BRIEF INVESTIGATORY DETENTIONS: A CRITIQUE OF *R. V. SIMPSON*

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In this article, the author examines the brief investigative detention power created by the Ontario Court of Appeal in R. v. Simpson *and challenges both the Court's reasoning and the way in which the decision has been followed in other Canadian jurisdictions. The common law power to detain an individual, based upon prominent U.S. and British case law, is inconsistent with the previous Supreme Court jurisprudence on police powers. The author demonstrates this by analyzing several cases involving police powers and joins the list of commentators who have urged the country's highest court to re-examine the* Simpson *doctrine. The author also argues that there has been a tendency for U.S. courts to grant increased discretion to the police even when such powers are unwarranted. There is a real possibility of a similar accretion of police powers in Canada. Moreover, the American experience also indicates that members of minority groups are frequently subjected to the rigours of brief investigative detention, often only because of their ethnic identity. Recent studies show that the same trend exists in Canada, serving to challenge democratic and egalitarian values that the* Charter *is designed to protect. The solution, according to the author, lies not with the Courts, but with Parliament taking the opportunity to define the extent and limits of brief investigative detentions.*

L'auteur de cet article examine le pouvoir de courte détention pour enquête créé par la Cour d'appel de l'Ontario dans R. c. Simpson *et conteste le raisonnement de la Cour et la manière dans laquelle la décision a été suivie dans les autres juridictions canadiennes. Le pouvoir de la common law de détenir un individu, reposant sur la jurisprudence américaine et britannique, est incompatible avec la jurisprudence précédente de la Cour suprême en matière de pouvoir de la police. L'auteur le démontre en analysant plusieurs causes impliquant les pouvoirs de la police; il se joint à la liste des commentateurs qui ont demandé avec insistance à la plus haute cour de réexaminer la doctrine* Simpson. *L'auteur fait également remarquer que les tribunaux américains semblaient accorder une plus grande discrétion à la police même si ce pouvoir n'est pas justifié. Il existe une réelle possibilité d'accroissement des pouvoirs de la police au Canada. De plus, l'expérience américaine indique aussi que les membres des groupes minoritaires font fréquemment l'objet des rigueurs d'une courte détention pour enquête et ce, uniquement en raison de leur identité ethnique. Des études récentes indiquent que les mêmes tendances existent au Canada, contestant ainsi les valeurs démocratiques et égalitaires que la* Charte *doit normalement protéger. La solution, selon l'auteur, ne réside pas auprès des tribunaux, mais bien auprès du Parlement qui doit saisir l'occasion de définir la portée et les limites de ces courtes détentions pour enquête.*

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I. INTRODUCTION

In *R. v. Simpson*,[1] the Court of Appeal for Ontario established a new common law police power in Canada — the so-called "brief investigatory detention." This article traces the British and American antecedents of this investigatory power and the jurisprudence since *Simpson* which has approved it in several Canadian jurisdictions and, in some cases, extended it some distance beyond that laid out by the Court of Appeal for Ontario.

For a number of reasons, I argue that the doctrine ought not to have been recognized in Canadian law. First, the recognition of the doctrine in *Simpson* failed to take into account the quite different contexts in both American and British law for the two legal concepts upon which it relies. Second, the doctrine ignores the constitutional framework established by the Supreme Court of Canada for assessing both arbitrary detention under s. 9 and unreasonable search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*.[2] Third, the jurisprudence since *Simpson* indicates that there are unwholesome extensions of the doctrine that should be disapproved. Fourth, the potential for the doctrine to be exercised in a discriminatory manner against minorities is a serious risk.

Moreover, I argue that common law police powers in general have no place in a criminal justice system based on both legislated criminal law and entrenched legal rights in the constitution. Thus, I conclude that, when the opportunity arises, the Supreme Court of Canada should disapprove of the *Simpson* doctrine and maintain the constitutional framework that it has established through decisions such as *Hunter v. Southam Inc.*[3]

II. THE DECISION IN *SIMPSON*

In *Simpson*, Doherty J., speaking for a unanimous Court, was faced with a situation where a police officer who was engaged in an investigation of a "crack house" began to follow a vehicle in which Simpson was a passenger. The police officer acknowledged that he did not have any information about the occupants of the vehicle nor grounds to arrest either of them. While speaking to Simpson, the officer noticed a bulge in Simpson's pocket. Simpson complied with a request to remove the object and it turned out to be a baggie of cocaine. Finding breaches of both ss. 8 and 9 of the *Charter*, the Court of Appeal quashed Simpson's conviction.

Along the way, the Court recognized that an officer could, in some circumstances, briefly detain a person for investigatory purposes. Justice Doherty relied upon an English case, *R. v. Waterfield*,[4] for the proposition that there exists a common law power to briefly detain an individual for investigative purposes. The *Waterfield* test consists of two parts: one, whether the police conduct in question was within the general scope of any statutory or common law duty imposed on the police; and two, whether, in the circumstances of the case, the conduct involved an unjustifiable use of police powers. Without much analysis, Doherty J. then held

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1 *R. v. Simpson* (1993), 12 O.R. (3d) 182, 20 C.R. (4th) 1 [*Simpson* cited to C.R.].

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

3 [1984] 2 S.C.R. 145 [*Hunter*].

