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“Detention” under the Charter after
R. v. Grant and R. v. Suberu

Steven Penney* and James Stribopoulos**

I. INTRODUCTION

In R. v. Grant1 and R. v. Suberu,2 the Supreme Court of Canada revisited the relationship between police detention powers and the Charter.3 In Grant it updated the test for deciding whether a “detention” has arisen for Charter purposes. This question is critical for two reasons: first, “detention” is the trigger for the constitutional guarantee forbidding arbitrary detention (section 9); and second, it is one of the two triggers (the other being “arrest”) of the right to be informed of the reasons for detention (section 10(a)) and the right to counsel (section 10(b)).5 In Suberu the Court held (in contrast to some lower courts) that absent exigent safety concerns, the section 10(b) caution must be given immediately to persons subject to the common law power of investigative detention.

Grant and Suberu have their doctrinal virtues. Grant’s multi-factor approach for assessing whether or not there has been a psychological detention is flexible and nuanced. It fails, however, to give police sufficient guidance on the scope of their authority. In our view, this uncertainty is likely to have three unfortunate effects. First, it will cause too many errors, that is, cases where police incorrectly decide (in relation to what the courts will or would have found) that a detention has or has not arisen. Second, in the face of this uncertainty, police will more often than not assume that a detention has not occurred and (and when they are

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1 Faculty of Law, University of Alberta.
2 Osgoode Hall Law School York University.
4 Section 9 of the Charter states: “Everyone has the right not to be arbitrarily detained or imprisoned.”
5 Section 10(a) and (b) of the Charter states: “Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; [and] (b) to retain and instruct counsel without delay and to be informed of that right ...”.
wrong) thereby deprive those detained of their rights under sections 9 and 10 of the Charter. Finally, in applying Grant, lower courts will too often take an overly deferential approach toward police decision-making.

Suberu’s virtue, in contrast, is its simplicity: police now know that they must issue the section 10(b) caution immediately upon any type of detention, including investigative detention. Of course, if it is often uncertain whether a detention has arisen, the benefit of this simplicity will be muted. More troubling, the Court’s failure to carve out an exception to the section 10(b) caution requirement for investigative detention will likely have three perverse effects: increasing the length and intrusiveness of detentions, diminishing law enforcement safety and effectiveness, and causing courts to avoid finding that a detention has arisen despite substantial intrusions on individual liberty.

In what follows we first review the jurisprudential history leading to Grant’s holding on detention. Next we consider this holding and its application to the facts in Grant and Suberu. We then outline our thesis regarding Grant’s flaws and suggest how the approach to deciding whether there has been a psychological “detention” should be further reformed. Last, we trace the history of the relationship between the common law power to detain for investigative purposes and section 10 of the Charter, and flesh out the case for justifying an override of section 10(b) during such detentions.

II. THE MEANING OF DETENTION UNDER THE CHARTER

1. History and Context

Absent detention, police enjoy considerable freedom in questioning suspects.6 Questioning may produce evidence of wrongdoing, because the answers are either incriminating or reveal the location of physical evidence. If the detention threshold is crossed, however, the constitutional implications are significant. First, if police lack the requisite legal grounds to detain,7 section 9 of the Charter is violated.8 Second, as

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7 In order to lawfully detain, a police officer must have reasonable grounds to suspect a clear nexus between the individual to be detained and a recently committing or still unfolding criminal offence. See R. v. Mann, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59, at paras. 34, 45 (S.C.C.) [hereinafter “Mann”].
mentioned, detention also triggers informational duties under section 10 of the Charter. This information may alert suspects to the potential jeopardy faced and cause them to stop talking. As a result, until they are ready to effect an arrest, the police will often want to avoid a detention. It is the courts, however, not the police, who ultimately decide whether and when the detention threshold was crossed in a given case.

It was a case involving section 10(b), the right to counsel, which first raised the meaning of detention before the Supreme Court. In R. v. Therens, police subjected a motorist to a breath demand under the Criminal Code. He was taken back to the police station, took and failed a breathalyzer test, and was arrested. At the time of the demand, police did not apprise him of his right to counsel, which section 10(b) requires on “detention”.

The issue before the Court in Therens was whether the motorist was “detained” following the breath demand but before his arrest. The Court

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9 See Casey Hill, “Investigative Detention: A Search / Seizure by Any Other Name?” (2008) 40 S.C.L.R. (2d) 179 [hereinafter “Hill”], who notes that there is a situational incentive for the police to provide the suspect less, rather than more, information about the transaction under investigation as the investigator’s questions attempt to draw out information about the suspect’s recent whereabouts, association with others, route, etc., committing the detainee to an account for evaluation against the officer’s possessed and incoming information.

Id., at 204.


had previously held\textsuperscript{12} that breath demands do not trigger a detention under section 2(c)(ii) of the \textit{Canadian Bill of Rights}, which provides the “right to retain and instruct counsel without delay” to persons “arrested or detained”.\textsuperscript{13} The fact that it is an offence to refuse to comply did not mean that a person subject to such a demand was legally detained.\textsuperscript{14} Detention, under the \textit{Canadian Bill of Rights}, was limited to situations of “actual physical restraint”.\textsuperscript{15}

In \textit{Therens}, Le Dain J. concluded that the meaning of detention under the \textit{Canadian Bill of Rights} was not controlling under the Charter. Rather, he reasoned that detention under the Charter should be read more broadly.\textsuperscript{16} In addition to physical constraint, he asserted, a detention also arises when police assume “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”.\textsuperscript{17} Given the legal duty on the motorist to accompany the police officer for the purposes of administering a breath test, this would have been enough to dispose of the appeal. But Le Dain J. went a step further, holding that a detention may sometimes arise even when there is neither physical restraint nor “criminal liability for failure to comply” with a legal duty.\textsuperscript{18} He explained:


\textsuperscript{13} \textit{Canadian Bill of Rights}, S.C. 1960, c. 44, s. 2(c)(ii) (emphasis added).

\textsuperscript{14} Chromiak, supra, note 12, at 478.

\textsuperscript{15} Id.

\textsuperscript{16} In so concluding, he emphasized “that the \textit{Charter} must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection”. \textit{Therens}, supra, note 10, at 638, Le Dain J. dissenting (on other grounds). He also went on to explain two further reasons for rejecting the narrow definition from \textit{Chromiak}. First, he acknowledged that the judiciary had felt rather restrained in its use of the \textit{Canadian Bill of Rights} given that it was simply legislation and therefore lacked constitutional status. \textit{Id}. In addition, given that the \textit{Canadian Bill of Rights} did not include any equivalent to s. 1 of the Charter, a narrow interpretation of “detention” was the only means by which the Court in \textit{Chromiak} could place reasonable limits on the right to counsel. \textit{Id.}, at 639. Of course, s. 1 of the Charter now permits the Supreme Court to balance individual and state interests more transparently.


\textsuperscript{17} Therens, \textit{id.}, at 644.
In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not. … Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.19

Not long after Therens was decided, its definition of “detention” for section 10 Charter purposes was transplanted to section 9. The Supreme Court concluded that there is “no reason in principle why the general approach to the meaning of detention reflected in those cases should not be applied to the meaning of ‘detained’ in s. 9”.20

Therens thus had the effect of recognizing three categories of detention, now pertinent for both sections 9 and 10 of the Charter: (i) psychological restraint (with legal compulsion); (ii) psychological restraint (without legal compulsion); and (iii) physical restraint.21

The second of these categories — the one addressed in Grant — has proved to be the trickiest. On its face, the test is paradoxical: it deems people to be “detained” for Charter purposes even though their liberty is not limited by law. Despite their (reasonable) belief that they must comply with police requests, they actually have no legal obligation to do so. (We thus sometimes refer to this category as “non-legal” psychological detention.) As the Court explained in Grant, “an individual confronted by state authority ordinarily has the option to choose simply to walk away”.22

How has this situation arisen? We can imagine a legal regime requiring police to tell people whether they are legally obliged to cooperate. Before stopping and questioning, for example, police would have to tell

19 Id. This is in keeping with the Supreme Court’s eventual recognition in Grant that the purpose of s. 9 is both to protect “physical liberty” as well as “mental liberty”. See Grant, supra, note 1, at para. 20.


21 See Therens, supra, note 10, at 641-44, Le Dain J., dissenting; Thomsen, supra, note 17, at 648-49. In Grant the Court specifically reaffirmed these three categories of detention first recognized in Therens. See Grant, supra, note 1, at para. 30.

22 Grant, id., at para. 21.
suspects that they are either: (i) being detained under law for a particular purpose (with an explanation as to what they are legally required to do and what they are free to refuse to do); or (ii) not being detained and free to leave or remain silent.  

Neither Parliament nor the courts, however, have seen fit to impose such a regime. Instead, they have sanctioned a state of affairs in which police are permitted (as a general rule) to approach people and ask them questions without any particularized suspicion and without any need to inform them of their legal status or rights. As the Supreme Court explained in *Grant*:

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

Given this legal milieu, it is not surprising that the Supreme Court of Canada has recognized that people often assume that they must comply with police requests. Nor is it surprising, given the imbalance of power and potential for abuse inherent in such encounters, that the Court has found that a “detention” may occur for Charter purposes even in circumstances where an individual has no legal obligation to remain in the company of police and would be legally justified in simply walking away.

