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SECTION 9 OF THE *CANADIAN CHARTER* & ARBITRARY LAWS: A TAXONOMY, AN ORGANIZATIONAL IDEAL, AND A PATH FORWARD

FRANÇOIS TANGUAY-RENAUD†

I. SECTION 9 AND THE ROAD NOT YET TRAVELLED

Section 9 of the *Canadian Charter of Rights and Freedoms* provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned."[1] Although it took many decades following the adoption of the *Charter* for Canadian courts to settle on an interpretive framework for this right, its two-part analytical structure is now well-established. For an individual's section 9 right to be infringed the state must, first, have detained or imprisoned this individual and, second, the detention or imprisonment must have been arbitrary.

While what constitutes imprisonment was never controversial,[2] the meaning of the related yet broader concept of detention was not fully elucidated in the context of section 9 until the 2009 decision of the Supreme Court of Canada in *R v Grant*. There, the Court established that a detention can arise in any of

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† Associate Professor, Osgoode Hall Law School, York University in Toronto. I wish to thank the participants in two workshops in which I presented this paper, hosted by the University of Ottawa Public Law Centre and the University of Toronto Faculty of Law. In particular, I am grateful to Benjamin Berger, Jorge Camacho, Vincent Chiao, Benjamin Ewing, Chad Flanders, Stephen Galoob, Lisa Kelly, Matt Matravers, Gabriel Mendlow, Joshua Kleinfeld, Sylvia Rich, Terry Skolnik, as well as two anonymous reviewers and the editors of the UBC Law Review for their helpful comments.

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

2 As the majority states in passing, "'[i]mprisonment' connotes total or near-total loss of liberty": *R v Grant*, 2009 SCC 32 at para 29 [*Grant*].

the following three ways: when a state agent physically takes control of an individual, when an individual is legally required to comply with a state agent's restrictive or coercive direction and, finally, where an individual has no legal obligation to comply with such a demand, but a reasonable person in that individual's position would feel so obligated.[3] The interpretive framework for assessing the arbitrariness of a detention or imprisonment also had to wait for *Grant* to take hold and was not fully settled until the 2019 decision of the Supreme Court in *R v Le*.[4] As clarified in *Le*, for a detention not to be arbitrary under section 9, it must meet three conditions: "the detention must be authorized by law; the authorizing law itself must not be arbitrary; and, the manner in which the detention is carried out must be reasonable."[5]

That it took almost 40 years after the entry into force of the *Charter* for the interpretive structure of section 9 to crystallize is nothing short of startling, given the importance of the right. In *Grant*, the Supreme Court sets out a clear target for why we should be concerned about arbitrary detention at the hands of the state; a target that has a weighty historical pedigree. "The purpose of s. 9," the Court proclaims, "is to protect individual liberty from unjustified state interference."[6] So interpreted, the right stands as a bulwark against state overreach and tyranny—as a limit on the state's ability to restrain people's physical liberty, or to impose other forms of coercive pressure on them, "without adequate justification."[7] And yet, it took close to four decades for the Supreme Court to settle on the broad parameters of what adequate justification requires in the section 9 context.

I underscore this protracted delay to contextualize and emphasize the pressing nature of the concern I wish to address

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3 *Ibid* at paras 24–44. This tripartite classification was inspired by the Supreme Court's classification of detentions under s 10 of the *Charter*. See especially *R v Therens*, [1985] 1 SCR 613 at 641–44, 1985 CanLII 29 (SCC) [*Therens*]; *R v Thomsen*, [1988] 1 SCR 640 at 649, 1988 CanLII 73 (SCC).

4 2019 SCC 34 [*Le*].

5 *Ibid* at para 124. See also *Grant*, *supra* note 2 at paras 54–56.

6 *Grant*, *supra* note 2 at para 20.

7 *Ibid*; *Le*, *supra* note 4 at para 25.

in this article. While the broad parameters of section 9 are now settled, the meaning of arbitrariness is still not. Recall that, according to *Grant* and *Le*, for a detention or imprisonment not to be arbitrary, it must be authorized by a law that is itself not arbitrary.[8] Therefore, for the Supreme Court to avoid circularity, it must provide a deeper account of arbitrariness: an account that explains what makes a law authorizing detention arbitrary. Unfortunately, the Court has yet to devote sustained attention to this question. Insofar as it has considered it, its pronouncements have tended to be brief, question-begging, and at times, ostensibly conflicting. As a result, the Court's answer to the question of what constitutes an "adequate justification" for detention or imprisonment—or, put differently, of what makes it non-arbitrary—in the context of section 9 remains incomplete, leaving the state to operate under ambiguous constitutional guidance.

Academic commentary on the relevant Supreme Court jurisprudence has been equally deficient. Some leading commentators, such as Steven Penney, Vincenzo Rondinelli, and James Stribopoulos, are content to point out that "it has usually been the presence of too little or too much discretion in the statutory authority conferred that has proven determinative."[9] They then make little effort to disentangle, explain, and justify the various aspects of the Court's case law that led them to this equivocal conclusion. Others, like Steve Coughlan and Glen Luther, insist instead, somewhat enigmatically and without pointing to any source for their claim, that the Court "does intend" only one definition of arbitrary laws to be "the definition".[10] There are also those who choose to raise the

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8 *Grant*, *supra* note 2 at paras 54–56; *Le*, *supra* note 4 at para 124.

9 Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada*, 3rd ed (Toronto: Lexis Nexis, 2022) at 149.

10 Steve Coughlan & Glen Luther, *Detention and Arrest*, 2nd ed (Toronto: Irwin Law, 2017) ("[t]he important point to note is that the Court has not merely said that not being governed by any criteria is *one* way to be arbitrary. Rather, it actually does intend that 'not governed by any criteria' is the definition of 'arbitrary' for section 9 purposes" at 299 [emphasis in original]). While the authors go on to express discontent with this state of

question of what makes laws arbitrary in the same breath as they raise the question of what makes executive action arbitrary, thus inviting their conflation and attendant confusion.[11]

In this article, I lay the groundwork for a remediation of this disquieting jurisprudential and doctrinal deficit. In Part II, I undertake a review of the Supreme Court's section 9 case law with the goal of developing a taxonomy of the various accounts of what makes laws arbitrary that can be discerned from it. I identify three: (1) a formal account with a procedural dimension, according to which, not to be arbitrary, a law authorizing detentions must provide judicially reviewable criteria for detention; (2) a purpose-sensitive account, according to which a law must not only provide criteria but criteria that are rationally connected to the purpose of the power of detention and are sufficiently well-tailored to it; and (3) an improper considerations account, according to which there are some considerations (such as discriminatory ones) that it would be arbitrary for a detention power to further. I seek to flesh out each of these three accounts as much as the case law allows, to identify ambiguities and blind spots in their development, and to point out similarities between them and related constitutional standards that exist under other sections the *Charter*. In the process, I set the stage for their individual assessment and an assessment of their interplay.

In Part III, I proceed to evaluate the three accounts in light of the stated purpose of section 9, which, again, is to ensure that detentions and imprisonments at the hands of the state not be effectuated without adequate justification. I follow the Supreme Court's invitation to understand the section—and, therefore, the kind of justification it requires—as advancing the ideal of the rule of law. Given the Supreme Court's limited articulation of what this ideal requires of laws themselves, I not only couch my analysis in the Court's underdeveloped pronouncements about it, but also in what I deem to be the best and most ecumenical

affairs, they fail to notice that different accounts of arbitrary laws already have currency in the Supreme Court's case law.

11 See e.g. Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 12th ed (Toronto: Emond Montgomery Publications, 2020) at 194–98.

theoretical account of it. Namely, I build on Joseph Raz's account of the rule of law, on which the Court itself relied early in its foundational discussion of the ideal and of which Raz published a careful reassessment prior to his death in 2022. I argue that, properly elaborated, the Court's three accounts of arbitrary laws correspond to different aspects of the rule of law. As such, they should all be applied to impugned laws authorizing detention, in a cumulative fashion. They should not be treated as alternative accounts, as the Court's disjointed case law often seems to suggest.

Finally, in Part IV, I turn to the Supreme Court's use of the ancillary powers doctrine to create new police powers of detention at common law with a view to assessing it in accordance with the previous analysis. Consideration of this doctrine is inevitable, I argue, given the Supreme Court's propensity to resort to it to create new powers without subjecting them to section 9 scrutiny, thus discounting the importance of the considerations discussed in Parts II and III. I contend that the assessment of the arbitrariness of common law powers should be much more central to the doctrine. I also argue that understanding the doctrine as being fundamentally aimed at advancing the rule of law, as opposed to subverting it, bolsters the case for the importance of such a revision.

Overall, I argue that the key parameters for a consistent and principled approach to what makes laws authorizing detentions arbitrary are already present in the Supreme Court's section 9 case law (and in some related aspects of its sections 7 and 15 case law). What is needed is for the Court to organize and implement them systematically based on the stated purpose of section 9, and to commit to advancing them, whenever applicable, through its evolving interpretation of this section.

II. WHAT MAKES LAWS ARBITRARY UNDER SECTION 9: A TRIPARTITE TAXONOMY OF THE SUPREME COURT'S CASE LAW AND SOME TENSIONS

As established in *Grant* and reiterated in *Le*, a detention (or imprisonment)[12] must be authorized by law not to be arbitrary, such that an unlawful detention is necessarily arbitrary.[13] Barring some complications that may arise from state agents' mixed motivations for detaining someone and from the Supreme Court's ancillary powers doctrine, to which I will turn later, this idea is fairly clear. Unless a state agent has a legal power—conferred by statute or the common law—to detain a person, and unless this agent acts within the confines of that power when detaining that person, the detention will be arbitrary under section 9.[14] Yet, as *Grant* and *Le* remind us, the arbitrariness story does not end there. For a detention not to be arbitrary, not only must it be lawful, but the authorizing law itself must not be arbitrary.[15]

What makes a law arbitrary? Although the Supreme Court's remarks on the subject have been surprisingly scarce, three distinct accounts can be discerned from its existing case law.

A. A Formal Account with a Procedural Check: The Requirement of Judicially Reviewable Criteria for Detention

[12] For the sake of simplicity, since every imprisonment is necessarily a detention under the *Grant* account of the latter, I will henceforth solely be referring to detentions.

[13] *Grant*, *supra* note 2 at paras 54–56; *Le*, *supra* note 4 at para 124. See also *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 88 [*Charkaoui*]; *R v McColman*, 2023 SCC 8 at para 51.

[14] I say that this idea is "fairly clear" for the following reason. Like detentions under the s 9 regime, searches and seizures must be authorized by law not to fall foul of s 8 of the *Charter*. However, even otherwise unlawful searches and seizures may legally be performed if the person searched consents to them. See generally *R v Borden*, 1994 CanLII 63 (SCC). Similarly, otherwise unlawful detentions that are genuinely consensual should not be found to infringe s 9. See also Steve Coughlan, *Criminal Procedure*, 4th ed (Toronto: Irwin Law, 2020) at 247.

[15] *Le*, *supra* note 4 at para 124. This criterion was first settled in *Grant*, *supra* note 2 at para 54.

The leading, or most often reiterated, account emanates from a pair of early *Charter* cases dealing with a statutory power authorizing police officers to stop vehicles at random to perform traffic-safety checks.[16] The statutory provision at issue authorized officers to stop vehicles only for legally-recognized traffic-related purposes such as "checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle."[17] Still, "random" stops were authorized in the sense that the statute did not require officers to have any specific reason for choosing to stop one car over another to conduct a check. In *Hufsky*, Le Dain J writes for the Court that:

> Although authorized by statute and carried out for lawful purposes, the random stop for the purposes of the spot check procedure nevertheless resulted, in my opinion, in an arbitrary detention because there were no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure. The selection was in the absolute discretion of the police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise.[18]

This formal definition of arbitrariness, which insists on the need for legal criteria restricting any discretion to detain, is reminiscent of the administrative law principle of arbitrariness. As established in the seminal case of *Roncarelli v Duplessis*,[19] this principle stands against "untrammelled 'discretion'"—that is to say, administrative action that "can be taken on any ground or for any reason that can be suggested to the mind of the administrator".[20] The *Hufsky* account is also reminiscent of the principle of vagueness under section 7 of the *Charter*.[21] As noted

16 *R v Hufsky*, [1988] 1 SCR 621, 1988 CanLII 72 (SCC) [*Hufsky* cited to SCR]; *R v Ladouceur*, [1990] 1 SCR 1257, 1990 CanLII 108 (SCC) [*Ladouceur* cited to SCR].

17 *Ladouceur*, *supra* note 16 at 1287.

18 *Hufsky*, *supra* note 16 at 632–33.

19 [1959] SCR 121, 1959 CanLII 50 (SCC) [*Roncarelli* cited to SCR].

20 *Ibid* at 140.

21 See *Charter*, *supra* note 1 (providing that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", s 7).

by the Supreme Court in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*,[22] this principle of fundamental justice is directed at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application".[23] To counter the perils of such "[*a*]*d hoc* discretionary decision making", the principle of vagueness requires that laws that empower state officials to restrict people's life, liberty, or security of the person provide them with at least some meaningful guidance in the form of "intelligible standard[s]" about how to exercise their discretion.[24]

Now, the existence of legal criteria for detention would be of limited use to counter ad hoc discretion if their implementation could not be independently controlled or, indeed, could not be independently controlled in a reasonably timely fashion. Thus, in *Charkaoui*, the Supreme Court held that the detention of foreign nationals declared to be inadmissible to Canada under the security certificate process of the *Immigration and Refugee Protection Act* was not arbitrary for lack of legal standards regulating the decision to detain.[25] Insofar as someone was detained on the statutory ground of security—and, by implication, of their dangerousness—criterial arbitrariness under section 9 was not an issue. Rather, what made the law authorizing such detention arbitrary was the absence of a prompt avenue to have the conformity of the decision to the relevant legal standards judicially reviewed: a detained foreign national had to wait at least 120 days for such review.[26] What

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[22] 2004 SCC 4 [*Canadian Foundation for Children*].

[23] *Ibid* at para 16, citing *Grayned v City of Rockford*, 408 US 104 (1972) at 109.

[24] *Canadian Foundation for Children*, *supra* note 22 at paras 15–17. See also *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 1992 CanLII 72 (SCC) [*Nova Scotia Pharmaceutical* cited to SCR] ("[a] vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria" at 639).

[25] *Charkaoui*, *supra* note 13 at para 89.

[26] *Ibid* at paras 90–91:

> The lack of review for foreign nationals until 120 days after the reasonableness of the certificate has been judicially determined violates the guarantee against

Charkaoui highlights, then, is the concomitant importance of the availability of prompt judicial review to the *Hufsky* principle, so as to ensure that a detention complies with the legal criteria regulating it. This holding can be interpreted as a logical extension of the principle that a detention must be based on legal criteria not to be arbitrary—that is, it must be based on legal criteria that are enforceable, in the sense that their actual application can be controlled by means of reasonably prompt judicial review.

