diminishes the protection for the innocent. It is also unnecessary. *Grant* is most famous for altering section 24(2) to permit contextual decisions to be made about the exclusionary remedy,⁹⁹ and it is in determining remedy that the reluctance to exclude probative evidence should have its effect, not in the application of rights.

Another possible explanation is fear that accepting that individuals tend to accede to police demands or directions out of a feeling of compulsion would potentially turn almost every interaction between the police and citizens into a psychological detention, thereby giving rise to pointless *Charter* warnings.¹⁰⁰ Again, this kind of concern should not drive the application of the law; what individuals reasonably believe is a question of fact, not legal policy. Moreover, the objective test is a modified objective test that allows for consideration of the actual vulnerability of the subject; if there is reason to believe that a subject is knowledgeable and capable of resisting police authority then it will not be reasonable for that person to assume that they are obliged. Nor can the "significance requirement" be forgotten. The natural tendency of most to accede to police demands or directions will not produce detentions unless the demand or direction has significant impact on freedom to control one's movements and actions.

⁹⁶ Stribopoulos, *supra* note 3 at 237.

⁹⁷ *Supra* note 84.

⁹⁸ *Supra* note 86.

⁹⁹ See the discussion of the law of section 24(2) after *Grant* in a 2009 electronic update chapter to David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 5th ed. (Irwin Law: Toronto, 2008), online: Irwin Law <http://www.irwinlaw.com/content/assets/content-commons/521/LE5rev_09.pdf>.

¹⁰⁰ In *Esposito*, *supra* note 53, the Court feared that taking the Le Dain approach might mean that in any police questioning, detention will be found: see Stuart, *Charter Justice*, *supra* note 72 at 323.

For his part, Professor Coughlan has expressed concern that the tendency to apply determinations of detention grudgingly could be a way of controlling what might be perceived to be overly robust *Charter* rights, a phenomenon that can be observed in section 8 jurisprudence where the concept of a “search” has apparently shrunk to keep the imposing demands of the “warrant requirement” under check.¹⁰¹ That same concern occurred to Binnie J. in *Suberu* as a possible explanation. In that case the majority of the Court held that section 10(b) requires a *Charter* warning to be given immediately upon detention, and does not allow officers to make a “quick assessment of the situation” to see whether the subject is in enough jeopardy to make legal advice necessary.¹⁰² Binnie J. wondered aloud whether the undesirable implications of this unremitting *Charter* obligation had not inspired the majority to “underestimate the coercive power of police commands [and] overestimate the resilience of the Canadian population” so as to delay the finding of detention and permit indirectly a “justifiable” delay by the officers in giving the section 10(b) warning.¹⁰³

To the extent that the desire to preserve “justifiable” police authority might influence the way detention findings are made, it undercuts the purpose identified for the detention concept. According to the direction of the Supreme Court of Canada, “justifiability” is relevant in deciding whether detention is “arbitrary,” not in identifying when detention occurs. Moreover, the Court was clear in *Grant* that “psychological detention” is not about “police-centred” concerns such as whether the officers acted justifiably; it is about the reasonable perceptions of the subject.

This is not to say that achieving a justifiable “balance between a society’s interest in effective policing and the detainee’s interest in robust *Charter* rights”¹⁰⁴ is irrelevant. Again, jurists understand that the way to achieve that balance is not by modulating the way that *Charter* definitions are applied on a case-by-case basis according to the subjective perceptions of balance held by individual judges. Instead, it is attained by selecting a balanced interpretation of the *Charter* rights. It is no coincidence that when the *Suberu* majority spoke of balance it was while explaining why it adopted the “meaning of ‘detention’” it did. That “meaning” invites inquiry into a state of facts. Is it more probable that the accused complied with a demand or direction because of a sense of compulsion or as a matter of voluntary choice?

101 Coughlan, “Great Strides,” *supra* note 79 at 80.

102 *Suberu*, *supra* note 4 at 482.

103 *Ibid.* at 485.

104 *Ibid.* at 475.

It is important to remember that finding a detention is only one component in the application of the *Charter's* detention-based protections. Even if there has been a detention, there will be no *Charter* violation unless the detention is arbitrary, or the police fail to comply with sections 10(a) or 10(b). Then there is the question of remedy. Together these bodies of law enable balance to be attained without the need for grudging applications of the stated tests for detention.

In sum, a subject will be detained if (1) significantly physically restrained; (2) if compelled by a lawful demand or direction that imposes significant restrictions on freedom of movement; or (3) if the subject complies with a demand or direction by a state agent that imposes significant restriction on their freedom of movement believing they are compelled to comply, and the circumstances known to the subject would cause a reasonable person in their position to draw that same conclusion. Each of these forms of detention can be understood in light of the underlying purpose of the *Charter's* detention protection, namely, to protect the liberty of individuals to control their own movements and actions free from state interference, and to preserve those choices that the law does confer on individuals to control their own movements or actions where state agents have taken away their liberty. More importantly, each of these forms of detention can be best applied by bearing those purposes in mind.