When it comes to psychological detention, the challenge is demarcating the line between consensual and coerced encounters. This is no easy task. Encounters between individuals and the police are rich in their diversity. Most such experiences are relatively benign, usually involving nothing more than conversation. Such exchanges can become more in-

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24 The *Grant* Court did counsel police that if they are “uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go”. *Grant*, supra, note 1, at para. 32.

25 *Grant*, id., at para. 38. See also *Subera*, supra, note 2, at para. 3.

26 *Therens*, supra, note 10.

27 See *Mann*, supra, note 7, at para. 19 (“the law has not yet reached a point that a compulsion to comply will be inferred whenever a police officer requests information, for that would mean police could never ask questions”). See also *R. v. Grafe*, [1987] O.J. No. 796, 60 C.R. (3d) 242 (Ont. C.A.); *United States of America v. Alfaro*, [1992] J.Q. no 831, 75 C.C.C. (3d) 211, at 236 (Que.
vasive, however, as consent and conversation shade over to coercion and interrogation. As noted, for non-legal psychological detention, the turning point is the moment when the suspect submits to police authority and reasonably believes that the choice to do otherwise does not exist. 28

Unfortunately, Therens failed to provide any concrete guidance to assist lower courts in distinguishing consensual from coerced encounters. Without it, lower courts, almost invariably seeing only cases involving factually guilty claimants, 29 have sometimes refrained from labelling ambiguously coercive encounters as detentions. 30

2. The Grant Standard for Psychological Detention without Legal Compulsion

In Grant, the Supreme Court of Canada expressly reaffirmed Therens’ definition of detention, including the category of psychological restraint without legal compulsion. 31 Under Grant, the ultimate question remains “whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand”. 32 But recognizing that this form of detention had “proven difficult to define consistently”, 33 the Court added a considerable measure of gloss. In so doing, however, it subtly narrowed the definition’s scope. Emphasizing a point absent from Therens, the Court stated that “not every trivial or insignificant interference with liberty attracts Charter scrutiny”; rather, only the person “whose liberty is meaningfully constrained has genuine need of the additional rights accorded by the Charter to people in that situation”. 34 The coupling of


28 Therens, supra, note 10, at 644.
29 See Stribopoulos, “The Forgotten Right”, supra, note 8, at 237-39 (discussing selection bias ensuing from the fact that courts are presented only with encounters where evidence is obtained, placing pressure to uphold police actions to ensure conviction of the factually guilty).
30 Id., at 239-45 (discussing this trend, especially in the Ontario Court of Appeal). See e.g., R. v. Lawrence, [1990] O.J. No. 1648, 59 C.C.C. (3d) 55 (Ont. C.A.), where a police officer, investigating a reported break-in, drove his police cruiser onto the sidewalk to block Ms. Lawrence from proceeding further on her bicycle. She was questioned for 25 minutes regarding where she lived. The officer disbelieved her and asked to look in her backpack; she complied, revealing evidence that implicated her in a break-in. She was then placed in the rear of the cruiser. The Court found that she was only detained after being placed in the police cruiser.
31 Grant, supra, note 1, at paras. 28-32.
32 Id., at para. 31.
33 Id.
34 Id., at para. 26 (emphasis added). The Court quoted here with approval from Mann, supra, note 7, where Iacobucci J. noted (at para. 26) that
“detention” with “imprisonment” in section 9, the Court explained, suggests that detention arises “when the deprivation of liberty may have legal consequences”. 35

The Court in Grant also stressed that the Therens test is objective, meaning that a police officer’s subjective intentions are not relevant in deciding if there was a detention. 36 The suspect’s “particular circumstances and perceptions,” however, may be relevant “in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive”. 37 The claimant’s testimony will usually be the best source of such evidence, the Court noted; but since the test is objective a claimant’s failure to testify is not fatal to finding a detention. 38

With this backdrop in place, the Court proceeded to identify a host of factors to consider when deciding whether a non-legal psychological detention occurred. First, it emphasized the importance of determining the police’s purpose in approaching or questioning the claimant. If this purpose was non-adversarial, a finding of detention is unlikely. For example, the Court stated that no detention would arise where police respond to an emergency call, even if they assume control over the situation or interfere with a person’s freedom of movement. 39 Similarly, there is no detention when police approach bystanders in the wake of an accident or crime to obtain preliminary information for their investigation. 40 Deprivations of liberty that result from such encounters are not “significant enough to attract Charter scrutiny because they do not attract legal consequences for the concerned individuals”. 41

According to the Court, neighbourhood policing initiatives (where police focus on meeting community needs and maintaining order) fall in...
the non-adversarial category. It rightly acknowledged, however, that this sort of proactive policing can “subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice”.  

The Court contrasted these kinds of non-adversarial encounters with situations where police have a “[f]ocussed suspicion”. While focused suspicion does not in itself give rise to a detention, “police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions”.  

The second factor the Court identified was the duration of the encounter. The shorter the interaction, the less likely it is to be labelled a detention. The longer the encounter, in contrast, the more likely a reasonable person would feel unable to walk away. 

Third, the Court noted that physical contact between the police officer and the individual affected is a relevant consideration. But as with other variables, its significance hinges on context. The Court gave the example of a police officer “placing” his or her hand on someone's arm: 

If sustained, it might well lead a reasonable person to conclude that his or her freedom to choose whether to cooperate or not has been removed. On the other hand, a fleeting touch may not, depending on the circumstances, give rise to a reasonable conclusion that one’s liberty has been curtailed.

Finally, the Court recognized that in some situations, “a single forceful act or word may be enough to cause a reasonable person to conclude that his or her right to choose how to respond has been removed”. No 

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42  Id., at para. 40. This observation by the Court reveals a perceptive appreciation of some of the realities of community policing. See Stephen M. Mastrofski, “Community Policing As Reform: A Cautionary Tale” [hereinafter “Mastrofski”] in Jack R. Green & Stephen D. Mastrofski, eds., Community Policing: Rhetoric Or Reality (New York: Praeger, 1988) 46, at 53 (noting that “aggressive order maintenance strategies” are often part and parcel 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”).

43  Grant, id., at para. 41

44  Id.

45  Id., at para. 42.

46  Id. As we discuss infra, note 145, anything more than a fleeting touch would likely result in detention by means of physical restraint.

47  Id.
reasonable person, for example, would feel free to walk away after a police officer points at him or her and issues an authoritative command to “get out of your car”!48

In conclusion, the Court in Grant set out the following useful summary:

… In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual’s circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:

(a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.

(b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

(c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.49

In considering these factors, trial judges must keep in mind “all the circumstances of the case”50 and engage in “a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements”.51 But while the trial judge’s findings of fact are owed deference on appeal, the “application of the law to the facts is a question of law”.52 Given the number of factors that a trial judge must take into account, the potential for reviewable error seems considerable.

3. Applying the Grant Factors in R. v. Grant and R. v. Suberu

Applying the factors discussed above, the Supreme Court concluded that there was a detention in Grant. Mr. Grant, a young black man, was

49 Grant, supra, note 1, at para. 44.
50 Id., at para. 43.
51 Id., at para. 32.
52 Id., at para. 43. See also id., at para. 32.
walking on the sidewalk of a Toronto street at midday when, according to two plainclothes police officers, his manner and clothing attracted their attention. The plainclothes officers requested that a nearby uniformed officer “have a chat” with Mr. Grant. The uniformed officer approached Mr. Grant head-on and stopped directly in his path. The officer asked Mr. Grant “what was going on”, and requested his name and address. In response, Mr. Grant produced a provincial health card. At one point, Mr. Grant, behaving nervously, adjusted his jacket, prompting the officer to tell him to “keep his hands in front of him”. By this time, the two plainclothes officers had also approached, flashed their badges and stood behind the uniformed officer. Pointed questions followed, with Mr. Grant being asked if he was carrying anything that he “shouldn’t have”, an exchange that culminated in Mr. Grant admitting that he was in possession of marijuana and a firearm and being arrested.

The preliminary approach and general questioning of Mr. Grant was not enough to trigger a detention, the Court found, because “a reasonable person would not have concluded he or she was being deprived of the right to choose how to act”. But a detention arose, the Court ruled, when the uniformed officer told him to “keep his hands in front of him”. While in some cases such a statement might be viewed merely as a “precautionary directive”, here the encounter was “inherently intimidating”. This conclusion was buttressed, the Court reasoned, by the arrival of two additional police officers who flashed their badges before taking up “tactical positions”; the fact that Mr. Grant was being singled out; the posing of probing, interrogative questions; and Mr. Grant’s youth and inexperience.

Contrast this with the facts in Suberu. There, a police officer attended at a liquor (“LCBO”) store in response to reports that two suspects were attempting to use a stolen credit card. On entering the store, the officer saw another police officer speaking with a store employee and another man. At this point, Mr. Suberu walked past the officer towards the exit and told him, “he did this, not me, so I guess I can go.” The officer followed Mr. Suberu outside and said, “Wait a minute. I need to talk to you before you go anywhere.” While Mr. Suberu was seated in the driver’s seat of a van, but turned outwards, facing the officer, there was a brief exchange during which the officer asked about Mr. Suberu’s

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53 Id., at para. 47.
54 Id., at paras. 49-52.
55 Id., at para. 48.
56 Id., at para. 50.
57 Suberu, supra, note 2.
relationship to the man inside the store, where the two men had come from, and who owned the van. As they spoke, the officer received further information over his radio linking the van and Mr. Suberu to the use of a stolen credit card at other locations earlier in the day (a Wal-Mart and an LCBO store). The officer then asked for Mr. Suberu’s identification and vehicle ownership. As he did so, he saw shopping bags inside the van from Wal-Mart and the LCBO and arrested Mr. Suberu.

