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Arbitrary Detention: Whither — or Wither? — Section 9

Steve Coughlan[*]

I. INTRODUCTION

It is a remarkable fact that more than 25 years after the *Canadian Charter of Rights and Freedoms*[1] came into effect, we still have no section 9 jurisprudence. It is not that there have been no decisions at all concerning the right not to be arbitrarily detained, of course, but taken in total they do not come anywhere near setting out an analytical framework. This stands in contrast to most other legal rights in the Charter. Section 7 jurisprudence has established the two-step approach to take in assessing claims under that section, including a three-step test for determining whether a proposed rule *is* a principle of fundamental justice.[2] For section 8 claims, very extensive case law has established that the right applies only where there is a reasonable expectation of privacy and that warrantless searches are *prima facie* unreasonable, and, most importantly, *R. v. Collins* has established a three-step test — (1) is the search authorized by law? (2) is the law itself reasonable? and (3) is the search carried out in a reasonable manner? — to assess any new situation involving a search.[3] Similar observations can be made around the development of informational and implementational rights relevant to section 10(b) or to the four-part analysis of whether there has been a violation of the right to a trial within a reasonable time in section 11(b).

In the case of section 9, on the other hand, the Supreme Court of Canada has said little, and much of what it has said seems likely to be wrong. Individual fact situations have been found to result (or not) in arbitrary detentions, but no consistent framework for analyzing such claims

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

[2] *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, 2003 SCC 74 (S.C.C.).

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

has been articulated or even consistently applied without being articulated. It must surely be surprising that a quarter-century of case law on the right to be free from arbitrary detention has not yet resulted in a clear definition of either the word "arbitrary" or the word "detention". Indeed, among the relatively few cases which have been decided, probably the most significant results have been to recognize the existence of new police powers: that is, the primary effect of section 9 case law has been to limit personal rights rather than to protect them.

Several reasons might have led to this relative neglect. First, an alleged violation of section 9 is unlikely to arise in isolation. If the detention is an on-the-street encounter, such as a vehicle stop or questioning of a pedestrian, then sections 8 and 10(b) are likely to be relevant. If the person was detained, then he or she will have been entitled to the right to counsel and might not have been afforded that. If the person has been charged with an offence, in all likelihood he or she was searched without a warrant as well as detained, and so a potential section 8 claim arises. In essence, if the accused has said something then section 10(b) is the sensible Charter right to assert, and if something was found on the accused, section 8 is the best claim. If the person said nothing and nothing was found then it is unlikely the person is an "accused" at all, and so the potential arbitrary detention all by itself is unlikely to be litigated. There could in principle be cases where only a section 9 violation is at issue, but they will be rare. More probable is that a section 9 violation might be asserted as part of a pattern of violations, but precisely because sections 8 and 10(b) already have well-developed analytical frameworks, the section 9 discussion is likely to be largely an afterthought.

In the above cases, any Charter violation would lead to a possible section 24 remedy. Section 9 claims can also arise in contexts leading to a possible section 52 remedy: where statutory schemes such as dangerous offender legislation or security certificates are challenged.[4] In those contexts, however, there is also likely to be an objection based on section 7 or perhaps on section 12, cruel and unusual punishment. Again, the need to rely on section 9 is diminished. Although it did not have to be the right which was neglected, once analytical frameworks began to exist for other rights but not for section 9, the tendency to leave arbitrary detention undeveloped became self-reinforcing.

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[4] See, for example, *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 (S.C.C.); *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.); or *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, 2007 SCC 9, [2007] 1 S.C.R. 350 (S.C.C.).

Also probably relevant to the development of this pattern is that early case law seemed to make it extraordinarily easy to justify violations of section 9. As the dissent point out in *R. v. Ladouceur*, the third of the trilogy of vehicle stop cases, the roving random stop power which was found to be saved in that case permitted any police officer to "stop any vehicle at any time, in any place, without having any reason to do so" which was "a total negation of the freedom from arbitrary detention guaranteed by section 9 of the *Charter*".[5] If such a violation of section 9 could be saved under section 1, it is not surprising that defence counsel might decide it was not ultimately fruitful to worry too much about proving a *prima facie* arbitrary detention.

In discussing the lack of section 9 jurisprudence I will consider three issues: (1) whether "arbitrary" has or should be equated with "unlawful"; (2) what "arbitrary" means and; (3) what "detention" means. I shall proceed in two stages: by considering the first 25 years of case law, and then the start of the second 25 years — or, more simply, everything up to the Supreme Court's decision in *R. v. Clayton*[6] and then *Clayton* itself. In essence, my intent is to show that both prior to and after *Clayton*, the Court has not created a section 9 jurisprudence. Important questions were left essentially unaddressed until this most recent decision, so that no general analytical approach to section 9 existed. Further, although *Clayton* addresses some of those questions, it does so in a way that still does not create anything which could be called a section 9 jurisprudence, and which in fact reflects a detrimental approach to analyzing the Charter in general.

II. THE FIRST 25 YEARS

1. Does "Unlawful" Equate to "Arbitrary"?

This is a relatively simple point, and its equivalent has been established with regard to section 8 for about 20 years. Since *R. v. Collins* and *R. v. Kokesch* it has been clear that an illegal search is an unreasonable search.[7] Making this equation has had many benefits in terms of clarity, and has had the effect of making "search and seizure law" and "section 8 law" essentially the same thing. In that particular context, the rule is captured

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5 [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257, at 1264 (S.C.C.).

6 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

7 *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.); *R. v. Kokesch* [1990] S.C.J. No. 117, [1990] 3 S.C.R. 3 (S.C.C.).

by the first two parts of the test set out in *Collins* for analyzing whether there is a section 8 violation: whether the search is authorized by law, and whether the law itself is reasonable.

In the context of section 9, the equivalent point would be that an unlawful detention is an arbitrary detention. In the first 25 years, the Court left this point unsettled: one could not say that the statement was true, but equally one could not say it was *not* true. The Ontario Court of Appeal, for example, had rejected the equation in its decision in *R. v. Duguay*, holding that a police officer who arrested on grounds that fell just short of being reasonable would have acted unlawfully but not arbitrarily.[8] On appeal, however, the only issue was whether the evidence should be excluded, and so the Supreme Court was not required to — and did not — comment on this point. Similarly, on other occasions the Court has deliberately left the issue aside, as in, for example, *R. v. Latimer*: "[u]nlawful arrests may be inherently arbitrary ... [but] it is not necessary to address that question."[9]

The potential equation of "unlawful" and "arbitrary" would actually break down to three related rules. Two of the rules are clear: if a detention is lawful it is *not* arbitrary, and if a detention is not lawful it *is* arbitrary. However, the first rule should also raise a third rule, similar to the second part of the *R. v. Collins*[10] test for searches: if the detention is lawful, the law authorizing the detention is itself reasonable.

Of these three rules, the first — if a detention is lawful it is not arbitrary — has actually been laid down by the Court. It held recently in *R. v. Mann* that "[i]t is well recognized that a lawful detention is not 'arbitrary'," [11] and that is in accord with the result in a long line of cases. What has not been so clearly established is whether there is a need to ask the follow-up question, "is the law itself reasonable?" This is an area in which the lack of a section 9 analytical framework is apparent. The Court has failed to specifically state whether this is or is not a rule, and its practice in this regard has made it difficult to glean a rule by implication.

In some cases, the Court has necessarily been asking whether the law itself is reasonable, since a statutory scheme permitting detention was

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8 [1985] O.J. No. 2492, 45 C.R. (3d) 140 (Ont. C.A.).

9 [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217, at para. 26 (S.C.C.).

