# A FAILED EXPERIMENT? INVESTIGATIVE DETENTION: TEN YEARS LATER

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*Ten years ago, the Ontario Court of Appeal introduced the investigative detention power to Canada with its decision in* R. v. Simpson. *After providing some necessary background about the realities of police detention practices, the author offers a critical evaluation of* Simpson *and the ancillary powers doctrine that it relied upon to create this new police power. The author then proceeds to consider how well the investigative detention experiment has fared over the last decade, examining whether it has lived up to the goal that provided its inspiration, namely, the regulation of police detention practices. The author advances two major claims. First, the investigative detention cases have done little to regulate but much to legitimize police detention practices, mostly serving to blur the line between the detentions they endorse and conventional arrests. Second, the investigative detention experiment holds larger lessons about the dangers inherent when courts, as opposed to legislatures, create police powers. Given these dangers, the paper contends that the ancillary powers doctrine should be rejected as a device for creating complex police powers, like investigative detention. Instead, the author draws upon the dialogue model, already embraced by the Supreme Court of Canada, to offer an alternative approach. He concludes by outlining steps the Court could take to encourage Parliament to finally enact the sort of clear, comprehensive, and prospective rules and procedures that are essential if police detention practices are to be effectively regulated in the future.*

*Il y a dix ans, avec la décision* R. c. Simpson, *la Cour d'appel de l'Ontario a introduit le pouvoir de détention par enquête au Canada. Après avoir fourni de l'information nécessaire au sujet des réalités des pratiques de détention, l'auteur donne une évaluation critique de l'affaire* Simpson *et de la doctrine de la compétence accessoire qui a servi de base à ce nouveau pouvoir de police. L'auteur examine ensuite le succès que cet essai de pouvoir de détention a connu depuis dix ans examinant s'il a permis d'atteindre l'objectif don't il a été inspiré, notamment la réglementation des pratiques de détention de la police. L'auteur fait valoir deux points très importants. Tout d'abord que les cas de détention par enquête ont fait peu de choses en termes de réglementation, mais ont plutôt légalisé les pratiques de détention de la police, c'est-à-dire que cela a surtout permis d'estomper la ligne entre les détentions qu'elle endosse et les arrestations habituelles. Ensuite, cet essai nous donne une meilleure leçon au sujet des risques présentés lorsque les tribunaux, contrairement aux autorités législatives, créent des pouvoirs policiers. Compte tenu de ces risques, l'article prétend que la doctrine de la compétence accessoire devrait être rejetée à titre de recours de création de pouvoirs complexes de la police, comme cette forme de détention. L'auteur s'inspire plutôt du modèle de dialogue, déjà adopté par la Cour suprême du Canada, comme solution de rechange. Il conclut qu'en établissant des étapes que la Cour pourrait suivre pour encourager le Parlement pour, en définitive, adopter les règles et les procédures claires, complètes et prospectives qui sont essentielles si l'on veut réglementer efficacement les pratiques de détentions policières à l'avenir.*

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## I. INTRODUCTION

It has been ten years since the term "investigative detention" first entered the Canadian criminal justice lexicon. Prior to 1993, with very few exceptions, Canadian law did not authorize the police to detain individuals short of arresting them. At least in theory, the police had only two options when dealing with persons they suspected of wrongdoing: arrest (assuming they possessed the required reasonable and probable grounds) or let them go. All of this changed when the Ontario Court of Appeal decided *R. v. Simpson.*[1]

In *Simpson*, the Court was convinced that, despite a lack of formal authority, investigative stops were a routine part of police patrol practices. It was in a stated effort to "regulate" such encounters that the Court went on to recognize a police power at common law to detain for investigative purposes in situations where the police have articulable cause (that is, reasonable suspicion) to believe that an individual is implicated in criminal activity.[2] In the

[1] *R. v. Simpson* (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 (Ont. C.A.) [*Simpson* cited to C.C.C.].

[2] *Ibid.*, indicating at 498 that "[u]nless and until Parliament or the legislature acts, the common law ... must provide the means whereby the courts *regulate* the police power to detain for investigatory purposes" [emphasis added].

intervening years, most Canadian appellate courts have followed *Simpson*, granting this new investigative tool to police officers across the country.[3]

To date, the Supreme Court of Canada has not directly addressed these developments.[4] It appears as though this is about to change, however, as the Court recently granted leave in a case that will place the status of this new police power squarely before it.[5] Accordingly, this seems a fitting time to evaluate how effective the investigative detention experiment has been in achieving the goal that provided its inspiration: the regulation of police detention practices.

This article begins in Part II with some essential background, examining the historic divide between the formal limits on police investigative stops and the realities of police practices. This section is followed in Part III by a careful examination of the decision in *Simpson*. That judgment is critically evaluated, as is the "ancillary powers doctrine" the Court relied upon to create a police investigative detention power. Once this essential background is in place, the focus shifts in Part IV to a consideration of whether *Simpson* has lived up to its goal of "regulating" police investigative stops. In making this assessment, the article proceeds from the assumption that the best way to control police power is by confining, structuring, and checking the exercise of discretion.[6] Finally, Part V explores the larger lessons to be learned from the investigative detention experiment.

The article advances two major claims. First, *Simpson* and its progeny have raised more questions than they have answered. In the process, the investigative detention cases have done little to "regulate," but much to expand and thereby legitimize police authority. The result has been a blurring of the line between the investigative detentions endorsed by these cases and those encounters historically characterized as arrests. Second, the investigative detention experiment holds larger lessons about the dangers inherent when courts, as opposed to legislatures, create police investigative powers. Although the authority to conduct investigative stops is of critical importance to the police, the creation of a new police power of detention is better left to Parliament. Unfortunately, as long as the courts remain willing to fill the legislative lacuna, meaningful controls will not be forthcoming, as Parliament will continue to lack any incentive to take needed action in this area.

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3 See *R. v. Ferris* (1998), 162 D.L.R. (4th) 87, 126 C.C.C. (3d) 298 (B.C.C.A.) [*Ferris* cited to C.C.C.]; *R. v. Dupuis* (1994), 162 A.R. 197 (C.A.) [*Dupuis*]; *R. v. Lake* [1997] 5 W.W.R. 526, (1996), 113 C.C.C. (3d) 208 (Sask. C.A.) [*Lake* cited to C.C.C.]; *R. v. G.(C.M)* (1996), 113 Man. R. (2d) 76 (C.A.); *R. v. Pigeon* [1993] R.J.Q. 2774, (1993), 59 Q.A.C. 103 (Que. C.A.); *R. v. Carson* (1998), 207 N.B.R. (2d) 39, 39 M.V.R. (3d) 55 (C.A.); *R. v. Chabot* (1993), 126 N.S.R. (2d) 355, 86 C.C.C. (3d) 309 (C.A.); *R. v. Burke* (1997), 153 Nfld. & P.E.I.R. 91, 118 C.C.C. (3d) 59 (Nfld. C.A.).

4 See *infra* note 106, detailing those cases in which the Supreme Court has cited *Simpson* yet carefully avoided passing upon the investigative detention power that it created.

5 See *R. v. Mann* [2002] 11 W.W.R. 435, (2002), 169 C.C.C. (3d) 272 (Man. C.A.) [*Mann* cited to C.C.C.], leave granted 27 March 2003 S.C.C. Bulletin, 2003 at 511.

6 See Kenneth Culp Davis, *Police Discretion* (St. Paul: West Publishing Co., 1975). In his groundbreaking work, Davis recognized the dangers of too little and too much discretion, arguing that "[u]nnecessary discretion must be eliminated. But discretion often is necessary and often must be preserved. Necessary discretion must be properly confined, structured, and checked" (*ibid.* at 170). See also Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University, 1969) at 25-26, 42, 94-95 [Davis, *Discretionary Justice*].

## II. INVESTIGATIVE STOPS: LAW VS. REALITY

### A. THE ABSENCE OF A COMMON LAW POWER

The Anglo-Canadian common law constitution has long required that any interference with individual liberty be based on lawful authority. This central tenet of the rule of law — known as the "principle of legality" — demands that "every official act must be justified by law."[7] Absent some legal justification suggesting otherwise, the right to liberty is presumed. In effect, individuals are considered to be in a state of perpetual freedom. Restraints on liberty are viewed as the exception and not the rule.

A lawful arrest has long been considered one of these exceptions. Historically, first at common law[8] and later through legislation,[9] police officers have had the authority to interfere with an individual's liberty by carrying out an arrest, provided that the officer possessed the requisite reasonable and probable grounds.[10] Short of that, however, the cases and the commentary seemed clear: police did not have the power to detain for investigative purposes.[11] In fact, prior to *Simpson*, this proposition seemed virtually unassailable,

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7 See Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf ed. (Toronto: Carswell, 1997), who refers to it as the "principle of validity" at 31-4). See also L.H. Leigh, *Police Powers in England and Wales*, 2nd ed. (London: Butterworths, 1985), who refers to it as the "principle of legality" at 32-33. For a classic statement of this principle of English constitutional law, see also Albert V. Dicey, *Introduction To The Study Of The Law Of The Constitution*, 8th ed. (London: Macmillan, 1915) at 198, 203-204.

8 At common law, a constable had both a right and a duty to arrest if he had reasonable grounds to believe that an individual had or was about to commit a felony. In contrast, warrantless misdemeanour arrests were only permitted in cases involving a breach of the peace. See James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill L.J. 225 (outlining the common law relating to arrest powers at 235-36).

9 See *Criminal Code*, S.C. 1892, c. 29, s. 552 (authorizing the warrantless arrest of persons "found" committing certain enumerated offences). Today, arrest powers remain in the *Criminal Code*. See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 494 and 495 [*Criminal Code* or *Code*].

10 See *Criminal Code*, *ibid.*, s. 495(1)(a) which contains the arrest power most commonly resorted to by police. It authorizes a police officer to arrest without a warrant a person who, "on reasonable grounds, he believes has committed or is about to commit an indictable offence" (*ibid.*). See also *R. v. Storrey* [1990] 1 S.C.R. 241, (1990), 53 C.C.C. (3d) 316 [*Storrey* cited to C.C.C.], holding that a police officer must subjectively believe reasonable grounds exist and that those grounds must also be objectively reasonable.

11 See *R. v. Klimchuk* (1991), 67 C.C.C. (3d) 385 at 403, 8. C.R. (4th) 327 (B.C.C.A.) [*Klimchuk* cited to C.C.C.]; *R. v. Hicks* (1988), 42 C.C.C. (3d) 394 at 400 (Ont. C.A.), aff'd on other grounds [1990] 1 S.C.R. 120, (1988), 54 C.C.C. (3d) 575; *R. v. Moran* (1987), 36 C.C.C. (3d) 225 at 258 (Ont. C.A.); *R. v. Esposito* (1985), 53 O.R. (2d) 356, 24 C.C.C. (3d) 88 at 94 (Ont. C.A.), leave to appeal to S.C.C. refused, [1986] 1 S.C.R. viii [*Esposito* cited to C.C.C.]; *R. v. Dedman* (1981), 32 O.R. (2d) 641, 59 C.C.C. (2d) 97 at 108-109 (C.A.), aff'd on other grounds [1985] 2 S.C.R. 2, (1985), 20 C.C.C. (3d) 97 [*Dedman* cited to C.C.C. at S.C.C.]; *Cluett v. The Queen* (1982), 3 C.C.C. (3d) 333 at 347-48 (Ont. C.A.), rev'd on other grounds [1985] 2 S.C.R. 216, (1985), 21 C.C.C. (3d) 318; *R. v. Guthrie* (1982), 39 A.R. 435, 69 C.C.C. (2d) 216 at 218-19 (Alta. C.A.); *Moore v. The Queen* [1979] 1 S.C.R. 195, (1978), 43 C.C.C. (2d) 83 at 89-90; *Rice v. Connolly*, [1966] 2 Q.B. 414 at 419 (C.A.); *Kenlin v. Gardner*, [1967] 2 Q.B. 510 (C.A.); *Koechlin v. Waugh and Hamilton* (1958), 118 C.C.C. 24 at 26-27 (Ont. C.A.); Peter Hogg, *Constitutional Law of Canada*, 3d ed. (Scarborough: Carswell, 1992) at 1072; Alan Young, "All Along The Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall L.J. 329 at 330, 343; David C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989) at 303-304; Canada, Law Commission of Canada, *Arrest*, Working Paper 41 (Ottawa: Supply & Services Canada, 1985) at 33, 37; Steve

especially given the clarity with which some of the most respected criminal law jurists in the country had spoken on the topic. For example, Chief Justice Dickson had stated:

> Short of arrest, the police have never possessed legal authority at common law to detain anyone against his or her will for questioning, or to pursue an investigation.... [P]olice lack legal authority to detain a person for questioning or for purposes of investigation at common law, even on suspicion, short of arrest.[12]

Similarly, Justice Martin of the Ontario Court of Appeal had indicated that:

> A police officer, when he is endeavouring to discover whether or by whom an offence has been committed, is entitled to question any person, *whether suspected or not*, from whom he thinks that useful information can be obtained. Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he, as a general rule, has no power to compel the person questioned to answer. *Moreover, he has no power to detain a person for questioning, and if the person questioned declines to answer, the police officer must allow him to proceed on his way unless he arrests him on reasonable and probable grounds.*[13]

Again, the implications of these cases and the quoted passages could not have been clearer: Canadian police did *not* have a power to detain suspected wrongdoers except by arresting them.

## B. THE REALITY OF POLICE PRACTICES

Despite this historic lack of formal power, police investigative stops based on grounds falling short of those required for an arrest have long been a reality in Canada.[14] This is not at all surprising. In the field, the distinction between mere suspicion and the reasonable and probable grounds needed for an arrest can be meaningless. Rather, if a police officer encounters someone who arouses his or her suspicions, that person will be approached, questioned, and possibly searched. If the individual does not acquiesce to police authority, some level of physical restraint will follow. In either case, the suspect will remain under police control until the officer's suspicion of wrongdoing is either confirmed (leading to an arrest) or dispelled (resulting in release). Such stops will persist regardless of their legal status because the police understandably see such street-level detentions as essential to the

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Coughlan, "Police Detention for Questioning: A Proposal" (1985) 28 Crim. L.Q. 64 at 66, 77; Canada, Report of the Canadian Committee on Corrections, *Towards Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) at 56-57 (Chair: Roger Ouimet).

12 *Dedman*, *ibid.* at 104, 106, Dickson C.J.C., dissenting. The majority did not take exception to these general statements of principle; *ibid.* at 121. *Dedman* is discussed in detail below; see *infra* notes 61 through 80 and accompanying text.

13 *Esposito*, *supra* note 11 at 94 [emphasis added].

14 Young argued that detention short of arrest is a mainstay of aggressive patrol practices and advocated for judicial and legislative efforts to regulate such practices; *supra* note 11 at 330-41, 367-68. See also Paul C. Weiler, "The Control of Police Arrest Practices: Reflections of a Canadian Tort Lawyer" in Allen M. Linden, *Studies in Canadian Tort Law: A Volume of Essays on the Law of Torts Dedicated to the Memory of the Late Dean C.A. Wright* (Toronto: Butterworths, 1968) 416, writing in the pre-*Charter* era, he noted at 437-40 that "detention for investigation" was common, although "outside the law."

performance of their functions. They are "part and parcel of the routine activities of all police forces."[15]

Indeed, much can be said in favour of vesting the police with the authority to conduct investigative detentions. The fiction in the pre-*Simpson* cases is difficult to deny. The idea that police officers readily distinguish between suspicion and the reasonable and probable grounds needed for an arrest has not been borne out by experience.[16] Policing is a complicated and challenging business. In court, viewed calmly through the dispassionate lens of the trial process, with the benefit of hindsight, the options available to a police officer can seem deceptively clear. In contrast, for that same officer on the street, as events unfold quickly, there may be little opportunity for self-reflection when making a decision. If a suspicious situation presents itself, an officer must be able to take immediate action in response. The sophisticated but guilty suspect — astute enough to ask "am I under arrest?" — should not be able to scuttle a police officer's inquiries by choosing to walk away before an officer's legitimate suspicions have crystallized into grounds for an arrest. In such cases, a police officer should be legally entitled to briefly maintain the *status quo* in order to quickly get to the bottom of things. To refuse the police such a power is to deny them a needed tool in the performance of their difficult duties.

### C. THE POTENTIAL FOR ABUSE

Nevertheless, it would be naive to think that the police should be granted such a power unconditionally. Throughout the twentieth century, Canadian police have increasingly come to see themselves as "crime fighters" engaged in a war against crime and those who perpetrate it.[17] Even though this crime-fighting self-image is more rhetoric than reality,[18] its potential influence on how the police fulfill their crime control and order maintenance functions should not be underestimated. On the street, the unchecked enthusiasm of some police officers can undoubtedly lead to unjustified stops. Given the recent move in many

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15 Young, *supra* note 11 at 330.

16 Canada, Commission for Public Complaints Against the RCMP, *Annual Report 1997-1998* (Ottawa: Minister of Public Works and Government Services Canada, 1999) (Chair: Shirley Heafey). The Commission noted that RCMP officers "do not always distinguish between evidence that creates a suspicion from evidence that constitutes reasonable grounds for believing that a person has committed a crime" (*ibid.* at 14).

17 See Greg Marquis, "Power from the Street: The Canadian Municipal Police" in R.C. Macleod & David Schneiderman, eds., *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994) 24 at 30-31.

18 See Jack R. Green & Carl B. Klockars, "What Police Do" in Carl B. Klockars & Stephen. D. Mafstrofski, eds., *Thinking About Police: Contemporary Readings*, 2d ed. (New York: McGraw-Hill, 1991) 273, noting at 275 that studies suggest that only a small fraction of police work involves fighting crime.

Canadian cities[19] towards "community policing"[20] models whose crime reduction benefits are said to be linked to "aggressive field interrogation and proactive citizen street contacts,"[21] the potential for police abuses can only increase.[22] In deciding whom to target for detention as part of these efforts, police officers will frequently rely upon intuitive assessments that a particular individual seems "out of place" or "suspicious."[23] As a result, the potential for unjustified stops is ever-present. Even more troubling, however, is the mounting evidence that these sorts of discretionary judgments by Canadian police are not free from the oblique influence of factors such as an individual's age, sex, socio-economic status, or race.[24] Although using any of these personal characteristics as a proxy for individualized suspicion is troubling, the most pernicious and, therefore, most controversial variable on this list is obviously race.

Over the last decade, the existence of racial discrimination within the Canadian criminal justice system has received official recognition, initially through the findings of government

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19 See Curt Taylor Griffiths, Richard B. Parent & Brian Whitelaw, *Community Policing In Canada* (Scarborough: Nelson Thomson Learning, 2001) at 19, who noted that in Canada, "the philosophy of community policing is having a significant impact on the structure and delivery of policing services." Community policing strategies have been implemented by police forces in cities and regions across the country (*ibid.* at 178-200). See also Paul F. McKenna, *Foundations of Community Policing in Canada* (Scarborough: Prentice Hall Allyn and Bacon Canada, 2000) at 295-334.

20 In theory, "community policing" contemplates a cooperative dynamic between citizens and the police aimed at solving contemporary community problems related to crime, fear of crime, social and physical disorder, and neighbourhood conditions. See Robert Trojanowicz *et al.*, *Community Policing: A Contemporary Perspective*, 2d ed. (Cincinnati: Anderson, 1998) at 3-24. In practice, this often translates into little more than taking officers out of patrol cars and putting them on the street "through foot patrols, park-and-walk patrols and fixed police posts"; see David H. Bayley, "Community Policing: A Report From The Devil's Advocate" in Jack R. Green & Stephen D. Mastrofksi, eds., *Community Policing: Rhetoric Or Reality* (New York: Praeger, 1988) 225 at 229 [*Rhetoric or Reality*].

21 Lawrence W. Sherman, "Policing Communities: What Works?" in Albert J. Reiss, Jr. & Michael Tonry, eds., *Communities and Crime, Vol. 8* (Chicago: University of Chicago Press, 1986) 343, noted that studies have shown that these sorts of contacts result in lower recorded crime rates at 369. But see Jack R. Greene & Ralph B. Taylor, "Community-Based Policing And Foot Patrol: Issues Of Theory And Evaluation" in *Rhetoric or Reality*, *ibid.* 195 at 206-19, questioning whether the studies actually support crime-reduction claims.

22 See Stephen M. Mastrofski, "Community Policing As Reform: A Cautionary Tale" in *Rhetoric or Reality*, *ibid.* at 47. Mastrofski noted that "aggressive order maintenance strategies" are often integral components of community policing efforts and can include "rousting and arresting people thought to cause public disorder, field interrogations and roadblock checks, surveillance of suspicious people, vigorous enforcement of public order and nuisance laws, and, in general, much greater attention to the minor crimes and disturbances thought to disrupt and displease the civil public" (*ibid.* at 53). See also Griffiths *et al.*, *supra* note 19 at 64, who noted that, as part of community policing efforts, "aggressive patrol may involve car stops, person checks, zero-tolerance enforcement, and other crackdowns" and cautioned that "officers must ensure that their actions do not violate the citizens' rights guaranteed in the *Canadian Charter of Rights and Freedoms.*"

23 See *e.g. R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.) at 268; the officer testified that he approached the accused because he was "continuing to watch the cruiser as it approached" and, according to the officer, there was "something not quite kosher" about such behaviour.

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

commissions and inquiries, and later in the opinions of Canadian courts.[25] In the case of Aboriginal people, a number of studies have acknowledged the existence of widespread racism, resulting in systemic discrimination in the criminal justice system.[26] Similarly, the *Commission On Systemic Racism in the Ontario Criminal Justice System* found that blacks are subject to discriminatory treatment at several key stages of the criminal process.[27] The official studies served to confirm what anecdotal evidence had long suggested, namely, that the Aboriginal and black communities are over-policed.[28]

Cogent evidence has recently emerged to suggest that both Aboriginals[29] and blacks[30] are stopped by police at considerably higher rates than members of other racial groups. For example, after surveying respondents about their experiences over a two year period, a study by the *Commission on Systemic Racism in the Ontario Criminal Justice System* found that, "after controlling for other variables, blacks are twice as likely as whites or Asians to experience a single stop … four times more likely to experience multiple stops … and almost

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25 See *R. v. Williams*, [1998] 1 S.C.R. 1128, (1998), 124 C.C.C. (3d) 481 at 504 and *R. v. Gladue*, [1999] 1 S.C.R. 688, (1999), 133 C.C.C. (3d) 385 at 411, each acknowledging the existence of "widespread racism" and "systemic discrimination" against Aboriginals in the criminal justice system. See also *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, (1997), 118 C.C.C. (3d) 353, wherein the Court acknowledged "widespread and systemic discrimination against black and aboriginal people" at 372; *R. v. Parks* (1993), 15 O.R. (3d) 324, 84 C.C.C. (3d) 353 (C.A.), acknowledging "anti-black racism" at 366-69. See also *R. v. Brown* (2003), 173 C.C.C. (3d) 23, 170 O.A.C. 131 (C.A.) at paras. 7-9 [*Brown*]; and *R. v. C.R.H.* (2003), 174 C.C.C. (3d) 67, 2003 MBCA 38 at para. 49, acknowledging the existence of and potential for "racial profiling." See *e.g. R. v. Peck*, [2001] O.J. No. 4581 (S.C.J.) (QL), in which the Court found that the race of the accused — a young black male — was consciously relied upon in deciding to make a stop.

26 See Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1996) at 33; Canada, Royal Commission On The Donald Marshall, Jr. Prosecution, *Digest of Findings And Recommendations* (Halifax: The Commission, 1989) at 162. See also Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: The Inquiry, 1991) at 96-113 [*Report on Aboriginal Justice in Manitoba*]; Canada, Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta* (Edmonton: The Task Force, 1991) at 2-5, 2-46 to 2-51 [*Justice on Trial*].

