Unchecked Power: The Constitutional Regulation of Arrest Reconsidered

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Over the last twenty years the *Canadian Charter of Rights and Freedoms* has had a profound impact on almost every facet of the criminal investigative process. Arrest provides a conspicuous exception. This article casts a probing light on police arrest powers in Canada, exposing justifiable concerns about how these powers are sometimes used. Gaps in existing intake and bail procedures are explored, revealing how a police officer's partisan assessment of the grounds for an arrest can often control an individual's custodial status long into the criminal process.

A reconsideration of the constitutional treatment of arrest highlights why the *Charter* has not yet provided a meaningful check on police arrest decisions. The article questions the current reading of section 9, the right "not to be arbitrarily detained or imprisoned", for failing to recognize thet unlawful arrests are inherently arbitrary. The author also explores how other *Charter* guarantees—including the right "to be secure against unreasonable ... seizure", the right to have the validity of a "detention determined by way of *habeas corpus*" and the right not to be denied one's "liberty" and "security" interests "except in accordance with the principles of fundamental justice"—could be interpreted to augment section 9 and mandate the creation of procedural safeguards to protect against nnjustified arrests.

Ultimately, the author concludes that it is necessary for the Supreme Court of Canada to recognize that unlawful arrests are inherently arbitrary and hence unconstitutional under section 9. The Court must also recognize that the structure of current arrest and intake procedures is fundamentally unjust, and therefore at odds with section 7 of the *Charter*. Only then will Parliament be moved to provide the sort of checks that are necessary for the effective regulation of police arrest decisions in future.

Au cours des vingt dernières années, la *Charte canadienne des droits et libertés* a eu un profond impact sur la plupart des facettes du processus d'enquête criminelle. L'arrestation demeure toutefois une exception flagrante. Cet article met en lumière les pouvoirs d'arrestation des corps policiers au Canada en soulevant certaines inquiétudes quant à la manière dont ces pouvoirs sont parfois exercés. L'auteur explore ensuite les lacunes des procédures d'admission et de cautionnement existantes, révélant comment l'évaluation partisane d'un policier des motifs d'arrestation peut souvent contrôler l'état d'arrestation de l'individu tout au long de la procédure criminelle.

Le défaut de ne pas avoir sn développer de contrôles constitutionnels efficaces fondés sur la *Charte* pour ce domaine important du droit est ensuite expliqué. Cet article met en question l'interprétation actuelle de l'article 9, le «droit à la protection contre la détention ou l'emprisonnement arbitraires», parce qu'elle n'admet pas que les arrestations illicites sont manifestement arbitraires. L'auteur explore comment les autres garanties juridiques de la *Charte* — compte tenant le droit «à la protection contre [...] les saisies arbitraires», le droit «de faire contrôler, par *habeas corpus*, la légalité de sa détention» et le droit de ne pas être privé des intérêts de l'individu de la «liberté» et la «sécurité» de la personne sauf «qu'en conformité avec les principes de justice fondamentale» — pourraient être interprété de manière que l'article 9 se prenne plus de force et que la création des sauvegardes de la procédure, se protégeant contre les arrestations illicites, soit commandé.

L'auteur conclut qu'il est nécessaire que le Cours suprême du Canada constate que les arrestations illicites sont manifestement arbitraires et donc inconstitutionnelles par rapport à l'article 9. Le Cour doit reconnaître aussi que présentement, la structure de l'arrestation et les procédures d'admission sont fondamentalement injuste et incompatible avec l'article 7. C'est seulement à travers ces constatations juridiques que le parlement sera motivé à créer la législation nécessaire pour la propre régulation des arrestations policières.

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Introduction

No other development has had as profound an impact on criminal procedure in Canada as the enactment of the *Canadian Charter of Rights and Freedoms*[1] in 1982. So extensive have been its effects that it is often said to have ushered in a "due process revolution".[2] But one critical police power has managed to escape this uprising of individual rights entirely unscathed: the authority to arrest—to decide that there is adequate cause to take a suspect into custody—persists very much as it was prior to the *Charter*. Today, much like before 1982, a police officer's decision to arrest, whether justified or not, will often control an individual's custodial status long into the criminal process.

The principal claim advanced in this paper is that the current arrest regime, when considered together with deficiencies in existing intake and bail procedures, is inherently unfair. The present scheme fails to minimize the risk of arrests in the absence of adequate cause and to effectively guard against the danger of such arrests escaping prompt detection. The result is that those who are arrested unjustifiably can spend extended periods living under restrictive bail conditions or, much worse, be subject to pretrial detention.

Arrest has historically fixed the point at which the relationship between the individual and the state shifts. In a tangible way, it marks the moment when the needs of law enforcement overtake the liberty interests of the individual. In Canada, the justification that has long been used to rationalize the arrest power is: the police may only arrest if they have objectively reasonable and probable grounds to believe an individual is guilty of a crime. Historically, the courts have held that this standard in itself is a sufficient safeguard to protect the public from unjustified arrest.[3] There is a systemic presumption that the police will not use their arrest powers inappropriately. As will be discussed in Parts I.D and I.E below, however, the "reasonable grounds" standard provides minimal guidance to police. This inexact standard can result in honest police mistakes, and even worse, it may serve to mask the misuse or even the abuse of police arrest powers. This problem is only compounded by the low visibility of police arrest decisions. As is explained below in Part II, existing intake procedures fail to provide an effective early check on police arrest decisions.

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

[2] See Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) ("[t]he effect of the due process revolution was dramatic and enough for one generation to absorb" at 3).

[3] See *Criminal Code*, R.S.C. 1985, c. C-46, s. 495(1). See also *R. v. Storrey*, [1990] 1 S.C.R. 241 at 249-51, 53 C.C.C. (3d) 316 [*Storrey* cited to S.C.R.], quoting with approval *Dumbell v. Roberts*, [1944] 1 All E.R. 326 at 329 (C.A.) [*Dumbell*].