This connection is also acknowledged elsewhere in the case law. For example, in *R v Pearson*,[27] Lamer CJC, writing for the majority, insists in the same breath on the existence of legal criteria and the availability of judicial review to justify his holding that the part of the statutory bail regime under scrutiny is not arbitrary under section 9:

> Section 515(6)(*d*) sets out a process with fixed standards . . . . Specific conditions for bail are set out. The highly structured nature of the criterion in s. 515(6)(*d*) is in sharp contrast to the completely random nature of the detention which was held to violate s. 9 in *Hufsky*, *R. v. Ladouceur* . . . . Furthermore, the bail process is subject to very exacting procedural guarantees (see ss. 516, 518(1)(*b*), 523(2)(*b*)) and subject to review by a superior court (see ss. 520 and 521).
>
> Accordingly, I conclude that s. 515(6)(*d*) does not violate s. 9.[28]

This description encapsulates what I take to be the Supreme Court's formal account of arbitrariness under section 9.

One may interject that, as described, this account leaves an important question open. Namely, does section 9 require specific kinds of legal criteria, or can *any* criteria do? *Hufsky* and later cases purporting to apply its account of arbitrariness are conspicuously silent on the topic. The assumption seems to be that there simply must be one or more legal criteria governing

arbitrary detention in s. 9 of the *Charter*, a guarantee which encompasses the right to prompt review of detention under s. 10(c) of the *Charter*.

27 [1992] 3 SCR 665, 1992 CanLII 52 (SCC) [*Pearson* cited to SCR].

28 *Ibid* at 700 [emphasis in original].

the decision to detain, as opposed to "no criteria".[29] Or, in other words, a discretion to detain must not be an "absolute discretion"[30] or "completely random"[31]—it must somehow be legally "structured".[32] And that is all.

B. A Purpose-Sensitive Account: The Requirement of Detention Criteria Rationally Connected and Tailored to the Purpose of the Detention Power

Following the reasoning in *Hufsky*, one could imagine legislators seeking to remedy the arbitrariness identified in the authorizing legislation by specifying *any* criteria for selecting which cars the police may stop. Consider criteria such as "the police may stop white cars," or "every *n*th car," or "the cars of drivers who are seen picking their noses." Would these criteria pass section 9 muster? Not only are they criteria, but they are clear, objectively observable criteria. So, based on *Hufsky*'s formal account of arbitrariness, such criteria would likely cure the section 9 infringement as identified in the case.

Yet, one may object that such criteria are the wrong kind of criteria for stopping cars, insofar as they are not obviously connected to the purpose of the statutory scheme. For example, they do not point to any reason to believe that the drivers being stopped pose a highway safety risk—that is, per the statute, that they are unlicensed or uninsured, that their car is mechanically unfit, or that they are inebriated.[33] Doesn't this lack of explicit rational connection between the legal criteria for detention and the purpose of the law authorizing it make such criteria arbitrary, in the sense, this time, that the criteria may be entirely dependent on lawmakers' whims or caprices?

While the *Hufsky* line of decisions does not address this concern, the Supreme Court appears more sensitive to it in a

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29 *Hufsky*, *supra* note 16 at 633.

30 *Ladouceur*, *supra* note 16 at 1277.

31 *R v Morales*, [1992] 3 SCR 711 at 740–41, 1992 CanLII 53 (SCC).

32 *Pearson*, *supra* note 27 at 699–700.

33 On the purpose of the statute in question, see *Hufsky*, *supra* note 16 at 631, 636.

parallel line of cases. Thus, in *Charkaoui*—a case that does not mention *Hufsky*—the Court insists that a "[d]etention is not arbitrary where there are 'standards that are rationally related to the purpose of the power of detention'".[34] In that case, the Court held that the statute authorizing the detention of individuals was not arbitrary in such a purpose-sensitive sense. It decided as such because the security ground for detention at issue was "based on the danger posed by the named person, and therefore provide[d] a rational foundation for the detention", in the sense of being rationally connected to the purpose of the power.[35] Similarly, in *R v Lyons*, a case dealing with the detention of "dangerous offenders" under what was then Part XXI of the *Criminal Code*,[36] La Forest J holds for the majority that:

> [T]he criteria in Part XXI are anything but arbitrary in relation to the objectives sought to be attained; they are clearly designed to segregate a small group of highly dangerous criminals posing threats to the physical or mental well-being of their victims.[37]

Related reasoning can also be found in *R v Swain*, a case concerned with the automatic detention, then mandated by the *Criminal Code of Canada*, of individuals acquitted of a crime because of a successful invocation of the defence of mental disorder.[38] While portions of Lamer CJC's majority opinion appear to endorse the *Hufsky* account of arbitrariness without mentioning the case by name,[39] he ends up endorsing a purpose-sensitive account. He acknowledges that, under the statutory scheme at issue, only people who have met a set of

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34 *Charkaoui*, *supra* note 13 at para 89, citing Peter W Hogg, *Constitutional Law of Canada*, vol 2, loose-leaf ed (Scarborough: Thomson-Carswell, 1997) (updated 2006, release 1) at 46-5.

35 *Charkaoui*, *supra* note 13 at para 89.

36 [1987] 2 SCR 309, 1987 CanLII 25 (SCC) [*Lyons* cited to SCR] (the relevant *Criminal Code* provisions are reproduced at 323–25).

37 *Ibid* at 347.

38 [1991] 1 SCR 933, 1991 CanLII 104 (SCC) [*Swain* cited to SCR] (the relevant provisions are reproduced at 957–59).

39 See *ibid* (Lamer CJC initially writing "[t]he duty of the trial judge to detain is unqualified by any standards whatsoever. I cannot imagine a detention being ordered on a more arbitrary basis" at 1012).

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specific criteria must be detained—namely, those who have committed the act component of an indictable offence, have a mental disorder severe enough to have met the requirements of the defence, and whose mental disorder has been established on a balance of probabilities. What this acknowledgement reveals is that, to the extent that there is an arbitrariness problem with the detention power in question, it cannot be reduced to a mere lack of legal criteria. Indeed, Lamer CJC concludes that even if one agrees, as he does, "that the mandatory detention order . . . only applies to people who have met these . . . criteria, it is still arbitrary in the way that it operates with respect to them. Not all of these individuals will be dangerous."[40] In other words, even insofar as there are legal criteria circumscribing detention orders, these criteria are overbroad in that they require the detention of at least some individuals whose detention does not advance the purpose of the statutory power to be realized—namely, protecting the public from presently dangerous individuals.[41] In some cases, then, legal criteria may be arbitrary if their application can yield some outcomes that are not rationally connected to the purpose of the detention power.

Like the "no criteria" understanding of arbitrariness, the purpose-sensitive account expounded here is reminiscent of the administrative law principle of arbitrariness introduced earlier. A close reading of *Roncarelli* suggests that a key problem with "untrammelled discretion" is its lack of required connection to the purpose of the discretion—or, in the Supreme Court's own words, "unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute."[42]

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40 *Ibid* at 1013.

41 The majority's comments that "the absence of discretion" may often render a law and its application arbitrary can be interpreted in a similar vein: *Lyons*, *supra* note 36 at 348. If the purpose of a detention scheme is to protect the public from dangerous offenders, as was the case in *Lyons*, the criteria for detention should grant sufficient latitude not to detain those who do not pose such danger.

42 *Roncarelli*, *supra* note 19 at 140.

Perhaps even more on point is the way in which the purpose-sensitive account finds two close equivalents in the Supreme Court's section 7 case law. In *R v Bedford*,[43] two principles of fundamental justice—arbitrariness and overbreadth—are held to be directed at the evil that arises "where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law."[44] On the one hand, the section 7 principle of arbitrariness echoes the reasoning in *Charkaoui* and *Lyons* in that it stands against a law that limits people's life, liberty, or security—for example, by authorizing their detention "in a way that bears *no* [rational] *connection* to its objective".[45] On the other hand, the section 7 principle of overbreadth parallels the reasoning in *Swain* in that it "addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts."[46] In *Swain*, recall, the majority's fundamental arbitrariness concern was with the lack of connection between the purpose of the statutory scheme and some, though not all, detention orders, because the applicable criteria were too rigid and could yield false positives. Under the *Bedford* categorization, such an overbroad law whose criteria

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43 2013 SCC 72 [*Bedford*]

44 *Ibid* at para 108.

45 *Ibid* at para 111 [emphasis in original]. Steve Coughlan objects that "[t]he word 'arbitrary' has two entirely distinct meanings in those two *Charter* rights [namely, ss 7 and 9], and it would be an error to try to use the section 7 definition as a way of analyzing a potential violation of section 9": Coughlan, *supra* note 14 at 246. This puzzling statement can only be explained by Coughlan's apparent failure to realize that a conception of arbitrariness that parallels the s 7 arbitrariness and overbreadth analysis already has well-established currency in the Supreme Court's s 9 caselaw, as demonstrated by the *Charkaoui–Lyons–Swain* line of cases. Coughlan's blind spot is further laid bare when, elsewhere, he argues that it may be possible "to change the definition of 'arbitrary' [under s 9] so that it takes into account the nature of the criteria used, not simply their existence": Coughlan & Luther, *supra* note 10 at 301.

46 *Bedford*, *supra* note 43 at para 112 [emphasis in original]. See also *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 85–88 [*Carter*].

may lead to some detentions that do not advance its purpose would now be described as "arbitrary *in part*."[47]

It must be said that the limited Supreme Court section 9 case law endorsing a purpose-sensitive understanding of arbitrariness has not been consistent on the question of arbitrariness in part. Consider, for example, the case of *R v Storrey*.[48] In *Storrey*, the Supreme Court gives its sanction to the statutory standard of "reasonable and probable grounds" (now reworded as "reasonable grounds"[49]) for warrantless arrests. According to this standard, unless the police find someone in the process of committing a crime, they must have reasonable and probable grounds that this person has committed, or is about to commit, some kind of crime before they may exercise their discretion to arrest them warrantlessly. While this legal criterion undoubtedly bears some rational connection to the purposes of the power of arrest—chiefly, the investigation of, and protection of people from, crime—this connection may not always obtain in fact. Why? Because, while the standard requires the police to have reasonable and probable grounds that a crime has, or soon will be, committed, it does not require them to be correct in their assessment. According to the Court, the police do not even need to have "a *prima facie* case for conviction".[50] Thus, from time to time, the application of the standard will unavoidably yield false positives, in the sense of arrests of people who are, in fact, innocent and may well have no connection whatsoever to criminality.

In *Storrey*, the Supreme Court does not seem troubled by this possible overbreadth. For the Court, the importance of achieving a "reasonable balance" between "the individual's right to liberty and the need for society to be protected from crime" entails that "the police need not establish more than reasonable and

47 *Bedford*, *supra* note 43 at para 112 [emphasis in original].

48 [1990] 1 SCR 241, 1990 CanLII 125 (SCC) [*Storrey* cited to SCR].

49 See *Criminal Code*, RSC, 1985, c C-46, s 495(1)(a). The two expressions have been held to have the same meaning. See *R v Loewen*, 2011 SCC 21 at para 5.

50 *Storrey*, *supra* note 48 at 250.

probable grounds for an arrest."[51] Instead, the Court rests content with the general purposive orientation of the statutory standard, emphasizing two related "safeguard[s] against arbitrary arrest" that it interprets the standard to provide.[52] First, the police must have a subjectively held belief that they have reasonable and probable grounds that someone has committed, or is about to commit, a crime before they may arrest them, and they must arrest them based on that belief. Second, the police's grounds for forming this belief must be reasonable from an objective point of view, in the sense that "a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest."[53] Notice that, even when taken together, these two requirements do not ensure that the application of the standard will always yield arrests that advance the purpose of the power. Yet, the Court seems to think that, overall, they ensure a sufficient rational connection.[54]

Note, incidentally, that the Court also pays no heed to the fact that "reasonable and probable grounds" is a rather inarticulate standard, whose application is inherently contestable. Contrast it, for example, with more bright-line criteria such as "the police may stop white cars" or "every *n*th car." As the Supreme Court of the United States has noted in respect of the analogous standard of "probable cause" under the Fourth Amendment of the United States *Bill of Rights*, it "is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not

51 *Ibid* at 249–50.

52 *Ibid* at 250.

53 *Ibid* at 250–51.

54 To be sure, the overall non-arbitrariness of the standard of reasonable and probable grounds under s 9 is not specifically at issue in *Storrey*. Nor does the Court speak explicitly about non-arbitrariness in terms of rational connection. However, when emphasizing the critical importance of two purpose-sensitive "safeguard[s] against arbitrary arrest" that it interprets as being part of the standard, the Court seems drawn to this understanding (*ibid* at 250).

readily, or even usefully, reduced to a neat set of legal rules."[55] Thus, when it comes to its assessment of arbitrariness, not only does the *Storrey* Court seem satisfied with the kind of overbroad rational connection provided by the reasonable and probable grounds standard, but it also refrains from probing the vagueness of the standard. This aspect of the decision is yet another way in which the Court's apparent understanding of arbitrariness in *Storrey* is in tension with the *Hufsky* line of cases, which equates non-arbitrariness with constrained discretion. While the standard of reasonable and probable grounds does not afford absolute discretion, it certainly affords a high amount of it.

The Supreme Court's approach to the common law police power of investigative detention, short of arrest, can be understood in a similar way. As established in *R v Mann*,[56] the criteria for the exercise of this power are that the police must have reasonable grounds to suspect—otherwise referred to as "reasonable suspicion"—that a prospective detainee is individually connected to a recently committed or still unfolding criminal offense and that their detention is reasonably necessary to investigate it, as assessed based on the totality of the circumstances.[57] Like the reasonable and probable grounds for arrest standard, the standard of reasonable suspicion is rather inarticulate and vague. Indeed, the Court holds it to be even less demanding, and consequently, even more permissive, than reasonable and probable grounds, "as it engages the reasonable possibility, rather than probability, of crime."[58] So, the Supreme Court recognizes that it is even more overbroad since "more innocent persons will be caught under a reasonable suspicion standard than under the reasonable and probable grounds standard."[59]

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55 *Illinois v Gates*, 426 US 213 at 232 (1983). The Supreme Court of Canada has characterized the two standards as "identical". See *Hunter v Southam*, [1984] 2 SCR 145 at 167, 1984 CanLII 33 (SCC).

56 2004 SCC 52 [*Mann*]

57 *Ibid* at paras 34–35.

58 *R v Chehil*, 2013 SCC 49 at para 27 [*Chehil*].

59 *R v MacKenzie*, 2013 SCC 50 at para 85.