27 See Ontario, Commission On Systemic Racism In The Ontario Criminal Justice System, *Report* (Toronto: Queen's Printer for Ontario, 1995) [*Report On Systemic Racism In The Ontario Criminal Justice System*].

28 See Julian V. Roberts & Anthony N. Doob, "Race, Ethnicity and Criminal Justice in Canada" in Michael Tonry, ed., *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives*, vol. 21 (Chicago: University of Chicago Press, 1997) 469 at 519, noting that: "[c]ommon to the research on Aboriginals and blacks is the finding that discrimination effects are probably strongest at the policing stage."

29 See *Report on Aboriginal Justice in Manitoba*, *supra* note 26 at 595; *Justice on Trial*, *supra* note 26 at 2-6, 2-48, 2-49.

30 See *Report On Systemic Racism In The Ontario Criminal Justice System*, *supra* note 27 at 349-60. See also Scot Wortley, "The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice (Paper presented at the 48th Annual Conference of the American Society of Criminology, Chicago, November, 1997) Criminol. [forthcoming] [Wortley]; Carl James, "'Up To No Good:' Black on the Streets and Encountering Police" in Vic Satzewich, ed., *Racism and Social Inequality in Canada: Concepts, Controversies, and Strategies of Resistance* (Toronto: Thompson Educational, 1998) at 157; Robynne Neugebauer, "Kids, Cops, and Colour: The Social Organization of Police-Minority Youth Relations" in Robynne Neugebauer, ed., *Criminal Injustice: Racism in the Criminal Justice System* (Toronto: Canadian Scholars' Press, 2000); Jim Rankin *et al.*, "Police Target Black Drivers Star analysis of traffic data suggests racial profiling" *Toronto Star* (20 October 2002) A8.

seven times more likely to experience an unfair stop."[31] These studies serve to reveal an unfortunate truth: in carrying out proactive stops, Canadian police sometimes use race as a substitute for objectively reasonable grounds.

None of this is intended to suggest that overt racism is rampant among Canadian police; the empirical evidence does not go that far. Nevertheless, it is undeniable that racism exists in Canada. Given this fact, it would be dangerous to presume that discretionary decision-making by police officers is somehow immune from its caustic effects. As with any group, there are undoubtedly some police officers who consciously act on the basis of racial stereotypes. Sadly, in deciding who to stop, these officers will invariably target members of minority groups whom they consider more likely to be engaged in wrongdoing and therefore more deserving of closer scrutiny.[32]

A much more likely danger, however, is that many police officers subconsciously operate on the basis of stereotypical assumptions regarding visible minorities. For these officers, the facts that tweak suspicion — "the commission of a 'furtive gesture,' an 'attempt to flee,' 'evasive' eye movements, 'excessive nervousness' — will not be accurate renditions of the suspect's actual behavior, but rather, a report that has been filtered through and distorted by the lens of stereotyping."[33] In a recent decision, the Ontario Court of Appeal made clear that regardless of whether a stop is the product of conscious or subconscious racial bias, the appropriate label for such discriminatory police practices is "racial profiling."[34] For our

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[31] Wortley, *ibid.* at 19. For comparative purposes, this study controlled for age, gender, income, employment status and education — "unfair stops" were those that respondents self-reported as involving "unfair" treatment by police.

[32] If police attitudes are reflective of those within Canadian society, this conclusion is somewhat inescapable. See Roberts & Doob, *supra* note 28 at 485, citing a 1995 Gallup poll of Canadians in which 45 percent of respondents indicated that there was a link between ethnicity and crime and, of this group, two-thirds identified blacks as the minority most likely to be involved in crime.

[33] Anthony C. Thompson, "Stopping the Usual Suspects: Race and the Fourth Amendment" (1999) 74 N.Y.U.L. Rev. 956 at 991.

[34] *Brown*, *supra* note 25. At para. 7, the Court cited Rosenburg J.A. who, in an earlier judgment (*R. v. Richards* (1999), 26 C.R. (5th) 286), explained that

> [r]acial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

The Court in *Brown* continued: "The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping" (*ibid.* at para. 8). For a discussion of racial profiling in Canada, see 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.

purposes, the important point is that race can sometimes inappropriately influence the police in choosing whom to stop for investigative purposes.[35]

A final consideration in outlining the divide between law and reality in this area is the low visibility of unjustified street level detentions. Arguably, of all police practices none is more secluded and, therefore, as susceptible to abuse as street level detentions. This flows from the very nature of such encounters. If an individual is detained without cause, chances are that he or she is innocent of any wrongdoing, in which case such stops do not yield evidence of criminality. It is only in those comparatively rare cases of unjustified detentions where a person happens to be guilty of wrongdoing and evidence of this is fortuitously acquired during the stop — for instance, the individual confesses or a search reveals contraband — that an arrest and charge(s) follow. Otherwise, in most instances, the victim of a groundless detention is ultimately released. As a result, courts get a very incomplete picture of what is taking place on the street; the cases they see "are only the tip of the iceberg."[36]

With this necessary background in place, we are now ready to embark on a consideration of *Simpson* and the investigative detention power that it created. Before moving forward, it is useful to briefly reiterate the lessons from this Part. First, although the common law foreclosed the possibility of investigative detentions by police, in reality these sorts of stops have long been a part of police practice. Second, irrespective of their legal status, such stops will continue because the police consider them essential to the effective performance of their functions. Third, given both their inevitability and their importance to the effective discharge of police duties, it makes sense to formally vest the police with an investigative detention power. Fourth, due to the very real risk of abuse, any such power should be carefully regulated. Finally, when assessing which branch — the legislative or the judicial — is best suited to create and regulate such a power, it ought to be remembered that courts only see a very small fraction of the cases in which police authority to detain has been abused.

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[35] In some circumstances, it is perfectly legitimate for police to rely upon an individual's race in deciding to effect a stop; see Samuel R. Gross & Debra Livingston, "Racial Profiling Under Attack" (2002) 102 Colum. L. Rev. 1413 at 1415:

> It is not racial profiling for an officer to question, stop, search, arrest, or otherwise investigate a person because his race or ethnicity matches information about a perpetrator of a specific crime that the officer is investigating. That use of race — which usually occurs when there is a racially specific description of the criminal — does not entail a global judgment about a racial or ethnic group as a whole.

[36] Young, *supra* note 11 at 355. See also Stephen D. Mastrofski & Jack R. Greene, "Community Policing and the Rule of Law" in David Weisburd & Craig Uchida, eds., *Police Innovation and Control of the Police: Problems of Law, Order, and Community* (New York: Springer-Verlag, 1993) 80 at 85 [Police Innovation and Control], noting that "the system for monitoring police compliance is limited to those relatively few instances where police actions are made visible in cases that receive review in court."

## III. *R. v. Simpson*: The Birth of Articulable Cause Investigative Detentions

### A. Clearing the Way for an Investigative Detention Power

The facts in *Simpson* are straightforward.[37] On the evening of 5 December 1989, Constable Wilkin was on routine patrol. He had recently read an internal police memo citing an unidentified street source that described a particular residence as a "suspected crack house." That night, he observed a car in the driveway of that house. The driver, a woman, exited the car and entered the house, where she stood in the doorway. A short time later, she and a man (Simpson) emerged from the house and drove off in the car. Constable Wilkin followed. He testified to having had "every intention of pulling them over to ask them where they had been, to see what story they were going to give me, see whether any of their story would substantiate what I believed my information to be at the time ... I was looking for them ... to trip themselves up to give me more grounds for an arrest."[38]

After a short drive, Constable Wilkin pulled the vehicle over. He directed the woman, who was driving, to sit in the police cruiser and she complied. The officer then directed Simpson to step out of the car, which he did. During their short conversation, the officer noticed a bulge in Simpson's front pant pocket. The officer reached out and felt the bulge, which was hard. Nonetheless, when asked what it was, Simpson insisted that it was nothing. At that point, Constable Wilkin directed Simpson to remove the object. Simpson took it from his pocket quickly, in an apparent effort to throw it away. After a short struggle, the officer managed to remove a baggie containing cocaine from Simpson's hand. Simpson was then arrested and charged with possession of a narcotic for the purpose of trafficking.[39]

At his trial, Simpson unsuccessfully argued that the cocaine should be excluded from evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.[40] The argument had two bases: first, he contended that the vehicle stop had violated his s. 9 *Charter* right "not to be arbitrary detained"[41] and second, he claimed that the direction to empty his pocket had violated his s. 8 *Charter* right "to be secure against unreasonable search or seizure."[42] Simpson renewed these same arguments on appeal.

The Ontario Court of Appeal judgment in *Simpson* began with an analysis of the s. 9 *Charter* issue of whether Simpson had been arbitrarily detained. To trigger the protection of s. 9, the encounter had to be considered sufficiently coercive to constitute a "detention." Not every interaction between an individual and the police qualifies for this label: under the case law, some element of "compulsory restraint" — physical or psychological — is necessary. Although physical restraint is sufficient, it is not essential. A demand or direction by a law enforcement official that effectively assumes control over an individual's freedom of

37 *Supra* note 1 at 486.
38 *Ibid.* at 487.
39 *Ibid.*
40 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
41 *Supra* note 1 at 488, referencing the *Charter*, *ibid.*, s. 9.
42 *Supra* note 1 at 505, referencing the *Charter*, *ibid.*, s. 8.

movement will also suffice.[43] The test is whether "the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."[44] Given that Simpson was travelling in a vehicle that was stopped by police, the answer was predetermined by precedent. The Supreme Court had previously held that motor vehicle stops result in a "detention" and engage s. 9 of the *Charter*.[45]

The next step in the s. 9 analysis involved deciding whether the detention was "arbitrary." The Supreme Court's jurisprudence had made clear that a lawful detention can be arbitrary, such as when the law that authorizes the detention does so on some arbitrary basis.[46] At the same time, decisions prior to *Simpson* had expressly refrained from equating "unlawful" with "arbitrary." These cases permit an unlawful detention — for example, an arrest based on something short of the reasonable and probable grounds required by law — to escape the arbitrariness label in situations where the responsible state official made an honest and reasonable mistake about the adequacy of his or her grounds.[47] Although there is now growing consensus among commentators that an unlawful detention should be viewed as inherently "arbitrary,"[48] *Simpson* serves to maintain this distinction.[49] The Court made it clear, however, that if the detention were found to be unlawful, this would "play a central role

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43 *R. v. Therens*, [1985] 1 S.C.R. 613, (1985), 18 C.C.C. (3d) 481 [*Therens* cited to C.C.C.], Le Dain J., dissenting in the result, defined "detention" for the purposes of s. 10 of the *Charter* at 504-505. See also *R. v. Thomsen*, [1988] 1 S.C.R. 640, (1988), 40 C.C.C. (3d) 411 at 417-18 [*Thomsen* cited to C.C.C.]; *R. v. Hufsky*, [1988] 1 S.C.R. 621, (1988), 40 C.C.C. (3d) 398 at 406 [*Hufsky* cited C.C.C.]. The Court in each case held that "detained" under s. 9 had the same meaning.

44 *Therens, ibid.* at 505.

45 *Supra* note 1 at 486, citing *Hufsky, supra* note 43 at 406; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, (1990), 56 C.C.C. (3d) 22 at 36-37 [*Ladouceur* cited to C.C.C.]; *R. v. Wilson*, [1990] 1 S.C.R. 1291, (1990), 56 C.C.C. (3d) 142 [*Wilson* cited to C.C.C.]. The Court in each case held that compliance with a police officer's direction to stop one's vehicle, after emphasizing the legal consequences of refusing to stop, results in a "detention."

46 *Supra* note 1 at 487. A law will authorize detention on an arbitrary basis if it mandates a loss of liberty without the need to consider any rational criteria or standards; see *R. v. Swain*, [1991] 1 S.C.R. 933, (1991), 63 C.C.C. (3d) 481 at 535-36 [*Swain* cited to C.C.C.]; *Lyons v. The Queen*, [1987] 2 S.C.R. 309, (1987), 37 C.C.C. (3d) 1 at 36, or if it confers unfettered discretion on state agents to detain individuals by providing no criteria as to when detention is permissible; see *Hufsky, supra* note 43 at 407. See also *Ladouceur, supra* note 45 at 37; *R. v. Morales*, [1992] 3 S.C.R. 711, (1992), 77 C.C.C. (3d) 91 at 109; *R. v. Pearson*, [1992] 3 S.C.R. 665, (1992), 77 C.C.C. (3d) 124 at 147.

47 See *R. v. Duguay* (1985), 50 O.R. (2d) 375, 18 C.C.C. (3d) 289 (C.A.), aff'd on other grounds [1989] 1 S.C.R. 93, (1989), 46 C.C.C. (3d) 1 [*Duguay* cited to C.C.C. at C.A.], which dealt with an unlawful arrest — *i.e.*, undertaken without reasonable and probable grounds — and suggested that if the officer's grounds fall "just short," and he or she honestly believed that the grounds were adequate, it cannot be said that such an unlawful arrest was "capricious or arbitrary" (*ibid.* at 296). See also *Klimchuk, supra* note 4 at 414; *R. v. Cayer* (1988), 66 C.R. (3d) 30 (Ont. C.A.); *R. v. Capistrano* (2000), 149 Man. R. (2d) 42, 47 W.C.B. (2d) 61 (Q.B.); *R. v. Sieben* (1989), 99 A.R. 379, 51 C.C.C. (3d) 343 (C.A.); *R. v. Brown* (1987), 76 N.S.R. (2d) 64, 33 C.C.C. (3d) 54 (C.A.); *R. v. Moore* (1988), 89 N.S.R. (2d) 199, 45 C.C.C. (3d) 410 (C.A.); *R. v. Pimental* (2000), 145 Man. R. (2d) 295, [2001] 2 W.W.R. 653 (C.A.).

48 See Stribopoulos, *supra* note 8, arguing that the *Duguay* definition does not accord with the purposive approach to *Charter* interpretation subsequently embraced by the Supreme Court at 266-72. See *infra* note 279 and accompanying text for a more detailed explanation of this argument. See also Hogg, *supra* note 7 at 46-5: "Probably, ... strict compliance with the law is a necessary (although not a sufficient) condition for compliance with s. 9"; Don Stuart, *Charter Justice In Canadian Criminal Law*, 3d ed. (Scarborough: Carswell, 2001) at 263, arguing that such a reading would make s. 9 "a far more powerful protection."

49 See *supra* note 1 at 488, 504. See also *infra* note 103 and accompanying text.

in determining whether ... [it was] ... also arbitrary."[50] This set the analytical stage for an inquiry into whether Constable Wilkin had lawful authority to detain Simpson.

The Crown faced an uphill battle in its effort to justify this stop. By 1993, the Supreme Court had already held that, unless an unknown informant's tip was compelling and substantially corroborated, it could not supply the reasonable and probable grounds needed for an arrest or search.[51] In *Simpson*, the internal police memo of an unknown date citing the bare assertion of an unidentified street source provided little more than suspicion, especially in relation to the occupants of a car that had had only a brief connection to the suspect residence.

In an effort to justify the vehicle stop, the Crown pointed to s. 216(1) of the Ontario *Highway Traffic Act*.[52] That section gives a police officer the authority to direct the driver of a motor vehicle to stop and obligates that driver to comply. The difficulty for the Crown was that the Supreme Court of Canada had already concluded that the predecessor provision — containing the exact same wording — was arbitrary and inconsistent with s. 9 of the *Charter*.[53] Although the Supreme Court upheld this provision as a reasonable limit under s. 1 of the *Charter*, citing the statistical evidence documenting the catastrophic human toll exacted by impaired and unlicensed drivers, it did so subject to a very strong caveat. The s. 1 justification holds in only those cases where a stop is carried out for the purpose of checking a driver's license, insurance, sobriety, or the mechanical fitness of a vehicle. Any probing beyond these limited purposes is strictly prohibited and serves to transform a stop from an encounter which is constitutionally permissible at its inception into an arbitrary detention.[54] Given the criminal investigative purpose for the stop in *Simpson*, the *Highway Traffic Act* could not be used as a justification.[55]

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50 *Ibid.* at 488.

51 See *R. v. Debot*, [1989] 2 S.C.R. 1140, (1989), 52 C.C.C. (3d) 193 at 217-18 [*Debot* cited to C.C.C.]: in cases involving reliance upon "an anonymous tip or on an untried informant ... the quality of the information and corroborative evidence may have to be such as to compensate for the inability to assess the credibility of the source."

52 R.S.O. 1990, c. H.8.

53 See *Hufsky*, *supra* note 43, a case involving a fixed point check stop, finding that the predecessor to this section — s. 189a(1) — authorized arbitrary detentions contrary to s. 9 of the *Charter*; and *Ladouceur*, *supra* note 45, coming to the same conclusion in a case involving random and roving stops. See also *Wilson*, *supra* note 45, which came to the same conclusion regarding s. 119 of the *Highway Traffic Act*, R.S.A. 1980, c. H-7. In each case, however, s. 1 of the *Charter* was relied upon to uphold the violation.

54 See *Ladouceur*, *ibid.* at 44. See also *R. v. Mellenthin*, [1992] 3 S.C.R. 615, (1992), 76 C.C.C. (3d) 481 at 487. But see Tanovich, *supra* note 34, who noted that the majority's s. 1 analysis in *Ladouceur* "may actually contain the seeds of its own demise" at 168. This is because the majority's analysis discounted concerns about the potential for abuses by concluding that "these fears are unfounded"; *Ladouceur*, *supra* note 45 at 44. Mounting evidence now suggests otherwise; see *supra* notes 24 through 35 and accompanying text. This new evidence could lead to a different result if the s. 1 analysis were to be revisited in future.

55 *Supra* note 1 at 493. Subsequent case law suggests that as long as road safety is one of the officer's purposes, the s. 1 justification will be maintained. See *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 233, 131 C.C.C. (3d) 1 (C.A.), holding that the police can stop for motor vehicle concerns while also harbouring ulterior investigative interests, so long as the secondary purpose is not itself unconstitutional — for instance, a stop undertaken for the purpose of effecting an unconstitutional search; *ibid.* at 116-17. See also *R. v. Duncanson* (1991), 12 C.R. (4th) 86 (Sask. C.A.), rev'd on other grounds [1992] 1 S.C.R. 836, (1992), 12 C.R. (4th) 98. But see *R. v. Guénette* (1999), 136 C.C.C. (3d) 311 (Que. C.A.).

In the absence of any statutory authority for this stop, the Court then expressed a need to "consider whether the common law authorized this detention."[56] A negative answer to this question seemed to be dictated by well-established precedent.[57] Although it acknowledged many of these cases, the *Simpson* Court read them as narrowly as reason would allow. According to the Court, the precedents simply denied a "general power to detain whenever that detention will assist a police officer in the execution of his or her duty."[58] These decisions did not foreclose "the authority to detain short of arrest in all circumstances where the detention has an investigative purpose."[59] This claim was as subtle as it was bold. In effect, it allowed the Court in *Simpson* to avoid the difficult and unseemly task of overruling many of its own decisions.[60] After carefully opening a fissure in the precedents, the Court quickly began to fill it with a new police power. To construct this power, the *Simpson* Court relied upon the Supreme Court of Canada's decision in *R. v. Dedman.*[61] As a result, an understanding of *Dedman,* and the ancillary powers doctrine it endorsed, is crucial to truly understanding *Simpson.*

## B. A QUESTIONABLE FOUNDATION: *R. V. DEDMAN* AND THE ANCILLARY POWERS DOCTRINE

In *Dedman*, the accused had been stopped at random by police conducting a Reduce Impaired Driving Everywhere (R.I.D.E.) check-stop program. After the stop, a police officer had formed the required grounds to make a breath demand. Ultimately, after some unsuccessful efforts, Dedman failed to furnish a breath sample and was charged under s. 234.1(2) [now s. 254(5)] of the *Criminal Code.* The facts of the case had preceded the *Charter*, so the constitutionality of the stop was not in issue. In the course of defending himself against the charge, however, Dedman argued that he had a "reasonable excuse" for not providing the sample: the unlawful nature of the initial stop. At the time, there was no authority for such a stop in either federal legislation or the Ontario *Highway Traffic Act.*[62]

In *Dedman,* a closely divided Supreme Court — four justices to three — recognized a police power at common law to stop motor vehicles at fixed sobriety checkpoints. In doing so, the majority relied heavily upon *R. v. Waterfield.*[63] In that case, the English Court of Criminal Appeal had crafted a two part test to be used in deciding whether a police constable was acting "in execution of his duty" at the time that he was allegedly assaulted — an essential ingredient of the offence charged.[64] The *Waterfield* Court had indicated that

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56 *Simpson, ibid.* at 493.

57 See *supra* notes 11 through 13 and accompanying text.

58 *Supra* note 1 at 495.

59 *Ibid.*

60 See *R. v. White* (1996), 29 O.R. (3d) 577, 108 C.C.C. (3d) 1 at 27-30 (C.A.), setting out the Court's approach to overruling its decisions.

61 *Supra* note 11.

62 R.S.O. 1970, c. 202. Section 14 of the *Act* only obligated drivers to surrender their licenses to police upon demand, it did not impose a duty upon motorists to stop, although subsequent amendments did. See *supra* notes 52 through 54 and accompanying text.

63 [1963] 3 All E.R. 659 (Ct. Crim. App.) [*Waterfield*]. See *Dedman, supra* note 11 at 119-22.

64 One appellant, Lynn, was appealing against his conviction for assaulting a police constable "in the due execution of his duty" contrary to s. 38 of the *Person Act*, 1861. The other appellant, Waterfield, was appealing against his conviction for counselling the commission of that offence. The same issue was key to the resolution of both their appeals. See *Waterfield, ibid.* at 660-61.

> In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of police powers associated with the duty. Thus, while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited.[65]

At least initially, Canadian courts had applied the *Waterfield* test in the same limited way as their English counterparts. The case was used to decide whether a police officer was acting "in execution of his duty" when an accused allegedly assaulted or obstructed him. In Canada, as in England, this is an essential element of each of these offences.[66] Thus, at its inception the test allowed, at the very most, for nothing more than an incremental and indirect expansion of existing police powers, as individual cases presented themselves for consideration. This point is best illustrated by the limited way in which English courts have applied *Waterfield*. The case has been cited infrequently, and its two-part test has never been used to justify the creation of an entirely new and invasive police investigative power.[67] In

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65 *Ibid.* at 661.

66 See *R. v. Stenning*, [1970] S.C.R. 631, 3 C.C.C. 145 at 149, dealing with a charge of assaulting a police officer "engaged in the execution of his duties" contrary to what was then s. 232(a) [now s. 270(1)(a)] of the *Code*; *Knowlton v. The Queen*, [1974] S.C.R. 443, (1973), 10 C.C.C. (2d) 377 at 380 [*Knowlton* cited to C.C.C.], dealing with a charge of obstructing a police officer "in the execution of his duty," contrary to what was then s. 118(a) [now s. 129(a)] of the *Code*.