Although many believed that the *Charter* would alter the historic balance between individual and state in the context of arrest,[4] little has really changed since 1982. To date, constitutional redress for unjustified arrests has depended exclusively upon "the right not to be arbitrarily detained or imprisoned" guaranteed in section 9 of the *Charter*.[5] Although "arbitrarily" may aptly describe how police powers are sometimes used in authoritarian states, in Canada this standard has proven a crude measure for scrutinizing police arrest decisions. As will be discussed in Part III.A, below, the jurisprudence remains unclear as to whether an unlawful arrest—that is, an arrest undertaken in the absence of the legislatively prescribed grounds—is necessarily "arbitrary" and therefore unconstitutional. This interpretive confusion in the case law has not fostered the development of constitutionally mandated procedural safeguards capable of providing an effective check upon police arrest powers.

Despite the *Charter*, the right to be free from unjustified arrest remains largely in the hands of the police well into the advanced stages of the criminal process. Under the existing regime, a person could be arrested by police in circumstances where the required reasonable and probable grounds are lacking. At present, a review of the supporting grounds for an arrest and charge(s) is not a precondition for a bail determination. This means that unjustifiably arrested persons can often spend extended periods living under onerous bail conditions, such as curfews, reporting requirements, and travel restrictions. If the person affected happens to be a poor candidate for bail, the consequences can be far worse: despite the fatal inadequacy of the Crown's case, he or she may be detained pending trial. The accused could then spend days or weeks in custody, hoping that a prosecutor will recognize the insufficiency of the evidence and withdraw the charge(s).

At present, *Charter* claims under section 9 only arise in those cases where incriminating evidence (usually a confession) is obtained following an unlawful arrest. In such cases, the Crown will usually press forward with the charges and litigate the constitutionality of the arrest. If an improper arrest does not yield any incriminating evidence, there is rarely an opportunity to raise the unjustified arrest in criminal proceedings. Instead, the charge(s) will normally be withdrawn by the prosecution prior to, or on the morning of, a scheduled preliminary inquiry or trial. This means that in the worst cases of unjustified arrest, when an accused is most likely to be innocent of any wrongdoing, judicial review under the *Charter* is unlikely.

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[4] See Bruce P. Archibald, "The Law of Arrest" in Vincent M. Del Buono, ed., *Criminal Procedure in Canada: Studies* (Toronto: Butterworths, 1982) 125 at 168; Law Reform Commission of Canada, *Arrest* (Working Paper 41) (Ottawa: Law Reform Commission of Canada, 1985) at 8-12 [Law Reform Commission of Canada, *Working Paper 41*]; Law Reform Commission of Canada, *Arrest* (Report 29) (Ottawa: Law Reform Commission of Canada, 1986) at 5 [Law Reform Commission of Canada, *Report 29*].

[5] *Supra* note 1, s. 9.

The present scheme for regulating arrests under the *Charter* is flawed. Although an individual who is unlawfully arrested may potentially obtain *Charter* redress at trial, due to the exclusion of evidence obtained at the time of an unlawful arrest, no constitutional mechanism has been developed to prevent unjustified arrests before they occur. Even more troubling, no procedure currently exists for promptly and objectively reviewing the grounds supporting police arrest decisions. In the worst cases, this can mean that someone who is unjustifiably arrested will spend a substantial period in custody before regaining her or his freedom. Although existing procedures ensure that those aggrieved by an unlawful arrest are ultimately released, for most, justice delayed will usually mean justice denied.

The effective regulation of police arrest powers is possible under the *Charter*, but it requires a change in approach. This does not mean that section 9 of the *Charter* should be abandoned. To the contrary, the continued relevance of section 9 is difficult to deny, given that it speaks so directly to the immediate by-products of police arrest decisions, namely, "detention" and "imprisonment". In fact, positive change should begin with section 9 of the *Charter* and an overdue acknowledgment by the Supreme Court that an unlawful arrest—again, an arrest in the absence of the legislatively prescribed grounds—is necessarily "arbitrary". As the discussion in Part III.A will demonstrate, this view is supported by a combination of interpretive factors. Meaningful constitutional safeguards, however, will also necessitate a move beyond section 9.

The development of effective protections will require Canadian courts to look towards other guarantees within the legal rights provisions of the *Charter* that are engaged by an arrest.[6] The due process purpose of these guarantees makes them the natural starting point for building constitutionally mandated procedural safeguards capable of more meaningfully regulating police arrest decisions. Beyond section 9, there are three other sections among the legal rights provisions that seem capable of anchoring the development of greater protections: subsection 10(c) (habeas corpus), section 8 (unreasonable searches or seizures), and section 7 (principles of fundamental justice).[7] The feasibility of using each of these guarantees to develop more effective constitutional controls over police arrest decisions is explored below in Part III. The search for solutions, however, ultimately leads to section 7.

To date, section 7 of the *Charter* has not played any role in regulating police arrest powers. This is quite surprising given that arrests (and the intake procedures that follow) easily engage section 7 because of their obvious impact on "liberty" and "security of the person". Such encounters trigger a need for compliance with the "principles of fundamental justice"—principles that are said to have both substantive

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[6] *Ibid.*, ss. 7-14.

[7] *Ibid.*, ss. 7, 8, 10(c).

and procedural content.[8] The challenge ahead for Canadian courts is in deciding what these principles require in relation to the arrest and intake of suspects.

This article will argue that, at a minimum, two prophylactic measures are necessary for the present system to comport with the principles of fundamental justice. First, in situations where it is clearly feasible to get a warrant, the police should be required to obtain one before carrying out an arrest. Second, in the vast majority of cases—where warrants would be impractical—a prompt judicial assessment of the grounds for an arrest and charge(s) should be undertaken before bail is ever addressed. Together, these two measures could effectively redress the potential for unfairness that infects existing arrest and intake procedures.

I. The Arrest Power

A. Defining Arrest (And Keeping It Distinct from Investigative Detention)

In Canada, individuals have traditionally enjoyed the right to be free from government interference, absent lawful authority to the contrary.[9] Legislation, however, has long provided the police with a power to interfere with liberty by carrying out an arrest.[10] Historically, absent grounds for arrest, it was often said that the police lacked the power to interfere with an individual's free movement.[11] This makes the definition of arrest critical in the balance of power between individuals and the state. It is therefore essential to have a clear sense of the type of police-citizen encounters that qualify as arrests. It is these types of encounters that are the focus of this paper.