Still, like reasonable and probable grounds, the standard has a subjective and an objective component: "the police officer's subjective belief"[60] must be backed by "objectively discernible facts, which can then be subjected to independent judicial scrutiny."[61] And both components must point to "a clear nexus between the individual to be detained and a recent or on-going criminal offence",[62] such that they are rationally connected to the purpose of the power of detention, which is to investigate crime.[63] While the *Mann* majority does not explicitly state that the power is not arbitrary because of the purpose-sensitiveness of the individualized reasonable suspicion standard, it seems to assume it. As Binnie J writes in his concurrence in *R v Clayton*, "[t]he specific point in *Mann* itself was that a detention based on individualized suspicion is based on rational criteria and is not, therefore, arbitrary."[64]

Thus, while the precise contours of this second, purpose-sensitive understanding of arbitrariness remain unsettled in the Supreme Court's case law, its general existence is well-established.

C. An Improper Considerations Account: Precluding Discrimination and Other Improper Public Determinations

A third account of what makes laws arbitrary under section 9 can be discerned in the Supreme Court's case law, even if its articulation to date is not as developed or settled as the articulation of the previous two accounts and even if expounding it requires some reconstruction work. According to this account, there are some considerations that it would be arbitrary for a law authorizing detentions to further, either by including them as part of the direct purpose(s) of detention powers or by failing to exclude them adequately from the scope of detention decisions.

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60 *R v M(A)*, 2008 SCC 19 at para 80.

61 *Chehil*, *supra* note 58 at para 26. See *Mann*, *supra* note 56 at paras 27–33.

62 *Mann*, *supra* note 56 at para 34.

63 *Ibid* at para 45.

64 *R v Clayton*, 2007 SCC 32 at para 101 [*Clayton*].

Discriminatory considerations are a case in point. In his concurrence in *Ladouceur*, a case that, like *Hufsky*, was concerned with criteria-less random traffic stops by the police, Sopinka J makes the following point (which he also attributes to the majority):

> [T]he roving random stop would permit any individual officer to stop any vehicle, at any time, at any place. The decision may be based on any whim. Individual officers will have different reasons. Some may tend to stop younger drivers, others older cars, and so on. Indeed, as pointed out by Tarnopolsky J.A., racial considerations may be a factor too. My colleague states that in such circumstances, a *Charter* violation may be made out.[65]

This reasoning raises the possibility that what makes random stops arbitrary is not just that there are no legal criteria for them, as *Hufsky* and the *Ladouceur* majority hold.[66] It suggests that such stops may also be arbitrary in the sense that the statute authorizing them grants so much decisional latitude to police officers that it does not sufficiently constrain invidious discrimination—say, based on drivers' age or race. As Sopinka J indicates, the absence of legal criteria structuring and constraining the exercise of a detention power opens the door to such discrimination. However, even if there were legal criteria constraining the discretion to detain, they could themselves be exposed to such a charge of arbitrariness if invidious discrimination were part of their purpose, or if they created too much of an opportunity for it as applied. As Kent Roach and others have remarked, "[i]t is difficult to imagine anything more unjustifiable or arbitrary than a detention or arrest undertaken because of a discriminatory motivation."[67] When transposed to the context of laws authorizing detentions, this remark may be directed at both detention powers with direct discriminatory aims and detention powers that allow or facilitate discrimination

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65 *Ladouceur*, *supra* note 16 at 1267.

66 See *Hufsky*, *supra* note 16 at 633; *Ladouceur*, *supra* note 16 at 1276–77.

67 Roach et al, *supra* note 11 at 195.

as applied, due to their criteria being insufficiently circumscribed.[68]

To be sure, such detention powers could also possibly run afoul of subsection 15(1) of the *Charter*, which prohibits discrimination based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability", or other analogous grounds.[69] After all, throughout the jurisprudential evolution of this subsection, arbitrariness has tended to play a central role in establishing wrongful discrimination.[70]

However, there is not yet any Supreme Court case addressing this issue in any depth in relation to detention powers, either under subsection 15(1) or section 9.[71] What we have so far in the

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68 For an argument defending the importance of remedying legislative schemes themselves, when they fail to take adequate measures to ensure respect for *Charter* rights in exercises of statutory discretion, see Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41:1 Osgoode Hall LJ 1.

69 *Charter*, *supra* note 1, s 15(1). For the leading decisions on s 15(1), see *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*]; *R v Sharma*, 2022 SCC 39 [*Sharma*].

70 The Supreme Court has sometimes explicitly equated discrimination with some forms of arbitrariness in its s 15 analysis. See e.g. *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19–20 [emphasis added]:

> The first part of the s. 15 analysis . . . asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground . . . . The second part of the analysis focuses on *arbitrary—or discriminatory—disadvantage*, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage . . .

Prior to that, the Court had suggested that s 15(1) requires "a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group": *Quebec (Attorney General) v A*, 2013 SCC 5 at para 331. While, under the current s 15(1) test, arbitrariness is no more a condition *sine qua non* of discrimination, it continues to inform the analysis. See *Sharma*, *supra* note 69 at para 53. For one view of the relationship between the two concepts, see also Meital Pinto, "Arbitrariness as Discrimination" (2021) 34:2 Can JL & Jur 391.

71 Many commentators have argued for a more deliberate development of such a jurisprudence. See e.g. David M Tanovich, "Using the Charter to Stop

section 9 context are a few decisions condemning the practice of "racial profiling" in policing[72]—which the Court defines in *R v Le* as "when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment".[73] However nascent as this case law may be, its existence is still revealing. It is indicative of a willingness on the part of the Supreme Court to address salient discrimination issues that arise in the context of detentions under section 9, as opposed to doing it under section 15 of *Charter*.[74] It also suggests that the Court is open to articulating its understanding of arbitrariness under section 9 in ways that encompass discrimination.

In *Le*, the Court asserts that "racial profiling is primarily relevant under section 9 when addressing whether the detention was arbitrary because a detention based on racial profiling is one that is, by definition, not based on reasonable suspicion."[75] The assumption underlying this assertion seems to be that a standard such as reasonable suspicion can guard against discrimination based on race, because suspicion based on race is always unreasonable. As Karakatsanis J writes in *Chehil*:

> [T]he elements considered as part of the reasonable suspicion analysis must respect *Charter* principles. The factors considered under the reasonable suspicion analysis must relate to the actions of the subject of an investigation, and not his or her immutable characteristics.[76]

Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 145 at 178–81; Terry Skolnik & Fernando Belton, "Luamba et la fin des interceptions au hasard" (2023) 101 Can Bar Rev 671; Terry Skolnik, "Expanding Equality" (2024) 47:1 Dal LJ 195 at 212–29 [Skolnik, "Expanding Equality"].

72 See especially *Le*, *supra* note 4 at paras 74–81.

73 *Ibid* at para 76. See also *Storrey*, *supra* note 48 at 251–52.

74 Relatedly, note that the Supreme Court has recently made a point of emphasizing that what makes "stereotyping" distinctively problematic is that it "connotes . . . discrimination and inequality of treatment": *R v Kruk*, 2024 SCC 7 at para 49.

75 *Le*, *supra* note 4 at para 78.

76 *Chehil*, *supra* note 58 at para 43.

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Notice, however, how underexamined the Court's assumption is. As discussed earlier, standards such as reasonable suspicion and reasonable and probable grounds are quite inarticulate and vague. As a result, they provide de facto latitude to those who implement them to factor in discriminatory considerations into their assessment, even if only unconsciously or under the cover of other overlapping non-discriminatory considerations. In contrast, bright-line detention criteria that are discrimination-neutral, such as "drivers of blue cars" or "every *n*th person", do not afford such latitude. Indeed, neither would a law that only authorized the police to stop cars based on a formal randomization procedure—say, after rolling the dice and picking out the cars whose rank-order on the highway corresponds to the number yielded by the dice. My point is that these latter grounds for detention may constrain police discretion in ways that limit invidious discrimination much more effectively than inarticulate criteria such as reasonable suspicion or reasonable and probable grounds. Yet, in the context of its embryonic development of an account of arbitrariness-as-discrimination, the Court has not yet engaged with such arguments. Nor, more generally, has it so far attempted to address how much decision-making latitude may be too much from an invidious discrimination standpoint in the context of criteria-bound detentions.[77]

In a sense, factual scenarios such as the ones underlying the decisions in *Hufsky* and *Ladouceur* are unhelpful because they could ground findings of arbitrariness under any of the three accounts identified so far. Because the stops of *Hufsky* and *Ladouceur* are in the absolute discretion of police officers, it does not matter under the authorizing statute whether the police's reasons for stopping this or that car are rationally connected in any way to the purpose of the detention power. The considerations based on which they decide what cars to stop do

[77] There seems to be a growing awareness of this problem amongst lower courts. See e.g. *R v Dudhi*, 2019 ONCA 665. In this case dealing with racial profiling in the context of an exercise of the power of arrest, Paciocco JA asserts that "[a] body of law that permits officers to exercise their power when subjectively, their decisions are influenced by race or racial stereotypes, has little to commend it" (*ibid* at para 64).

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not matter at all. Because the authorizing statute does not direct officers on how to randomize, it is also arbitrary in the sense of providing no criteria. Finally, the statute may also be arbitrary in the sense of permitting invidious discrimination, at least de facto, since it imposes no constraints on the kinds of considerations based on which officers may stop drivers.

Notice that this possible convergence of the three accounts does not entail that they are one and the same and do not merit separate development. As I will continue to argue in Part III, while a law may sometimes be arbitrary in all three senses identified—like the law at stake in *Hufsky* and *Ladouceur*—the three senses track different rule of law concerns. For the sake of clarity and because these three accounts may sometimes be in tension with each other, it is important to continue to consider them in their own right, even if, as I will argue, they are ultimately united in terms of their importance for the rule of law.

One more possible source of confusion should be brought to the fore at this stage. The account of arbitrariness-as-improper-considerations that I just described with a focus on discrimination relates to the appraisal of laws authorizing detentions *themselves*. It should not be confused with the kind of arbitrariness that can arise when, for example and to quote the Supreme Court in *Storrey*, an "arrest was made because a police officer was biased towards a person of a different race, nationality or colour".[78] Such a charge of arbitrariness, which may be levelled in practice against all forms of detention and not just arrests, extends beyond a criticism of the authorizing law. It might relate to it if, for example, the source of the problem is that the legal criteria authorizing a detention are discriminatory on their face, or that the law allows for invidious discrimination as applied by affording excessive latitude to the decision maker. However, the kind of arbitrariness decried in this passage from *Storrey* relates chiefly to the problematic *implementation* by governmental agents, *in specific cases*, of legal criteria assumed not to be arbitrary in and of themselves.

[78] *Storrey*, *supra* note 48 at 251–52.

Recall that, according to the *Grant* and *Le* interpretive framework, a detention must, first, be authorized by law not to be arbitrary. That question must be answered affirmatively before the question of the arbitrariness of the law itself arises. Of course, this first analytical step requires that, in every given case, there be a law authorizing detention. However, it also requires that those who carry out a detention do so in a way that is actually authorized by the law, in the sense that they must be acting within the confines of the particular legal authorization. It is at this analytical stage that the discriminatory motives, beliefs, and attitudes of the state agents carrying out detentions will typically be held to make their actions arbitrary.

This kind of arbitrariness in implementation can arise in two ways. First, it can arise if, by acting for discriminatory considerations (or other improper reasons), state agents fail to meet the relevant legal criteria for a detention. This sort of arbitrariness in implementation is what the Supreme Court refers to in *Le*, when it affirms that a detention based on racial profiling is arbitrary because it is based on generalized assumptions about race, and not on individualized reasonable suspicion as the power of investigative detention requires.[79]

Second, arbitrariness in implementation can arise when state agents detain someone for a mix of reasons, some of which might satisfy the requirements of the authorizing law if taken on their own, but which are combined with other improper ones in a way that renders the detention unlawful. This kind of arbitrariness in implementation is what the Court refers to in *Storrey*, when it asserts that "factors [such as racial bias], if established, might have the effect of rendering invalid an otherwise lawful arrest."[80]

Here, it is important to emphasize that prohibited discriminatory considerations are not the only ones that may turn an otherwise lawful detention into an unlawful one. For example, in *R v Nolet*,[81] a case dealing with police searches of commercial vehicles incident to authorized traffic stops, Binnie J

79 *Le*, *supra* note 4 at para 78.

80 *Storrey*, *supra* note 48 at 251–52.

81 2010 SCC 24 [*Nolet*]

UBC Law Review, Vol. 57, Iss. 1 [], Art. 6

writes for the Court that "[i]f the *Charter* is violated, it makes little difference, I think, that the police had in mind multiple purposes. A valid regulatory purpose, whether predominant or not, would not sanitize or excuse a *Charter* violation."[82] Thus, not only may it be problematic from the point of view of the lawfulness of a detention if a state agent partly detains someone based on constitutionally prohibited grounds of discrimination, but it may also be if that agent partly does so based on any other constitutionally objectionable consideration. Consider, for example, detentions targeting, amongst other considerations, those who express unpopular political views.

Are *Charter*-infringing considerations the only impermissible ones then? The Supreme Court suggests otherwise in *Storrey* when it states that "a personal enmity between a police officer directed towards the person arrested" might render unlawful an otherwise lawful arrest.[83] While the Supreme Court has yet to pronounce itself on whether other considerations than *Charter*-infringing ones and personal enmity may have this effect on otherwise lawful detentions, the Ontario Court of Appeal has suggested that "improper purposes" should, as a category, include "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 [the detaining state agent's] public duty."[84] There is certainly much room for future jurisprudential elaboration of this issue.

However, to come back to the central subject of my inquiry, recall my contention that arbitrariness in the implementation of a law authorizing detentions should be understood as distinct from the arbitrariness of the authorizing law itself. I believe this distinction to be important, as it tracks the distinction between the acts of lawmakers—in the section 9 context, legislation or judicial decisions authorizing detention—and the acts of the government officials in charge of their implementation. The

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82 *Ibid* at para 39.

83 *Storrey*, *supra* note 48 at 251–52.

84 *Brown v Durham (Regional Municipality) Police Force*, [1998] OJ No 5274 at para 39, 1998 CanLII 7198 (ONCA) [*Brown*], referred to in *Nolet*, *supra* note 81 at para 38.

distinction also coheres with the Supreme Court's overall interpretive structure for section 9. Still, consideration of the judicial treatment of implementation concerns under section 9 holds at least one important lesson for our assessment of the arbitrariness of authorizing laws themselves. It suggests that prohibited discrimination is not the only substantive frame of reference external to an authorizing law according to which its arbitrariness should be assessed. If the *de jure* authorization of, or provision of excessive latitude for, detentions grounded in constitutionally-prohibited discriminatory considerations is properly characterized as arbitrary under section 9, then laws that improperly aim or allow for detentions grounded in other *Charter*-infringing considerations or in considerations otherwise contrary to the public nature of the state—such as private gain, self-interest, or even vengeance—should perhaps also be so characterized.