67 *Waterfield* has only been cited in the following eight cases. See *Ghani v. Jones*, [1969] 3 All. E.R. 1700 at 1703-704 (C.A.); although Lord Denning questioned the result in *Waterfield*, he did not refer to or rely upon the two part test; *Donnelly v. Jackman*, [1970] 1 All E.R. 987 (Q.B.), wherein the appellant's conviction for assaulting a police officer "in the execution of his duty" was upheld when he responded to a police officer who wanted to speak to him and who had touched his shoulder in an effort to stop him by turning around and striking him with "some force." After characterizing the officer's touch as a "minimal matter," the Court concluded that he was "acting in the execution of his duty when he went up to the appellant and wanted to speak to him" (*ibid.* at 988-89); *Hoffman v. Thomas*, [1974] 2 All E.R. 233 (Q.B.) [*Hoffman*], in which the appellant's conviction for refusing to stop when directed to do so by a "constable in the execution of his duty" contrary to s. 22(1) of the *Road Traffic Act* 1972 was overturned because the constable was said to lack either common law or statutory authority to signal motorists to stop for this purpose and, consequently, "that signal cannot have been an act in the execution of his duty" (at 237-38); *Johnson v. Phillips*, [1975] 3 All E.R. 682 at 685-86 (Q.B.), where the Court upheld the appellant's conviction for wilfully obstructing a police constable "in the execution of his duty" contrary to s. 51(3) of the *Police Act* 1964 after he refused a constable's direction that he move his car, which was blocking the removal of injured persons to an ambulance; and *Coffin v. Smith* (1980), 71 Cr. App. R. 221 (D.C.), considering the dismissal of charges against two youths accused of assaulting a police constable "in the execution of his duty" contrary to s. 51(1) of the *Police Act 1964*. The two youths had been asked by the officers to leave a Boys' Club and, after initially complying, they returned and assaulted the officers. After applying the *Waterfield* test, both judges disagreed with the result below, concluding that the officers "were in effect simply standing there on their beat in the execution of their duty when they were assaulted" by the two accused (*ibid.* at 226-27). See also *Oxford v. Austin* [1981] RTR 416 at 419 (Q.B.), wherein the Court referred to a passage from *Waterfield* indicating that it is a question of fact for a jury whether or not a place qualifies as a "road" under s.

fact, in one of the last English decisions that refers to *Waterfield*, the Court noted that while the "common law evolves" through "a delicate process," the creation of a new police investigative power would represent a "violent change," which is "a matter for Parliament rather than the courts."[68] Incidentally, police powers in England — including the authority to detain and search suspects based on reasonable suspicion — were subsequently the subject of comprehensive legislation by Parliament.[69]

The majority in *Dedman* was no doubt anxious to do its part in combatting the evils of drinking and driving. Unfortunately, in the process, it seriously misread how the English courts had applied the two-part *Waterfield* test. Initially, at least, the *Dedman* majority correctly noted that "[t]he test laid down in *Waterfield*... [was generally]... invoked in cases in which the issue [was] whether a police officer was acting in the execution his duties."[70] After excerpting some cryptic references to police "powers" in a few of the English and Canadian cases that had relied upon *Waterfield*, however, the majority further indicated that the test had "been recognized as being a test for whether the officer had common law *authority* for what he did."[71] This conclusion was taken to justify the conversion of the

196(1) of the *Road Traffic Act 1972*, the two-part test from *Waterfield* is not mentioned; *McLorie v. Oxford*, [1982] 3 All E.R. 480 at 485 (Q.B.), in which the Court overturned the appellant's convictions for obstructing and assaulting a police constable "in the execution of his duty," contrary respectively to ss. 51(1) and 51(3) of the *Police Act 1964*, after he forcefully resisted police officers who entered onto his property without a warrant to remove a car that they believed had been used as a weapon by the appellant's son, who was arrested "some hours earlier" for attempted murder at that same location. Although the vehicle could have been taken incidental to the arrest, the Court refused to recognize a "right of search and/or seizure of material from the scene of an arrest after that arrest has been completed"; therefore, the police "were not acting in execution of their duty" in entering upon the appellant's property (*ibid.*); *Steel v. Goacher* [1983] RTR 98 at 103-104 (Q.B.), where the Court referred to *Waterfield* for its interpretation of the forerunner to s. 159 of the of the *Road Traffic Act 1972* — a provision which obligates drivers to stop when directed to do so by police; its interpretation was rejected and the decision did not refer to or rely upon the two-part test.

68 *McLorie v. Oxford*, *ibid.*

69 See *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60 [*PACE*]. There are a series of provisions in *PACE* relating to the authority of police to stop and search individuals based on "reasonable grounds for suspecting" that they are in possession of "stolen or prohibited articles" (*ibid.*, ss. 1 through 8). It includes provisions which impose a duty upon officers to record the particulars of each stop; (*ibid.*, s. 3). Other provisions require police forces to compile the data from these individual reports and make such information public on an annual basis (*ibid.*, s. 5). The *Act* also authorizes the Secretary of State to issue Codes of Practice — guidelines that further explain the legislative provisions; (*ibid.*, ss. 66, 67). In the context of police powers to stop and search, a detailed Code of Practice elaborates on a number of important issues. See *PACE, Code A: Code of Practice for the Exercise of Police Officers Statutory Powers of Stop and Search*, online: Her Majesty's Stationery Office <www.homeoffice.gov.uk/docs/pacecodea.pdf> [*PACE, Code of Practice for Stop and Search*]. The Code includes prohibitions on the misuse of race in deciding who to stop and search (*ibid.*, ss. 1.1, 2.2); elaborates upon the meaning of "reasonable suspicion" (*ibid.*, ss. 2.2 - 2.6, 2.25); places general limits upon the length of detentions and their location (*ibid.*, s. 1.2, 3.3 - 3.4); explains the circumstances in which searches can be carried out, including their manner and scope (*ibid.*, ss. 1.5, 2.9 - 2.11, 3.1 - 3.11); and elaborates on the reporting obligations of police officers after a search is completed, and how that data is to be compiled and used by police superiors (*ibid.*, ss. 4.1 - 4.10, 5.1 - 5.4).

70 *Dedman*, *supra* note 11 at 120.

71 *Ibid.* [emphasis added]. The majority relied on the following sources to justify this new use for the *Waterfield* test: First, a passage from *Hoffman* where the Court indicated that the officer's direction to stop was "a signal which he had no *power* to make either at common law or by virtue of statute" was excerpted (*supra* note 67 at 238 [emphasis added]). Second, the majority pointed to the following passages from Fauteux C.J.C.'s judgment in *Knowlton*: "Police duty and the use of *powers* associated

*Waterfield* test from an aid in assessing whether a police officer was acting in execution of his duties into something completely different. In effect, the test was transformed into an expansive law-making mechanism by which courts could vest the police with those ancillary powers that would assist them in the fulfilment of their broad duties.[72] The *Dedman* majority ignored the fact that no English or Canadian court had ever used the *Waterfield* test in this way before. The Court in *Dedman* then proceeded to apply the test in deciding whether or not to recognize a police power to conduct random sobriety check stops.

When put to use for this new law-making purpose, the *Waterfield* test yielded predictable results. The majority emphasized that the right to drive around in a vehicle is a "liberty" in a very qualified sense. Unlike "a fundamental liberty like the ordinary right of movement of the individual," driving is a "licensed activity that is subject to regulation and control for the protection of life and property."[73] Bearing the qualified nature of the right in mind, the majority applied the first prong of the *Waterfield* test and easily concluded that it was satisfied: random stops fell within the general scope of police officers' duties to prevent crime and protect life and property by controlling traffic.[74]

The Court then considered the second prong of the test, namely whether the police conduct involved an unjustifiable use of police powers associated with the duty. In making this assessment, the majority indicated that it was required to consider whether the police conduct at issue was "necessary for the carrying out of the particular police duty and ... reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference."[75] In effect, the recognition of a new police power turns upon the Court's weighing of the costs versus the potential benefits. After acknowledging the arbitrary nature of such stops and the potentially unpleasant psychological effect on drivers, the Court noted that other factors weigh in their favour, including the well-publicized nature of these programs and the short duration of such stops. The Court then asserted that, "having regard to the importance of the public purpose served," such stops do not involve "an

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with such duty are the sole matters in issue in this appeal" and "I cannot find in the record any evidence showing that Sergeant Grandish or other police officers resorted, on the occasion, to any unjustifiable use of the *powers* associated with the duty imposed upon them" (*supra* note 66 at 379 [emphasis added]). Third, the Court quoted from L.H. Leigh, *Police Powers in England and Wales* (London: Butterworths, 1975), who wrote that *Knowlton* reflected a movement "towards an ancillary powers doctrine which would enable the police to perform such reasonable acts as are necessary for the due execution of their duties" (*ibid.* at 33). The majority ignored Leigh's comments expressing skepticism about using the *Waterfield* test in this way (see *infra*, note 72). Finally, the *Dedman* majority also pointed to Chief Justice Dickson's judgment in another case, where he dealt with *Waterfield* under the heading "The common law *powers* of the police" (see *Reference re an Application for an Authorization*, [1984] 2 S.C.R. 697, (1984), 15 C.C.C. (3d) 466 at 481 [emphasis added]).

72 The "ancillary powers doctrine" is a term that has been used to describe the use of the *Waterfield* test as a means of recognizing new police powers. The term was coined by Leigh; *ibid.* at 29. It was quoted with approval in Dickson C.J.C.'s dissenting judgment in *Dedman*, *supra* note 11 at 104. Leigh noted that the police do not have all of those powers which might be thought necessary to the performance of their duties. He indicated that "[h]istorically, there is no warrant for an *ancillary powers doctrine* of this sort" (Leigh, *ibid.* at 29 [emphasis added]). In the second edition of his book, Leigh described the *Waterfield* decision as "inconsistent with the ancillary powers doctrine" (*supra* note 7 at 36-37).

73 *Dedman*, *supra* note 11 at 121.

74 *Ibid.*

75 *Ibid.* at 122.

unjustifiable use of a power associated with the police duty."[76] Therefore, the majority concluded that "there was common law authority for the random vehicle stop for the purpose contemplated by the R.I.D.E. programme."[77]

The *Dedman* majority's use of the two-part *Waterfield* test to create a new police power was strongly criticized by Chief Justice Dickson in his dissenting opinion:

> To find that arbitrary police action is justified simply because it is directed at the fulfilment of police duties would be to sanction a dangerous exception to the supremacy of law. It is the function of the Legislature, not the courts, to authorize arbitrary police action that would otherwise be unlawful as a violation of rights traditionally protected at common law.
>
> ...
>
> With respect, the majority of the court departs firm ground for a slippery slope when they authorize an otherwise unlawful interference with individual liberty by the police, solely on the basis that it is reasonably necessary to carry out general police duties.[78]

As these comments reveal, at the heart of the disagreement between the majority and the dissent in *Dedman* are two fundamentally different visions of the appropriate division of labour between the Supreme Court and Parliament. For the justices in dissent, the Court overstepped its limited rights-protecting function by embracing the *Waterfield* test as a device for transforming police action into police power based on the judicial application of a cost-benefit analysis. They saw this approach as setting a dangerous precedent, by blurring the important division between the functions of the legislative and the judicial branches of government.[79]

After *Dedman*, the ancillary powers doctrine seemed to fade away for a period. In subsequent decisions, the comments of some Supreme Court justices, as well as statements concurred in by a majority of the Court, cast serious doubt on the continued validity of the ancillary powers doctrine as a vehicle for creating police investigative powers in the *Charter* era.[80] However, the Ontario Court of Appeal's reliance upon the ancillary-powers doctrine in *Simpson* made clear that its use as an expansive law-making device was not at an end.

## C. CREATING A NEW POLICE POWER

Before applying the ancillary powers doctrine, the *Simpson* Court explained its reasons for taking action. Due to the low threshold for a "detention" under the *Charter*, the Court indicated that it had

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76 *Ibid.*

77 *Ibid.*

78 *Ibid.* at 106-107. See also Don Stuart, "*R. v. Dedman*: Annotation" (1985) 46 C.R. (3d) 193 at 195, who argued that it would have been more appropriate for the Court to insist that lawful authority should come from Parliament, at which point "the mandate of the Supreme Court would be to assess whether such a scheme violated the ... *Charter*."

79 See Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar. Rev. 481 at 515-17, for a general discussion of this larger debate and Chief Justice Dickson's role in it.

80 For a discussion of these cases, see *infra* notes 247-48 and 274, along with the accompanying text.

> no doubt that the police detain individuals for investigative purposes when they have no basis to arrest them. In some situations the police would be regarded as derelict in their duties if they did not do so. I agree with Professor Young, "All Along the Watch Tower" ... at p. 367 when he asserts:
>
> > The courts must recognize the reality of investigatory detention and begin the process of regulating the practice so that street detentions do not end up being non-stationhouse incommunicado arrests.
>
> Unless and until Parliament or the legislature acts, the common law and specifically the criteria formulated in *Waterfield* ... must provide the means whereby the courts regulate the police power to detain for investigatory purposes.[81]

In the next part, we shall consider how effective *Simpson* and the cases it spawned have been in regulating police detention practices. Before reaching that question, however, it is necessary to consider how the *Waterfield* test was applied in *Simpson* to recognize an investigative detention power.

In the Court's view, the first prong of the *Waterfield* test — whether the officer was acting in the course of his duty — was easily satisfied on the facts of this case, given that the officer was pursuing a criminal investigation when he stopped Simpson.[82] The Court then turned to a consideration of the second prong of the test, whether the detention involved an unjustifiable use of police powers associated with the duty: the cost-benefit analysis endorsed in *Dedman*. Before proceeding to weigh the competing interests, the Court attempted to flesh out this part of the test:

> the justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.[83]

The Court then proceeded to frame the interests at stake. In this case, "'the fundamental liberty' to move about in society without governmental interference" was at issue.[84] The Court noted that the officer's purpose in stopping Simpson was not some service-related police function. Rather, this stop involved a criminal investigation, "intended to bring the force of the criminal justice process into operation against the appellant."[85] These strong pronouncements were immediately followed by an assertion that "where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, detention can only be justified if the detaining officer has some 'articulable cause' for the detention."[86]

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81. *Supra* note 1 at 498, citing *Young*, *supra* note 11.
82. *Ibid.* The Court was of the view that the officer's effort to determine whether criminal activity was occurring at the location and to substantiate police intelligence fell within the "wide duties placed on police" to prevent crime and enforce criminal laws (*ibid.* at 499).
83. *Ibid.*
84. *Ibid.*
85. *Ibid.* at 500.
86. *Ibid.*; the Court indicated that "[d]ifferent criteria may well govern detentions which occur in a non-adversarial setting not involving the exercise of the police crime prevention function."

In choosing this standard, the *Simpson* Court borrowed freely from the American Fourth Amendment[87] jurisprudence and, in particular, the "stop and frisk" cases.[88] Prior to these decisions, American case law had held that any interference with an individual's freedom of movement, no matter how unobtrusive or brief, qualified as an arrest requiring probable cause.[89] This rule was eventually abandoned by the U.S. Supreme Court in *Terry v. Ohio*. In *Terry*, the Court applied a balancing approach,[90] like that used in *Dedman*, to essentially hold that the Fourth Amendment permits a police officer to stop a person that he reasonably suspects is engaged in criminal behaviour, and to frisk that person for a weapon, if the officer also has reason to believe that he is dealing with an armed and dangerous individual.[91] Unfortunately, although the *Simpson* Court was cognizant of the American cases and the standard that they had developed, it did not acknowledge the larger lessons of that experience.[92]

Rather, after embracing the "articulable cause" standard, the *Simpson* Court attempted to define it. It instructed that this standard requires "a constellation of objectively discernible

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87 U.S. Const. amend. IV [Fourth Amendment].

88 *Supra* note 1 at 500. The Court quoted from *Terry v. Ohio*, 392 U.S. 1 (1968) [*Terry*] and *United States v. Cortez*, 449 U.S. 411 (1981) [*Cortez*]. Later in the judgment, the *Simpson* Court provided additional reasons for choosing this standard. First, it pointed to *Wilson*, *supra* note 45, a case in which the Supreme Court found s. 119 of the *Highway Traffic Act*, R.S.A. 1980, c. H-7 authorized arbitrary detentions contrary to s. 9 but was justified under s. 1 of the *Charter*. In *Wilson*, the Court held that the stop, which was "lawful" in the sense that it was authorized by law, was not "arbitrary" despite the fact that s. 119 authorized detentions on an arbitrary basis, given that on the facts the officer in that case happened to have "articulable cause" (*ibid.* at 147). Second, it referred to *R. v. Mack*, [1988] 2 S.C.R. 903, (1988), 44 C.C.C. (3d) 513, the leading entrapment decision, in which the Supreme Court held that it was only constitutionally permissible for police to afford opportunities to commit offences to individuals who they had "reasonable suspicion" to believe were already involved in criminal activity (*supra* note 1 at 502-503).

89 See *e.g. Henry v. United States*, 361 U.S. 98 at 103 (1959), where the Court characterized the stopping of a car as an "arrest" of the occupants requiring "reasonable cause to believe that a crime had been committed."

90 After separating the Warrant Clause of the Fourth Amendment, which provides that "no Warrant shall issue, but upon probable cause" from what was termed the Amendment's "general proscription against unreasonable searches and seizures" (see *Terry*, *supra* note 88 at 20), the Court then quoted from its earlier decision in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 534-35 (1967) and explained that:

> In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen" for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails" (*Terry*, *supra* note 88 at 20-21).

It was in *Camara* and *Terry* that this balancing approach first gained a foothold in Fourth Amendment jurisprudence. See Scott E. Sundby, "A Return To Fourth Amendment Basics: Undoing The Mischief of *Camara* and *Terry*" (1988) 72 Minn. L. Rev. 383, for a persuasive critique of this development.

91 The majority in *Terry* did not go quite this far, however. Its position was more tentative, holding only that a police officer may conduct a frisk search where he reasonably believes that criminal activity may be afoot and that the person whom he is investigating may be armed and dangerous (*Terry*, *supra* note 88 at 23-24, 27, 30). It was Justice Harlan's concurring opinion that fleshed out the stopping power somewhat, noting that to justify the frisk "the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop" (*ibid.* Harlan J., concurring at 32-33 [emphasis in original]). In subsequent decisions, the U.S. Supreme Court came to read *Terry* as though it also authorized stops based on reasonable suspicion. See Stephen A. Saltzburg, "*Terry v. Ohio*: A Practically Perfect Doctrine" (1998), 72 St. John's L. Rev. 911 at 925-52, detailing how *Terry*'s holding gradually evolved.

92 The lessons of the American experience under *Terry* are considered in some detail in Part IV.

facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation."[93] The Court's reasons reveal great optimism regarding the prophylactic benefits flowing from the adoption of an objective standard, claiming that it

> serves to avoid indiscriminate and discriminatory exercises of the police power. A "hunch" based entirely on intuition gained by experience cannot suffice, no matter how accurate that "hunch" might prove to be. Such subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation. Equally, without objective criteria detentions could be based on mere speculation. A guess which proves accurate becomes in hindsight a "hunch".[94]

The judgment assumes that the standard selected, in itself, will go a considerable distance towards regulating the exercise of police discretion. Admittedly, formalizing a standard is a good first step in structuring and confining police authority to conduct investigative stops. Effective regulation, however, requires much more.[95] On the street, legal standards are only one of many variables that will influence police behaviour. "[S]ignificant sociological research" has demonstrated that police "do not consider these laws and then apply them to the facts in the manner of a law student taking an exam"; the evidence suggests, rather, that "police officers blend legal knowledge, 'common sense,' and various behavioral norms in using such laws to deal with problems they are called upon to handle."[96] Unfortunately, *Simpson* does not acknowledge this larger truth about policing. Instead, it offers little more than a legal standard against which to measure a police officer's decision to detain in those comparatively rare cases where evidence is acquired, charges are laid, the decision to detain is challenged and the basis for the stop is actually litigated.

There are other problems that flow from the standard selected by the Court. The judgment proceeds with an exaggerated sense of both the ability of the police to recognize, and their desire to respect, the difference between mere suspicion, articulable cause (that is, reasonable suspicion), and reasonable and probable grounds.[97] The standard was no doubt selected by the Court because it gives the police wide latitude in responding to the myriad of suspicious situations that they confront in the field. Unfortunately, while the flexibility of this standard is clearly its chief benefit it is also its main drawback. First, as a practical matter, the open-ended nature of the standard provides little meaningful direction to police. As the U.S. Supreme Court has conceded,

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93 *Supra* note 1 at 502.

94 *Ibid.* at 501-502.

95 See Samuel Walker, "Historical Roots of the Legal Control of Police Behaviour" in *Police Innovation and Control, supra* note 36, 32 at 47, noting that "rules are not self-enforcing. The mere existence of a rule on a piece of paper somewhere means nothing.... Anyone knowledgeable about policing can think of examples of the systematic evasion of a rule or rules."

96 Debra Livingston, "Gang Loitering, The Court, And Some Realism About Police Patrol," (1999) Sup. Ct. Rev. 141 at 191. See also Mastrofski & Greene, *supra* note 36 at 84, noting "that police use the law instrumentally, as a means to accomplish a variety of ends, and they therefore draw on it selectively, applying it in ways that appear (legally) inconsistent."

97 See *supra* notes 14 through 35 and accompanying text.

> [c]ourts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad of factual situations that arise. But the essence of all that has been written is that the totality of the circumstances — the whole picture — must be taken into account.[98]

Of course, simply telling the police to take the "totality of circumstances" into account, or to make sure they possess a "constellation of objectively discernible facts," does little to make up for the uncertainty inherent in the standard.

Even more troubling, however, is the possible effect that such an ambiguous standard can have on the behaviour of some police officers. As Jerome Skolnick has warned,

> whenever rules of constraint are ambiguous, they strengthen the very conduct they are intended to restrain. Thus, the police officer already committed to a conception of law as an instrument of order rather than as an end in itself is likely to utilize the ambiguity of the rules of restraint as a justification for testing or even violating them.[99]

Quite simply, the same officer who is inclined to stop unjustifiably is also likely to use malleable legal standards like "articulable cause" or "reasonable suspicion" as a cloak. For such an officer, the standard will serve as a pliable measurement against which to construct reasons justifying those groundless stops that happen to yield evidence and which may need to be defended in court as a result.[100]

Putting the *Simpson* Court's optimistic view of the chosen standard to one side, it is necessary to consider how it applied the second prong of the *Waterfield* test. Here, the Court attempted to impose some limits on the power that it had just created: the existence of articulable cause was considered "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."[101] The Court explained that,

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98 *Cortez, supra* note 88 at 417. Before adopting the "articulable cause" standard, the *Simpson* Court quoted this passage (and others) from *Cortez* (*supra* note 1 at 501). See also Tracey Maclin, "The Decline Of The Right Of Locomotion: The Fourth Amendment On The Streets" (1990) 75 Cornell L. Rev. 1258 at 1332-33, arguing that "[i]n an era of diluted probable cause, the Court should discard the reasonable suspicion test.... there is no need for, and no way to meaningfully articulate and apply, an intermediate standard between probable cause and arbitrariness"; Livingston, *supra* note 96 at 178, noting that the stop-and-frisk standard "cannot be stated in clear and readily understandable language."

99 Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society*, 3d ed. (New York: Macmillan, 1994) at 12. See also Tracey Maclin, "*Terry v. Ohio's* Fourth Amendment Legacy: Black Men And Police Discretion" (1998) 72 St. John's L. Rev. 1271 at 1320: "History teaches us that when law enforcement personnel are given loosely supervised discretionary powers, police behavior will reflect the biases and prejudices of individual officers. The police suspicion standard announced in *Terry* facilitates abuse."

100 Providing standards with little else also plays into the hands of those critics who argue that arrest and detention standards are intentionally elastic so that the exercise of police power can be justified after the fact. Critics who claim, in effect, that due process is for crime control; see *e.g.* Doreen McBarnet, "Arrest: The Legal Context of Policing," in Simon Holdaway, ed., *The British Police* (London: Edward Arnold, 1979) 24.

101 *Supra* note 1 at 503.

> [f]or 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.[102]

The above passage suggests that the investigative detention power is limited in a number of different ways, depending on the nature of the crime suspected, the temporal connection between the crime and the detention, the duration of the detention, and the intrusiveness of the encounter. Unfortunately, while it alluded to these potential limitations, the Court refrained from setting out any concrete rules or guidelines. Rather, it willingly embraced a case-by-case approach, leaving the elucidation of associated powers and limitations regarding this new police authority for another day. In doing so, the Court failed to recognize the inherent incompatibility between the *ex-post facto* approach it embraced and its laudable regulatory aims. Absent a well-defined power, coupled with clearly stated limits, police discretion is not meaningfully structured or confined. Similarly, given the low visibility of street-level detentions, after-the-fact judicial review in that very small category of cases where abuses yield evidence of criminality leaves the vast majority of unjustified street-level detentions unchecked.