Interactions between individuals and the police are rich in their diversity. Most such encounters are relatively benign, usually involving nothing more than conversation. Such exchanges can become more invasive, however, as conversation

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[8] *Reference Re Section 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 at 498-504, 511-13, 24 D.L.R. (4th) 536 [*B.C. Motor Vehicle* cited to S.C.R.].

[9] See *Chaput v. Romain*, [1955] S.C.R. 834, 1 D.L.R. (2d) 241; *Lamb v. Benoit*, [1959] S.C.R. 321, 17 D.L.R. (2d) 369; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689. Each case is a classic Canadian example of this principle of English constitutional law being vindicated in the courts.

[10] See *Criminal Code*, S.C. 1892, c. 29, s. 552 [*Criminal Code, 1892*].

[11] See *R. v. Dedman*, [1985] 2 S.C.R. 2 at 28-29, 20 D.L.R. (4th) 321, Dickson C.J.C., dissenting ("[s]hort of arrest, the police have never possessed legal authority to detain anyone against his or her will ... " at 13), aff'g on other grounds (1981), 32 O.R. (2d) 641 at 652-53, 122 D.L.R. (3d) 655 (C.A.) [*Dedman* cited to S.C.R.]; *Rice v. Connolly*, [1966] 2 Q.B. 414 at 419, [1966] 2 All E.R. 649 (C.A.); *R. v. Esposito* (1985), 53 O.R. (2d) 356 at 362, 24 C.C.C. (3d) 88 (C.A.); *R. v. Moran* (1987), 36 C.C.C. (3d) 225 at 258, 21 O.A.C. 257; *Kenlin v. Gardiner* (1966), [1967] 2 Q.B. 510, [1966] 3 All E.R. 931; *Koechlin v. Waugh* (1958), 11 D.L.R. (2d) 447, 118 C.C.C. 24 (Ont. C.A.) [*Koechlin*].

turns to questioning that increasingly resembles interrogation. Coercion can replace consent if a police officer assumes control over an individual's movements by verbal command or physical restraint.[12] The intrusiveness of such an encounter may be increased by its duration and, potentially, by an accompanying search. An arrest is the final and most formalized step in this progression. It is at the upper end of a graduated continuum of increasingly coercive measures that the police make recourse to in fulfilling their law enforcement and order maintenance functions.

On a technical level, an arrest "consists of the actual seizure or touching of a person's body with a view to his detention" or alternatively of the pronouncing of "words of arrest" if "the person sought to be arrested submits to the process and goes with the arresting officer."[13] The failure to use the word "arrest" is not determinative; rather, it is the substance of the encounter that matters most—that is, the use of language that reasonably leads an individual to conclude that he or she is in police custody and is not free to leave.[14] Of course, these abstract definitions lifted from the case law provide only a partial and somewhat sanitized account of what an arrest entails.

An arrest has the potential to be much more intrusive than the definitions alone suggest. If the subject offers resistance or attempts to flee, police officers are licensed to use as much force as they consider necessary to effect an arrest. In certain circumstances, they may even use lethal force.[15] In addition, the use of handcuffs to restrain those arrested is a standard police practice,[16] as is the incidental search, which can vary in intrusiveness from a mere pat-down to a complete strip search.[17] Finally, in

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[12] Voluntary compliance with police requests does not result in an arrest. See *R. v. Acker* (1970), 1 N.S.R. (2d) 572, 4 C.C.C. 269 (C.A.). But at a certain point, an encounter that falls short of arrest may constitute a "detention" under the *Charter*, triggering the rights in section 10. The definition of "detention" under the *Charter* is explored below. See *infra* notes 176, 177 and accompanying text.

[13] *R. v. Whitfield* (1969), [1970] S.C.R. 46 at 48, 7 D.L.R. (3d) 47 [*Whitfield* cited to S.C.R.]. See *R. v. Asante-Mensah*, 2003 SCC 38 at paras. 42-45 [*Asante-Mensah*].

[14] *R. v. Latimer*, [1997] 1 S.C.R. 217, 142 D.L.R. (4th) 577 [*Latimer* cited to S.C.R.]. The Court in *Latimer* held that the accused, for whom police had reasonable and probable grounds to arrest but who was told he was "being detained for investigation" (*ibid.* at 225), was placed under "*de facto* arrest", as the police officer's wording made it clear to the accused that he was in police custody, and he thereafter acquiesced to police authority (*ibid.* at 230-32). See also *Asante-Mensah*, *ibid.* at para. 46.

[15] See *Criminal Code*, *supra* note 3, s. 25.

[16] See *Fraser v. Soy* (1918), 52 N.S.R. 476, 44 D.L.R. 437 (C.A.); *Hamilton v. Massie* (1889), 18 O.R. 585 (C.A.). Both cases acknowledge a common law power on the part of the police to use handcuffs to restrain those arrested.

[17] See *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, 53 C.C.C. (3d) 257 [*Cloutier* cited to S.C.R.] (acknowledging a common law power to search for weapons or evidence incidental to an arrest); *R. v. Golden*, [2001] 3 S.C.R. 679, 207 D.L.R. (4th) 18, 2001 SCC 83 (limiting the authority to conduct strip searches to situations where there are reasonable and probable grounds to believe that such an intrusive search is necessary to secure a weapon or evidence and requiring that such searches only be undertaken at the station house absent exigent circumstances).

the period following an arrest, fingerprints and photographs will also be taken.[18] In effect, the hallmarks of an arrest are a prolonged loss of one's freedom of movement, either through acquiescence or physical restraint, accompanied by a marked reduction in personal privacy. All of that said, arrests do not represent the sum total of potentially intrusive encounters between individuals and the police.

Until quite recently in Canada, absent an arrest, the police did not possess any legal authority to interfere with an individual's freedom of movement.[19] Despite this lack of formal power, police investigative stops, based on grounds falling short of those required for an arrest, have long been a reality in Canada.[20] In *R. v. Simpson*, after expressing a desire to regulate such practices, the Ontario Court of Appeal recognized a common law power on the part of the police to conduct brief investigative detentions based on "articulable cause".[21] The legal foundation upon which this new police power was constructed, however, is less than firm.