While I cannot predict whether the Supreme Court will ultimately espouse in full this articulation of arbitrariness-as-discrimination in respect of laws authorizing detentions, it would certainly be in line with how it views arbitrariness at the level of legal implementation. It also seems to fall in line with the Court's understanding of section 9 as an example of a principle of fundamental justice under section 7 of the *Charter*, and the Court's view that some such principles warrant the substantive review of Canadian laws.[85] Note, however, that unlike vagueness, arbitrariness, and overbreadth, substantive non-discrimination has not yet been explicitly recognized as a principle of fundamental justice.[86] Nor, more

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85 On the possibility of reviewing the substance of laws under s 7 of the *Charter*, see generally *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81 (SCC) [*Re Motor Vehicle Act* cited to SCR]. The Court emphasizes at 502:

> Sections 8 to 14 . . . address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7.

86 Some have argued that it should. See Kerry A Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice"

generally, has the issue of improper considerations per se. Still, the rule against bias—which serves to prevent the making of decisions based on factors that are irrelevant in the decision-making process—is a well-established principle of natural justice in Canadian administrative law.[87] The question of what considerations are improper in state decision making is also at the heart of the analysis of many other relevant constitutional rights, including those guaranteed by sections 2, 12, and 15 of the *Charter*. Thus, it would be a mistake to think that the Supreme Court is in completely uncharted territory when it comes to the development of a third account of arbitrariness along such lines.

III. A PATH FORWARD: THE RULE OF NON-ARBITRARY LAWS

A. STRUCTURING THE ROAD AHEAD IN TERMS OF THE RULE OF LAW: CONTRASTING JUSTIFICATIONS UNDER SECTION 9 AND SECTION 1 OF THE *CHARTER*

With this taxonomy in place, the following line of questioning presents itself. From now onwards, how should the Court seek to develop its accounts of what makes laws authorizing detentions arbitrary? Should it retain and develop the three of them? Should it instead seek to unify them? Or should it only keep one or two?

To answer these questions, it helps to go back to the purpose of section 9.[88] Recall that *Grant* establishes that "[t]he purpose of

(2012) 42(3) Ottawa L Rev 411; Suzy Flader, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice under Section 7 of the Charter" (2020) 25 Appeal 43.

[87] See e.g. Laverne Jacobs, "The Architecture of Fairness: Independence, Impartiality, and Bias" in Colleen M Flood and Paul Daly, eds, *Administrative Law in Context* (Toronto: Emond Montgomery Publications, 2022) at 268. And as McLachlin CJC notes in *Charkaoui*, principles of fundamental justice under s 7 of the *Charter* "include a guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security": *Charkaoui*, *supra* note 13 at para 19.

[88] James Stribopoulos suggests a similar approach, arguing that "[r]ealizing the potential of section 9 depends on revisiting how its key terms are read in light of [its] overarching objective": James Stribopoulous, "The Forgotten

s. 9, broadly put, is to protect individual liberty from unjustified state interference."[89] Section 9 guards, the Court insists, against detentions "without adequate justification."[90] How should we understand this demand for justification? The key to answering the previous questions lies, I think, in the answer to this more general one.

Note, first, that the Supreme Court's case law makes clear that justification under section 9 differs from the kind of justification required, under section 1 of the *Charter*, for the infringement of a right to be constitutionally upheld as "a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society."[91] *Hufsky* and *Ladouceur* are cases in point. In these cases, the law authorizing random stops was held to be arbitrary, and thus to be unjustified under section 9. However, the law was still constitutionally upheld as justified under section 1. As Le Dain J concludes in *Hufsky*:

> In view of the importance of highway safety and the role to be played in relation to it by a random stop authority for the purpose of increasing both the detection and the perceived risk of detection of motor vehicle offences, many of which cannot be detected by mere observation of driving, I am of the opinion that the limit imposed by s. 189*a*(1) of the *Highway Traffic Act* on the right not to be arbitrarily detained guaranteed by s. 9 of the *Charter* is a reasonable one that is demonstrably justified in a free and democratic society. The nature and degree of the intrusion of a random stop for the purposes of the spot check procedure in the present case, remembering that the driving of a motor vehicle is a licensed activity subject to regulation and

Right: Section 9 of The Charter, Its Purpose and Meaning" (2008) 40 SCLR (2d) 211 at 248. While Stribopoulos objects to a "legalistic" understanding of this objective, he does so only because he deems such an understanding excessively "narrow and restrictive" (*ibid*). As I argue in Part III.C, below, when properly understood in terms of the ideal of the rule of law, it is not so.

89 *Grant*, *supra* note 2 at para 20.

90 *Ibid*.

91 *Charter*, *supra* note 1, s 1.

control in the interests of safety, is proportionate to the purpose to be served.[92]

Admittedly, there are striking similarities between the standards that the Supreme Court uses to assess section 1 justifications and its accounts of what makes laws arbitrary under section 9. For example, to be justified under section 1, the infringement of a right must be "prescribed by law"[93]. The Supreme Court has insisted that "where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no 'limit prescribed by law'."[94] No doubt, this justificatory step is reminiscent of the "no criteria" account of arbitrariness under section 9. However, as *Hufsky* and *Ladouceur* demonstrate, the two standards are not equivalent. While the authorizing law in these cases was held to be arbitrary due to its failure to provide criteria for detention—and thus, for conferring absolute discretion—the resulting infringement of right was still held to be prescribed by law under section 1. So, based on these examples, it seems as though the section 1 "prescribed by law" standard may be significantly less demanding than the Court's formal account of arbitrariness under section 9.[95]

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[92] *Hufsky*, *supra* note 16 at 636 [emphasis in original]. See also *Ladouceur*, *supra* note 16 at 1278–88.

[93] *Charter*, *supra* note 1, s 1.

[94] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 983, 1989 CanLII 87 (SCC) [*Irwin Toy*].

[95] In *Therens*, *supra* note 3 at 645, Le Dain J (writing for the majority on this point) establishes that that:

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.

In *Hufsky*, *supra* note 16 at 633–34, Le Dain J, purporting to apply his own test, holds that the statutory power at issue satisfies it:

> There is, in my opinion, the implication of a limit on the right not to be arbitrarily detained arising from the terms of s. 189*a*(1) of the *Highway Traffic Act*, which confers an authority on a police officer to choose, in his absolute discretion, the

To be justified under section 1, a law infringing a right must also be "rationally connected" to a pressing and substantial purpose, and it must not be overbroad in the sense that it "should impair 'as little as possible' the right or freedom in question".[96] These justificatory steps are strongly reminiscent of the rational connection required by the purpose-sensitive account of arbitrariness under section 9. Yet, here again, the Supreme Court's case law calls for differentiation. Perhaps most notably in *Bedford* and *Carter*, the Court explicitly insists that section 1 justificatory standards and principles of fundamental justice, such as arbitrariness and overbreadth, under section 7 must be

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drivers of motor vehicles whom he will require to stop. In other words, it authorizes the random stop of motor vehicles.

Cory J endorses this holding in *Ladouceur*, *supra* note 16 at 1286. Since then, in *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31 [*GVTA*] the Supreme Court seems to have heightened the requirement somewhat. While citing *Therens*, Deschamps J writes for the Court that for statutory infringements of rights to meet the "prescribed by law" requirement, it must be that "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply" (*ibid* at para 53). Yet, in the same breadth, citing *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 94, 1991 CanLII 60 (SCC), she adds that "the standard is not an onerous one": *GVTA*, *supra* note 95 at 54. "Unless the impugned law 'is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools'," she emphasizes, "it will be deemed to have met the 'prescribed by law' requirement" (*ibid*). Thus, it is unclear that the Supreme Court would characterize the powers at issue in *Hufsky* and *Ladouceur* any differently today than it did then when it found them to be prescribed by law as part of its section 1 analysis in these cases. Tellingly, the Superior Court of Quebec recently completely skipped over this step—likely assuming its satisfaction—when proceeding to the next steps of the *Oakes* test in its assessment of similar powers found to contravene ss 9 and 15 in *Luamba c Procureur général du Québec*, 2022 QCCS 3866 at paras 643ff [*Luamba*].

[96] *R v Oakes*, [1986] 1 SCR 103 at 139, 1986 CanLII 46 (SCC) [*Oakes*]. The minimal impairment requirement has been reinterpreted over time to allow for a reasonable margin of appreciation, which may vary depending on the circumstances of the case and the availability of reasonable alternatives. See *Irwin Toy*, *supra* note 94.

understood as distinct.[97] Given the close jurisprudential relation, mentioned earlier, between the section 9 purpose-sensitive account of arbitrariness and the said principles of fundamental justice under section 7 (which the Court sometimes refers to as principles of "instrumental rationality"[98]), the Court's differentiation analysis pertaining to the latter seems readily transposable to the former. After all, as the Court has reiterated time and again, "[t]he s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice."[99]

Crucial in the Court's analysis in *Bedford* and *Carter*, I think, is its insistence that section 1 standards should be understood and calibrated to require a justification in "the broader public interest" or "the greater public good", understood both qualitatively and quantitatively;[100] a justification that weighs "competing moral claims" such as "competing social interests or public benefits conferred by the impugned law."[101] In contrast, section 7 principles of instrumental rationality as they apply to laws depriving people of their liberty—and, by extension, section 9 principles of arbitrariness that overlap with them—call for a more limited qualitative appraisal of the self-presentation of the law and its tailoring to its specific purpose, taken at face value.[102]

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97 *Bedford*, *supra* note 43 at paras 124–29; *Carter*, *supra* note 46 at 79–82. See also *Swain*, *supra* note 38 at 977; *Charkaoui*, *supra* note 13 at paras 79–80.

98 *Bedford*, *supra* note 43 at para 107.

99 *Grant*, *supra* note 2 at para 54.

100 *Bedford*, *supra* note 43 at para 126.

101 *Carter*, *supra* note 46 at para 79.

102 *Bedford*, *supra* note 43 at paras 125, 127. As the Court explains at para 125:

> With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose. Under s. 1, the question is different—whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest.

While there may be some apparent tension, to which I will come back, between this demarcation line and the discrimination/improper considerations account of arbitrariness,[103] I highlight this effort at differentiation because it provides an important window into the Court's understanding of the kind of justification expected under section 9. That is to say, the adequate justification that the state must provide if it is to detain someone non-arbitrarily is not a general moral justification or, to borrow the Court's own language, a justification resting on matters external to the law, such as the broader societal interest or public good. Such wider considerations belong to the section 1 justificatory analysis. Rather, what the Court's reasoning suggests is that, under section 9, like under its section 7 parent, the state must justify laws authorizing detentions in terms of their qualitative adherence to a more limited set of standards specific to law as mode of governance. In the Court's own oft-repeated words, section 9 is to be understood as expressing "one of the most fundamental norms of the rule of law"[104]—as opposed, I take it, to a norm seeking to advance public morality more generally.

To be in a good position to assess the Supreme Court's takes on arbitrary laws, then, consideration of what the rule of law requires is in order. The Court's reasoning clearly invites it as a next step.

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[103] I say "apparent tension" since one may wonder how the improper consideration account of arbitrariness under s 9 relates to the s 1 justificatory requirement that rights-infringing measures have a "pressing and substantial objective": *Oakes*, *supra* note 96 at 138–39. Are these two related standards as distinct as the others discussed above? As Hamish Stewart remarks, "[i]n the vast majority of cases where a *Charter* right is infringed, it is not difficult to identify a pressing and substantial objective" sufficient to meet this requirement of the *Oakes* test: Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed (Toronto: Irwin Law, 2019) at 357. One hypothesis is that, here also, disparities in outcomes track the wider array of justificatory considerations in the public interest available under s 1. See Part III.C.3, below.

[104] *Charkaoui*, *supra* note 13 at para 88; *Grant*, *supra* note 2 at para 54.

B. ARBITRARY LAWS AND THE RULE OF LAW: THE SUPREME COURT'S UNDERDEVELOPED VIEW

At the outset, it is important to acknowledge that the content of the ideal of the rule of law has been the subject of much contestation over the years. Ever since Aristotle first asserted that "the rule of law is preferable to that of any individual",[105] and perhaps especially, in our era, since Lon Fuller reinvigorated the debate in his seminal discussion of the ideal as law's "internal morality",[106] academic arguments about the subject have blossomed.

As a point of departure, then, it seems wise to inquire into what the Supreme Court itself has had to say about the ideal in terms of how it applies to laws—since, recall, my chief concern is with what makes laws authorizing detentions arbitrary. The first thing to note is that the Court explicitly understands the rule of law as providing "[a]t its most basic level . . . a shield for individuals from arbitrary state action."[107] This general assertion bolsters the connection that the Supreme Court makes between non-arbitrariness and respect for the rule of law in the specific context of section 9.

How does the rule of law provide such a shield? At a high level of generality, the Court insists that the rule of law "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order."[108] These laws must then rule "supreme over officials of the government as well as private individuals," which, the Court asserts, makes them "preclusive of the influence of arbitrary power."[109]

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[105] *Aristotle's Politics*, translated by Benjamin Jowett, (Oxford: Clarendon Press, 1908) at 139.

[106] Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 4, 46–91.

[107] *Reference re Secession of Quebec*, 1998 CanLII 793 at para 70 (SCC) [*Re Secession of Quebec*].

[108] *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 749, 1985 CanLII 33 (SCC) [*Re Manitoba Language Rights*].

[109] *Ibid* at 748.

But surely, if laws are to play such a preclusive role, they must not themselves be arbitrary. It is to forestall this possibility that the Court specifies in *Grant* and *Le* that laws authorizing detentions should not be arbitrary. Surprisingly, the Court has not had many other helpful things to say on this issue beyond what I already discussed in relation to its sections 9, 7, and 1 case law. For example, in *British Columbia v Imperial Tobacco Canada Ltd*,[110] the Court generally asserts that, while the actions of the legislative branch are constrained by the rule of law, they are "only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed)."[111] This assertion flies in the face of the Court's own emphasis on the necessity of legal criteria for detention, of their rational connection and tailoring to the purposes of the laws prescribing them, and of avoiding invidious discrimination and other improper orientations—at least insofar as one takes seriously the Court's injunction that section 9 be understood as advancing the rule of law.

One possible way of rationalizing the Court's assertion about legislation in *Imperial Tobacco* may be to point out that it is a general one, and that the contexts of sections 7 and 9 are more specific. Additional rule of law requirements may apply to laws authorizing deprivations of life, liberty, or security of the person, and perhaps particularly to laws authorizing detentions, in virtue of that very fact. Such an interpretation of section 9 requirements that rests on the specificity of the section would seem to make sense of the Court's jurisprudential approach so far. This interpretive tack could also be analogized to the Court's approach to the specific applicability of other rule of law requirements. For example, when it comes to the constitutional protection against retrospective and retroactive laws, often deemed to be a central principle of the rule of law, the Court has

[110] 2005 SCC 49 [*Imperial Tobacco*].

