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Ending the Erasure?: Writing Race into the Story of Psychological Detentions – Examining R. v. Le

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I. Introduction

When does a police detention begin? In various instances, the answer to this question may be entirely obscure but nevertheless consequential to one's constitutional rights and the admission of evidence. Even in the absence of circumstances where police officers employ physical restraint, the Supreme Court of Canada has recognized that law enforcement officials may nevertheless "psychologically detain" an individual.[1] Specifically, a reasonable person may believe that they are simply unable to walk away from a police-initiated encounter and are compelled to respond to questioning. Due possibly to a sense of coercion, this perceived inability may arise even where the detention is or appears arbitrary. Such interactions beg certain

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[1] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353 (S.C.C.).

questions. How does one construct the "reasonable person" in police-initiated encounters? With what characteristics are they imbued? Because many encounters transpire between police officers and racialized individuals, should the person's ethnicity or racial background be a constitutive characteristic of the reasonable person?

State-initiated interactions are a persistent feature in the lives of many racialized persons, particularly those from Indigenous and Black communities. Whether it is the disproportionately higher rates of incarceration, the practice of carding, expulsion/suspension of youths from school or any other conduct that treats certain members of our society as a perpetual suspect class, such actions take their toll. To the extent that the criminal justice system is engaged, in what ways might courts impose limits on the conduct of police officers when they violate the constitutional rights of those subject to their behaviour? Courts and various commissions have recognized that racism plays numerous roles in the criminal justice system. Thus, it is important to ask how courts might engage in a more race-sensitive analysis when dealing with, among other things, breaches of constitutional rights situated within the *Canadian Charter of Rights and Freedoms*[2] and the exclusion of evidence.

In this article, I examine the Supreme Court's decision in *R. v. Le*[3] and, specifically, its articulation of a reasonable person standard in relation to detentions under section 9 of the Charter.[4] Section 9 guarantees that: "Everyone has the right not to be arbitrarily detained or imprisoned."[5] The *Le* decision contains a number of significant issues worth examining. One of these is the Court majority's response to the racial dimensions at play in the case and how it factored them into its analysis. I shall analyze its construction of the "reasonable person" within the framework of its psychological detention analysis and the emphasis it placed on race as an important component of this construction. I argue that in doing so, the majority demonstrated a crucial sensitivity to the role of race in its Charter analysis while shining necessary attention on police practices, surveillance and interactions concerning racialized communities and the neighbourhoods in which they live. As I demonstrate below, the accounting of race in the reasonable person analysis intersects with the timing of the detention. In addition, through the Court's decision, it is clear that state actors can and do exploit informal norms about the obligation to speak to police officers even in the absence of any formal requirement to do so. In many instances, this may relate to a sense of civic or moral duty to assist police officers making inquiries. Yet, for many racialized communities subjected to

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

[3] [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431 (S.C.C.).

[4] *Canadian Charter of Rights and Freedoms*, s. 9, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[5] *Canadian Charter of Rights and Freedoms*, s. 9, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

persistent profiling, carding and/or surveillance, the decision to speak to the police when confronted may arise from a feeling of coercion, rather than a sense of civic duty. As the discussion below will illustrate, the experiences of racialized individuals, including male youth and adults, strongly suggest that they are not able simply to walk away even in instances where they have a right to do so.

This paper is divided into three main parts. Part II provides a summary of the salient facts of the *Le* decision and the points of fracture between the majority and dissenting opinions. Part III then proceeds to set out the theoretical framework from which I draw — critical race theory — to address the majority's race-sensitive analysis of psychological detention and its relevance. Part IV undertakes, through several sections, a detailed analysis of the majority decision's incorporation of race. The first section sets out how the Supreme Court in *R. v. Grant*[6] established the analytical framework for determining the existence of psychological detentions. It then examines how the *Grant* Court failed to respond to the racial dynamics in that case thus providing a clear contrast to what would later occur in *Le*. The remaining section and subsections focus attention on the *Le* majority's approach to incorporating race as an explicit consideration into its analysis and the sources upon which it relies to construct the reasonable person in this context. Fundamentally, and in contrast to other decisions such as *Grant*, the majority in *Le* has explicitly written race into the story of psychological detentions. In short, with respect to assessing psychological detentions, the majority in *Le* takes the role of race seriously, while their counterparts in *Grant* did not.

II. SUMMARIZING *LE*

On the evening of May 25, 2012, three police officers entered into a private backyard space without the consent of the homeowner or any legal authority.[7] This backyard was situated in a Toronto housing cooperative and adjacent to a common area. The officers had received a tip from two housing cooperative security guards who posited that suspicious activity typically transpired at the address. The backyard contained an enclosure along its perimeter. Within the backyard, five individuals, including the accused, were present and conversing among one another. There was no evidence of any criminal activity and the police officers themselves testified to this fact. All five individuals are members of visible minorities: four are Black and the accused is of Asian descent.

Almost immediately upon trespassing into the backyard, the officers made inquiries and requested identification of those present. The officers also issued curt orders regarding the individuals' movements and, specifically, directed them to keep their hands in front of them. When one of the officers approached Le and inquired about the contents of his satchel, Le attempted to flee. In response, the officers

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[6] [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353 (S.C.C.).