9. "Arbitrary" Detention: Using Purpose to Define "Arbitrariness"

The law of arbitrary detention, as described in *Grant*, has been accurately captured by Professor Coughlan in his annotation, "Great Strides in Section 9 Jurisprudence." As he explains, whether a detention is arbitrary can be determined by using a three-part template:¹⁰⁵

- 1) Is the detention authorized by law?
- 2) Is the law itself arbitrary?
- 3) Is the manner in which the detention was carried out arbitrary?

This template mirrors the unreasonable search analysis adopted in *R. v. Collins* for section 8 of the *Charter*.¹⁰⁶ Prior to *Grant* it was contentious whether arbitrary detention cases should be analyzed in this way. Indeed,

¹⁰⁵ Steve Coughlan, "Great Strides," *supra* note 79 at 77.

¹⁰⁶ The *Collins* template requires that to be constitutionally valid, searches must be authorized by law, the authorizing law must be reasonable, and the search must be carried on in a reasonable fashion; see *R. v. Collins*, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508 as summarized in *Grant*, *supra* note 2 at 389.

the knock on the pre-*Grant* authority was that the law had left the arbitrariness standard “elusive,”¹⁰⁷ or incompletely and incorrectly articulated.¹⁰⁸ The *Grant* Court settled on the *Collins*-like approach for the concept of arbitrariness by examining that concept purposively.

This purposive analysis is simple, and persuasive. Specifically, it looked to section 7 of the *Charter*, holding that “[t]he section 9 guarantee against arbitrary detention is a manifestation of the general principle, enumerated in section 7, that a person’s liberty is not to be curtailed except in accordance with the principles of fundamental justice.”¹⁰⁹

In truth, the net effect of finding section 9’s meaning in section 7’s principles of fundamental justice renders section 9 functionally redundant; if the concept of “arbitrariness” in section 9 describes detentions that are contrary to relevant principles of fundamental justice, section 9 adds nothing to section 7 given that anyone who is detained contrary to the principles of fundamental justice will also have been deprived of their liberty contrary to section 7. The fact that section 9 adds nothing to section 7, however, is not problematic. It has long been recognized that sections 8 to 14 are, in fact, particular manifestations of the principles of fundamental justice, articulated out of an abundance of caution. As Lamer J. said in *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*:

Sections 8 to 14 ... address specific deprivations of the “right” to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, [violations of ss. 8 to 14 are also] violations of s.7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s.7....¹¹⁰

The virtue in using section 7 as the point of departure in defining and applying the arbitrariness concept in section 9 is that courts have worked out a structured approach to defining principles of fundamental justice,¹¹¹ something that had not previously been satisfactorily done for section 9. More importantly, the core principles of fundamental justice have already been firmly defined and include relevant principles needed to give meaning to the three-part analytical template adopted in *Grant*. The purposive guidance that this provides is sorely needed if the

¹⁰⁷ Stribopoulos, *supra* note 3 at 219.

¹⁰⁸ Coughlan, “Arbitrary Detention,” *supra* note 9 at 157.

¹⁰⁹ *Grant*, *supra* note 2 at 387-88.

¹¹⁰ [1985] 2 S.C.R. 486 at 502-503, 24 D.L.R. (4th) 536. And see *R. v. Mills*, [1986] 1 S.C.R. 863 at 918 and 967, 29 D.L.R. (4th) 161.

¹¹¹ See *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at 633-34.

analytical template offered by the *Grant* Court is to take on meaning. This is because only the first criterion – Is the detention authorized by law? – has clarity. The second – Is the law [authorizing the detention] itself arbitrary? – provides no guidance. Standing alone, it says only that a detention will be arbitrary when it is arbitrary. The third criterion – Is the manner in which the detention was carried out arbitrary? – suffers from the same criticism. The law can best be amplified and applied by borrowing what is familiar and relevant from section 7 jurisprudence in order to give “arbitrariness” its meaning.

A) Is the Detention Authorized by Law?

The most significant contribution of the recent Supreme Court of Canada authority on the law of detention was the decision to tie “arbitrariness” to legality. Although lower courts often found arbitrariness in unlawful detentions,¹¹² when it came to expressing the law the received view until the last few years, grounded in the Ontario Court of Appeal decision of *R. v. Duguay*,¹¹³ was that illegal detentions are not necessarily arbitrary detentions.¹¹⁴ The thinking was that “arbitrariness” connotes more than unlawfulness – suggesting “capriciousness” – and that minor illegalities such as the failure to comply with the letter of *Criminal Code* statutory arrest provisions should not be treated as *Charter* violations.¹¹⁵ As recently as 1997 in *R. v. Latimer* the Court refrained from committing itself on this question.¹¹⁶ It has now done so. While *Mann*,¹¹⁷ *R. v.*

¹¹² See a partial list of such decisions in Coughlan, “Arbitrary Detention,” *supra* note 2 at 162-63.