4 [1964] 1 Q.B. 164 (C.A.) [*Waterfield*].

that the officer's conduct satisfied the first arm of the test simply because he was engaging in an investigation of drug crimes, which fell within the more general duty of preventing crime and enforcing the law. Turning to the second arm, Doherty J. relied upon the American jurisprudence to determine whether the power was exercised in a justifiable way under the circumstances. He accepted the American position that the justifiability of an investigative detention must be assessed on the totality of the circumstances, and that there must be articulable cause in the form of a reasonable suspicion of wrongdoing. According to the Court of Appeal for Ontario, this would consist of "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation."[5] Moreover, he stressed the importance of the objective aspect of the test in order to avoid impermissible discrimination on factors such as sex, colour, age, ethnic origin, or sexual orientation.[6] However, even if the articulable cause existed, an investigative detention would not be justified in all circumstances:

> The inquiry into the existence of an articulable cause is only the first step in the determination of whether the detention was justified in the totality of the circumstances and consequently a lawful exercise of the officer's common law powers as described in *Waterfield, supra*, and approved in *Dedman, supra*. Without articulable cause, no detention to investigate the detainee for possible criminal activity could be viewed as a proper exercise of the common law power. If articulable cause exists, the detention may or may not be justified. For example, a reasonably based suspicion that a person committed some property-related offence at a distant point in the past, while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person had just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute the suspicion. Similarly, the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation.[7]

On the facts, the Court found that the officer lacked the requisite reasonable suspicion to justify the detention and therefore, the detention was arbitrary and contrary to s. 9 of the *Charter*. Justice Doherty subsequently concluded that the search was unreasonable and excluded the evidence under s. 24(2) of the *Charter*.

The most striking thing about the recognition of a power to briefly detain for investigative purposes was that it was completely unnecessary to the result in the case. Without consideration of the power, there still would have been a violation of both ss. 8 and 9 on existing Supreme Court of Canada jurisprudence and the exclusion of the evidence would therefore still have been considered. In respect of s. 9, a finding of arbitrary detention would have been mandated because the stop was not for any of the four purposes permitted without cause by *R. v. Ladouceur*[8] nor were there the requisite reasonable and probable grounds that would normally be required. Similarly, as the Court indeed held, there were no grounds to

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5 *Simpson, supra* note 1 at 20.

6 *Ibid.*

7 *Ibid.* at 24.

8 [1990] 1 S.C.R. 1257 [*Ladouceur*].

justify a search of Simpson's body. In consequence, without raising the issue of brief investigatory detentions, the Court would still have been faced with the question of exclusion or admission of the evidence under s. 24(2) of the *Charter*.[9]

Thus, a fair point against *Simpson* is that the discussion of brief investigatory detentions was *obiter*. Unfortunately, the decision has not been read in that way, with the result being that at least 360 cases have subsequently mentioned the decision and that it has been adopted in most jurisdictions in Canada.[10] Moreover, in some of the cases approving of *Simpson*, the governing criteria have not been rigourously applied and extensions to the power to detain have been recognized.[11] These developments will be discussed below. First, however, I will engage in a discussion of the American and British case law that underpin the *Simpson* doctrine.

III. BRITISH AND AMERICAN JURISPRUDENCE

One of the curiosities of *Simpson* is the extent to which its rationale rests on dubious authority from other countries and in contexts quite different from that in *Simpson* itself. My submission is that the contexts are sufficiently dissimilar to warrant much closer scrutiny before the acceptance of brief investigatory detentions into Canadian law.

The British case upon which *Simpson* draws its authority is *Waterfield*.[12] The case concerned whether the police had the authority to prevent the movement of a vehicle operated by the two accused; if they did, the two accused would have been liable for assaulting the police in the execution of their duty. However, the Court held that there was no such authority. Thus, although the Court did articulate the two-staged test adopted in *Simpson*, it did so in a single paragraph without amplification or authority, and certainly did not find any power for the police to, in effect, detain citizens. Indeed, the Court noted that neither accused had been charged or arrested, thus implicitly rejecting a detention power.[13] This aspect of the case was not mentioned at all in *Simpson*.

It may be that Doherty J. engaged in no analysis of the context in *Waterfield* because the ancillary powers doctrine referred to in it has already been accepted by the Supreme Court of Canada in several decisions.[14] Unfortunately, that Court has not engaged in a comprehensive analysis, either of the precise holding in *Waterfield* itself or of its context.

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9 Indeed, one might suppose that the arguments for exclusion of the evidence would have been even stronger had the Court not recognized at least the possibility of the legality of the detention and had instead focused on a standard of reasonable and probable grounds.

10 This is the number of references in Quicklaw's Quick Cite database as of January 2004. It is an update from a similar search undertaken by Peter Sankoff, "Articulable Cause Based Searches Incident to Detention — This *Cooke* May Spoil the Broth" (2002) 2 C.R. (6th) 41.

11 *Ibid.* See also Steve Coughlan, "Search Based on Articulable Cause: Proceed with Caution or Full Stop?" (2002) 2 C.R. (6th) 49. For further critical consideration of the case, see also James Stibopoulos, "A Failed Experiment? Investigative Detention: Ten Years Later" (2003) 41 Alta. L. Rev. 335.

12 *Supra* note 4.

13 *Ibid.* at 171.

14 See *e.g. R. v. Stenning*, [1970] S.C.R. 631 [*Stenning*]; *Knowlton v. The Queen*, [1974] S.C.R. 443[*Knowlton*]; *Dedman v. The Queen*, [1985] 2 S.C.R. 2 [*Dedman*]; and *R. v. Godoy*, [1993] 1 S.C.R. 311[*Godoy*].

Waterfield, as in two of the Supreme Court decisions, *Stenning*[15] and *Knowlton*,[16] dealt with an offence that contained as an element that a police officer was engaged in the execution of a duty. *Waterfield* concluded that there was no such duty, while *Stenning* and *Knowlton* decided the opposite. Nevertheless, there is a great deal of difference between using the *Waterfield* approach to determine whether a police officer, already engaged in a duty imposed by statute or common law, has unjustifiably used the powers associated with the duty, and the more expansive approach in *Simpson* and *Godoy*,[17] where an entirely new police power has been created. In the former situation, there is a policy concern not to permit an accused to avoid liability for actions against the police if a specific duty cannot be determined in the circumstances; it is arguably sufficient that the officer be engaged in some general duty.[18] That is different, however, from formulating a new police power.