10 [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

11 [2004] S.C.J. No. 49, 2004 SCC 52, at para. 20.

at issue. In deciding that the provisions in the *Criminal Code*[12] requiring the automatic detention of anyone found not guilty by reason of insanity violated section 9, for example, the very issue was the reasonableness of the law.[13] Further, in many of the vehicle stop cases, effectively the equivalent of asking "is the law itself reasonable?" results from the Court's approach in those decisions: find the detention arbitrary but uphold the law authorizing it under section 1. This approach, adopted for example in *R. v. Hufsky*, *R. v. Ladouceur* and *R. v. Wilson*, amounts to saying that the detention was authorized by law and that the law itself was reasonable.[14] In other cases the Court has explicitly referred to the issue as though it were a necessary step: in *R. v. Latimer*, for example, the Court concluded that the arrest was lawful and therefore "failing an attack against the legislative provision which authorized the arrest", there could not be a section 9 violation.[15] It is therefore apparent that the question must sometimes be asked.

On the other hand, in other cases the Court's treatment of the question is less clear. In *R. v. Jacques*,[16] for example, the Court concluded that the *Customs Act*[17] permitted a customs officer to stop and search a vehicle on the relatively low standard that the officer suspects the possibility of smuggling. The majority and dissent disagreed over whether the evidence permitted that suspicion reasonably to be formed, the majority concluding that it did. The majority also explains why the border crossing context meant that this lower standard was "eminently understandable".[18] However, it is not entirely clear in context whether this discussion is meant to be a rejection of a section 9 challenge to the legislative provision, an argument that the section 9 violation is justified under section 1, an interpretive tool to understanding the wording of the *Customs Act*, or something else.

Further, some cases seem to ignore the question. In *R. v. Mann*, for example, the Court creates a common law power of investigative detention

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12 R.S.C. 1970, c. C-34, s. 542 (2).

13 *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.).

14 *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.); *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.); *R. v. Wilson*, [1990] S.C.J. No. 54, [1990] 1 S.C.R. 1291 (S.C.C.).

15 [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217, at para. 26 (S.C.C.). See also *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.), where the Court concluded that a vehicle stop was not authorized by s. 14 of the Ontario *Highway Traffic Act*, R.S.O. 1970, c. 202, and therefore that "it is unnecessary to express an opinion as to the constitutional validity of s. 14" (at para. 63).

16 [1996] S.C.J. No. 88, [1996] 3 S.C.R. 312 (S.C.C.).

17 R.S.C. 1985, c. 1 (2nd Supp.).

18 *R. v. Jacques*, [1996] S.C.J. No. 88, [1996] 3 S.C.R. 312, at para. 15 (S.C.C.).

and accordingly concludes that the accused was not unlawfully detained: it moves from that immediately to the conclusion that he was not arbitrarily detained.[19] To do so is to ignore any requirement that the law itself must be reasonable. Of course one might suggest that in *Mann*, or any other case involving the use of the ancillary powers doctrine, the step is unnecessary because the court would not create a common law power and then find it to be unreasonable. In fact, though, the Court does not omit this step when engaged in this same process in other contexts.

In *R. v. Mann*,[20] for example, the Court used the ancillary powers doctrine first to create the investigative detention power and second to create a power of search incident to that investigative detention. In the search context the Court observed:

> A finding that a limited power of protective search exists at common law does not obviate the need to apply the *Collins* test for determining whether a warrantless search passes constitutional muster under section 8 of the *Charter*.[21]

That is, even though the Court had just created a new common law power, it still noted the separate requirement that that law was required to be reasonable.

Certainly a specific requirement that any law authorizing a detention must itself be reasonable seems like a minimum requirement for a sensible section 9 analytical framework. The Court has tended to operate on the assumption that there is such a rule, but it would be beneficial to have that requirement unambiguously stated.

The more difficult half of equating "unlawful" with "arbitrary" is the final issue: whether, if a detention is not lawful, that automatically means it is arbitrary. This equation has been made in the case of searches, but was not, in the first 25 years, settled in the case of detentions.

As noted above, the Ontario Court of Appeal in *R. v. Duguay*[22] rejected this position, on the basis that an arrest which fell just short of reasonable grounds should not be seen as arbitrary. That particular argument has probably been overtaken by subsequent events. When the Ontario Court of Appeal took that position, one could have said with some confidence that short of the existence of reasonable and probable grounds, the police

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19 [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.). The same approach is taken in *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.).

20 [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

21 [2004] S.C.J. No. 49, 2004 SCC 52, at para. 44 (S.C.C.). See also para. 36.

22 [1985] O.J. No. 2492, 45 C.R. (3d) 140 (Ont. C.A.).

had no authority to detain an individual. Since *R. v. Mann*,[23] of course, it is clear that this position is no longer correct: police can also briefly detain an individual where they have reasonable grounds to suspect that there is a clear nexus between that individual and a recent or ongoing criminal offence, and the detention is reasonable in all the circumstances. As a result, it is no longer clear that a detention on something "just short" of reasonable grounds would be unlawful at all: it might well qualify as an investigative detention and thus still be lawful.[24]

However, the issue of unlawful detentions is broader than failed arrests: there are many circumstances in which the state could fail to comply with the requirements of the law and as a result detain an accused. For example, section 503 of the *Criminal Code*[25] requires an arrested person to be taken before a justice of the peace as soon as practicable, and in any case within 24 hours: failure to comply with that requirement will result in an unlawful detention. Lower courts are divided as to whether such a detention will be arbitrary. This particular issue has actually come before the Supreme Court of Canada, but its entire decision — overturning a court of appeal judgment — consisted of two sentences stating that there was no reason to interfere with the exercise of discretion by the trial judge.[26] On no other occasion in the first 25 years did the Court clarify this issue, and so whether unlawfulness necessarily amounted to arbitrariness was left in doubt.

There are good reasons to adopt such a rule: simplicity and clarity are among them. If arbitrariness can be inferred from unlawfulness, that does not end the analysis: further steps follow which allow for balancing the competing interests. On the other hand, if unlawfulness need not mean arbitrariness, then before reaching those other steps additional analytical tools will need to be developed. If it is not just unlawfulness that makes a detention arbitrary, then what further criteria must be met as well? Since these considerations, whatever they might be, can be built

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[23] [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

[24] See, for example, *R. v. Pimentel*, [2000] M.J. No. 256, 2000 MBCA 35 (Man. C.A.), where the Manitoba Court of Appeal found that an officer who had arrested an accused did not have grounds to do so, but did have articulable cause and therefore had the authority on that basis to detain the person. *Pimentel* predates *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.) and so does not apply the investigative detention test arising from it. Although this means a different result might be reached on the particular facts, it does illustrate that such an approach is possible.

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

[26] See *R. v. Simpson*, [1994] N.J. No. 69, 29 C.R. (4th) 274, at para. 98 (Nfld. C.A.), revd [1995] S.C.J. No. 12, [1995] 1 S.C.R. 449 (S.C.C.). See also *R. v. W. (E.)*, [2002] N.J. No. 226, 168 C.C.C. (3d) 38 (Nfld. C.A.), or *R. v. Tam*, [1995] B.C.J. No. 1428, 100 C.C.C. (3d) 196 (B.C.C.A.).

into other aspects of the analysis, it is unnecessarily complex to introduce an extra step at this preliminary stage.

More important than clarity and simplicity, however, would be the fact that equating unlawfulness with arbitrariness would better reflect the way that the state's coercive powers are meant to interact with individual liberty. The point has been stated by the Court many times, but was put most succinctly in *R. v. Mann*:

> Absent a law to the contrary, individuals are free to do as they please. By contrast, the police (and more broadly, the state) may act only to the extent that they are empowered to do so by law.[27]

That is, individuals should be free from coercive intervention unless some specific power authorizes the police or other state actors to so intervene. This is a fundamental proposition not just about criminal investigative powers, but about the nature of liberal democracy. Equating unlawfulness with arbitrariness accords with this position: failing to make the equation is inconsistent with it.