¹¹³ (1985), 50 O.R. (2d) 375, 18 C.C.C. (3d) 289 (Ont. C.A.) [*Duguay*], *aff’d* [1989] 1 S.C.R. 93.

¹¹⁴ This proposition was endorsed by courts across the country; see Stribopoulos, *supra* note 3 at 222, including notes 48 and 49.

¹¹⁵ According to the Ontario Court of Appeal, whether a detention attained the required level of arbitrariness depended on how significant the departure was from the reasonable and probable grounds for arrest standard. Notwithstanding its conclusion that illegal detentions are not necessarily arbitrary detentions, it found the arrest of the two suspects to be arbitrary since there was no reasonable basis for it. The majority of the Supreme Court of Canada did not comment on the arbitrary detention issue as the Crown conceded the breach. L’Heureux-Dubé J. wrote a dissenting opinion in which she agreed with the Ontario Court of Appeal that illegality alone is not arbitrariness, and then, in spite of the Crown concession of a breach, went on to hold that there had been no breach; see *Duguay*, *supra* note 113, *aff’d* [1989] 1 S.C.R. 93.

¹¹⁶ [1997] 1 S.C.R. 217 at 232, 142 D.L.R. (4th) 577.

¹¹⁷ *Mann*, *supra* note 8 at 71: “It is well recognized that a lawful detention is not “arbitrary” with in the meaning of that provision.” This is an incomplete expression of half of the arbitrariness-lawfulness equation.

*Clayton*¹¹⁸ and *Charkaoui v. Canada (Citizenship and Immigration)*¹¹⁹ together build an imposing case that this has been the law for the last few years, the decision in *Grant* makes the relationship between arbitrariness and legality hard and fast:

A lawful detention is not arbitrary within the meaning of s.9, unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s.9¹²⁰

As indicated, the *Grant* Court arrived at this position using the principles of fundamental justice. Although the Court did not use this label, it held, in effect, that the concept of arbitrariness in section 9 was meant to protect section 7's "principle of legality" in the context of detention – namely, that "every official act must be justified by law."¹²¹ Specifically, the *Grant* Court said:

[Section] 7 ... expresses ... one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law. Section 9 serves to protect individual liberty against unlawful state interference.¹²²

Fortunately, the legal rules authorizing the more common forms of police detention are settled and can be easily stated.

1) *The Law of Arrest*

The power of police officers to legally arrest subjects are found in the *Criminal Code*. Officers may arrest with valid arrest warrants.¹²³ Those officers who have reasonable and probable grounds to believe that an offence has been committed may arrest individuals for indictable and hybrid offences, without a warrant.¹²⁴ For summary conviction offences,

¹¹⁸ *Clayton*, *supra* note 22 at 739. The Court said: "If the police conduct ... amounted to a lawful exercise of ... powers, there was no violation of their *Charter* rights. If, on the other hand, the conduct fell outside of the scope of these powers, it represented an infringement of the right under the *Charter* not to be arbitrarily detained..." The latter observation was *obiter dictum*.

¹¹⁹ 2007 SCC 9, [2007] 1 S.C.R. 350 at 400-01 [*Charkaoui*]: "The state may not detain arbitrarily, but only in accordance with law."

¹²⁰ *Grant*, *supra* note 2 at 431.

¹²¹ Stribopoulos, *supra* note 2 at 224-25, where prior to *Grant*, Professor Stribopoulos contended that this was central to a purposive interpretation of "arbitrary detention."

¹²² *Grant*, *supra* note 2 at 431 [citations omitted].

¹²³ *Criminal Code*, *supra* note 32, ss. 504, 507.

¹²⁴ *Ibid.*, s. 495(1)(a), interpreted in light of the principles in *R. v. Dudley*, 2009 SCC 58, [2009] 3 S.C.R. 570.

officers cannot arrest on reasonable and probable grounds without a warrant unless they actually find the individual committing the offence.¹²⁵ There are statutory restrictions in section 495(2) on when the power of arrest should be used for less serious offences, but the failure to comply with those restrictions does not render an arrest unlawful.¹²⁶

2) *Investigative Detention Short of Arrest*

Officers may legally detain individuals “for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary.”¹²⁷ The same holds true in “neighbourhood policing where the police are not responding to any specific occurrence.” While officers carrying out neighbourhood policing responsibilities can act non-coercively in approaching and questioning suspicious individuals in an effort to maintain order, they cannot detain those individuals without reasonable grounds to suspect in all of the circumstances that they may have committed a particular crime.¹²⁸

While discharging their duty to investigate and prevent serious crimes endangering the public safety that they reasonably apprehend or believe to have occurred, officers can also detain individuals they have no particularized grounds to suspect but who have a clear nexus to the crime, if doing so in the totality of the circumstances is reasonably necessary to investigate or prevent that crime and “the nature of the stop is no more intrusive of liberty interests than is necessary to address the risk.”¹²⁹

3) *Motor Vehicle Stops*

Police officers may randomly stop individual motor vehicles for the purpose of enforcing vehicle registration, and insurance and traffic laws,¹³⁰ and they may conduct roadblock stops and even roving random

¹²⁵ *Criminal Code*, *ibid.* s. 495(1)(b).