There is an additional contextual consideration. At the time that *Waterfield* was decided, very few police powers in the United Kingdom were in statutory form. In contrast, Canada has long put the vast majority of police powers in statutory form, either in provincial statutes, the *Criminal Code*,[19] or other federal statutes. Therefore, the ambit of police powers such as to arrest, obtain search warrants and the like was relatively clear. In the United Kingdom, however, there was a greater need for the courts to rely upon common law powers because Parliament had not dealt with the issue. Since *Waterfield*, Britain has become much more like Canada and has passed legislation to set out the scope of police authority.[20] In short, Canadian courts do not have to fill in the same lacunae that their counterparts in Great Britain have traditionally been obliged to do. As a consequence, Canadian courts should be more circumspect when considering whether to adopt a single reference in a solitary case in a country with a somewhat different attitude towards legislating police powers.

Justice Doherty also relied upon American jurisprudence for the particular police power in question. Again, however, there was no discussion of the context in which the corresponding power in the United States developed. In *Terry v. Ohio*,[21] the United States Supreme Court first held that it was constitutional for a police officer who had a reasonable suspicion of wrongdoing to stop and frisk the suspect. The officer in question had observed three people engaged in suspicious behaviour, walking the same route on the street, and peering in the same store window. He suspected that they were casing the store for an armed robbery and when he accosted them, he almost immediately engaged in a frisk search for weapons, which he discovered.

Although the U.S. Supreme Court upheld the stop and frisk, there was very little analysis of the justification for the initial stop, and more attention paid to the search for weapons that followed. Thus, little guidance was provided for the justification of a brief investigatory

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15 *Ibid.*

16 *Supra* note 14.

17 *Ibid.*

18 Even that approach may be too broad in some circumstances. For example, the decision in *R. v. Moore*, [1979] 1 S.C.R. 195 attracted a strong dissent and considerable academic criticism. Moreover, even if there were a reasonable doubt about the officer being in the execution of a duty, there is usually liability for some other offence, such as assault.

19 R.S.C. 1985, c. C-46.

20 See *e.g. Police and Criminal Evidence Act* (U.K.), 1984, c. 11, ss. 32-33.

21 *Terry v. Ohio* 392 U.S. 1, 20 L. Ed. 2d 889, 1963 [*Terry*].

detention. Chief Justice Warren did, however, acknowledge the potential for discriminatory policing,[22] and, while establishing the same totality of circumstances test later adopted in *Simpson*, nevertheless accepted that there must be limitations on the ability to detain by "[f]ocusing the inquiry squarely on the dangers and demands of the particular situation,"[23] thus hinting that a detention for a trivial matter would not be justified. In addition, a point that is significant for the Canadian variation of the doctrine is the extent to which the search power was limited. The Court was clear that only a reasonable suspicion that the person was armed could justify a search and that a search was not justified to seek evidence.[24]

More pertinent, however, than the actual reasoning in *Terry* is the very different constitutional framework at play in the United States compared to its Canadian counterpart. In order to uphold the stop and frisk, the United States Supreme Court had to find an exception to the warrant requirement in the Fourth Amendment of the U.S. Constitution,[25] in order to overcome the mandatory exclusionary rule. In contrast, the Court in *Simpson* need not have recognized the validity of a brief investigatory detention because, without it, although there would have been violations of ss. 8 and 9 of the *Charter*, there was also the possibility of admitting the evidence on the s. 24(2) analysis. In other words, the impetus for recognizing the doctrine was not nearly so strong in Canada as in the United States.

IV. THE CANADIAN CONSTITUTIONAL FRAMEWORK

If the Court of Appeal for Ontario was not mindful of the different contexts of the jurisdictions from which it drew, it also appeared to have disregarded the constitutional framework established in Canada. Other commentators[26] have pointed out the lack of congruity of *Simpson* with Supreme Court of Canada decisions and, hence, have argued that our nation's highest court should not uphold the doctrine of brief investigatory detentions when given the opportunity. As the following discussion will show, I agree strongly with this view.

The beginning point must be the seminal case of *Hunter*,[27] where the Supreme Court stated that:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.[28]

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22 *Ibid.* at 904.
23 *Ibid.* at footnote 18.
24 *Ibid.* at 908.
25 *U.S. Const., amend IV.*
26 See *e.g.* Coughlan, *supra* note 11; Ron Delisle, "Judicial Creation of Police Powers" (1993) 20 C.R. (4th) 29; and Don Stuart, *Charter Justice in Canadian Criminal Law*, 3rd ed. (Scarborough: Carswell, 2001) at 268-69.
27 *Hunter*, *supra* note 3.
28 *Ibid.* at 169.

In the same case, the Court expressed a very strong preference for judicial authorizations for interference with individual privacy and held that the typical standard for overriding privacy should be at the level of reasonable and probable grounds. Thus, the effect of *Simpson* is as both Ron Delisle[29] and Douglas J.'s dissent in *Terry*[30] have stated — that the police are able to justify a detention and perhaps a search without a warrant and on slighter grounds than would be required for a warrant.

Admittedly, there have been exceptions to both of the *Hunter* principles cited above. Warrantless searches have been approved in exigent circumstances.[31] In addition, some statutory provisions permit police invasions of privacy on less than reasonable and probable grounds.[32] Most of these provisions have not been assessed against constitutional standards, but would likely pass muster because of the lower expectation of privacy and the relatively minor intrusion that is involved. Those contexts are, however, quite different from that involved in stopping a vehicle or individual for investigative purposes. There was no analysis in *Simpson* of why a reduced standard was justifiable.

