ARREST WITHOUT WARRANT:

ACTUALITY
V.
MYSTIQUE

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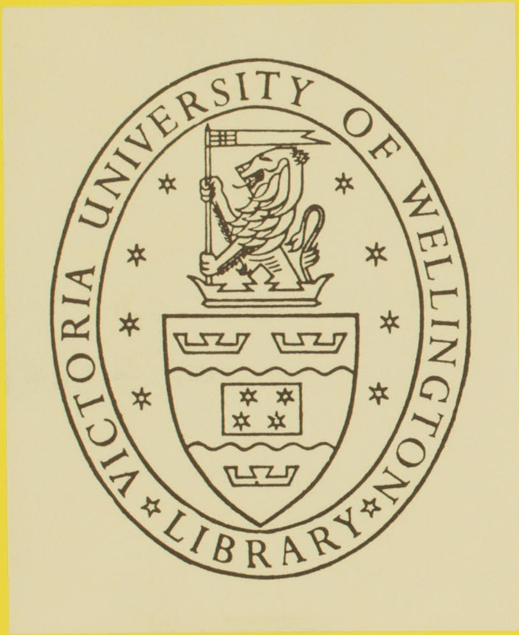
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ARREST WITHOUT WARRANT:

ACTUALITY V. MYSTIQUE

SUBMITTED FOR THE LL.B. (HONOURS) DEGREE AT
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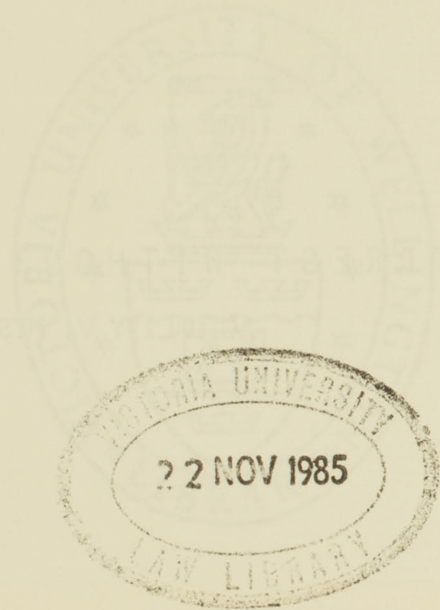
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I INTRODUCTION

The focus of this paper is on one of the central procedural powers of the criminal law - arrest without warrant. As a legal concept the justified detention of an individual against their will is one of the more controversial. This is because its basis and content can be seen as a compromise between two fundamental democratic desires, one for maximum individual freedom, and the other for effective crime control.

The law of arrest is an attempt to reach the optimum equilibrium between these two desires, and as such arises out of conflict. Having arrest embodied in legality is frequently perceived as an attempt to minimise the imposition and arbitraryness of it occurence, yet maximise the 'just' nature of the substantive law it enables to be enforced.

However, an English sociologist, Dr Doreen McBarnet[1] has claimed that the British criminal justice procedures, such as arrest, are not the attempts to reduce the laws arbitraryness, or emphasise its just qualities, that the 'rhetoric' of the law would have its adherents believe. McBarnet further contends that the failure of the system to adhere to the rhetoric is not the result of the routine activities of those actors engaged in its operation at the petty official level, but rather the product of institutionalised deviation in the system structure, established, managed and legitimised by the states hierarchy.

It is the question of whether such propositions are equally applicable to New Zealand that will be considered here.

As such this paper will attempt to discover what in New Zealand is accepted as a lawful exercise of the power to arrest, and whether this actuality of the law is as out of step with its rhetoric as its British counterpart is claimed to be.

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Such an enquiry is particularly relevant given that the Justice Department is currently reviewing the Crimes Act 1961, the main, but not exclusive, source of arrest powers.

As submissions on the possible reform of the arrest powers may suffer the same failings as their counterparts in Britain, by being based on assumptions of the law, it is hoped that the following discussion may assist in the rationalisation, and fruitfulness of the debate.

Of course, should it be found that there is an institutionalised 'gap' between the actuality of the law and its rhetoric, that finding can be used as a basis for questioning the politics of the law at a macro-level.

Thus, to provide that basis and an anchor point for discussions on the reform of the law of arrest, this paper will consider:

- the benefits of a legalistic approach and the McBarnet use of it.
- the formal rules of the law on arrest.
- whether the law matches its rhetoric.
- desirable reforms.

II LEGALISTIC APPROACH AND THE McBARNET THESIS.

Most analyses of the power to arrest focus on its implicit discretion - "Any constable ... *may* arrest",[2] and attempt to explain why an arrest is made in one situation but not in another similar one. As a result there is a flood of literature[3] attempting to explain why segments of society are disproportionately arrested. Such explanations are derived from empirical evidence gathered on Police interaction with the influences that prey upon them in the exercising of their discretion.

Hence, it is claimed that "if the Police conduct arrests in a way that contradicts the spirit of legality this is merely a by-product of informal interaction"[4]. Yet as McBarnet points out[5], the majority of such studies assume that the law embodies this 'spirit of legality'. As a result, a dichotomy of law enforcement is perceived: at one end of the spectrum, due process (the spirit of legality incorporated in statutes and the common law); at the opposite end, crime control (the approach adopted by Police in efficiently performing their duty, yet deviant from their authority).

In a reaction to this, McBarnet in a logical, if unorthodox, move chose to analyse the law of arrest in its legal and judicial context. Thus by asking -'what are lawful exercises of the Police power to arrest?' - the formal rules of the law, its statute base and judicial interpretation, could all be considered.

Such an analysis of not what the Police actually do, but rather what they are legally allowed and expected to do, provides an accurate context for any discussion of any interactionary influences, and the realising or discrediting of assumptions as to the content of the law.

But McBarnet's intention was to do more than this. It was to allow "a direct entree into the nature of the law itself, and the judicial and political elites who make it and maintain it ".[6] This would be achieved by attempting to match up the law's actuality with its rhetoric. The rhetoric being the image held out of the law to the public, by the law itself, and its agents, by a process of mystification. (Thus it would be more appropriate to consider the laws embodyment of its mystique).

It is the matching of the actuality of the law with its mystique, and even the desirability of such a match that is relevant for this paper's conclusion as to reform.

The general theme of the law, McBarnet claims the mystique suggests, is that the law is an attempt to limit the imposition of the state's authority onto its citizens. This theme is achieved by six main concepts:

1. That arrest powers are clearly stated;
2. That arrests are only made in relation to a specified offence;
3. That incriminating evidence of the offence is needed before an arrest for it can be made;
4. That the offences themselves are clearly defined;
5. That an arrestee can resist an unlawful arrest;
6. That all arrests are accountable.

These six inter-linked concepts will be considered in relation to New Zealand law in Part II of this paper.

McBarnet found that the phenomenon of an individual unwillingly 'helping the Police with their enquiries' clearly indicated a 'gap' between the British law of arrest and its mystique. Such a detention was really a de facto arrest, which even if it was in relation to a specific offence still contrasted sharply with the mystique. Indeed a strong argument could be made that the 'arrest' was for the purposes of obtaining incriminating evidence.

The major clash McBarnet found in such situations between the law and its mystique was that the 'arrest' was routinely interpreted by the courts as not being an arrest, de jure or de facto, but rather 'voluntary' assistance.

Even in cases where arrests were made, purportedly in law, the courts would strenuously assert that they were lawful, despite numerous breaches in the mystique such as general arrests with charges decided later and even where arrests were made to obtain incriminating evidence.

But even such limited efforts towards accountability were deemed 'gestures' by McBarnet, as they were infrequent occurrences, potentially harmful to the arrestee's position if raised during the trial for the offence charged with, or expensive if pursued through a civil action. In any case, chances of success were remote. As such, another element of the mystique, while existing, was found to have little real substance.

Another concept found somewhat jaded was that the arrestable offences should be clearly defined. Certain glaring examples termed 'marginal' offences were identified by McBarnet;

> "breach of the peace ... loitering with intent, or being on premises for unlawful purposes ... possessing goods for which one cannot satisfactorily account ... carrying implements that could be used for house-breaking ... or as weapons".[7]

These were all offences where the subjective Police decision to arrest was equated with the substantive law and requisite evidence.

Another marginal offence, obstruction, had been held to be "'the doing of any act which makes it more difficult for the Police to carry out their duty', and might include simply refusing to answer any questions, and any sarcasm".[8] Nor is it difficult to move from the 'innocent' acts required for obstruction, to resisting arrest, or even assault on a constable acting in the execution of duty, or otherwise.

That there are such 'obscure' offences would indicate that it would be difficult for an individual to know whether they were being lawfully arrested or not, and thus whether they were entitled to resist.

Thus McBarnet held the wide body of discretion with little apparent fettering, granted to the Police through vague substantive laws and wide procedural powers did little to assert the laws links with its mystique.

But this degree of discretion, McBarnet noted, was not gained surreptitiously by the Police, but was formally allocated by the British Parliament.

Thus the McBarnet claim is that not only do Police practices deviate from the spirit of legality by reason of those factors identified in interactionist studies, but that the context in which that interaction takes place, the law itself, is divorced from such a spirit, and allows, indeed encourages, such deviation.

Consequently there is a clear 'gap' between the mystique of arrest and its actuality, which is institutionalised in the law, and not merely the result of overzealous or knavish Police officers. There is therefore, no dichotomy of law enforcement - due process _is_ for effective crime control, and protects few individual rights.

The Police in McBarnet's eyes are the 'fall-guys' of the legal system. If they act in accordance with their actual powers they are perceived as deviating from a law assumed to embody its mystique. Yet at the same time Police officers are unsure when the courts might refuse to support their actions, and hold them personally responsible for any infringement of a law which is less than clear.

Of course this point does tend to undermine McBarnet's thesis somewhat in that if the Police (and even elements of the judiciary) are unsure as to the standing of the law of arrest, it is likely that they will be imbued with the same mystique as the public. Consequently constables would be unlikely to act to the full extent of their powers granted to them, as identified by McBarnet. Certainly her contentions as to the extensive limits of law are real, and have on occasion been used, but possibly they are the exceptions rather than the rule.

However, despite this flaw, McBarnet's main contention that the actuality of the law is far removed from its mystique is valid. As is the contention that the gap between the two is not the result of the 'bit' players in the system - the Police - but rather those of the states hierarchy.

Thus a legalistic approach to the law of arrest can result in findings that may be the basis for assertions as to the fundamental nature of the state.

III ARREST WITHOUT WARRANT - THE LAW.

In New Zealand, unlike England[9] the power to arrest without warrant is solely statutory. Thus, for a valid arrest the provisions of the arrest power must be strictly complied with -

> "The power to arrest an individual, thereby denying the freedom of that arrested individual, is one which must be exercised in strict accordance with the law" 10

The power to arrest in criminal matters rests only in Police constables, and any person they may call to their assistance.

The main provisions providing for criminal arrest are found in section 315(2) of the Crimes Act 1961, which must be read in conjunction with certain justifications contained in Part III of the Act - Matters of Justification or Excuse.

A. Section 315(2)(a).

> Any constable ... may arrest ... any person whom he finds disturbing the public peace or committing any offence punishable by death or imprisonment.

This is the sole remainder of the so called 'on view' absolute arrest powers of section 315(2), the others being repealed and replaced by section 39(1) and (2) of the Summary Offences Act 1981.[11] The new 'on view' arrest power is no longer 'absolute', but contains a qualification.