If the unlawfulness of a detention — that is, the fact that the police were not empowered by law to make the detention — meant that it was arbitrary, then an individual might be able to obtain a Charter remedy. This result would not be guaranteed, since there will be further hurdles to cross, but this approach would provide some positive support for the assertion that individuals are free to do as they please. On the other hand, if unlawfulness did not amount to arbitrariness, then in some cases there would be no violation of section 9 despite the fact that the police had acted without authority. This would amount to saying that individuals are not always free to do as they please even though there is no law to the contrary. It would also amount to saying that police may sometimes act even though they are not empowered to do so by law. In other words, denying the equation contradicts both components of this fundamental democratic proposition.

It is also worth elaborating on the further steps involved in the Charter analysis: at least three "safety valves" exist to help guard against anything seeming like an unmeritorious claim. In particular, for an accused to receive any real benefit from a section 9 Charter argument, the police action must not only have been arbitrary but also must have amounted to a detention, that arbitrary detention must not be saved under section 1, and a remedy (most likely under section 24) must be appropriate. At each

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[27] [2004] S.C.J. No. 49, 2004 SCC 52, at para. 15 (S.C.C.).

of these stages the claim could fail, and so equating "unlawful" with "arbitrary" is not the end of the story.

That said, it must be acknowledged that there are some limits on how effective those safety valves could actually be. Realistically, it is likely that in many cases where a section 9 claim is pursued, the "detention" aspect of the analysis will be met. At least in cases where police have purported to use a power but have fallen outside the conditions for using it — the type of "failed arrest" cases falling just short of reasonable grounds referred to in *R. v. Duguay*,[28] or overly long periods before an arrested person is taken before a justice of the peace in accordance with section 503 of the *Criminal Code*[29] — the nature of the interference with liberty is likely to meet any reasonable definition of "detention". The point of such police powers, after all, is precisely to authorize police to assert control over an individual's liberty. If police have attempted to use such a power without meeting the conditions for doing so, there is not likely to be much doubt that the individual was detained.

On the other hand, if the unlawfulness arises from the fact that police are simply acting in a way which is unregulated — by asking questions of an individual on the street without asserting control over that person's movements, for example — then there could be some dispute over whether there was a detention at all. When the unlawfulness arises from a complete absence of any power rather than a failed exercise of a power, what is most likely to be at issue is a psychological detention, which will be discussed in greater detail below. For the moment it is only necessary to observe that psychological detentions are the most difficult to identify, and so in this context at least the need to meet this further criterion could plausibly lead to a finding that there is no *prima facie* section 9 violation.

It should also be noted that adopting the relatively broad approach of saying that unlawfulness equates to unreasonableness could cause more narrow approaches to be used elsewhere, such as in defining "detention". In the search context, for example, the Court has not only said that an illegal search is an unreasonable one, it has also held that a warrantless search is *prima facie* unreasonable. As a practical matter, though, warrantless searches not authorized by any law do sometimes produce evidence of crime, and it is only those instances that actually come to court. As a result, judges tend only to see the factually guilty,

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28 [1985] O.J. No. 2492, 45 C.R. (3d) 140 (Ont. C.A.).

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

but are faced with rules saying that the warrantless action was illegal and therefore unreasonable. In response, there has been a tendency in recent years to reconsider and narrow the meaning of the word "search", and to restrict the impact of section 8 in that fashion.[30] It would be unfortunate if the effect of making clearer the meaning of "arbitrarily" in section 9 were simultaneously to make less clear the meaning of "detained".

The second safety valve, the use of section 1, is also likely to have a limited role in practice. If there is a *prima facie* section 9 violation, then in principle that infringement of rights could be justified under section 1. However, a requirement of saving a violation under section 1 is that it was "prescribed by law": by definition we would be discussing violations *not* prescribed by law, since the arbitrariness arises from unlawfulness. Admittedly the Court has been responsible for some fancy manoeuvring around the "prescribed by law" issue, such as by finding a law in the "operational requirements" of a statute in *R. v. Orbanski*.[31] Still, to do anything of that sort in this context would be to find that the infringement was not unlawful after all, so it would remove it from the set of cases under discussion.

On the other hand, section 24 can function perfectly well as a safety valve. Courts routinely find violations of section 8 or section 10(b) but decide that the evidence garnered should nonetheless be admitted. Under section 24(1), only an "appropriate and just" remedy is to be granted. If the unlawfulness in question is so minor as to amount to a technicality, then despite the finding of a section 9 violation it could be that granting no remedy is just in the circumstances.

Of course, the remedy section must truly be used as a safety valve: that is, with regard to the particular circumstances of a particular case. It ought not to be used on a "blanket" basis to ignore particular classes of section 9 violations. If courts were to reason, for example, that no remedy was appropriate on any occasion when police detained a person only briefly for an investigative detention without meeting the *R. v. Mann*[32] criteria, this would actually amount to creating a new police power. Since there would be no consequence to the finding of a section 9 violation, and indeed there would be tacit approval of the behaviour, courts would effectively

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[30] See *R. v. Belnavis*, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 341 (S.C.C.) or *R. v. Tessling*, [2004] S.C.J. No. 63, 2004 SCC 67, [2004] 3 S.C.R. 432 (S.C.C.). The Court's pending review of *R. v. Brown*, [2006] A.J. No. 755, 2006 ABCA 199 (Alta. C.A.) should cast more light, for good or ill, on this development.

[31] *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, 2005 SCC 37, [2005] 2 S.C.R. 3 (S.C.C.).

[32] [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

be giving a green light to police to act as though they had such a power. That is not the role of section 24.

This point does raise, however, an important fourth safety valve which makes it appropriate to equate "unlawful" with "arbitrary". It is not the task of section 9, nor of courts in interpreting section 9, to see to it that all necessary police powers exist. Of course society is safer when genuinely necessary police powers exist, but nonetheless creating those powers is not the role of section 9 of the Charter.

Rather, the role of section 9, like that of the rest of the Charter, is to protect against state power, and police power in particular. If police act where they have no power to do so, the Charter should protect individuals by recognizing that police did not have the authority to act, which is what equating "unlawful" and "arbitrary" would do. If more police powers should exist, then it is open to Parliament to change the *Criminal Code*[33] or some other statute. That is precisely the purpose of the "prescribed by law" criterion in section 1: to recognize that Charter rights can be overridden for a sufficiently important competing objective, but only when legislators have determined to do so. Exactly the same reasoning applies in this context. If particular unlawful police action seems like it should not be found to violate section 9, then Parliament could authorize it. At that stage the quite fully developed analytical framework already built up around section 1 can be used to assess the competing interests.

Failing to equate "unlawful" and "arbitrary", however, makes it more difficult to follow this route. As a result, failing to make this equation is not just an instance of the lack of section 9 jurisprudence in itself: it also helps prevent using well-developed jurisprudence developed in other areas of the Charter.

I suggest, therefore, that it would be entirely beneficial for section 9 jurisprudence to include the rule that an unlawful detention is an arbitrary one. That is, however, the start of the analysis, not the end of it. To say that unlawful detentions are arbitrary is a useful part of the definition of "arbitrary", but it is not the entire definition. We should therefore now turn to look at that question in greater detail.

2. The Definition of "Arbitrary"

This is an aspect of section 9 where the Court has actually articulated a rule. Unfortunately it seems pretty clear that the rule laid down cannot

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

be correct and that something more, or perhaps something entirely different, is needed.