Applying the *Grant* factors, the Supreme Court upheld the trial judge’s conclusion that Mr. Suberu was *not* detained before his arrest. 58 The Court began by noting that when police believe a crime has recently been committed, they “may engage in preliminary questioning of bystanders without giving rise to a detention under ss. 9 and 10 of the *Charte*r”. 59 While the “line between general questioning and focused interrogation amounting to detention may be difficult to draw in particular cases”, the Court concluded that the trial judge’s “findings on the facts, supported by the evidence” lead to the conclusion that the officer’s questions were merely “exploratory” and he had “not yet zeroed in on the individual as someone whose movements must be controlled”. 60

The Court also considered the words used by the officer (“wait a minute, I need to talk to you before you go anywhere”). On their face, the Court observed, these words were equivocal. On the one hand, they might mean “I need to talk to you to get more information”; on the other, they could be interpreted “as an order not to leave, suggestive of putting Mr. Suberu under police control”. 61 The Court preferred the former interpretation, emphasizing that the officer made no move to obstruct Mr. Suberu’s movements, Mr. Suberu remained seated in the van while he spoke with the officer, and the encounter was “very brief”. 62

The trial judge’s conclusion, the Court concluded, was also supported by the lack of evidence regarding Mr. Suberu’s “personal circumstances, feelings or knowledge”. 63 Because he did not testify, “there was no evidence as to whether he subjectively believed that he could not leave”. 64 Without such evidence, the Court was left with the evidence of the police officer who testified that he was merely “exploring

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58 *Id.*, at para. 35.
59 *Id.*, at para. 28.
60 *Id.*, at paras. 29-31.
61 *Id.*, at para. 33.
62 *Id.*, at para. 33.
63 *Id.*, at para. 33.
64 *Id.*
the situation”, Mr. Suberu never told him he did not wish to speak, and their conversation was not “strained”. 65

The Court thus dismissed the claim that Mr. Suberu’s section 10(b) Charter rights were violated by the officer, who had proceeded to question him without apprising him of his right to counsel.

4. Problems with the Grant Test

While appellate courts undoubtedly appreciate their nuance, the kind of open-ended, multi-factored standards developed in Grant create at least three problems. First, compared to bright-line rules, they give insufficient guidance to police, who must often make snap decisions in quickly unfolding (and sometimes dangerous) circumstances. 66 It is simply unrealistic to expect police to consider a host of situationally variable factors in deciding whether they have crossed the detention threshold. As a consequence, their decisions will frequently be wrong (in relation to what a court will or would have decided ex ante). 67 In some cases, they will incorrectly decide that they have not detained an individual. In many of these cases, these mistakes will cause Charter violations, because police either had no legal authority to detain (thereby violating section 9) or failed to issue the required section 10 cautions. Indeed, as noted above, if police are (wrongly) confident that they have not detained a suspect, they have little reason to comply with section 10 (especially section 10(b)). If the Charter is violated in one of these ways, harm is caused to both detainees and the state. Detainees suffer the liberty and self-incrimination harms that these Charter rights are meant to protect against, and the state suffers from the diminished probability that factually guilty suspects will be convicted (because unconstitutionally obtained evidence may be excluded at trial under section 24(2) of the Charter).

65 Id.
A complete account of the harm to detainees generated by Charter violations of this kind must also acknowledge the phenomenon of discriminatory profiling.\textsuperscript{68} It is now widely recognized that the exercise of police discretion may sometimes be motivated, consciously or subconsciously, by nefarious considerations, like an individual's age, economic circumstances, ethnicity or race.\textsuperscript{69} For example, in recent years a growing body of evidence has emerged strongly suggesting that both Aboriginals\textsuperscript{70} and African Canadians\textsuperscript{71} are stopped by police at disproportionately higher rates than members of other racial groups.\textsuperscript{72}

\textsuperscript{68} See generally R. v. Storrey, [1990] S.C.J. No. 12, [1990] 1 S.C.R. 241, at 251-52 (S.C.C.) (s. 9 of the Charter is violated if an arrest is 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.”). Of course, if a police officer is motivated by some bias that implicates one of the prohibited grounds of discrimination under s. 15(1) of the Charter, then that section would also be violated. See also Brown v. Durham (Regional Municipality) Police Force, [1998] O.J. No. 5274, 131 C.C.C. (3d) 1, at 116-17 (Ont. C.A.) (s. 9 violated by detentions carried out for “improper purposes”, including “purposes which are illegal, purposes which involve the infringement of a person’s constitutional rights and purposes which have nothing to do with the execution of a police officer’s public duty”).

\textsuperscript{69} 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).


\textsuperscript{72} For an excellent summary of the compelling evidence that racial profiling is a reality in Canada, see David M. Tanovich, The Colour of Justice: Policing Race in Canada (Toronto: Irwin, 2006).
Responding to this evidence, two provincial appellate courts have recently acknowledged the existence of racial profiling, which the Ontario Court of Appeal has defined as

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 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.

Of course, in the individual case, establishing that race improperly influenced a police officer’s decision to detain or arrest is no easy task. As a result, successful claims of discriminatory profiling remain extraordinarily rare in criminal proceedings. Nevertheless, the empirical evidence makes plain that the impact of erroneous police decisions that have not triggered a detention will fall disproportionately on visible minorities. In other words, the inherent uncertainty of the *Grant* approach to detention unfortunately tends to make racial profiling more, not less, likely.

The second problem with *Grant*’s open-ended approach is that it will likely be applied in a manner that, on average, undervalues individuals’ Charter-protected interests. As mentioned, police have a strong incentive to avoid warning suspects of their right to counsel. Because the line

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75 In some circumstances police may legitimately rely on an individual’s race in deciding whether to investigate a suspect. See Samuel R. Gross & Debra Livingston, “Racial Profiling Under Attack” (2002) 102 Colum. L. Rev. 1413 (“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”). But see David Tanovich, “Moving Beyond ‘Driving While Black’: Race, Suspect Description and Selection” (2004-2005) 36 Ottawa L. Rev. 315 (cautioning against placing too much weight on generic racial descriptors).

76 See generally David Tanovich, “E-Racing Racial Profiling” (2004) 41 Alta. L. Rev. 905 (chronicling many of the practical obstacles to proving such claims and suggesting ways in which they might be overcome).


78 See Tracey Maclin, “*Terry v. Ohio*’s Fourth Amendment Legacy: Black Men And Police Discretion” (1998) 72 St. John’s L. Rev. 1271, at 1320 (“[h]istory teaches us that when law enforcement personnel are given loosely supervised discretionary powers, police behaviour will reflect biases and prejudices of individual officers”). In *Grant*, only Binnie J. explicitly acknowledged the disproportionate impact of unjustified stops on racial minorities and other marginalized persons: *Grant*, supra, note 1, at paras. 154, 169, Binnie J., concurring.

79 *Hill*, *supra*, note 9.
between detention and non-detention is blurry, and the prospect of evidentiary exclusion distant and uncertain, this incentive will often tempt police to stretch the boundary of non-detention past its breaking point. That risk will be especially great when police are engaged in community policing efforts and their primary concern is the maintenance of order rather than collecting admissible evidence for prosecution.

Finally, in the few cases that do go to trial, judges also have strong incentives to avoid evidentiary exclusion. As discussed above, an inherent selection bias presents mostly factually guilty defendants to the courts. The benefits of evidentiary exclusion (encouraging police compliance with Charter norms, protecting individual liberty against unjustified state interference, and disassociating courts from police malfeasance) are distant, systemic and ephemeral. The cost (the potential acquittal of the factually guilty), in contrast, is immediate, direct and visceral. In this milieu, the flexibility of the Grant factors will most often inure to the benefit of the state. With a reviewing court’s focus dispersed over a long list of relevant considerations, the coercive nature of a dynamic encounter can easily become obscured.

In our view, this is precisely what happened in Suberu, where the Court arguably ignored Grant’s admonition to engage in “a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements”. Recall that the majority interpreted the statement “wait a minute, I need to talk to you before you go any-
where” as a mere request for information. However, as Binnie J. persuasively argued in dissent, viewing that comment in context makes the officer’s meaning plain:

The verbal exchange between Constable Roughley and Mr. Suberu clearly established an unambiguous police order. When Mr. Suberu walked past Constable Roughley, saying, “He did this, not me, so I guess I can go”, and Constable Roughley replied, “Wait a minute. I need to talk to you before you go anywhere”, it was a command to stay put. Constable Roughley’s words were only ambiguous if one ignores the preceding remark from Mr. Suberu. Constable Roughley was replying to Mr. Suberu, who had essentially said, “Can I leave?”, by essentially saying, “No”. It was clear to Mr. Suberu that he was not free to go “anywhere” and any reasonable person in that position would have come to the same conclusion.