¹²⁶ *Ibid.*, s. 495(2) and (3).

¹²⁷ *Mann*, *supra* note 8 at 81.

¹²⁸ *Grant*, *supra* note 2 at 383, and 388-89.

¹²⁹ *Clayton*, *supra* note 22 at 739-44. This describes the particular application of the *Waterfield* test at play in *Clayton*. The *Waterfield* test for defining additional police powers, described and applied in both *Clayton* and *Mann*, is capable of providing additional lawful ancillary powers of detention that can only be identified on a case-by-case basis using what are in truth, poorly defined criteria: see note 151 *infra* for a description of the *Waterfield* test.

¹³⁰ *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, 56 C.C.C. (3d) 22 [*Ladouceur*]. Such detentions are in *prima facie* violation of section 9 but saved under section 1.

stops of vehicles for the purpose of ensuring sobriety so as to protect road safety.¹³¹ The police cannot, however, randomly stop individual vehicles for the purpose of enforcing criminal laws unrelated to driving; such stops will be arbitrary unless there are reasonable grounds to suspect that an offence has occurred.¹³² The legality of motor vehicle stops can therefore turn largely on the explanation offered for the stop¹³³ and it is illegal to use the authority to enforce traffic laws as a ruse to permit stopping and detaining the occupants of a motor vehicle.¹³⁴ So long as one of the purposes is related to traffic enforcement or road safety, the stop itself will not be arbitrary if other purposes for the stop are not improper and do not go beyond the nature of the stop permitted for traffic enforcement purposes.¹³⁵

B) Is the Law Itself Arbitrary?

In *Clayton* the Court expressed an obvious but crucially important qualification on the correlation between arbitrariness and unlawfulness. It cautioned:

The statement that a detention which is lawful is not arbitrary should not be understood as exempting the authorizing law, whether it is common law or statutory, from *Charter* scrutiny. Previous decisions of this Court are clear that where a detention

¹³¹ *Hufsky*, *supra* note 7; *R. v. Wilson*, [1990] 1 S.C.R. 1291, 56 C.C.C. (3d) 142; *R. v. O’Kane*, 2008 NBCA 58, 333 N.B.R. (2d) 274. Again, such detentions are in *prima facie* violation of section 9 but saved under section 1 using a variety of provincial statutes relating to police traffic enforcement powers. Further issues of arbitrary detention can arise if the driver is made subject to a roadside demand or an evidential breath demand. For the roadside demand to be lawful and non-arbitrary, the officer must reasonably suspect that the driver has alcohol in his body. For the detention related to the evidential breath demand to be lawful and non-arbitrary, the officer requires reasonable and probable grounds to believe that the subject is committing an alcohol driving offence.

¹³² *Harrison*, *supra* note 8; *Simpson*, *supra* note 8. The *Simpson* decision used the “articulable cause” standard, but after *Mann* that test is best expressed as a “reasonable cause to suspect;” see *Mann*, *supra* note 7 at 76, and *Harrison*, *ibid.* at 502.

¹³³ *R. v. Doell*, 2007 SKCA 61, [2007] 9 W.W.R. 51.

¹³⁴ *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223, [1998] O.J. No. 274 (Q.L.) (C.A.) [*Brown*].

¹³⁵ *Ibid.* In *Brown* the police were also interested in intelligence gathering and detecting criminal law violations and they selectively stopped only apparent members of motorcycle gangs. The Trial Judge accepted, in spite of this, that the stops legitimately involved traffic enforcement objectives. Since the additional police objectives fell within the proper exercise of police powers and did not alter the nature or duration of the traffic stop detentions (i.e., no searches were engaged in beyond plain view observation) they did not render the stops arbitrary. See the concerns expressed in Tanovich, *Colour of Justice*, *supra* note 69 at 141-43 about random vehicles stops and racial profiling.

by the police is authorized by law, the law authorizing the detention is also subject to *Charter* scrutiny.¹³⁶

This was already clear from prior authority. Since its inception, many of the constitutional challenges taken under section 9 were challenges to legislation.¹³⁷ Still, the comment was important in reinforcing that the *Charter* defines the limits of ordinary laws and does not take its meaning from ordinary laws. Simply put, as a result of the principle of legality lawfulness is a necessary condition to the constitutional validity of a detention, but it is not a sufficient condition.