The earliest cases dealing with section 9 were a series of vehicle stop cases. In *R. v. Hufsky*,[34] the particular scheme in question was authorized by statute and allowed police to randomly stop vehicles to check for mechanical fitness and licensing issues. The stops were purely random, not requiring any criteria to be met: rather, the selection of vehicles was in the absolute discretion of the police officer. In this context the Court offered its definition of "arbitrary" for the purposes of section 9: "A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise."[35]

This definition was consistently applied in a number of other vehicle stop cases.[36] Importantly, it was also applied beyond vehicle stops to other contexts: to assess various aspects of the *Criminal Code*'s[37] bail provisions, for example.[38] Similarly, in considering the automatic detention of a person found not guilty by reason of insanity, without making specific reference to *R. v. Hufsky*,[39] the Court nonetheless adopted the same standard: "[t]he duty of the trial judge to detain is unqualified by any standards whatsoever. I cannot imagine a detention being ordered on a more arbitrary basis."[40]

In the context of vehicle stops, it might have been the case that "no criteria" was not meant to be a *definition* of "arbitrary", but simply one fashion in which arbitrariness could be established. That is, it might have been the case that one could show a detention to be arbitrary by showing it to be governed by no criteria, but also in some other fashion as well. However, the way in which the test was used in other cases shows that "no criteria" is not merely *a* way to be arbitrary, it is *the* way to be arbitrary: that is, for the Supreme Court it is the definition of the term.

In *R. v. Lyons*,[41] for example, the dangerous offender provisions were challenged under sections 7, 9 and 12 of the Charter. The Court noted

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34 [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.).

35 [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621, at 633 (S.C.C.).

36 *R. v. Wilson*, [1990] S.C.J. No. 54, [1990] 1 S.C.R. 1291 (S.C.C.); *R. v. Ladouceur*, [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.); *R. v. Macooh*, [1993] S.C.J. No. 28, [1993] 2 S.C.R. 802 (S.C.C.); *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615 (S.C.C.).

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

38 See *R. v. Pearson*, [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 (S.C.C.) and *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.).

39 [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.).

40 *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933, at 1012 (S.C.C.).

41 [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 (S.C.C.).

that the provisions set out criteria governing when an offender could be designated as dangerous, and noted that: "If these criteria are themselves unconstitutional, it is because they otherwise fail adequately to safeguard the liberty of the individual, not because they are arbitrary."[42] That is, so long as there *were* criteria, the detention was not arbitrary. Any challenge to the *content* of the criteria, the Court held, would involve a challenge under section 12 (or presumably section 7).

Similarly, in both *R. v. Pearson*[43] and *R. v. Morales*[44] the Court adopted "no criteria" as a definition for assessing aspects of the Code's bail provisions. After citing the *R. v. Hufsky*[45] definition of "arbitrary", the Court concluded that the provisions were "not arbitrary in this sense": that is, there were criteria. Insofar as the section 9 discussion was concerned, that settled the matter, with no discussion about the content of those criteria. In each case, that the provisions had some criteria — that they were not random — led directly to the conclusion that the provisions did not violate section 9. If the provisions were not arbitrary in "that sense", then they were not arbitrary at all. Those two cases show that "no criteria" is not merely one way to be arbitrary, but is in fact the definition of "arbitrary".[46]

The trouble is that this definition is clearly inadequate if section 9 is to play anything like the kind of role one would expect it to play. To take the simplest example, if section 9 is to play any significant role at all, then one would expect it to be capable of addressing racial profiling. Indeed, racial profiling is one of the few situations where section 9 would actually be useful in isolation. That is, a person might be stopped based on his or her race, but then be advised of the right to counsel and legally searched. In such circumstances there would be no section 8 or section 10(b) claims, but the impropriety of detaining the person based on race should give rise to a section 9 claim.

However, to stop a person based on race is not to stop that person based on no criteria. Rather, it is to stop the person based on improper criteria. As the Court has developed the definition of "arbitrary" so far, the use of improper criteria is not a relevant consideration under section 9.

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42 [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 347 (S.C.C.).

43 [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 (S.C.C.).

44 [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.).

45 [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.).

46 [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665, at 700 (S.C.C.); [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.).

The definition in *R. v. Hufsky*,[47] consciously adopted in other cases and contexts, excludes consideration of that issue.

That said, the Court has occasionally said things which show it recognizes that section 9 should address interests other than random detentions. It has not offered an alternative definition of "arbitrary", but it has made statements inconsistent with randomness being the only relevant issue.

In *R. v. Lyons*, for example, the Court suggested in the midst of its section 9 discussion of dangerous offender legislation that "if … a prosecutor in a particular case was motivated by *improper or* arbitrary reasons in making a Part XXI application, a section 24 remedy would lie" (emphasis added).[48]

Similarly, in the context of a section 9 challenge in *R. v. Storrey*, the Court suggested that an otherwise valid arrest could be invalidated if it was shown that "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".[49] These cases offer no new definition of arbitrariness, but do at least recognize that broader issues are involved.

Quite recently, the Court has used a standard other than randomness in assessing a section 9 claim, though without noting that they were departing from *R. v. Hufsky*[50] or offering any real rationale for the different standard. In *Charkaoui v. Canada (Citizenship and Immigration)*[51] the Court was faced with a section 9 challenge to the security certificate scheme under the *Immigration and Refugee Protection Act*[52] which permitted foreign nationals to be detained without warrant, and which prevented review of this detention for 120 days. The Court upheld the first of these rules but struck down the second. In upholding detention without a warrant under a security certificate, the Court held that a detention is not arbitrary when there are "standards that are rationally related to the purpose of the power of detention".[53] Unlike, for example,

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47 [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.).

48 [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 348 (S.C.C.).

49 [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241, at 251-52 (S.C.C.).

50 [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621 (S.C.C.).

51 [2007] S.C.J. No. 9, 2007 SCC 9, [2007] 1 S.C.R. 350 (S.C.C.).

52 S.C. 2001, c. 27.

53 [2007] S.C.J. No. 9, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 89 (S.C.C.), quoting P.W. Hogg, *Constitutional Law of Canada* (looseleaf ed.), vol. 2 (Scarborough, ON: Carswell, 1997), at 46-5.

R. v. Lyons,[54] the Court did not focus on the mere existence of criteria at all, but rather on their content: that detention was ordered because the person posed a danger, and this was a rational foundation. This is a better approach than in *Lyons*.

On the other hand, the Court struck down the 120-day period of non-review, holding that it violated section 9. Although it is clear that the Court did not use the "no criteria" definition to reach this conclusion, it is not clear what other definition was used. They noted that similar reviews of other detentions were required to occur in periods of 24 to 48 hours, and seemingly concluded directly from this difference that the 120-day detention violated section 9.

Certainly an adequate section 9 jurisprudence requires more than a definition of arbitrary that is limited to "based on no criteria". That standard, as noted above, fails to deal with the very serious issue of racial profiling. Beyond that, however, it fails to deal with many other types of situations for which section 9 seems to be designed. Applied literally it would have absurd results, since "foolish criteria" does not meet the "no criteria" standard. That would mean that a police officer stopping every car which passes would be causing arbitrary detentions, but an officer who stopped only yellow cars because he thought he had read somewhere that alcoholics favoured that colour would not be acting arbitrarily. The second officer would not be violating section 9, and so would not need his ability to act on this mistaken belief justified under section 1. It is difficult to imagine that that is the intent behind the prohibition on arbitrary detentions. Indeed, lower courts routinely find section 9 violations in circumstances not based on the "no criteria" definition.