The majority’s approach was no doubt motivated by the practical difficulties of implementing the right to counsel incidental to investigation detention. But the Court’s solution to this problem — defining detention so amorphously that it need not capture all situations where reasonable people would believe that they were “not free to go and had to comply with the police direction or demand” — is akin to killing the patient to cure a cold. While it avoids the impracticality of complying with section 10(b) of the Charter, in the process it immunizes a host of highly coercive encounters from scrutiny under section 9. As we discuss below, there are other solutions to the section 10(b) problem that would allow police to engage in brief, preliminary questioning without issuing the section 10(b) caution.

The final problem posed by the Grant factors is that, even if judges do find a detention, the flexibility of the exclusionary discretion under section 24(2) of the Charter (also reformulated by the Court in Grant) provides ample opportunity to excuse police mistakes. Certainly deliberate and negligent Charter violations are likely to result in exclusion. Where police

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84 Suberu, supra, note 2, at paras. 33-34.
85 Id., at para. 56, Binnie J., dissenting. In separate reasons Fish J. also dissented, agreeing with Binnie J. that Mr. Suberu was detained. See Suberu, id., Fish J., dissenting.
86 See Suberu, id., at paras. 47-48, Binnie J. dissenting.
87 Grant, supra, note 1, at para. 31.
88 Id., at para. 75 (“It follows that deliberate police conduct in violation of established Charter standards tends to support exclusion of the evidence.”); R. v. Harrison, [2009] S.C.J. No. 34, [2009] 2 S.C.R. 494, at para. 22 (S.C.C.) (violation considered serious when “departure from Charter standards was major in degree, or where the police knew (or should have known) that their conduct was not Charter-compliant”).
(unintentionally) err in applying indeterminate legal standards, however, courts often decline to exclude under section 24(2). In *Grant*, the Court noted that “the point at which an encounter becomes a detention is not always clear, and is something with which courts have struggled”. Since police were “operating in circumstances of considerable legal uncertainty,” their failure to comply with section 10(b) was “understandable”, tipping the “balance in favour of admission”. Making the rules clearer for police will reduce that uncertainty; police compliance with Charter standards would then become more likely, as would the potential for a remedy in those cases where an individual’s rights are violated.

5. Reform

How might this situation be improved? In short, the courts should interpret and apply *Grant* in a manner that provides as much *ex ante* certainty to police as possible. In that regard, the experience in provincial appellate courts after *Therens* is instructive. Shortly after *Therens* was decided, the Ontario Court of Appeal articulated a test for detention that is similar in many ways to the approach in *Grant*. In *R. v. Moran*, Martin J.A. set out a list of relevant criteria in a case involving an accused interviewed by police at the station-house on two separate occasions during the course of a homicide investigation. The *Moran*
criteria were adopted by most courts of appeal and applied to many different types of police-suspect encounters, including the questioning of pedestrians.

At first glance, the Moran approach appears at least as open-ended and indeterminate as Grant. A close look at the jurisprudence, however, reveals that most often (including in Moran itself) detention turned on the (related) fourth, fifth and sixth factors, namely, the stage of the investigation, the degree of suspicion attaching to the accused and the nature of the questioning.

Before Grant, a detention was usually found when police identified the accused as the likely perpetrator and conducted questioning with a view to inducing self-incriminating statements. When both of these commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;

5. Whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;

6. The nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;

7. The subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.


96 For example, writing for the Manitoba Court of Appeal in H. (C.R.), Steele J. held that police did not detain a pedestrian even though they asked for his identification and checked his name against a computer database. See R. v. H. (C.R.), supra, note 94. See also R. v. B. (L.), id., at para. 67 (request for pedestrian’s identity and running of database check did not trigger detention). Subsequently, Steele J. concluded for the same court in R. v. Dolsynchuck, [2004] M.J. No. 135, 184 C.C.C. (3d) 214, at para. 32 (Man. C.A.) that police did detain the accused when they questioned him in a parking lot after receiving a tip that he had been driving while impaired. Police had more than a mere suspicion that he had committed this offence, indicated that they would have detained him for investigative purposes after they confirmed his identity, and asked him a question ("were you driving?") the answer to which provided proof of an element of the offence. Police had "already decided that a crime had been committed and that the accused was the perpetrator" and their question was designed to obtain "incriminating statements".

97 See, e.g., R. v. Voss, supra, note 94, at 204 ("the police investigation changed from one of trying to determine a cause of death to one of trying to get information from a man who is alleged to
conditions were present, a detention was usually triggered even when suspects were told that they were free to leave or to decline answering questions.98 Conversely, when one of these conditions was not present (such as accusatory questioning), a detention was usually not found even if police had grounds to detain or arrest at the conclusion of questioning.99 It thus appeared that while courts formally applied an open-ended, “totality of the circumstances” approach, like that endorsed in Grant, the results in actual cases were dictated by a (relatively) “bright-line” standard. In all but a few cases, detention was found when (and only when), police attempted to elicit incriminating statements from the likely perpetrator of the offence under investigation.100

To be clear, we do not mean to argue that the Moran criteria, as narrowed and refined in subsequent cases, should be resurrected to replace the various factors identified in Grant. In fact, as we detail below, the controlling considerations that emerged in Moran are under-inclusive because they fail to provide any protection where the police have no offence in mind but are instead engaged in an invasive fishing expedition, as they were in Grant.101 The Moran factors were developed with section
10 of the Charter in mind and are most relevant to formal, “sit down” interviews conducted at the police station or other suitable location. They were not designed to address the section 9 liberty interests implicated by impromptu, “in the field” inquiries of pedestrians, motorists, and the like. We reference Moran’s treatment only to stress that not all factors under a multi-factor approach are deserving of equal emphasis. By focusing on

**Intervention Strategy (“TAVIS”).** TAVIS is a relatively recent initiative of the Toronto Police Service. Its stated purpose (“an intensive, violence reduction and community mobilization strategy intended to reduce crime and increase safety in our neighbourhoods”) is laudable. See Toronto Police Service, TAVIS, available online: <http://www.torontopolice.on.ca/tavis>. In practice, however, it involves large teams of police officers proactively policing “high-crime” neighbourhoods and engaging in aggressive stop and frisk practices. Those stopped are asked to produce identification and routinely searched. Individuals who are in possession of drugs or weapons are arrested, as are those for whom there are outstanding warrants or who happen to be breaching the terms of a bail or probation order. For others, the encounter often only ends after the police have completed a “contact card”, known within the Toronto Police Service as a “208 card”. See Timothy Appleby, “New police strategy designed to blanket high-violence areas”, *The Globe and Mail*, February 13, 2006, A1; Moira Welsh, “Elite Toronto police squad goes looking for trouble”, *Toronto Star* (February 8, 2010) available online: <http://www.thestar.com/specialsections/raceandcrime/article/761310--elite-toronto-police-squad-goes-looking-for-trouble>.

The use of these cards was explained by LaForme J. in *R. v. Ferdinand*, [2004] O.J. No. 3209, 21 C.R. (6th) 65, at paras. 12, 16 (Ont. S.C.J.):

> A 208 card is approximately 3” by 5” and is printed on both sides, commencing with the words, “Person Investigated”. It records information obtained from a person who is stopped by the police that includes information such as, “name, aliases, date of birth, colour, address, and contact location including the time”. On the back it has entries for things such as: “associates” and “associated with: gang, motorcycle club, Drug Treatment Court”. The police then input the information from the completed 208 cards into a police computer database for their future reference.

There is no evidence that any police officer advises, or has ever advised, any person stopped that they have a right not to answer any questions from this card and that they are free to leave if they wish. The testimony of the two young men from the neighbourhood is that: The police “always stop them, and always search them”, and they are not told they do not have to answer. They add that, persons stopped by these two officers always answer questions and submit to searches because they believe they have to, and that it does not do any good not to.

It is fair to say that LaForme J. was troubled by the way in which these cards were being used. In a rather prescient comment, he noted that the “impression that one could draw from the information sought on these 208 cards — along with the current manner in which they are being used — is that they could be a tool utilized for racial profiling”. *Id.*, at para. 21.

In 2010, the *Toronto Star* gained access, by means of a freedom of information request, to the data compiled by Toronto police using the 208 cards. See *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 90, 93 O.R. (3d) 563 (Ont. C.A.). After analyzing the data, which includes racial descriptors of the persons stopped and questioned, the *Toronto Star* reported that black males between the ages of 15 and 24 are 2.5 times more likely to be stopped and documented than white males the same age. See Jim Rankin, “Race Matters: Blacks documented by police at high rate” *Toronto Star* (February 6, 2010), online: <http://www.thestar.com/specialsections/raceandcrime/article/761343--race-matters-blacks-documented-by-police-at-high-rate>.
the key variables identified in Grant, courts can both give police clear guidance and achieve a more optimal accommodation between the conflicting interests implicated by police-citizen encounters.