The *Simpson* Court proceeded to apply its newly-articulated power to the facts of the case. The deficient tip, combined with Simpson's very fleeting connection to the suspect residence foreclosed a finding of articulable cause, and hence, the detention could not be justified under the common law power created by the Court. Given the absence of any basis to suggest that Constable Wilkins "erroneously believed on reasonable grounds that he had an articulable cause" — a finding that the Court suggested might shield an unlawful detention from being characterized as arbitrary — the detention was held to violate s. 9 of the *Charter*.[103] The analysis of the pocket search was straightforward: it, too, lacked lawful authority and was therefore inconsistent with s. 8.[104] After characterizing these violations as serious, the Court proceeded to rule the cocaine inadmissible under s. 24(2) of the *Charter*. Given that the Crown had no further evidence, the Court allowed the appeal and substituted an acquittal.

The *Simpson* decision effectively vested police with an unprecedented power to detain suspects in the field. At the same time, given the result, it essentially insulated this new authority from immediate review by the Supreme Court of Canada. The Crown, no doubt happy with its windfall — the judgment's recognition of an investigative detention power — sensibly decided against an appeal. As a result, the unprecedented investigative detention

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102 *Ibid.*

103 *Ibid.* at 504. For an explanation of why, under existing jurisprudence, an unlawful detention might still not be characterized as arbitrary under s. 9 of the *Charter*, see *supra* notes 46 through 50 and accompanying text.

104 See *Collins v. The Queen*, [1987] 1 S.C.R. 265, (1987), 33 C.C.C. (3d) 1 at 14 [*Collins* cited to C.C.C.], holding that lawful authority is a precondition for a "reasonable" search or seizure.

power had an opportunity to take root and, in time, it has developed a virtually national following.[105] Nevertheless, the Supreme Court has not yet directly endorsed it.[106]

Before moving on to consider the practical difficulties flowing from *Simpson* and the power it created, it is helpful to reiterate the major lessons from this Part. First, the investigative detention power was built on a questionable foundation, given that existing case law seemed to clearly foreclose it.[107] In addition, closer scrutiny reveals that the ancillary powers doctrine, upon which the creation of this new police power depends, seems neither well-conceived nor well-established. Second, on a practical level, *Simpson* did little more than create an investigative detention power and articulate a standard for its use. For a decision ostensibly driven by a desire to "regulate" police detention practices, the judgment provides little concrete guidance. Unfortunately, as the next Part illustrates, subsequent decisions have not managed to do much better.

## IV. REGULATION OR LEGITIMIZATION

The decision in *Simpson* served to legalize police investigative detentions based on articulable cause. As explained earlier, such stops are an inevitable and even essential part of police practice, whether or not they are lawful. Making these practices legal could no doubt play an important role in finally regulating them.[108] Effective regulation, however, will require much more. Unfortunately, the cases following *Simpson* have done little to clarify the limits of the investigative detention power. The result has been more questions, few answers, and greater confusion, often accompanied by an incremental expansion of police power.[109]

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105 See *supra* note 3 for a list of those provincial appellate courts that have followed *Simpson*.

106 See *R. v. Jacques*, [1996] 3 S.C.R. 312, (1996), 110 C.C.C. (3d) 1 at 11 [*Jacques* cited to C.C.C.], relying on *Simpson*'s definition of "reasonable suspicion" to interpret s. 99(1)(f) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), which authorizes searches based on what was considered to be essentially the same standard, where an officer "suspects on reasonable grounds"; *R. v. Godoy*, [1999] 1 S.C.R. 311, (1999), 131 C.C.C. (3d) 129 at 137 [*Godoy* cited to C.C.C.], endorsing *Simpson*'s formulation of the second prong of the *Waterfield* test (see *supra* note 83 and accompanying text) but without expressly commenting on the investigative detention power. See also *R. v. Asante-Mensah*, 2003 SCC 38 at para. 75 [*Asante-Mensah*], pointing to *Simpson*'s formulation of the second prong of the *Waterfield* test as supplying a "broad range of factors" to be considered in assessing "[j]ustication in the criminal law" generally, while similarly failing to address the investigative detention power. But see *R. v. Latimer*, [1997] 1 S.C.R. 217, (1997), 112 C.C.C. (3d) 193 at 203 [*Latimer* cited to C.C.C.], where the Court held that an individual suspected of murder who was told that he was "being detained for investigation" was in fact placed under *de facto* arrest — requiring reasonable and probable grounds and thereby avoiding a characterization of the encounter as an investigative detention.

107 See *supra* notes 9 through 13 and accompanying text. See also Steve Coughlan, "Search Based On Articulable Cause: Proceed With Caution Or Full Stop?" (2002) 2 C.R. (6th) 49 at 51-57, noting how the existence of such an investigative detention power seems inconsistent with and foreclosed by a number of Supreme Court decisions.

108 See Davis, *Discretionary Justice*, *supra* note 6 at 12, noting that lawmakers sometimes acquiesce in or even encourage illegal official action, whereas "the proper course may be to make legal the illegal official practices that have long been a part of our system."

109 See Lesley A. McCoy, "Liberty's Last Stand? Tracing The Limits Of Investigative Detention" (2002) 46 Crim. L.Q. 319 at 320, arguing that the decisions following *Simpson* "have been less rigorous in the application of investigative detention such that the principle has been expanded beyond its original design."

In considering *Simpson*'s legacy over the last decade, and in attempting to forecast what the future might bring, it is helpful to look to the United States. Although Canadian developments do not exactly parallel those south of the border, in the short period since *Simpson* was decided some clear similarities are already apparent. This suggests that the American stop-and-frisk cases subsequent to *Terry* provide the best insight into what the future will likely hold for Canadian law, should the Supreme Court of Canada ultimately choose to endorse a judicially-created investigative detention power.

## A. USE OF FORCE

The use of force to effect an investigative detention creates the first challenge. Although *Simpson* gave police the "power" to conduct investigative detentions, it did not address the amount of force that can be used if an individual does not acquiesce to police authority. In what has become a familiar pattern, none of the appellate court decisions following *Simpson* has effectively filled this gap.

To date, the decisions have provided only minimal guidance on the amount of force police are permitted to use in effecting investigative stops. In one case, the Ontario Court of Appeal held that if an individual for whom a police officer possesses articulable cause to detain does not "submit to lawful detention," then the officer is entitled to "pursue him" and, when caught, to "physically restrain" him.[110] In another case, the Alberta Court of Appeal suggested that an articulable cause detention entitled a police officer to kick a suspect who was discovered hiding underneath a car after he refused to come out when directed.[111] Finally, the drawing and pointing of firearms, as well as the handcuffing of suspects, has met with the approval of the courts of appeal in both British Columbia[112] and Alberta.[113] None of these cases establish clear guidelines for police regarding the amount of force that can be used in carrying out future investigative stops.

In the United States, police powers associated with the authority to conduct *Terry* stops have been fleshed out on the same case-by-case basis for over thirty-five years. If this approach is maintained in Canada, there is little reason to think that the rules generated here will not eventually be to the same effect. In time, with respect to the degree of force permissible in carrying out investigative stops, this approach will inevitably lead, as it has in the United States, "to the permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally

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110 *R. v. Wainwright* (1999), 68 C.R.R. (2d) 29 at 30 (Ont. C.A.).

111 See *R. v. Yum* (2001), 277 A.R. 238 (C.A.) [*Yum*]. The police officer was charged with assault but acquitted because the Court concluded that he had articulable cause to detain "the suspect and to employ the force that he did" (*ibid.* at para. 7).

112 See *Ferris*, *supra* note 3, in which the Court did not comment on either the drawing of handguns or the use of handcuffs. See also *R. v. Lal* (1998), 130 C.C.C. (3d) 413 (B.C.C.A.) [*Lal*], where control over the suspect (whom the officer had good reason to believe armed) was secured at gunpoint — a matter about which the Court made no comment.

113 See *Dupuis*, *supra* note 3 at para. 7, where the drawing of handguns and the use of handcuffs was characterized by the Court as "not an unreasonable exercise of force" in a case where the police detained a room full of people in search of a drug seller.

associated with arrest than with investigatory detention."[114] And while lower courts have incrementally expanded police power, limits on the amount or nature of permissible force remain far from clear. For instance, the U.S. Supreme Court has still not addressed whether potentially fatal force can ever be used to effect a *Terry* stop.

In contrast, s. 25(1) of the *Criminal Code* authorizes a police officer to "use as much force as is necessary" in carrying out an arrest, while subsections (3) and (4) go on to carefully limit the circumstances in which force that is intended to cause grievous bodily harm or death can be used. Although it has been suggested that s. 25 might apply to investigative detentions,[115] subsection (1) only licenses the use of force by a police officer who "acts on reasonable grounds" — the more onerous standard historically associated with conventional arrests.[116] Therefore, absent legislative intervention, the force that can be used to effect an investigative stop will continue to be determined on a case-by-case basis. This approach tends to legitimize the force actually used by police, while rarely supplying guidance about the outer limits of police authority.

## B. INCIDENTAL SEARCHES

The existence and scope of a search power, incidental to the authority to conduct an investigative detention, is also far from settled. The *Simpson* Court did not suggest that the power it was creating would carry with it the authority to search those subject to an investigative detention.[117] Although the Court relied on *Terry* — the source of the "stop and frisk" power in the United States — it did so only for the "articulable cause" standard governing stops.[118] In effect, *Simpson* transplanted to Canada the "stop" power from American jurisprudence without incorporating the authority to "frisk."

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114 *United States v. Tilmon*, 19 F.3d 1221 at 1224-25 (7th Cir. 1994) [*Tilmon*], observing this trend in the *Terry* stop-and-frisk jurisprudence. See also *United States v. Sanders*, 994 F.2d 200 (5th Cir. 1993); *United States v. Merkley*, 988 F.2d 1062 (10th Cir. 1993), each holding that handcuffing is permissible during a *Terry* stop when police have reason to believe a suspect might be armed or dangerous. See also *United States v. Jones*, 973 F.2d 928 (D.C. Cir. 1992), holding that handcuffing is permissible where the suspect is caught after a chase. But see *Reynolds v. State*, 592 So.2d 1082 (Fla. 1992), holding that handcuffing during *Terry* stops is not permitted as a matter of routine. See also *United States v. Rodriguez*, 831 F.2d 162 (7th Cir. 1987), holding that it is permissible to require a suspect to sit in a police cruiser for a few minutes during a *Terry* stop. But see *United States v. Ricardo D.*, 912 F.2d 337 (9th Cir. 1990), holding that placing a suspect in a police car, absent some basis for concern regarding officer safety or security, transformed the encounter into an arrest requiring probable cause. See also *United States v. Hensley*, 469 U.S. 221 (1985), holding that it is permissible for police to draw weapons if there is reason to believe a suspect is armed and dangerous.

115 See Coughlan, *supra* note 107 at 55-56, who refers to *Yum*, *supra* note 111, and undoubtedly came to this conclusion based on the fact that the police officer in that case was acquitted of assault — although the judgment does not mention s. 25 of the *Code*.

116 See *R. v. Smellie* (1994), 95 C.C.C. (3d) 9 at 17 (B.C.C.A.), in which the Court held that "reasonable grounds" essentially equates to reasonable and probable grounds; leave to appeal to S.C.C. refused, (1995), 97 C.C.C. (3d) vi.

117 *Supra* note 1 at 505-506: given that the Court concluded that there was no articulable cause to justify the stop, it was unnecessary to address whether — had the stop been lawful — the search of the pocket would have been permissible.

118 *Ibid.* at 500-501.

A decade later, almost half of the appellate courts that have embraced the investigative detention power have still not conclusively addressed whether it carries with it a concurrent search power.[119] In these provinces, police officers have been granted the authority to come into close proximity with potentially dangerous suspects without being afforded any guidance on the measures they can lawfully take to ensure their safety. This does not mean that police officers in these provinces are not searching detainees. Rather, as those who have studied police behaviour report, "when police are not provided with explicit authority to deal effectively with the problems they encounter ... they often unwittingly become dirty workers, furtively 'doing what has to be done' through the exercise of their discretion."[120] This is troubling because it means that the chance to limit overly intrusive searches, those that exceed what is necessary to ensure the safety of police officers, is lost.

This is not to suggest that the solution lies in courts recognizing an incidental search power. Judicial efforts aimed at addressing this problem can have their own unfortunate side-effects. The case-by-case explication of an incidental search power will lead to an incremental expansion of police authority to a point that far exceeds what is needed for police safety — the original rationale for recognizing such a power. This negative byproduct of a judicially created search power is best illustrated by the experience in both the United States and those Canadian provinces where courts have already endorsed an incidental search power.

In *Terry*, the U.S. Supreme Court recognized that the power to "stop and frisk" suspects based on articulable cause represented a significant departure from the probable cause long demanded by its prior Fourth Amendment jurisprudence.[121] In justifying this deviation from established constitutional standards, the Court emphasized the limited nature of the permissible search. The "sole justification" for a search "is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[122] Searches were not meant to be an automatic part of every stop. Rather, they were to be limited to those situations that cause an officer "reasonably to conclude ... that the persons with whom he is dealing may be armed and presently dangerous."[123] In addition, even where an officer has legitimate safety concerns, the "search" had to be restricted to a "frisk" — a "carefully limited search of the outer clothing" worn by a suspect.[124] During this initial search, if police officers detect something that has the potential to be a weapon, they are entitled to reach inside a pocket or beneath clothing to retrieve it.[125]

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119 As explained below, only five of the nine provincial appellate courts that have endorsed the investigative detention power have also recognized an incidental search power: British Columbia, Alberta, Saskatchewan, Manitoba and Quebec.

120 George L. Kelling & Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York: Free Press, 1996) at 167.

121 See *supra* note 89 and accompanying text.

122 *Terry*, *supra* note 88 at 29.

123 *Ibid.* at 30.

124 *Ibid.*

125 The Court held that the search here was reasonable because the officer began by patting down outer clothing and "did not place his hands in their pockets or under the outer surface of their garments until he had felt the weapons, and then he merely reached for and removed the guns" (*ibid.*). See also *Sibron v. New York*, 392 U.S. 40 (1968) [*Sibron*]. *Sibron* was a companion case to *Terry*. In *Sibron* the officer had "thrust his hand" into the suspect's pocket. The Court noted that its decision in *Terry* only approved "a limited patting of the outer clothing of the suspect for concealed objects which might be used as

In the thirty-five years since *Terry* was decided, however, many of the limits it carefully imposed on the search power it created have gradually been eroded. The pliability of the police-safety rationale has figured prominently in these developments. First, "[l]ower courts have consistently expanded the *types of offenses* always considered violent regardless of the individual circumstances."[126] Similarly, they have also come to accept that "certain *types of persons and situations* always pose a danger of armed violence to police."[127] As a result, "[w]hen confronted with these offenses, persons, or situations, police may *automatically* frisk, whether or not any individualized circumstances point to danger."[128] In effect, searches have become a much more common feature of stops, making the "stop *and* frisk" label apt.

Since *Terry* was decided, the scope of searches carried out incidental to investigative detentions has also grown. Although the U.S. Supreme Court has maintained that the accompanying personal search must be limited to no more than a "frisk" for weapons,[129] more intrusive probing for evidence or contraband is still easily justified. For instance, given the risk that any hard object may potentially be a weapon, a search inside pockets or beneath clothing is quite often defensible.[130]

The police safety rationale has also been used to extend the scope of potential searches well beyond the person of the detainee. American courts commonly uphold searches inside the purses, briefcases, knapsacks and duffle bags carried by individuals subject to a *Terry*

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instruments of assault," and held the search in this case unconstitutional because it "was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception — the protection of the officer by disarming a potentially dangerous man" (*ibid.* at 65).

126 David A. Harris, "Frisking Every Suspect: The Withering of *Terry*" (1994) 28 U.C. Davis L. Rev. 1 at 5 [emphasis in original]. For example, a stop based on reasonable suspicion of drug possession (see *United States v. Alexander*, 907 F.2d 269 (2d Cir. 1990)) or drug trafficking (see *United States v. Sinclair*, 983 F.2d 598 (4th Cir. 1993); *United States v. Salazar*, 945 F.2d 47 (2d Cir. 1991); *United States v. Salas*, 879 F.2d 530 (9th Cir. 1989); *United States v. Gilliard*, 847 F.2d 21 (1st Cir. 1988); *United States v. Nersesian*, 824 F.2d 1294 (2d Cir. 1987); *United States v. Pajari*, 715 F.2d 1378 (8th Cir. 1983) automatically entitles police to frisk because of a judicial presumption that the drug trade is inherently dangerous.

127 Harris, *ibid.* [emphasis in original]. For example, a person who is in the company of someone who is arrested is subject to a similar presumption and can automatically be frisk searched. See *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971). But see *United States v. Flett*, 806 F.2d 823 (8th Cir. 1986).

128 Harris, *ibid.* See also David A. Harris, "Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio" (1998) 72 St. John's L. Rev. 975 at 1001-1012 ["Particularized Suspicion"].

129 See *Minnesota v. Dickerson*, 508 U.S. 366 (1993). In *Dickerson*, the officer felt a small lump in the suspect's pocket during the pat-down, and after manipulating it further between his fingers, the officer concluded it was crack cocaine and removed it from the pocket. The Court concluded that the further examination of the lump, after the officer realized it was not a weapon, exceeded "the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*" (*ibid.* at 378).

130 See *United States v. Swann*, 149 F.3d 271 (4th Cir. 1998), where a search inside a sock containing five credit cards was upheld; *United States v. Strahan*, 984 F.2d 155 (6th Cir. 1993), where a search of a pocket containing a metal money clip full of money was upheld; *State v. Morrow*, 603 A.2d 835 (Del. 1992), where a search of a pocket containing tightly packed bags of crack cocaine was upheld; *State v. Betterman*, 232 N.W.2d 91 (Minn. 1975), where a search of a pocket containing a prescription bottle was upheld.

stop.[131] Those stopped while travelling in a car fare even worse. As a matter of routine, the police are entitled to order the driver and any passenger(s) out of the car.[132] In addition, a concern that weapons may be contained inside the vehicle entitles police to conduct a protective search of the "passenger compartment... limited to those areas in which a weapon may be placed or hidden."[133] This can include searching the glove compartment[134] and any bags or other containers found inside the vehicle.[135]

Not surprisingly, given the influence of the American case law, it took very little time for many of those Canadian appellate courts that followed *Simpson* to begin grafting a search power onto the authority to conduct an investigative detention.[136] In some provinces, an automatic and intrusive search power was recognized from the outset by reference to those principles that govern the power to search incidental to an arrest.[137] For example, in a case involving an articulable cause detention, in addition to searching for protective purposes, the Quebec Court of Appeal held that the police are entitled to search "to secure evidence of a crime."[138] The Saskatchewan Court of Appeal likewise blurred any distinction between

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131 See *United States v. Williams*, 962 F.2d 1218 (6th Cir. 1992), where a search of a purse was upheld; *State v. Ortiz*, 683 P2d 822 (Haw. 1984), where a search of a knapsack was upheld; *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981), where a search of a briefcase was upheld; *United States v. Johnson*, 637 F.2d 532 (8th Cir. 1980), where a search of a duffle bag was upheld.

132 See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), granting this power in relation to drivers who are stopped for routine traffic violations; *Maryland v. Wilson*, 519 U.S. 408 (1997), extending this power to include passengers. See also *United States v. Hardnett*, 804 F.2d 353 (6th Cir. 1986); *United States v. Patterson*, 648 F2d 625 (9th Cir. 1981); *United States v. White*, 648 F.2d 29 (D.C. Cir. 1981), which make clear that *Mimms* - and by implication *Wilson* — apply equally to *Terry* stops.

133 See *Michigan v. Long*, 463 U.S. 1032 (1983), authorizing protective vehicle searches incidental to a *Terry* stop.

134 See *United States v. Holifield*, 956 F.2d 665 (7th Cir. 1992), where police were entitled to unlock a glove compartment and look inside, given that the driver and the passengers were inside with keys; *United States v. Brown*, 913 F.2d 570 (8th Cir. 1990), holding that the police were entitled to unlock and search the glove compartment even though all three suspects were outside of the car at the time.

135 See *United States v. Williams*, 822 F.2d 1174 (D.C. Cir. 1987), holding that it was permissible for police to look inside a bag found inside the car; *United States v. Longmire*, 761 F.2d 411 (7th Cir. 1985), holding that it was permissible for police to search inside a purse located within a car.

136 In some cases the existence of such a power was largely assumed. See *R. v. Waniandy* (1995), 162 A.R. 293 (C.A.) [*Waniandy*]; *Lake, supra* note 3; *R. v. McAuley* (1998), 124 C.C.C. (3d) 117 (Man. C.A.) [*McAuley*]. In others, such a power was only recognized after an application of the two prong *Waterfield* ancillary powers test. See *Mann, supra* note 5; although the Court cited its earlier decision in *McAuley*, it did not rely on it as providing authority for a search. See also *Ferris, supra* note 3.

137 For a discussion of the power to search incident to arrest, see *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, (1990) 53 C.C.C. (3d) 257 at 274 [*Cloutier* cited to C.C.C.], affirming that "the common law as recognized and developed in Canada holds that the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him"; *R. v. Caslake*, [1998] 1 S.C.R. 51, (1997), 121 C.C.C. (3d) 97 at 107 [*Caslake* cited to C.C.C.], making clear that a search incidental to arrest can extend to an arrestee's vehicle; *R. v. Golden*, [2001] 3 S.C.R. 679, (2001), 159 C.C.C. (3d) 449 [*Golden*], limiting the authority to conduct strip searches incidental to an arrest to situations where there are reasonable and probable grounds to believe that such an intrusive search is necessary to secure a weapon or evidence, and requiring that such searches only be undertaken at the station house absent exigent circumstances.

138 *R. v. Murray* (1997), 136 C.C.C. (3d) 197 at 212 (Que. C.A.). In *Murray*, the police had set up a roadblock along a likely escape route for three armed robbery suspects. After stopping the appellant, the officer saw what appeared to be a panel in the cargo area and was concerned that the two other suspects might be hiding beneath it. A search revealed that the panel was actually a tarp under which the officer discovered clearly-marked contraband cigarettes. Arguably, given the potential presence of

investigative detentions and conventional arrests. That Court upheld a pocket search of a detained suspect before he was placed in a police cruiser.[139] In doing so, the Court explicitly noted that "[f]or the purposes of this case there is no difference between the police power to search attendant upon an arrest and that incident to detention."[140]

Although the British Columbia Court of Appeal did not set out to license searches for contraband and evidence incidental to investigative stops, this has been the effect of its judgments. In the Court's first decision following *Simpson*, the *Waterfield* test was applied to authorize police "if they are justified in believing that the person stopped is carrying a weapon, to search for weapons as an incident to detention."[141] In coming to this conclusion, the Court quoted those passages from *Terry* that emphasized the need to give police officers the power to protect their safety when in close contact with suspected criminals. Those excerpts that stressed the importance of limiting the incidental search to no more than a "frisk" or a "pat-down" were not reproduced.[142] Instead, the Court placed only the loosest of limits on the potential scope of the searches it authorized:

> The seriousness of the circumstances which led to the stop will govern the decision whether to search at all, and if so, the scope of the search that is undertaken. As Chief Justice Warren put it in *Terry* (at p. 905), the search must be "reasonably related in scope to the circumstances which justified the interference in the first place". Questioning an elderly shopper about a suspected shoplifting would not ordinarily require a search for weapons; questioning someone after a bank robbery might require *a search of the detainee and his or her immediate surroundings.*[143]

In the course of upholding the search at issue in that case,[144] the Court avoided imposing any concrete limits on the scope of potential searches. Rather, it deferred to police discretion, refusing to "require them to determine with precision the least intrusive manner of securing their safety."[145]

Subsequent judgments of the British Columbia Court of Appeal have built upon the Court's early holding that the "seriousness of the circumstances" might permit "a search of

two armed suspects, a protective search power would have been enough to uphold the officer's cursory examination of the cargo area in this case.