What then, is the standard of *Charter* scrutiny for laws that do provide for detention? As indicated, the *Grant* Court proclamation that the “the law authorizing the detention [cannot be] arbitrary”¹³⁸ provides no guidance. Nor does the *Grant* Court go on to identify the relevant underlying principles of fundamental justice that should govern; the principle that the issues in the case required to be identified,¹³⁹ namely “the principle of legality,” spent its contribution in supporting the first leg of section 9’s analytical structure – “Is the detention authorized by law?” Fortunately, one does not have to look far to find the two most important, relevant principles of fundamental justice that can serve to identify *prima facie* arbitrary laws, section 7’s own “principle of arbitrariness” and the “principle of overbreadth.” As will be explained, these principles focus on the *necessity* and *proportionality* of the detention. It is no coincidence that in describing detention-based *Charter* values in the specific context of *Clayton* Abella J. observed:

The common law regarding police powers and detention building on *R. v. Waterfield* [1963] 3 All E.R. 659 (Eng.C.A.), and *Dedman*, is consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focuses on whether the interference with liberty is *necessary given the extent of the risk* and the liberty at stake, and *no more intrusive than reasonably necessary to address this risk*.¹⁴⁰

¹³⁶ *Clayton*, *supra* note 22 at 739-40.

¹³⁷ See e.g. *Hufsky*, *supra* note 7 and *Ladouceur*, *supra* note 130, where violations were found but justified under section 1. See *Charkaoui*, *supra* note 119 and *R. v. Swain*, [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481 [*Swain*], where statutory provisions were struck down because the arbitrary detention they authorized could not be justified under section 1.

¹³⁸ *Grant*, *supra* note 2 at 431.

¹³⁹ The issue was whether the unlawful detention of *Grant* was an arbitrary detention.

¹⁴⁰ *Clayton*, *supra* note 22 at 739-40 [emphasis added].

C) The “Principle of Arbitrariness”

The “principle of arbitrariness” as described by Sopinka J. in *Rodriguez v. British Columbia (Attorney-General)* provides:

Where the deprivation of the right in question does little or nothing to enhance the state’s interest (whatever it may be), it seems to me to that a breach of fundamental justice will be made out, as the individual’s rights will have been deprived for no valid reason.¹⁴¹

This principle can be used to explain the leading pre-*Grant* Supreme Court of Canada decisions on arbitrary detention. Those decisions endorse the proposition that “discretion is arbitrary if there are no criteria, express or implied, which govern its exercise”¹⁴² or if the detention is “governed by unstructured discretion.”¹⁴³ The problem where this is so is that given the absence of criteria such laws authorize the detention of individuals even where their detention would do little or nothing for the state interest.

These “no criteria” cases have traditionally been heavily criticized. The knock on them, though, is not that it is somehow wrong to suggest that a law that permits detention for no valid reason should be constitutionally vulnerable. It is that the Supreme Court of Canada has from time to time presented this “no criteria” standard not as an illustration of arbitrariness but as *the* definition of arbitrariness.¹⁴⁴ The problem with a “no criteria” definition, and the reason it has been called incomplete and incorrectly articulated,¹⁴⁵ is that it contains no quality controls. Even heavy-handed and ill-considered or inherently offensive decisions can be based on criteria. As Professor Coughlan points out, “something like racial profiling seems obviously to violate section 9, but it is not a detention based on no criteria – quite the opposite.”¹⁴⁶ By defining “arbitrariness” as including “unlawful detention” and incorporating principles of fundamental justice into section 9, the *Grant* Court has removed this concern; arbitrariness includes “no criteria” detentions, but is not confined to them. The arbitrariness concept extends as well to those provisions having criteria that do only “little to enhance the state interest,” and to detention laws that contravene other principles of fundamental justice such as overbreadth.

¹⁴¹ [1993] 3 S.C.R. 519 at 594, 107 D.L.R. (4th) 342.

¹⁴² *Hufsky*, *supra* note 7 at 633.

¹⁴³ *R. v. Pearson*, [1992] 3 S.C.R. 665 at 699-700, 77 C.C.C. (3d) 124.

¹⁴⁴ Coughlan, “Great Strides,” *supra* note 79 at 75.

¹⁴⁵ Coughlan, “Arbitrary Detention,” *supra* note 3 at 157.

¹⁴⁶ Coughlan, “Great Strides,” *supra* note 79 at 75.