In addition, as Steve Coughlan has pointed out, the reasonable suspicion standard does not fit well with other Supreme Court pronouncements.[33] Both by explicit language and implicitly, aspects of the Court's decisions in *R. v. Latimer*,[34] *R. v. O'Donnell*,[35] *R. v. Duguay*,[36] *R. v. Storrey*,[37] and *R. v. Feeney*[38] do not fit with a power to detain short of arrest on less than reasonable and probable grounds. Moreover, the Court has frequently refused to create police powers, calling instead for Parliamentary action. This has occurred in *R. v. Kokesch*,[39] *R. v. Stillman*,[40] *R. v. Wong*,[41] *R. v. Wise*,[42] and *Feeney*. As well, in *R. v. Mellenthin*,[43] the Court refused to extend the reasons for a random vehicle stop beyond those approved in *Ladouceur*.[44] Finally, extensions from *Simpson* to permit, for example, a search as an incident of the detention run afoul of the Supreme Court's views on the relationship between an arrest and a search as an incident of arrest, a topic that will be discussed below.

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29 Delisle, *supra* note 26 at 30-31.

30 *Terry*, *supra* note 21 at 914.

31 *R. v. Grant*, [1993] 3 S.C.R. 223.

32 See *e.g. Criminal Code*, *supra* note 19, ss. 492.1 and 492.2, which permit tracking warrants and number recorder warrants, respectively, on the grounds of a reasonable suspicion and s. 529.3(2)(a), which allows a reasonable suspicion to ground entry into a dwelling to prevent imminent bodily harm or death. Section 99(1)(f) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) also permits the stopping of a vehicle at a border crossing on the same standard. This was upheld by the Supreme Court of Canada in *R. v. Jacques*, [1996] 3 S.C.R. 312 on the footing that the customs context has a reduced expectation of privacy.

33 *Hunter*, *supra* note 3 at 51-57.

34 [1997] 1 S.C.R. 217.

35 [1985] 2 S.C.R. 216 at para. 13.

36 [1989] 1 S.C.R. 93.

37 [1990] 1 S.C.R. 241.

38 [1997] 2 S.C.R. 13 at para. 150.

39 [1990] 3 S.C.R. 3.

40 [1997] 1 S.C.R. 607.

41 [1990] 3 S.C.R. 36.

42 [1992] 1 S.C.R. 3.

43 [1992] 2 S.C.R. 615.

44 *Supra* note 8.

It is true that some Supreme Court decisions may be read as supporting the *Simpson* doctrine. In particular, *Dedman*,[45] because it both approved the stopping of vehicles for narrow purposes without reasonable grounds for either believing or suspecting wrong-doing and relied upon *Waterfield*, might presume to indicate a degree of support for investigative detentions. However, as Steve Coughlan has argued, *Dedman* is a limited decision that permitted the stoppage of vehicles under a well-publicized program, but only for purposes related to driving, a licensed activity.[46] Moreover, *Dedman* did not consider the *Charter* in its analysis. *Ladouceur* and *Mellenthin* have now made it clear that random roving vehicle stops without grounds are permitted only for reasons related to the licensed activity. As was specifically held in *Ladouceur*, vehicle stops for reasons other than the mechanical fitness of the vehicle, impairment of the driver, or to check for a valid driver's license, registration, and insurance are not permitted except when there are reasonable and probable grounds to do so.[47] This would rule out the brief investigatory detention of the driver of a motor vehicle and surely should rule out the stopping of a pedestrian who is not, after all, engaged in a licensed and regulated activity.

It is, of course, possible that the Supreme Court of Canada could backtrack from its previous jurisprudence and approve the *Simpson* doctrine. However, to do so, it would be necessary to jettison much of the reasoning that has pervaded the s. 8 and s. 9 jurisprudence.[48] Given the soundness of that jurisprudence in terms of balancing the state's interest in detecting crime with the privacy of citizens, it would be curious indeed should the Court embark on that path. Nowhere in *Simpson* was the case made that crime detection would be frustrated without the additional power. On the other side, it must be recognized that a reasonable suspicion will much more frequently be wrong than will reasonable and probable grounds. The potential for errors, particularly where related to discriminatory law enforcement practices, is a topic to which some discussion is directed below. Before this, however, I will turn to the extensions from *Simpson* that have occurred to show that the decision has put Canadian law on a slippery slope indeed.

V. EXTENDING THE AMBIT OF BRIEF INVESTIGATORY DETENTIONS

It probably should not have been a surprise that other courts would approve of *Simpson* and extend its reach to new situations. However, what is somewhat surprising is the extent to which the narrowness of *Simpson* has not been respected. One major way in which this has

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45 *Supra* note 14.

46 *Supra* note 11 at 52.

47 *Ladouceur*, *supra* note 8 at para. 60.

48 It would be remiss not to mention *R. v. Wilson*, [1990] 1 S.C.R. 1291, a companion case to *Ladouceur*, in which the majority referred to "articulable cause" as a basis for a vehicle stop. However, there was no analysis in the case of why that standard should prevail; the Court was able to uphold the stop on *Ladouceur* grounds; and it is inconsistent with other Supreme Court rulings, including *Ladouceur* and *Duguay*. Therefore, I submit that *Wilson* has little precedential effect and should not be read as authority for investigative detentions. Indeed, a more positive development that would reduce the risk of discriminatory policing would be to insist upon articulable cause as a basis for exercising a vehicle stop for any of the four reasons approved in *Ladouceur*, with the possibility of permitting a fixed checkpoint stop where all vehicles were stopped. The articulable cause basis would be the American position as developed in *Delaware v. Prouse* 99 S.Ct 1391 (1979) (U.S.S.C.). The same case, in *obiter* at 1401, raised the possibility of the second approach that was later adopted by the United States Supreme Court in *Michigan Department of State Police v. Sitz* 496 U.S. 444 (1990).

occurred is for courts not to follow the analytical steps espoused by Doherty J.: to first determine whether the police were within the course of their duty when the interference with liberty and privacy occurred, then to assess whether there was articulable cause for the interference as a part of the determination of its justifiability, and finally, a further determination on the totality of the circumstances of whether the detention was indeed justified. As Steve Coughlan has put it:

> [*Simpson*] did not find a general power to detain for investigative purposes. Nor did it find a power to detain for investigative purposes whenever articulable cause exists. The decision consciously disavowed both of those possibilities. What the case actually found was that without articulable cause, no detention could be justified. If there were articulable cause, a detention *might* be justified, but even if it were the power was intended to be very limited. Articulable cause alone specifically was *not* sufficient to authorize physical restraint and extensive interrogation.[49]

Sadly, many courts have not paid attention to the limited reach of the decision. The broadening of *Simpson* has occurred in several different ways.