In *Simpson*, the court relied primarily upon the two-part test developed by the English Court of Criminal Appeal in *R. v. Waterfield*.[22] That test was crafted as a means for deciding whether a police officer, whom the accused was charged with obstructing, was acting in execution of his or her duties at the time—an essential ingredient of the offence charged.[23] Canadian courts initially used the test in this same way.[24] At its inception, it allowed for no more than an incremental expansion of existing police powers as individual cases presented themselves for consideration. The test was never intended to license the judicial creation of police investigative powers

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[18] See *Identification of Criminals Act*, R.S.C. 1985, c. I-1. See also *R. v. Beare*, [1988] 2 S.C.R 387, 55 D.L.R. (4th) 481 [*Beare* cited to S.C.R.] (upholding the constitutionality of this legislation). But if the police choose to compel an accused's appearance in court through less intrusive means, the taking of fingerprints and photographs can be delayed. See *infra* note 68 and accompanying text.

[19] See *supra* note 11 and accompanying text.

[20] See Alan Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991) 29 Osgoode Hall L.J. 329 (arguing that detention short of arrest is a mainstay of aggressive police patrol practices and advocating for judicial and legislative efforts to construct rules and regulations by which to regulate it at 330-41, 367-68).

[21] *R. v. Simpson* (1993), 12 O.R. (3d) 182 at 199, 200-204, 79 C.C.C. (3d) 482 (Ont. C.A.) [*Simpson*]. Ronald J. Delisle notes, however, that "the court in *Simpson* is not 'regulating'. It is not restricting police powers. It is not standing between the government and the citizen and interpreting laws which authorize police conduct. It is creating new police powers!" ("Judicial Creation of Police Powers" (1993) 20 C.R. (4th) 29 at 30).

[22] (1963), [1964] 1 Q.B. 164, [1963] 3 All E.R. 659 (Ct. Crim. App.) [*Waterfield* cited to Q.B.].

[23] *Ibid.* The test requires an inquiry into "whether (a) such conduct falls within the general scope of any duty imposed by statute or recognized at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty" (*ibid.* at 171).

[24] See *R. v. Stenning*, [1970] S.C.R. 631 at 636-37, 10 D.L.R. (3d) 224; *Knowlton v. R.* (1973), [1974] S.C.R. 443 at 446, 33 D.L.R. (3d) 755.

out of whole cloth.[25] Its ill-conceived transformation into an expansive law-making device began in *R. v. Dedman*, where a slim majority of the Supreme Court, anxious to do its part in combating drunk driving, used the test to create a police power to randomly stop vehicles at sobriety spot checks.[26] From this extraordinary conclusion, the investigative detentions endorsed in *Simpson* seem like a natural, even almost inevitable, extension of the test.[27]

Setting the questionable foundation for investigative detentions aside, this new police power has been endorsed by appellate courts across the country over the last decade.[28] Unfortunately, these cases have served to raise more questions than they answer. There is still no consensus as to the scope of any incidental search power(s).[29] Similarly, no case has satisfactorily addressed the interrelationship between the police power to conduct investigative detentions and the duties imposed upon police under subsections 10(a) and 10(b) of the *Charter*.[30] There is also little guidance on the

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[25] See Aman S. Patel, "Detention and Articulable Cause: Arbitrariness and Growing Judicial Deference to Police Judgment" (2002) 45 Crim. L.Q. 198.

[26] *Dedman*, *supra* note 11 at 34-36.

[27] See *Brown v. Durham Regional Police Force* (1998), 43 O.R. (3d) 223, 167 D.L.R. (4th) 672 (C.A.) [*Brown* cited to O.R.]. In that case Justice Doherty, the author of *Simpson*, writes that absent "a controlling statute or reconsideration by the Supreme Court of Canada, the ancillary power doctrine [as enunciated in *Waterfield*] is the established means by which the courts must draw the line between police conduct which is lawful and that which amounts to an unconstitutional interference with individual liberties" (*ibid.* at 245). See also *R. v. Godoy* (1998), [1999] 1 S.C.R. 311, 168 D.L.R. (4th) 357 (the Supreme Court's most recent use of *Waterfield*, recognizing a police power to enter private premises in response to disconnected 911 calls).

[28] See *R. v. Ferris* (1998), 162 D.L.R. (4th) 87, [1998] 9 W.W.R. 14 (B.C.C.A.); *R. v. Dupuis* (1994), 162 A.R. 197, 26 C.R.R. (2d) 363 (C.A.) [*Dupuis*]; *R. v. Lake* (1996), [1997] 5 W.W.R. 526, 113 C.C.C. (3d) 208 (Sask. C.A.); *R. v. McAuley* (1998), 126 Man. R. (2d) 202, 124 C.C.C. (3d) 117 (C.A.); *R. v. Carson* (1998), 207 N.B.R. (2d) 39, 39 M.V.R. (3d) 55 (C.A.); *R. v. Burke* (1997), 153 Nfld. & P.E.I.R. 91, 118 C.C.C. (3d) 59 (Nfld. C.A.); *R. v. Chabot* (1993), 126 N.S.R. (2d) 355, 86 C.C.C. (3d) 309 (C.A.).

[29] See Steve Coughlan, "Search Based on Articulable Cause: Proceed with Caution or Full Stop?" (2002) 2 C.R. (6th) 49. See also Peter Sankoff, "Articulable Cause Based Searches Incident to Detention—This *Cooke* May Spoil the Broth" (2002) 2 C.R. (6th) 41 (arguing that an incidental search power would be difficult to reconcile with section 8 of the *Charter*, which requires reasonable and probable grounds as a precondition for searches in a criminal law context [see below, Part III.C for a discussion of section 8 standards]).