[7] The facts and judicial history of this case can be found in *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at paras. 6-22 (S.C.C.).

chased, captured and arrested Le. Upon searching Le's satchel incidental to his arrest, the officers found a loaded firearm and cash. Up to the point where Le took flight, the entire encounter between the officers and the occupants lasted less than a minute. Later, while being searched at the police station, Le reliquished 13 grams of cocaine he held in his possession to the police. Following an unsuccessful Charter challenge based on sections 8 (unreasonable search and seizure) and 9 arising from the brief interaction in the backyard, the pieces of evidence taken after his arrest were admitted at trial and Le was convicted. On appellate review, a majority of the Ontario Court of Appeal affirmed the judgment to include the evidence, with one justice dissenting, triggering an automatic right of appeal to the Supreme Court.

Le was decided by a narrowly divided five-judge panel. Justices Brown and Martin (with Karakatsanis J. concurring) held that the police officers violated Le's right not to be detained arbitrarily.[8] The majority concluded that the psychological detention commenced the moment the officers trespassed into the backyard space.[9] Further to the Court's earlier decision in *Grant*, where it defined psychological detentions and the applicable legal test, the *Le* majority determined that a reasonable person standing in the shoes of the accused would have believed that they were being detained.[10] Within its psychological detention analysis, the majority took into account the racialized background of the accused and race relations between law enforcement and racialized communities.[11] After concluding that the detention was arbitrary, the majority determined that the evidence seized should be excluded under section 24(2) of the Charter.[12]

The dissent, written by Moldaver J., with Wagner C.J.C. concurring, agreed that Le was detained arbitrarily but concluded that the detention commenced at a later point.[13] In addition, they affirmed succinctly that the race of the accused could be factored into the psychological detention analysis.[14] Where the dissenters departed significantly with the majority, among other things, was in the application of section 24(2) — Moldaver J. and Wagner C.J.C. would have allowed the admission of the evidence despite the Charter breach.[15] At a basic level, therefore, it is worth noting that notwithstanding the dissent's position with respect to the exclusion of the evidence under section 24(2) or the starting point for when the detention began — neither of which are insignificant points — there was unanimous agreement that race was a relevant factor in conducting the reasonable person analysis.

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[8] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 5 (S.C.C.).

[9] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 5 (S.C.C.).

[10] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at paras. 122-123 (S.C.C.).

[11] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at paras. 69-106 (S.C.C.).

[12] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 166 (S.C.C.).

[13] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at paras. 276-277 (S.C.C.).

[14] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 260 (S.C.C.).

[15] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 305 (S.C.C.).

III. SEEING PSYCHOLOGICAL DETENTIONS THROUGH A CRITICAL RACE LENS

In this section, I discuss the relevance of critical race theory ("CRT") when examining the *Le* majority's race-sensitive approach to psychological detentions. CRT has been defined as a "[r]adical legal movement that seeks to transform the relationship among race, racism, and power".[16] While this movement encompasses a diverse range of scholars and ideas, Richard Delgado and Jean Stefancic have articulated that there are nevertheless certain basic tenets that such scholars likely share. Below, I review a couple of key tenets and connect them more directly to concerns about racism in the Canadian criminal justice system and psychological detentions.

One of CRT's primary tenets is that racism is not aberrational but indeed normal.[17] Despite denials from various quarters, some institutions have formally acknowledged the systemic and institutionalized nature of racism within Canadian society and its considerable impacts on racialized communities.[18] In an often-quoted passage, the Ontario Court of Appeal asserted:

> Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.[19]

Two years later, the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* defined systemic racism as the "social production of racial inequality in decisions about people and in the treatment they receive".[20] Systemic racism in turn is rooted in racialization "which is a process by which societies construct races as real, different and unequal in ways that matter to economic,

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[16] Richard Delgado & Jean Stefancic, *Critical Race Theory*: *An Introduction*, 2nd ed. (New York: New York University Press, 2012), at 159.

[17] Richard Delgado & Jean Stefancic, *Critical Race Theory*: *An Introduction*, 2nd ed. (New York: New York University Press, 2012), at 7.

[18] Racism has been a long-standing problem in the Canadian legal system and it has been well documented by various historians. Seen in a broad historical context, the continued persistence of systemic discrimination is hardly surprising or revelatory. See, *e.g.*, Barrington Walker, *Race on Trial*: *Black Defendants in Ontario's Criminal Courts, 1858-1958* (Toronto: University of Toronto Press, 2010); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999).

[19] *R. v. Parks*, [1993] O.J. No. 2157, 84 C.C.C. (3d) 353, at 378-379 (Ont. C.A.).

[20] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1995), at 39.

political and social life".[21] Racialization consists of a "classification of people by reference to signs of origin and judgments about the character, skills, talents and capacity to belong in Canada that signs of origin represent".[22] Relevant to this paper, systemic racism can manifest itself in the criminal justice system through, *inter alia*, policing and racial profiling. David Tanovich writes that racial profiling "occurs when law enforcement or security officials, consciously or unconsciously, subject individuals at any location to heightened scrutiny based solely or in part on race, ethnicity" and/or other factors, "rather than on objectively reasonable grounds to suspect that the individual is implicated in criminal activity".[23]

Combatting systemic racism represents a considerable social, political and legal challenge. Nonetheless, some measures might be advocated in response to various findings concerning systemic discrimination in Canada. This article highlights the role that the Charter could play as one possible but non-exclusive mechanism to combat manifestations of systemic racism. Yet there is significant room for pause. Tanovich has argued that the Charter, at least as interpreted by the courts, has been ineffective as a protective mechanism. Writing in 2008, he posited that "[r]acial justice has not had a chance to grow over the last 25 years because there has been a significant failure of trial and appellate lawyers to engage in race talk in the courts and a failure of the judiciary to adopt appropriate critical race standards when invited to do so".[24] However, despite these failures, Tanovich observed that "Charter litigation remains an important means of addressing fundamental injustice".[25] This again depends on the willingness of judges to *see* and address these racial injustices. Since Tanovich's article, there has not been a great deal of evidence to suggest the

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[21] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1995), at 40.