First, there has been a tendency to focus immediately on the presence or absence of a reasonable suspicion and, if it exists, to find the detention justified. This ignores both the initial requirement of a lawful duty (admittedly, on the reasoning in *Simpson*, not a difficult step) and the additional scrutiny that is required after articulable cause has been found.[50] As a result, many more investigative detentions may be upheld than *Simpson* itself would permit.

Second, one might have supposed that the investigatory detention power related to motor vehicles as a licensed activity, even though Simpson himself was not the driver of the vehicle in that case, since the beginning of the detention consisted of stopping the vehicle. However, perhaps because *Terry* involved a pedestrian, courts have resorted to the doctrine in contexts other than driving, including stopped pedestrians and the occupants of houses.[51] In part, this may have occurred because Simpson was merely a passenger. In any case, almost no attention has been paid to contexts other than motor vehicles as representing an even greater intrusion on privacy. Because operating a motor vehicle is a highly regulated activity and because it can move away quickly, the courts have tended to depart from *Hunter* standards to permit warrantless searches and, after *Ladouceur*, to stop vehicles for certain limited reasons.[52] As well, the Supreme Court decision in *R. v. Belnavis*[53] has served to greatly reduce the expectation of privacy, especially for passengers. On the other hand, pedestrians on the street or the occupants of a home or other building have traditionally not been required to account for themselves to the police.[54] Extending brief investigative detentions to these

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49 Coughlin, *supra* note 11 at 57.

50 See *e.g. R. v. Yum* (2001) 277 A.R. 238 (C.A.) [*Yum*]; *R. v. Cooke* (2002), 2 C.R. (6th) 35 (B.C.C.A.).

51 See *e.g. Yum, ibid.*; *R. v. Dupuis* (1994), 162 A.R. 197 (C.A.); *R. v. C.M.G.* (1996), 113 Man. R. (2d) 76 (C.A.); *R. v. McAuley* (1998), 124 C.C.C. (3d) 117 (Man. C.A.).

52 See *e.g. R. v. Rao* (1984), 46 O.R. (2d) 80 (C.A.), leave to appeal dismissed (1984), 57 N.R. 238n (S.C.C.).

53 [1997] 3 S.C.R. 341.

54 See the dissenting judgment in *Moore*, *supra* note 18 for this proposition, which was not denied by the majority. Moore was on a bicycle, which provincial statute placed on a par with a motor vehicle and, for the majority, that gave rise to his liability for obstruction of a peace officer in the execution of a duty.

contexts places us closer to such a legal duty — a hallmark of a totalitarian state, rather than a democracy. The reasonable suspicion standard is not sufficient protection because, since a suspicion is at a much lower level than a probability, there is a strong possibility of error.

A third extension that has occurred is in permitting the use of a degree of force by police when effecting a brief investigative detention.[55] Citizens are generally not knowledgeable about their own rights or about the scope of police powers. As a consequence, it should be no surprise that some suspects will flee or resist when faced with an investigative detention. It is disturbing, then, for the courts to uphold force as an adjunct to brief investigatory detentions, for along with that additional power will undoubtedly come more police-generated offences, such as obstruction, resisting arrest, or assaulting a peace officer. Indeed, one could readily see that an innocent person would be more apt to resist such a detention since she/he would be more resentful of the police intervention. This is even more acute in the case of members of minority communities, for whom there is evidence of more targeting by police.[56]

A fourth extension or, at least, uncertainty from *Simpson* concerns the length of the detention that is permitted. By the term adopted by Doherty J., one would suppose that the duration is intended to be slight in order to minimize the interference with personal liberty and only for so long as the officer requires to satisfy the suspicion. However, that has not turned out to be the case. For instance, in *R. v. Dupuis*,[57] the police detained a group of people for over an hour and this was later approved by the Court. Moreover, some cases have approved the moving of the detainee to another location,[58] although apparently not so far as to a police station.

That the concept is a slippery slope is also illustrated by *R. v. Murray*.[59] The Quebec Court of Appeal again relied upon the ancillary powers doctrine from *Waterfield* to approve a police power to set up a roadblock in order to apprehend some bank robbers. Although distinct from a brief investigatory detention, the power to do so can be seen as an extension of the doctrine. While it may be agreed that the police require the ability to set up roadblocks in certain circumstances, it would be far better if such a power were defined by democratic legislatures than approved in an *ad hoc* fashion by judiciaries.

Most disturbing of all, however, is the trend towards permitting a search of the person as an incident to the detention. Even after more than twenty years' experience with entrenched rights, Parliament has not chosen to legislate standards for the search of arrestees. It has therefore been left to the courts to regulate this area. Unfortunately, the courts have not required reasonable and probable grounds or articulable cause for the most commonly exercised search power of all — those searches involving bodily integrity (which should

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55 See *e.g. Yum, supra* note 50; *R. v. Wainright*, [1999] O.J. No. 3539 (C.A.); and the various cases listed in Jason Nicol, "'Stop in the Name of the Law': Investigative Detention" (2002) 7 Can. Crim. L.R. 223 at 233, note 36.

56 This point will be developed further at *infra* notes 71-86 and accompanying text.

57 *Supra* note 51.