By classifying section 315(2)(a) as 'absolute' is meant, that it does not prima facie provide for the arresting constable to make a mistake as to whether the person arrested had in fact committed the offence arrested for.

(For reasons of ease of analysis and understanding, this power, and later that of section 315(2)(b), will be considered independently of any effect of provisions in Part III of the Act).[12]

(Similarly, the consequences of the incorporation of 'disturbing the public peace' in the power will be considered in juxtaposition with section 315(2)(b)'s 'breach of the peace').[13]

Section 315(2)(a), if taken in literal terms, is an arrest power of the pure form expected in a society that stresses individual freedom. That is, an individual can only be detained by the state if they have actually committed an offence that allows for the deprivation of liberty. Thereby matching the claim that it is only acceptable for 'wrong-doers' to have their freedom curtailed.

It would seem doubtful whether there is any current practical need for section 315(2)(a). Any offence for which this power authorises an arrest is also covered by section 315(2)(b). However, despite the immediate advantages of arresting under an express qualified power, the Police continue to use section 315(2)(a).

Indeed it is likely that should the Police decline to use section 315(2)(a) in 'found committing' situations, it would not find judicial favour. This is because it would clearly be contrary to the legislatures intention, which saw fit to distinguish between 'found committing' and 'good cause to suspect' situations. Indeed there were, and are, clear policy reasons for making arrests under section 315(2)(a) absolute. Those being first, that as the constable has perceived the action judged to be a crime there is less risk of a mistaken arrest than if circumstantial and hearsay evidence was needed to be considered. Second, that as the judgement of the act as an offence is solely the arresting constable's, they should assume the responsibility for it.[14]

Therefore being a prima facie absolute power, a lawful arrest would appear to occur only when an offence had been found to be occurring and the individual arrested was committing it.

Consequently three issues of interpretation arise:

1. What do the words "finds committing" imply ?
2. Who must find the offender ?
3. At what stage must the arrest be made ?

1. "Finds committing".

This issue can itself be split into two subsidiary questions:

(a) What is it necessary to do to 'find' a person committing an offence ?

(b) Does 'committing' require actual guilt ?

(a) In a recent Court of Appeal judgment, Police v. Carter[15], a definitive statement was given as to the circumstances in which a person can be said to be 'found'. Based on the ordinary meaning of the word, the Court decided a person may be 'found' if 'seen', 'discovered', 'come upon' or otherwise 'perceived'. The Court agreed with Mr Justice Mahon in R. v. Otten[16] who concluded that mere proof of guilt by inference or admission is insufficient to 'find' someone in a situation itself an offence, or committing an offence.

The Court of Appeal in an obiter statement also agreed with the ratio from McKenzie v. Police.[17] That case arose out of a constable calling on McKenzie, who had been indulging in drink at his home, and inviting him to go to the Police station to be interviewed for some matter or other. McKenzie agreed and followed the constable to the car. As soon as he emerged onto the footpath he was arrested by the constable and subsequently charged with being found drunk in a public place.[18]

Mr Justice Henry took the approach, later approved by the Court of Appeal, applying the ordinary meaning of 'find'[19], but he also indicated what the appropriate nature of the finder was to be

> "All the cases are instances where some viewer, unconnected with and not accompanying the person, perceives the person in the particular place". 20

'Particular place' also refers to the particular circumstances of the offence.

Therefore to 'find' someone committing an offence there must be first, a perception of the act constituting the offence[21], and second, uninvolvement in the act itself by the finder, other than as an observer.[22]

This first aspect is in accordance with the approach taken in English courts[23] but the second is not, and has in fact been specifically rejected. In Winzar v. Chief Constable of Kent[24], the defendent had been removed from a public hospital by two constables to its forecourt. He was arrested and charged with being found drunk on a highway, an offence under section 12 of the Licensing Act 1872. Thus the fact situation would appear identical to McKenzie.

The court held that words 'found drunk' meant 'perceived to be drunk'. That Winzar's presence on the highway was the direct result of the constables' actions, and actually involuntary (unlike McKenzie) was held to be irrelevant.

Thus the McKenzie decision as to the nature of the finder as approved by the Court of Appeal in Carter, finds no support in the English courts.

Indeed this McKenzie aspect is likely to create difficulties for the Police. This difficulty will arise with Police use of 'agent provocateurs' who, by participating in the offence, could not be said to 'find' the offence being committed.

This is not the situation in Canada, where the Appellate Division of the Supreme Court of Alberta[25] rejected the argument that 'find' precludes any participation by the arrestor in the offence. This principle was extended to cover situations where an individual may 'find' another assaulting him.[26]

If in New Zealand the Police use the agent provocateur, who, because of concern of proof or the offender escaping, arrests under section 315(2)(a) as 'finding' the offence being committed, it has been suggested[27] that the Courts may take the broad Canadian view of 'find' and restrict McKenzie to its facts.

However, given that McKenzie was a clear case of an agent provocateur and has subsequently been approved by the Court of Appeal, it would seem unlikely that it could be restricted.

(b) A literal reading of section 315(2)(a)'s 'finds committing' would require that the arrested person have actually been offending. Hence if a constable arrested someone who was later found not to have committed an offence there would then have been an unlawful arrest, and the constable would not have been acting in the execution of duty.

However, there is a large body of English authority that runs contrary to such an orthodox reading of absolute arrest powers. The English courts are not adverse to the reading in of a qualification such as 'apparently' or 'appears on reasonable grounds to be' committing an offence, in those powers which allow for arrest in situations of flagrant delicto, (where the offence is in the process of being committed).

Whether a New Zealand court would follow such a lead in any interpretation of section 315(2)(a) is questionable. It is hoped that the following synopsis of the principal cases will show that the English situation is sufficiently removed from that here to deter such interruptive licence being taken with legislation.

The initial case was Trebeck v. Credence[28] where 'apparently' was read into a 'found committing' arrest power to prevent the arrest being unlawful, thereby preventing a suit of false imprisonment being brought against the arresting constable.

The primary reason for the insertion of the qualification was that the constable acted to prevent what he saw as a potential danger to 'life or limb ' situation arising - an 'apparently' drunk cab driver. The court conceded that this warranted prompt action with the requirement of proof of guilt on the suspect's part being unlikely to be acquired by the constable before public safety would have been compromised.

Thus the lesser requirement of a reasonable belief in a state of facts, which if true would have ensured a lawful arrest, was imported into the arrest power.

This decision 'bound' a later court Wiltshire v. Barrett[29] to read in a qualification to another absolute arrest power dealing with drink-driving.

However, between these two cases there had been an extension of the Trebeck principle, that of reading in a qualification in 'public safety' situations, to that of mere 'public interest' situations such as 'importuning'. The Court in Isaacs v. Keech[30] made that extension because it mistakenly believed itself bound by Trebeck.

These three cases all involved the court reading in a qualification to act as a 'shield' for the arresting constable, from a claim of false imprisonment and assault.

However, a pinnacle has been reached with the fourth case in the series, Wills v. Bowley[31]. The House of Lords, in a majority decision, decided to provide a qualification, not for a 'shield' but a 'sword' so that charges resulting from an otherwise unlawful arrest could be pressed.

The appellant had been arrested for using obscene language in a public place, under a 'found committing' arrest power[32] and had assaulted the three constables 'detaining' her.

At trial she was acquitted of the obscene language charge[33] but convicted of assaulting constables in the execution of their duty. The court also found that the arresting constable honestly and reasonably believed that the appellant was committing the offence arrested for.

It was accepted by all parties that the convictions could only stand if the arrest was lawful.[34] Thus the question for the House was 'whether the true construction of section 28 was that it was an absolute or qualified arrest power ?'.

The majority found the power to be qualified, and read an allowance for an honest mistaken belief based on reasonable grounds. Lord Bridge saw this conclusion as giving the correct expression of the legislature's intention in enacting section 28,

> "Parliament in enacting any such provision must have intended that any person who was committing any of the specified offences, whether serious or trivial, should be arrested and brought to justice" 35

For this intention to be realised it was claimed that the arrestor needed protection, from civil suits, and as in this case,

> "against violent resistance to reasonable force which a person exercising a lawful power of arrest is entitled to use in order to effect and maintain his arrest. If the protection the law affords is contingent and unpredictable, how can Parliament reasonably have expected anyone to rely on it" 36

Thus it was contended the legislature must have intended to grant some protection to an arresting constable. This was especially so where the constable was under a duty to arrest[37], which if neglected could have resulted in the imposition of criminal sanctions. Lord Bridge was sure that the legislature would not have expected a constable to have to choose between a possible unlawful arrest and a criminal neglect of duty.

That only protection would in accordance with the current 'crop' of arrest powers[38] result from an "honest belief on reasonable grounds that he has observed the commission of a relevant offence by the person he arrests".[39] Thus Lord Bridge held section 28 did incorporate a qualification that acted as a protection for a constable who had made an honest and reasonable mistake.

His Lordship considered that little harm would result from such an interpretation, as an individual so arrested was required to be taken 'forthwith' before a justice, who could more appropriately consider the matter.

A question can be raised as to the 'justice' of the impetus behind Lord Bridge's reading in of a protection, that created a lawful arrest.[40] It is doubtful that severe consequences would have arisen if the arrest had been unlawful, possibly an action in tort, but had the arrest been honest and reasonable, the damages would have been unlikely to be more than nominal. What was more important and possibly the major influence on Lord Bridge was that an essential ingredient of the offence the appeal was on, was that the constable have acted lawfully. Surely though, had the appellant's actions in assaulting the constable been less than reasonable, as Lord Bridge appears to intimate, a conviction for common assault would have been an acceptable vindication of the constables actions.

Lord Lowry, in dissent, took a more orthodox approach to the interpretation of section 28, applying basic principles of statutory construction,

> "(i) Words should, where possible be construed in their ordinary meaning;
>
> (ii) Additional words ought not to be read into a statute unless they are required to make the provisions intelligible; 41
>
> (iii) A provision creating a power or duty of arrest, particularly without warrant should be construed in favour of the liberty of the subject; 42
>
> (iv) A statute should be interpreted as making the least change in the law which is consistent with its meaning." 43

A literal reading of section 28 reached the conclusion that an arrest under it would only be lawful if the arrestee actually committed the offence arrested for. Lord Lowry then considered whether there were sufficient grounds for departing from this interpretation, which was the result of the application of the rules of construction.

The correctness of the decision in <u>Trebeck</u> was doubted, and like <u>Wiltshire</u> accepted as authority only for the reading in of a qualification in arrest powers that dealt with matters of potential danger to the public. They were to be regarded as exceptions to the rule, not examples of it. <u>Isaacs</u>, Lord Lowry considered, was wrongfully decided, relying on <u>Trebeck</u> for a much wider proposition than the decision and dicta could support.

> "The combined weight of these three cases, two of which were 'drink and drive' authorities, is in my opinion, quite inadequate to overcome the general principles of construction to which I have referred" 44

In reply to Lord Bridge's contention that the arresting constable needs protection, Lord Lowry affirmed that should the constable have acted honestly and reasonably, there were procedures for ensuring any action arising out of an unlawful arrest were not too 'painful'.