[22] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1995), at 56.

[23] David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006), at 13.

[24] David M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 S.C.L.R. (2d) 655, at 657. See also Benjamin L. Berger, "Race and Erasure in Mann" (2004) 21 C.R. (6th) 58; David M. Tanovich, "The Colourless World of Mann" (2004) 21 C.R. (6th) 47.

[25] David M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 S.C.L.R. (2d) 655, at 660. Tanovich posits that successful litigation brings with it, among other things, considerable attention through media, community organizations, universities and law schools, and judicial conferences. These in turn he states can raise public consciousness, stimulate academic research (as in the case of this paper on *Le*) and teaching. David M Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 S.C.L.R. (2d) 655, at 658.

Supreme Court has adopted a race-sensitive approach to Charter analyses regarding policing. Yet, as I argue here, *Le* represents a *possible* shift insofar as the majority incorporated a heightened recognition of race in its analysis of psychological detentions. If indeed a shift, it would be an important one, because, as Kelsey Sitar asserts, "the realities of racialization and over-policing must be given significant weight".[26] She adds that due to the instrinsic power imbalances between Persons of Colour and police officers, the former are not on equal footing in contrast to White persons in similar circumstances.[27]

Relevant to my discussion below regarding the *Le* majority's race-sensitive approach is the contribution of critical race scholarship to legal storytelling and narrative analysis. Delgado and Stefancic explain that legal storytelling and narrative analysis "focuses on the theory or practice of unearthing and replacing underlying rhetorical structures of the current social order, insofar as these are unfair to disenfranchised groups".[28] Judicial decisions can often pay insufficient, if any, attention to the relevance of race and the dynamic it plays in a particular matter. This may be because many members of the dominant racial group, which in the North American context consists of those who are from White European backgrounds, cannot grasp what it is like to be non-White.[29]

Race-conscious legal storytelling can help counter this deficit that often fails to account for the experiences of People of Colour in the criminal justice system. Though such "counterstorytelling" may arise from fictional works of literature and within popular culture, there is obviously a needed place for race-conscious storytelling to occur within court decisions, official storytelling and legal advocacy. The experience of law and certainly experiences with law enforcement are not race-neutral. Courts that fail to account for how race (or, for that matter, gender, sexual orientation, class and/or ableism) has or may have played a role in the cases before them undermine their own credibility, not to mention do a disservice to the communities affected by the courts' omissions. As I discuss below, the *Le* majority considered the experiences of racial minorities with respect to detention. It did so by incorporating their stories, testimonies, as well as official reports that have examined the experiences of racialized communities in connection with policing. Unlike the Court's decision in *Grant* in 2009, which cried out for an inclusion of a discussion on race, *Le* carried the discussion to a different and important place where race

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[26] Kelsey L. Sitar, "Gladue As a Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial" (2016) 20:3 C.C.L.R. 247, at 256.

[27] Kelsey L. Sitar, "Gladue As a Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial" (2016) 20:3 C.C.L.R. 247, at 256.

[28] Richard Delgado & Jean Stefancic, *Critical Race Theory*: *An Introduction*, 2nd ed. (New York: New York University Press, 2012), at 166.

[29] Richard Delgado & Jean Stefancic, *Critical Race Theory*: *An Introduction*, 2nd ed. (New York: New York University Press, 2012), at 45.

occupies a significant portion of the analysis. The majority in *Le* actually listened to the voices of those marginalized.

IV. RACE AND PSYCHOLOGICAL DETENTIONS

1. Constructing Psychological Detentions

Judicial interpretations of the term "detention" are important for Charter analyses. These interpretations apply to sections 9 and 10, both of which textually incorporate this word. As noted above, section 9 is concerned with arbitrary detention or imprisonment. Section 10 is triggered upon arrest or detention; when either event transpires, an individual is entitled to be informed *promptly* of the reasons and to be afforded the opportunity to retain and instruct counsel without delay.[30] The concept of detention has both spatial and temporal significance. When a person is detained, their liberty and freedom of movement are restricted. Detention is also a temporal event as it concerns a period of time for when the protections afforded in these Charter provisions apply.[31] An individual who makes incriminating statements while unlawfully detained may be successful in having their statements excluded. Courts may also exclude any physical evidence obtained due to such detentions.

The concept of psychological detentions was an important jurisprudential development concerning the law on detentions. As the Supreme Court has instructed, detentions are not limited to circumstances where police officers take "explicit control over the person and command obedience".[32] However, they do not extend to every "fleeting interference or delay".[33] Although the Court in *R. v. Therens* addressed the idea of detentions that arise from physical or psychological restraint,[34] it provided further elaboration on the latter in *Grant*. The *Grant* Court highlighted that defining detention for the purposes of sections 9 and 10 should be grounded in the principle of choice.[35] With respect to section 9, the Court determined that due to the juxtaposition of the words detention and imprisonment (of which the latter indicated near or total loss of liberty), this suggested that "'detention' requires significant departure of liberty".[36]

Arising from this interpretive context, the meanings attributed to psychological detentions can then be examined. First, an individual may be psychologically

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[30] *Canadian Charter of Rights and Freedoms*, s. 10(a)-(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[31] There are of course further temporal considerations to account for in connection with s. 10 when the police fail upon arrest or detention to inform someone *promptly* and to retain and instruct counsel *without delay*.