[111] *Ibid* at para 60.

held that it only extends to the particular case of offence-creating penal laws, per section 11(g) of the *Charter*.[112]

So, given that, outside of the context of section 9 (and of its parent section 7) which I have already reviewed and now seek to evaluate, the Supreme Court provides little helpful guidance about what the rule of law requires of laws, one must look elsewhere to find out more about the content of ideal. Yet, as I already suggested, a key problem with doing so is that the content of the ideal is contested. Scholarly accounts of it range from leaner ones focusing on the form and modality of law—or how law should do things—to thicker accounts that also address, to various degrees, what the law should regulate—or why the law should do things.[113]

So, where should one start? As a point of departure, I propose to turn to the work of legal philosopher Joseph Raz. I do so for three main reasons. First, the Supreme Court case law itself invites it. The Court has cited and explicitly relied on Raz's influential work for the fundamental proposition that the rule of law "has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it".[114] Starting with Raz's account is also methodologically sensible given his attempt, in his final work on the rule of law before his death in 2022, to take stock of decades of work on the topic and provide an account that is minimalist, coherent, cogent and, in the process, as ecumenical as he deems it possible. Finally, I choose to focus on Raz's thought because I believe that it sheds a particularly helpful and systematic light on what the Supreme Court has so far sought to do with section 9.

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112 See *ibid* at para 69, interpreting *Charter*, *supra* note 1, s 11(g). Of course, this constitutional point is aside from "the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects": *Imperial Tobacco*, *supra* note 110 at para 71.

113 I borrow this distinction from John Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012) at 206.

114 *Re Manitoba Language Rights supra* note 108 at 750, citing Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 213–14 [Raz, *The Authority of Law*].

C. A THEORETICALLY INFORMED ASSESSMENT OF THE SUPREME COURT'S ACCOUNTS OF ARBITRARY LAWS

1. THE RULE OF LAW AND FORMAL ARBITRARINESS

The second aspect of the rule of law that Raz identifies is the one I will start with, since it speaks directly to what the ideal requires of laws. To provide a shield against arbitrariness as opposed to facilitating it, laws must provide guidance to governments on how to govern and, thus, constrain their actions. Raz argues that, to be able to provide such guidance, laws must live up to at least five principles that "are common to virtually all accounts of the doctrine [of the rule of law]."[115] To be capable of guiding, laws must be "(1) reasonably clear, (2) reasonably stable, (3) publicly available, (4) general rules and standards, that are (5) applied prospectively and not retroactively."[116] The underlying idea is reasonably straightforward. To guide and constrain governance, laws must be articulated in terms of rules and standards that have what it takes to be followed and obeyed. They must not be overly unclear, secret, constantly moving targets or be otherwise unavailable to offer guidance at the time of application.

This general idea underlies the Court's formal account of arbitrariness. Recall that this account emphasizes the importance of constraining and structuring official discretion through legal criteria. To create such a constraining structure, laws must impose standards that circumscribe discretion and, it seems to follow, these standards must be capable of being acted upon, in the sense of not being exceedingly vague or otherwise undiscernible.

Still, as sound as it may be, this proposition is question-begging because the principles of the rule of law listed are themselves vague. As such, they allow for various degrees of compliance. For example, as Raz notes, discretion in the application and interpretation of laws is inevitable.[117] The

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115 Joseph Raz, "The Law's Own Virtue" (2019) 39:1 Oxford J Leg Stud 1 at 3 [Raz, "The Law's Own Virtue"].

116 *Ibid*.

117 *Ibid* at 3–4.

Supreme Court itself acknowledges it when it remarks that lawmakers "can never foresee all the situations that may arise, and if they did, could not practically set them all out. It is thus in the nature of our legal system that areas of uncertainty exist".[118] Thus, since it is inevitable that discretion be a feature of the laws of a legal system, and since no one seriously contends that such inevitability is fatal to the possibility of the rule of law, the insufficiency of the principles listed becomes apparent. They do not answer the question of what degree of curtailment of discretionary powers the rule of law requires. Raz himself insists that the ideal provides no general answer to this question—that is, none that can be derived from the ideal's general guidance rationale. After all, he argues, people, including state agents, can be guided by partial or uncertain information. Therefore, he concludes that "while the law aims to guide, its ability to do so is much less securely connected with the rule of law principles I enumerated than is often assumed."[119]

This analysis helps explain why, in the context of developing its formal account of arbitrariness under section 9, the Supreme Court does not say more about the degree of guidance that it expects legal criteria to provide. What the account requires is simply that there be legal criteria structuring the exercise of powers to detain. While the idea of a legally structured discretion entails criteria that provide at least *some* guidance, partial or uncertain guidance may very well still cohere with the ideal. This analysis similarly helps explain why the degree of vagueness deemed allowable under section 7 is considerable, and laws subject to this section are merely required to be articulated in terms of "intelligible standards" that provide "an adequate basis for legal debate" and delineate a non-descript "area of risk".[120]

Surely, the Supreme Court could decide to require more clarity and precision for laws authorizing detentions specifically, but it has so far refrained from doing so. Its endorsement of vague standards for detention such as reasonable and probable

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118 *Canadian Foundation for Children*, *supra* note 22 at para 17.

119 Raz, "The Law's Own Virtue", *supra* note 115 at 4–5.

120 *Canadian Foundation for Children*, *supra* note 22 at paras 15–18.

grounds and reasonable suspicion is a case in point. However, my deeper contention is that even if the Court sought to impose a higher guidance threshold in the context of detentions, it would need to defend it based on a rationale that goes beyond the rule of law principles discussed so far.

One possibility may be for the Court to reason that deprivations of liberty such as those at stake in the section 9 context can be so disruptive of people's lives that the state should provide especially clear guidance to officials carrying them out, as well as to ordinary individuals seeking to avoid them. However, the Court has already rejected this rationale as being required by the ideal of the rule of law, and therefore, most likely also, by the idea of arbitrariness anchoring section 9. In *Nova Scotia Pharmaceutical Society*, Gonthier J settles the issue for the Court in relation to the section 7 principle of vagueness, in a way that seems readily transposable to section 9 and its formal account of arbitrariness. He writes:

> In the criminal field, it may be thought that the terms of the legal debate should be outlined with special care by the State. In my opinion, however, once the minimal general standard [of vagueness] has been met, any further arguments as to the precision of the enactments should be considered at the "minimal impairment" stage of s. 1 analysis.[121]

The Court's suggestion seems to be that while the greater public good may, in some contexts, require heightened clarity and precision, the fact that a law is criminal and may lead to serious deprivations of liberty is not, on its own, a sufficient reason for it.

Another possibility is the one I mooted earlier about clear and precise criteria making it harder for officials to act based on discriminatory or other improper considerations. If police officers are only empowered to stop every *n*th person or must stop every, and only every, *n*th car, their ability to act for improper reasons is correspondingly limited. Yet, here again, the rationale for heightened guidance does not obviously flow from the listed principles of the rule of law, and the court has so far refrained from investigating it.

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121 *Nova Scotia Pharmaceutical*, *supra* note 24 at 642–43.

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I should also note that, whatever degree of vagueness is allowable for legal criteria of detention, it clearly follows from the ideal of the rule of law that there must exist independent institutional arrangements for upholding these criteria at the point of their purported official application. The rule of law, as Raz explains, does not only impose requirements on the form of laws. It also requires an independent judiciary providing effective judicial review of the implementation of laws with such form by the executive—another feature of the ideal that is widely accepted.[122] Thus, in this respect again, the Supreme Court's understanding of arbitrariness under section 9 seems quite firmly in line with the ideal.

2. THE RULE OF LAW AND THE IMPORTANCE OF RATIONAL CONNECTION

Are the principles covered in the last section all that the ideal of the rule of law requires of laws? If this were the case, the Supreme Court's further two senses of arbitrariness would turn out not to constitute requirements of the ideal and, therefore, would be out of step with how the Court insists on framing the normative restrictions that section 9 imposes on laws. For the Court to restore internal coherence to its conceptualization of arbitrary laws, it would need to make either of two changes. Either it would need to jettison its two further accounts of arbitrariness, retaining the minimal level of guidance that the formal account requires as the main arbitrariness constraint on authorizing laws, or it would have to revise its view of the kind of justification acceptable under section 9.

Thankfully, such radical revisions are unnecessary. If one abstracts back to the more general aim of the ideal recognized by the Supreme Court, one can discern additional demands that intrinsically flow from it, and which are consistent with the Court's further accounts. I am referring here to the aim of avoiding arbitrary government.

This approach may seem circular. By reverting to this more general aim of the ideal, am I not simply inviting again the

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[122] Raz, *The Authority of Law*, *supra* note 114 at 216–18.

question I started with—namely, what does *arbitrary* mean? The point of refocusing the inquiry in this way is to emphasize that legal guidance that lives up to the principles listed in the last section does not ensure that a government that adheres to it will not act arbitrarily in a more substantive way. As discussed, legal guidance that lives up to those principles may remain partial or uncertain to a significant extent. Thus, in some cases, government officials may reasonably be able to interpret this guidance as authorizing them to act in pursuance of some of their whims or, say, their self-interest. Indeed, there is nothing in the principles mentioned in the last section that limits the reasons for which governments may act. These principles only impose restrictions on the means through which government actions are guided. Yet, isn't a government that acts according to its whims or some other reasons unrelated to its governmental functions acting arbitrarily?

Raz insists that such governmental action is paradigmatically arbitrary and seeks to explain why in conceptual terms. Arbitrary government, he contends, is government that uses power in a way that is "indifferent to the proper reasons for which power should be used."[123] Of course, this definition begs the question of what reasons should guide governmental action, and indifference to which yields arbitrary government. Yet, one does not need to look far for an obvious answer that is intrinsically connected to the rule of law as an ideal of governance. "[G]overnments", Raz remarks, "are constituted by law and, in creating them, the law, explicitly or implicitly, identifies their purposes."[124]

And here we have the missing link between the Court's purpose-sensitive account of arbitrariness and the rule of law. If, to act non-arbitrarily, a government must act for the purposes of the laws empowering it to act, then such laws should not authorize it to act based on criteria that are disconnected from these purposes. Nor should such laws authorize it to act based on criteria that only sometimes advance their purposes. This

[123] Raz, "The Law's Own Virtue", *supra* note 115 at 5.

[124] *Ibid*.

additional rule of law principle reflects both the *Charkaoui* and *Swain* accounts of what makes laws arbitrary. For a law authorizing detention not to be arbitrary, it must provide detention criteria that are rationally connected to its purpose. It must also limit their overbreadth.

One important implication of this line of reasoning is that, to abide by the rule of law, laws authorizing detentions must not simply provide criteria for detention that are reasonably clear, stable, and so forth. These criteria must also be rationally connected to the purposes of the authorizing laws in which they figure. Thus, insofar as the Supreme Court is serious about interpreting section 9 as advancing the rule of law, its formal account of arbitrariness should not be viewed as an alternative to, or as competing with, its purpose-sensitive account. Rather, the two accounts should be viewed as additive. To be non-arbitrary under section 9, an authorizing law should not only provide criteria for detention, but it should provide criteria that are rationally connected to its purpose or purposes. So, the requirement for a rational connection constitutes a further constraint that the rule of law imposes on the kind of guidance that authorizing laws must provide not to be arbitrary under section 9—just like the principles of arbitrariness and overbreadth impose additional limits that go beyond the principle of vagueness under section 7.

At this point, one may interject that, while recognizing the importance of an overall rational connection, the Supreme Court has sometimes still been known to endorse overbroad criteria for detention. Recall, for example, the argument that it did so for both the statutory standard of reasonable and probable grounds for warrantless arrests, and for the common law standard of reasonable suspicion for investigative detentions. Do such holdings not suggest that the Supreme Court sometimes privileges the existence of criteria, however well connected they may be to the purposes of authorizing laws, over criteria whose rational connection is well tailored to them?

This suggestion does not hold up to closer scrutiny. In both *Storrey* and *Mann*, the Court seeks to justify its decision to champion overbroad criteria by arguing that they achieve a reasonable balance between "the individual's right to liberty and

the need for society to be protected from crime"[125] or, more broadly, between "individual liberties", "legitimate police functions", and "a societal interest in effective policing."[126] Notice that the Court nowhere suggests that this analysis tracks rule of law and corresponding arbitrariness considerations. Indeed, nothing in the ideal of the rule of law as I have analyzed it so far requires that criteria be justified in the broader public or societal interest. Rather, as the Court suggests in *Bedford* and *Carter*, this kind of appraisal more fittingly belongs to section 1 in the *Charter* context or, as I have myself framed it before, to the realm public morality writ large.

What may explain the reasoning in *Storrey* and *Mann* is that, while both decisions claim to be informed by the limits imposed by section 9, neither of the two legal criteria at issue is, strictly speaking, impugned and upheld under this section. In *Storrey*, the rationale underlying the criterion is expounded as a matter of statutory interpretation.[127] In *Mann*, the criterion is developed under the Court's ancillary powers doctrine used for the development of police powers at common law.[128] While both analyses are clearly informed by *Charter* values, the Court does not make any specific effort to distinguish between rule of law considerations and other kinds of relevant *Charter* considerations, as it may have been more careful to do if the criteria in question had been more directly challenged under section 9. Therefore, one should not interpret these decisions as relaxing the section 9 rational connection requirement for laws authorizing detentions. That these decisions both emphasized the importance of an overall rational connection is what should be taken from them, without any implication for what amount of

[125] *Storrey*, *supra* note 48 at 249–50.

[126] *Mann*, *supra* note 56 at paras 1, 15.

[127] *Storrey*, *supra* note 48 at 249–51.

[128] *Mann*, *supra* note 56 at paras 23–35. On this point, see generally Vanessa MacDonnell, "Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of Charter Jurisprudence" (2012) 57 SCLR (2d) 225.

criterial overbreadth may or may not be permissible under section 9 itself.[129]

I want to make one last clarificatory remark about the rational connection requirement. In the same breath as he discusses the importance of this requirement for the rule of law, Raz suggests that "arbitrary government differs from making random decisions, which could be a proper way of deciding among options where there are conclusive reasons to choose one of them yet there is no reason or no known reason to prefer one over the others."[130] Does this assertion not fly in the face of the formal account of arbitrariness, thus hinting at a yet unacknowledged tension between that account and the rational connection account?