In concluding, his Lordship, though expressive in the direction of his sympathies in the case, remained convinced that it was for the legislature not the courts to do the 'right thing' by constables. The courts task was to apply the law as it was, not as they perceived it should be,

> "It is quite reasonable to argue that a constable ought to be regarded as acting in the execution of his duty if he arrests without a warrant a person whom he reasonably, but wrongly, believes to be committing an offence against section 28, but the proposition that he is so acting is not self evident. The conflict, which everyone has recognised in this case between public order and the liberty of the subject is for Parliament to resolve, and not the court". 45

It is doubtful that the conclusion reached in Wills v. Bowley would have much influence on any interpretation of section 315(2)(a), the legal context being alien to that of section 28.

The New Zealand legislature have clearly indicated that it was not their intention for section 315(2)(a) to be qualified, as they have made it prima facie absolute, yet in the next paragraph expressly granted a qualification - section 315(2)(b). In addition, as will be argued later[46] an arrestor under section 315(2)(a) who acts unlawfully but makes an honest and reasonable mistake as to the commission of an offence and its perpetrator, will be justified in so arresting and not subject to criminal or civil proceedings.

Thus following the Lord Lowry contention, and excepting the Lord Bridge argument as to providing a protection to the Police from resistance,[47] there are insufficient reasons to depart from a literal reading of section 315(2)(a).

2. The finder.

A literal reading of section 315(2)(a) would seem to indicate that the legislature, by using the phrase 'he finds committing', expressly envisaged the finder to be the arrestor.

In England there is authority for the proposition that the person who arrests a person under a 'found committing' power, need not be the one who found the offence being committed.

To achieve this result two methods have been used. The first[48] involves the arrestor being perceived as acting as an agent for the finder[49]. The second[50] acknowledges that the arrestor is the principal of the act, but whose involvement in the events from the actual 'finding' and arrest are so closely interrelated that the offence is deemed 'found being committed' by the eventual arrestor.

The implications for section 315(2)(a) of such decisions arise from a Canadian decision, Frey v. Fedoruk[51] that equated the expression 'he finds committing' with 'found committing'.

The Court cited with approval Hanway and Howarth and adopted the broader approach of holding that in neither case was it necessary that the arrestor actually find the offence being committed.

American courts have taken the same broad approach, using concepts similar to those espoused in Hanway and Howarth. The primary case being Silverstein v. State[52] where it was held that a Police officer arresting on information from another officer of the same detail (squad - team) was acting as an agent of the finding officer. In a later case, Robinson v. State[53], the prerequisite of the arrestor and finder being 'team members' was deemed unnecessary if the non-finding but arresting officer was closely involved in the chase and apprehension of the offender.

It is worth noting that the sympathies of American courts frequently lie with the arrestor, as many quite serious offences are labelled 'misdemeanours' and are often only able to be arrested for under a 'found committing'[54] power. Compounding this is that society has changed markedly since the formulation of such powers. With the greater access to transportation, and urban anonymity, the Police task of apprehending offenders has been handicapped by their 'working conditions', primarily procedural powers, being relics of the last century. As such the immediate Police pressures to remove such shackles is on those who control their use, the courts.[55]

It seems unlikely that arguments based on such authority would have much influence in New Zealand. The Crimes Act's incorporation of section 315(2)(a) has occurred recently, and cannot be said to be an anachronism.

With respect to the court in Frey, it is contended that 'he finds' has significantly different connotations to 'found committing'. As such it is clear that it was the legislatures intention that the arresting constable be the one who found the offence occurring, whether it happened immediately, or after a chase.

Nor are the public policy factors of effective crime control sufficient enough to do the necessary violence to section 315(2)(a)'s interpretation and justify the inclusion of such concepts as, 'one continuous transaction' or 'communication of information from the finder to the arrestor'. Such situations would provide the necessary good cause to suspect, thereby enabling an arrest to be made under section 315(2)(b).[56]

3. Time of the arrest.

The phrasing of section 315(2)(a) implies that should a constable find someone about to commit an offence, or in circumstances that indicate an offence has just been completed then it cannot be used to make a lawful arrest.

However, in the initial situation of finding someone about to commit an offence this may in fact be an offence in itself - an attempt. Section 72 of the Crimes Act[57] makes it an offence to attempt to commit an offence. Thus any person 'found' attempting to commit an offence, will, despite its non-completion, have been found committing the offence of attempt, and may be arrested under section 315(2)(a).

Whether or not an act was in fact an attempt is a question of law. If the act arrested for is deemed not an attempt, then there will have been an unlawful arrest.

In the second situation, where an offence has been committed, the instantaneous nature of many offences necessarily requires that the offender be arrested subsequently. The arrest may even come as a result of an "immediate and fresh pursuit".[58]

Time is not the issue. If an offence is 'found' being committed and the circumstances between the finding and the eventual apprehension involve a continuity of action then an arrest under section 315(2)(a) will be lawful.

Therefore, to sum up, to make a lawful arrest under section 315(2)(a) the arresting constable must perceive the offence occurring and be unconnected with that occurrence. Further, the offence must be proven in court, a mistake as to the accused's guilt - even if honest and reasonable - renders the arrest unlawful. Finally, the arrest must be made while the offence is occurring (for these purposes it should be noted that certain acts may constitute the offence of attempt) and after the offence has occurred, if the circumstances between the finding and arrest are an uninterrupted sequence of events.

B. Section 315(2)(b).

> Any constable ... may arrest ... any person whom he has good cause to suspect of having committed a breach of the peace or any offence punishable by death or imprisonment.

This is a 'qualified' arrest power, meaning that constables who have 'good cause' to 'suspect' the person they have arrested of committing an offence, even though they hadn't, will still have made a lawful arrest. It is contended that this section also contains by implication, provisions that the 'good cause' to 'suspect' also goes to the existence of an offence itself.[59]

Unfortunately, the formulation of the qualification is not standard, being one of several that have been used by the legislature. However, it has been recently repeated in section 39(1) of the Summary Offences Act. Other examples of qualifications have included 'reasonable cause to believe' - section 53A(5) of the Police Offences Act 1927; 'reasonably suspected' - section 20 of the Firearms Act 1958; 'reasonably believes' - section 39(2) of the Summary Offences Act; and 'reasonable and probable grounds to believe' - section 77(4) of the Fire Services Act 1927, and section 32 of the Crimes Act.

If a literal approach was taken to the interpretation of such powers, one could be forgiven for believing that the legislature was intending to establish different tests for each qualification. However in practical terms it seems unlikely that this was the case, but rather the result of drafting licence. Indeed this was the finding of Mr Justice North, in Police v. Anderson[60], who held that there was no significance in the variation between 'reasonable cause ' and 'good cause'. Both were expressions of the reasonableness of the 'belief' or 'suspicion'.

However, a distinction has been drawn in the requirement established by legislation for 'belief' and 'suspicion'. It arose from Seven Seas Publishing Coy v. Sullivan[61] a case dealing with an appeal against a search warrant.

The warrant should only have been issued if there were 'reasonable grounds for believing' the item being searched for was on the premises. The magistrate issuing the warrant had stated that there were 'reasonable grounds for suspecting' this was so.

Although in reality this was probably merely a grammatical error, Mr Justice McGregor concluded that in law the Magistrate had adopted a lower test than required. Therefore more substantial grounds for forming a 'reasonable belief' are required than for a 'reasonable suspicion'.

Higher authority for such a contention is found in the judgment of Lord Bridge in Wills v. Bowley[62]. In his reading in of a qualification into a prima facie absolute provision 'belief' was preferred to the 'suspect' approved in Wiltshire v. Barrett[63] as it necessitated a higher standard for the reasonable grounds to meet -

> "The distinction may be a fine one, but when it is necessary to extend the ambit of an express statutory power of arrest without warrant by the process of necessary implication, I do not believe the implication should go any further than is strictly necessary to make the statutory power work" 64

It should be noted that the quoted qualification in the Police Offences Act was replaced by the very qualification in issue here, by section 39(1) of the Summary Offences Act, enacted after the Seven Seas decision. As such it may be argued that the legislature has endorsed Mr Justice McGregor's distinction, and preferred the lower standard of 'suspect' to that of the higher 'belief'.

Consequently, while it would appear that 'good cause' equates with 'reasonable grounds', a 'suspicion' is easier to obtain than a 'belief'.

The reason for the legislatures granting of a qualified arrest power is as a concession to the realities of police work.

The situation will often be such that the Police will be reliant on information from non-Police sources as to both the commission of an offence and the identity of its perpetrator. Often whether an offence has been committed will be apparent upon investigation. But it is so that the Police can act on information received, and not be held to have acted unlawfully, should a reasonable but honest mistake be made, that qualified arrest powers are provided.

Such a concession is tempered by a possible judicial review of the lawfulness of the arrest. Such a review requires that what were the grounds of the suspicion be decided as a question of fact. Once such findings have been made, an objective determination by the Court is required as to whether such facts could have created the necessary suspicion in the reasonable person. The complexity of such an enquiry was stated by Mr Justice Turner, in Blundell v. Attorney-General.[65]

> "It is beyond doubt that the proper couse is for the Judge to ask the jury such specific questions of fact as he may consider necessary as to the matters of primary fact contended for on the evidence; and then, using the findings, it is for the Judge to decide, perhaps as a matter of fact, perhaps as a matter of law, perhaps as a mixed matter of fact and law, whether on the facts so found by the jury the constable had reasonable and probable grounds for belief that the person arrested had committed an offence for which he (the constable) had authority to arrest without warrant".

Whether the constable believed there was good cause is not the issue.[66] Rather the issue is 'would the reasonable person with the constable's experience, and in the constable's position, have suspected the arrested person of committing the offence arrested for'?

This raises the issue of the nature of a suspicion. Lord Devlin, using its ordinary meaning as a premise, stated it to be [67]

> "a state of conjecture or surmise where proof is lacking... arising at or near the starting point of an investigation of which the obtaining of prima facie proof is at the end".

Thus as our Court of Appeal has recognised in Police v. Cooper[68] a lawful arrest may occur, even though the grounds on which it was based would be inadmissible as evidence, or would not themselves be sufficient to sustain the charge for which the arrest was made.

It is implicit from Section 315(2)(b), and the common law,[69] that the grounds on which the suspicion was formed were known before the arrest and not subsequent to it.

It is difficult (and not desirable) to attempt to establish in precise terms, the grounds that may contribute to the formation of a suspicion. However, certain factors have often been acknowledged.

First, previous convictions. Lord Wright in McArdle v. Egan[70] accepted that the previous convictions of a suspect, though not decisive in themselves, were an acceptable factor to be considered in the formation of a suspicion.[71]

Second, hearsay evidence/information from third parties. In New Zealand information of this type has been accepted as being able to create the necessary reasonable grounds to believe, required for the issuing of a search warrant. As Mr Justice Hutchison stated in Inglewood Servicemens Club Inc. v. Mauriri,[72]

> "I see no reason why a Justice should not be satisfied by certain hearsay evidence that there is reasonable grounds to believe that there was an offence occurring".

A similar approach would surely be taken if the issue arose with regard to an arrest.

However, acceptance of such grounds creating a reasonable suspicion is coupled with an assessment by the constable of the reliability of the information. Thus the issue for the arresting constable is twofold: what is the content of the information and what is its credibility.