[32] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 24 (S.C.C.).

[33] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 24 (S.C.C.).

[34] [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.).

[35] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 27 (S.C.C.).

[36] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 29 (S.C.C.).

detained when they are legally obliged to comply with a direction or demand, as is the case with roadside breathalyzer tests.[37] Second, and likely the more complex and challenging incarnation of psychological detentions, is where there is no legal requirement to comply with a restrictive or coercive demand but a reasonable person in the individual's position would nonetheless feel obligated to do so.[38] The Court in *Grant* posed the question as follows: "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."[39] Though the test is notionally framed through an "objective" lens, the Court stressed that "the individual's *particular circumstances and perceptions at the time* 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".[40] In assessing whether a reasonable person in the circumstances of the accused would conclude that they had been deprived of their liberty of choice, the Court highlighted three groups of factors that courts may consider.[41] While I deal with each in turn, it is worth noting that among these factors as articulated in *Grant*, race was not an explicit consideration and indeed was in no way incorporated into the majority's analysis in that decision.

The first group examines the circumstances giving rise to the encounter as they would reasonably be perceived by the individual.[42] This inquiry assesses whether the police were singling out an individual for focused investigation, making general inquiries regarding a particular occurrence, maintaining general order or providing general assistance.[43] It would appear that the more an individual is singled out for focused attention, the greater the possibility that a reasonable person in such circumstances would feel that their freedom to choose to remain and be subjected to conversation has been abridged. Yet, the *Grant* Court noted that focused attention in and of itself does not transform an encounter into a detention.[44] This is where the other two groups may play a decisive role.

The second group of factors evaluates the nature of the police conduct during their interactions with an individual that may give rise to a reasonable person concluding that they are being detained.[45] In undertaking this analysis, courts may

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[37] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 30 (S.C.C.).

[38] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 30 (S.C.C.).

[39] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 31 (S.C.C.).

[40] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 32 (S.C.C.) [emphasis added].

[41] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 44 (S.C.C.).

[42] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 44 (S.C.C.).

[43] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 44 (S.C.C.).

[44] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 41 (S.C.C.).

[45] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 44 (S.C.C.).

scrutinize the language employed by the police, the use of physical contact, the place where the interaction occurred, the presence of others and the duration of the encounter.[46]

Lastly, a third group of factors assists courts in examining the particular circumstances of the individual that may be relevant. They include an individual's age, physical stature, minority status and level of sophistication. The Court did not articulate any particular definition of "minority status". While "minority status" could logically include one's membership in a racial minority, one may also be part of a minority by virtue of being part of a sexual minority or have a particular disability, exclusive of race. In addition, thinking intersectionally, one may belong to a racial minority, as well as be a person with a disability and/or a member of a sexual minority.

2. Erasing Race from the Story in *Grant*

Having set out the relevant principles, I now scrutinize how the Supreme Court in *Grant* went about applying them with respect to the facts in that case. In *Grant*, the accused, who was "a young black man",[47] was walking down a street in Toronto that the Court described as being in an area where four schools were situated and where there was a "history of student assaults, robberies, and drug offences occurring over the lunch hour".[48] In the vicinity, three police officers, Gomes, Worrell and Forde, were patrolling for the purpose of "monitoring the area and maintaining a safe student environment".[49] While driving, Worrell and Forde noticed Grant walking down the street but behaving in a manner that aroused their suspicions.[50] As Grant was walking in Gomes's direction, Worrell and Forde conveyed to Gomes that he should "have a chat" with Grant.[51] Gomes, who was in uniform, disembarked from his marked car and stood on the sidewalk directly in Grant's intended path.[52] Gomes asked Grant "what was going on" and for his identification.[53] After furnishing Gomes with identification, Grant purportedly continued to act nervously and began adjusting his jacket.[54] Gomes instructed Grant to "keep his hands in front of him".[55] Worrell and Forde then joined the encounter,

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[46] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 44 (S.C.C.).

[47] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 5 (S.C.C.). It is worth noting that this was possibly the only time race was raised in the majority's decision.

[48] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 4 (S.C.C.).

[49] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 4 (S.C.C.).

[50] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 5 (S.C.C.).

[51] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 5 (S.C.C.).

[52] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 6 (S.C.C.).

[53] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 6 (S.C.C.).

[54] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 6 (S.C.C.).

[55] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 6 (S.C.C.).

presented their identification and took tactical positions behind Gomes "obstructing the way forward".[56] The exchange between Gomes and Grant continued whereby Gomes elicited incriminating statements from Grant indicating that he possessed "a small bag of weed" and a firearm.[57] After Grant admitted to possessing these items, the officers arrested him and seized the marijuana and gun.[58] The trial court judge found that there were no Charter violations and that Grant was guilty of the crimes charged. The Ontario Court of Appeal held that Grant's section 9 rights were breached but determined that the admission of the evidence was nevertheless proper under a section 24(2) analysis.