139 *Lake*, *supra* note 3 at 209. In *Lake*, the officer admitted that he routinely searched those detained, not only for safety sake, but to ensure that they "don't ... 'have anything on their person that's illegal'"; *ibid.* Although the Court concluded that the officer had grounds to arrest the accused for impaired driving, it unfortunately did not emphasize this fact in its reasons. Rather, the Court wrote generally about the authority to search "a lawfully detained person" and specifically cited *Simpson*, *ibid.* at 211.

140 *Lake*, *ibid.* at 211-12.

141 *Ferris*, *supra* note 3 at 314.

142 *Ibid.* at 312-14. For a description of the limits *Terry* attempted to impose, see *supra* notes 121 to 125 and accompanying text.

143 *Ferris*, *supra* note 3 at 314-15 [emphasis added].

144 In *Ferris*, the suspect had been a passenger in a car that was stopped because police reasonably suspected it might be stolen. After the suspect's hands were cuffed behind her back, the detaining officer searched inside the waistpack she was wearing for identification and weapons and instead found cocaine. Following the deferential approach it endorsed, the Court rejected an argument that police safety would have been adequately served by taking the pack away from the suspect during the stop. *Ibid.* at 303-305.

145 *Ibid.* at 299.

the detainee and his or her immediate surroundings."[146] In addition to upholding searches inside "waist packs"[147] and "fanny packs"[148] worn by suspects, the Court has relied upon this broad power to permit police to explore the contents of a bag a suspect was carrying when stopped.[149] The Court has also upheld vehicle searches incidental to investigative stops. In one case, it upheld the search of a closed bag found inside a vehicle[150] and in another case, it upheld the opening of a glove compartment and examination of its contents.[151] Although the Court has indicated that in contrast to searches incidental to arrest, "investigative detention does not provide a foundation for a search for contraband,"[152] it has ignored the fact that the intrusive searches it has authorized essentially look identical to those that accompany conventional arrests.[153] In fact, given the permissible scope of a search, a police officer can quite easily search for contraband and/or evidence incidental to an investigative stop and be assured that the search will be upheld on review as long as officer safety is offered to justify it.[154]

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146 *Ibid.* at 315.

147 *Ibid.*

148 See *Lal, supra* note 112. In *Lal*, the officer began his search by unbuckling the fanny pack worn by the suspect, which then fell to the ground "as if there was a brick in it" (*ibid.* at para. 12). A search of its contents revealed a loaded semi-automatic pistol.

149 See *R. v. Yamanaka* (1998), 128 C.C.C. (3d) 570 (B.C.C.A.) [*Yamanaka*]. In *Yamanaka*, the police had been responding to a complaint of gunfire in the vicinity. An officer became concerned that an athletic bag one of the suspect's was holding close might contain weapons, so he searched it. The Court upheld the search which revealed instruments for breaking into vending machines.

150 See *R. v. Cooke* (2002), 2 C.R. (6th) 35 (B.C.C.A.). After stopping the suspects, the police searched their vehicle. Inside, they located a bag which, once opened, was found to contain cash and coins. The money was counted and it matched the amount taken in a recent robbery. The suspects were arrested. Any protective motivation for this search was clearly exhausted by the point the police began counting the money. According to the Court, the articulable cause justifying the stop "fully justified the police ... conducting a search on the spot" (*ibid.* at para. 17).

151 See *R. v. Hyatt* (2002), 171 C.C.C. (3d) 409 (B.C.C.A.) [*Hyatt*]. In *Hyatt*, the search revealed coins and cigarettes which served to link the suspects to a recently committed robbery, resulting in their arrest. The trial judge concluded that the appellants, as passengers in the vehicle, lacked a reasonable expectation of privacy and therefore had no standing to challenge this search. The Court refused to interfere with this conclusion (*ibid.* at para. 41). As a result, the Court did not assess the propriety of the search or clarify whether its motivation was police safety or evidence gathering.

152 *R. v. Le* (2001), 160 C.C.C. (3d) 146 (B.C.C.A.). In *Le*, the Court also indicated that "to conflate the kind of necessitous search undertaken on an investigative detention with a search incident to a lawful arrest would run counter to a good deal of well-established s. 8 *Charter* jurisprudence" (*ibid.* at para. 13).

153 See *supra* note 137, explaining the search incidental to arrest power with supporting cases.

154 See *R. v. Johnson* (2000), 32 C.R. (5th) 236 (B.C.C.A.). In *Johnson*, the Court held that the police exceeded their authority to search incidental to a lawful investigative detention when they looked inside two pillow-cases carried by a suspect. The Court noted that "[n]either police officer testified that the search was for anything other than contraband. They did not give evidence that the search was necessary for their safety. The search, in my view, was therefore unreasonable" (*ibid.* at para. 12). The clear implication is that had such evidence been offered, the search would likely have been justified. A good example of this is the Court's recent decision in *R. v. Hunt*, 2003 BCCA 434. In *Hunt*, the police detained a suspect in the course of investigating a bank robbery. The police had information that the assailant was armed and pointed to this in explaining why the suspect had been searched. The search yielded 30 $100 bills secreted in the suspect's sock and in other parts of his clothing. The suspect was not carrying a weapon. In upholding this search, the Court emphasized the legitimate safety concerns expressed by police. Lost in this analysis is the fact that a mere frisk search would have quickly confirmed that the suspect was unarmed. Instead, a concern about weapons was enough to justify an unnecessarily intrusive search into the suspect's socks and beneath the outer surfaces of his clothing: a search that ultimately revealed evidence, not weapons.

The experience in Alberta has been to the same effect, although by a less direct path. At least in principle, the Court of Appeal has recognized the importance of limiting an incidental search power. The Court has held that where a police officer is concerned that a suspect might be carrying a weapon, a "pat search" is permissible. In that judgment, however, the Court went on to conclude that probing into the suspect's pockets was justified because a "bulky leather jacket provided the special reason for the more intrusive search."[155] Of course, heavy garments are commonplace in Alberta during much of the year. The same is true throughout most of Canada.[156] On a practical level, this makes pocket searches the rule rather than the exception. More recently, the Alberta Court of Appeal again reiterated the police safety rationale in concluding that it was permissible for police to search inside the handbags carried by two suspects subject to an investigative stop.[157] In no time at all, what began as a limited power to conduct a "pat-search" for weapons has mushroomed into the authority to search inside a suspect's pockets and any bags they may be carrying.

In Manitoba, an expansive search power has also been recognized, albeit by a more curious route. The Manitoba Court of Appeal first dealt with the existence of an incidental search power in a case involving a suspect who was detained after arriving at a location where police were in the process of executing a search warrant.[158] After emphasizing the need to ensure the safety of police officers executing warrants and citing decisions from provinces where an incidental search power had already been accepted,[159] the Court agreed with the Crown's submission that a "limited search" was permissible on the facts.[160] The Court therefore upheld what it characterized as a "frisk" search carried out by police.[161] On closer scrutiny, however, the incriminating evidence revealed by this search consisted of "a cigarette, which was found to be marihuana, two sets of keys, and a paper sketch."[162] Given that none of these items could possibly be mistaken for a weapon, and given that the suspect's pockets had to have been emptied and the contents closely examined, the police action upheld in this case represented much more than a *limited* "frisk" search.

In its next decision — the case that will finally place the status of investigative stops and any incidental search power before the Supreme Court of Canada — the Manitoba Court of

155 *Waniandy*, *supra* note 136 at para. 4.

156 See Coughlan, *supra* note 107 (making this same point and noting that it serves to make s. 8 a "fair weather right" at 65).

157 *R. v. T.A.V.* (2001), 48 C.R. (5th) 366 (Alta. C.A.) [*T.A.V.*]. In *T.A.V.*, the police claimed they had reasonable suspicion to stop the suspects and search their handbags for weapons on the basis of two intercepted telephone conversations. One telephone call reported that the two suspects would be travelling to Edmonton from Vancouver by bus. During the second call, when one of the callers was asked about the reason for the trip, the other responded: "Bang, bang, we're dead, 50 bullets in your head, one red, one blue, they are full of chicken poo" (*ibid.* at para. 2). The Court readily accepted that this nonsensical rhyme provided reasonable suspicion not only to stop the suspects, but to search for weapons inside the bags they were carrying.

158 See *McAuley*, *supra* note 136.

159 *Ibid.* at paras. 22-40.

160 *Ibid.* at para. 39.

161 *Ibid.* at para. 12.

162 *Ibid.* One of the keys, when tested, opened the front and back doors at the location, which was being used to grow a large quantity of marihuana. Another set opened a safe at the location which contained a number of additional pieces of very incriminating evidence, while the sketch was a diagram of a ventilation system similar to that being used at the location that was searched.

Appeal expressly embraced a rather expansive search power. In *Mann,*[163] the accused had been stopped by police because he matched the description of a suspect in a nearby break-in. The stop was accompanied by what the officer described as a "pat-down ... security search" for weapons. During this initial search, the officer felt something that he conceded "was not hard" in the kangaroo-style pouch of the suspect's sweater. The officer then searched inside the pouch and removed a plastic bag containing almost an ounce of marihuana and some baggies. The officer explained his exploration of the pouch by noting his concern that a weapon could have been concealed behind the soft item he had initially felt.[164]

The Court did not rely upon its earlier decision to provide authority for this search. Instead, after applying the *Waterfield* test, the Court concluded that the police not only had the authority to detain in these circumstances, but also had the power to carry out a pat-down (or frisk) "limited to a search for weapons."[165] After recognizing this power, however, the *Mann* Court proceeded to grant police considerable discretion in deciding when to conduct a more intrusive search:

> as we are taking about a search undertaken for safety reasons, it would not be reasonable to place too rigid a restraint on a police officer's right to ensure that the detainee has no weapon or other object with which he might cause harm to the police, himself or members of the public. It is therefore my opinion that, so long as the court is satisfied that the search for weapons was conducted in good faith — and not as an excuse to search the detainee for evidence of a crime — the officer should be allowed some latitude. In the present case, the officer's explanation of why he searched inside the pouch ... strikes me as a reasonable ground for extending the pat-down search to a search inside the pouch. There is certainly nothing to suggest that the officer was not acting in good faith in this regard.[166]

Under this deferential approach, a police officer's plausible safety concerns are a sufficient basis for justifying a more probing search than a "pat-down." As a practical matter, given that "anything hard in the accused's pocket could be a weapon, and anything soft could be covering something hard,"[167] the decision, if it ultimately stands, would serve to make intrusive personal searches a routine part of most investigative stops.

After the Supreme Court granted leave in *Mann*, the Manitoba Court of Appeal appeared to have second-thoughts about the considerable leeway it had given police in determining the potential scope of incidental searches. In another judgment,[168]after reiterating much of its earlier holding in *Mann*, the Court attempted to clarify the circumstances in which a more intrusive protective search than a "pat-down" or "frisk" is permitted. Before proceeding further, an officer must subjectively believe that a more probing search is necessary for safety reasons.[169] In addition, the Court supplemented its holding in *Mann* with an objective test:

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163 *Supra* note 5.
164 *Ibid.* at paras. 2-5.
165 *Ibid.* at para. 26.
166 *Ibid.* at para. 37.
167 Steve Coughlan, "*R. v. Mann*: Annotation" (2003) 5 C.R. (6th) 306 at 307.
168 *R. v. Willis*, (2003), 174 C.C.C. (3d) 406, 2003 MBCA 54 (C.A.), leave to appeal to S.C.C. requested.
169 *Ibid.* at paras. 33-38.

> there must be evidence to support the existence of reasonable grounds to believe that a search was necessary for officer safety. The officer should be able to specify the particular facts on which the belief is based, and a prudent individual in those circumstances must be able to come to the conclusion that a search is reasonably necessary for safety reasons.[170]

In *Willis*, the suspicious circumstances surrounding the stop, the fact that one of the officers had prior (apparently violent) dealings with the suspect, together with a bulge that the suspect had attempted to hide, combined to provide "objectively justifiable reasons to substantiate officer safety concerns."[171] Consequently, it was permissible for police to automatically probe beneath the outer surfaces of the suspect's clothing. Under this approach, the Court was not required to address how the papers and bills that were discovered could be mistaken for a weapon during the initial pat-down. Rather, a more probing search is always justified where a police officer has objectively justifiable safety concerns. The search in *Willis* easily satisfied this requirement and was therefore considered reasonable under s. 8 of the *Charter*.[172]

A common thread can be found in the reasoning of those Canadian courts that have recognized a power to search incidental to an investigative detention. In each case, it is not unusual for the suspect's s. 8 *Charter* right — "to be secure against unreasonable search or seizure"[173] — to get lost in the shuffle to uphold a "police officer's *right* to ensure that the detainee has no weapon."[174] To date, despite claims to the contrary, no court has managed to convincingly reconcile a search power premised upon articulable cause with the established s. 8 jurisprudence.[175]

The requirements of s. 8 of the *Charter* are easily explained by reference to two decisions of the Supreme Court, beginning with *Hunter v. Southam*[176] In *Hunter*, the Supreme Court set out three basic requirements for assessing whether a law that authorizes a search or

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[170] *Ibid.* at para. 37.

[171] *Ibid.* at para. 38.

[172] *Ibid.*

[173] *Supra* note 40, s. 8.

[174] *Mann*, *supra* note 5 at para. 37 [emphasis added]. See Peter Sankoff, "Articulable Cause Based Searches Incident to Detention — This *Cooke* May Spoil the Broth" (2002) 2 C.R. (6th) 41 at 47, noting that in these cases it often seems that "officer safety is utilized as a *generalized* justification to conduct a comprehensive search … the 'risk' is deemed to justify a general need for privacy interests to give way to a search" [emphasis in original].

[175] The appellate courts in Quebec, Saskatchewan and Alberta created the search power without expressly addressing the requirements for reasonable searches or seizures under s. 8 of the *Charter*. In *Ferris*, the British Columbia Court of Appeal under the heading "Is the Power to Search Incident to an Investigative Detention a Reasonable Law?" dealt with the question by simply indicating that it "was not an issue on this appeal. Having found that an investigative detention and a search incidental to that investigation meets the test of reasonable necessity, it cannot be said that the common law power is unreasonable" (*Ferris*, *supra* note 3 at para. 61). In the quoted passage, the Court is referring to the ancillary powers doctrine from *Dedman*, indicating that if a search power emerges from the application of the *Waterfield* test, then by necessity it must be reasonable under s. 8. A fitting metaphor for this approach is that the ancillary powers tail can wag the constitutional dog! See also *Mann*, *supra* note 5 at para. 31, citing this passage from *Ferris* as confirmation that the search power accords with s. 8.

[176] [1984] 2 S.C.R. 145, (1984), 14 C.C.C. (3d) 97 [*Hunter* cited to C.C.C.].

seizure is "reasonable" under s. 8.[177] Most importantly, for our purposes, searches or seizures may only be permitted where there are reasonable grounds to believe an offence has been committed and that evidence will be found in the place to be searched.[178] This standard applies equally to warrantless search powers.[179]

*Hunter* was followed by *Collins*,[180] which supplied a general framework for assessing reasonableness. In *Collins*, the Court held that to be "reasonable,"a search must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner.[181] Later cases made clear that *Hunter*'s safeguards only apply to criminal or quasi-criminal search powers. Less rigorous protections are required for search powers in other contexts.[182] In circumstances where the state's interest is criminal law enforcement, however, the Supreme Court has usually insisted upon strict observance of *Hunter*'s requirements, given the individual liberty and privacy interests at stake.[183]

In the criminal investigative context, the Supreme Court has only upheld deviations from *Hunter*'s standards once, with respect to searches incident to arrest.[184] This longstanding common law search power, as developed in Canada, was found to be consistent with the requirements of s. 8, even though it permits searches in cases where a police officer may lack

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177 They are: (1) a warrant is necessary to search whenever it is feasible to obtain one — warrantless searches are presumed to be unreasonable and must be justified by the state; (2) warrants should only be issued when there are reasonable and probable grounds, established under oath, that an offence has been committed and that evidence will be found in the place to be searched; and (3) that persons authorizing searches, although not necessarily judges, must at least be capable of acting judicially (*ibid.* at 109-10, 114-15).

178 *Ibid.*

179 See *Baron v. Canada*, [1993] 1 S.C.R. 416, (1993), 78 C.C.C. (3d) 510 at 532-33 [*Baron* cited to C.C.C.]: "[T]his court established in *Hunter* that a standard of credibly based probability rather than mere suspicion should be applied in determining when an individual's interest in privacy is subordinate to the needs of law enforcement."

180 *Supra* note 104.

181 *Ibid.* at 14. See also *R. v. Wiley*, [1993] 3 S.C.R. 263, (1993), 84 C.C.C. (3d) 161 at 168: "Searches founded upon either common law principles or statutory provisions may be 'authorized by law' within the meaning of s. 8." See also *Caslake*, *supra* note 137 at 105-106, further clarifying the lawfulness requirement.

182 See *R. v. Simmons*, [1988] 2 S.C.R. 495, (1988), 45 C.C.C. (3d) 296 at 320-21 [*Simmons* cited to C.C.C.]; *Jacques*, *supra* note 106 at 9; *R. v. Monney*, [1999] 1 S.C.R. 652, (1999), 133 C.C.C. (3d) 129 at 147-48, 150 [*Monney* cited to C.C.C.], dealing with border/custom searches. See *Comite paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406, (1994), 21 C.R.R. (2d) 193 at 202-204; *Thomson Newspapers v. Canada*, [1990] 1 S.C.R. 425, (1990), 54 C.C.C. (3d) 417 at 475-78 [*Thomson Newspapers* cited to C.C.C.]; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 2627, (1990), 55 C.C.C. (3d) 530 at 542-46 [*McKinlay Transport* cited to C.C.C.], relating to administrative or regulatory searches. See *R. v. M.(M.R.)*, [1998] 3 S.C.R. 393, (1998), 129 C.C.C. (3d) 361 at 377-79, 382-85, dealing with searches of students while in school for disciplinary purposes.

183 See *R. v. Grant*, [1993] 3 S.C.R. 223, (1993), 84 C.C.C. (3d) 173 at 187: "this court remains vigilant with respect to searches conducted in relation to criminal investigations, given that the liberty of individuals is ultimately at stake." See also *Thomson Newspapers*, *ibid.* at 476-77, emphasizing that citizens have "a very high expectation of privacy in respect of such investigations."

184 See *R. v. M. (M.R.)*, *supra* note 182 at 383: "The other basic principle enunciated in the *Hunter* decision was that a reasonable search must be based on reasonable and probable grounds.... The requirement of reasonable and probable grounds has been maintained subject only to very limited exceptions *e.g.*, search incident to arrest; see *Cloutier v. Langlois*." See also *Golden*, *supra* note 137 at para. 84; *R. v. Stillman*, [1991] 1 S.C.R. 607, (1997), 113 C.C.C. (3d) 321 at 340 [*Stillman* cited to C.C.C.].

reasonable and probable grounds to believe anything will be found.[185] It must be remembered, however, that a precondition for this power is a lawful arrest.[186] As the Supreme Court has explained, from the standpoint of s. 8, such an exception "is justifiable because the arrest itself requires reasonable and probable grounds (under s. 494 of the *Code*) or an arrest warrant (under s. 495)."[187]

In contrast, searches incidental to investigative detentions are not premised on the existence of reasonable and probable grounds to believe that the suspect has committed a crime, or that he or she might be in possession of contraband or evidence. Instead, such encounters are based upon the less onerous reasonable suspicion standard. Given that courts in Canada are obligated to develop the common law in accordance with the specific guarantees and fundamental values enshrined in the *Charter*,[188] it seems doubtful whether the judicial recognition of an incidental search power is constitutionally possible.[189] This no doubt factors into why almost half of those appellate courts that have endorsed the investigative detention power have not yet accepted any incidental search power.[190] Arguably, however, a limited search power could be developed in accordance with s. 8 of the *Charter*.

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185 See *Cloutier*, *supra* note 137 at 274, making clear that such a search does not require reasonable and probable grounds beyond the grounds that were sufficient to support the lawfulness of the arrest itself. See also *Stillman*, *ibid.*

186 See *Stillman*, *ibid.* at para. 27, indicating that "[n]o search, no matter how reasonable, may be upheld under this common law power where the arrest which gave rise to it was arbitrary or otherwise unlawful." See also *Caslake*, *supra* note 137 at 106; *R. v. Feeney*, [1997] 2 S.C.R. 13, (1997), 115 C.C.C. (3d) 129 at 159-60 [*Feeney* cited to C.C.C.].

187 *Caslake*, *ibid.* For an explanation of the arrest power, see *supra* note 10 and accompanying text.

188 See *RWDSU, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174 at 198: "the courts ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution." See also *Cloutier*, *supra* note 137 at 266-67; *R. v. Salituro*, [1991] 3 S.C.R. 654, (1991), 68 C.C.C. (3d) 289 at 301, 305 [*Salituro* cited to C.C.C.]; *Swain*, *supra* note 46 at 510; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, (1994), 94 C.C.C. (3d) 289 at 314-15; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, (1995), 126 D.L.R. (4th) 129 at 152-59; *Golden*, *supra* note 137 at 488-89.

189 See Renee M. Pomerance, "The Unreasonable and the Arbitrary — Recent Developments Under Sections 8 and 9 of the *Charter*" (1994), 6 J.M.V.L 127 at 153, arguing that "[t]he power of the police to detain on the basis of articulable cause does not translate into a lower constitutional standard for investigative activity involving search or seizure.... [This is because] section 8 of the *Charter* ... requires, as a constitutional minimum, that search/seizure activity be based on reasonable and probable grounds." See also Coughlan, *supra* note 107 at 62-63.

190 See *e.g.* *R. v. Polashek* (1999), 45 O.R. (3d) 434, 134 C.C.C. (3d) 187 (C.A.). *Polashek* implicitly questioned whether pocket searches would be constitutional incident to an investigative detention, pointing out that a court contemplating such a power would "have to consider the impact of recent amendments to the *Criminal Code*. Sections 117.02 and 487.11 authorize warrantless searches of the person in exigent circumstances but generally only based upon reasonable grounds. Section 11(7) of the *Controlled Drugs and Substances Act* is to a similar effect" (*ibid.* at 198-99). The clear implication being that if Parliament is respecting the reasonable and probable grounds standard for weapons searches, courts surely must do the same: see also *R. v. Lewis* (1998), 38 O.R. (3d) 540, 122 C.C.C. (3d) 481 (C.A.) [*Lewis* cited to C.C.C.], in which the Court dealt with an investigative detention that included a search of a traveller's luggage. The Court indicated that authority for this search required a valid consent, at no point suggesting that an investigative detention carries with it an incidental search power, even for protective purposes (*ibid.* at 493). See also *R. v. Power* (2001), 204 Nfld. & P.E.I.R. 221, 48 C.R. (5th) 177 (C.A.), implicitly rejecting the existence of an incidental search power. See also Aman S. Patel, "Detention and Articulable Cause: Arbitrariness and Growing Judicial Deference to Police Judgment" (2001) 45 Crim. L.Q. 198 at 205-206.