[30] *Supra* note 1, s. 10(a) (the right upon detention "to be informed of the reasons therefor"); *ibid.*, s. 10(b) (the right to be informed of the right "to retain and instruct counsel without delay"). See *R. v. Lewis* (1998), 38 O.R. (3d) 540, 122 C.C.C. (3d) 481 (C.A.) [*Lewis* cited to O.R.] (implying that the right to counsel might apply at 550). But see *R. v. T.A.V.* (2001), 299 A.R. 96, [2002] 4 W.W.R. 633, 2001 ABCA 316 (holding that the right to counsel does not apply, but without engaging in an analysis of section 1 of the *Charter* to justify this conclusion).

amount of force that the police can use to effect such detentions[31] or the precise temporal limits on such encounters.[32]

If the Supreme Court ultimately decides to endorse a police power to conduct investigative detentions based on articulable cause, it must proceed with caution. Such a development could—by implication—erode the standard for conventional arrests in the field. This will depend upon the intrusiveness of any powers that the Court ultimately concludes the police might have incidental to carrying out an investigative detention. For example, if the Court licenses the police to use force to effect such stops, to hold those detained for extended periods, to move those held to different locations (like the station house), and to carry out intrusive personal searches, then investigative detentions start looking more and more like conventional arrests. The effect of such developments, on a practical level, is that "arrest-like" encounters would be licensed by the courts on the basis of a considerably lesser standard than the one that Parliament has legislatively mandated for arrests—reasonable and probable grounds.[33]

If the Supreme Court chooses to travel this route, it must be vigilant in maintaining a clear distinction between brief investigatory detentions and conventional arrests.[34] As the United States Supreme Court has explained:

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[31] See *Criminal Code*, *supra* note 3, s. 25(1) (authorizing those enforcing the law to "use as much force as necessary," provided they have "reasonable grounds", which seems to foreclose relying on this subsection in the case of investigative detentions based only on "articulable cause"). But see *R. v. Wainwright* (1999), 68 C.R.R. (2d) 29 (Ont. C.A.) (recognizing that if the subject does not submit, the police can "physically restrain", but without delineating any limits on the amount of force that can be used).

[32] See *Dupuis*, *supra* note 28 (investigative detention power entitled the police to hold a room full of people for over an hour). But see *R. v. Monney* (1997), 153 D.L.R. (4th) 617, 120 C.C.C. (3d) 97 (Ont. C.A.) [*Monney* (C.A.) cited to D.L.R.] ("I cannot accept that the common law power to make a brief detention based upon articulable cause implies a power to detain a person for an almost unlimited period of time until the suspect either produces evidence of his guilt or establishes his innocence" at 665-66), rev'd on other grounds [1999] 1 S.C.R. 652, 171 D.L.R. (4th) 1 [*Monney* (S.C.C.)].

[33] See Coughlan, *supra* note 29; Sankoff, *supra* note 29. Both authors make this point and caution that the distinction between arrests and investigative detentions must be kept clear. See also *Monney* (C.A.), *ibid.* (Justice Rosenberg expresses similar concerns at 665-67).

[34] The U.S. Supreme Court has refused to impose any rigid time limits on investigative stops, which means that it can often be unclear when a detention becomes an "arrest" requiring probable cause. Instead, the court has emphasized that the circumstances of each particular case control. See *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587 (1981); *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568 (1985). But see *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637 (1983) (insinuating that 90 minutes might be outside the limit at 709-10); *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248 (1979) (where taking the suspect back to the station house to conduct an interrogation was characterized as an arrest at 211-13). But see also *United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304 (1985) (upholding 18 hour investigative detention of suspected alimentary canal smuggler). See generally Wayne R. LeFave, "'Seizures' Typology:

> An arrest is a wholly different kind of intrusion upon individual freedom ... It is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.[35]

Police-citizen encounters of this quality, which can culminate in restrictive bail conditions or pretrial detention, are the focus of the remainder of this article.

B. Common Law Origins

Arrest powers have a long and unfortunate history of being misused. In fact, at common law, it was the prevalence of complaints about false arrest and imprisonment that provided the forum for the evolution of arrest law. Civil suits brought by persons claiming to be victims of improper arrests led courts to create gradually a body of law to govern the exercise of arrest powers.[36] In time, English law eventually developed differential powers of arrest depending on whether the crime involved was a felony or a misdemeanour. The distinction was premised on the much more serious nature of felonies, which carried a penalty of death upon conviction. Suspected felons were thus presumed to be desperate and dangerous characters in need of immediate apprehension by any and all means, which meant that it was entirely lawful to kill them rather than allow their escape.[37]

By the eighteenth century, the rules of arrest at common law were well settled. A suspected felon could be arrested without a warrant first being procured. A constable had both a right and a duty to arrest if he had reasonable grounds to believe that a felony had been committed and that the party to be arrested was guilty of the crime. In addition, an arrest was permitted in order to prevent the commission of a felony.[38] Conversely, neither private citizen nor public officer could make an arrest for a misdemeanour without first obtaining a warrant. A narrow exception to this general prohibition existed: a warrantless arrest was permissible if the misdemeanour involved a breach of the peace or if there were grounds for believing that a breach of the peace

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Classifying Detentions of the Person to Resolve Warrant, Grounds and Search Issues" (1984) 17 U. Mich. J.L. Ref. 417.

[35] *Terry v. Ohio*, 392 U.S. 1 at 26, 88 S. Ct. 1868 (1968) [*Terry*]. *Terry* gave birth to the "stop-and-frisk" power in the United States—it was relied upon in *Simpson* (*supra* note 21).

[36] See Jack K. Weber, "The Birth of Probable Cause" (1982) 11 Anglo-Am. L. Rev. 155. See also Sir William Holdsworth, *A History of English Law*, rev. ed., vol. 3 (London: Methuen, 1960) at 599-600.

[37] See Bruce C. McDonald, "Use of Force by Police to Effect Lawful Arrest" (1967) 9 Crim. L.Q. 435 at 437. See also David M. Doubilet, "The Use of Deadly Force in the Apprehension of Fugitives from Arrest" (1968) 14 McGill L.J. 293 at 307-308.

[38] See *Samuel v. Payne* (1780), 1 Dougl. 359, 99 E.R. 230 (K.B.); *Leachinsky v. Christie*, [1946] 1 K.B. 124 at 128-29, [1945] 2 All E.R. 395 (C.A.), aff'd [1947] A.C. 573, [1947] 1 All E.R. 567 (H.L.) [*Leachinsky*]. See also *Dedman*, *supra* note 11 at 13, Dickson C.J.C., dissenting; Glanville L. Williams, "Arrest for Felony at Common Law" [1954] Crim. L. Rev. 408.

was about to occur or be renewed in an arresting officer's presence.[39] In all other cases—for instance, where the breach of the peace had already subsided—a misdemeanour arrest was only possible after obtaining a warrant from a magistrate.[40] While contemporary Canadian arrest powers bear some similarity to their common law antecedents, much has also changed.