After setting out the relevant factors and considerations to assess whether a psychological detention had occurred, the Supreme Court concluded that Grant was indeed detained and his right to be free from an arbitrary detention infringed. The Court identified certain key factors that brought it to the conclusion that a reasonable person in Grant's circumstances would conclude that his right to choose how to act had been removed. Specifically, it highlighted that Grant was: (1) instructed to keep his hands in front of him; (2) faced with the presence of three physically larger police officers in adversarial positions; and (3) subjected to a pointed line of questioning driven by a focused suspicion.[59] In addition, the Court also noted Grant's youth and inexperience in connection with the situation he encountered.[60]

What was conspicuous by its absence in the Court's analysis was the relevance of race as part of Grant's minority status. The only place where race was mentioned in the Court's decision was when it referred to him as a "young black man". The omission of race is striking since the Court itself identified a person's minority status as a factor (where relevant) when examining the particular circumstances of the individual in the context of a psychological detention analysis. The omission did not go unnoticed. In his concurrence, Binnie J. noted the racial dynamics of the case and how visible minorities have been subjected to police confrontations on a regular basis. He observed: "A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified 'low visibility' police interventions in their lives. The appellant, Mr. Grant, is black. Courts cannot presume to be colour-blind in these situations."[61] Yet, remaining largely colour-blind was exactly what the Court majority did. Furthermore, racialized individuals may possess serious reservations about simply walking away when asked pointed questions from police officers and faced with demands to see

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[56] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 7 (S.C.C.).

[57] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 7 (S.C.C.).

[58] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 7 (S.C.C.).

[59] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at paras. 49-51 (S.C.C.).

[60] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at paras. 49-51 (S.C.C.).

[61] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 154 (S.C.C.).

their identification.[62] The majority in *Le* took a different approach — it was sensitive to the role of race in constructing the reasonable person in connection with detentions and the apprehension of racialized persons in being unable to ignore the commands of law enforcement officials. I turn to this next.

3. Writing Race into the Psychological Detention Analysis

Unlike the *Grant* Court, the majority's decision in *Le* considered the important role that race could play in the context of a Charter analysis with respect to psychological detentions. As discussed in the introduction, in *Le*, three police officers, working from information received from security guards at a housing cooperative, but without reasonable suspicion, entered and confronted five racialized youth in the private backyard space of a townhouse. When the officers arrived, the five individuals were simply conversing. Upon trespassing, the officers took immediate control, issued curt demands and required the five individuals to produce identification. When Le was asked about the contents of his satchel, he fled and was quickly apprehended. Le was arrested and subsequently charged with 10 offences, including unlawful possession of a firearm and narcotics for the purpose of trafficking.

The Court addressed the central issues of whether Le was arbitrarily detained pursuant to section 9 of the Charter, and, if so, whether the evidence should have been excluded further to section 24(2). In affirmatively answering these inquiries, the majority examined the role of race in its analysis and proceeded on the basis of scrutinizing whether Le was psychologically detained by virtue of the factors established in *Grant*. To recall, the first two sets of factors examine the circumstances giving rise to the encounter and the nature of the police conduct. These two groups of factors do not formally incorporate an analysis of race. However, it is notable that in discussing "the place where the interaction occurred" as part of the nature of the police conduct analysis, the *Le* majority quoted from Lauwers J.A. of the Ontario Court of Appeal in his dissent, who observed that the officers in the case would not likely have "brazenly entered a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community".[63] The majority opined: "[T]he reputation of a particular community or the frequency of police contact with its residents does not in any way license police to enter a

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[62] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353 (S.C.C.) (Binnie J. stating at para. 169: "This gap between the reality on the street and the court constructed 'reasonable person' is of particular relevance to visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk way itself to be taken as evasive and later be argued by the police to constitute sufficient grounds of suspicion to justify a *Mann* [investigative] detention"). See also the *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 3 (1991), at chapter 4, online: <http://www.ajic.mb.ca/volumelll/chapter4.html>.

[63] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 59 (S.C.C.), citing *R. v. Le*, [2018] O.J. No. 359, 360 C.C.C. (3d) 324, at para. 162 (Ont. C.A.), Lauwers J., dissenting.

private residence more readily or intrusively than they would in a community with higher fences or lower rates of crime."[64] However, it is in connection with the third group of factors — the particular characteristics or circumstances of the accused — that the majority placed greater stress on race in its analysis. Below, I focus my attention on this.

(a) Consistent with Grant?

In highlighting race as an important consideration regarding its analysis of the particular characteristics or circumstances of the accused, the *Le* majority tethered its decision to the judgment in *Grant* and the latter's recognition of the need to account for "diverse realities".[65] This was presumably in service of suggesting that their approach was consistent with the Court's approach in *Grant*. The *Le* majority stated:

> By expressly including the race of the accused as a potentially relevant consideration, this Court acknowledged that, based on distinct experiences and particular knowledge, various groups of people may have their own history with law enforcement and that this experience and knowledge could bear on whether and when a detention has reasonably occurred.[66]

To be clear, the majority's decision in *Grant* did not identify "race" as a potentially relevant consideration; rather, it looked to "minority status" generally. As stated above, this may easily incorporate considerations of race. However, it can also include, separate and apart from race, considerations of sexual minority status, religion and/or national origins. That Grant himself was Black might suggest that race was what was intended by the term "minority status". However, as noted above, one searches in vain to find evidence that Grant's race was actually factored in any explicit way into the Court's analysis. Indeed, the *Grant* majority focused on his "age and inexperience".[67] It then posited: "In our view, the evidence supports Mr. Grant's contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct."[68] Save for Binnie J.'s consideration of race in his concurrence, the *Grant* majority's treatment of race is conspicuous by its absence.