In *Hunter*, the Supreme Court made clear that reasonableness is a context-specific determination[191] — opening the door to less onerous safeguards for searches in the regulatory, administrative, customs, and school contexts.[192] The way in which a search power is labelled, however, is not necessarily determinative of the protections required for it to be considered reasonable.[193] Rather, two factors have been key to this determination in the Court's opinions: the privacy expectation involved, and the intrusiveness of the search power being considered.[194] In cases where privacy expectations are high and the search power is quite intrusive, such as where state action would interfere with an individual's bodily integrity, the Supreme Court has required even greater protections than those demanded by *Hunter*.[195] In contrast, where privacy expectations are diminished and the search power is not very intrusive, the Supreme Court has signalled that slight deviations from the reasonable and probable grounds standard may be constitutional.[196]

On this basis, a convincing argument could be made, similar to that accepted by the Court in *Terry*, in favour of a limited protective search power. Admittedly, individuals enjoy a relatively high expectation of privacy in their persons, including the contents of their pockets and any bags or parcels they may be carrying. That said, it could be argued that those expectations are somewhat diminished with respect to the bulges and hard edges produced

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191 *Hunter*, *supra* note 176, at 115, noting that "[w]here the State's interest is not simply law enforcement as, for instance, where State security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one."

192 See *supra* note 182 and accompanying text.

193 See *McKinlay Transport*, *supra* note 182 at 542-43, Wilson J., concurring: "Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information ... it follows that the standard of review of what is 'reasonable' in a given context must be flexible if it is to be realistic and meaningful"; *Baron*, *supra* note 179 at 529: "The point is that the characterization of certain offences and statutory schemes as 'regulatory' or 'criminal', although a useful factor, is not the last word for the purpose of *Charter* analysis." See also *14371 Canada Inc. v. Quebec (A.G.)*, [1994] 2 S.C.R. 339, (1994), 90 C.C.C. (3d) 1 at 32.

194 See *Simmons*, *supra* note 182 at 320-21 and *Jacques*, *supra* note 106 at 8-9, both emphasizing the substantially diminished privacy expectations of travellers crossing international boundaries in accepting deviations from *Hunter*'s requirements. See also *Thomson Newspapers*, *supra* note 182 at 475-76, emphasizing the diminished privacy expectations of those operating businesses in regulated fields to explain why deviations from *Hunter*'s requirements are constitutional. See also *McKinlay Transport Ltd.*, *supra* note 182 at 546, Wilson J., concurring, noting that "[t]he greater the intrusion into privacy interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required"; *Baron*, *supra* note 179 at 530-31, holding that under the *Income Tax Act*, "[g]iven the intrusive nature of searches and the corresponding purpose of such a search to gather evidence for the prosecution of a taxpayer, I see no reason for a radical departure from the guidelines and principles expressed in *Hunter*."

195 See *R. v. Dyment*, [1988] 2 S.C.R. 417, (1988), 45 C.C.C. (3d) 244 at 262: "when the search and seizure relates to the integrity of the body rather than the home, for example, the standard is even higher than usual." See also *Stillman*, *supra* note 184 at 342; *Monney*, *supra* note 182 at 151-52; *Golden*, *supra* note 137 at para. 88.

196 See *R. v. Wise*, [1992] 1 S.C.R. 527, (1992), 70 C.C.C. (3d) 193 at 229 [*Wise* cited to C.C.C.]: after noting that the privacy expectation in one's vehicle is "markedly diminished" relative to one's home or office, the Court indicated that given that a electronic tracking device only reveals a vehicle's location, it is "a less intrusive means of surveillance than electronic audio or video surveillance. Accordingly, a lower standard such as a 'solid ground' for suspicion would be a basis for obtaining an authorization from an independent authority, such as a justice of the peace, to install a device and monitor the movements of a vehicle."

by concealed weapons. As a result, an incidental search power could be considered reasonable under s. 8, subject to true limitations on both its availability and its scope.

From an objective standpont, beyond the existence of articulable cause for a detention, there ought to be something about the circumstances themselves to warrant taking protective measures. The only way that reasonable privacy expectations can be reconciled with a protective search power is if individual privacy interests are respected as much as possible. This can be accomplished by overriding only the diminished privacy expectation in concealed weapons on less than reasonable and probable grounds to search. This would mean that the scope of any search power would have to be quite limited, permitting only a true pat-down designed solely to detect weapons. Probing into and removing items from inside pockets and bags would have to be restricted to those situations where the object felt, from an objective standpoint, could potentially be a weapon. Anything less would invite pre-textual searches and completely overrun the innocent individual's legitimate privacy interests.

Even though a limited search power may be considered constitutional, it does not follow that the Supreme Court of Canada should recognize it. As the American experience teaches, even a well-defined judicially-created search power, like that recognized in *Terry*, will be incrementally expanded by lower courts well beyond its original design.[197] Lower courts are not very good stewards of judicially-created police powers. Rather, they have an understandable tendency to continually expand the rule to endorse that police conduct being challenged in a given case. After all, the case before the court is always the one where a search actually yielded a weapon, contraband, or some other valuable evidence. In such cases, it is difficult for a court to conclude, given the benefit of hindsight, that the decision to search or the level of intrusiveness was unreasonable. In time, the cumulative effect of these decisions is a blurring of any distinction between the sorts of searches that accompany investigative stops and those historically associated with arrests.[198]

In contrast, Parliament is better positioned to decide the appropriate balance between police officers' safety needs and the s. 8 *Charter* right of *innocent* Canadians. In addition, it is more difficult (albeit far from impossible) for courts to manipulate statutory provisions enacted by Parliament because their interpretation necessitates a certain level of deference. The common law, however, is something over which the courts justifiably feel a certain degree of ownership and, consequently, greater license to change as they deem necessary.

## C. LIMITS ON THE LENGTH OF DETENTIONS AND THE MOVEMENT OF SUSPECTS

Although the judgment in *Simpson* included language which suggested that investigative detentions should be kept "brief," it did not set out any clear temporal limits.[199] Similarly, the judgment did not directly address whether detained individuals could be moved by police from the location where the stop commenced and, if so, under what circumstances and how

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[197] See *supra* notes 126 through 135 and accompanying text.

[198] See Sankoff, *supra* note 174 at 48, arguing that if "[l]eft unchecked and without strict limits, the articulable cause search risks becoming the exception that will swallow the s. 8 rule. It is important for the courts to consistently reinforce the very important distinctions between detention and arrest."

[199] See *supra* note 102 and accompanying text, reproducing the relevant passage from *Simpson*.

far.[200] Unfortunately, subsequent decisions have not clarified either of these important and related issues. As a result, after almost a decade, the cases are still bereft of clear guidance on how much time and/or movement might serve to transform an investigative detention into the sort of intrusive encounter that will be considered a conventional arrest requiring reasonable and probable grounds to justify it.

On the question of temporal limits, courts have done little more than repeat the original direction from *Simpson* that these encounters be kept "brief."[201] Only once in the last decade has a Canadian appellate court expressly acknowledged the danger of approving overly-long investigative detentions. In rejecting the Crown's claim that the detention of a suspected alimentary canal smuggler — in a "drug-loo" facility for five hours before formal arrest — could be justified as an investigative detention under *Simpson*, the Ontario Court of Appeal indicated that

> [i]n this case, the "detention" of the appellant had all the attributes of an arrest, but without the necessary reasonable and probable grounds. I cannot accept that the common law power to make a brief detention based upon articulable cause implies a power to detain a person for an almost unlimited period of time until the suspect either produces evidence of his guilt or establishes his innocence. The danger of extending this limited common law power to encompass the kind of situation presented in this case is obvious. Since the officers would be acting outside any statutory authority, the *Criminal Code* provisions respecting arrest and the requirement that the offender be taken before the courts would not seem to apply.[202]

Unfortunately, beyond coming to a conclusion specific to this case (namely, that five hours is too long to constitute a valid detention), the Court missed the opportunity to set down a clear time limit for investigative detentions generally.

Absent clearly stated time limits, however, the risk that investigative stops might become anything but "brief" is quite real, as a decision of the Alberta Court of Appeal has already served to illustrate.[203] That Court upheld the conduct of police in entering a residence with guns drawn, in search of the supplier of drugs purchased in a recent undercover buy. The police found a number of people at the location. All of them were directed to lie down, some at gunpoint, while others were also handcuffed. The Court concluded that the police had articulable cause to detain this group of people until a search warrant arrived.[204] For our

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200 *Supra* note 1 at 494. The *Simpson* Court rejected that *Duguay* was determinative — a case in which the suspects were formally arrested, transported to the station-house, held for an extended period, and interrogated at some length (see *Duguay*, *supra* note 47). Rather, the Court noted that *Duguay* involved a "prolonged and highly intrusive detention," implying that the power it was creating would not go this far, but without specifying any clear limits (*Simpson*, *ibid.* at 494).

201 See *e.g. Ferris*, *supra* note 3, merely indicating that "[i]n these circumstances the police were entitled to *briefly* detain the respondent for investigation and to safeguard themselves while they did so. ... at some point *soon* the detention would come to an end" (at para. 58 [emphasis added]).

202 *R. v. Monney* (1997), 120 C.C.C. (3d) 97 at para. 79 (Ont. C.A.), rev'd on other grounds, *Monney*, *supra* note 182. The Supreme Court of Canada ultimately held that this detention was authorized by s. 98(1)(a) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) and therefore did not address the investigative detention power.

203 See *Dupuis*, *supra* note 3.

204 *Ibid.*; at para. 9, the Court restricted this power to cases involving a "serious or violent crime ... where it would not be possible for police to follow up on their inquiries if all of the persons present were permitted to leave."

purposes, the relevant point is not the entry, but the fact that the Court relied upon *Simpson* to uphold the detention in this case despite its having "persisted for over an hour."[205]

There is even less guidance on the authority of police to move a suspect from the initial location where a detention began. In a rare case where the movement of a suspect was mentioned, the Ontario Court of Appeal suggested that it is permissible for police to move detainees short distances.[206] Beyond that, however, it remains an open question how much movement might be too much, such as whether suspects can be required to sit in police cruisers (as the driver in *Simpson* was), driven back to a crime scene, or even transported to the station-house. Although such steps would seem at odds "with the general intent that investigative detentions be brief and minimally intrusive,"[207] no appellate court has ever said as much. After more than a decade, it remains unclear at what point the movement of a suspect, when combined with other factors, such as the duration of a detention and the intrusiveness of an accompanying search, might combine to force an encounter over the threshold of arrest.[208]

Once again, if the American experience is any indication, concrete rules relating to each of these issues will not be forthcoming anytime soon. After thirty-five years, the U.S. Supreme Court has provided only minimal guidance on the amount of movement that is permissible. Although its cases make clear that transporting a detainee back to the station-house will usually constitute an arrest,[209] there is little direction on the amount of movement that may otherwise be permitted.[210]

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205 *Ibid.* at para. 10. Today, the constitutionality of this sort of entry would be determined based upon *R. v. Silveira*, [1995] 2 S.C.R. 297, (1995) 97 C.C.C. (3d) 450 [*Silveira* cited to C.C.C.] and s. 11(7) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*].

206 See *e.g. Lewis*, *supra* note 190. In *Lewis*, a suspect initially detained in an airport concourse was moved by police to a private room about twenty feet away. The Court characterized the decision to move the suspect as "appropriate" (*ibid.* at para. 27).

207 McCoy, *supra* note 109 at 326.

208 The Supreme Court has held that an "arrest" "consists of the actual seizure or touching of a person's body with a view to his detention" or, alternatively, the pronouncing of "words of arrest" if "the person sought to be arrested submits to the process and goes with the arresting officer" (see *R. v. Whitfield*, [1970] S.C.R. 46, [1970] 1 C.C.C. 129 at 130). The failure to use the word "arrest" is not determinative; rather, it is the substance of the encounter that matters most, and the use of language that reasonably leads an individual to conclude that he or she is in police custody and not free to leave. See *Latimer*, *supra* note 106 at paras. 22-26. See also *Asante-Mensah*, *supra* note 106 at paras. 42-46. Of course, focusing on these technical definitions alone can cause one to miss the essence of an "arrest": "the hallmarks of an arrest are a prolonged loss of one's freedom of movement, either through acquiescence or physical restraint, accompanied by a marked reduction in personal privacy" (see Stribopoulos, *supra* note 8 at 232).

209 See *Dunaway v. New York*, 442 U.S. 200 at 213 (1979): the accused was transported back to the station-house, detained in an interrogation room and questioned for over an hour before he finally confessed — the Court cautioned that "any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." See also *Hayes v. Florida*, 470 U.S. 811 (1985), holding that suspects cannot be transported back to the station-house and held there — even briefly — under the authority of *Terry*.

210 See *Florida v. Royer*, 460 U.S. 491 (1983). In *Royer*, the accused was originally stopped in an airport concourse but then moved 40 feet to a police office where he was interrogated behind a closed door, while the officers held his ticket and identification. The Court held that the Fourth Amendment was violated, noting that "[a]s a practical matter, Royer was under arrest" (*ibid.* at 503). But the court also noted that "there are undoubtedly reasons of safety and security that would justify moving a suspect

Similarly, the U.S. Supreme Court has consistently refused to impose any fixed limits upon the potential duration of investigative stops. Therefore, it is also unclear how much time can pass before a "detention" is characterized as an "arrest" requiring probable cause.[211] Instead, the Court has embraced a case-by-case approach:

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. ... A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.[212]

In adopting this approach, the Court rejected "a *per se* rule that a 20-minute detention is too long to be justified under the *Terry* doctrine."[213] It feared that a time limit would interfere with the ability of the "authorities to graduate their responses to the demands of any particular situation."[214]

A flexible, fact-specific standard, however, carries its own unique drawbacks. First, as the American Law Institute (the Institute) explained in endorsing a twenty minute rule, "[i]t is important that a police officer have a clear notion of how long he may hold a person and when he must tell that person he is free to go." Failing that, the Institute warned, the meaning of "brief" "might in certain circumstances plausibly appear to an officer to be a period of one or two hours."[215] Second, under a flexible standard, courts will be more inclined to accept that the police acted appropriately. After all, cases seen by the courts are invariably those in which the delay paid off, where contraband or evidence was ultimately acquired, and where hindsight compels the court to conclude that the police acted reasonably. Over time, the danger is that courts will extend the duration of stops so far that the line between investigative detentions and conventional arrests will be practically eliminated.[216]

None of this is intended as an argument in favour of courts adopting a fixed time limit on investigative stops. The fact is that the U.S. Supreme Court and the American Law Institute are *both* right. The problem is that courts are ill-equipped to offer the best of both approaches. In contrast, by enacting legislation, Parliament can do just that. It can delineate the circumstances under which a suspect may be moved and set out clear restrictions. In

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from one location to another during an investigatory detention, such as from an airport concourse to a more private area" (*ibid.* at 504-505).

211 See *Michigan v. Summers*, 452 U.S. 692 (1981); *United States v. Sharpe*, 470 U.S. 675 (1985) [*Sharpe*]. But see *United States v. Place*, 462 U.S. 696 (1983) [*Place*], insinuating at 709-10 that 90 minutes might be outside the limit. But see *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) [*Montoya de Hernandez*], upholding an 18-hour investigative detention of a suspected alimentary canal smuggler. See generally Wayne R. LaFave, "'Seizures' Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues" (1984) 17 U. Mich. J.L. Ref. 417.

212 *Sharpe, ibid.* at 686.

213 *Ibid.*

214 *Place, supra* note 211 at 709, n. 10.

215 American Law Institute, *A Model Code Of Pre-Arraignment Procedure* (Washington, D.C.: 1975) at 283. In its Model Code, the Institute adopts a 20-minute rule; *ibid.*, § 110.2(1).

216 See *e.g. Montoya de Hernandez, supra* note 211, where the detention of a suspected alimentary canal smuggler for 18 hours was upheld under the *Terry* doctrine.

addition, Parliament can impose a time limit on investigative stops — a point by which, if a suspect has not been arrested, he or she must be released. This can be combined with a procedure for extending such detentions in cases where it is necessary to do so. Extension could require the approval of a senior officer who would have to concur in the continued existence of articulable cause. Finally, to minimize the risk of such extensions being abused, their number could be limited and a reporting requirement could be imposed upon senior officers with respect to each extension granted. This is just one of several options. The important point here is that effective regulation is possible under a comprehensive legislative scheme, while far from likely under a patchwork of judicially-created rules.

### D. THE RIGHTS UNDER SECTIONS 10(A) AND 10(B) OF THE *CHARTER*

The final consideration in this part is an issue unique to Canada. In the United States, the rationale for developing the *Miranda* warnings was the need to dissipate the inherent coerciveness of the police custodial environment.[217] According to the U.S. Supreme Court, the "comparatively non-threatening" nature of *Terry* stops means that they do not trigger a need to comply with *Miranda*'s safeguards.[218] These warnings only become necessary when "a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'"[219] As a result, police officers in the United States are free to question those detained, to confirm or dispel the suspicion that led to a stop, unencumbered by any obligation to appraise the suspect of either the right to silence or the right to counsel.

In contrast, the constitutional guarantees found in s. 10 of the *Charter* are not contingent on entry into the police custodial environment. Rather, they confer "the right on arrest or *detention* ... to be informed promptly of the reasons therefore" (10(a)) and "to retain and instruct counsel without delay and to be informed of that right" (10(b)).[220] Given the well established and relatively low threshold for a "detention,"[221] the clear implication seems to be that these rights must be respected during an investigative stop.[222] As a practical matter, it is relatively easy for a police officer to comply with s. 10(a) by simply telling a suspect why he or she is being detained. The same is not true for the right to counsel guaranteed by s. 10(b).

The difficulty arises when an individual, upon being informed of that right, responds by asking to speak with a lawyer. Absent a situation of urgency, such a request obligates a police

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217 See *Miranda v. Arizona*, 384 U.S. 436 at 467 (1966), explaining this rationale.

218 See *Berkemer v. McCarty*, 468 U.S. 420 at 439-40 (1984): the issue in *Berkemer* was whether *Miranda* warnings had to be given as part of an ordinary traffic stop. The Court reasoned that "the usual traffic stop" is analogous to a "so called 'Terry stop'" and then indicated that "[t]he comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*."

219 *Ibid.* at 440.

220 *Supra* note 40, ss. 10(a) and 10(b) [emphasis added].

221 See *supra* notes 43 through 45 and accompanying text.

222 See Pomerance, *supra* note 189 at 152-53, arguing that a *Simpson* stop must engage ss. 10(a) and 10(b) as both of these rights are "automatically triggered by detention."

officer to facilitate contact with counsel and, in the interim, to hold off on any questioning.[223] As a logistical matter, it would be impossible for counsel to be consulted during most investigative detentions, given that they usually take place on the street and must be kept "brief." As a result, it is difficult to reconcile the requirements of s. 10(b) with the investigative detention power. Unfortunately, despite this obvious conflict, *Simpson* did not provide police officers with any guidance on how to resolve it in the field.[224] Again, subsequent decisions have failed to correct this original shortcoming.

The British Columbia Court of Appeal seemed to assume in one of its decisions that s. 10(b) applies to investigative detentions.[225] In that judgment, however, the Court did not explain how police officers are to reconcile the right to counsel with the inherent limits of these encounters. Rather, the Court devoted its analysis almost exclusively to explaining why, in that case, the s. 10(b) violation was too attenuated from the evidence found during a search of the suspects' vehicle to be considered for exclusion under s. 24(2) of the *Charter*.[226]

The Ontario Court of Appeal has not done much better. It found a s. 10(b) violation where, during an investigative detention and based on his purported consent, the police did not appraise a detainee of his right to counsel prior to searching his bag for evidence. In coming to this conclusion, however, the Court deliberately restricted the impact of its decision to stops that are accompanied by consensual searches.[227] The Court's judgment did not provide much needed guidance on the extent to which the right to counsel might apply more generally during investigative detentions.

The only Court that has supplied a clear answer to that question is the Alberta Court of Appeal, although its approach is not immune to criticism. After endorsing a protective search power, the Court held that a s. 10(b) warning need not precede such a search. The Court explained this conclusion by noting that because "the right to search pursuant to a lawful detention is in place to protect the safety of the officers, it is not likely to be undone by a failure to first warn of a right to counsel."[228] There are a couple problems with this pragmatic solution. First, it flies in the face of the Supreme Court's prior opinions which clearly held that a detainee must at least be informed of the right to counsel immediately upon

223 See *R. v. Manninen*, [1987] 1 S.C.R. 1233, (1987), 34 C.C.C. (3d) 385 at 391-92.

224 *Simpson*, *supra* note 1 at 504, averting to the issue but noting that "counsel has not alleged a violation of s. 10(b) of the Charter and I will not address the s. 10(b) implications raised by this case."

225 *Hyatt*, *supra* note 151, initially noting at para. 7, that there was a violation of s. 10(b), but later locating its analysis beneath the heading, "The *alleged* breach of the appellant's s. 10(b) Charter right" (*ibid.* at 417 [emphasis added]).

226 *Ibid.* at 417-21.

227 In *Lewis*, *supra* note 190 at para. 28, the Court indicated, "[w]ithout deciding whether every investigative detention requires compliance with s. 10(b), I would hold that this investigative detention, which encompassed a search of the respondent's luggage, gave rise to an obligation that the police inform the respondent of his right to counsel: *R. v. Debot*." *Debot* held that when an individual is detained, a s. 10(b) warning must precede any search premised upon consent (*supra* note 51 at 199).

228 *T.A.V.*, *supra* note 157 at para. 35.

detention.[229] Second, it essentially upholds a violation of a s. 10(b) without engaging in the analysis required by s. 1 of the *Charter* prior to overriding a constitutional right.

There is established precedent for using s. 1 to uphold a law that violates s. 10(b) in situations where it would not be feasible for a detainee to speak with a lawyer. For example, the Supreme Court used s. 1 to uphold the suspension of the right to counsel implicit in the *Criminal Code* provisions for administering roadside breath tests to suspected impaired drivers.[230] Provincial appellate courts have applied s. 1 in this same way. They have upheld police powers to conduct routine vehicle stops, pursuant to provincial traffic legislation, without the need to apprise detained motorists of their right to counsel.[231] It is important to note, however, that each of these examples involved legislatively-created police powers overriding the right to counsel.

There is no precedent for a judicially-created police power overriding a constitutional guarantee being justified under s. 1 of the *Charter*. It is not entirely surprising that the issue has not arisen before, given that the ancillary powers doctrine has been used only sporadically to create new police powers. It is not clear how this matter might be resolved. Although the Supreme Court has applied s. 1 to uphold an established common law rule that clashed with a specific *Charter* right,[232] it has generally insisted that the courts develop the common law in a manner consistent with the specific guarantees and larger values protected by the *Charter*.[233] Given the inherent conflict between investigative detentions and the requirements of s. 10(b), the judicial creation of such a power puts the Court in a rather awkward position. On the one hand, the Court would be licensing a violation of the right to counsel guaranteed by s. 10(b) of the *Charter*, while also bearing primary responsibility, as "guardian of the Constitution,"[234] for the enforcement of the very same right. These functions are fundamentally conflicting: the former is legislative in nature, the latter is judicial. Unfortunately, this sort of conflict is an inevitable by-product of courts using the ancillary powers doctrine to create new police powers. This provides an additional reason why the creation of an investigative detention power is probably best left to Parliament.

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229 See *Debot*, *supra* note 51 at 198, holding that "immediately upon detention, the detainee does have the right to be informed of the right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel." In essence, the detainee must be informed of the right immediately, even though facilitation of contact with counsel may be delayed. See also *Feeney*, *supra* note 186 at 160.

230 See *Thomsen*, *supra* note 43, holding that although those subject to roadside breath demands under s. 234.1(1) of the *Criminal Code* are "detained" for the purposes of s. 10(b), the legislative scheme implicitly overrides that right, given the impracticality of complying with that right at the roadside, and upholding this violation as demonstrably justifiable under s. 1 of the *Charter*.