A third factor connected with the second is information received by a fellow constable. Mr Justice Hutchison's judgment also assists here in that the 'hearsay' evidence received came from a constable. His Honour contended that there was no reason why the constable's information itself would not be sufficient to create a reasonable belief. This has been the case in England where the communication of one constable's suspicion to another by radio has been held to be sufficient to create the necessary reasonable suspicion in the arresting constable.[73]

It is suggested that this approach of the arresting constable actually forming his own suspicion and acting as the principal, as a result of another constable's communication of his suspicions, is more appropriate than the perception of him as acting as the initial suspecting constable's agent. This is in accordance with the established distinction between 'suspicion' and 'belief'. It seems doubtful that such a communication could create a reasonable belief on the arresting constable's part.[74] To see the arresting constable as an agent seems to be a confusion of concepts the law could well do without.

There are, no doubt, numerous other factors able to create a suspicion, some general, some appropriate only to specific offences. To create a list as has been done[75], normally entails generality and creates unnecessary complexity for the constable. It would seem best to leave the matter to the courts, who will be best able to judge the reasonableness of the constables suspicion in the myriad of situations that could arise.

Clearly it is undesirable to attempt to decide in advance on questions of fact.

That a constable must only 'suspect' that the arrested person committed the offence, and not 'believe' allows for the operation of multiple arrests, for an offence which only one person could have committed.

Such was the case in Hussein[76] where no significance was attached to the fact that two men were arrested on the grounds that they were both reasonably suspected for a crime that only one could have committed. Clearly then it is not the impossibility of whether all those arrested could have committed the crime known to have only one culprit that is important, but rather whether all those arrested were reasonably suspected. Although the greater the number arrested, if by the same constable, or detail aware of the other arrest, would tend to reduce the likelihood that the courts would hold there was reasonable suspicion for all the arrests.

A question frequently raised in relation to qualified arrest powers, such as section 315(2)(b), that apply to a wide variety of offences is 'does the standard of reasonableness vary according to the offence arrested for ?'

As would be expected there are three diverging attitudes. First, the courts should require a higher degree of reasonableness for serious offences; second, the courts will require a lesser degree of reasonableness for serious offences; third, the standard does not vary with regard to the offence.

The first view has the importance of the individual as the courts priority. The courts are seen as attempting to ensure that individuals are not arrested, subsequently processed and stigmatised in a fashion reserved for those who 'deserve it', unless there is good reason. Thus there would be a scrupulous consideration of grounds for any suspicion that resulted in an arrest for serious offences.

The second view stresses the wider public interest[77], and would see the courts as taking a lenient position in considering the reasonableness of any suspicion of serious offences. This is to assist the police in the prevention of further crime and destruction of evidence. It is this view that has found favour in American[78] and English[79] courts.

The third view is of course the happy medium, which sees the court as being objective in its construing of reasonableness regardless of the offence.

No bias toward either of the first two attitudes would appear clearly dominant in New Zealand courts. However, much the judiciary is aware of the difficulties of the Police task, and the ever-increasing crime problem, they are equally aware of the desirability of limiting state impositions on individuals. Thus possibly an overall analysis of the courts decision would indicate the third view is prevalent, though of course a single case out of that context could be an exception.

C Breach of the Peace.

Section 315(2)(a) provides for an arrest of any person 'found disturbing the public peace' while section 315(2)(b) provides for the arrest of those whom there is 'good cause to suspect of having committed a breach of the peace'.

Arrests for either two reasons was until recently,[80] an obscure use of the Police powers little known, and less used.[81] Prima facie these two concepts would appear to belong in the company of the offences dealing with public order - unlawful assembly and rioting, sections 86 and 87 of the Crimes Act. However the difference is more than just one of degree, it is also that there are no offences of 'disturbing the public peace' or 'breach of the peace'.

Thus these hybrids of substantive and procedural law allow the Police to make lawful arrests of individuals who have done, or have been reasonably suspected of doing, acts that were not unlawful. What further removes these two concepts from the bulk of the criminal law is that they have no established legal definition. All that exists is a large body of common law indicators of what the judiciary have shown minimal preference for. Consequently it is possible to find authority for holding almost any act to be a disturbance of breach of the peace, public or otherwise.

However, some common threads do seem to run through some of the better definitions. Adams,[82] in a compilation of ratios contends that 'breach of the peace' includes;

> "actual assault or fighting, apparently either in a public place or on private premises ... it may in this context extend to the commission of some wrongful act causing public alarm and excitement ... use of insulting or abusive language if the act complained of is one which tends to attract a crowd and interfere with public convenience".

Of note is the Scots definition of breach of the peace, which is an offence, as stated by Lord Justice McDonald.[83]

> "Breach of the peace consists of such acts as will reasonably produce alarm in the minds of citizens, not necessarily alarm in the sense of personal fear, but such alarm as causes them to believe that what is being done causes or will cause real disturbance to the community".

A more recent definition is that provided in R. v. Howell[84]

> "whenever harm actually occurs, or is likely to occur, to a person, or in his presence to his property, or when a person is in fear of being harmed through an assault, riot, unlawful assembly or any other disturbance".

These three definitions are with specific reference to 'breach of the peace', as such a question exists as to their application to 'disturbing the public peace'.

Despite the clear legislative indication of the difference in the concepts, it is difficult to perceive what the distinction is to be, unless it is one of degree, for which there is no evidence. Nor would there seem to be any advantage in distinguishing the two. Indeed, the Ferguson and Howell definitions both refer to breaches being 'disturbances' of the peace.[85] The adding of the adjective 'public' to 'peace' also does not seem to have any practical significance.

Therefore, for all intents and purposes there would seem to be no difference in substantive terms between the concepts 'disturbing the public peace' and 'breach of the peace'.

Thus the only real difference would seem to be in their procedural use, 'disturbing' when found occurring, and 'breach' having occurred. But this has been complicated by judicial interpretation of the nature of a breach. It would appear that once a breach has occurred it is repeated, rather than continued, consequently resulting in arrests for 'breach' rather than 'disturbance' even though the act perceived to be a breach was still occurring at the time of arrest. His Honour Judge Taylor's decision in Reid v Attorney-General[86] is an example of this phenomenon,

> "we are left only with a power to arrest after a past or present breach of the peace has occurred ... the Crimes Act ... is specific in granting powers of arrest

(continued)

only in response to breaches which have actually occurred or are presently occurring".

If this is indeed the case, then arrests for 'disturbing the public peace' would seem to have been abrogated by judicial interpretation of the power to arrest for a 'breach of the peace'.

Thus it would appear that the major distinction between the two concepts, their use no longer exists, and the Police now have the 'soft' option open to them of only needing reasonable suspicion of the circumstances that would indicate a disturbance/breach, rather than actually having to 'find' it occurring.

Therefore the arrest must either occur while the disturbance/breach is occurring - section 315(2)(a), and apparently (b), or has occurred - section 315(2)(b). There is no longer the power to arrest for an anticipated disturbance/breach, that existed before 1961.[87]

However, this has not left the Police impotent to act in situations where they reasonably anticipate that a disturbance/breach may occur. It is established law that a constable has a common law duty to prevent a disturbance/breach.[88] Thus, should a constable perceive that one is about to occur, or is occurring, the person or group involved can be informed of this perception and asked to desist with the activity. If they do not do so, they may be arrested and charged with obstructing a constable acting in the execution of duty.[89]

In each case it is necessary that it be decided on the facts whether the constable had reasonable grounds for suspecting that a disturbance/breach had, or would have, occurred. If it had not occurred, then the anticipation had to be that there was a 'real' not 'remote' possibility of its occurrence.[90]

There are three main implications arising from the findings on these aspects of the power to arrest.

First, that unless the individual arrested for a disturbance/breach is subsequently charged with an offence, they will not be brought before a court. Thus the arrestee does not, except by civil action, have the opportunity to have the lawfulness of their arrest determined by a court, as they would have if they pleaded not guilty to a criminal charge.

Civil actions are complicated, usually of an extended nature, and as such, frequently expensive.

It is therefore contended that the right to bring civil proceedings for wrongful arrest is an inadequate check on the Police use of these powers of arrest.

Second, that the substantive concept of disturbance/breach is somewhat less than definitive and would seem to have an inherent bias towards the acceptance of a subjective Police definition.

Third, a question exists as to the length of the detention of those arrested for a disturbance/breach. It is unclear whether it is until the disturbance/breach has ceased or until there is little likelihood of a repetition of the activities leading to the arrest, or until a writ is issued for release. The seriousness of such a question is intensified when it is realised that unlike those arrested for an offence, section 316(5) of the Crimes Act does not require those arrested for a disturbance/breach, to be brought 'as soon as possible' before a court.

This question remains unanswered despite the fact that it is accepted law that an arrest remains lawful only so long as continued restraint is justified.[91] There is no expression, statutory or judicial, as to what is justified detention in such arrests, although it would seem unlikely that the Police would wish to detain someone for a period sufficiently extended to cause a writ to be issued.

Of course civil proceedings could be undertaken to discover whether the detention was unjustified or not, but to discover ones substantive rights by court decision, subsequent to the event when there is no present standard is unacceptable both to the individual, and the Police.

D. Motive for Arrest.

There has been a recent and novel development in the law relating to English police procedural powers, which will have severe implications for any constable wishing to make an arrest. As the premise for such a development exists in New Zealand, the possibility of a similar approach being adopted by our courts warrants a consideration of the decision in Hdgate - Mohammed v. Duke.[92]

The question for the House of Lords arose from a suit of false imprisonment against the chief constable, he being vicariously liable for the actions of his constables. The action arose out of a constable arresting Holgate, the appellant, on suspicion of burglary. The court at first instance held that the arresting constable had had reasonable grounds for forming the necessary suspicion but that the sole purpose for which the arrest was made was to subject Holgate to stress and pressure, so that she might confess more readily. This motive the Judge held to be 'improper' and thus the constable's exercise of the power to arrest was unlawful.

The Court of Appeal allowed an appeal by the chief constable on the grounds that the motive was lawful.

In the House, Lord Diplock[93] confirmed the decision of the Court of Appeal, but the reasoning for reaching the decision was somewhat more expansive.

The power of arrest in issue, section 2(4) of the Criminal Law Act 1967, is very similar to our section 315(2)(b),

> Where a constable, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence.

Prior to Holgate - Mohammed, a lawful arrest would have been made if it was held the arresting constable did have reasonable cause to suspect an arrestable offence had occurred, and the person arrested had committed it.

However, Lord Diplock saw that finding as only one of the conditions necessary in creating a lawful arrest[94],

> "Section 2(4) of the 1967 Act makes it a condition precedent to a constable having any power lawfully to arrest a person without warrant that he should have reasonable cause to suspect that person to be guilty of the arrestable offence in which the arrest is being made."

The other condition identified as being necessary for a lawful exercise of the power arose out of the executive discretion (conferred by the wording of the sub-section - 'may arrest'), whether to arrest or not. This recognition of a discretion is not new, and had been stated by the Privy Council in Hussein.[95]

> "To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case ... There is no serious danger in a large measure of executive discretion in the first instance because countries where common law principles prevail the discretion is subject indirectly to judicial control".

What was novel was that the discretion, perceived as executive rather than judicial, was Lord Diplock claimed, able to be reviewed by a court, to decide whether or not it had been 'lawfully' exercised.

Therefore for the exercise of the arrest power section 2(4) to be lawful (in accordance with its power), the arresting constable must meet the two conditions arising from it. First, they must have reasonable cause to suspect an arrestable offence had occurred, and the person arrested had committed it, and second, the motive for arresting has to be lawful.

It is incorrect to see this second condition as being a common law factor separate from the arrest power itself. Lord Diplock clearly states it arises from the power and is essential for a lawful exercise of it.