First, although police sometimes misuse their powers based on objectionable criteria like race or nationality, there is no particular reason that the concept of arbitrary detention should be limited to only those particular misuses. In *R. v. Herter*,[55] for example, the accused was stopped on suspicion of impaired driving and was deliberately unresponsive to the officer's questions. The officer conceded in cross-examination that he placed the accused in the drunk tank out of frustration, solely because he had been uncooperative. The accused was kept there for over seven hours, as a punishment for his behaviour. The judge concluded — rightly, one would think — that this amounted to a section 9 violation. On the

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[54] [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309 (S.C.C.).

[55] [2006] A.J. No. 1058, 40 C.R. (6th) 349 (Alta. Prov. Ct.), revd [2007] A.J. No. 1498 (Alta. Q.B.) based on the appeal judge's different view of the facts.

Supreme Court's definition, the officer's decision was not made randomly or without criteria, and so was not arbitrary.

Beyond that, there are many instances of courts finding section 9 violations where no issue of malice, race-based or otherwise, arises at all. Frequently a section 9 violation is found because police have failed to stay within the limits of their powers, though no question of random action arises. For example, courts recently found arbitrary detentions in all of the following situations, none of which involved randomness or malice:

R. v. Perello: The police arrested the accused for a "proceeds of crime investigation" solely because $55,000 cash was found in his camper van. This was found not to constitute reasonable grounds for arrest. Although the Saskatchewan Court of Appeal took the view that being unlawful did not automatically make the arrest arbitrary, it nonetheless found that there was a section 9 violation.[56]

R. v. Calderon: The police detained the occupants of a vehicle for a purported investigative detention concerning drug trafficking based on "indicators" such as the presence of cell phones, fast food wrappers and maps in the car. Pointing out the "neutrality and apparent unreliability" of these features, the Ontario Court of Appeal concluded that the police had in fact been acting on a hunch, not on a power of investigative detention, and therefore had arbitrarily detained the accused.[57]

R. v. Houben: The police stopped a vehicle, but were not acting under the authority of a statutory stop check power which did exist. Rather, they stopped the car based on what they subjectively felt was a reasonable suspicion. Finding that objectively the suspicion was not reasonable, the court held that the accused's section 9 right had been violated.[58]

R. v. D. (J.): The police stopped the accused to question him while he was walking on the street, but there were no reasonable grounds to suspect that he was connected to a particular crime. As a result the investigative detention power in *R. v. Mann*[59] was not available and the accused was arbitrarily detained.[60]

R. v. K. (C.): The police arrested the two accused and did not take them before a justice of the peace within 24 hours. They could have done so during ordinary business hours but had not finished interrogating the

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56 *R. v. Perello*, [2005] S.J. No. 60, 27 C.R. (6th) 19 (Sask. C.A.)

57 *R. v. Calderon*, [2004] O.J. No. 3474, 23 C.R. (6th) 1 (Ont. C.A.).

58 *R. v. Houben*, [2006] S.J. No. 715, 44 C.R. (6th) 338 (Sask. C.A.).

59 [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

60 *R. v. D. (J.)*, [2007] O.J. No. 1365, 45 C.R. (6th) 292 (Ont. C.J.).

accused at that time. By the time the interrogation was over justices of the peace were not so easily available. Because the police chose not to respect the 24-hour deadline, there was a section 9 violation.[61]

R. v. Jutras: The accused was a Canadian citizen stopped for impaired driving. Because he was registered as a student at a U.S. university, the police decided not to release him but instead to hold him overnight and take him to a bail hearing on the basis that he was a flight risk. Since there was no reasonable ground for this belief, his detention was arbitrary.[62]

These examples could be multiplied many-fold. In practice, lower courts in Canada generally do not apply the only definition of "arbitrary" that the Supreme Court has handed down. This means that the actual test used for arbitrary detention is something other than what the Court has said. We clearly need a section 9 jurisprudence which includes a more accurate and useful definition of "arbitrarily".

I do not propose here to offer precise wording for a revised definition, but it is clear what sort of factors must be taken into account. First, I have suggested in the previous section that detentions should be seen as arbitrary if they are unlawful. Accordingly, "unlawful detentions are arbitrary" should be part of the definition. However, there is more to be said.

As the examples from recent cases show, detentions should be seen as arbitrary in a number of situations. When police or other state officials deliberately misuse their powers or use them for oblique motives, any resulting detention should be seen as arbitrary. When police are motivated by unconscious factors to use their powers against one accused where they would not have done so against another (which would describe some cases of racial profiling, as well as other instances), such a detention should be arbitrary. Where police are overly casual in the use of their powers, choosing to arrest or detain without giving sufficient consideration to whether the preconditions for exercising a coercive power genuinely exist, that detention should be seen as arbitrary. When police are unwise in the use of their powers, subjectively concluding that reasonable grounds exist when objectively that is entirely unreasonable, the detention should be called arbitrary. All of these are approaches which offer a more complete and realistic meaning to the word "arbitrary".

It is worth considering how these examples interact with the suggested rule that unlawful detentions are arbitrary. On some of these examples,

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61 *R. v. K. (C.)*, [2005] O.J. No. 4583, 36 C.R. (6th) 153 (Ont. C.J.).

62 *R. v. Jutras*, [2007] O.J. No. 2396, 49 C.R. (6th) 320 (Ont. S.C.J.).

one could say that the police had acted lawfully but that the detention was arbitrary nonetheless. Consider, for example, the roving random stop power approved in *R. v. Ladouceur*.[63] Although police have the power to stop any vehicle at any time, the case acknowledges the possibility of racial profiling and states that it would violate the Charter.[64] It would be odd to say that such a stop had become unlawful: it would have been made entirely in accord with the legal power granted. Rather, it would be more natural to say that despite being lawful the detention was nonetheless unreasonable. It would constitute an arbitrary detention on that basis.

Similarly, in *R. v. Storrey*,[65] where the Court held that bias or enmity could render invalid an otherwise lawful arrest, it seems unnecessary to think of the arrest as unlawful. If an officer has subjective grounds to arrest which are objectively reasonable, then the arrest is lawful; if the officer is also motivated by personal dislike for the arrestee without which he or she might have exercised the discretion differently, then the arrest seems like an arbitrary detention. The normal requirements for a legal arrest would still be met, however, so it would not necessarily be unlawful. Indeed, consider subsections 495(2) and (3) of the *Criminal Code*:[66] between them they state that although there are circumstances in which a peace officer *should not* arrest, an arrest will nonetheless be lawful. It is not odd to think that such an arrest might be arbitrary, however. It is as true for police as for anyone else that there are times when it is unreasonable to use the powers one has. Arbitrariness should not *demand* unlawfulness.

There is a further point to be noted. The Court generally has acted on, without specifically articulating, an equivalent to the rule for searches that "the law itself is reasonable", which is the second part of the *R. v. Collins*[67] analysis. It would also be beneficial to incorporate an equivalent to the third part of that analysis, that the search is carried out in a reasonable manner. Even when using existing search powers, police are required to use them reasonably: the same should be said for detentions. To avoid being arbitrary when a detention is authorized by law, the law itself must be reasonable and the power to detain must be used in a reasonable

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63 [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.).

64 [1990] S.C.J. No. 53, [1990] 1 S.C.R. 1257 (S.C.C.). The point is actually clearer in the dissenting judgment, though is attributed to the majority (at 1297): "... racial considerations may be a factor too. My colleague states that in such circumstances, a *Charter* violation may be made out."

65 [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241 (S.C.C.).

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

67 [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

manner. Adding this requirement would capture abuse of powers for deliberate or unconscious racial profiling, detentions motivated by enmity or annoyance, and even potentially foolish or unwise misuse of discretion around bail, such as in *R. v. K. (C.)*[68] or *R. v. Jutras*,[69] above.