231 See *e.g. R. v. Ellerman* (2000), 255 A.R. 149 (C.A.), applying s. 1 of the *Charter* to uphold s. 119 of the *Highway Traffic Act*, R.S.A. 1980, c. H-7.

232 See *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214, (1988), 44 C.C.C. (3d) 289 at 311-14, applying s. 1 to uphold the common law of criminal contempt and an injunction ordered pursuant to that power as a reasonable limit on the right to freedom of expression guaranteed by s. 2(b) of the *Charter*.

233 See *supra* note 188.

234 *Hunter*, *supra* note 176 at 105.

## E. REGULATION OR LEGITIMIZATION - SOME CONCLUSIONS

The Supreme Court of Canada should think carefully before deciding to endorse a judicially-created investigative detention power. If the American experience can teach us anything, it is that a case-by-case approach to the explication of police powers associated with investigative detention can be dangerous. It invariably takes place while a guilty person is before the court, evoking a strong desire to affirm the conduct of the police and ensure that wrongdoing is punished.[235] This leads to an almost inevitable expansion of police authority. As one American commentator recently observed,

> *Terry* has not succeeded.... the nature of judicial review contemplated — deferential review of discretionary, low profile, street level decisions according to a malleable balancing standard — was poorly suited to achieve the desired result of creating clear guidelines for the use of stop and frisk.... It offered little guidance about what sorts of police conduct would be permissible ... It should come as no surprise that ... movement by the lower courts, prosecutors, police, and even the Supreme Court itself has been inexorably away from *Terry*'s narrow holding and toward increased police discretion.... Judicial review has not succeeded in controlling the widespread abuse of stop and frisk, the vast brunt of which falls, as it did in 1968, on minority suspects.[236]

Clearly, many of these observations apply with equal force with respect to the investigative detention experiment in Canada over the past ten years. Arguably, however, the effect in Canada has already been worse. The expansion of police power has been faster and much more substantial than in the United States. And while the cases have served to expand police authority, they have done little to delineate the outer limits of police power. After ten years, a number of critically important issues remain unresolved, including: (1) how much force police officers can use to effect a stop; (2) whether there is an incidental search power and its precise scope; (3) the circumstances in which a suspect can be moved, and how much

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235 See William J. Stuntz, "Warrants and Fourth Amendment Remedies"(1991) 77 Va. L. Rev. 881, arguing that the distorting effect of hindsight is particularly acute when the exclusion of incriminating evidence is at stake in a criminal case because "in the exclusionary rule case, the fact that the evidence was found inevitably makes the claimant seem undeserving. One of the prerequisites for the defendant's ... claim — the existence of suppressible evidence of crime — tends to suggest that the defendant deserves punishment, not relief.... Even honest judges, acting in good faith, may find their judgment distorted when the police officer's suspicion turned out to be justified, *and* the defendant is seeking relief from the consequences of his own criminal conduct" (at 912-13 [emphasis in original]). See also Carole S. Steiker, "Second Thoughts About First Principles" (1994) 107 Harv. L. Rev. 820 at 852-53.

236 Susan Bandes, "*Terry v. Ohio* In Hindsight: The Perils Of Predicting The Past" (1999) 16 Const. Commentary 491 at 493-94 [footnotes omitted]. The author is not alone in these observations. A number of American commentators share a similar view. See Maclin, *supra* note 98, at 1334-35, who in 1990 described the legacy of *Terry* as "two decades of rulings enlarging the government's investigatory powers" that have served to "sharply curtail" the "right of locomotion." See Harris, "Particularized Suspicion," *supra* note 128, who argued at 1022-23 that while the U.S. Supreme Court continues to assert that "*Terry* is a well-balanced, carefully crafted decision which limits police power ... lower court cases expand that police power almost continually." Of course, there are also those who argue that *Terry* has lived up to its lofty objectives: see *e.g.* Saltzburg, *supra* note 91. At the same time, other commentators give the decision a more mixed review; see *e.g.* Debra Livingston, "Police Patrol, Judicial Integrity, And The Limits of Judicial Control" (1998) 72 S. John's L. Rev. 1353 at 1359-61, observing that the importance of *Terry* is "its dispelling of the illusion of judicial control" over police detention practices while noting that the larger task of "placing reasonable constraints on police ... remains unfinished today," but arguing that "*Terry* points us in the right direction — to the integration of judicial, political, and administrative controls, rather than to an illusory reliance on exclusionary rule litigation alone."

movement is permitted; (4) how long a detention can last; and (5) to what extent the right to counsel must be respected during a detention.

Resolving these important issues through a case-by-case approach is inherently problematic. Some key questions may take years to answer, while others may never be resolved. In the interim, without the benefit of much needed guidance, police officers will still be required to make on-the-spot decisions in response to the suspicious and often dangerous situations they confront in the field. In this context, most police officers will soon recognize that the "law on the books" does not actually speak to the reality of the street. The way in which police will respond to this predicament is already known. They will continue to do what they perceive as necessary to get the job done.[237] No doubt, for the officer who is already inclined to use his or her discretion inappropriately, a lack of clear and comprehensive rules only serves to increase the very real potential for abuse.[238]

In this light, the effect of *Simpson* and its progeny is made clear. The impact of these cases has not been regulatory at all. Rather, on a practical level, the decisions have primarily served to authorize encounters that are very much "arrest-like" based on "reasonable suspicion" — a much less demanding standard than the "reasonable and probable grounds" long required by Parliament for arrests. And while police authority has grown, after-the-fact judicial review in those comparatively rare cases where an unjustified stop actually yielded evidence of criminality has done very little to keep police investigative detention practices in check. As a result, experience suggests that Professor Delisle's early cynicism regarding *Simpson's* purported regulatory objectives was justified. At the time, he noted that "the court in *Simpson* is not 'regulating'. It is not restricting police powers. It is not standing between the government and the citizen and interpreting laws which authorize police conduct. It is creating new police powers!"[239] Regrettably, subsequent decisions have not managed to do much better.

## V. LARGER LESSONS: POLICE POWERS, THE COURTS, AND THE *CHARTER*

### A. INSTITUTIONAL LIMITATIONS OF COURTS (WHY PARLIAMENT IS BETTER SUITED TO THE TASK)

None of the above is intended as an indictment of any particular court. Rather, the difficulty with the investigative detention cases is symptomatic of a larger institutional shortcoming. Quite simply, courts are not very effective at either setting public policy or implementing the rules that flow from their policy choices.[240] If the goal is the effective

[237] See Kelling & Coles, *supra* note 120 and accompanying text.

[238] See *supra* notes 99 through 100 and accompanying text.

[239] Ronald J. Delisle, "Judicial Creation of the Police Powers" (1993) 20 C.R. (4th) 29 at 30.

[240] There are a number of reasons for this, including: (1) courts do not choose their cases, they can only address those issues that are raised by the cases and parties that happen to come before them; (2) courts typically only hear from the parties regarding the issue(s) in dispute between them, a fact that limits their ability to explore all possible alternatives or to gain a broader perspective on the issues raised; (3) judges are generalists, and lack the necessary expertise to choose the correct solution among what are frequently complex and specialized policy options; (4) because of the limits of the adjudicative process, courts are ill suited for ascertaining relevant social facts which are usually essential for the development of sound social policy but often irrelevant to the disposition of the particular case being considered; (5)

regulation of police detention practices, these inherent institutional limitations unfortunately combine to destine any judicially-created scheme for failure.

The experience of the last ten years demonstrates that courts, unlike legislatures, are ill-suited to the task of creating the sort of clear, comprehensive and prospective rules that are essential if police discretion is to be meaningfully structured and confined. This shortcoming is endemic to the incremental nature of judicial rule-making. In addition, in making public policy choices about how to best balance collective versus individual interests in the criminal investigative process, courts "deal with specific cases that ordinarily involve people who have broken the law, a fact that does not encourage the broader perspective that should be brought to the issue."[241] As the previous Part demonstrates, courts faced with the factually-guilty accused are under an almost irresistible pressure to continually expand police power. Finally, given the limits of exclusionary rule litigation, restricted as it is to cases where unjustified detentions happen to yield evidence, the vast majority of groundless stops continue to go unchecked under a judicially-created regulatory scheme.

Unlike Parliament, courts are unable to mandate the sort of administrative procedures that stand the best chance of truly keeping police detention practices in check. For example, as argued above, comprehensive legislation could include a requirement that after a certain amount of time, a suspect must be released unless a senior officer approves an extension of the length of that detention. As noted, the risk of extensions being abused could be minimized by also making each one subject to a reporting requirement. Of course, reporting requirements could be mandated for every investigative detention — as is the case in other jurisdictions.[242] Police officers could be required to complete and file a form that includes, for example, the officer's name, police force and badge number, the detainee's name (if ascertained), a physical description of the detainee (including his or her race), the date, time, and location of the stop, and the reasons for the stop. The report could also detail the nature of any force used and the reasons it was necessary, the scope of any search that was carried out, including its justification and the results, the duration of the stop, and how the encounter ended (that is, whether the suspect was released or arrested). To reduce the burden imposed

courts lack the ability to monitor the policy implications of their judgments and to efficiently modify the rules they promulgate in light of those developments. See Alan Young, "Fundamental Justice and Political Power: A Personal Reflection On Twenty Years In The Trenches" (2002) 16 S.C.L.R. (2d) 121 at 125. See also *Watkins v. Olafson*, [1989] 2 S.C.R. 750 [*Watkins*], acknowledging many of these institutional limitations at 760-61. See generally Donald L. Horowitz, *The Courts and Social Policy* (Washington: Brookings Institute, 1977); Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281; Mauro Capelleti, "The Law Making Power of the Judge and its Limits: A Comparative Analysis" (1981) 8 Monash U.L. Rev. 15.

241 *R. v. Evans*, [1996] 1 S.C.R. 8, (1996), 104 C.C.C. (3d) 23 at 28, LaForest J., concurring.

242 For example, in the U.K., the particulars of each investigative stop must be recorded by police officers; see *supra* note 69 for a description of the reporting requirements in *PACE*. Similarly, the New York City Police Force has required officers to complete such a form (the UF-250) since 1986; see New York, Attorney General of the State of New York, *The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York From The Office Of The Attorney General* (New York: Civil Rights Bureau, 1999), Chapter Three, Part II(C), online: "Stop and Frisk" Report <www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html> [N.Y. Attorney General's Report].

on police officers completing these forms, a checklist format could be used to record much of this information.[243]

A reporting requirement would serve a number of important checking functions. These forms could be used internally by the police force itself, so that specific officers with a penchant for unjustified stops or inappropriate practices (for example, for using too much force or searching unnecessarily) could be identified for closer supervision, further training, discipline, and even dismissal.[244] Similarly, larger patterns within particular divisions or forces could also be identified. For example, the forms could assist in revealing whether or not a particular force engages in inappropriate practices, such as racial profiling. In specific cases where racial profiling is alleged, the officer's past forms may go a considerable distance in proving or refuting the allegation.[245] It is most important to recognize that effective checks are possible if the solution comes from Parliament, but quite unlikely if the development of the investigative detention power remains exclusively with the courts.

Unfortunately, it is a rare occurrence for courts to acknowledge their own institutional limitations. This is especially true in the areas of criminal law and criminal procedure. In explaining the activist stance adopted by the Canadian judiciary in these areas since the *Charter*'s enactment, it has been noted that the courts believe that they have "an accumulated body of expertise.... In these cases, the courts appear to regard themselves as having a kind of 'comparative advantage' over the legislative branch, thereby justifying a more rigorous standard of review ... [for this reason they have] ... been far more willing to intervene"[246] in this context. The ascent of the ancillary powers doctrine and its use to create an investigative detention power are undoubtedly linked, in part, to this self-perception.

It seems but a small step to move from viewing courts as ideally suited to the task of defining the contours of the *Charter*'s legal rights provisions and standing as a bulwark between individuals and the state, to concluding that courts are also competent to create and effectively regulate police powers. These functions, however, are of an entirely different nature. Giving meaning to the open-ended language found in the *Charter*'s guarantees, and calling the state to task when these minimum constitutional standards are not met, lies at the heart of the judicial function in a constitutional democracy. In contrast, granting police an

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243 For example, in New York City, much of the information to complete the UF-250 is provided by checking boxes that correspond to the available explanations, reducing the time necessary to complete the form. The forms are filed with supervising officers, who must sign and log them before they are compiled. See N.Y. Attorney General's Report, *ibid.* Also see Kevin Flynn, "After Criticism of Street Frisk Records, Police Expand Report Form" *The New York Times* (5 January 2001) B6 (reproducing a copy of the current UF-250 form).

244 N.Y. Attorney General's Report, *supra* note 242, noting that at the N.Y.P.D. "a supervisor is required to review and sign the form at the time it is prepared, and supervisors are held responsible for ensuring that officers can articulate sufficient levels of suspicion for any action taken. In appropriate instances, if they have committed violations or made mistakes, they are disciplined or retrained."

245 *Ibid.*: "In addition to informing the court what circumstances led the officer to believe that a stop was necessary, the report also serves to protect the officer and the Department from allegations of police misconduct which may sometimes arise from the proper performance of police duty."

246 Patrick J. Monahan, "The Charter Then and Now" in Philip Bryden, Steven Davis & John Russell, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life* (Toronto: University of Toronto Press, 1994) 105 at 116.

entirely new investigative power, which in turn necessitates the resolution of a myriad of difficult policy issues, is the type of task that falls squarely within the legislative function.

On a number of recent occasions, the Supreme Court of Canada has made comments suggesting a keen awareness of, and a sensitivity towards, this important distinction.[247] For example, on behalf of the Court, Justice Iacobucci explained that

> in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.[248]

Such statements ought to sound the death knell for the ancillary powers doctrine. Despite this, there are a couple of reasons why it remains very much alive. First, as the investigative detention power spread across the country, these cases served to revive the ancillary powers doctrine, following an eight year hiatus after *Dedman*.[249] Second, *Dedman* has never been overturned. More importantly, in the wake of *Simpson*, the Supreme Court has again relied on it and the ancillary powers doctrine to recognize a new police power.[250] Now, as the investigative detention power finally makes it way before the Supreme Court, Canadian criminal procedure stands at a precipice. The effect of the Court adopting a judicially-created investigative detention power will be to firmly entrench the ancillary powers doctrine in Canadian law as a device for creating entirely new, complex, and far-reaching police powers. In choosing whether to take Canadian law in this direction, the Supreme Court should bear in mind the U.S. experience and recall the existence of some fundamental constitutional differences between the two countries on matters of criminal procedure.

## B. RESISTING THE PULL OF THE AMERICAN CASE LAW

The American stop-and-frisk cases, as Part IV above made apparent, have had a considerable influence on those Canadian appellate courts that have chosen to endorse the

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[247] See *Watkins*, *supra* note 240 at 760-61, indicating "that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution." See also *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 S.C.R. 925 at para. 18; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Ship Building Ltd.*, [1997] 3 S.C.R. 1210 at para. 93, McLachlin J.; *R. v. Cuerrier*, [1998] 2 S.C.R. 371, (1998), 127 C.C.C. (3d) 1 at para. 43, McLachlin J. concurring.

[248] *Salituro*, *supra* note 188 at 301.

[249] *Dedman* was decided in 1985. The ancillary powers doctrine that it endorsed was not used again until 1993 when it was relied upon in *Simpson* to recognize the investigative detention power; *supra* note 1.

[250] See *Godoy*, *supra* note 106. In *Godoy*, the Supreme Court used the ancillary powers doctrine—including *Simpson*'s approach to the second prong of the *Waterfield* test — to vest police with the power to enter private premises in response to a disconnected 911 call. This is the first time since *Dedman* that the Supreme Court has relied upon the doctrine to recognize a new police power. No doubt a sensible result, unfortunately, the decision does not speak to the host of other emergency situations that might entitle police to enter premises without a warrant. In contrast, legislation could address the problem more generally.

investigative detention power. It is important to note, however, that the U.S. Supreme Court developed the stop-and-frisk power under a different constitutional framework than that which exists in Canada, within the parameters of the Fourth Amendment, and in the context of a very different federal system.[251]

In the United States, the Supreme Court is charged with interpreting and applying the Fourth Amendment of the federal constitution. In doing so, it essentially sets minimum standards for the nation that both state and federal officials are required to meet.[252] Under the American federal system, criminal law and procedure is a federal as well as a state responsibility. The bulk of criminal law, however, is enacted and enforced by individual states.[253] In enforcing these laws, state officials must respect the requirements of the Fourth Amendment, as interpreted by the federal courts. That said, provided that they meet these minimum standards, state legislatures and courts, operating within the parameters of state constitutions, are entitled to create additional protections for their citizens.[254] These differences should be remembered by Canadian courts before deciding to transplant American criminal procedure jurisprudence to Canada.

A considerably different system is at work in Canada. Here, the Supreme Court interprets the *Charter* under a federal system of criminal law and procedure.[255] This means that in the context of the *Charter* and its influence on police investigative powers, the Court is able to engage in a very different kind of dialogue with Parliament than what is possible in the United States. In the context of police powers, the constitutional judgments of the U.S. Supreme Court speak not only to Congress, but also to fifty state legislatures which, at any

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251 On a number of occasions, the Supreme Court of Canada has acknowledged the need to use American constitutional jurisprudence with caution when interpreting the *Charter*'s guarantees. See *R. v. Keegstra*, [1990] 3 S.C.R. 697, (1990), 61 C.C.C. (3d) 1 at 32, pointing out that "Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States." See also *Rahey v. The Queen*, [1987] 1 S.C.R. 585, (1987) 33 C.C.C. (3d) 289 at 325, LaForest J., concurring; *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1991] 3 S.CR. 459, (1991), 67 C.C.C. (3d) 544 at 558-59; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, (1995), 99 C.C.C. (3d) 97 at 139.

252 Initially, the Fourth Amendment only served as a restraint on the federal government. Like many of the provisions in the Bill of Rights, however, the U.S. Supreme Court eventually concluded that it was so "fundamental" that it was "incorporated" into the due process guarantee found in the Fourteenth Amendment. This had the effect of extending the Fourth Amendment to the States. See *Wolf v. Colorado*, 338 U.S. 25 (1949). See also *Mapp v. Ohio*, 367 U.S. 643 (1961), which also incorporated the exclusionary rule.

253 The federal government has the power to create criminal laws that deal with matters falling within the heads of federal power. See U.S. Const. art. I, § 1 and art. I § 8. By default, everything else is left to the states. See Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure*, 3d ed. (St. Paul: West Group, 2000) at 3-7.

254 See *Ker v. California*, 374 U.S. 23 (1963) at 34, noting that "[t]he States are not ... precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures [contained in the Fourth Amendment]."

255 See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(27), which grants the Federal Parliament exclusive jurisdiction over "[t]he Criminal Law" and "Procedure in Criminal Matters."

given time, may employ rather varied approaches to the regulation of police practices.[256] By default, if state law is silent on the scope of a police officer's authority in a given situation, the officer is entitled to act up to the limits imposed by the federal constitution. Decisions of the U.S. Supreme Court thereby indirectly create police powers, at least in a negative sense, by not prohibiting police conduct in certain situations.[257]

It is neither sensible nor necessary for the Supreme Court of Canada to follow the American model of creating police investigative powers. One of the strongest criticisms directed at the U.S. Supreme Court in recent history asserts that, under this model, the rules created by its judgments are overly complex and therefore not very effective at regulating police investigative practices.[258] This shortcoming has, in fact, caused some critics to pronounce the criminal procedure revolution a failure and to call for comprehensive

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256 For example, in *Terry*, Ohio did not have legislation in place conferring authority upon police officers to stop-and-frisk suspects. See *Terry*, *supra* note 88. In contrast, in a companion case to *Terry*, the Court was dealing with a stop and frisk from New York State, where state legislation was in place that expressly conferred a stop-and-frisk power upon the police: see *Sibron*, *supra* note 125 at 43-44, setting out the relevant provisions from §180 of the N.Y. Code of Criminal Procedure.

257 For example, in *Sibron* (*ibid.* at 60-62) the U.S. Supreme Court refused to decide whether or not the New York stop-and-frisk statute conformed with the requirements of the Fourth Amendment. It explained that

> New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement ... and in the process it may call the standards it employs by any names it may choose. It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure 'is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. *Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one*'" (*ibid.* at 60-61 [emphasis added]).

258 See Tracey Maclin, "What Can Fourth Amendment Doctrine Learn From Vagueness Doctrine" (2001) 3 U. Pa. J. Const. L. 398 at 422-23, noting that "Fourth Amendment law is certainly complex, but over the last two decades the trend of the Court's cases has been to expand police power"; Gregory D. Totten, Peter D. Kossoris & Ebbe B. Ebbesen, "The Exclusionary Rule: Fix It, But Fix It Right" (1999) 26 Pepp. L. Rev. 887 at 901, commenting upon the "complexity" and "unpredictability" of Fourth Amendment jurisprudence and noting that the confusion "is not limited to police officers. Judges and lawyers also have difficulty interpreting and applying the law in this difficult area"; Omar Saleem, "The Age of Unreason: The Impact of Reasonableness, Increased Police Force, And Colorblindness On *Terry* 'Stop And Frisk'" (1997) 50 Okla. L. Rev. 451 at 451, observing that "the rules governing general public-police encounters are misleading, confusing, and susceptible to numerous interpretations"; Akhil Reed Amar, "Fourth Amendment First Principles" (1994) 107 Harv. L. Rev. 757 at 758, noting that Fourth Amendment jurisprudence "is a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse"; Phyllis T. Bookspan, "Reworking The Warrant Requirement: Resuscitating The Fourth Amendment" (1991) 44 Vand. L. Rev. 473 at 488, noting that "fourth amendment jurisprudence is a mass of confusion that clouds and often eliminates fourth amendment protections"; Silas J. Wasserstrom & Louis Michael Seidman, "The Fourth Amendment As Constitutional Theory" (1988) 77 Geo. L. J. 19 at 20, observing that "there is virtual unanimity, transcending normal ideological dispute, that the Court simply has made a mess of search and seizure law"; Craig M. Bradley, "Two Models of the Fourth Amendment" (1985) 83 Mich. L. Rev. 1468 at 1472, observing that "the fundamental problem with fourth amendment law is that it is confusing. It fails to inform the police how to behave and to inform the lower courts of the basis for the exclusionary decision"; Albert W. Alschuler, "Bright Line Fever and The Fourth Amendment" (1984) 45 U. Pitt. L. Rev. 227 at 287, noting that the "system of case-by-case adjudication" has left "fourth amendment law incomprehensible" and indicating that the cause of this "is not the lack of categorical rules but too many of them."

legislative reform to finally clean up the mess.[259] Given these criticisms, the Supreme Court of Canada would be wise to think carefully before starting down a similar path by endorsing a judicially-created investigative detention power. The Court should remember that the Canadian constitutional context arguably allows for something different — an approach that avoids many of the pitfalls inherent in a system of judicially-created police powers.

### C. A DIFFERENT APPROACH: POLICE POWERS AND THE CANADIAN DIALOGUE MODEL

Historically, there has been little political will in Canada for legislative reform directed at police investigative powers. This is best demonstrated by Parliament's failure to implement the recommendations made by the Law Reform Commission of Canada. Throughout the 1980s, the Commission conducted an almost wholesale review of Canadian criminal law and procedure. Its efforts culminated in recommendations for sweeping legislative reforms that, among other things, would have served to consolidate and simplify police investigative powers.[260] Unfortunately, few of the Commission's recommendations have ever been implemented.