D) *The Principle of Overbreadth*

The “principle of overbreadth” is essentially a proportionality doctrine:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective... The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.¹⁴⁷

This principle of fundamental justice can be used to explain those existing Supreme Court of Canada arbitrary detention cases that have found section 9 breaches relating to statutes that do in fact provide criteria for detention. The problems identified in these cases were with the procedures related to the power to detain. In *R. v. Swain* provisions requiring the automatic committal after trial of those who were mentally disordered at the time of the offence were arbitrary because they did not provide for a disposition hearing to see whether committal was in fact required in light of the *current* state of detainee’s mental health.¹⁴⁸ And in *Charkaoui*, the failure to provide a timely detention review of those subject to security certificates was held to contravene section 9.¹⁴⁹ In each case, the procedures or means chosen were deficient because, structurally, they left open the possibility that individuals would be detained even where their detention may not advance the purposes of the relevant statutory regime. The regimes were, in other words, overbroad.

This principle of overbreadth can also be used to ensure that the detention provided for by law “is no more intrusive than reasonably necessary to address th[e relevant] risk.”¹⁵⁰ In *Mann*, for example, the Supreme Court of Canada assessed “the necessity and reasonableness of the [relevant] interference with the liberty [bearing in mind] the nature of the liberty interfered with.”¹⁵¹ Ultimately, the Court held that, given the nature

¹⁴⁷ *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348 at 792.

¹⁴⁸ *Swain*, *supra* note 137 at 1013 .

¹⁴⁹ *Supra* note 119.

¹⁵⁰ *Clayton*, *supra* note 22 at 739-40 [emphasis added].

¹⁵¹ *Mann*, *supra* note 8 at 73. The *Mann* Court did not overtly invoke the principles of fundamental justice in coming to this conclusion. Instead, it relied on the *Waterfield* test introduced in footnote 129 above. This test asks whether the police were acting in the general course of their duties, and whether the actions they undertook were a justifiable use of the powers associated with the duty, an amorphous question that the *Mann* Court reduced to whether, in all the circumstances, “the detention of a particular individual is ‘reasonably necessary;’” see Coughlan, “Arbitrary Detention,” *supra* note 2 at 172. The same *Waterfield* approach was used in *Clayton*, *supra* note 22, and would provide a clearer standard had the *Clayton* majority accepted Binnie J.’s dissenting

of the intrusion into liberty that a detention constitutes, the standard that can lawfully trigger an investigative detention must be more than a mere hunch. Section 9 of the *Charter* requires that the power of police officers to “detain an individual for investigative purposes [is to be based on nothing less than] reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime such that a detention is necessary.”¹⁵²

In sum, determinations of arbitrariness are to be based on relevant principles of fundamental justice. A law authorizing a detention will be in *prima facie* violation of section 9 of the *Charter* if it fails to respect the principle of arbitrariness (because the detention does little or nothing to enhance the state’s interest), or if it contravenes the principle against overbreadth (that the means chosen by the state related to the detention are necessary to achieving its purpose), or any other identifiable principle of fundamental justice.

E) Is the Manner in Which the Detention was Carried out Arbitrary?

1) Using Detention Powers for Improper Purposes

Even when laws are valid, they can be applied inappropriately. If the law is being used illegally then only the first of *Grant*’s three analytical principles is required. But what if the law was being used in a technically correct way, but for improper motives? Prior to *Grant* there was *dictum* leaving an undefined role for section 9 in ensuring that powers of detention are used for proper purposes. For example, in *R. v. Lyons* the Court commented when discussing section 9 that if a prosecutorial decision was “motivated by improper or arbitrary reasons” it would be unconstitutional, yet nothing more was said about what propriety requires.¹⁵³ Meanwhile, in *R. v. Storrey* Cory J. suggested that a racially profiled detention would be arbitrary¹⁵⁴ without tethering that

position that “justifiable use” must comply with the reasonableness requirements set out for section 1 of the *Charter*. Professor Coughlan is correct (*ibid.* at 173) to criticize the use of the *Waterfield* test to determine the reach of section 9 as the Court is wont to do, since the *Waterfield* test is about the reach of police powers, when the issue under section 9 should focus on the demands of individual rights. This is not a semantic quibble. The *Waterfield* test is intended to ask what the police reasonably need whereas the *Charter* should examine what the relevant liberty interest requires. Using the purposive analysis in *Grant* and its use of principles of fundamental justice to define arbitrariness would provide a more appropriate focus that asks the same essential questions but with a liberty rather than police power disposition.

¹⁵² *Mann*, *supra* note 8 at 81.

¹⁵³ [1987] 2 S.C.R. 309 at 348, 44 D.L.R. (4th) 193.

¹⁵⁴ *Storrey*, *supra* note 28 at 251-52; and see *Brown*, *supra* note 134, where the

observation to any general principles. *Grant* has now affirmed that the approach to section 9 mirrors the section 8 analysis, in which searches must be carried out in a reasonable manner.¹⁵⁵ In the language of the principles of fundamental justice, a lawful power of detention that is used for improper purposes is neither necessary in the interest of the state, nor is it being used proportionally. It would therefore contravene both the principles of arbitrariness and overbreadth and be arbitrary contrary to section 9.