The lawfulness of the exercise of discretion must be considered on the basis of the principles of administrative law which apply to public officers. These principles have been enunciated by the Master of the Rolls, Lord Greene, in the celebrated case of <u>Associated Provincial Picture House</u> v. <u>Wednesbury Corporation</u>.[96]

> "The Court is entitled to investigate the actions of the local authority with a view to seeing whether they had taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account. Once that question is answered in favour of the local authority it may still be possible to say that although the local authority have kept within the four corners of the matters which they ought to consider, they have none the less come to a conclusion so unreasonable that no authority could ever come to it. In such a case again I think the court can interfere".

Thus in <u>Holgate - Mohammed</u> there were three questions to be answered: first, did the constable act in good faith ?; second, did the constable consider or not consider matters a reasonable constable should or shouldn't have ?; third, even if all appropriate matters were considered or discarded was the conclusion one a reasonable constable could have reached ?

There had already been a finding of fact that the constable had acted in good faith. A belief that the only evidence likely to prove Holgate's guilt would be a confession, and that such a confession would be more likely to arise from arrest and subsequent questioning, were, the House decided, proper considerations for the constable to take into account. The ultimate decision to arrest was also reasonable. Therefore the arrest was lawful and the suit failed.

Such a matter was deemed relevant for consideration because what could justify an arrest on suspicion need not be admissible evidence nor sufficient for a conviction. Thus arrest, for the purpose of resolving the suspicion, or obtaining admissible evidence was a lawful consideration for the constable.

A judicial review of the motive for an arrest, in order to consider the lawfulness of it (other than this House of Lords decision) has no Commonwealth authority, nor were any American cases referred to. Never before has it been held or even adverted to that the power to arrest was contingent on the motive of the arresting constable. Arrest is a summary law enforcement procedure and alien to decisions taken by an administrator or tribunal, whose statutory power may well incorporate guidelines as to its use and thus be amenable to the Lord Greene principles.

Until Holgate the courts had limited their control over arrest to whether the arrested person was 'found committing' an offence or there had been 'reasonable grounds for suspecting' they had, depending on the power arrested under. But now the courts in an attempt to further balance the twin desires of individual freedom and crime control, have assumed the previously unnoticed role of fettering Police discretion.

Certainly such a role had been accepted in relation to reviewing the exercise of discretion in policy matters, as observed by Lord Denning M.R., in R. v. Metropolitan Police Commission, ex parte Blackburn.[97]

> "There are some policy decisions with which I think the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law"

But some Police discretions the Master of Rolls considered, were unable to be reviewed.[98]

> "It is for the Commissioner of the Metropolis, or the chief constable as the case may be, to decide in any particular case whether enquiries should be pursued or whether an arrest should be made or a prosecution brought".

In any event, Blackburn was not considered by the House, or the Court of Appeal.

The main basis for the House construing the discretion as reviewable was the arrest power's use of the word 'may'. It is questionable whether this was in fact an indicator by the legislature that the motive of the arrest was a relevant factor in considering its lawfulness. More likely, 'may' was merely the means to grant an arrest power, subject to the conditions of 'reasonable suspicion' or 'finds committing'.

If a New Zealand court were to follow Holgate - Mohammed, as indeed it could, given that the basis for decision, the incorporation of 'may arrest' on the arrest power exists in sections 315(2)(a) and (b), the immediate issue arises - 'what are lawful motives for an arrest?'

This would involve a consideration of the current reasons why Police constables make arrests. It has been suggested[99] that there are nine basic reasons why an arrest, rather than some other procedure,[100] is used by constables.

(a) To ensure that the accused appears for trial:- while it is accepted that it is difficult in our modern, interdependent society to 'lose' someone it is easier to keep total control over them than to have to 'find' them later.

(b) To enable ancilliary rights to be exercised by the Police against the suspect:- such as search of the person and property[101], taking of photographs and fingerprints.

(c) To enable the suspect to be identified:- when a summons can't be served as the Police are unsure of the suspects identity.

(d) To enable the Police to detain for questioning:- in relation to the offence arrested for, or possibly, some other suspected of.

(e) To allow the Police to prepare their case without hindrance from the accused:- a suspect may destroy or suppress evidence, intimidate witnesses or conspire to do such activities.

(f) To harass or punish the accused and intimidate others.

(g) To prevent a suspect from undertaking further criminal activity.

(h) To protect the accused:- from community outrage of a physical nature or from the accused's own actions through remorse.

(i) To mark the serious nature of the offence alleged to have been committed.

Some of these reasons may be lawful motives for arrest, others not. But formal indicators as to what is reasonable are difficult to find.

The legislature has not expressly provided for any, but some arise by implication. Section 19 of the Summary Proceedings Act 1957 provides that a warrant for arrest should be issued if it is necessary to compel attendance at court, or to emphasise the severity of the offence. ((a) and (i) above.)

Nor have the courts provided much in the way of indicators. Holgate - Mohammed approved arrest for questioning ((d) above), and Hussein[102] provided,

> "The possibility of escape, the prevention of further crimes and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar".

(That is (a), (g) and (e) above.)

The Police also appear lacking in the provision of suitable motives for arrest. In their book of general instruction, there is a recognition that the power to arrest "is at all times to be exercised with discretion".[103] Expansion on this general consideration includes having "good and sufficient reasons"[104] for arresting children and young persons, and respectable citizens who have committed minor offences[105], who can be brought before the court on summons.

The inference from these 'sparse' instructions would seem to be that for the Police, arrest is the normal method of initiating a criminal prosecution.

It would therefore appear that if the courts in this country are prepared to take the bold step of following the <u>Holgate - Mohammed</u> precedent, and further 'fettering' Police discretion, formal indicators as to 'lawful' motives will be required. It is unacceptable that a constable should have an arrest deemed unlawful because a court decides there was an unlawful motive involved in the arrest, when the only certainty as to what is lawful or not has arisen from that decision.

It would therefore be appropriate, for purposes of certainty, and legitimacy, that the lawful motives come from the legislature. Court imposed motives are likely to be somewhat alien from the working environment of the Police, and of course derived from hindsight. Police motives are likely to be too general and regarded by the public (and courts ?) with suspicion and cynicism.

E. Matters of Justification or Excuse.

Section 315(2)(a) and (b) were considered independently of certain 'justifying' provisions in Part III of the Act, primarily for ease of analysis and to ensure there is no confusion between them and 'powers'.

Section 31.

> Every constable is justified in arresting any person without warrant in accordance with provisions of section 315 of this Act or in accordance with any other enactment conferring on him a power to so arrest.

By 'justifying' any arrest in accordance with section 315 is meant that a constable who so arrests is 'not guilty of an offence, and not liable to any civil proceeding'.

To arrest 'in accordance' with section 315(2)(a) means the arrested person must have been found by the arresting constable and must have committed the offence arrested for. If these elements are not present in the arrest, then it was not lawful, and not in accordance with its power, it cannot therefore be justified under section 31.

Hence any charges resulting from such arrest, which require it to be lawful cannot be pressed, and the arresting constable may be guilty of an offence, and liable for civil proceedings.

Similarly, to arrest in accordance with section 315(2)(b) requires the arresting constable to have good cause to suspect the arrested person had committed an offence. If that good cause did not exist then the arrest was not lawful and not in accordance with its power and therefore not justified under section 31.

In addition, should the Holgate - Mohammed decision be applied in New Zealand for an arrest under either power to be in accordance with its provisions it would have to be for a lawful motive.

Consequently it can be seen that section 31 will only justify arrests under section 315(2)(a) and (b) if they are lawful. However, it is implicit that a constable who acts lawfully cannot be liable to civil or criminal proceedings. Therefore section 31 would appear unnecessary.

Section 32.

> Where under any enactment any constable has power to arrest without warrant any person who has committed an offence, the constable is justified in arresting without warrant any person whom he believes, on reasonable and probable grounds to have committed that offence, whether or not the offence has in fact been committed, and whether or not the arrested person committed it.

This section provides a justification for constables who mistakenly 'believe' on 'reasonable and probable' grounds that an offence has occurred and the person they arrested has committed it. As has been stated[106] 'reasonable and probable' can be taken as merely 'reasonable'.

There is a question as to the extent of the protection granted. Clearly a reasonable but mistaken belief as to a state of facts is covered, but not it would appear as to the law.

But to which arrest powers, if any, does section 32 apply ?

A literal reading indicates that the power to arrest that section 32 applies to is one of 'arresting any person who "has committed" an offence'. The arrest power prima facie protected by section 32 is absolute, and phrased in the past tense. Neither section 315(2)(a) or (b) are such powers. It would appear then that section 32 applies to enactments other than the Crimes Act.

But there are no absolute arrest powers phrased in the past tense. Thus it would appear that section 32 is without an area for application.

However, the courts would be unlikely to accept such an interpretation, especially given the impetus of section 5(j) of the Acts Interpretation Act 1924.[107]

It requires that the provisions of Acts receive an interpretation that will best ensure the attainment of the intention of that provision.

Clearly the intention of section 32 is to provide a justification for arrestors. But the question of which powers are to be justified, if they are not lawful, is raised.

There are three options: Section 32 applies to; all arrest powers; only absolute powers; or only qualified powers.

Arguments exist in favour of all options. Applying section 32 to all powers gives a large measure of previously absent protection to a constable who arrests under an absolute provision. If the contention that reasonable suspicion as to the commission of an offence is contained in qualified powers by implication[108] is correct then section 32 adds nothing to them. If that contention is incorrect then section 32 adds a previously absent protection to those arresting under qualified powers, although the standard of reasonableness is the higher one of belief.

Indeed if section 32 did apply to qualified powers then there would be a doubling up of the protection for those who made an honest but reasonable mistake in arresting the wrong person. What makes section 32's application to qualified powers even more unlikely is that the differences in the standard of reasonableness between 'believe' and 'suspect'[109] would result in it being easier to make a lawful arrest than a justified one.

Thus it would appear that if section 32 were to apply to any arrest powers it would not be qualified ones, merely absolute. Such a contention is strengthened by a realisation that there is no reason to distinguish between a 'present tense' and a 'past tense' phrased absolute arrest power, in the granting of a justification.

Unlawful arrest.

The law relating to arrest is specified so that unacceptable breaches of the state's authority over individuals can be controlled, sanctioned and repetitions inhibited.

A distinction has been drawn between 'lawful' and 'justified' arrests. Usually the two concepts are muddled into one, especially where there is talk of a 'citizens power of arrest'.

A 'lawful' arrest is one in accordance with the power granted. In the Crimes Act these powers exist only in section 315 (2)(a) and (b). If a lawful arrest is made, then it is possible that failure to act precisely as told by the constable could result in further charges other than the one arrested for being pressed. These include: resisting a constable acting in the execution of duty (Section 23(a) of the Summary Offences Act; assaulting a constable in the execution of duty (Section 10 of the Summary Offences Act); and escaping from lawful custody (Section 120(1)(c) of the Crimes Act).

Thus even if the original offence arrested for is not proven, and one or more of the above three offences occurs, so long as the initial arrest was lawful the further charges can be pressed.

But if the initial arrest was unlawful, the individual's rights supercede those of the constables, so that the arrestee can 'reasonably' resist, even if that entails assault and can lawfully 'escape' from custody.

The unlawfully arrested individual may wish the arrestor to be charged with a criminal offence - assault, or institute civil proceedings - false imprisonment. It is at this stage that the justification provided by section 32 may grant some protection to the constable. Presumably this protection was enacted to protect those constables who although acting unlawfully, did so in good faith and whose mistake was reasonable.