58 Lesley A. McCoy, "Liberty's Last Stand? Tracing the Limits of Investigative Detention" (2002) 46 C.L.Q. 319 at 325.

59 (1999), 32 C.R. (5th) 253 (Que. C.A.).

therefore enjoy the greatest constitutional protection). Instead, the right to search flows from a lawful arrest that requires at least reasonable and probable grounds.[60] Thus, there are standards at play, albeit not directly focused on the search itself. One might have supposed that a search incident to an investigative detention would not be permitted, since doing so has the obvious result of permitting a search on a very slight basis. Yet, several courts have approved such searches. As Steve Coughlan has analyzed,[61] this has been done on different bases — sometimes by analogy with the search incident to arrest,[62] and sometimes as an independent power.[63]

Regardless of the basis for recognizing the power to search, it is a worrisome trend. To begin with, it must be remembered that the American genesis for investigatory detentions limited the ability to search to situations where there was a reasonable suspicion that the suspect had a weapon. A search for evidence was specifically ruled out.[64] The Canadian jurisprudence has not generally imposed such a limitation,[65] perhaps since even in *Simpson*, had there been the basis for a reasonable suspicion, the search for evidence might have been approved.

The objections to a search incident to an investigative detention may be summarized as follows. First, it greatly weakens constitutional protection both by avoiding prior authorization and by reducing the standard significantly. Second, in some case, there has been an unjustified extension beyond a search for weapons to a search for evidence. Third, even where such a search has been restricted to a search for weapons, when other evidence has been found, it has typically been admitted into evidence. Related to this, it is far too easy for the police to simply assert that they are searching for weapons in order to justify the finding of contraband evidence. These developments are worrisome intrusions on our constitutional protection of privacy and liberty.

Canada must be mindful of the way in which brief investigative detentions have expanded in the United States since *Terry*. As David Harris has concluded:

> During the next twenty-five years, many cases fleshed out *Terry*'s rules. These cases gradually required less and less evidence for a stop and frisk. A substantial body of law now allows police officers to stop an

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60 The *Criminal Code*, *supra* note 19, s. 495(1) sets out the main police powers of arrest. Reasonable and probable grounds are the standard for arresting for an indictable offence while the arrest power for a summary conviction offence requires that the officer finds the accused committing the offence. This was, however, interpreted in *R. v. Biron*, [1976] 2 S.C.R. 56 to mean "apparently" committing the offence, thus arguably reducing the criteria to reasonable and probable grounds. In *R. v. Caslake*, [1998] 1 S.C.R. 51, the Court made it clear that the power to search incident to arrest is dependent upon the legality of the arrest. Coughlan, *supra* note 11 at 61-62 has noted other occasions on which the Supreme Court has restricted more intrusive search procedures by the requirement of reasonable and probable grounds.

61 *Supra* note 11 at 58-61.

62 See *e.g. R. v. Lake* (1997), 113 C.C.C. (3d) 208 (Sask. C.A.) and *Murray*, *supra* note 59.

63 See *e.g. R. v. Ferris* (1998), 16 C.R. (5th) 287 (B.C.C.A.), leave to appeal dismissed [1998] S.C.C.A. No. 424; and *Cooke*, *supra* note 50.

64 *Terry*, *supra* note 21 at 904.

65 Some cases have restricted a search incident to an investigative detention to a search for weapons if there is a further reasonable suspicion that the suspect may have a weapon (see *e.g. R. v. Johnson* (2000), 32 C.R. (5th) 236 (B.C.C.A.); and *R. v. Waniandy* (1995), 162 A.R. 293 (C.A.)).

> individual based on just two factors: presence in an area of high crime activity, and evasive behavior. In other words, many courts now find that reasonable suspicion to stop exists when the person involved 1) is in a crime-prone location, and 2) moves away from the police.[66]

To this must be added the distressing trend to water down *Terry* in other respects. Increasingly, courts in the United States have deferred to police judgement and experience in the determination of the reasonable suspicion standard.[67] Moreover, the purpose of the frisk has changed from permitting only a search for weapons to permitting searches for other evidence.[68] This has become an automatic power to search in the case of drugs.[69] The result is a general weakening of constitutional protection, and considerably more complexity in the law than what was conceived in *Terry* to be a narrowly drafted police power. As one of the leading American texts on the law of search and seizure devotes some 365 pages to the jurisprudence involving stop and frisk detentions,[70] it is truly worrisome that Canadian jurisprudence has been so precocious in moving quickly towards the American position in just over ten years. Added to that is the strong potential for discrimination against minority communities to occur in Canada, as it already has in the United States.

VI. DISCRIMINATION AND BRIEF INVESTIGATORY DETENTIONS

In *Ladouceur*, Sopinka J. expressed for the minority concern that vehicle stops without reasonable and probable grounds or articulable cause, even for limited reasons, carried the potential to permit discrimination against minorities through police discretion.[71] On the surface, it might be thought that the reasonable suspicion standard for a *Simpson* detention would afford some protection that is absent in the *Ladouceur* stop situation. Indeed, Doherty J. was alive to this issue in *Simpson*.[72] Unfortunately, the experience in the United States would suggest that the low standard of a reasonable suspicion can nonetheless lead to greater scrutiny for minorities than for the majority community. There are now some data to suggest that this is also the case in Canada.

As previously indicated, the American jurisprudence since *Terry* has moved to the extent that the courts make a finding of a reasonable suspicion to justify a stop and frisk if two criteria are satisfied: first, that the suspect is in a crime-prone area and second, that the suspect moves away from the police when approached.[73] Indeed, some courts have held that avoiding the police is itself enough to justify a stop and frisk.[74] Much of this movement away from the restrictions of *Terry* has arisen in the so-called "war against drugs." Accompanying this has been the relaxation of permission to conduct a frisk search for evidence. The effect has been to institutionalize a great deal more scrutiny of Blacks and other minorities. This

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66 David A. Harris, "Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked" (1994), 60 Indiana L.J. 659 at 660 [footnotes omitted].

67 *Ibid.* at 665-69, describes this evolution.

68 See *e.g. Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993) (U.S.S.C.).

69 Harris, *supra* note 66 at 676-77.

70 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 3d ed., vol. 4 (St. Paul, MN: West Publishing, 1996).

71 *Supra* note 8 at 1267.