Of course, this raises the questions: which of the Grant factors are most important to achieving this accommodation and what guidance should courts give to the police in future cases? In the aftermath of Grant, we would emphasize two variables:

(1) The language used to initiate the encounter. Permissive language would be far less likely to result in a detention than obligatory language. For example, in the context of a street stop, “I’d like to speak with you” or “Would you mind if I asked you some questions?” would be unlikely to result in a detention. A detention would likely arise, in contrast, from “Stay right there!”, “Freeze!”, or “Show me some identification!”102 Similarly, for “sit down” interviews, “I’d like to speak with you at a time and place of your choosing” is less likely to trigger detention than, “We want you to come with us to the police station to talk about this right now.”103

(2) The nature of any ensuing questioning. Purely exploratory questions are unlikely to trigger detention. By this we would include situations such as a police officer approaching a pedestrian and asking, “How are things?” or an officer responding to an emergency call and asking someone present, “What’s going on?” In contrast, detention is much more likely to be found when police approach a pedestrian, ask for identification, and ask questions like, “Where are you coming from?”, “What are you doing?”, “Where are you going?” or “Do you have any

102 Unfortunately, Grant did not address whether a police demand for identification results in a detention. When police asked Mr. Grant for his name and address, he produced his provincial health card without a police request, so the question did not arise. A number of pre-Grant cases suggest that such a request does not result in a detention. See R. v. B. (L.), supra, note 95; R. v. Hall, supra, note 95, at paras. 21-23; R. v. H. (C.R.), supra, note 94, at paras. 33-36. Post-Grant, it remains to be seen how this question will be resolved. Obviously, police must be free to approach people and engage them in conversation, which includes the social pleasantries of asking someone’s name. Few would feel compelled to remain in a police officer’s presence because of such a routine and benign question. But a police request for identification is undoubtedly different. Given a police officer’s position of authority, most people would not hesitate in complying with what they would reasonably perceive as a demand. And, surely, once a police officer is holding your identification (especially if while doing so simultaneously peppering you with questions regarding where you are coming from, where you are going, whether you have anything in your possession that you shouldn’t, etc.), most people would not think that they are free to leave.

103 See Moran, supra, note 92, at 258 (stressing scrutiny of language used in requesting person to come to the police station and “whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home”).
weapons or drugs?” In the latter circumstances, few reasonable people would feel free to walk away. Similarly, in a more formal interview context, a detention would not likely arise from open-ended, non-accusatory questions designed to gather preliminary information; questions designed to elicit self-incriminating evidence from someone strongly suspected of committing a crime likely would.

The first of these variables targets the liberty interests inhering in section 9,104 the second aims to protect the interests inhering in section 10(b) — preventing inquisitorial abuses and compelled self-incrimination.105 Each also allows police to seek preliminary investigative information without significant restraint. It follows that a detention should usually be found when either of these factors points in that direction. If courts were to require both, one of these Charter-protected interests would frequently be left unprotected. Without factor (1), as long as they do not engage in interrogation-like questioning, police could coercively restrain people’s freedom without reasonable suspicion that they have committed a crime. And without factor (2), as long as they do not coercively restrain people’s freedom, police could conduct accusatory (and potentially abusive) interrogations, again without reasonable suspicion and without extending the protections of the right to counsel.

In addition to enabling a better balance between individual and law enforcement interests, our proposal gives police much more concrete guidance than the open-ended Grant factors. In short, it tells them that if they do not want to detain, they should use permissive language and refrain from interrogating. Conversely, it warns them that if they use compulsory language to initiate encounters with suspects or engage in the functional equivalent of an interrogation, they will likely have triggered a detention and must thus comply with sections 9, 10(a) and (subject to any changes to the law that we advocate for below) 10(b) of the Charter. In other words, they must have reasonable grounds to suspect an individual of being involved in a recently committed or unfolding criminal offence, tell that person why he or she has been detained, and

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104 In Grant, supra, note 1, at para. 20, the Court finally took the opportunity to expressly acknowledge the purpose underlying this important Charter right, which it recognized as being, “broadly put … to protect individual liberty from unjustified state interference”. Rather remarkably, even though s. 9 of the Charter had been before the Court on 24 prior occasions, it has never before expressly identified its purpose. See Stribopoulos, “The Forgotten Right”, supra, note 8, at 214-23.

inform the person of the right to retain and instruct counsel without delay.

As mentioned, the Court suggested in *Grant* that if the police want to avoid engaging these various Charter rights, there is a relatively simple solution: tell the affected individual in unambiguous terms that he or she is under no obligation to answer questions and is free to go. This suggestion, we caution, should be read very strictly. In the context of brief “in the field” inquiries, such a statement would likely be enough to convey to most people that they are truly not required to cooperate. In the context of accusatory questioning at the police station (and perhaps other “sit down” interviews), something more may be required to impress upon suspects that they are not under legal constraint.106 It would be prudent, for example, to require suspects in such circumstances to read, understand and sign a statement (perhaps repeatedly in the case of lengthy interviews) clearly explaining that they are legally entitled to leave or remain silent.

III. INVESTIGATIVE DETENTION AND SECTION 10 OF THE CHARTER

1. History and Context

As noted, the reforms to *Grant*’s conception of non-legal psychological detention that we have proposed do not address the problem of applying the section 10(b) right to counsel to suspects lawfully detained for investigative purposes. Before 1993, police had no power to detain short of carrying out a formal arrest.107 All this changed with the Court of

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106 See the cases cited supra, note 98 (finding detention in the context of accusatory “sit down” interviews despite police statements that suspects were free to leave or remain silent).

Appeal for Ontario’s decision in Simpson.\textsuperscript{108} The Simpson court used the ancillary powers doctrine to recognize a power to briefly detain when police have “articulable cause” to believe that the person is involved in criminal activity.\textsuperscript{109}

The investigative detention power recognized in Simpson was ultimately endorsed by appellate courts across the country.\textsuperscript{110} It took 11 years, however, for the Supreme Court of Canada to finally give it its stamp of approval. Acknowledging that “police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing”, in \textit{R. v. Mann} the Court applied the ancillary powers doctrine to recognize an investigative detention power.\textsuperscript{111}

In Mann, the Court held that an individual may be briefly detained where police have reasonable grounds to suspect a clear nexus between the individual being detained and a recently committed or still unfolding criminal offence.\textsuperscript{112} An investigative detention that is carried out in accordance with this common law power, the Court explained, is not “arbitrary” and thus does not infringe section 9 of the Charter.\textsuperscript{113}

The Court also held that where suspects are lawfully detained for investigative purposes, police may conduct a limited protective pat-down search. “Such a search power does not exist as a matter of course”, the Court explained, “the officer must believe on reasonable grounds that his

\textsuperscript{108} Supra, note 8.

\textsuperscript{109} Id., at 499-502.


\textsuperscript{111} \textit{R. v. Mann}, supra, note 7, at para. 16.

\textsuperscript{112} Id., at paras. 34, 45. Unfortunately, the Court could have been clearer on whether the investigative detention power identified was limited to crimes actually known to police or whether it also extends to crimes that are reasonably suspected. The latter explanation makes much more sense as it allows police to respond to events that they observe while on patrol giving rise to a reasonably based suspicion that criminality may be afoot. See \textit{R. v. Nesbeth}, [2008] O.J. No. 3086, 238 C.C.C. (3d) 567, at para. 18 (Ont. C.A.) (“While the court in Mann speaks of reasonable grounds to suspect that the individual is connected to ‘a particular crime’, in my view, it is not necessary that the officers be able to pinpoint the crime with absolute precision.”); \textit{R. v. Yeh}, [2009] S.J. No. 582, 2009 SKCA 112, [2009] 11 W.W.R. 193, at para. 84 (Sask. C.A.) (“a ‘particular crime,’ read in context, reflects the idea that the police may not detain an individual out of a general sense he or she might be doing something unlawful. … police suspicions must relate to specific criminal wrongdoing.”).

\textsuperscript{113} Mann, id., at para. 20.
or her own safety, or the safety of others, is at risk”.

Accordingly, police are not permitted (as they did in Mann) to search for evidence.115

Before Mann, there was no clear and consistent answer as to whether section 10(a) and (b) of the Charter apply when an individual is subject to investigative detention.116 In Mann, the Supreme Court thankfully made clear that section 10(a) of the Charter does apply. The Court explained that the police must tell the person “in clear and simple language” of the reasons for the detention.117 Unfortunately, the same was not true for section 10(b). Although the Supreme Court cautioned in Mann that the police should not use compliance with that right as an excuse to unduly and artificially prolong an investigative detention, it deliberately deferred for another day the more pressing question of whether or not the right applies.118 It took five more years of uncertainty before that day arrived.

2. Suberu, Investigative Detention and Section 10(b) of the Charter

As mentioned, in Suberu the Supreme Court of Canada definitively held that, “subject to concerns for officer or public safety”, police must tell people subject to investigative detention about their right to retain and instruct counsel immediately upon detention and must do everything required under section 10(b) to facilitate that right.119 It summarily dismissed the suggestion that a suspension of the right to counsel during such detentions was justified under section 1 of the Charter, which subjects section 10(b) and other Charter rights to “reasonable limits prescribed by law

114 Id., at para. 40.
116 See, e.g., R. v. V. (T.A.), supra, note 94, at para. 32 (Alta. C.A.) (“When a brief search is conducted to ensure the safety of the officers involved, it seems implausible that this must be preceded by a 10(b) warning”); R. v. Lewis, [1998] O.J. No. 376, 122 C.C.C. (3d) 481, at para. 28 (Ont. C.A.) (“Without 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.”)
117 Mann, supra, note 7, at para. 21.
118 Id., at para. 22.
as can be demonstrably justified in a free and democratic society". “Because the definition of detention, as understood in these reasons, gives the police leeway to engage members of the public in non-coercive, exploratory questioning without necessarily triggering their Charter rights relating to detention,” the Court reasoned, “s. 1 need not be invoked in order to allow the police to effectively fulfill their investigative duties.”