2) *Improper Conduct when Using Detention Authority*

Recognition that a detention will be arbitrary if carried out in an arbitrary manner also provides a mechanism for controlling the mode of detention, again by using the principles of fundamental justice of arbitrariness and overbreadth. In *Mann* the Court explained in the investigative detention context that

[b]oth the detention and the pat-down search of the detained individual must be conducted in a reasonable manner. In this connection I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police.¹⁵⁶

Section 9's role in providing oversight as to the manner in which detentions are conducted is important. The Hon. Justice Casey Hill has observed that the issue of whether a detention is appropriate is only a small part of the reality of how detention impacts on liberty interests. He provides an incomplete but informative list of police activity that often accompanies detention, including the illumination of the interior of vehicles, opening vehicle doors, directing subjects to exit their vehicles, directing subjects to

Ontario Court of Appeal held that if a detention was racially motivated, it would be arbitrary.

¹⁵⁵ To be clear, the *Grant* Court does not say overtly that a detention will contravene section 9 if it is carried out in an arbitrary manner. In discussing the constitutional limits on detention, it lists only the requirements that the detention be lawful, and that the law not be arbitrary. However, this follows immediately after its observation that the section 9 "approach mirrors the framework developed for assessing reasonable and probable searches of the *Charter*," which it described as follows: "a search must be authorized by law to be reasonable; the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner.;" see *Grant, supra* note 2 at 388-89. It is evident that, in context, the Court was recognizing without saying so directly that to be constitutional a detention must be carried out in a non-arbitrary manner. To make the point more simply, it is untenable to argue that a detention carried out in an arbitrary manner is not arbitrary.

¹⁵⁶ *Mann, supra* note 8 at 81.

display their hands, physical restraint, seizure of cell phones, controlling the movement of detainees such as by directing them to sit in police cruisers, pursuit, the use of force, asking about weapons, movement of clothing, requests for identification, and subjecting the subject to identification procedures.¹⁵⁷ Section 9 can be used to determine whether these and other police actions consequent on a detention advance a relevant state interest or are proportionate. If they are not, and the improper conduct is a significant intrusion on liberty, section 9 may be violated.

10. Reasonable Limits and Burdens of Proof

A) Reasonable Limits and Section 1

Section 1 of the *Charter*, providing for reasonable limits on *Charter* rights and freedoms, is not relevant to the first and third components of the arbitrariness analysis. Section 1 and its *Oakes* test¹⁵⁸ is about justifying laws, not state conduct. The first form of arbitrariness caught by section 9 occurs because there is no law supporting the detention. In the last form of arbitrariness (just discussed) the complaint is about the manner in which lawful powers have been exercised by state agents. The complaint does not challenge the law itself, but rather state conduct, again leaving section 1 inapplicable. Where section 1 does apply is the second category of arbitrariness since the complaint is that the law relied upon is arbitrary. As intimated, laws that are *prima facie* arbitrary because they contravene the principles of fundamental justice captured by the concept of arbitrariness can be saved under section 1 of the *Charter*. This occurred in *R. v. Hufsky*¹⁵⁹ and *R. v. Ladouceur*.¹⁶⁰

It is evident that there is tremendous overlap between the principles of fundamental justice that give the arbitrariness concept its meaning, and the range of factors considered under section 1 to justify *prima facie* violations. The “principle of legality” requires detentions to be legal, and section 1 requires *prima facie* violations to be “prescribed by law,” which amounts to the same thing. The “principle of arbitrariness” requires detentions to advance a state interest, a concept akin to the necessity and rational connection ideas found in section 1 analysis. And the principle of overbreadth used to identify arbitrariness operates in substance as a proportionality doctrine, capable of capturing the proportionality

¹⁵⁷ Hill, *supra* note 19 at 206-08, notes 107 and 108.

¹⁵⁸ *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321 at 345.

¹⁵⁹ *Hufsky*, *supra* note 6.

¹⁶⁰ *Ladouceur*, *supra* note 127, upholding the statutory authority of police officers to randomly stop motor vehicles for the purpose of enforcing traffic laws.

considerations contained in the *Oakes* test. This strong conceptual overlap between the “arbitrariness” concept under section 9 and the section 1 factors should be neither surprising nor alarming. It should not be surprising because even before *Grant* Professor Coughlan equated arbitrariness and reasonableness,¹⁶¹ and the very role of the *Oakes* standards is to provide a systematic way of understanding those things that mark reasonable authority to countermand constitutional interests. The overlap should not be alarming because a number of section 7’s principles of fundamental justice overlap with section 1’s factors, including the “void for vagueness” doctrine. The Supreme Court of Canada has not been hesitant to recognize principles of fundamental justice that happen to overlap conceptually with section 1’s principles. If principles are fundamental to justice, they can ground a *prima facie* breach.