C. Contemporary Statutory Powers

There are no longer any common law offences or arrest powers in Canada.[41] Today, arrest powers are found exclusively in statutes. Arrest powers for criminal offences are found in the *Criminal Code*.[42] Like the common law, the *Criminal Code* supplies differing arrest powers depending on the seriousness of the crime. Indictable offences are generally more serious and, as such, are subject to a broader arrest power than that available for summary conviction offences. In practice, however, this distinction is somewhat artificial for two reasons. First, since hybrid offences (those that can be prosecuted either as summary conviction or indictable offences) are deemed to be "indictable" until the Crown formally elects to proceed summarily, many offences that are not very serious are subject to the more expansive arrest powers applicable to indictable offences.[43] Second, since there are relatively few offences that can only be proceeded with summarily, the narrower arrest power rarely applies. This lack of a meaningful distinction between indictable offences and

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[39] *Leachinsky, ibid.* See also Archibald, *supra* note 4 at 143; Jerome Atrens, "Compelling Apearance" in Jerome J. Atrens, Peter T. Burns & James P. Taylor, eds., *Criminal Procedure: Canadian Law and Practice*, vol. 1 (Vancouver: Butterworths, 1981), III-1 at III-4 to III-5; Glanville L. Williams, "Arrest for Breach of the Peace" [1954] Crim. L. Rev. 578 at 578 [Williams, "Breach of Peace"]. But see *Atwater v. Lago Vista (City of)*, 532 U.S. 318, 121 S. Ct. 1536 (2001) (concluding that there was a lack of consensus at common law as to whether a breach of the peace was a precondition for a warrantless misdemeanor arrest at 326-45).

[40] See *Cook v. Nethercote* (1835), 6 Car. & P. 741, 172 E.R. 1443 at 1445 (Ex. Ct.); *Mathews v. Biddulph* (1841), 3 Man. & G. 390, 133 E.R. 1195 (C.P.).

[41] *Criminal Code*, *supra* note 3, s. 9(a) (foreclosing convictions for common law offences). See Robert Wood, "Power of Arrest in Canada under Federal Law" (1970) 9 West. Ont. L. Rev. 55 at 65-66. But see *Brown*, *supra* note 27 at 248-49; *Hayes v. Thomson* (1985), 17 D.L.R. (4th) 751 at 755-61, [1985] 3 W.W.R. 366 (B.C.C.A.) [*Hayes*]. Both *Brown* and *Hayes* acknowledge the persistence of the common law power to arrest for apprehended breaches of the peace. Other cases, however, reject the existence of such a power. See *Reid v. DeGroot and Brown* (1964), 42 C.R. 252 at 264, 49 M.P.R. 246 (N.S.S.C. (A.D.)).

[42] Statutory arrest powers are also contained in provincial legislation for some provincial offences. Such arrests, however, are far less common than arrests under the *Criminal Code*. See Law Reform Commission of Canada, *Working Paper 41*, *supra* note 4 at 25.

[43] See *Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(1)(a). See also *R. v. Huff* (1979), 17 A.R. 499 at 505-506, 50 C.C.C. (2d) 324 (C.A.); *Collins v. Brantford Police Services Board* (2001), 204 D.L.R. (4th) 660 at 667-68, 158 C.C.C. (3d) 405 (Ont. C.A.) [*Collins* cited to D.L.R.].

summary conviction offences should be remembered as we review the arrest powers found in the *Criminal Code*.

Section 494 introduces the arrest powers in the *Criminal Code* by recognizing the authority to carry out a "citizen's arrest". The provision allows everyone, police included, to arrest without warrant a person whom they *find* committing, or apparently committing, an indictable offence.[44] In addition, if there are reasonable grounds to believe that an individual has committed a "criminal offence"[45] and is escaping from, and being freshly pursued by, those with lawful authority to arrest, then a warrantless arrest is also permitted.[46] Finally, section 494 confers an analogous power to arrest on owners or custodians of property, when they find someone committing, or apparently committing, a criminal offence in relation to that property.[47] Given that it is rare for the police to be present when an offence is committed, they will usually not look to this provision but rather to subsection 495(1) for their authority to arrest.

The most important arrest power is contained in paragraph 495(1)(a). Under its terms, a police officer may arrest without warrant a person whom, "on reasonable grounds, he believes has committed or is about to commit an indictable offence."[48] This provision is essential to the police, who must usually form their grounds for arrest based on information supplied to them by the public. It allows an officer "to act on his belief, if based on reasonable and probable grounds."[49] The standard has a

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[44] *Criminal Code*, *supra* note 3, s. 494(1)(a). See *R. v. Cunningham* (1979), 49 C.C.C. (2d) 390 at 394 (Man. Co. Ct.) [*Cunningham*]; *Roberge v. R.*, [1983] 1 S.C.R. 312, 147 D.L.R. (3d) 493.

[45] The use of the term "criminal offence" means that the power extends to both indictable and summary conviction offences. See *Plested v. McLeod* (1910), 3 Sask. L.R. 374 at 378, 15 W.L.R. 533 (C.A.); *R. v. Johnson* (1924), 3 D.L.R. 470, 34 Man. L.R. 100, 42 C.C.C. 279 (C.A.).

[46] *Criminal Code*, *supra* note 3, s. 494(1)(b). "Fresh pursuit" requires that the pursuit be conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction. See *R. v. Macooh*, [1993] 25 S.C.R. 802 at 816-17, 105 D.L.R. (4th) 96 [*Macooh* cited to S.C.R.]. But see *R. v. Dean* (1996), 1 O.R. 592 at 595-96, 3 C.C.C. 228 (C.A.).

[47] *Criminal Code*, *supra* note 3, s. 494(2). See *Cunningham*, *supra* note 44 at 394.