Similarly, the Court rejected the view of the court below that the reference to “without delay” in section 10(b) contemplated a “brief interlude” between the initial investigative detention and the point at which police must advise suspects of the right to counsel. During this period, the Court of Appeal had concluded, police may make “a quick assessment of the situation to decide whether anything more than a brief detention of the individual may be warranted”. The Supreme Court explained:

To allow for a delay between the outset of a detention and the engagement of the police duties under s. 10(b) creates an ill-defined and unworkable test of the application of the s. 10(b) right. The right to counsel requires a stable and predictable definition. What constitutes a permissible delay is abstract and difficult to quantify, whereas the concept of immediacy leaves little room for misunderstanding. An ill-defined threshold for the application of the right to counsel must be avoided, particularly as it relates to a right that imposes specific obligations on the police.

3. Problems with the Suberu Approach

As the Supreme Court emphasized in Mann, investigative detention “should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police”. It further warned that it cannot be allowed to “become a de facto arrest”. In light of these directives, the Court hinted (though as mentioned it expressly declined to decide the issue) that applying section 10(b) of the Charter to investigative detention might not be appropriate. “Mandatory compliance with [section 10(b)’s] requirements,” it stated, “cannot be transformed

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120  *Suberu, id.*, at para. 45.
122  *Id.*
123  *Suberu, supra*, note 2, at para. 42.
124  *Mann, supra*, note 7, at para. 45.
125  *Id.*, at para. 35.
into an excuse for prolonging, unduly and artificially, a detention that, as I later mention, must be of brief duration.126

These *dicta* were seemingly ignored in *Suberu*. In our view, applying section 10(b) to investigative detention will have bad effects for both law enforcement and individual liberty. For law enforcement, complying with section 10(b) involves much more than reading a caution card.127 After doing so, police must also ensure that detainees understand the caution, and if there is any indication that they do not, take steps to facilitate understanding.128 Critically, police may not question or otherwise seek to obtain self-incriminating information from detainees until this understanding is achieved.129

Further, if detainees invoke their right to counsel,130 police must do a number of things to facilitate it. They must allow detainees to telephone a lawyer in private131 as soon as reasonably possible.132 If private telephone

126 *Id.*, at para. 22.
128 See *R. v. Evans*, *id.*, at 891 (“where … there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding”). The degree of understanding required, however, is modest. See *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 933, 939, 941-42 (S.C.C.) (detainees must have “sufficient cognitive capacity to understand what he or she is saying and what is said”, including “the ability to understand a caution that the evidence can be used against the accused”; they need not be capable of exercising “analytical reasoning”, or making “a good or wise choice or one that is in his or her interest.”).
consultation is possible at the place of initial detention (or anywhere a detainee is taken before a police station), it must be provided there. If not, it must be provided at the station. Again, police may not elicit any evidence from the detainee before such access is provided.

Once police provide private telephone access, they must give detainees a “reasonable opportunity” to talk to a lawyer of their choosing. The duration of this reasonable opportunity is uncertain, but in many cases it may extend for several hours. It may turn on (among other things), the availability of duty counsel, an urgent need to obtain evidence and whether detainees were “diligent” in exercising their rights. Once again, police may not question or obtain self-incriminating information from detainees until this reasonable opportunity has expired.


See R. v. Manninen, supra, note 105, at 1242 (“there may be circumstances in which it is particularly urgent that the police continue with an investigation before it is possible to facilitate a detainee’s communication with counsel”); R. v. Burley, [2004] O.J. No. 319, 181 C.C.C. (3d) 463, at para. 16 (Ont. C.A.).


See R. v. Lewis, [2007] N.S.J. No. 18, 2007 NSCA 2 (N.S.C.A.) (public phone in railway station did not provide sufficient privacy; police justified in transporting accused almost immediately to police station to use telephone there).

R. v. Lewis, id.; at para. 32.

See R. v. Ross, [1989] S.C.J. No. 2, [1989] 1 S.C.R. 3, at 11 (S.C.C.) (detainees only expected to have access to another lawyer, such as one provided by a duty counsel service, if chosen lawyer “cannot be available within a reasonable time”).

See R. v. Prosper, supra, note 17, at 269-70 (“the existence of duty counsel services may affect what constitutes ‘reasonable diligence’ of a detainee in pursuing the right to counsel, which will in turn affect the length of the period during which the state authorities’ s. 10(b) implementation duties will require them to ‘hold off’ from trying to elicit incriminatory evidence from the detainee”).


R. v. Prosper, supra, note 17, at 269.

See R. v. Manninen, supra, note 105, at 1242; R. v. Prosper, supra, note 17, at 269. As a rule, this bar does not apply to evidence that is not self-incriminating. Police are thus not obliged to defer most types of searches until a reasonable opportunity to talk to a lawyer has been provided. See R. v. Debot, supra, note 119, at 1146; R. v. Lewis, supra, note 134, at para. 34. But see R. v. Simmons, supra, note 17 (s. 10(b) rights violated when accused was subjected to a customs strip search; had she been given the right to consult counsel, counsel could have informed her of her statutory right to request higher authorization for the search); R. v. Debot, id. (where legality of search of a detained individual contingent on consent, compliance with s. 10(b) condition precedent to a valid search).
detainee who wants to talk to a lawyer changes his or her mind before doing so, police must advise him or her of the right “to a reasonable opportunity to contact counsel” and of the obligation on police during this time frame “not to elicit incriminating evidence”.141

In many cases, complying with these requirements will dramatically increase the duration and intrusiveness of an investigative detention. Indeed, when detainees invoke their right to counsel, it will frequently be impossible to comply with section 10(b) within the “brief” period permitted by investigative detention. Despite the ubiquity of mobile phones and 24-hour duty counsel, the private consultation and “lawyer of choice” requirements will necessitate prolonged detention on the street or at the police station in a great many cases. Contrary to the Supreme Court’s warning in Mann, applying section 10(b) would go a long way to transforming investigative detention into “de facto arrest”.142 Many people would consequently be subjected to prolonged, custodial detention on the basis of a standard (reasonable suspicion) that is markedly lower than the grounds required for arrest (reasonable and probable grounds).143

A further cost of applying section 10(b) to investigative detention is the loss of valuable investigative information. Some detainees who exercise their rights (and who would otherwise have cooperated with police) will heed their lawyers’ advice to remain silent. As the purpose of investigative detention is to obtain preliminary information from people reasonably suspected of committing criminal offences, and as such information will often justify the use of further investigative tools (such as arrest, searches incident to arrest and the obtaining of search warrants), the loss of this information is no small matter.

As mentioned, the Court’s response to these difficulties was to note in Suberu that its definition of detention “gives the police leeway to engage members of the public in non-coercive, exploratory questioning without necessarily triggering their Charter rights”.144 However, as we have argued, the very flexibility of this definition permits police to impose considerable restraints on individual liberty.

Further, even if we concede (for the sake of argument) that Grant demarcates the optimal line between coercive and non-coercive restraint for the category of non-legal psychological detention, there is still the matter of detention by physical restraint. There is little jurisprudence on

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141 R. v. Prosper, supra, note 17, at 274.
142 Mann, supra, note 7, at para. 35.
144 Suberu, supra, note 2, at para. 45.
the meaning of this category of detention, likely because it is usually obvious. Though no court has ventured to define it, it appears to encompass situations where police take physical control over suspects by handling them in a manner that is more than fleeting or trifling. So, for example, if police grasp an individual’s arms, use handcuffs or direct a suspect into the back seat of a police cruiser, a physical detention obviously results. Detention similarly ensues from searching suspects’ bodies or clothing, or searching their personal belongings while in their presence. In any of these circumstances, an analysis as to whether there was a psychological detention is unnecessary. Once a police officer takes physical control of a suspect, no reasonable person could possibly conclude that he or she is still free to walk away.

It is therefore clear that if police conduct a protective pat-down search, they have triggered a detention and must comply with section 10(b) of the Charter. The same occurs any time police touch a suspect in a non-trivial way. We take no issue with the need for police to have reasonable suspicion and otherwise comply with the requirements for lawful investi-

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145 As mentioned, in Grant, supra note 1, at para. 42, the Court noted that a fleeting touch is probably not enough to result in a non-legal psychological detention. Any physical contact that is more sustained or significant, however, should undoubtedly be characterized as a physical detention. See, e.g., R. v. Debot, supra, note 119, at 1152, 1161 (suspect ordered to stand “spread eagle” against a wall and empty his pockets was detained); R. v. Feeney, supra, note 17, at para. 56 (accused detained when police shook his leg and told him to get out of bed).


150 See R. v. Feeney, supra, note 17, at para. 56 (accused detained when police shook his leg and told him to get out of bed).