As has been stated it is doubtful that section 32 applies to arrests made under section 315(2)(b) as it is easier for an arrest to be made lawful under it, than justified under section 32. It seems likely that section 32 applies to, at least, section 315(2)(a). As a result, although an arrest made under this absolute provision may not be lawful, if there was a reasonable belief that the arrested person had committed an offence and the offence arrested for had occurred, civil or criminal proceedings would be blocked.

However the recent decision of Mr Justice Sinclair in Andrew v. Police[110] indicates that he does not perceive such a distinction between 'powers' and 'justification'.

> "Section 32 of the Crimes Act 1961 also gives powers to a constable in relation to an arrest without warrant ... whether the person arrested is subsequently convicted matters little so long as the person effecting the arrest has the belief based on reasonable grounds that an offence has occurred" (Emphasis added).

Although this was only an obiter statement, severe implications arise out of a per-ception of section 32 as a power to arrest. These are increased with a realisation that the case was dealing not with a suit of false arrest, but a prosecution resulting from the arrest, that needed this arrest to be lawful.[111]

Such a statement could mean one of two things (or even both?). First, that section 32 itself is an arrest power. Second, that the arrest provisions which section 32 applies to must have their 'power' read with that of section 32. Thus if as has been argued section 32 applies to section 315(2)(a) it is no longer an absolute provision. A lawful arrest may still be made if the constable arresting makes a reasonable mistake as to the existence of an offence, and that the person arrested had committed it.

A similar finding occurred in the Canadian decision R. v. Biron.[112] Biron had been arrested by a constable for 'creating a disturbance by shouting' under an absolute arrest power. He was then passed to another constable who passed him onto a third.

At this stage Biron protested against his arrest, for which he was subsequently charged and convicted of 'resisting a constable in the execution of duty'. He was acquitted of the 'disturbance' charge and appealed against his 'resistance' conviction.

The appeal was allowed by a majority of the Quebec Court of Appeal, which held that as Biron had not been found committing a criminal offence his arrest was illegal and he was entitled to reasonably resist it. The Crown appealed.

On appeal the majority of the Canadian Supreme Court using Wiltshire v. Barrett, held that the absolute arrest power Biron had been arrested under should have the qualification 'apparently' read in, thereby making the arrest lawful and resistence to it unlawful.

But, and important for our purposes, the majority, in case it were mistaken as to the nature of the arrest power, noted that the constable who was enforcing Biron's custody at the time of the resistence was 'justified' in so doing. This 'justified custody' was held to mean that the constable had a lawful sanction to enforce Biron's custody and as such Biron was under lawful arrest.

Chief Justice Laskin in dissent, expressed the exasperation he and subsequent commentators felt at such a decision.[113]

> "I would find it astonishing that a provision concerned with a constable's criminal or other responsibility, and which immunises him in specific circumstances in respect of an arrest that he has made, should become the vehicle for providing a basis upon which an accused may himself be convicted of resisting the arrest. To do that is to turn a protection provision, a shield, for the constable, into a sword against an accused by treating the protection as an expansion of the power of arrest already expressly granted "

With respect to the majority in Biron, and Mr Justice Sinclair, it is contended that this dissenting view of the Chief Justice gives the more appropriate interpretation of the legislation.

There are other strong legislative indications that a perception of section 32 as a power is contrary to the intention of the legislature. If section 315(2)(a) was intended to have a qualified power it would have been expressed similarly to section 315(2)(b). That it wasn't clearly indicates that it was meant to be an absolute power. Further, the phrasing of section 32 makes it clear that it was meant as a justification. Perception of it as a power makes the following nonsensical:

> Where under any enactment any constable has a power to arrest without warrant any person who has committed an offence the constable is justified ... (Emphasis added).

Finally the interpretation in section 2 of justified, indicates that it was for defensive, not offensive, purposes.

The legislature by providing a distinction between a justified arrest, and one that is lawful, have attempted to ensure that individuals who act on their rights in resisting an unlawful arrest cannot be penalised. As a necessary corollary, it was essential that constables who make unlawful arrests but act in good faith and whose mistake to its lawfulness was reasonable, should also not be penalised.

IV ACTUALITY v. MYSTIQUE

Having tentatively identified the actuality of the law of arrest, it now remains to consider how closely it matches its mystique. Its mystique being that perception of the law held by its adherents, fostered by the law itself and its agents.

This perception has as a fundamental premise that arrests are not to be arbitrary, but to occur within an established framework,

> "In the idealogy of the liberal democratic state the role of the state over the individual is closely circumscribed by the notion of legality" 114

The 'notion of legality' is seen as being embodied in both the Common Law and statutory law. The trend in recent times, in an attempt to reduce the arbitraryness of the impositions of the states authority, has been to locate the law within statutes. This has been done to ensure that a 'base' point exists for the application of a particular law, both modernising it and improving its clarity and specifity. The purpose for such a progression was to allow for a greater certainty in any state-citizen interaction.

The current laws two parts, substantive and procedural, are accepted as the legislatures attempt to balance the conflicting societal desires for, individual freedom and stability of social order. Depending on the bias of the state, the balance could be reached at any number of points on the scale between such opposite goals.

McBarnet identified six concepts that were seen as essential in achieving the desired balance, and implicit in the societal consensus of legality. Certainly this was the perception for British society, and it is suggested that they are appropriate for our purposes.

Thus the laws mystique propounds that in the limiting of the state's impositions on the individual, the notion of legality present in statute law embodies the following concepts:

1. That arrest powers are clearly stated;
2. That arrests are only made in relation to a specified offence;
3. That incriminating evidence of the offence is needed before an arrest for it can be made;
4. That the offences themselves are clearly defined;
5. That an arrestee can resist an unlawful arrest;
6. That all arrests are accountable.

How well does the actuality of New Zealand law match its mystique by the embodyment of these six concepts ?

First, that arrest powers are clearly stated. Certainly section 315(1) of the Crimes Act assures that there are only statutory arrest powers, but as has been seen, due to the drafting inconsistencies, there is some confusion as to their exact content.

With section 315(2)(a) this confusion arises from such queries as: what does 'find' mean ?; is it truly absolute ?; who must find the offender ?; and when can the arrest be made?

With section 315(2)(b) the confusion arises from questions as to: whether the qualification refers, by implication, to mistakes as to the existence of an offence ?; whether the assumption of a common standard of reasonableness in qualification is correct ?; whether the significance attached to the distinction between 'belief' and 'suspicion' is appropriate ?; what is sufficient to create a suspicion ?; to what extent will reasonable suspicion allow multiple arrests ?; and whether the standard of reasonableness varies according to the severity of the offence ?

There are further questions as to whether the motives for an arrest are reviewable, and if so, what are lawful motives. Nor is it clear: what the concepts of 'disturbance of the public peace' or 'breach of the peace' entail; whether the drafting distinction between the two is significant ?; and why the concept of 'disturbance' seems to have been abrogated by the courts.

Such confusion is aggravated when apparently clear distinctions between 'lawful' and 'justified' arrests are ignored. Indeed with the justification provisions it is unclear which arrest powers they refer to; whether a reasonable mistake of law is covered; and whether the existence of such provisions imply that lawful arrests are not in themselves protected from civil or criminal proceedings.

The questions raised above are not so fanciful or obscure as to be only of interest to academics but are very real issues of contention affecting the content of one of the central procedural powers of the criminal law. Certain indications as to the possible answers of some of these questions have been provided in this paper, but clearly misgivings will still exist.

Thus while arrest powers must be strictly adhered to, it is unclear exactly what entails a 'lawful' or even a 'justified' arrest. The clarity and specificity hoped for, and claimed by the mystique to exist, has become lost in a complex web of legal niceties, that do little to curb the state's authority.

Second, that arrests are only made in relation to a specified offence. This concept is clearly severed from the actuality of the law, by the allowance of arrests for 'disturbing the public peace' and 'breach of the peace', neither of which are offences.

If it is accepted that an arrest is a justified detention of an individual against their will, then there is the phenomenon of 'de facto arrests' although they have specifically not been termed as 'de jure' arrests by the legislature. These also are removed from the mystique in that they are not for a specified offence, but for a specified purpose.

Examples of these de facto arrest powers include; the power to stop and search any person reasonably believed by any constable to be in possession of offensive weapons or disabling substances - section 202B of the Crimes Act;

the power to detain and search any person reasonably believed by any constable to have stolen or unlawfully obtained property in their possession - section 227A of the Crimes Act; the power to require the user of a motor vehicle to stop and give their name and address on demand of any constable - section 66 of the Transport Act 1962; the power to detain a driver reasonably suspected of having consumed drink for the administering of a breath test - section 58A of the Transport Act 1962; the power to detain a person found intoxicated in a public place - section 37A of the Alcoholism and Drug Addiction Act 1966; and the power to detain and search a person reasonably believed to possess controlled drugs - section 18 of the Misuse of Drugs Act 1975.

Such powers, although not classified as arrests, would seem to manifest external indicators of an arrest, and consequently as they are not for an offence, although charges could result out of their use, are a clear breach of the mystique.

However, there are clear policy reasons for the existence of each power, which are limited in their application. For example, with all except 'intoxication' the 'arrest' is only for the period of the search or questioning.

In such cases, the options of either altering the powers so that they are de jure arrests for offences, or their total abolition, are both undesirable. Thus elements of the actuality that do not meet the mystique are in some cases appropriate, and in others such as 'disturbance' or 'breach' are not.

Third, that incriminating evidence of the offence is needed before an arrest for it can be made. The absolute power to arrest, section 315(2)(a) would seem to embody this aspect of mystique. For, to 'find' an offence being committed would necessitate incriminating evidence to be apparent.

However as section 315(2)(b) allows an arrest to be made on reasonable suspicion, there is no requirement that the suspicion has to be created by incriminating evidence. The necessary suspicion could arise from inadmissible evidence, and the arrest used to provide admissible (incriminating) evidence of the offence.

Despite this apparent distancing of the law from its mystique, the necessity for arrestors using qualified powers, such as section 315(2)(b) to act on evidence not necessarily incriminating may require the mystique to be altered rather than the law.

Fourth, that offences themselves be clearly defined. Although this concept is beyond that of mere arrest, it is appropriate to note that strict procedural requirements do little to restrict arbitrary arrest, if the substantive law they enforce is vague.

Certain of the more common concepts/offences, such as breach of the peace, resisting arrest or obstruction, rely fundamentally on the Common Law and Police definitions. Consequently what will constitute the necessary act is less than clear and subject to value judgments where the authority view has dominance.

Other offences may have some doubts as to aspects of their control, that is unavoidable. But this failure in law to match its mystique to the extent it does in 'marginal' offences is undesirable and inappropriate.

Fifth, unless an arrest is lawful the arrestee need not submit to it. This notion of legality has often found judicial expression, in terms such as those of Lord Simonds,[115]

> " ... it is the corollary of the right of every citizen to be free from arrest, that he should be entitled to resist arrest unless that arrest is lawful".

The difficulty in exercising such a right exists initially in the vagueness of certain of the offences, where the arrestee may believe he has not committed an offence, thus perceiving any arrest as being unlawful. Such an action is aggravated by the distinction between absolute and qualified arrest powers.