So although unlawful detentions should be arbitrary, so too should be some lawful detentions, when there is improper police action. That is not to say, though, that impropriety should be a requirement. It is clearer that a detention should be seen as arbitrary if, for example, police have not bothered to think about the limits of their power and therefore have acted outside them. However, to insist on such a criterion would complicate the review process. In deciding whether police had reasonable grounds for arrest, for example, it would make it necessary to do something like adopt two standards of review: if the grounds were not objectively reasonable, then the arrest would be unlawful, but they would need to be somehow even further removed from reasonable to also be arbitrary. Similar rules would need to be adopted for the wide variety of contexts in which detentions can occur.

This approach would be needlessly complex. As discussed in the first section, it would be simpler, clearer, and more in accordance with the purpose of section 9 in particular and the Charter in general to incorporate into the definition of arbitrary the simple requirement that the detention be unlawful. Whether a police officer has acted despite the complete absence of any statutory or common law power to do so, or has attempted to use a particular power but not met the specific requirements for doing so, the resulting detention can reasonably be described as arbitrary. Whether the failure to comply with a statutory power is serious or minor could then properly be considered under section 24.

3. The Definition of "Detention"

The Court has articulated a reasonably clear definition of the term "detention". That is the case, however, because many of the very earliest Charter decisions addressed the issue of what kind of police intervention would trigger the right to counsel in section 10(b).[70] The Court subsequently

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[68] [2005] O.J. No. 4853, 36 C.R. (6th) 153 (Ont. C.J.).

[69] [2007] O.J. No. 2396, 49 C.R. (6th) 320 (Ont. S.C.J.).

[70] See, for example, *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.); *R. v. Trask*, [1985] S.C.J. No. 31, [1985] 1 S.C.R. 655, at 657 (S.C.C.); *R. v. Rahn*, [1985] S.C.J. No. 32, [1985] 1 S.C.R. 659 (S.C.C.); and *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C.).

decided that the word "detention" has the same meaning in ss. 9 and 10, and so that section 10(b) jurisprudence can be carried over.[71]

The Court initially considered the meaning of "detention" in *R. v. Therens*, where it noted that a broad definition was appropriate because of the existence of section 1: since limitations on the right could be justified elsewhere, there was no need to build limits into the definition.[72] Shortly afterward the Court restated its conclusions from that case in *R. v. Thomsen*:

> 1. In its use of the word "detention", s. 10 of the *Charter* is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
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> 2. In addition to the case of deprivation of liberty by physical constraint, there is a detention within s. 10 of the *Charter*, when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.
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> 3. The necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply.
>
> 4. Section 10 of the *Charter* applies to a great variety of detentions of varying duration and is not confined to those of such duration as to make the effective use of *habeas corpus* possible.[73]

Generally speaking these definitions, recognizing as they do that there are different ways in which a person could be detained, have proven quite serviceable. The one aspect, however, which has proven less straightforward and has given rise to real difficulty in practice is the concept, first introduced in *R. v. Therens*,[74] of "psychological detention". This is contained in the third part of the definition from *R. v. Thomsen*,[75] "a reasonable belief that one does not have a choice as to whether or not

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71 *R. v. Hufsky*, [1988] S.C.J. No. 30, [1988] 1 S.C.R. 621, at 632 (S.C.C.).

72 [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 639-40 (S.C.C.). Note also *R. v. Mellenthin*, [1992] S.C.J. No. 100, [1992] 3 S.C.R. 615, at 622 (S.C.C.), where the Court observed that the fact that a decision to stop a person is reasonable does not affect whether it is a detention, and is only relevant to the s. 1 analysis.

73 [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at 649 (S.C.C.).

74 [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

75 [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C.).

to comply". In practice this has been a difficult test to apply, and there would be much benefit to a more complete discussion and definition. Unfortunately, the Court has passed up several opportunities to provide that clarification.

Psychological detention raises complications because almost by definition it involves situations in which police have acted where they in fact had no power to act. Most typically the issue arises in police questioning situations. For example, the police might ask/tell a person they see passing on the street to step over to the police cruiser for a moment to answer a few queries: the police might perceive the interaction as "asking", the individual as "telling". Similarly, the police might indicate to a suspect in a criminal investigation that they would like to interview him or her. In either case, the individual does not have to comply, but likely does not know that. The question of whether he or she was detained therefore arises not only for section 9 purposes, but also to determine whether the person should have been advised of the right to counsel.

The need for a much fuller elaboration of the factors establishing whether an individual is or is not psychologically detained was apparent almost immediately. In 1988, the same year *R. v. Thomsen*[76] was decided, the Ontario Court of Appeal set out a list of considerations to be taken into account in deciding the issue, in *R. v. Moran*.[77] In the nearly 20 years since then, the Supreme Court has not added anything to that discussion.

The opportunities have existed. In 1993, the Court heard an appeal of the Newfoundland Court of Appeal decision in *R. v. Hawkins*,[78] a case where an accused had been questioned at the police station without being given the right to counsel. The central issue was whether he was, either at the start of the questioning or at some point during it, psychologically detained. The Court of Appeal had considered various decisions of other courts of appeal, discussed a variety of relevant factors which had been listed in them, including the subjective feeling of the individual and the need sometimes to protect individuals from themselves, as well as the changing views of the police officers doing the questioning. Ultimately they proposed the rule that:

> when these suspicions become crystallized, and the investigator's approach to the encounter is changed from a questioning of the individual

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76 [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640 (S.C.C.).

77 [1987] O.J. No. 794, 36 C.C.C. (3d) 225 (Ont. C.A.).

78 [1992] N.J. No. 147, 14 C.R. (4th) 286 (Nfld. C.A.).

> to an examination with an intent to charge him or her with the offence, that a detention must be deemed to have arisen.[79]

On the appeal of this case, the Supreme Court's decision overturning the Court of Appeal judgment consisted entirely of this:

> We are all of the view that on the facts of this case the respondent was not detained. It follows that there could not be any infringement of his rights guaranteed by section 10(b) of the *Canadian Charter of Rights and Freedoms*.[80]

A similar opportunity to clarify psychological detention arose in 2006, as it happens also on an appeal from a Newfoundland Court of Appeal judgment. In *R. v. Chaisson*,[81] a police officer saw a car parked behind a closed service station and decided to investigate it. Seeing movement in the car that appeared to be someone throwing something to the side when he approached, the officer told the two occupants to get out. He then searched and found a bag of marijuana on the car floor. The trial judge found that this amounted to an arbitrary detention, as well as violations of sections 8 and 10(b), and excluded the evidence. On these facts, the question of psychological detention arises: the accused was not required to do as the officer said, but might well have thought he was. The officer's testimony was that he requested the two to get out of the car, but did not order them to do so. Further, the accused did not testify as to his perception of the situation, so there was no evidence of his subjective perception. Nonetheless, the Court of Appeal held that it was reasonable to conclude that the accused felt psychologically detained. On the other hand, it also concluded that the detention was not arbitrary since the officer was empowered to act by the decision in *R. v. Mann*,[82] and therefore that there was no section 9 violation.

Again the Supreme Court overturned the decision, and again without offering any elaboration on the question of psychological detention. On this aspect of the decision, it simply held:

> We are all of the view that the Court of Appeal erred in concluding as it did. With respect, we are satisfied that the trial judge was entitled,

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79 *R. v. Hawkins*, [1992] N.J. No. 147, 14 C.R. (4th) 286, at 298 (Nfld. C.A.).

80 *R. v. Hawkins*, [1993] S.C.J. No. 50, [1993] 2 S.C.R. 157, at 157 (S.C.C.).

81 [2005] N.J. No. 277, 2005 NLCA 55 (N.L.C.A.).