[48] *Criminal Code*, *ibid.*, s. 495(1)(a). The provision begins by also indicating that a police officer may arrest without warrant "a person who has committed an indictable offence" (*ibid.*). This introductory language would appear to validate arrests, provided that guilt is subsequently established. See Law Reform Commission of Canada, *Working Paper 41*, *supra* note 4 at 48. These words, however, have been effectively read out of paragraph 495(1)(a). See *Storrey*, *supra* note 3 ("[what is now paragraph 495(1)(a)] makes it clear the police were required to have reasonable and probable grounds that [the accused] had committed the offence ... before they could arrest him" at 249).

[49] *R. v. Biron* (1975), [1976] 2 S.C.R. 56 at 72, 59 D.L.R. (3d) 409 [*Biron* cited to S.C.R.]. Prior to 1985, paragraph 495(1)(a) specified that an officer must have "reasonable *and probable* grounds" [emphasis added]. See *Bail Reform Act*, *infra* note 62, s. 450(1)(a). Following a recommendation by the Law Reform Commission of Canada, "probable" was removed. See *Criminal Code*, *supra* note 3, deleting the reference to "probable" in paragraphs 495(1)(a), 495(1)(c), and 495(2)(d). It has since

subjective and objective component. Not only must the arresting officer personally believe that he or she possesses the required grounds to arrest, those grounds must be objectively established in the sense that a reasonable person standing in the shoes of the officer would believe that there are reasonable and probable grounds to make an arrest.[50] Finally, the paragraph also licenses a proactive response so that a police officer can arrest an individual who has taken the preparatory steps towards committing a crime, without actually awaiting its commission.[51]

With respect to arrests for summary conviction offences, the key provision is paragraph 495(1)(b), which provides that a police officer may arrest without warrant "a person whom he finds committing a criminal offence."[52] Given the existence of paragraphs 494(1)(a) and 495(1)(a), this provision is redundant as it relates to indictable offences. Its sole function is to bestow a limited power on police officers to arrest individuals who are discovered committing, or apparently committing, summary conviction offences.[53] If a police officer does not witness the offence, then he or she must procure a warrant before carrying out an arrest.[54]

The final provision in the series is paragraph 495(1)(c), which authorizes a police officer to arrest if she or he has "reasonable grounds to believe that a warrant of arrest or committal" is outstanding within the "territorial jurisdiction in which the person is found."[55] The authority conferred under this provision does not depend upon actual possession of the warrant or knowledge of its contents. When acting under this paragraph, "the duty of the arresting officer is fully discharged by telling the arrested person that the reason for his arrest is the existence of an outstanding warrant ... "[56] This provision allows an officer who has the requisite grounds to arrest to obtain a warrant, and to have it registered on the Canadian Police Information Computer so that other officers encountering the subject can also effect an arrest.

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been held that "reasonableness comprehends a requirement of probability. The meaning of the section has not changed with the amendment" (*R. v. Smellie* (1994), 95 C.C.C. (3d) 9 at 17, 53 B.C.A.C. 202, leave to appeal to S.C.C. refused, 97 C.C.C. (3d) vi, 191 N.R. 396n).

[50] *Storrey*, *supra* note 3 at 250-51. See also *R. v. Feeney*, [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609 [*Feeney* cited to S.C.R.] ("[a]ny finding that the subjective test is not met will generally imply that the objective test is not met, unless the officer is to be considered to have an unreasonably high standard" at 40).

[51] See *R. v. Beaudette* (1957), 118 C.C.C. 295 (Ont. C.A.).

[52] *Criminal Code*, *supra* note 3, s. 495(1)(b).

[53] *Biron*, *supra* note 49 at 71-75.

[54] See Archibald, *supra* note 4 at 138; *R. v. Stevens* (1976), 18 N.S.R. (2d) 96 at 105, 20 A.P.R. 96, (C.A.).

[55] *Criminal Code*, *supra* note 3, s. 495(1)(c).

[56] *R. v. Gamracy* (1973), [1974] S.C.R. 640 at 643, 37 D.L.R. (3d) 405 (interpreting section 29 of the *Criminal Code*). But see *Charter*, *supra* note 1, s. 10(a) (guaranteeing on arrest or detention the right "to be informed promptly of the *reasons* therefor" [emphasis added]).

Lastly, there is the police power in subsection 31(1) of the *Criminal Code* to arrest any person found committing a breach of the peace or whom, on reasonable grounds, the officer believes is about to join in or renew a breach of the peace.[57] The Law Reform Commission of Canada recommended the elimination of this power because it is premised on an "exceedingly vague" standard.[58] It also gives rise to post-arrest confusion since there is no offence in the *Criminal Code* of "breaching the peace" like there was at common law. It is therefore unclear how long an individual can be held following such an arrest and what procedures, if any, can be carried out as an incident thereto.[59] Given that no charge or court proceedings follow, the extent to which police make recourse to this power is unknown.

Any discussion of the arrest powers in the *Criminal Code* would be incomplete absent a consideration of subsection 495(2). This section has been described as suffering from "bewildering complexity".[60] It was added to the *Criminal Code* in the early 1970s amidst concerns that police were exercising their arrest powers unnecessarily.[61] Parliament responded with the *Bail Reform Act*.[62] The principal purpose of the reforms was to minimize the unnecessary use of police arrest powers. Once a police officer decides that he or she has the required grounds to carry out an arrest, subsection 495(2) directs the officer not to arrest for less serious indictable offences, hybrid offences, and summary conviction offences if there are reasonable grounds to believe that an arrest is unnecessary to satisfy the "public interest".[63] In assessing the "public interest", an officer is directed to consider "all the circumstances", including the need to establish identity, secure or preserve evidence, or prevent the continuation of the offence or the

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[57] *Criminal Code*, *supra* note 3, s. 31(1).

[58] Law Reform Commission of Canada, *Working Paper 41*, *supra* note 4 at 62. But see Williams, "Breach of Peace", *supra* note 39 (a "breach of the peace" is said to include riots, unlawful assemblies, or simply fighting at 578). See also *R. v. Howell*, [1982] Q.B. 416 at 426, [1981] 3 All E.R. 383 (C.A.).