151 As noted above, in Grant, supra, note 1, at para. 36, the Court stated that no detention arises when police “interfere with a person’s freedom of movement” in the context of a “non-adversarial role and assisting members of the public in circumstances commonly accepted as lacking the essential character of a detention”.

152 Unfortunately, the case law provides little direction as to the sort of force that police are permitted to use incidental to an investigative detention. On more than a few occasions, the courts have noted (uncritically) that police used physical force to restrain an uncooperative detainee. See R. v. Clayton, [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725, at paras. 10-12 (S.C.C.); R. v. Duong, supra, note 115, at paras. 30-32; R. v. Greaves, supra, note 115, at paras. 18, 55, 59. Provided that police use only as much force as “necessary,” s. 25(1) of the Criminal Code would provide a justification for police in such circumstances. For example, in a pre-Mann case, the Ontario Court of Appeal held that if a suspect does not “submit to lawful detention”, then the officer is entitled to “pursue him” and, when caught, to “physically restrain” him: R. v. Wainwright, [1999] O.J. No. 3539, 68 C.R.R. (2d) 29, at 30 (Ont. C.A.). Courts have also approved the use of handcuffs during investigative detentions for reasonable safety reasons. See R. v. O. (N.), [2009] A.J. No. 213, 2 Alta. L.R. (5th) 72, at paras. 9-10, 45 (Alta. C.A.); R. v. Greaves, id., at paras. 55, 59; Duong, id., at paras. 28, 57.
gative detention before intruding on suspects’ bodily integrity in these ways. Requiring them to comply with section 10(b) of the Charter in all such cases, however, would be unwise. Consider a police officer who has reasonable suspicion (but not reasonable and probable grounds) that a pedestrian has committed an offence. Assume as well that the officer reasonably believes that the suspect might be carrying a weapon. The officer has three choices: (i) approach the suspect to make preliminary inquiries without triggering a detention; (ii) effect an investigative detention; or (iii) leave the suspect alone. Under option (i), the officer would not be permitted to conduct a protective pat-down search, thereby risking the officer’s own (and perhaps others’) safety. Under option (ii), the officer would be forced to comply with section 10(b), thereby risking losing valuable evidence and prolonging a potentially innocent person’s detention. And under option (iii), an opportunity to obtain evidence of a potential crime and apprehend its perpetrator would be lost.

These and all the other costs of applying section 10(b) of the Charter to investigative detention that we have discussed might be worth incurring if they were outweighed by the benefits. In Suberu, the Court outlined its concerns about suspending the right to counsel for investigative detention as follows:

A situation of vulnerability relative to the state is created at the outset of a detention. Thus, the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. In order to protect against the risk of self-incrimination that result from the individuals being deprived of their liberty by the state, and in order to assist them in regaining their liberty, it is only logical that the phrase “without delay” must be interpreted as “immediately”. If the s. 10(b) right to counsel is to serve its intended purpose to mitigate the legal disadvantage and legal jeopardy faced by detainees, and to assist them in regaining their liberty, the police must immediately inform them of the right to counsel as soon as the detention arises.153

This argument is not convincing. The Court itself has recognized in many analogous situations that brief detentions accompanied by non-accusatory questioning do not imperil the interests protected by section 10(b) of the Charter. It has held that police need not comply with section 10(b) in exercising powers to briefly detain motorists to investigate driving-related offences. In Thomsen, it concluded that the right to

153 Suberu, supra, note 2, at para. 41.
counsel may be denied to drivers subject to breath alcohol screening demands. It has similarly upheld the denial of the right to counsel to drivers questioned about their alcohol consumption or asked to perform physical sobriety tests. Courts of appeal have also exempted police from cautioning drivers and passengers subject to brief, lawful, roadside detentions for general vehicle offence investigations. Similarly, the Court has held that customs officials need not comply with section 10(b) when conducting brief, preliminary questioning of people entering and leaving Canada.

The rationale behind these exemptions from section 10(b) is simple: complying with section 10(b) in these circumstances would often needlessly prolong an individual’s detention and also frustrate investi-

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154 Thomsen, supra, note 17, at 650-56. Section 254(2) of the Criminal Code permits police, on the basis of reasonable suspicion, to demand that a motorist provide a sample of breath for analysis by an “approved screening device” (“ASD”). To be legally effective and constitutionally sound, this demand must generally be made immediately, i.e., before there is a reasonable opportunity to contact counsel. A positive result does not prove liability, but will typically give police the reasonable and probable grounds they require to demand a breathalyzer sample, which precisely determines the alcohol concentration in a person’s blood. See Criminal Code, s. 254(3); R. v. Woods, [2005] S.C.J. No. 42, [2005] 2 S.C.R. 205, at paras. 13-15, 30-32, 43-44 (S.C.C.); R. v. Latour, [1997] O.J. No. 2445, 116 C.C.C. (3d) 279 (Ont. C.A.).

155 R. v. Orbanski, R. v. Elias, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3, at paras. 54-60 (S.C.C.) [hereinafter “Orbankski & Elias”]. See also Berkemer v. McCarty, supra, note 92 (Miranda does not apply to motorists subject to brief roadside questioning as such questioning does not constitute “custodial interrogation”). At the time the offences were committed in Orbankski; Elias, police did not have the power to compel motorists to answer questions or perform sobriety tests. They must therefore have sought motorists’ voluntary cooperation. However, they could randomly stop motorists to investigate driving offences (which is a form of legal psychological detention) and in the course of such an investigation ask motorists to voluntarily answer questions or voluntarily perform sobriety tests. See R. v. Hufsky, supra, note 20; R. v. Ladouceur, supra, note 20. The Criminal Code has since been amended to empower police to demand that motorists perform roadside physical coordination tests based on reasonable suspicion. Criminal Code, s. 254(2)(a).

156 R. v. MacLennan, [1995] N.S.J. No. 77, 138 N.S.R. (2d) 369, at para. 61 (N.S.C.A.) (driver is not entitled to right to counsel during period between detention and conclusion of the inspection of documents, which must be as brief as possible); R. v. Campbell, supra, note 8, at para. 49 (no violation when police obtained driver’s licence during roadside detention without first advising driver of right to counsel).


gations\textsuperscript{159} while doing little to advance the objectives of the right. In the case of roadside screening demands, so long as police follow the rules, suspects must either comply or risk criminal punishment for refusal.\textsuperscript{160} In the vast majority of cases, talking to a lawyer would not change this situation.

More importantly, affording a right to counsel at this point would do little to deter abusive interrogation practices. Brief roadside stops are not likely to involve coercive interrogation methods or generate false confessions. As the United States Supreme Court has observed, the brevity and public nature of most traffic stops substantially mitigates the risk of this kind of abuse.\textsuperscript{161} The same logic applies to preliminary customs and immigration questioning. There is little to be gained (and much to be lost) in providing the right to counsel to people subject to routine questioning at border crossings.

So it is for investigative detention. As long as such detentions remain limited to their intended scope (brief questioning to quickly confirm or refute the reasonably based suspicion that led to the stop), there is no need for section 10(b)’s protections. Imposing the right to counsel in these circumstances would instead increase the duration and intrusiveness of detentions, compromise police and public safety, and deprive police of valuable preliminary investigative information. Further, in an effort to avoid these consequences, courts will be strongly tempted (as the Supreme Court was in \textit{Suberu}) to avoid finding that a detention has arisen despite a substantial intrusion on a person’s liberty.

4. Reform

If we are correct that the best policy is to exempt investigative detention from section 10(b), the question becomes how to apply it in a manner consistent with the Charter. We agree with the Supreme Court in \textit{Suberu} that the approach taken in the court below was ill-advised. Not only did it require a strained reading of “without delay”,\textsuperscript{162} but the uncertain duration of the “brief interlude” contemplated by the Court of Appeal would cause


\textsuperscript{160} See \textit{Criminal Code}, s. 254(5).

\textsuperscript{161} \textit{Berkemer v. McCarty}, supra, note 92, at 438-39.

\textsuperscript{162} See \textit{Suberu}, supra, note 2, at para. 47, Binnie J., dissenting (noting that the Court of Appeal’s proposal “sits uncomfortably with the constitutional text”).
many police officers to issue the caution prematurely, thereby prolonging the detention of the innocent (on the minimal standard of reasonable suspicion) and make it more difficult to obtain reliable, incriminating evidence from the guilty.\(^{163}\) In other cases, police would wait too long, depriving suspects of their rights in precisely the circumstances when they are most needed to protect against inquisitorial overreaching.

The better solution is to justify a brief override of section 10(b) under section 1 of the Charter. This is the approach that the Supreme Court has taken for roadside investigations relating to motor vehicle safety. In each of these cases, the courts have found that the claimant was detained but that the failure to comply with section 10(b) was justified under section 1 of the Charter.\(^{164}\) The Court did not take this approach in the customs and immigration cases. Despite the fact that failure to cooperate in these circumstances is an offence,\(^{165}\) the Court found that people stopped for routine questioning and searches at border crossings are not detained for Charter purposes.\(^{166}\) This approach is plainly inconsistent with the Therens/Grant definition of psychological detention with legal compulsion.\(^{167}\) The same result could have more sensibly been achieved, however, by applying section 1 of the Charter.