82 [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

> on the facts as he found them, to conclude that the appellant's rights under ss. 8, 9 and 10(b) of the *Charter* had been violated.[83]

As a result, the leading case on psychological detention seems still to be the 1988 Ontario Court of Appeal decision in *R. v. Moran*.[84] Perhaps the Supreme Court has felt no need to add to the discussion because *Moran* got it right. If that is the case, though, it would be a simple enough matter to say so. If not, then a proper section 9 jurisprudence requires elaborating what the correct test for psychological detention really is.

III. THE SECOND 25 YEARS — DOES *CLAYTON* CHANGE THINGS?

The Court's most recent decision with regard to section 9 is *R. v. Clayton*,[85] handed down in July 2007. One might ask whether *Clayton* has said anything to change the law on equating "unlawful" with "arbitrary" and on the definitions of "arbitrary" and "detention". The answers to those specific questions are "possibly", "no", and "no". The more important general question is whether *Clayton* has changed anything with regard to the claim that we really have no section 9 jurisprudence. The answer there is that post-*Clayton* we still have no section 9 jurisprudence, but that statement is now true in a new and unfortunate fashion.

R. v. Clayton[86] concerned two accused stopped at a police roadblock set up in response to a report of men with guns in a parking lot, and describing particular vehicles. The police stopped all vehicles leaving the parking lot whether they matched the vehicle descriptions or not: Clayton and Farmer, the occupants of one car, were both found to have handguns. A central issue was whether there was a violation of the accuseds' section 9 rights.

There was no dispute that the two accused were detained, and so the decision offers nothing new on that point. There is also no discussion of the definition of "arbitrary", except to the extent that that issue is related to the question of equating "unlawful" and "arbitrary". That particular equation, as noted above, is one which the Court has neither rejected nor accepted in previous case law. In *R. v. Clayton*, however, in a throwaway line offered as though the point had been long settled, the Court states:

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83 *R. v. Chaisson*, [2006] S.C.J. No. 11, 2006 SCC 11, at para. 7 (S.C.C.).

84 [1987] O.J. No. 794, 36 C.C.C. (3d) 225 (Ont. C.A.).

85 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

86 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

> If the police conduct in detaining and searching Clayton and Farmer amounted to a lawful exercise of their common law powers, there was no violation of their *Charter* rights. *If, on the other hand, the conduct fell outside the scope of these powers, it represented an infringement of the right under the Charter not to be arbitrarily detained* or subjected to an unreasonable search or seizure. (emphasis added).[87]

In this passage the Court does not merely repeat the long-established point that a lawful detention is not arbitrary. It also adopts the complementary point that an unlawful detention *is* arbitrary. Thus, the Court here explicitly articulates both halves of the "unlawful = arbitrary" equation. Indeed, it has done this by coupling the analytical framework for section 9 to that of section 8.

That is precisely the approach which I have argued the Court ought to have taken before, and so of course it is encouraging to see it adopted. The way in which it has been done is very casual, however, and the point is not actually essential to the result reached in the case, so it will be important to see the point picked up and applied in subsequent cases.

In fact, the Court has actually done more than just equate "unlawful" and "arbitrary": it also explicitly articulates the principle that for a lawful detention the law itself must be reasonable. It held:

> The statement that a detention which is lawful is not arbitrary should not be understood as exempting the authorizing law, whether it is common law or statutory, from *Charter* scrutiny. Previous decisions of this Court are clear that where a detention by police is authorized by law, the law authorizing detention is also subject to *Charter* scrutiny ...[88]

Once again this adopts the approach to section 9 which I have suggested should be adopted. This particular point, however, raises the way in which *R. v. Clayton* in fact undermines the notion of a section 9 jurisprudence. While saying the right thing on this point, the majority does the wrong thing, and adopts an approach which turns Charter analysis on its head.

The objection I wish to make to the majority's approach in *R. v. Clayton*[89] is very similar to that made by the minority decision in the case: in essence, that the analysis of the Charter issue is not a Charter analysis at all. The effect is therefore to leave us still without a section 9 jurisprudence, because the issues have been taken out of the Charter

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87 *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 19 (S.C.C.).

88 *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 21 (S.C.C.).

89 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

realm. I will briefly review the minority and majority's approaches to the case, but then turn to relate the majority's approach more specifically to past section 9 cases, to show how dramatically matters have changed.

As noted, *R. v. Clayton*[90] concerned whether in stopping the accused at the roadblock despite the fact that their vehicle did not match any description given, the police violated section 9. The minority judges held that the proper method of analysis was first to ask whether the police acted lawfully in stopping the accused: in particular, whether there was a common law power permitting them to do so. The second question was whether that common law power resulted in an arbitrary detention. If so, the next step was to ask whether that law was justified under section 1. The minority judges also noted that in some cases it would be necessary to ask whether the power was exercised reasonably in the totality of the circumstances. All of this is entirely in accord with the traditional approach to Charter analysis, in some cases (for example the fourth step) bringing the approach to section 9 more in line with that taken to other sections.

Applying that approach to the case, the dissent concluded that no previously existing common law power (such as those in *R. v. Dedman*[91] or *R. v. Mann*[92]) authorized the stop but that (using the *Waterfield* test[93]) a new common law power to set up a roadblock of all vehicles in response to a report of ongoing serious firearm offences should be created. As a result the detention was authorized by law. That law would nonetheless create an arbitrary detention, since it would permit stops in the absence of individualized suspicion. However, that section 9 violation could be saved under section 1, and so the law did not ultimately violate the Charter. Since the manner in which the legal power was used in the case was reasonable, there was no Charter violation.

The majority, really, do none of these things. As noted, they state the rule that laws authorizing detentions are subject to Charter scrutiny. However, on the basis that the common law should be developed in a manner consistent with the Charter, they immediately replace the question of whether the accuseds' section 9 rights were violated with the question of whether the *Waterfield* test authorized the actions of the police. That is,

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90 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

91 [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.).

92 [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

93 *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.).

the analysis ceases to be one about individual rights and becomes one about police powers.

Thus, the majority approach does explicitly recognize a point which has been implicit in much previous section 9 case law: that the law must be reasonable. Having recognized the point, though, the majority turns the reasonableness of the law purely into a question about the ancillary powers doctrine. This is the contrary of a section 9 Charter jurisprudence. The point of section 9 is to protect individuals from unreasonable interference by the state, and particularly to protect against the expansion of state power. In contrast, the point of the *Waterfield*[94] test is exactly to *expand* state power. Thus the majority's approach has the opposite goal to that which a section 9 analysis should have. Where the question should be "what protection do individuals need from state power?" the majority instead asks "what powers does the state need?" One can hardly call this approach a section 9 jurisprudence.

Indeed, the decision has the effect of expanding police powers dramatically. The *Waterfield*[95] test depends on two criteria: that the police were acting in the general course of their duties, and that the actions they took were not an unjustifiable use of powers associated with the duty. The first criterion is rarely in issue, and so it is the second which really settles the issue. In *R. v. Clayton* the majority effectively reduce that question to whether in the totality of the circumstances "the detention of a particular individual is 'reasonably necessary'".[96] But to say that the police can detain an individual whenever that is reasonably necessary is to make that ability far more frequently available to police.

One might suggest that the majority's approach is still doing the same thing as section 9 intends: both approaches are meant to find the proper balance between individual rights and the needs of the state. However, there is a very real difference depending on what one regards as the norm and what is carved out from the norm. Recall that *R. v. Mann* restated the fundamental principle that "the police ... may act only to the extent that they are empowered to do so by law."[97] That amounts to saying that the norm is for the police to be unable to interfere with individual liberty, no matter how reasonable it might be to do so, unless they have been

94 *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.).

95 *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.).

96 [2007] S.C.J. No. 32, 2007 SCC 32, at para. 30 (S.C.C.).