I do not believe so. What the formal account as developed in cases like *Hufsky* stands against are detentions that are "completely random" in the sense of being "in the absolute discretion of the police officer."[131] Insofar as a law authorizes detentions based on a more restricted and legally specified randomization procedure, such detentions are not completely random in the sense of being criteria-less. Consider my earlier examples of a law that empowers the police to stop every *nt*h car,

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[129] One reviewer objected that if legal standards such as reasonable and probable grounds and reasonable suspicion were deemed overbroad, then large swaths of criminal procedure standards, beyond those governing arrests and investigative detentions, would likely also be—which is implausible. As disquieting as this possibility may seem, the objection is unpersuasive. To the extent that the said standards are arbitrary in part, this feature counts against them, and s 9 reflects this value judgment. However, these standards may well have other features that count in their favour—such as their manageability, their effectiveness, and so forth. What ultimately matters in our constitutional order is that they be justified, all things considered, in the context of a free and democratic society, even if they are deficient from the perspective of the rule of law. The framework I defend in no way limits this possibility. It merely stands against the conflation of rule of law and wider public interest considerations in the context of the s 9 analysis itself.

[130] Raz, "The Law's Own Virtue", *supra* note 115 at 5. On this point, see also Vincent Chiao, "*Ex Ante* Fairness in Criminal Law and Procedure" (2011) 15:2 New Crim L Rev 277.

[131] *Hufsky*, *supra* note 16 at 632–33; *Morales*, *supra* note 31 at 740–41.

or every car whose rank order on the road matches the number yielded by a roll of dice. Not only are these examples of criteria that would satisfy the *Hufsky* requirement, but they are clearer criteria than many others that have since received the Supreme Court's sanction, such as reasonable grounds for arrest and reasonable suspicion for investigative detention. So, Raz's remarks about the acceptability of some forms of random decision making from the perspective of the rule of law need not, and should not, be construed as departing from his more general remarks about the importance of legal guidance to the rule of law.

His remarks about randomization are also consistent with his insistence on governments being guided by laws well-tailored to their purposes. Not all randomization is in keeping with the rule of law. Raz only contends that it is when there is no reason or no known reason to prefer one option over others, yet there are conclusive reasons for making a choice. From the perspective of the rule of law, this appraisal of reasons should be done in view of the purpose of the authorizing law. For example, a randomization procedure may be rationally connected to the purpose of detecting traffic safety offences that cannot be detected by mere observation of driving. Assuming police officers' lack of (known) reasons for stopping one car over another in many relevant cases, the impossibility or unreasonableness of stopping all cars, and the need to stop at least some cars to realize the law's purpose, a randomization procedure may be as rationally tailored a criterion as there can be. However, insofar as there are evident reasons for stopping some cars over others in ways that advance the law's purpose, randomization would not be rationally connected to its purpose in the same tailored way and, to that extent, would be arbitrary. The Supreme Court's purpose-sensitive account of arbitrariness should be understood with this caveat in mind.

3. THE RULE OF LAW AND IMPROPER LEGAL PURPOSES

Consider again the view that arbitrary government is government that uses power in a way that is indifferent to the proper reasons for which power should be used. In the last section I contended that, from a rule of law standpoint, the

proper reasons for which a government should act are reasons that are rationally connected to the purposes of the laws authorizing it to act. However, does the ideal not have anything more to say about the purposes that laws should properly seek to advance, beyond insisting that laws should be articulated in ways that are rationally connected to their own purposes? Is the rule of law really an ideal that entitles lawmakers to make laws that promote whatever purposes they wish?

Some, who are uncomfortable with this idea, argue that respect for the rule of law entails that there are at least certain ends that the law must pursue. For example, it has been argued that, for the rule of law to obtain, "law must afford adequate protection of fundamental human rights"[132] or, more broadly, of "respect-worthy things."[133] However, this view is far from universal. Many, with Raz at the forefront, insist instead that "[d]etermining what ends to pursue . . . is the stuff of ordinary politics, and the rule of law does not review the success of politics."[134]

Which family of views should one side with? Fortunately, the gap is perhaps not as wide as the dichotomy just presented makes it seem, and Raz's own work demonstrates why. Raz posits that there are some purposes that no government is entitled to pursue if it is to act as a government, and that the exclusion of

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132 Tom Bingham, "The Rule of Law" (2007) 66:1 Cambridge LJ 67 at 75.

133 Julian A Sempill, "Ruler's Sword, Citizen's Shield: The Rule of Law & the Constitution of Power" (2016) 31:3 JL & Pol 333 at 366–74. Sempill strives to summarize a wider tradition of thinking that he associates with, amongst others, John Locke and Immanuel Kant (*ibid*).

134 Raz, "The Law's Own Virtue", *supra* note 115 at 6. Raz is far from alone in defending this limited view of the ideal. For example, Lon Fuller's account of the rule of law as the "inner morality of law" or its "internal morality" is explicitly "concerned, not with the substantive aims of legal rules, but with ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be": Fuller, *supra* note 106 at chs 2, 4 and at 97, 153. Or consider John Finnis's account of the rule of law as "the specific virtue of legal systems", or "a state of affairs in which a legal system is in legally good shape", that may well not secure "the substance of the common good": John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 270–74. See also Gardner, *supra* note 113 at 211, 218–20.

such purposes is part and parcel of the ideal of the rule of law. "Governments", he argues, "are there not to promote their own interests, but . . . the interests of the governed. Understood broadly, eg to include their moral interests".[135] So, to accord with the rule of law, laws and governmental actions under them must be justified as being in the interests of the governed.

Is Raz not endorsing here a substantive view of the kinds of purposes that a government and the laws that empower it should pursue? And is he not thereby contradicting his own position that the choice of which purposes the law should advance is the stuff of politics, and not of the rule of law? His response is that merely pointing out that certain purposes are excluded by the very nature of government is "not a matter of taking sides on which purposes this or that government should pursue. It is no more than insisting that it should act as a government."[136] Thus, Raz argues, the rule of law does not prescribe purposes for the law and governments acting under it. It only stands *against* certain purposes. Furthermore, he stresses, this categorical exclusion of some purposes does not rest on an evaluation of which purposes are justified all things considered.[137] It simply flows from the very nature of the enterprise of governance in which the law and government acting under it are involved and, as such, it rightly forms part of the rule of law.

As the Supreme Court itself recognizes, the rule of law is ultimately an ideal of governance according to which "individuals should be governed by the rule of law, not the rule of persons."[138] When viewed through the prism of Raz's gloss, this understanding of the ideal helps at least partially make sense of the Supreme Court's third account of arbitrariness. If the rule of law is understood as an ideal that is opposed to the rule of persons, the law and governance under it should not be geared

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135 Raz, "The Law's Own Virtue", *supra* note 115 at 7.

136 *Ibid*.

137 It does not, for example, rest on an evaluation of whether given legal purposes advance societal concerns "which are pressing and substantial in a free and democratic society", as is required for justification under s 1 of the *Charter*: *Oakes*, *supra* note 96 at 138–39.

138 *Canadian Foundation for Children*, *supra* note 22 at para 16.

at promoting the personal interests of rulers. The law and government acting under it should not promote, as the Supreme Court emphasizes in *Storrey*, government officials' "personal enmity" towards the governed.[139] Nor should the law and government acting under it pursue, as the Ontario Court of Appeal cautions, "purposes which have nothing to do with the execution of a . . . public duty" or public functions more generally[140]—say, government officials' personal enrichment. To quote Raz once again, pursuing such ends is simply "not something that *any* government can legitimately do."[141]

What about laws that promote discriminatory purposes? Raz hastens to add that the rule of law principle of governance in the interest of the governed is a principle of governance in the interest of *all* the governed. In his words, "[*t*]*he interests of all* the governed should be given their proper significance and importance."[142] Invidiously discriminatory purposes stand in stark contrast with such an egalitarian principle.

Of course, what it means precisely to give to the interests of all of those who are governed their proper significance and importance is controversial and beyond the scope of this article.[143] My point, here, is simply to highlight this general principle as part of what the rule of law requires of laws—and, therefore, as one of the key aspects of the normative architecture of what may make laws authorizing detentions arbitrary under section 9. It is my hope that, with this clarification in hand, courts will be in a better position to develop the right coherently and in a principled way.

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139 *Storrey*, *supra* note 48 at para 39.

140 *Brown*, *supra* note 84 at 116–17.

141 Raz, "The Law's Own Virtue", *supra* note 115 at 7.

142 *Ibid* [emphasis in original].

143 Even this vague formulation of the principle is controversial amongst those who endorse its general tenor. For example, Paul Gowder argues that to live up to the rule of law, laws "must be actually justifiable to all on the basis of reasons that are consistent with the equality of all": Paul Gowder, *The Rule of Law in the Real World* (Cambridge: Cambridge University Press, 2016) at 4.

Still, it bears noting that scholars of discrimination tend to agree that wrongful discrimination characteristically involves an objectionable rank-ordering. According to various leading accounts, a wrongfully discriminating law, or government acting under it, treats some people as inferior or subordinate to others, or as less worthy, deserving, or free than others, based on morally irrelevant personal traits.[144] Thus, it is unsurprising that this aspect of the rule of law finds at least some recognition in subsection 15(1) of the *Charter*, which proscribes purposeful discrimination based on a series of prohibited and analogous grounds.[145] Constitutional entrenchment of this aspect of the rule of law, to the extent that subsection 15(1) captures it, further confirms its recognition as part of the ideal of the rule of law in Canada.

To be sure, these points can be generalized. From the perspective of the rule of law, improper purposes include, although they may not be limited to, purposes that contravene the *Charter* rights of the governed. So, purposes may be improper in the fundamental way that they are not in the interest of the governed or do not give these individuals' interests their proper significance and importance. Their impropriety may also be compounded by the fact that they flout how such proper consideration is already recognized by the law itself, in various

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[144] See especially Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) at 122, 194; Sophia Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford: Oxford University Press, 2020) at ch 5; Catharine A MacKinnon, "Substantive Equality: A Perspective" (2011) 96:1 Minn L Rev 1 at 11–12; Deborah Hellman, *When is Discrimination Wrong?* (Cambridge: Harvard University Press, 2008) at 34–38; Denise G Réaume, "Discrimination and Dignity" (2002–2003) 63:3 La L Rev 645 at 678–79.

[145] I say "at least some recognition" to allow, for example, for the possibility that forms of invidious discrimination that are currently not proscribed by s 15(1) of the *Charter* should be proscribed, with a view to enhancing the legal system's adherence to the rule of law. See e.g. Skolnik, "Expanding Equality", *supra* note 71 (arguing for "the judicial acceptance of new analogous grounds of discrimination that courts have either rejected or have yet to recognize, such as poverty, homelessness, or having a criminal record" at 28–29). And if such recognition is not forthcoming under s 15(1), could it be under section 9?

constitutionally entrenched rights respect for which is part of the conditions of legal validity in Canada.[146]

Once again, the rule of law principle expounded in this section should be viewed as an addition, and not as an alternative, to the principles considered in the previous two sections. My contention, following Raz, is that, to live up to the rule of law, not only must laws authorizing detentions provide criteria for detention that are reasonably clear, stable, etc., and that are rationally connected and tailored to the purposes of these laws, but these laws must also not promote improper purposes. In other words, they must not promote purposes that are not in the interest of the governed and that do not give the interests of all the governed their proper significance and importance. This requirement also forms part of what the rule of law requires of laws and, as I have noted, is sometimes already recognized in other provisions of the *Charter*, such as subsection 15(1).

4. THE RULE OF LAW, THE ARBITRARINESS OF LAWS INSUFFICIENTLY LIMITING ARBITRARY APPLICATIONS . . . AND ARBITRARINESS IN EFFECT?

I said that the rule of law principle considered in the last section only partially helps make sense of the Court's third account of arbitrariness. That is because this principle only speaks to laws whose purposes are manifestly (to borrow Raz's expression)[147] or "taken at face value" (to borrow from the Supreme Court's expression)[148] invidiously discriminatory or otherwise improper.

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[146] It bears emphasizing that even if laws with such constitutionally entrenched improper purposes may sometimes end up being justified under s 1 of the *Charter* as reasonable in a free and democratic society, this possibility does not undermine my point. My concern here is only with these laws' lack of justification under s 9 of the *Charter*—which solely has to do with their lack of conformity with the rule of law. In other words, that rule of law principles may sometimes be overridden by conflicting considerations does not alter their content, either in general theoretical terms or in terms of their application under s 9.

[147] Raz, "The Law's Own Virtue", *supra* note 115 (Raz himself speaks in terms of "manifest intention" at 7–8).

[148] I borrow this expression from the Supreme Court's s 7 analysis in *Bedford*, *supra* note 43 at para 125. In the s 15 context, the Court speaks of

However, as Sopinka J's concurrence in *Ladouceur* suggests, facially neutral laws might also be held to be arbitrary under section 9 if they are crafted in ways that fail to exclude improper considerations from detention decisions adequately.[149] Another way to put the point might be to say that facially neutral laws authorizing detentions can be arbitrary to the extent that they unreasonably allow or facilitate discrimination, or the pursuit of other improper considerations, in their application. This kind of arbitrariness is really a version of the more general vagueness concern discussed earlier under the heading of formal arbitrariness. However, this time, the concern is further specified in terms of ensuring guidance that limits wrongful discrimination and state action based on other improper considerations. Now, once this possibility is mooted, a logical next step may also be to query whether unintended discriminatory (or otherwise relevantly improper) *impacts* of laws authorizing detentions could themselves count as arbitrary under section 9, thus making such laws arbitrary in effect.

There exists, under section 7, an effects-sensitive principle of fundamental justice. In *Bedford*, the Supreme Court explains that the principle of "gross disproportionality" stands against laws whose "effects on life, liberty, or security of the person are so grossly disproportionate to [their] purposes that they cannot rationally be supported."[150] The Court suggests that this idea is paradigmatically captured by "a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk."[151] In the specific context of section 9 case law, a similar idea may well implicitly underlie the Supreme

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discrimination on the "face" of an impugned law, as opposed to its "impact". See e.g. *Sharma*, *supra* note 69 at para 28.

149 *Ladouceur*, *supra* note 16 at 1267.

150 *Bedford*, *supra* note 43 at para 120. See also *Carter*, *supra* note 46 at paras 89–90.

151 *Bedford*, *supra* note 43 at para 120. Interestingly, Allan Manson uses the label of "arbitrary disproportionality" to refer to some such cases. See Allan Manson, "Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Standards" (2012) 57:8 SCLR (2d) 173 at 200–01.

Court's insistence, in *Mann*, that detentions for mere investigative purposes "should be brief in duration".[152] It may also underlie the Supreme Court's holding in *Storrey* that a detention of 18 hours, after an arrest for which there were reasonable and probable grounds but before a formal charge was laid, for the purpose of furthering police investigation, was not unreasonable and did not infringe section 9.[153]

Note, however, that the *Bedford* principle in question does not explicitly speak to, for example, the possibility of a liberty-depriving law impacting someone in a grossly disproportionate way because of their age, race, or other characteristic that is not rationally supported by a proper purpose of the law. The Court's current understanding of the principle of gross disproportionality under section 7 seems to be that it must only be assessed in terms of the severity of deprivations of life, liberty, or security for the person.