Moreover, as the *Hufsky* and *Ladouceur* decisions demonstrate, the symmetry between the principle against arbitrariness and section 1’s necessity test is imperfect. The ideas are aligned but not identical. Where the law provides “no criteria” for detaining individuals, there is a *prima facie* violation since, on the face of the law, there will be no state-based interest in detaining all of those individuals who the law permits to be detained. Where, however, the state can show that there is a pressing and substantial need for those random detentions which the law permits as it did in these cases, the necessity component of section 1 will be satisfied. Functionally, the “no criteria” conception of arbitrariness serves to reverse the onus on the necessity question.

B) Prima Facie Violations and Burdens of Proof

There are more basic questions about burdens of proof relating to *prima facie* violations of section 9 violations. The received view is that the burden on all section 9 issues falls to the *Charter* claimant. *Grant*, however, described how its “approach [to section 9] mirrors the framework for assessing unreasonableness of search and seizures under section 8 of the *Charter*.”¹⁶² The section 8 approach, of course, requires a *Charter* applicant to prove that there has been a warrantless search, after which the obligation falls to the state to demonstrate the reasonableness of the warrantless search. Parallel reasoning would suggest that where the *Charter* complainant proves a warrantless detention, the onus should fall to the state to demonstrate that detention was not arbitrary. The attraction of proceeding this way would be two-fold. First, as the Hon. Justice Casey Hill points out, many detentions are also warrantless searches or lead to

¹⁶¹ Coughlan, “Arbitrary Detention,” *supra* note 9 at 150-51.

¹⁶² *Grant*, *supra* note 5 at 388-89.

warrantless searches and there is little sense in bifurcating onuses in such cases.¹⁶³ In other words, there can be two overlapping *Charter* claims involving the same facts and conduct, one on which the *Charter* claimant is said to bear the burden, and the other on which the state does. This makes no sense. Second, the intrusiveness of a detention will generally be more serious than the intrusiveness of a search, certainly in the case of searches of things or places. That being so, why should the state be called on to show the reasonableness of warrantless searches but not warrantless detentions? It would be reading too much into things to suggest that this is what the Supreme Court of Canada was getting at in *Suberu* when it said that “the onus is on the application to show that in the circumstances he or she was effectively deprived of his or liberty of choice” (in other words that he or she has been detained), but did not say anything about the accused bearing the burden of demonstrating arbitrariness.¹⁶⁴ Given that the arbitrariness concept is the way of identifying justifiable intrusions into the liberty of choice, and given the conceptual overlap between the principles governing arbitrariness and section 1 determinations, however, there is much to be said for expecting *Charter* claimants to prove that they were detained without warrant but then placing the onus on the Crown of demonstrating that the detention was not arbitrary. This is not currently the law, but it should be.

11. Conclusion

The law of detention can now be more cogently explained in light of the purposive approach adopted in *Grant*. Specifically, the concept of detention is animated by two related but distinct choice-based concepts. First, section 9 exists to protect the freedom of individuals to make choices about their movements and physical actions, free from state interference. Meanwhile section 10 exists to protect those choices that the law furnishes to individuals who have lost their freedom to choose their movements or physical actions. These principles help explain why the *Charter*'s detention-based protections do not prohibit police questioning of suspects or require *Charter* warnings to be given to those who the police are investigating as suspects but who have not deprived of their freedom of movement. These choice-based purposes help to explain why subjects who are not actually deprived of their freedom of movement and who therefore rely on psychological detention have to believe subjectively that they have lost that freedom before a detention can be found. These choice-based purposes also explain why the reasonableness inquiry in the psychological detention concept uses a

¹⁶³ Hill, *supra* note 19.

¹⁶⁴ *Suberu*, *supra* note 4 at 476-77.

modified objective standard, and why it is not to be influenced by what the police know or intend or think unless communicated to the subject.

The concept of arbitrariness is also more coherent now that *Grant* explains that it takes its meaning from the principles of fundamental justice. The equation between arbitrariness and lawfulness that has resulted from the principle of legality provides a clear and easy guide in most cases to identifying section 9 violations. The principle of arbitrariness, for its part, provides a way of understanding the “no criteria” cases and affirming that they are examples of arbitrariness rather than its exclusive embodiment. The principle of overbreadth provides a foundation for understanding arbitrary detention decisions that are grounded in failures of process. Together both the principle of arbitrariness and the principle of overbreadth provide a basis for assessing whether those powers of detention that do exist are being used in an arbitrary way.

While *Grant* has done tremendous service in rationalizing the law, its more important contribution is in those open-textured aspects of the law of detention that call for close judgment. Considering the principles of fundamental justice should help in making psychological detention and investigative detention determinations; in deciding on the constitutional validity of laws authorizing detention, and in brokering the validity of liberty-depriving police conduct that occurs during or incidental to detentions.

It took a quarter of a century to achieve a clear and comprehensive purposive interpretation of these provisions. This is a signal development. When wondering what to mention about detention, the place to start and end is with purpose.