72 *Supra* note 1 at 20.

73 Harris, *supra* note 66.

74 *Ibid.* at 673, n. 137.

is because the high crime areas are typically seen to exist in inner city neighbourhoods where the poor and minorities are more apt to live and frequent. Moreover, the experience of many members of minority communities is one of disparate treatment by the police. Statistically, police are far more likely to stop Black men than White men.[75] It is no surprise then that many Blacks and Hispanics wish to avoid contact with the police. However, if evasion equates to a reasonable suspicion, such people will provide the necessary justification for a stop and frisk. When this plays out in the jurisprudence, there is a tendency to view the results of *Terry* detentions as justification themselves since, by definition, criminal cases are ones in which some evidence was found on the suspect. Yet, as Harris has pointed out:

> Opinions in post-*Terry* cases that include avoidance of the police create a distorted picture. These cases convey the impression that only one reason exists to avoid police: escaping apprehension for a crime. After all, the cases all end in a seizure of some evidence, which seizure the defendant then contests as unconstitutional. These opinions, however, represent only one part of the universe of cases in which people are stopped because they avoided the police. It is simply not true that only the guilty avoid the police; there are many innocent reasons a person might run from them.[76]

The difficulty is, of course, that those who are subjected to a stop and frisk, but who are completely innocent will rarely seek a remedy in the courts, often because of a lack of resources to litigate, but perhaps quite understandably because of a lack of faith in the system to vindicate their rights.

This situation has been exacerbated in the United States with the explicit advent of racial profiling. David Tanovich has reviewed the American research on the practice of racial profiling.[77] That research shows that the police disproportionately subject Blacks to routine vehicle stops and searches. Other minority groups, such as Hispanics, Asians, and Arabs are also subject to racial profiling in these police processes. Much of this additional attention to minorities began as a part of the war on drugs through a program known as Operation Pipeline. Operation Pipeline began as a profile to assist in apprehending drug couriers. Originally, the focus was more on certain behaviours that might indicate that a person was a drug courier across borders but, over time, this changed to a more race-based pretext for stops and searches. Such innocuous factors as rental cars, careful compliance with traffic laws and, more ominously, drivers wearing "lots of gold," not fitting the vehicle, or belonging to certain minorities thought to be involved with drugs became important.[78] No doubt the anti-terrorism hysteria since September 11, 2001 has intensified racial profiling.

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75 *Ibid.* at 680, note 165.

76 *Ibid.* at 679.

77 David M. Tanovich, "Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall L.J. 145 [Tanovich, "Using the *Charter*"]. See also David M. Tanovich, "Res Ipsa Loquitur and Racial Profiling" (2002) 46 C.L.Q. 329; "Operation Pipeline and Racial Profiling" (2002) 1 C.R. (6th) 52.

78 David A. Harris, "Driving While Black: Racial Profiling On Our Nation's Highways" (1999) (ACLU Special Report), online: <www.aclu.org/profiling/report/index.html>, referred to in Tanovich, "Using the *Charter*," *ibid.* at 152.

Meanwhile, as Tanovich has recounted, Operation Pipeline has come to Canada.[79] However, even without that particular program, there is considerable evidence that the police routinely use race or ethnicity as a basis for deciding whom to stop. For example, an investigation into racism in Ontario found that young Black men were roughly twice as likely to be stopped by police as young white men.[80] Subsequent research in Manitoba found that Aboriginal people were subjected to greater scrutiny than non-Aboriginals.[81] Although other factors operate to cause the overrepresentation of both Aboriginals and Blacks in prisons, greater surveillance by the police is a contributing cause.[82] Recent case law has begun to recognize as well that systemic discrimination plays a role in policing decisions.[83]

It is, unfortunately, difficult to assess the extent to which racial profiling or systemic discrimination play a role in brief investigatory detentions. To begin with, it is rarely the case that a police officer will admit that the decision to stop was based on race, ethnicity, or other personal factors. It is quite easy for an officer to assert other reasons as providing the necessary reasonable suspicion.[84] As in the United States, innocent people will rarely pursue a remedy and many of those who are factually guilty will simply plead guilty without litigating the constitutionality of the detention. Moreover, the burden rests with the defence to demonstrate a breach of s. 8 or s. 9. As Tanovich has pointed out:

> The problems of distorted policing are particularly acute in the context of criminal investigatory detentions. There is no question that the requirement of an individualized standard of belief as a minimum standard for *Simpson* detentions provides an important protection against the use of racial profiling. However, because reasonable suspicion is such a low standard of belief, it depends heavily on an officer's experience and his or

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79 All three articles cited at *supra* note 77 identify this development. See also David M. Tanovich, "E-Racing Racial Profiling" (2004) 41 Alta. L. Rev. 905.

80 Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Government of Ontario, 1995).

81 A.C. Hamilton & C.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1: "The Justice System and Aboriginal People" (Winnipeg: Government of Manitoba, 1991).

82 Tanovich, "Using the *Charter*," *supra* note 77 at 162 sees scrutiny by the police in relation to drug offences as the primary factor in the overrepresentation of Blacks in Ontario prisons, although he concedes that this is a contested point. In respect of Aboriginal people, I have expressed the view that overpolicing is an aspect of the overincarceration that we see in Canada (Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders" in *Continuing Poundmaker & Riel's Quest* (Saskatoon: Purich Publishing, 1994) 269). For instance, in 2001, although Aboriginal people represent only between 2-3 percent of the Canadian population, 20 percent of those admitted to provincial, territorial, and federal custody were of Aboriginal descent (online: Statistics Canada <www.statcan.ca/english/Pgdb/legal30a.htm>).