In the case of facially neutral laws authorizing detentions that unreasonably facilitate discriminatory applications or impacts, the Court may well reason that they should be addressed under subsection 15(1) of the *Charter* itself.[154] Notice, however, that this option would obviously not be available for improper applications or impacts that are not covered by subsection 15(1) yet may be markedly out of step with the purposes of the laws under which they are generated. Then again, in the section 9 context, the Court's thinking could be that other parts of the *Grant* and *Le* interpretive framework can address this blind spot. In the case of arbitrary applications generated by governmental agents acting for improper reasons, they may not be recognized as authorized by law under the first prong of the framework. In the case of disproportionate impacts generated by state agents

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152 *Mann*, *supra* note 56 at para 45.

153 *Storrey*, *supra* note 48 at 255–58.

154 For a finding of discriminatory application of a facially neutral law, see *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69. For an argument that this kind of finding should also lead courts to reevaluate and remedy, under the *Charter*, the statutory scheme allowing for it, see Choudhry and Roach, *supra* note 68. On the issue of laws with adverse discriminatory impacts, see e.g. *Fraser*, *supra* note 69 at paras 30ff.

acting for proper reasons, they might be held to amount to detentions that are not carried out in a reasonable manner, under the third prong of the framework.

Still, as I suggested earlier, an argument could conceivably be made under section 9 that, in the name of the rule of law, laws authorizing detentions should seek to provide guidance that anticipates and seeks to forestall applications that, in grossly disproportionate ways, cannot be supported by their purposes. An argument could also conceivably be made that the impacts of such laws should not be grossly disproportionate to their purposes. After all, Raz suggests, the rule of law also requires that state decisions and actions be "reasonable, relative to their declared reasons."[155] While the Supreme Court has yet to contend with such arguments systematically, it may only be a question of time.[156]

Arguably, then, all accounts of arbitrary laws of which the Court's section 9 jurisprudence invites consideration correspond to complementary aspects of what the ideal of the rule of law requires of laws. This realisation should pave the way for the Court to acknowledge it explicitly and, henceforth, systematically seek to give shape to the right in pursuance of this normative foundation.

IV. ARBITRARINESS AND THE ANCILLARY POWERS DOCTRINE

A. ARBITRARY ANCILLARY POWERS

I could not conclude this article without commenting on the ancillary powers (or *Waterfield*) doctrine to which the Supreme Court has now resorted for many decades to recognize new

[155] Raz, "The Law's Own Virtue", *supra* note 115 at 8.

[156] See especially the case of *Luamba*, *supra* note 95, in which the Superior Court of Quebec recently concluded that random traffic stops violate both s 9 and s 15(1) of the *Charter*. This high-profile decision, which assesses the application and disparate impacts of a facially neutral law authorizing detentions from the perspective of both s 9 and s 15(1), is currently under appeal before the Court of Appeal of Quebec.

police powers at common law, including powers of detention.[157] I must consider it because the Supreme Court has made it a practice not to subject new powers thus created to the same kind of section 9 scrutiny as the one to which it subjects statutory powers of detention. Thus, if left unchecked, this doctrine threatens to create a disjointed framework for—or worse, a gaping hole in—the constitutional regulation of the arbitrariness of new common laws authorizing detentions. As Coughlan and Luther put it:

> [T]he current approach to creating common law powers of detention . . . tends to collapse into a single step the questions of whether a detention was authorized by law and whether the law was arbitrary. Where the Court simply creates a law in a case, it is unlikely to then ask whether the law it has just created is arbitrary.[158]

Given my analysis in Part III, I believe that a strong case can be made that the scrutiny of statutory and common law powers of detention should be brought into much closer alignment when it comes to the assessment of their arbitrariness.

Here is how the ancillary powers doctrine operates and how its applications end up only being subject to indirect, less systematic *Charter* scrutiny. According to the doctrine, a new police power may be judicially recognized if (1) it falls within the general scope of a statutory or common law police duty (notably, to preserve peace, prevent crime, and protect people and property from harm),[159] and (2) it is justified as reasonably

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157 The Supreme Court's invocation of the doctrine dates back to *R v Stenning*, 1970 CanLII 12 (SCC) and *Knowlton v R*, 1973 CanLII 148 (SCC).

158 Coughlan & Luther, *supra* note 10 at 302. Terry Skolnik puts the point even more trenchantly, asserting that "[j]udicially created police powers signal to Parliament that these powers respect the Constitution (otherwise, why would courts recognize these powers in the first place?)": Terry Skolnik, "Racial Profiling and the Perils of Ancillary Powers" (2021) 99:2 Can B Rev 429 at 432 [Skolnik, "Racial Profiling"].

159 For the most recent formulation of this criterion, see *Fleming v Ontario*, 2019 SCC 45 at paras 46, 69 [*Fleming*], citing *R v MacDonald*, 2014 SCC 4 at para 35 [*MacDonald*]. For the original formulation of the criterion based on the English Court of Appeal case of *R v Waterfield*, [1963] 3 All ER 659;

necessary for the fulfillment of that duty.[160] In answering the second question, the Supreme Court has indicated that three factors must be weighed:

1. the importance of the performance of the duty to the public good;
2. the necessity of the interference with individual liberty for the performance of the duty; and
3. the extent of the interference with individual liberty.[161]

In *Clayton*, a case in which the Supreme Court recognized a police power to set up roadblocks for criminal investigative purposes in some circumstances, Abella J, writing for the majority, speaks directly to the relationship between the doctrine and the *Charter*:

> The courts can and should develop the common law in a manner consistent with the *Charter . . . .* The common law regarding police powers of detention, developed building on *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.), and *Dedman v. The Queen*, [1985] 2 S.C.R. 2, is consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk. The standard of justification must be commensurate with the fundamental rights at stake.[162]

Accordingly, in *Clayton*, Abella J does not subject the new detention power she recognizes to direct section 9 scrutiny—that is, beyond asserting, in a way that fails to anticipate the full development of the *Grant* and *Le* interpretive framework, that "a detention which is found to be lawful at

[1964] 1 QB 164 [*Waterfield*], see *R v Dedman*, [1985] 2 SCR 2 at 32–35, 1985 CanLII 41 (SCC) [*Dedman*].

160 For the most recent formulation of the criterion, see *Fleming*, *supra* note 159 at paras 46–47, 75, citing *MacDonald*, *supra* note 159 at para 36. For the original formulation, see *Dedman*, *supra* note 159 at 33, 35–36.

161 *MacDonald*, *supra* note 159 at para 37 [citations omitted].

162 *Clayton*, *supra* note 64 at para 21.

common law is, necessarily, not arbitrary under s. 9 of the *Charter*."[163] Neither does she subject it to section 1 scrutiny—an approach that has since been reiterated in *Fleming*, where the Court confirms that "whether a common law power exists does not itself require the court to apply s. 1 of the *Charter*".[164] Instead, she only subjects the power at issue to the balancing of values required by the ancillary powers doctrine itself, an approach which has become the norm.

Many, starting with Binnie J in his concurrence in *Clayton*, have decried this approach as "sidestep[ping] the real policy debate in which competing individual and societal interests are required to be clearly articulated in the established framework of *Charter* analysis."[165] Admittedly, the Supreme Court has observed that there are important parallels between the ancillary powers doctrine and the *Oakes* test that governs section 1 justifications. In *Fleming*, the Court emphasizes that the factors to be weighed under the second prong of the doctrine require a purported power to impair individual rights minimally and, also, require "a proportionality assessment."[166] Still, there remain significant differences between the two tests. For example, Terry Skolnik has perceptively pointed out that the ancillary powers doctrine focuses primarily on how a purported police power impacts an individual's rights in a particular case, rather than how this power may have wider deleterious societal effects—such as "disparately impact[ing] racialized and Indigenous persons on a more systemic level."[167]

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[163] *Ibid* at para 20.

[164] *Fleming*, *supra* note 159 at para 53.

[165] *Clayton*, *supra* note 64 at para 61.

[166] *Fleming*, *supra* note 159 at para 54. See also Richard Jochelson, "Ancillary Issues with *Oakes*: The Development of the *Waterfield* Test and the Problem of Fundamental Constitutional Theory" (2012) 43:3 Ottawa L Rev 355 at 365–69.

[167] Skolnik, "Racially Profiling", *supra* note 158 at 454. See also MacDonnell, *supra* note 128 at 232–37. Contrast with the final step of the *Oakes* test, which requires that there be proportionality between the deleterious and salutary effects of the impugned law. See *Oakes*, *supra* note 96 at 139.

However, the Court's approach is as, if not more, problematic from the standpoint of the right guaranteed by section 9. By not subjecting purported new common law detention powers to independent section 9 scrutiny, and by subjecting them instead to a justificatory framework under which the broader public good must be weighed, the Court's approach muddies the assessment of rule of law considerations and related arbitrariness concerns.

To be sure, the ancillary powers doctrine may well be interpreted to include some version of the section 9 requirements for the existence of detention criteria and their reviewability, for their rational connection to the purpose of realising the police duty in question, and for this purpose not to be improper. Yet, the distinct assessment of these requirements can be easily lost in the Court's general justificatory test. Specific problems of arbitrariness that should ultimately be weighed against the importance of the purported power for the public good may then go unnoticed or unaddressed.

Consider the example I mentioned earlier of the possible overbreadth of the reasonable suspicion criterion for investigative detentions, which is not addressed in the *Mann* decision that recognizes the power.[168] Consider also *Clayton* itself, where the majority does not specifically assess the arbitrariness of the roadblock power it recognizes. In his concurrence, Binnie J argues that the power is, indeed, arbitrary, in that there are "no criteria for the selection of the drivers to be stopped",[169] no requirement of "individualized suspicion" linking the detained motorists or their cars to the crimes under investigation, and "no criteria to 'tailor' the roadblock more precisely."[170] While one may quibble with him that a power to stop "all cars" in a roadblock is not criteria-less, he is right that the majority's lack of attention to rational connection issues is

168 See Part III.C.2, above.

169 *Clayton*, *supra* note 64 at para 67, citing *Hufsky*, *supra* note 16.

170 *Clayton*, *supra* note 64 at para 103.

startling.[171] And it gets worse. In *R v Aucoin*,[172] the Court asserts as settled "[t]he existence of a general common law power to detain where it is reasonably necessary in the totality of the circumstances",[173] without acknowledging any of the arbitrariness concerns inherent in such a vague and general power.

Yet, there is reason to be hopeful. In *Fleming*, the most recent majority statement on the ancillary powers doctrine, the Supreme Court recognizes that "the rule of law requires that strict limits be placed on police powers".[174] It is true that, despite this statement, the Court ends up doubling down on the articulation of the ancillary powers doctrine explained above. However, it does so while adding that:

> It is important for the courts to give officers the clearest possible guidance as to what common law powers are available to them within the general scope of their duties. The police will then be able to apply these guidelines to their day-to-day operations.[175]

This recent recognition that the rule of law inevitably matters a great deal to the doctrine (and new powers generated under it) provides, I think, a pathway for a future elaboration that coheres with the general argument I advanced in this article. It provides a pathway that takes seriously the need for a specific consideration of the arbitrariness of purported common law powers, in accordance with the multipartite normative account of the concept I have defended in Part III above. It offers a pathway that acknowledges the importance of such consideration as an analytical step distinct from the wider justificatory balancing carried out under the doctrine. In other words, the Court's recent recognition provides an opportune precedential hook on which to hang a restatement of the doctrine that is explicitly and directly sensitive to arbitrariness concerns,

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[171] *Ibid* at para 67.

[172] 2012 SCC 66 [*Aucoin*].

[173] *Ibid* at para 36, where the Court argues that this general power was already recognized in *Clayton*, *supra* note 52 at para 30.

[174] *Fleming*, *supra* note 159 at para 38.

[175] *Ibid* at para 52.

even if the Court continues to insist that new common law powers can be developed without direct *Charter* scrutiny. For, as the Court thereby recognizes, the rule of law—and, by extension, the protection against arbitrary laws that it includes—is clearly an important value for common law police powers, just as it is for statutory police powers.

In this vein, recall that the *Grant* and *Le* interpretive framework, which requires that laws authorizing detentions not be arbitrary themselves, makes no distinction between statutes and common law.[176] And as the Court reminds us in *Fleming*, "statute law is not the only source of legal authority" for such powers. "In particular circumstances", the Court insists, "the common law may also provide a legal basis for carefully defined powers."[177] So, to ensure a fuller realization of the approach to section 9 contemplated in *Grant* and *Le*, or at least to bring the ancillary powers doctrine in closer alignment with it deliberately, the modest readjustment of the doctrine contemplated in this part should be welcomed.

B. The Ancillary Powers Doctrine in the Service of the Rule of Law

Some may object to my characterization of the readjustment I am advocating for as modest. They may point to the history of application of the doctrine in which the Supreme Court has generally insisted on recognizing powers tethered to the particular facts of the cases under review. Thus, the claim may be, the advancement of the rule of law was never envisaged as a key motivation for the doctrine or its interpretation.

In *Mann*, for example, the majority insists that it is only "lay[ing] down the common law governing police powers of investigative detention in the particular context of this case."[178]

[176] This position is in line with the wider jurisprudence of the Supreme Court. According to the Court, the *Charter* applies to the common law when "the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom": *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 599, 1986 CanLII 5 (SCC) [*Dolphin Delivery*].

[177] *Fleming*, *supra* note 159 at para 39.

[178] *Mann*, *supra* note 56 at para 17.

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Similarly, in *Clayton*, the majority holds, in a case-specific way, that:

> In the totality of the circumstances, the . . . [roadblock] detention in this case was reasonably necessary to respond to the seriousness of the offence and the threat to the police's and public's safety inherent in the presence of prohibited weapons in a public place, and was temporally, geographically and logistically responsive to the circumstances known by the police when it was set up.[179]

This approach has been criticized as contrary to the rule of law in a number of ways. It recognizes new powers that are applied retroactively to the police in those cases. It also provides an incentive to police officers to act as they deem reasonably necessary in the moment, in the hope of retroactive judicial vindication later. Interpreted as such, the doctrine seems to present itself more as a breeding ground for arbitrariness than as a constraint on it.[180]

Interestingly, at the other end of the spectrum, the Court has sometimes also recognized general future-oriented powers, such as the "general common law power to detain where it is reasonably necessary in the totality of the circumstances" referred to in *Aucoin*.[181] As I suggested before, such a general and vague authorization also does not do much to cabin police arbitrariness.

These rule of law concerns are very real. As applied in these cases, the ancillary powers doctrine generates radical uncertainty for ordinary individuals who may want to avoid being at the receiving end of exercises of new police powers, yet are unable to know when or in what form such powers will be judicially recognized *ex post facto*. It also muddies the predicament of police officers who may not feel as compelled to act as authorized by existing law, or, insofar as they seek to act as

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179 *Clayton*, *supra* note 64 at para 41.