97 [2004] S.C.J. No. 49, 2004 SCC 52, at para. 15 (S.C.C.).

given a specific power. The approach in *R. v. Clayton*,[98] on the other hand, amounts to saying that the police have the power to do anything which is reasonable. In that event, the norm is that police are empowered to act, with an exception for cases where that can be shown to be unreasonable. That approach might pay lip service to the fundamental principle of limited police power, but contradicts its spirit.

There is another way to look at this point, which ties it more closely to previous section 9 case law. In *R. v. Dedman*,[99] the Court below had drawn a distinction between police powers and legal liberties. In signalling the accused to pull over for a vehicle stop the officer was not, the Court of Appeal had held, exercising a power. However, there was no criminal or tort law *preventing* the officer from signalling the accused to stop, and so he had the legal liberty to do so. In the circumstances that had been held sufficient. The Supreme Court rejected this view. They held that reliance on a legal liberty was not an appropriate approach. Rather, "[p]olice officers ... only act lawfully if they act in the exercise of authority which is either conferred by statute or derived as a matter of common law from their duties."[100]

On the one hand, the majority's approach is consistent with the letter of this principle, since on the approach in *R. v. Clayton*[101] the police become authorized at common law to detain. However, the approach is inconsistent with the spirit of *R. v. Dedman*.[102] To say that police are authorized at common law to detain when that is reasonably necessary is virtually to say that they can detain so long as no law prevents them from doing so: most exercises of legal liberties will be reasonable. In its effect *Clayton* therefore comes very close to saying that as long as police act in accordance with their legal liberties then they are empowered to act: that is inconsistent with *Dedman*. Essentially every reasonable detention is a police power on the *Clayton* approach.

Further, adopting this point goes some considerable distance toward undermining having equated "unlawful" with "arbitrary" earlier in the decision. A major benefit of making that equation is to simplify the task of deciding whether or not a detention is arbitrary, since it should be relatively simple to determine whether it was made unlawfully. But on

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98 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

99 [1981] O.J. No. 2993, 23 C.R. (3d) 228 (Ont. C.A.).

100 [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2, at 28 (S.C.C.).

101 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

102 [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.).

the *R. v. Clayton*[103] approach it will become more difficult to determine whether a detention was unlawful. The absence of a statutory power will certainly not settle the point, because if the detention is found to be reasonable then it will likely turn out to have been lawful after all. However it will not always be obvious beforehand — and certainly not at the time of the interaction between the police and the individual — whether the detention will later be seen as reasonable. In that event, the scope of section 9 is actually made less clear, not more clear, by the decision.

Similarly, it was argued above that a benefit of equating "unlawful" and "arbitrary" was that it better reflected the fundamental principle, found in *R. v. Mann*[104] and elsewhere, that individuals are free to do anything not forbidden while police are only permitted to do those things they are specifically empowered to do. That is, there will be some situations where an individual clearly has a Charter right not to be arbitrarily detained, and other situations where police clearly have the power to detain an individual. Falling in between those clear situations will be a large grey area, where an individual's behaviour will simply fall into the "not forbidden" category, rather than being the exercise of a guaranteed right. In those cases it will be less clear whether police action which is not specifically authorized by law will constitute an arbitrary detention. To say that unlawful — *i.e.*, not in accordance with a specific power granted to the police — actions are arbitrary is to start the analysis on the assumption that there is a *prima facie* section 9 violation. This would then allow the grey area to be dealt with by balancing the various relevant factors, which will be relevant to later parts of the Charter analysis such as in section 1 or section 24.

On the other hand, the approach in *R. v. Clayton*[105] of asking what powers police need rather than what freedoms individuals need leads to the opposite result. On the reasoning in *Clayton*, actions will be lawful if they are permitted at common law, and the common law powers of the police will include actions which are reasonably necessary. In effect this eliminates most of the grey area, assimilating it into the police powers category. Accordingly, there would be no *prima facie* Charter violation and therefore no opportunity to balance the relevant factors at later stages of the analysis.

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103 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).
104 [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).
105 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

To conclude on *R. v. Clayton*,[106] two things are worth noting. The first is a certain irony. Neither *R. v. Dedman*[107] nor *R. v. Mann*[108] were hailed as strong "civil liberty" cases when they were handed down: rather, both were expansions of police powers. That one can criticize *Clayton* for failing to live up to the standards of restraint on state power articulated in those decisions, therefore, is a truly worrying prospect.

The other concluding point relates to a matter which is taken for granted by the majority and explicitly stated by the minority, but which, it must be said, is not correct. The whole discussion around the legality of the police action focuses on whether there is a common law power in this case, because the "absence of Parliamentary action"[109] makes that approach necessary. In fact, though, Parliament has legislated in ways directly relevant to this situation.

A police roadblock is an investigative procedure which constitutes a search, and an unreasonable one if not authorized. No provision in the *Criminal Code*[110] specifically authorizes roadblocks — which means that the police here could have obtained a general warrant under section 487.01 authorizing them to act as they did. Further, under section 487.01(7) they could have obtained that general warrant by telephone, using the telewarrant provisions. Parliament in fact has acted in a way to cover precisely this situation, and indeed virtually all situations, since section 487.01 allows a warrant to "do any thing".

The police might claim that there was not time in this situation even to obtain a telewarrant, since immediate action was necessary. In that regard it is worth noting Parliament's action in creating section 487.11 of the *Criminal Code*,[111] allowing some powers to be exercised in exigent circumstances where grounds for a warrant exist but it is impracticable to obtain one. Note, though, that although Parliament made that provision available for search warrants in section 487, it did not make them available for general warrants in section 487.01. On the other hand, this "exigent circumstances" exception, which was added to the Code after the general warrant provisions, does apply to section 492.1 tracking warrants, which were added to the Code at the same time as general warrants. It seems hard to escape the conclusion that Parliament deliberately did not make

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106 [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

107 [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.).

108 [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.).

109 *R. v. Clayton*, [2007] S.C.J. No. 32, 2007 SCC 32, at para. 76 (S.C.C.).

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

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

the powers available under general warrants available without judicial scrutiny in exigent circumstances. That deliberate decision is not an "absence of Parliamentary action": it is a conscious policy choice. Further, it is a conscious policy choice ignored and contradicted by creating a common law power to exactly the opposite effect.

Of course, one might analyze sections 487.01, 487.1, 487.11 and others and reach a different conclusion than that offered here. But surely if a new common law power is to be created on the basis of Parliamentary inaction, a full justification must look at the variety of relevant ways Parliament has in fact acted.

IV. CONCLUSION

The right not to be arbitrarily detained has been the neglected aspect of the legal rights set out in the Charter. There is no reason in principle that this should be so: the nature of many coercive state powers is precisely to detain, and therefore knowing the limits on such powers would be a valuable thing. Nonetheless, the first 25 years of Charter case law failed to establish a useful method of analysis for assessing section 9 claims.

Such a long period of neglect seems undesirable, and of course it is so. The most recent developments, however, suggest that benign neglect can be preferable to harmful attention. To neglect section 9 was simply not to develop the limits on state power that could have been developed. To continue in the approach to section 9 that *R. v. Clayton*[112] adopts, however, would actually be to expand state power.

It is worth recalling the words of Dickson J. (as he then was) speaking for a unanimous Supreme Court in the early days of Charter jurisprudence:

> I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.[113]

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[112] [2007] S.C.J. No. 32, 2007 SCC 32 (S.C.C.).

[113] *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc*., [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 156 (S.C.C.).

Failing to have a well-articulated approach to deciding whether or not the detention of an individual was arbitrary is unfortunate. On balance, however, that was preferable to an approach that turns the Charter on its head and makes it a tool for the limitation, not the protection, of individual rights.