An individual who resists an arrest, performed under section 315(2)(a) because they are sure they have not been found committing an offence, which is later borne out, will have been entitled to resist because the arrest would have been unlawful. However, it appears that if the constable had made an honest and reasonable mistake as to the act believed to have been committed by the arrestee, section 32 would justify the arrest. Hence no civil or criminal proceedings could be instigated against the constable. Nor could charges of resisting be brought against the arrestee.

But if the same constable with the lesser standard of proof of the offence, only a suspicion, had arrested under section 315(2)(b), the arrest would have been lawful and any resistence could have lead to further charges.

Thus whether an individual innocent of any offence (and disturbance or breach) lawfully resists an arrest or not, depends on the arrest power used by the constable.

Even if the resisting was initially unlawful, it is still possible that a charge of common assault could arise.[116] This would be the result of an individual who forcibly exercises their right to be free from unlawful arrest. This is because section 39 of the Crimes Act authorises a constable to use such force as may be necessary to overcome any force used in resisting arrest.

Naturally then, any resistence to an ultimately unlawful arrest would be countered by the constable, which could result in greater resistence, until assault would seem to be the very least of the charges able to be brought.

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If the resistence was initially reasonable yet repeatedly countered by the arresting constable, it is unclear at what stage this escalation of violence would be deemed to have ceased being reasonable.

Thus it would appear that an individual being arrested and unable to make the same post hoc analysis of the reasonableness of a constable's suspicion/belief in making a lawful/justified arrest, resists at their own peril. This would appear unsatisfactory as evidence of offences other than the one arrested for, that turn up as a result of an unlawful arrest, is admissible. Indeed it appears a no-win situation for the arrestee as resisting an arrest - exercising what is perceived as ones civil rights can be seen as indication of guilt[117] and not resisting can be seen as acquiescence in a 'fair cop'.

The dissatisfaction with this aspect of the mystique does not end here.

Constables acting lawfully (or even unlawfully but justifiably) should not have to expect to suffer resistence/ assault from individuals who believe mistakenly or correctly that they are acting in lawful defence of their rights.

Thus while this aspect of the mystique does have some basis it has a very limited application, which is difficult to ascertain at the moment of its occurrence. As such it has undesirable connotations for both, individuals who mistakenly attempt to act on the mystique, and constables who must suffer the consequences of such mistakes.

Sixth, that all arrests are accountable. This aspect of the mystique is correct, if somewhat misleading. Arrests are only accountable if challenged. That such a challenge is unusual is not surprising once it is realised that to make such a claim in the case dealing with the offence arrested for is generally perceived as unnecessarily aggravating the court, (Compounding this of course is that most defendents plead guilty).

Further that any civil claim is usually complicated, of a drawn out nature and as such, frequently costly.

Indeed as has been noted, vague substantive laws and wide procedural powers make it very difficult to make an effective check on their use. This of course assumes that the courts are totally objective in their approach. However, it would seem that the courts have an inherent reflex to support the police, and only sanction those actions grossly ultra vires[118]. A popular expression of this intention is given by Lord Bridge,[119]

> "Making an arrest can never be an agreeable task and may often be very disagreeable; how much more so if the law gives no assurance of protection".

Therefore it would appear that a gap between the actuality of the law and its mystique does exist in New Zealand. Certain aspects of this gap are understandable, possibly even desirable, others are not.

That this gap exists and has been found through a legislative study of the law, rather than an interactionist approach indicates that the deviation is institutionalised. Thus the recurring examples of contradictions between the mystique and practice of law are not merely the result of the activities of the 'bit' players within the system. Certainly the police may have lobbied for certain of the powers identified in this paper, but the fact remains that each and every aspect was granted by Parliament. Or if not granted, and merely the result of judicial interpretation, then not amended.

This finding of an institutionalised deviation prompts these questions raised by McBarnet: why does such a deviation occur ?; how is it managed and legitimised, and by whom?; and why does it vary ?

> "Finding that the law does not live up to its rhetoric then, is not just the end of a piece of indignant research but the beginning of a new series of questions" [120]

Such questions cannot be answered in this paper. What can be done is to suggest some reforms to limit the gap between the laws mystique and actuality.

V CONCLUSION AND REFORM.

Therefore as has been seen the law of arrest without warrant does not appear to match the mystique that emanates from it. The questions arising from a recognition of this institutionalised deviation will not be considered in this paper, merely acknowledged. Rather, this paper will conclude with certain reforms that, it is suggested, will go some way to narrowing the gap between the law's actuality and mystique.

That there is not a general outcry against the existence of this gap is an insufficient reason for ignoring its existence. The potential exists in the law, as at present, for an arbitrary use of arrest powers. That this is an infrequent occurence is more the result of the good intentions of the agents of the law, rather than the law itself. As has been noted[121] such intentions would result primarily from the Police, and to some extent the courts, being themselves imbued with the mystique.

However, reliance on such fortuitous sentiments in the operation of the law is unsatisfactory. That the law does not embody its mystique, which in some respects is desirable, means that both the Police and individuals lack certainty in their dealings with one another.

It could of course be argued that it would be easier to re-orientate the mystique to match the law. That, it is contended, is unacceptable given the desirable nature of certain aspects of the mystique, and the many undesirable aspects of the present law. Nor would it increase the certainty of the laws operation.

Thus the following reforms will go further than merely creating grammatical consistency within the law, to a real attempt to improve the confidence of both parties in any Police-individual interaction.

Consequently, to provide clear and specific laws of arrest, and to incorporate those elements of the mystique that are desirable, the following reforms are suggested.

It is unrealistic to expect constables to arrest only those guilty of an offence, negating any fallibility in deciding, the existence of an offence or the identity of its perpetrator. The ascribing of an impossible standard, and the penalising of those who fail to meet it, is unlikely to provide for the efficient maintenance of social order.

Therefore the qualification of 'reasonable suspicion' on a constable's part as to the commission of an offence, and who committed it, should be maintained but extended to cover all arrest situations. As a result there should no longer be any 'absolute' arrest powers, nor any justification provisions.

Thus an arrest would either be lawful or not. If it wasn't then the arrestor could be subject to criminal and/or civil proceedings.

However there should be no allowance for a constable to make a reasonable mistake as to the state of the law. A constable can be expected to know the law they seek to enforce. Thus if such a mistake is made, reasonably and honestly (or otherwise), criminal and civil proceedings can be taken by the arrestee. Presumably if the mistake was reasonable and honest, the penalty and/or damages would be minimal.

The problems identified as resulting from arrests made under a qualified power necessitate that there no longer be a right to resist an arrest, lawful or unlawful, by a constable. Should the arrest be unlawful then criminal and/or civil proceedings can be taken by the arrestee. This change in the law would require a 'blind faith' on the arrestee's part in the constable, and a refusal to allow the prosecution to make any insinuations from the acquiescence to the arrest.

A necessary corollary to this demise of an established right is that any evidence of any offence that is acquired as a result of an unlawful arrest is inadmissible as evidence.

There is one exception to this denial of the right to resist arrest - unlawful or otherwise - that of the individual who believes that the arrestor is not a constable.

The recent 'addition' to English law of a judicial review of the motive for arrest has the attraction of a further fettering of the extensive Police discretion in the use of arrest. Thus despite the fact that the language and concepts of administrative law appear alien within the context f summary law enforcement procedures it is suggested a similar approach has merit in New Zealand.

To ensure certainty, lawful motives should not have to be concluded post hoc from court decisions. This would also impair the image of the courts as being a body independent from the Police. Consequently a conclusive list of lawful motives should be established which to have the necessary aura of legitimacy, should derive from the legislature.

Of the motives identified[122], it is possible to suggest desirable ones[123]. (Their use may still be unlawful if the principles of <u>Associated Provincial Picture House</u> v. <u>Wednesbury Corporation</u> are not satisfied).

(a) To ensure that the accused appears for trial; a lawful motive.

(b) To enable ancilliary rights to be exercised by the Police against the suspect; that such rights exist upon arrest and not upon use of an alternative procedure, such as a summons, causes arrest to be favoured as the means of initiating a criminal prosecution. As a motive this would be unlawful. As a corollary to arrest it is, of course, still acceptable.

(c) To enable the suspect to be identified; should be a lawful motive if the constable has reasonable grounds for suspecting a false name and address have been provided, thereby negating the effective use of a summons.
(d) To enable the Police to detain for questioning; was accepted as a lawful motive in Holgate- Mohammed, and would seem to be a necessary corollary to the power to arrest on suspicion, that need not have been based on incriminating evidence.
(e) To allow the Police to prepare their case without hindrance from the accused; a lawful motive.
(f) To harass or punish the accused and intimidate others; clearly not a lawful motive.
(g) To prevent a suspect from undertaking further criminal activities; depending on the nature of their offence, it could be a lawful motive. Where there is a need for a 'cooling off' period in domestic or breach of the peace type situations it would be lawful. But if merely to deny someone the opportunity to commit crime - preventative detention - it would be unlawful.
(h) To protect the accused; no matter how laudable this is, it is still unlawful. If it is for protection from the accused's self, then possibly the Mental Health Act 1969 procedures would be more appropriate.
(i) To mark the serious nature of the offence allegded to have been committed; unless this is linked with one of the above lawful motives this on its own would appear unlawful. Although this does have legislative backing as a lawful motive.

Another aspect of reform is to improve the accountability of arrests. Thus should charges be pressed, the lawfulness of the arrest should be considered as a matter of course by the court. This is regardless of whether a guilty plea is entered or not.

It is hoped that this might provide an effective check on the Police use of their extended powers, by removing the disincentive of having to specifically contend an arrest was unlawful. The burden would be shifted to the Police.

To facilitate possible criminal or civil proceedings it is suggested that each arrestee be provided with a written account of their arrest, and its basis in law.

Finally the offences termed 'marginal' should have a more certain content. It is suggested that the concept of 'breach of the peace' which appears to be a central tool of the Police, should lose its hybrid nature and become a substantive offence.

Such reforms will not ensure that the law entirely matches its current mystique, but will go some way towards narrowing the gap. To finally marry the two aspects of the law - actuality and mystique - the propogation of mystique by the laws agents should be more attuned to its actual basis, which should incorporate those desirable aspects of the current mystique.

FOOTNOTES

1. McBarnet, Doreen J., Conviction - Law, the State and the Construction of Justice, (MacMillan Press, London, 1983).
   McBarnet, Doreen J., Arrest: The Legal Context of Policing in The British Police, Holdaway, S. (Ed.), (Edward Arnold, London, 1979).
2. Section 315(2) of the Crimes Act 1961 and s. 39 of the Summary Offences Act 1981.
3. Cain, M., Society and the Policeman's Role, (Routledge & Kegan Paul, 1973).
   Cox, B., Civil Liberties in Britain, (Penguin, 1975).
   Skolnick, J., Justice Without Trial, (Wiley, 1966).
4. McBarnet, op.cit., (1979), p.25.
5. Idem.
6. Ibid., p.27.
7. Ibid., p.30.
8. Ibid., p.29.
9. Williams, Glanville., Textbook of Criminal Law, (2nd ed.), p.486.
   In England ... "powers of arrest without warrant (summary arrest) are bewildering in their variety. They are given not only by common law and general Acts of Parliament (some operating in particular areas only) but by local Acts of Parliament, many of which are not available in law libraries, and they are given both to the police and less commonly to persons holding particular positions and the public at large".
10. Barnard v. Gormann [1941] A.C. 378,391.
11. An Act to reform and restate the law relating to summary offences, and to replace the Police Offences Act 1927.
12. Infra. p.41.
13. Infra. p.29.
14. This of course ignores the difficulty of the constable being able to decide if the necessary intent was present.
15. [1978] 2 N.Z.L.R. 29.