Prior to the *Charter*, there was no real incentive for Parliament to clarify the parameters of police authority. Given that illegally obtained evidence was almost always admissible, there was little practical benefit in expending limited political capital on an endeavour like criminal procedure law reform.[261] The advent of the *Charter*, whose substantive guarantees combined with the discretion to exclude unconstitutionally obtained evidence (s. 24(2)) and the authority vested in the courts to invalidate unconstitutional laws (s. 52(1)), served to change the stakes of political inaction. The *Charter*'s remedial provisions have given courts the authority to make the legal rights of individuals matter, by imposing a cost on government for disregarding them.[262]

The consequences of inaction have served to transform the relationship between Parliament and the Supreme Court, facilitating what has come to be termed a constitutional

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259 See Craig M. Bradley, *The Failure of the Criminal Procedure Revolution* (Philadelphia: University of Pennsylvania Press, 1993) at 37-56, 62-87, 49-51, 144-74.

260 See Canada, Law Reform Commission of Canada, *Report on Search and Seizure* (Report 24) (Ottawa: Law Reform Commission of Canada, 1984); Canada, Law Reform Commission of Canada, *Report On Arrest* (Report 29) (Ottawa: Law Reform Commission of Canada, 1986); Canada, Law Reform Commission of Canada, *Our Criminal Procedure* (Report 32) (Ottawa: Law Reform Commission of Canada, 1988); Canada, Law Reform Commission of Canada, *Recodifying Criminal Procedure, Volume 1, Police Powers* (Report 33) (Ottawa: Law Reform Commission of Canada, 1991).

261 See *R. v. Wray*, [1971] S.C.R. 272, [1970] 4 C.C.C. 1 at 17, recognizing only a limited discretion in trial judges to exclude evidence if its admission would operate unfairly, but indicating that this would only be the case where the evidence were gravely prejudicial, its admissibility tenuous, and its probative value with respect to the main issue before the court trifling.

262 See Peter W. Hogg & Allison A. Thornton, "Reply to 'Six Degrees Of Dialogue'" (1999) 37 Osgoode Hall L.J. 529 at 534, noting that the *Charter* "forces the legislative bodies to pay more attention to the liberty of the individual and to show more respect for minorities than the majority's representatives in the legislature are likely to do in the absence of judicial review."

"dialogue."[263] This dialogue has frequently played itself out in the criminal procedure context.[264] While in the past, Parliament has been reluctant to amend the *Criminal Code* to implement recommendations made by the Law Reform Commission of Canada, it has been quick to respond with legislative reform whenever its hand has been forced by the *Charter* decisions of the Supreme Court. In circumstances where the Court has held that a particular investigative power or practice was unconstitutional, either because it lacked the necessary legal authority, or because its enabling legislation did not meet minimum *Charter* requirements, a legislative response has usually been forthcoming from Parliament. The legislation has typically refined the investigative power involved "to build in civil libertarian safeguards that meet the requirements of the *Charter* as set out by the Supreme Court of Canada."[265] This dynamic has been embraced by the Court, which has maintained that the reciprocal institutional review that it entails has "the effect of enhancing the democratic process, not denying it."[266]

It is important to note a significant detail about this dialogue in the context of police investigative powers. Each example involves a decision of the Supreme Court under s. 8 of the *Charter* that prompted a legislative response from Parliament in the form of a codified search power.[267] These legislated powers respected the minimum constitutional requirements set down by the Court under s. 8.[268] From a practical standpoint, this has meant that most

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263 See Peter W. Hogg & Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75. Hogg and Bushell use the term "dialogue" somewhat narrowly, restricting it to "those cases in which a judicial decision striking down a law on *Charter* grounds is followed by some action by the competent legislative body"; *ibid.* at 82. They contend that "*Charter* challenges to the actions of police officers and other officials do not result in the striking down of a law, and often will not give rise to any dialogue with the competent legislative body" but acknowledge that "[i]n some cases, however, a successful *Charter* challenge to the action of a police officer or other official will expose a deficiency in the law that the competent legislative body will want to correct" (*ibid.* note 15). Here, when I use the term "dialogue," I mean it to include cases in both categories, essentially any judicial pronouncement under the *Charter* that provokes a legislative response.

264 See Roach, *supra* note 79 at 486, 518-23, listing the decisions and legislative responses.

265 Hogg & Bushnell, *supra* note 263 at 88.

266 *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 139. See also *R. v. Mills*, [1999] 3 S.C.R. 668, (1999), 139 C.C.C. (3d) 321 at 356-58; Roach, *supra* note 79 at 485, arguing that under this model, the Court and Parliament play "distinctive yet complementary roles in resolving questions that involve rights and freedoms ... [and claiming that this] ... can produce the most constructive partnership between courts and legislatures."

267 See *Criminal Code*: s. 487.05, creating a legislative scheme for the issuance of DNA warrants, in response to *R. v. Borden*, [1994] 3 S.C.R. 145, (1994), 92 C.C.C. (3d) 404; s . 487.091, creating a legislative scheme for the issuance of body impression warrants, in response to *Stillman*, *supra* note 184; s. 492.1(1), creating a legislative scheme for the issuance of a warrants to place an electronic tracking device on a vehicle, in response to *Wise*, *supra* note 196; s. 184.1, creating a procedure for participant surveillance, to ensure the safety of police officers involved in dangerous undercover operations, in response to *R. v. Wiggins*, [1990] 1 S.C.R. 62, (1990), 53 C.C.C. (3d) 476 and *R. v. Duarte*, [1990] 1 S.C.R. 30, (1990), 53 C.C.C. (3d) 1; s. 487.01 creating a legislative scheme for a general warrant to authorize the use of any investigative device, technique or procedure, in response to *Duarte*, *ibid*, and *R. v. Wong*, [1990] 3 S.C.R. 36, (1990), 60 C.C.C. (3d) 460 [*Wong* cited to C.C.C.]; s. 487.11 (and s. 11(7) of *CDSA*, *supra* note 205), authorizing warrantless searches if the grounds for a search with warrant exist but due to exigent circumstances it is not feasible to obtain one, in response to comments by the Court in *Silveira*, *supra* note 205; ss. 529 & 529(1) creating a legislative scheme for the issuance of a warrant to enter a dwelling-house to effect an arrest, in response to *Feeney*, *supra* note 186.

268 *Ibid.* For a discussion of these standards, see *supra* notes 176 through 183 and accompanying text.

police search powers are now codified.[269] These powers are defined in clear, comprehensive, and prospective terms. In addition, because they are set out in the *Criminal Code*, they are readily accessible to police officers, lawyers, and judges. Given all of this, a strong argument can be made that, especially when compared to police detention practices, police search powers are effectively regulated in Canada.

There are two principal reasons why the *Charter* served to foster a dialogue that led to the effective regulation of police search powers. First, early in the development of the s. 8 jurisprudence, the Supreme Court carried the principle of legality forward into the guarantee.[270] The Court held that, to be reasonable under s. 8, a search or seizure had to be "authorized by law."[271] In coming to this conclusion, the Court categorically rejected a number of early decisions that had concluded that an unlawful search or seizure was not necessarily "unreasonable" under s. 8.[272] Second, with one recent exception,[273] the Court has refrained from using the ancillary powers doctrine to create new police search and/or seizure powers. In fact, it is in this context that the Court has made some of its strongest statements against the judicial creation of police powers. For example, on one occasion, a majority of the Court went so far as to indicate that "it does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice."[274] It was the Supreme Court's insistence on legal authority for searches and seizures, and its refusal to supply it by creating new police powers, that led directly to the constructive dialogue that emerged under s. 8 of the *Charter*.

In contrast, with respect to police detention powers and the right "not to be arbitrarily detained or imprisoned" under s. 9 of the *Charter*, a meaningful dialogue has never gotten off the ground.[275] There are a couple of reasons for this. First, the principle of legality has not

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269 Not all, however. The search incident to arrest power was recognized at common law long before the *Charter* and it has persisted as an uncodified search power. See *supra* note 137. See also *supra* notes 184 through 187 and accompanying text. In addition, the Supreme Court's recent use of the ancillary powers doctrine to recognize a police power to enter private premises in response to disconnected 911 calls is obviously not a codified search power. See *Godoy*, *supra* note 106. See also *supra* note 250.

270 See *supra* note 7 and accompanying text (explaining the principle of legality).

271 *Collins*, *supra* note 104 at 14. See *supra* note 181 and accompanying text.

272 See *R. v. Haley* (1986), 27 C.C.C. (3d) 454 at 467 (Ont. C.A.), noting that "every illegality, however minor or technical and peripheral or remote, does not … render such search unreasonable." See also *R. v. Noble* (1984), 16 C.C.C. (3d) 146 (Ont. C.A.); *R. v. Heisler* (1984), 57 A.R. 230, 11 C.C.C. (3d) 475 (C.A.); *R. v. Cameron* (1984), 16 C.C.C. (3d) 240 (B.C.C.A.).

273 See *Godoy*, *supra* note 106. See also *supra* note 250.

274 See *Wong*, *supra* note 267 at 486: a majority of the Court concurred with Justice LaForest's opinion, which had offered this very strong statement in explaining why it would be inappropriate for the Court to read the electronic surveillance provisions in the *Code* to authorize surreptitious video surveillance. See also *R. v. Evans*, [1996] 1 S.C.R. 8, (1996), 104 C.C.C. (3d) 23 at 27-28, LaForest J. concurring, for a similar statement about the appropriate role for the Courts under the *Charter*; *R. v. Kokesch*, [1990] 3 S.C.R. 3, (1990), 61 C.C.C. (3d) 207 at 218-19, Dickson C.J.C., dissenting in the result only, making clear that the authority for searches must come from clear statutory language and categorically refusing to employ the common law to authorize same. See also *Hunter*, *supra* note 176 at 106, noting that the *Charter*'s purpose is to "constrain governmental action inconsistent with those rights and freedoms [it guarantees]; it is not in itself an authorization for governmental action."

275 *Charter*, *supra* note 40, s. 9.

been incorporated into s. 9. To the contrary, a number of appellate court cases have held that an unlawful detention is not necessarily arbitrary.[276] Although most commentators contend that unlawful detentions should be treated as inherently arbitrary,[277] the Supreme Court has deliberately refrained from resolving this issue.[278] Second, unlike search and seizure powers, as Parts III and IV above demonstrated, over the last decade the ancillary powers doctrine has been consistently used by appellate courts to supply police with the power to detain for investigative purposes. In effect, the experience with police detention practices under s. 9 of the *Charter* has been the opposite of the experience with police search practices under s. 8.

Assuming that effective regulation of police detention practices is the goal, the experience under s. 8 of the *Charter* with police search powers offers an instructive model. If the conditions for the effective regulation of police detention practices are ever to be realized, Canadian courts must initiate the dialogue. As the previous two paragraphs make clear, there are two simple steps that the Supreme Court can undertake to accomplish this critical objective. First, the Court must finally acknowledge that a detention which is not authorized by law is necessarily arbitrary under s. 9 of the *Charter*.[279] Second, the Court must reject any use of the ancillary powers doctrine for all but the most minor and incremental changes to the common law. By implication, this would necessarily require a rejection of the judicially-created investigative detention power. In taking these steps, the Supreme Court would finally get the constitutional dialogue with respect to police detention practices up and running.

The regulatory benefits that would flow from taking these two steps would prove considerable. Together, they would set the groundwork for a repetition of the experience under s. 8 of the *Charter*. Invariably, because police officers must detain for investigative purposes, cases would come before the courts where such "unlawful" police detentions resulted in the acquisition of evidence. Due to an absence of legal authority, such detentions would be labelled "arbitrary" under s. 9. In these initial cases, the Court might nevertheless

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276 See *supra* notes 46 through 50 and accompanying text. See also *supra* note 103 and accompanying text.

277 See *supra* note 48.

278 See *Latimer*, *supra* note 106; Lamer C.J.C., on behalf of the majority, indicated at para. 26 that "it is not necessary to address that question, because Mr. Latimer's arrest was entirely lawful, and failing an attack against the legislative provision which authorized the arrest, I do not see how a lawful arrest can contravene s. 9 of the *Charter* for being arbitrary."

279 Beyond the regulatory benefits that would flow from such a conclusion, there are good reasons why this interpretation is also compelled by a "purposive" reading of s. 9, including that: (I) the insistence in the early cases that there be a "capricious" or "despotic" mindset on the part of the arresting or detaining officer does not accord with the Supreme Court's subsequent rejection of dictionary definitions in the interpretation of the *Charter*'s guarantees; (ii) an interpretation that equates "illegal" with "arbitrary" respects the principle of legality, long a part of Anglo-Canadian constitutional law (in fact, unlawful detentions were termed "arbitrary" at common law); (iii) the drafting history, in which a predecessor provision to s. 9 equated illegal detentions with unconstitutional ones by prohibiting detentions that were not "in accordance with procedures, established by law" (the change in wording was precipitated by a desire to strengthen, rather than weaken, the guarantee); (iv) Art. 9(1) of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976), which prohibits not only "arbitrary arrest or detention," but also all deprivations of liberty that are not "in accordance with such procedure as are established by law," suggesting that equating arbitrary with unlawful under s. 9 would better accord with Canada's international treaty obligations; (v) such an interpretation would bring consistency to the Legal Rights guarantees by developing analogous standards under ss. 8 and 9. See Stribopoulos, *supra* note 8 at 267-72, exploring these arguments in detail.

decide to admit the unconstitutionally obtained evidence under s. 24(2), yet use these decisions to signal that, absent legislative authority, such stops will result in the exclusion of evidence in the future. Assuming that Parliament will respond to such developments the way it did when confronted with analogous rulings under s. 8, it will not take long for legislative action to follow.

Obviously, the substance of any legislation so enacted would also be of pivotal importance. It would be no solution if Parliament simply granted police express legislative authority to detain for investigative purposes without also addressing the myriad of difficult issues that go along with creating such a power (see Part IV above). In rejecting a judicially-created investigative detention power, the Court could do much to ensure that Parliament responds with the sort of comprehensive legislative scheme that is essential if police detention practices are to be effectively regulated in the future.

First, to reduce the risk of Parliament simply enacting the investigative detention power as is, the Court could signal its disinclination to fill the gaps that would be left by such a bare bones response. It could make clear, for example, that it would not be prepared to use the *Interpretation Act* as a means of reading in other powers — such as the use of force to effect stops, the carrying out of protective searches, and the moving of suspects — or to imply an override of the right to counsel guaranteed by s. 10(b) of the *Charter*.[280] The Court could justifiably point out that because a statute authorizing investigative detentions would "encroach on the liberty of the subject," it would "be construed, where ambiguous, in favour of upholding such liberty."[281] In effect, the Court could let it be known that if Parliament wants an investigative detention power that does all of these things, it must create such a power itself. The prospect that investigative stops might be invalidated and evidence excluded because of such legislative shortcomings would likely be enough to prompt Parliament to enact the sort of comprehensive legislation that is necessary if effective regulation is to be realized.

Second, in rejecting a judicially-created investigative detention power, it would also be sensible for the Court to seize this opportunity to signal to Parliament, in general terms, the minimum constitutional requirements a legislative scheme would be required to meet. For example, beginning with the threshold for investigative detentions, the Court could make clear that a scheme which authorized stops based on anything less than articulable cause (that is, reasonable suspicion) would probably run afoul of the right not to be arbitrarily detained, as guaranteed by s. 9 of the *Charter*.[282] Of course, in legislating this standard, there would

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280 The federal *Interpretation Act*, R.S.C. 1985, c. I-21 would apply to any statutory investigative detention power (*ibid.* s. 3(1)). Section 31(2) of that *Act* provides that "[w]here a power is given to a ... officer ... to do ... any ... thing, all such powers as are necessary to enable the person, officer or functionary to do ... the doing of the ... thing are deemed to be also given."

281 *Asante-Mensah*, *supra* note 106 at para. 41. See also *R. v. Colet*, [1981] 1 S.C.R. 2, (1981), 57 C.C.C. (2d) 105 at 112-13: the Court applied this principle to explain its refusal to use the predecessor of what is currently s. 31(2) of the *Interpretation Act* to imply a search power into a legislative provision that only expressly authorized a "seizure" power.

282 The Supreme Court's existing s. 9 *Charter* jurisprudence requires that, at a minimum, any legislative standard authorizing detention or imprisonment do so based on rational criteria or standards; see *supra* note 46 and accompanying text. Anything less than reasonably-based suspicion — for example, an officer's subjective suspicion alone — would probably violate s. 9. See also *supra* note 88, which

be nothing stopping Parliament from elaborating upon its meaning for the benefit of police officers in the field. Regulations could be used to promulgate the sort of guidelines that have been developed in the United Kingdom which, among other things, attempt to explain in practical terms what "reasonable suspicion" is and is not.[283]

The same could be done with any incidental search power. The Court could put Parliament on notice that to comply with s. 8 of the *Charter* (for the reasons explored above in Part IV(B)), a search power granted to police would probably need to be restricted to situations where there is some objectively-based safety concern and be limited, at least initially, to nothing more than a protective pat-down designed to locate weapons. Assuming these minimum constitutional requirements are met, there is again no reason why Parliament could not supplement such a power with practical guidelines to better direct its use in the field.[284]

Finally, as noted above, since the vast majority of unjustified stops do not result in the acquisition of any evidence, they do not lead to the laying of charges. Therefore, the effective regulation of police detention practices will further require that any legislative scheme include procedures capable of minimizing both the occurrence and the impact of these low-visibility encounters. Time limits on the length of detentions, a procedure for extending their duration, and reporting requirements, are all essential if police detention practices are to be effectively checked. Of course, for good reasons, there are limits on how far the Court can go in shaping any legislative scheme enacted by Parliament. That said, legislation authorizing investigative stops would undoubtedly intrude upon "liberty" and "security of the person" so as to engage s. 7 of the *Charter* and require compliance with the "principles of fundamental justice."[285] As a result, the adequacy of the procedural checks included in any legislative scheme would ultimately be subject to review by the Supreme Court. Under the existing s. 7 jurisprudence, the Court would have to decide whether the legislation enacted strikes a constitutionally fair balance between the liberty interests of Canadians and the law-enforcement interests of the state.[286]

None of the above is intended to suggest that if Parliament responds with comprehensive rules to confine and structure the exercise of police discretion, and combines those rules with procedures capable of checking police detention practices, the courts will be left without any role. On the contrary, the courts will still perform a number of critically important functions. First, they will be required to consider challenges to Parliament's legislative scheme and assess whether it in facts meets the *Charter*'s requirements. In the process, the courts will

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explains the holding in *Wilson*, *supra* note 45, a Supreme Court decision which suggests that articulable cause is probably the minimum permissible standard for a lawful detention to escape being labelled "arbitrary" under s. 9.

283 See *PACE, Code of Practice for Stop and Search*, *supra* note 69, ss. 2.2 - 2.6, 2.25.

284 *Ibid.*, ss. 1.5, 2.9 - 2.11, 3.1 - 3.11, supplying detailed guidance on when searches can be undertaken, as well as their manner and scope.

285 *Supra* note 40, s. 7.

286 Under its contemporary s. 7 jurisprudence, the Supreme Court of Canada has held that "[t]o determine the nature and extent of the procedural safeguards required by section 7 a court must consider and balance the competing interests of the state and the individual" in the particular context. See *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, (1992), 77 C.C.C. (3d) 65 at 85. See also *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, (1992), 72 C.C.C. (3d) 214 at 237.

interpret the *Charter*'s guarantees and further elucidate the minimum constitutional standards governing investigative detention. Second, in individual cases, they will adjudicate claims that s. 9 of the *Charter* was violated because the statutory requirements for a lawful detention were not respected. Similarly, they will hear s. 8 *Charter* claims regarding incidental searches and determine whether the limits of the statutory search power were respected. Finally, the courts will address any constitutional claims that are not subsumed within the legislative scheme enacted. For example, the Supreme Court has previously indicated that s. 9 of the *Charter* would be violated if an arrest (or, by implication, a detention) was undertaken "because a police officer was biased towards a person of a different race, nationality or colour, or that there was a personal enmity between a police officer directed towards the person arrested."[287] Even if Parliament chose not to include an express prohibition on racial profiling in the legislative scheme, adjudicating any such claims would remain the function of courts.

As this Part of the article makes clear, if the ultimate goal is the effective regulation of police detention practices, there is a much better option than a judicially-created investigative detention power. The dialogue model, already embraced by the Supreme Court, offers the solution. The next step, however, requires considerable courage: the Court must reject over ten years of jurisprudence. Yet, as one commentator observed, "... if the Court avoids taking bold steps, chances are that the dialogue will never get off the ground and we will have neither judicial nor legislative rules designed to maximize the fairness of the process."[288]

## VI. CONCLUSION

Investigative stops are essential to the police. Police officers must be able to stop and question individuals they suspect of criminal wrongdoing, without arresting them, if they are to perform their difficult jobs effectively. As a result, regardless of their legal status, such stops are an inevitable part of police practices. Just as inevitable, however, is the danger that many stops will be undertaken without good cause or because of nefarious considerations, such as an individual's race. All of this gives rise to an unavoidable tension: the police need a power to carry out investigative stops, and the public requires real assurances that any such power will be effectively regulated.

In *Simpson*, the Ontario Court of Appeal attempted to bridge the gulf between the conventional common law rule that forbade any interference with individual liberty short of arrest and the reality of police practices. In acting, the Court's stated goal was regulatory. To that end, they applied the *Waterfield* test in order to recognize an investigative detention power. But as was demonstrated above in Part III, that test was never intended to be used as a device for the judicial creation of new and invasive police powers. Nevertheless, the ancillary powers doctrine supplied the faulty foundation upon which the entire investigative detention experiment has been built.

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287 *Storrey*, *supra* note 10 at 325.

288 Alan Young, "The *Charter*, The Supreme Court Of Canada And the Constitutionalization Of the Investigative Process," in Jamie Cameron, ed., *The Charter's Impact On The Criminal Justice System* (Scarborough: Thomson Canada, 1996) 1 at 32.

If the goal is to effectively regulate police detention practices, a judicially-constructed power is destined for failure. As Part IV demonstrated, given the dynamic involved when such a power is left to the incremental decision-making of judges, who only see those cases involving the factually guilty "victims" of unjustified stops, the inevitable trend is towards a continual, virtually boundless expansion of police power. In time, the effect is far from regulatory. Rather, this approach tends to accomplish little more than blurring the distinction between investigative stops and conventional arrests.

The simple truth is that, institutionally, courts are not capable of single-handedly regulating police detention practices. The very nature of judicial rule-making is incompatible with the creation of the sort of clear, comprehensive, and prospective rules that are essential if police discretion is to be meaningfully structured and confined. Courts are similarly incapable of developing the necessary administrative procedures to meaningfully check police detention practices. Wishful thinking aside, a judicially-created investigative detention power cannot accomplish the goal of regulating police detention practices.

Reaching this conclusion does not require Canadian courts to wait patiently for a legislative scheme that may never come. Rather, courts can take important steps to foster an atmosphere in which the necessary legislation will emerge. As outlined in Part V(C), the Supreme Court can kick-start the constitutional dialogue in relation to police detention practices by taking two simple but important steps. First, the Court must finally hold that a detention which lacks lawful authority — that is, an illegal detention — is necessarily arbitrary under s. 9 of the *Charter*. Second, the Court must reject opportunities to employ the ancillary powers doctrine as a device for vesting the police with new and complex criminal investigative powers. By implication, this would mean rejecting a judicially-created investigative detention power. Unfortunately, as long as the courts maintain such a power, Parliament will continue to lack the necessary incentive to enact the sort of legislation that is essential if police detention practices are to be effectively regulated in the future.

It would be premature to pronounce the investigative detention experiment a failure. At this point, the opportunity to vest the police with such a power while also effectively regulating it remains open. Experience makes it clear, however, that a judicially-created power is not the solution. Instead, comprehensive legislation is absolutely essential if police discretion is to be meaningfully confined, structured, and checked. It is within the Supreme Court's power to create an atmosphere in which such legislation will be forthcoming — one in which the Court must take bold steps to initiate a truly constructive dialogue with Parliament. If this occurs, the goal of effectively regulating police detention practices may be realized in the foreseeable future. The experiment can still work, but it needs some serious modifications.