83 See *e.g. R. v. Brown* (2002), 57 O.R. (3d) 615 (Sup. Ct.), a case in which it was argued that a Black man who was a professional basketball player was stopped because he was driving an expensive car. His conviction was overturned on appeal, with the appellate court finding that the trial judge's rejection of his defence exhibited a reasonable apprehension of bias. See also *Johnson v. Halifax (Regional Municipality) Police Service*, [2003] N.S.H.R.B.I.D. No. 2 (Board of Inquiry, P. Girard, Chair) in which it was found that systemic discrimination had played a role in the stopping and subsequent treatment of a Black man. The complainant had been stopped in his vehicle by the police near his home some 28 times in a five year period. He is a professional boxer who was also driving an expensive car.

84 Tanovich, "Using the *Charter*," *supra* note 77 at 181, notes the difficulty of proving such a claim. He states that the police are "adept at ensuring that their notes and testimony conform to expected standards of conduct" and goes on to add that, sometimes, officers may fabricate evidence to conceal the racial basis for a stop (*ibid.*). Some officers may be so inculcated with the stereotype that underlies programs such as Operation Pipeline that they are unaware that their decisions were affected by the race or ethnicity of the suspect.

> her interpretation of unfolding events when the power is being used to determine whether criminal activity is afoot, that is, crime detection. As noted earlier, this experience and interpretation can be influenced or distorted by unconscious racism.[] For example, an officer may see a black man in a white neighbourhood carrying a large package and may stop the man to investigate what is in the package because, in the officer's mind, he appears "out of place." Alternatively, an officer may interpret a handshake between two black men in a high crime area as a drug transaction. Such innocent behaviour might not be interpreted in such an incriminating manner if the men were white.[85]

As with the American experience, there is a strong concern that the courts will defer to the experience and judgement of police officers in assessing whether the requisite reasonable suspicion existed. This, combined with the risk that presence in an area of perceived high crime and moving away from the police will become the dominant factors as they have in the United States, should cause us to pause in our adoption of the *Simpson* detention. In a country committed by our Constitution to multiculturalism and equality,[86] we should be vigilant not to condone policing practices that further alienate members of minority communities. We must bear in mind that a reasonable suspicion, while carrying a partially objective standard, nevertheless permits a detention and possible search when there is less than a probability of the suspicion being correct. Errors based on stereotyping should not be permitted in a multicultural, egalitarian society.

VII. WHY COMMON LAW POLICE POWERS SHOULD NOT EXIST

For the reasons advanced throughout this article, the brief investigative detention authorized in *Simpson* should not be approved if and when the Supreme Court of Canada is given the opportunity to consider the question. There is, however, a broader question: should the common law anymore be a source of police powers? I would argue strongly against common law police powers in a modern democracy where there are constitutionally-entrenched rights. In taking this position, I do not wish to be understood as arguing for a narrow, strict-constructionist role for the courts in constitutional law. That is a separate question. Nor I am suggesting that there is no role whatever for the common law in criminal law and procedure. Obviously, Parliament has not spoken on some issues for which the courts must fill the gap. Rather, the position taken here is focused against the *ad hoc* creation of police powers. There are several reasons why I advance this position.

First, the development of the common law is quintessentially an after-the-fact type of reasoning. In propounding common law rules, judges are attempting to solve the precise legal problem before them on the narrow facts of a given case. In many areas of the law, this is both necessary and appropriate and the common law then develops incrementally. In contrast, devising new police powers involves a grant of additional state power to that which the state may itself grant by legislation and within a context in which it is extremely difficult to assess the implications. As the previous discussion has shown, the case law since *Simpson* is a vivid illustration of extensions from an initial, relatively narrow power to a broader power that represents much greater intrusions on constitutionally protected rights.

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85 *Ibid.* at 183 [footnote omitted].

86 Sections 27 and 15 of the *Charter*, *supra* note 2 protect these rights.

Moreover, the creation of a police power to deal with a particular fact situation too often seems like a search for a conviction that is not possible on the existing jurisprudence. For example, although the result in *Godoy*[87] was widely applauded, it, too, involved the creation of a new police power authorizing police to enter premises in order to assess the seriousness of a 911 telephone call. Nevertheless, I would argue that the preferable route to achieve the same result in that case would have been to find a constitutional violation in respect of the entry, which might have been fatal to a conviction for assaulting a peace officer, but which might still have led to liability for an assault on the basis of excessive force. Parliament would then have been free to legislate a power to enter premises in similar circumstances. In other situations, the finding of a *Charter* violation might not necessarily lead to exclusion of the evidence under s. 24(2).

Another drawback to the judicial creation of police powers is that it blurs the role of the judiciary as a guardian of constitutional rights. When there are legislated police powers, the courts may undertake their proper role to assess arguments against the constitutionality of the law. In contrast, when a court establishes a common law power, at least in that case it effectively usurps the ability of a litigant to challenge the constitutionality of the power or of the state to seek its justification under s. 1 of the *Charter*.[88] It is true that the Supreme Court has sometimes modified common law rules to conform with the *Charter*, but this has occurred without consideration of s. 1.[89]

Perhaps more fundamentally, the proper place to settle on the parameters of police powers over citizens is surely through the democratic process. While we may lament that Parliamentary scrutiny of legislation is not as thorough, informed, and vigourous as it might be, it is preferable to judges establishing rules without the opportunity for debate and amendment. Finally, as the experience in the United States has shown, the development of a police power may well lead to excessive complexity in the law.[90] It would be far better to have clear legislative prescriptions for the extent of the powers of state actors that might then be applied to individual cases, rather than adapting the common law to suit new situations with the attendant risks of expanding state power and increasing discriminatory effects.

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87 *Supra* note 14.

88 A position analogous to mine was taken by the dissenting judges, especially Arbour J., in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2004), 234 D.L.R. (4th) 257. I would submit that my argument in respect of the creation of police powers by the judiciary has even more force than the re-definition of s. 43 of the *Criminal Code*, *supra* note 19, that the majority engaged in that case.

89 See *e.g. R. v. Swain*, [1991] 1 S.C.R. 933; and *R. v. Daviault*, [1994] 3 S.C.R. 63.

90 *Supra* note 70.