180 See James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31:1 Queen's LJ 1 at 54–55; Steve Coughlan, "Common Law Police Powers and the Rule of Law" (2007) 47 CR (6th) 266 at 266–67.

181 *Aucoin*, *supra* note 172 at para 36.

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legally authorized, may not be able to find out with any level of certainty what the law requires of them. It is to avoid such radical uncertainty that, as mentioned in the last part, the prospective and non-retroactive application of laws is widely recognized as a core component of the ideal of the rule of law and the protection it offers against arbitrary governance.[182]

Now, as I already noted, the Supreme Court has asserted that except for laws creating penal offences "the retrospectivity and retroactivity of which is limited by s. 11(g) of the *Charter*, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution."[183] I submit that the Court should rethink this blanket statement in light of its explicit commitment to upholding the rule of law under section 9. To protect against arbitrary governance, section 9 should be held to require that legislation authorizing detentions be prospective and non-retroactive, subject, of course, to justification in the broader public interest under section 1. Otherwise, the other constraining desiderata of reasonably clear, stable, publicly available, and general legal guidance that is rationally connected to legal purposes that are not improper or improperly circumscribed, would count for little. Admittedly, the Court has not yet had to contend directly with this issue under section 9 with respect to legislation. My point is that when presented with the opportunity to correct its course in the specific context of section 9, it should take it.

However, when it comes to the ancillary powers doctrine, the Supreme Court has made it clear that it is here to stay. "We have crossed the Rubicon," Binnie J proclaimed in *R v Kang-Brown*.[184] Does this definitive statement, coupled with the way in which the doctrine has historically tended to be articulated and applied, not amount to an explicit abandonment of the rule of law in respect of the creation of detention powers at common law? If this were the case, the recentering of the doctrine on rule of law and related arbitrariness considerations that I am advocating would be far

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182 Raz, "The Law's Own Virtue", *supra* note 115 at 3.

183 *Imperial Tobacco*, *supra* note 110 at para 69.

184 2008 SCC 18 at para 22 [*Kang-Brown*]. See also *Fleming*, *supra* note 159 at para 42.

from modest. Côté J's comments about the importance of the rule of law considerations in the implementation of the doctrine would also be quite out of step with the overall trajectory of the case law.[185]

I believe that such an interpretation fundamentally misunderstands the relationship between the ancillary powers doctrine and the rule of law. Or, perhaps more accurately, that it ignores an important dimension of this relationship. To see why, one must go back to the foundations of the ideal of the rule of law. Recall that in *Re Manitoba Language Rights*, the Supreme Court cites Raz with approval for the fundamental proposition that the rule of law "has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it".[186] So far, I have mostly focused on the latter aspect of the ideal. However, the first is also important and points to the fact that the ideal does not just set out requirements for existing laws. It also requires that there be laws, and that there be laws that are obeyed. Again, in the Court's own words, "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order."[187]

Plainly, there should not be laws regulating everything. For example, it is unlikely that the rule of law requires laws determining the identity of our political representatives, over and beyond governing the procedures through which they are chosen. That determination is the province of politics and, in a democracy, of popular choice. Thus, underlying the fundamental rule-of-law dimension that people should be ruled by laws is the further question of *when*, or *in what contexts*, there should, or should not, be laws—laws that are generally obeyed—for the rule of law to prevail. While Raz does not expand much on this aspect of the ideal in his work, other prominent public law scholars have.

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[185] See *Fleming*, *supra* note 159 at paras 38, 52.

[186] *Re Manitoba Language Rights*, *supra* note 108 at 750, citing Raz, *The Authority of Law*, *supra* note 114 at 212–13.

[187] *Re Manitoba Language Rights*, *supra* note 108 at 749.

Not least among them is Timothy Endicott, who explores this question in terms compatible with the Supreme Court's interpretation of the purpose of section 9 in *Grant* and other cases.[188] Endicott argues that the rule of law stands against arbitrary governance, in the sense of state action that calls for, but lacks, some justification other than the fact that the state or its agents willed it and did it. His reasoning then proceeds as follows. Insofar, for example, as the police's behaviour, when it detains people, calls for more justification than the police's own say-so—and, as we have seen, the Supreme Court has held that the very purpose of section 9 is to require such additional justification for detentions—then the rule of law requires that yet a further question be asked. Namely, whether laws specifically regulating the behaviour in question that meet the requirements of the second aspect of the ideal would help provide the required justification. Insofar as they would, then such laws should exist. And insofar as such laws should exist, but other lawmaking bodies (perhaps more competent and democratically legitimate) are unwilling to enact them, courts may end up as the rule of law's last resort. That is to say, they may be the last agents of the state in a position to develop and enforce legal rules facilitative of justified police action.[189]

Notice that this reasoning parallels the Supreme Court's own reasoning about its role in resorting to the ancillary powers doctrine:

> [T]he courts cannot abdicate their role of incrementally adapting common law rules where legislative gaps exist", the Court has insisted, explicitly leaving it open to the legislature later "to

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[188] Timothy Endicott, "The Reason of the Law" (2003) 48:1 Am J Juris 83 at 90–95. See also Jeff King, "The Rule of Law" in Richard Bellamy & Jeff King, eds, *The Cambridge Handbook of Constitutional Theory* (Cambridge: Cambridge University Press) at ch 18 [forthcoming in 2024].

[189] That courts may be the last state agents positioned to act thus does not mean that they are optimally positioned to do so. It simply means that at a given moment, if they do not undertake to advance the rule of law, no one else will.

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> expand, modify, restrict or abolish such common law powers, subject to constitutional limits.[190]

Seen in this light, the new legal powers recognized in decisions such as *Mann* and *Clayton* may be reinterpreted not as an abandonment of the rule of law but as attempts to assert it.

As a matter of fact, in *Mann*, the majority comes close to endorsing this rationale explicitly when it writes that:

> [T]he unregulated use of investigative detentions in policing, their uncertain legal status, and the potential for abuse inherent in such low-visibility exercises of discretionary power are all pressing reasons why the Court must exercise its custodial role.[191]

One might object that, *de jure* detentions short of arrest for investigative purposes were not legally unregulated in the pre-*Mann* era. Such detentions were illegal in that the police lacked the legal power to effectuate them.[192] However, de facto, the practice was unregulated since the police pervasively resorted to it in ways that did not come to the attention of courts. Legislators also refrained from turning their minds to its effective regulation. Thus, by establishing legal parameters circumscribing justified resort to the practice and inviting judicial review of their application, the Court was seeking to assert the rule of law where it was otherwise lacking.

This analysis might seem to suggest a dilemma, internal to the ideal of the rule of law, for the Supreme Court. Should the Court prioritize one aspect of the ideal over the other? Namely, should it prioritize ensuring that there are laws specifically regulating detention practices that are otherwise left unregulated, or should

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[190] *Fleming*, *supra* note 159 at para 42. See also *Kang-Brown*, *supra* note 184 at paras 50–51.

[191] *Mann*, *supra* note 56 at para 18.

[192] Of course, this statement should be read in a way that accounts for the lower court decisions that, in the years leading up to *Mann*, recognized a legal power of investigative detention short of arrest. See especially *R v Simpson*, 1993 CanLII 3379 (ONCA). It should also be read in a way that accounts for the existence of specific statutory powers to stop vehicles for traffic-safety purposes, as discussed in *Hufsky*, *supra* note 16, and *Ladouceur*, *supra* note 16.

it instead prioritize ensuring that whatever laws regulate detentions meet the non-arbitrariness requirements of the second aspect of the ideal? This apparent dilemma only arises if one equates the ancillary powers doctrine with the recognition of case-specific *ex post facto* police powers (as in *Mann* and *Clayton*), or of vague and general forward-looking powers (as in *Aucoin*). Were the Supreme Court to choose instead to use the ancillary powers doctrine to recognize only reasonably clear, stable, general, purpose-sensitive, etc., powers on a forward-looking basis, the apparent dilemma would dissolve. That the Court has been disinclined to do so, and has tended to focus on the immediate circumstances of the cases before it, seems to flow from its perceived and actual lack of democratic legitimacy and institutional competence, as compared with legislative bodies also in the business of crafting police powers.[193] Yet, as important as these countervailing considerations may be, it is important to realize that they are external to the ideal of the rule of law.[194]

What this argument suggests is that, in the final analysis, the rule of law may not be the only important consideration in the judicial development of constitutionally justified powers of detention. Considerations of institutional legitimacy and competence may also matter. However, that other considerations matter should come as no surprise. We already encountered this suggestion in another form in the earlier discussion of the contrast between the justification of detention powers as rule-of-law compliant and their justification in the broader

[193] On the democratic legitimacy front, Lebel J recognizes in *Kang-Brown* that "[c]ourts form part of the institutions of a democratic state where democratically elected legislatures debate and enact laws in an open public process": *Kang-Brown*, *supra* note 184 at para 7. Thus, Binnie J adds that "it would be *desirable* for Parliament to enact a comprehensive scheme governing police powers": *ibid* at para 61 [emphasis in original]. On the institutional competence front, the majority in *Mann* states that "this Court must tread softly where complex legal developments are best left to the experience and expertise of legislators": *Mann*, *supra* note 56 at para 17.

[194] The Supreme Court itself makes clear that it understands democratic and rule of law principles as distinct. See *Re Secession of Quebec*, *supra* note 107 at paras 61–69, 70–78.

public interest. The critical point, though, is that, *as far as the ideal of the rule of law is concerned*, Côté J is right when she asserts in *Fleming* that common law powers should be developed in ways that live up to it.[195]

In the context of the evaluation of the arbitrariness of statutory powers of detention under section 9, I argued, following the Supreme Court's explicit invitation, that it should solely be concerned with their compliance with the rule of law, leaving other kinds of considerations to the section 1 justificatory analysis. The ancillary powers doctrine makes such segregation more difficult, since its application mixes rule of law considerations with considerations of the broader public good *and* considerations pertaining to courts' comparative institutional standing. Yet, if I am right that the fundamental purpose of the doctrine is to advance the rule of law, then I am on firm footing when I contend that the Court should not rest content to advance only one of the two core aspects of the ideal through it. So is Côté J writing for the Court in *Fleming.* Although a multidimensional ideal, the rule of law remains one ideal.

Thus, my recommendation remains modest and in line with the foundational rationale for the doctrine. The Court's approach to the ancillary powers doctrine should keep the rule of law and its multiple requirements firmly in focus. It should treat them as fixed requirements against which to assess countervailing public good and institutional standing considerations. How exactly the Court settles on doing this is less important than that it explicitly undertakes to do it. Such disambiguation holds the promise of making more obvious the trade-offs between different kinds of considerations that the Court believes should, or should not, be made, and the reasons for which it is making them. As a result, it also holds the promise of circumscribing in more consistent and predictable ways the jurisprudential development of doctrine and its future applications.

So, here again, I think, a focus on the rule of law—rather than on its abandonment in favour of, or confusion with, other considerations—holds the key to charting a sound path forward

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[195] *Fleming*, *supra* note 159 at paras 38, 52.

for the Supreme Court in terms of its constitutional assessment of (common) laws authorizing detentions.

V. CONCLUSION: A PRINCIPLED SELF-STANDING FRAMEWORK

Section 9 jurisprudence may have been off to a slow start, and the Supreme Court's case law about what makes laws arbitrary under it may remain disjointed and, at times, detached from a sound normative rationale. However, I hope to have successfully demonstrated in this article that it is possible, without too much effort, to organize it systematically in a manner that paves the way for its consistent, coherent, and principled development. For this to happen, the Court must simply commit to the purposive foundation for the right that it established in its more recent case law, and to reviewing all detention powers challenged before it in its explicit light—be they derived from statute or the common law. The pieces of the puzzle and the board that can firmly hold them together are already there. It is now up to the Court to realize it and undertake to complete the puzzle using them, progressively and diligently—thus further revealing the shape, shades, and retreats of the rule of law in this country as it relates to the constitutional regulation of detentions.

Admittedly, other sections of the *Charter* have also been interpreted in ways that address many (although not all) aspects of the arbitrariness of laws I discussed in this article—most notably, sections 7 and 15. Throughout, I remained agnostic about the wisdom of championing these corresponding aspects under section 9 or under these other rights.

One view may be that, insofar as the Supreme Court ensures that all such aspects are addressed somewhere and somehow, we should not expect more from it. I want to conclude by suggesting that there may be good reason to resist this view.

Early in the history of the *Charter*, the Supreme Court characterized the legal rights contained in sections 8 to 14 of the *Charter* as "designed to protect, *in a specific manner and setting*, the right to life, liberty and security of the person set forth in s. 7."[196] Section 7 is a very capacious section of the *Charter*. It

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[196] *Re Motor Vehicle Act*, *supra* note 85 at 502 [emphasis added].

provides protections against types and aspects of state action that extend far beyond arbitrary detentions. Section 15 also has a much wider ambit. With the vast coverage of these *Charter* rights also comes a large and complex jurisprudential baggage.[197] As a narrower right applicable to more specific settings, and as a comparatively under-interpreted right, section 9 offers a unique opportunity to the Supreme Court. The Court has the chance to continue to develop it, in a relatively unencumbered way, as an internally coherent and highly principled guarantee that is sensitive to the particularities of what makes *detention powers* arbitrary.

In this sense, there may be a silver lining to the delayed jurisprudential development of section 9 when it comes to the interpretation of what makes laws authorizing detentions arbitrary. The Court is now in a position to give meaningful life to the specificity of this aspect of the right, against the informative backdrop of forty years of interpretation of related rights. Consider the following examples. In the future, a resolute focus on this aspect of section 9 could facilitate the Court's development of specific guidance about what levels of overbreadth are acceptable, and what levels of clarity and prospectivity should be expected, for detention powers in particular. A more systematic focus on this aspect of the right could also facilitate the elaboration of a specific jurisprudence governing the extent to which lawmakers should, in their drafting, be expected to anticipate and pre-empt the use of discriminatory and other improper considerations in detention decisions. It could also expedite an examination of what purposes and impacts are particularly improper for detention powers to have.

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[197] Section 7 is the *Charter* section with the broadest and most varied coverage. See generally Stewart, *supra* note 103. Section 15 is one of the most complex *Charter* rights, whose tests and corresponding protections keep fluctuating in the case law. See further Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the *Charter*" (2014) 19:2 Rev Const Stud 191 at 208–15; Jennifer Koshan & Jonnette Watson Hamilton, "'Clarifications' or 'Wholesale Revisions'? The Last Five Years of Equality Jurisprudence at the Supreme Court of Canada" (2023) 114 SCLR (2d) 15.

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Yet, for that to happen, the Court must commit to taking this aspect of the right seriously and, at last, give it the attention it deserves.

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