Far from seeking to castigate the *Le* majority, I would simply observe that its inclusion and emphasis on race is what makes it positively distinguishable from *Grant* and an important step forward in psychological detention analyses.

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[64] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 60 (S.C.C.).

[65] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 73 (S.C.C.).

[66] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 73 (S.C.C.).

[67] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 50 (S.C.C.).

[68] *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 50 (S.C.C.).

(b) Distinguishing Between Race and Racial Profiling for Psychological Detentions

Many police encounters, including psychological detentions, may transpire as a consequence of racial profiling. This raises an issue as to what role, if any, a positive or negative finding of racial profiling in a particular case should play. The Supreme Court has defined racial profiling as

> any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny.
>
> Racial profiling [also] includes any action by a person in a situation of authority who applies a measure in a disproportionate way to certain segments of the population on the basis, in particular, of their racial, ethnic, national or religious background, whether actual or presumed.[69]

The *Le* majority articulated that racial profiling is tied to the internal mental processes of the relevant persons in authority.[70] Therefore, a finding that there has been no racial profiling on the part of state actors will not have much bearing on the timing of the detention, which is assessed on what a reasonable person standing in the shoes of the accused would perceive.[71] A finding of racial profiling is more central to an assessment of whether a detention or imprisonment is arbitrary.[72] This said, the majority observed that an actual finding that racial profiling animated a detention may impact how a reasonable person experiences the police interaction at issue.

These pronouncements are important as a psychological detention analysis should not be reliant on or defeated due to an accused's inability to show what motivated the state actors in question. Furthermore, requiring an accused to do so would defeat the nature of the test that looks at the reasonable person in the circumstances of the accused. In addition, and connected to one of the important themes of critical race scholarship discussed above, the focus on the reasonable racialized person in such encounters allows courts to at least consider the stories behind these types of encounters through the often-ignored lenses of those subjected to these confrontations.

(c) Race and the Timing of a Psychological Detention

In determining whether a detention has occurred and when it commenced, courts

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[69] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] S.C.J. No. 39, [2015] 2 S.C.R. 789, at para. 33 (S.C.C.).

[70] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 78 (S.C.C.).

[71] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at paras. 79 and 81 (S.C.C.).

[72] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 78 (S.C.C.).

are to examine the circumstances through the lens of the reasonable person standing in the shoes of the accused. More specifically, this judicially constructed person is deemed to have knowledge of how relevant race relations would affect an interaction between police officers and, in the *Le* case, "four Black men and one Asian man in the backyard of townhouse at a Toronto housing co-operative".[73] The majority discussed the sources that would inform the reasonable person about the state of race relations between the police and various racialized communities.[74] The sources included formal reports concerning race relations[75] and testimonial evidence.[76] Importantly, such sources convey significant experiences and narratives of racialized persons and their interactions with police. Further to critical race scholarship, these race-informed narratives supply the types of counterstories that legal decisions typically fail to account for. By incorporating them into the decision, the majority recognized their value as part of the legal analysis. I discuss each in turn.

(i) Reliable Reports on Race Relations

There is no dearth of information on relations between police and racialized communities. The *Le* majority asserted that the "information necessary to inform the reasonable person is readily available from many sources and authorities which are not the subject of reasonable dispute" and indeed numerous submissions and interveners made arguments relying on such studies.[77] In addition to academic scholarship, the majority pointed specifically to reports by the Ontario Human Rights Commission ("OHRC") from 2003 and again in 2018, in addition to the commissioned *Report of the Independent Street Checks Review* prepared by Justice Michael Tulloch of the Ontario Court of Appeal (the "Tulloch Report"). These several reports lend support to what critical race scholars have observed for some

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[73] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 82 (S.C.C.). The events in the *Le* case transpired in a lower-income neighbourhood and there was very likely an intersection between race and socio-economic status at play. However, it is also critical to acknowledge that many racialized individuals will be targeted for questioning outside of lower-income neighbourhoods and because of their presence in more affluent areas regardless of their actual socio-economic status. Therefore, the majority's race-sensitive analysis regarding psychological detentions remains important for police interactions with racialized persons more generally. For instance, members of Black communities may be profiled for the vehicles they drive regardless of vicinity. "Wes Hall compelled to speak about systematic racism after George Floyd's death" *CBC* (June 17, 2020), online: <https://www.cbc.ca/player/play/1752140867798>; Claire Loewen, "With rolling protest, Black Montrealers denounce the challenge of 'driving while Black'" *CBC* (July 6, 2020), online: <https://www.cbc.ca/news/canada/montreal/driving-while-black-racial-profiling-convoys-1.5638548>.

[74] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 88 (S.C.C.).

[75] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at paras. 89-97 (S.C.C.).

[76] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at paras. 98-106 (S.C.C.).

[77] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 89 (S.C.C.).

time — namely, that racism is an ordinary phenomenon.