16. [1977] 2 N.Z.L.R. 44.
17. [1956] N.Z.L.R. 1013.
18. Section 41(a) Police Offences Act 1927 - it was not an offence for a person to be drunk in any public place, but it was if they were found there.
19. Mere proof of presence at the time of the offence's occurance was insufficient, there had to be a perception.
20. McKenzie v. Police [1956] N.Z.L.R. 1013,1016.
21. Both Carter and McKenzie were 'perceived' by the arresting constable.
22. Only in Carter was the arresting constable an impartial observer of Carter's actions. In McKenzie the arresting constable accompanied McKenzie from the point where no offence existed to where it did. It could even be said the constable initiated an element of the offence - McKenzie's presence in a public place.
23. Trebeck v. Credance [1918] 2 K.B. 354.
    R. v. Goodwin [1944] 1 All E.R. 506.
24. The Times, 28.3.85.
    See also Sheadan v. Piddington [1955] Q.S.R. 574.
25. R. v. Hills [1924] 1 W.W.R. 651.
26. R. v. Dunham [1950] 1 D.L.R. 498.
27. Arnold, T., Arrest, (Unpublished LL.M. Thesis, V.U.W. 1972), p.69.
28. Supra. n.23.
29. [1966] 1 Q.B. 312.
30. [1925] 2 K.B. 354.
31. [1982] 3 W.L.R. 10.
32. Section 28 Town Police Clauses Act 1847 - 'person who within the arresting constable's view was committing an offence'.
33. Presumably because the court was not satisfied that the language used was not to the annoyance of those within earshot.

34. If the arrest was unlawful there would have been nothing to prevent charges of common assault being brought, unless her resisting was reasonable.

35. Wills v. Bowley [1982] 3 W.L.R. 10.,46.

36. Idem.

37. Section 28 states the constable 'shall arrest'.

38. Section 2(2) of the Criminal Law Act 1967 - "Any person may arrest without warrant anyone who is, or whom he with reasonable cause suspects to be, in the act of committing an arrestable offence".

39. Supra. n.35.

40. Although it should be noted that as Lord Bridge had the express intention of protecting the arresting constable, creating a lawful arrest was the only alternative. He could not have 'read in' a whole justification section.

41. Lord Bridge seemed to have been working on the principle not that section 28 was intelligible, but rather 'unworkable' and that this justified the reading in of additional words.

42. Williams, Glanville., Crim. L.R. [1958] 73.
"In statutes relating to arrest, Parliament has expressly dealt with the problem of liberty and endeavoured to effect a reconciliation between the opposing values of liberty and public order. Such statutes should be construed in the way that seems best to accord with the intention of the legislature and it does not follow that every question of doubt must be resolved in favour of the subject".

43. Wills v. Bowley [1982] 3 W.L.R. 10., 23.

44. Ibid., 28.

45. Ibid., 34.

46. Infra. p.41.

47. A valid point but one specifically rejected by the legislature by such a protection being included within s.315(2)(b). Indeed as already noted, supra p.16., unreasonable resistance to arrest, even though unlawful, can still lead to a charge of common assault.

48. Hanway v. Boultbee (1830) 1 M & Rob 14; 174 E.R.6.
Griffith v. Taylor (1876) 2 C.P.D.184.

49. There is a requirement that the finder have the power to arrest.

50. R. v. Howarth (1828) 1 Mood. 207; 168 E.R.1243.
Downing v. Chapel (1867) L.R. 2C. p.461.

51. [1949] 2 W.W.R.604., a majority decision in the Court of Appeal of British Columbia.

52. 6 A.2d. 465, (1939).

53. 143 A.2d. 879, (1968).

54. It is usually an 'in presence' requirement.

55. Skolnick, op.cit., p.227.

56. This argument was not made in Frey because the arrestor, a civilian, only had a 'found committing' arrest power. As such there was no equivalent to s.315(2)(b), which allowed the court to so interpret the absolute power, as to make his arrest lawful.

57. See also s.311 of the Crimes Act.

58. Supra. n.48.

59. This contention arises from the fact that s.32 contains provision for such a mistake. It will be argued, infra. p.41., that s.32 applies only to s.315(2)(a). It would seem contrary to the scheme of the Act, that s.315(2)(b), the power more likely to be subject to a mistake, should be without a protection granted to an absolute arrest power.
The counter argument to this is that had the legislature wanted to grant such a protection it would have expressly done so, as it did with s.32.

60. [1972] N.Z.L.R.233 - A case dealing with powers of arrest arising from traffic legislation.

61. [1968] N.Z.L.R.663.

62. Supra. n.31.

63. Supra. n.29.

64. [1982] 3 W.L.R.10, 47.

65. [1968] N.Z.L.R.341,347. And is based on authority such as McArdle v. Egan [1933] All E.R.611. Dallison v. Caffrey [1965] 1 Q.B.348.

66. Williams v. Police [1981] 1 N.Z.L.R.108.

67. Hussein v. Chong Fook Kam [1970] A.C.942,948.

68. [1975] 1 N.Z.L.R.217.

69. Hussein v. Chong Fook Kam [1970] A.C.942,946.

70. Supra. n.65.

71. Note that this is an example of inadmissible evidence.

72. [1961] N.Z.L.R.882,886.

73. R. v. Evans [1974] R.T.R.232. Moss v. Jenkins [1974] R.T.R.25.

74. This is merely a contention based on the nature of a belief.

75. Marston, John., Reasonable Suspicion, Justice of the Peace, February 4th, 1984. - Matters identified by the Sub-committee on Powers of Arrest and Search, reporting to the Advisory Committee on Drug Dependence, "(1) the demeanour of the subject; (2) the gait and manner of the subject; (3) ... knowledge ... of the suspect's character or background; (4) ... the nature of what he is carrying; (5) the mode of his dress, bulges in his clothing ... considered in the light of all the surrounding circumstances; (6) the time of observation; (7) any remarks or conversations ... which might be overheard ... (8) the area involved; (9) information from a third party; (10) any connection between that person and any other person whose conduct at the time is reasonably suspect; (11) the suspect's apparent connection with any overt criminal activity".

76. Supra. n.67.

77. This would seem to involve a contradiction, as it is surely in the public interest that individuals, possibly innocent, not be 'picked' off at a lower standard of reasonableness than appropriate, merely because of the gravity of the offence in question. Justification for such action normally rests on the desire to solve the offence, but arresting an innocent person, no matter how serious the crime, will not solve it, and will not be in the public interest.

78. Brinegar v. United States 338 U.S.160,183 (1949)

"if we are to make judicial exception to the Fourth Amendment ... it seems to me they should depend on the gravity of the offence."

United States v. Kansco 252 F.2d. 220,222 (1958)

"the word reasonable is not to be construed in the abstract or in a vacuum unrelated to the field to which it applies".

United States v. Soyka 394 F.2d. 443,452 (1968)

"If the decision were mine to make, I would not be at all adverse to straightforward recognition that the gravity of the suspected crime ... are factors bearing on the validity of the ... arrest decision".

79. Wright v. Sharp (1947) 176 L.T.308,311.

"... and whilst having due regard to the importance and the liberty of the subject, which is not to be interfered with lightly, I must also have regard to the importance of the detection and apprehension of criminals".

80. The age of mass arrests - 1981 Springbok Tour, Bastion Point, Waitangi Celebrations, are examples of where arrests were made for those reasons.

81. Auckland District Law Society, Public Issues Committee, Peaceful Protest and Arrest for Breach of the Peace, (1983).

82. Adams, F.B., Criminal Law and Practice in New Zealand, (2nd.ed, Sweet & Maxwell, 1971 annotated to date), para.526 with reference to Halsburys Laws of England, (4th.ed., Butterworths, London, 1980) Vol.10. para 153. The Adams definition is similar to that provided in the Police General Instructions, para. D.45.

"A breach of the peace arises when there is an actual assault or when public alarm and excitement are caused by another persons wrongful act. The mere use of bad language does not constitute a constructive breach of the peace, unless utterred in such a place and such a manner as to attract a crowd of persons and interfere with public convenience and tend to arouse and inflame the passion of the crowd".

83. Ferguson v. Carnochan (1889) 2 White, 275,281.

84. [1982] 1 Q.B.416,417.

85. If this is accepted it somewhat limits the effectiveness of the definition i.e., 'a disturbance is a disturbance'.

86. (1984) 2 D.C.R. 237,247.

87. Idem., that power was granted by s.37(b) of the Police Offences Act 1927, and was repealed by s.412 of the Crimes Act. Similarly s.315(1) repudiated any residual common law arrest powers, should arrest for an anticipated disturbance/breach, have subsisted there.

88. Burton v. Power [1940] N.Z.L.R.305.
Allen v. Police [1961] N.Z.L.R.732.
Pounder v. Police [1971] N.Z.L.R.1080.

89. Section 23 (a) of the Summary Offences Act 1981.

90. Police v. Peek [1973] 2 N.Z.L.R.595,597.

91. Oten v. McFadyen (1982) Unreported, Dunedin, Registry M. 66/82.

92. [1984] 1 All E.R.1054.

93. In a judgment which the four other Law Lords were in accord with.

94. Holgate - Mohammed v. Duke [1984] 1 All E.R.1054,1057.

95. Supra. n.67.

96. [1948] 1 K.B.233.

97. [1968] 2 W.L.R.893,903.

98. Idem.

99. Arnold, T., Why Arrest ? in Essays on Criminal Law, (1971), p.203.

100. A summons.

101. A right at common law to seize and take possession of articles on the premises which are in the possession of or under the control of the arrested person, as evidence tending to show their guilt. The right only exists if the arrest is made on the premises, and must be reasonably contemporaneous with the making of the arrest.
Barnett and Grant v. Campbell (1902) 21 N.Z.L.R.484.
McFarlane v. Sharp [1972] N.Z.L.R.838.

102. Supra. n.67.

103. <u>Police General Instructions</u>, para. A 106(1).

104. <u>Ibid.</u>, para. A 106(2).

105. <u>Ibid.</u>, para. A 106(3).

106. Supra. p.22.

107. "Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal constructions as will best ensure the attainment of the object of the Act, and of such provision or enactment according to its true intent, meaning, or spirit".

108. Supra. p.22.

109. <u>Idem.</u>

110. M.617/84 Auckland Registry, 2 October 1984.

111. Section 23 of the Summary Offences Act - resisting a constable in the execution of duty.

112. (1975) 23 C.C.C.(2d) 513.

113. <u>Ibid.</u>, 515.

114. McBarnet, <u>op.cit.</u>, (1979), p.40.

115. <u>Christine</u> v. <u>Leachinsky</u> [1947] A.C. 573,591.

116. <u>Rudling</u> v. <u>Police</u> (1978) Unreported, Auckland Registry.

117. The maxim - "only the guilty take advantage of civil right".

118. <u>Duffy</u> v. <u>Attorney-General</u> (1982), Unreported, Wellington Registry - an example of gross impropriety on the Police's part.

119. <u>Wills</u> v. <u>Bowley</u> [1982] 3 W.L.R. 10,46.

120. McBarnet, <u>op.cit.</u>, (1979), p.40.

121. Supra. p.8.

122. Supra. p.38.

123. Supra. n.99.

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