Justifying non-compliance with section 10(b) for investigative detention will help ensure that questioning remains brief and preliminary and thus limit the tendency of courts to increasingly expand the boundaries of


the common law power. As in the contexts of vehicle stops and border crossings, police seeking to investigate further would have to issue the caution immediately. Further, because such questioning by definition exceeds the scope of the investigative detention power, police would either have to make an arrest or make it absolutely clear that the suspect is free to leave.

What precisely do we mean by “brief” and “preliminary”? Courts have been reluctant to impose a quantitative limit on the length of investigative detentions, and we do not propose one here. However, absent exceptional circumstances, a detention lasting longer than 20 minutes would seem to be excessive. The scope of investigative detention would also be exceeded by questioning that is the functional equivalent of an interrogation. As under the Moran approach to detention discussed above, an investigative detention (and the accompanying suspension of the right to counsel) would expire when police decide that the individual probably committed an offence and ask questions designed to induce self-incriminating answers. These are precisely the circumstances when suspects need the protection of the right to counsel.

To summarize, under Mann police may detain for investigative purposes when they reasonably suspect that a person has recently committed (or is still committing) a criminal offence. Investigative detention can be triggered by either physical or (non-legal) psychological detention. Under our proposal, in the latter case detention arises from constraints on

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169 Therens, supra, note 10. See also Orbanski; Elias, supra, note 155, at para. 57 (“there is no question that the motorist who is not allowed to continue on his way but, rather, is requested to provide a breath or blood sample, is entitled to the full protection of the Charter right to counsel”). See also R. v. Woods, supra, note 154, at paras. 35-36.
170 See, R. v. Simmons, supra, note 17, at 521 (detention arose when suspect strip-searched); R. v. Jacoy, supra, note 158, at 557-58 (detention arose when decision made to strip-search suspect if necessary).
171 See, e.g., R. v. Greaves, supra, note 115, at paras. 50-55 (40-minute detention lawful as accused’s evasive and inconsistent responses regarding his identity gave rise to reasonable grounds to suspect him of attempting to obstruct justice). See also United States v. Place, 462 U.S. 696, at 709, n. 10 (1983) (a time limit would interfere with the ability of the “authorities to graduate their responses to the demands of any particular situation”).
172 In its Model Code the Institute adopts a 20-minute rule. See American Law Institute, A Model Code of Pre-Arraignment Procedure (Philadelphia: American Law Institute, 1975), at 283 [hereinafter “Model Code”].
173 See Penney, “What’s Wrong?”, supra, note 100, at 321.
174 Mann, supra, note 7, at paras. 34, 45.
liberty and is decided with reference only to the first variable of the test we proposed above (“the language used to initiate the encounter”). Police effecting such detentions need not comply with section 10(b) of the Charter. In contrast, police triggering a detention by means of the second variable (“the nature of any ensuing questioning”) exceeds the scope of investigative detention and must therefore comply with section 10(b) of the Charter. Police wishing to interrogate likely perpetrators without issuing the Charter caution must therefore make it clear that they are not being detained and are free to leave.

Ideally, this proposal would be effected by legislation upheld by the courts under section 1 of the Charter. If the courts apply Grant in the way that we have proposed, police may become legitimately frustrated with their obligation under the current law to comply with section 10(b) during investigative detention and lobby Parliament for a statutory response.

What is at least as likely, however, is that courts will strain to avoid finding detention, permitting police to substantially curtail suspects’ liberty without reasonable suspicion. In this scenario, Parliament may conclude (as it often does) that there is little to be gained from legislative intervention.

Though in principle a second-best solution, the most realistic one may thus be for the Supreme Court to reconsider Suberu and uphold under section 1 the denial of the right to counsel during lawful common law investigative detentions. Indeed, as long as the courts are prepared to recognize new common law police powers, some may inevitably have to be justified under section 1 of the Charter. The Supreme Court has held that common law rules are “prescribed by law” within the meaning of that provision. It has also upheld Charter-limiting common law rules

175 See Stribopoulos, “A Failed Experiment?”, supra, note 167, at 376-78, suggesting that an override of the right to counsel incidental to investigative detention could be upheld as a reasonable limit under s. 1 of the Charter but arguing that the overriding of constitutional rights is something that should come from Parliament and not the courts. For a model legislative response, see, Model Code, supra, note 172, § 110.2(1).


177 Penney, “Triggering the Right”, supra, note 67, at 289-90. The Court in Suberu, supra, note 2, at para. 45, may have planted the seed for such a reappraisal in noting that it was “not persuaded, on this appeal, that a case has been made out for a general suspension of the s. 10(b) right to counsel for investigatory purposes ...” (emphasis added).

178 Therens, supra, note 10, at 645.
(including newly recognized ones) in many other contexts. And unlike in any of these cases, justifying the limitation of section 10(b) for investigative detention would benefit both the state and the individual. Police would find it easier to obtain preliminary investigative information from persons reasonably suspected of criminal activity, and such persons (if not arrested) would on average spend less time in custody. Of course, applying section 10(b) to investigative detention would benefit factually guilty suspects who exercised their rights and remained silent as a consequence of talking to a lawyer. But given the limited, inherently non-coercive nature of the questioning permitted for investigative detentions, this loss of protection against self-incrimination is not worthy of consideration under section 1 of the Charter.

IV. CONCLUSION

Unfortunately, the Court’s judgment in Grant on the meaning of non-legal psychological detention seems to be written exclusively for one audience: lower courts. A second, and equally important, audience (the police) is ignored, encouraging a troubling division between law in the courtroom and law on the streets. For those most likely to be victims of


180 The Supreme Court suggested in Orbanski; Elias, supra, note 155, at paras. 58-59, that, as a result of concerns over compelled self-incrimination, the violation of s. 10(b) during roadside detentions might not be justified if the Crown attempted to prove impairment by adducing evidence created by the accused such as the results of alcohol screening tests and answers to questions about consumption. See also R. v. Milne, [1996] O.J. No. 1728, 107 C.C.C. (3d) 118, at 121 (Ont. C.A.); R. v. Coutts, [1999] O.J. No. 2013, 136 C.C.C. (3d) 225, at paras. 15-18 (Ont. C.A.). Similarly, Suberu’s counsel argued on appeal that a s. 1 exemption for investigative detention would only be warranted if “any incriminating evidence gathered prior to informing an individual of his or her s. 10(b) right to counsel is inadmissible against him or her”: Suberu, supra, note 2, at para. 44.

This position is curious. If evidence created by drivers during roadside detentions is admissible for the purpose of demonstrating the existence of reasonable and probable grounds (which it is), and such grounds provide the basis for breathalyzer demands (the results of which are admissible), then this evidence must be “self-incriminating” in any realistic sense of the phrase. It is thus difficult to understand why evidence collected from drivers during roadside detentions should not be admissible to prove impairment or, putting the same point slightly differently, why s. 1 of the Charter justifies denying the right to counsel when such evidence is admitted to establish grounds for the breathalyzer demand on the voir dire but not when it is admitted to prove impairment at trial. Similarly, immunizing self-incriminating statements made before the right to counsel is afforded would greatly frustrate the purpose of investigative detention. If such statements, or if any further information “derived” from them, were not admissible, police would have little reason to use the power.
unjustified police stops, this division can only worsen existing cynicism toward the law, the police and the criminal justice system.\textsuperscript{181} If the purpose of section 9 of the Charter is to protect people from unjustified state interference, the constitutional safeguard must meaningfully regulate the countless daily interactions between police and members of the public. The starting point for such an endeavour must be clear guidance for the police. We hope that in years to come Canadian courts will interpret and apply \textit{Grant} to provide just that.

We also hope that Parliament and the Supreme Court, ideally working in constructive dialogue, revisit the application of section 10(b) of the Charter to investigative detention. It is a rare occasion indeed when the interests of the individual and state coincide in constitutional criminal procedure. This is one of them. Justifying non-compliance with section 10(b) as a reasonable limit under section 1 of the Charter would help police obtain valuable evidence of crime, protect innocent suspects from lengthy and intrusive detention, and prompt courts to confine the investigative detention power to its proper, limited scope.

\textsuperscript{181} See Janet E. Mosher, “Lessons in Access to Justice: Racialized Youths and Ontario’s Safe Schools” (2008) 46 Osgoode Hall L.J. 807, at 812. In reporting on the results of a study involving Black youth living in the Jane-Finch area of Toronto, Mosher explained that:

\ldots for the youths, law was regarded as inextricably connected to power, and thus to the powerful. In their accounts, the law is simply what the powerful authority figures in their lives — the police officers \ldots command at any given moment. This lesson regarding law and power is repeated for them over and over again in their interactions with \ldots criminal justice personnel. The law is not something that generates entitlements or protections; rather, it is invoked by those with power against those without. The youths describe a reality in which there is no rule of law — a reality in which the law does not operate to check state power or apply equally to all. Predictably, these experiences and understandings of the way law works lead to a deep scepticism regarding the ability of the legal system to dispense justice.

See also Hon. Roy McMurtry & Alvin Curling, \textit{Roots of Youth Violence}, vol. 1 (Toronto: Queen’s Printer, 2008), at 77-79, cautioning that “if police stops or interventions are done discriminatorily or aggressively in a degrading manner \ldots a deep sense of grievance and frustration can result \ldots [Y]outh must be treated with respect and dignity; they cannot be expected to respect a system that does not respect them.”