Drawing from these various reports, the *Le* majority made certain observations that were in no way novel but confirmed long-standing police practices and phenomena. First, members of racial minorities tend to have disproportionate levels of contact with police and the criminal justice system more generally.[78] Second, and connecting to the OHRC's 2018 report, due to such higher levels of contact, Black persons in Toronto were 20 times more likely than a White person to be involved in a police shooting that resulted in a civilian death.[79] The majority also noted that the OHRC's 2018 report illustrated several recurring themes relevant to understanding the reasonable person's knowledge of race relations — the lack of legal bases for police stopping, questioning and detaining Black people in the first place, inappropriate or unjustified searches during encounters with police, and unnecessary charges or arrests.[80]

The majority then turned its attention to the Tulloch Report, which was released after the appeal in *Le* was heard by the Supreme Court. It stated that the Tulloch Report was especially relevant because it focused "on the *perceptions* of those subject to police encounters similar to the kind" that took place in *Le*.[81] Contextually, the Tulloch Report addressed the history and development of street checks and the practice of carding. At its roots, the practice of carding began with specifically targeted persons of interest but later expanded to anyone police officers deemed to be persons of interest. Drawing from the interviews and consultations with community members, Tulloch J.A. found that the persistent over-policing and carding of marginalized and racialized members of society (including its youth) had many deleterious consequences, including impacts on their physical and mental health, as well as their ability to pursue employment and educational opportunities.

Although such recent official reports provide useful and up-to-date information, they also, in the majority's estimation, document actions and attitudes that have existed for a long time.[82] The majority observed:

> A striking feature of these reports is how the conclusions and recommendations are so similar to studies done 10, 20, or even 30 years ago. These reports do not establish any new fact, but they build upon prior studies, research and reports and present a clear and comprehensive picture of what is currently occurring. Courts generally benefit from the most up to date and accurate information and, on a go-forward basis, these reports will clearly form part of the social context when

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[78] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 90 (S.C.C.).

[79] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at paras. 91-93 (S.C.C.).

[80] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 93 (S.C.C.).

[81] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 94 (S.C.C.) [emphasis in original].

[82] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 96 (S.C.C.).

determining whether there has been an arbitrary detention contrary to the *Charter*.[83]

It is worth noting that the *Le* majority also posited that even in the absence of such recent reports, "we have arrived at a place where the research now shows disproportionate policing of racialized and low-income communities".[84] From its perspective, it was through this broader and recognized social context that the police entry into a private backyard space with the questioning of Le and his friends had to be approached. It was yet "another example of a common and shared experience of racialized young men: being frequently targeted, stopped, and subjected to pointed and familiar questions".[85]

(ii) Testimonial Evidence

Though the aforementioned reports would have been sufficient evidence to inform the judicially constructed reasonable person, the *Le* majority instructed that direct testimony from the accused and others may also be elicited to inform the analysis. Connected to critical race scholarship, the inclusion of such evidence draws attention to the sustained nature of police contact that many racialized persons endure due to their race or ethnicity. Testimonials concerning the impact of frequent low-visibility encounters with police officers constitute compelling counterstories, which are typically left out of official accounts. Such narratives offer important explanations as to why racialized persons would reasonably believe that they have little choice but to answer the questions of police officers and, in some cases, incriminate themselves.

At trial, Le and other individuals testified regarding the persistent exposure to police surveillance and questioning. For instance, one individual, LD, whose backyard space was the site where the confrontation in *Le* took place, provided testimony regarding frequent stops in which officers asked him "a bunch of questions" and to produce identification.[86] In one notable encounter, LD testified that a police officer on a bicycle approached him as he was about to enter his own house. LD recounted that the officer commanded him to stop, not to enter his home and to lift his shirt. After complying, the officer then told LD that he could enter his house. LD reflected that this incident intimidated and frightened him; the fact that this occurred as LD was about to enter his home was particularly salient.

Le had also testified about his experiences with police officers that illustrated the regularity of such interactions and their physically intimidating nature. The majority incorporated portions of Le's testimony recounting that when he was 13 or 14, he was stopped frequently by police officers patrolling in cruisers, bicycles and on foot. Le stated that police would

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[83] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 96 (S.C.C.).

[84] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 97 (S.C.C.).

[85] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 97 (S.C.C.).

[86] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 100 (S.C.C.).

> ask us where are going [*sic*], ..., ask if we live in the area. Or if a bike officer stopped us, they actually get in our face, get off our bikes, basically, make a perimeter with their bikes so we can't really run away, and they would ask us, what's our names, what are we doing around here, a little frisk.[87]

In addition, he learned of stories of police violence against others and indeed witnessed physical violence.[88] Le confirmed that due to these accounts, he "feared such violence would be turned towards him if he refused or resisted".[89]

The frequency and the authoritative nature of the police stops and carding practices create a normative expectation that police directions must be followed. Another witness addressed this. What flows from the following examination during *voir dire* is the witness signalling compliance on the basis of an unspoken rule and the assumption of ominous consequences that would likely ensue.[90]

Q. Did you ever feel you could not answer their questions?

A. You couldn't not answer. You always have to answer them.

Q. Did you ever feel you could walk away and not be searched?

A. No.

Q. Why not?

A. 'Cause always it would be, you, it was, like, an unspoken rule to not. You would have to just give up your ID or you would just keep on getting harassed 'til you gave your ID, so you'd always have to comply with them.

Q. And what, where did this unspoken rule, how did that come to be in your mind as a rule?

A. It just happened so much that I just got used to it.

Q. And what do you think would happen if you didn't?

A. God knows. I'm not sure.

Q. Well, something good or something bad?

A. Probably bad. Most likely bad.

Q. Why bad?

A. I don't think there's any other way to go about it.

Such incidents and the persistent feeling of having to constantly produce identification and answer questions in order to counter the presumption of criminality appears to be a disturbing feature of the lived experiences of many Black

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[87] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 102 (S.C.C.).

[88] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 103 (S.C.C.).

[89] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 103 (S.C.C.).

[90] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 101 (S.C.C.).

communities in and beyond Toronto.[91] In addition to the majority's inclusion of the testimonials above, the OHRC's 2018 report included various accounts by interviewees. Their experiences share striking commonalities with the testimonials quoted by the *Le* majority and the feeling of always fitting a general description.[92] One Black male aged between 20 to 24 years of age posited: "Truthfully all my friends have been through the same things I have been through. It has become second nature to be aware of the police . . . [It's a] clear violation, but position of power leaves us just to accept this treatment as normal."[93] Similarly, journalist/activist Desmond Cole has articulated the impact of frequent stops by police officers and how they came to represent a symbol of danger. He has written: "As my encounters with police became more frequent, I began to see every uniformed officer as a threat. The cops stopped me anywhere they saw me, particularly at night."[94] Such accounts strongly indicate a commonly shared experience that compliance in police encounters is expected.

Notably, the *Le* majority's inclusion of the accused's testimony and those of other racialized persons was despite the fact that the trial judge found their evidence not to be credible.[95] The experiences of these young persons "were seen as manufactured because their testimony was too consistent and their explanation about what had happened over various years lacked specifics, such as dates and the names of the officers involved".[96] It seems strikingly questionable to expect teenagers and young adults to document these encounters with the degree of specificity the trial judge expected of them, especially since they were quite frequent and regularized.[97] In any event, the majority was unmoved by the trial judge's credibility assessments since the relevant analysis was an objective one. It posited: "In the absence of testimonial evidence, which is what happens when such is either rejected or was never tendered,

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[91] Such encounters are also shared by others, including Indigenous communities. Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2003), at 54-66.

[92] Ontario Human Rights Commission, *A Collective Impact: Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2018), at 28-30.

[93] Ontario Human Rights Commission, *A Collective Impact: Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: Ontario Human Rights Commission, 2018), at 10.

[94] Desmond Cole, "The Skin I'm In: I've Been Interrogated by Police More Than 50 Times — All Because I'm Black" *Toronto Life* (21 April 2015), online: https://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/.

[95] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 104 (S.C.C.).

[96] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 104 (S.C.C.).

[97] Even had these individuals done so, it might be worth asking whether such assiduous record-keeping — *i.e.*, documenting the types of specific information demanded by the trial court judge — would have been received positively, or just dismissed as incredible.

there is still a need to inquire into how the race of the accused may have impacted the s. 9 analysis."[98]

Consistent with *Grant*, the *Le* majority considered the accused's level of sophistication, physical stature and age. The consideration of these accumulated factors led to the majority concluding that a reasonable person in the shoes of the accused would feel that they were psychologically detained. After determining that the detention was arbitrary, the majority held that the evidence should have been excluded under section 24(2), in contradistinction with *Grant*. The *Le* majority concluded that despite the reliability of the evidence, the nature of the Charter-infringing conduct was serious (involving intentional trespass on private property without legal authority) and had a significant impact on Le's interests, specifically his liberty from unjustified state interference.[99]

V. CONCLUSION

The Supreme Court's decision in *Le* represents an important step forward in showing how race can and should play a greater role in Charter litigation and constitutional analysis. The incorporation of race in the psychological detention analysis for the purposes of sections 9 and 10 is especially important in light of consistent police practices of targeting and carding members of racialized communities. It signifies a noticeable departure from earlier cases such as *Grant* where race was entirely excluded from the majority's analysis. Such race-sensitive analyses may incorporate the experiences and narratives of racialized persons that can often be omitted from official accounts and highlight the quotidian nature of these encounters. They highlight that for many racialized persons, the ability to simply walk away from a police-initiated interaction is not a reasonable expectation.[100]

It is perhaps too much to expect one decision to penetrate the entrenched cultural mindsets and practices of various actors in the criminal justice system. Nevertheless, thinking aspirationally, the majority's analyses in *Le* may inspire varying degrees of change. For instance, it might embolden defence lawyers to make arguments about the role of race in policing, and, where appropriate, have their clients testify during *voir dires* in furtherance of pre-trial motions to exclude evidence in violation of sections 9 or 10 of the Charter. The *Le* decision may also encourage more judges to account for the manner in which race plays a considerable role in the interactions

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[98] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at para. 106 (S.C.C.).

[99] *R. v. Le*, [2019] S.C.J. No. 34, 375 C.C.C. (3d) 431, at paras. 143-166 (S.C.C.).

[100] However, even where a court determines that a detention has transpired for the purposes of s. 9, if it is done in furtherance of a common law police power and the interference is deemed a justified use of such power, the conduct may be viewed as non-arbitrary and thus not constitute a Charter breach under s. 9. The expansion and growth of such powers further to the ancillary powers doctrine has been examined elsewhere in this issue. See Terry Skolnik & Vanessa MacDonnell, "Policing Arbitrariness: *Fleming v. Ontario* and the Ancillary Powers Doctrine", in this volume.

between police officers and members of racialized communities. In particular, it could sensitize courts as to how the experience of policing may lead racialized persons to reasonably believe they are being detained and required to answer questions. Responsively, law enforcement officials might in turn seek to tread more carefully in their interactions with racialized communities. The failure to do so may lead courts to designate such conduct as Charter breaches and result in the exclusion of evidence.[101] The risk of future judicial determinations and denunciation regarding police practices that infringe the Charter may foster concern among some officers about the reputational harm to themselves personally, as well as to police institutions more broadly.

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[101] See, *e.g.*, *R. v. Thompson*, [2020] O.J. No. 1757, 2020 ONCA 264 (Ont. C.A.).