[59] See *R. v. Lefebvre* (1982), 1 C.C.C. (3d) 241 at 244, 8 W.C.B. 285 (B.C. Co. Ct.), aff'd (1984), 15 C.C.C. (3d) 503, 13 W.C.B. 125 (B.C.C.A.); *R. v. Januska* (1996), 106 C.C.C. (3d) 183, 30 W.C.B. (2d) 434 (Ont. Ct. J. (Gen. Div.)) [*Januska*].

[60] Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough, Ont.: Carswell, 2001) at 260 [Stuart, *Charter Justice*].

[61] See Martin L. Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) (arrests were preferred in 91 to 97 percent of the cases, despite the ability to simply summon at 9). See also *Report of the Canadian Committee on Corrections: Towards Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) at 108-15 (Chair: Roger Ouimet) [*Ouimet Report*].

[62] R.S.C. 1970 (2d Supp.), c. 2.

[63] See *Criminal Code*, *supra* note 3, ss. 495(2)(a) (referring to offences in section 553, e.g., theft or fraud), 495(2)(b) (hybrid offences), 495(2)(c) (summary conviction offences). See also s. 503(4) of the *Criminal Code* (which imposes an analogous obligation to release anyone who is arrested on the basis that there were reasonable grounds to believe they were about to commit an indictable offence, but where detention is no longer needed to prevent the commission of such an offence).

commission of some other crime.[64] An arrest is also permissible if there are reasonable grounds to believe that the person will fail to attend court in answer to the charge.[65] There is an ongoing obligation on the arresting officer to release the person from custody if the circumstances change[66] as well as an obligation upon the officer in charge of the station to reconsider these same factors once an accused is back at the station house.[67] Should the police officer choose not to arrest or to release, there are a number of less intrusive means by which to secure an individual's attendance in court.[68]

Although the relevant statutory provisions impose a legal obligation on police not to arrest when it is unnecessary to do so, in reality there are rarely ramifications for disregarding these provisions. Police decisions are deemed lawful for the purposes of an accused's trial.[69] This does not foreclose a civil suit for false imprisonment, but absent an admission that the police completely failed to consider their release obligations, success is very unlikely.[70] A police officer's assertion that the decision to arrest, or not to release, was based on principled rather than punitive considerations will be difficult to refute.[71] It is not surprising then that the Law Reform Commission of Canada concluded that these provisions almost run the obligation to release "into a charade."[72]

Although the statutory arrest powers have "a somewhat Byzantine complexity of form,"[73] two points should be remembered. First, for indictable offences, a police officer is authorized to make a warrantless arrest if she or he has reasonable and probable grounds to believe that an individual is responsible for a crime. Second, in the case of summary conviction offences, a police officer cannot arrest without a warrant unless he or she actually witnesses the crime being committed. But given that

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[64] *Ibid.*, s. 495(2)(d)(i)-(iii).

[65] *Ibid.*, s. 495(2)(e).

[66] *Ibid.*, ss. 497(1), 497(1.1).

[67] *Ibid.*, ss. 498(1), 498(1.1). The officer in charge has the added power to release for any indictable offence punishable by a maximum of not more than five years.

[68] An accused's attendance may be compelled through an appearance notice, a promise to appear, a summons, or a recognizance entered into before the officer in charge. The officer in charge may also require the accused to enter into an undertaking with conditions. See *ibid.*, ss. 496, 497(1), 498(1), 503(2), (2.1).

[69] *Ibid.*, ss. 495(3)(a), 497(3)(a), 498(3)(a). See also *R. v. Cayer* (1988), 66 C.R. (3d) 30, 28 O.A.C. 105 [*Cayer*]; *R. v. Adams* (1972), [1973] 2 W.W.R. 371, 21 C.R. (N.S.) 257 (Sask. C.A.); *R. v. McKibbon* (1973), 12 C.C.C. (2d) 66 (B.C.C.A.).

[70] See *Kucher v. Guasparini*, [1998] B.C.J. No. 582 (S.C.) (QL) (for a rare example of success). See also *Collins*, *supra* note 43 (to succeed the plaintiff must establish that the arresting officer "believed on reasonable grounds that the public interest, having regard to all the circumstances, could be satisfied without arresting [the plaintiff] " at 667).

[71] Archibald, *supra* note 4 at 143. See *e.g. Abbey (Guardian ad litem of) v. Dallin*, [1991] B.C.J. No. 108 (S.C.) (QL).

[72] Law Reform Commission of Canada, *Working Paper 41*, *supra* note 4 at 81.

[73] *Ibid.* at 62. The Commission recommended a substantial overhaul of these overlapping and cumbersome provisions.

this is unlikely, and given the fact that so few offences are strictly summary, the vast majority of arrests will be premised on the reasonable and probable grounds standard. It is this standard that effectively defines police arrest powers in Canada and that as a result provides the focus of much of the next section.

D. Risk of Honest Mistakes

The reasonable and probable grounds standard provides the threshold for triggering the police arrest power. Once crossed, state interests in effective law enforcement are permitted to predominate over the individual's liberty interests. It is largely assumed that "the public *is safeguarded* by the requirement ... that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt."[74] According to the Supreme Court, an "additional safeguard" is provided by the requirement that the arresting officer's grounds be objectively reasonable.[75] The reasonable and probable grounds standard, with its subjective and objective components, is essentially celebrated as an effective means for protecting the individual from unjustified arrest.[76]

The view that the standard itself provides effective protection is premised on the assumption that the police will only ever arrest when they have the required grounds. At the critical moment, however, it is the officer's judgment that determines the sufficiency of his or her grounds to arrest. In the field, a police officer is the ultimate arbiter of the evidence. The objective reasonableness of the grounds supporting an arrest only become relevant if the decision to arrest is subsequently challenged in court (for instance, at the accused's trial). As a result, the effectiveness of the reasonable and probable grounds standard as a "safeguard" really depends upon the extent to which it provides meaningful guidance to the police.

So far judicial attempts to define the contours of the reasonable and probable grounds standard have met with only limited success. The Supreme Court's best efforts have led to the placement of the standard along a spectrum. According to the Court, "reasonable and probable grounds" imports a standard of reasonable probability, which

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[74] *Dumbell*, *supra* note 3 at 329 [emphasis added]. See also *Storrey*, *supra* note 3 (quoting this passage from *Dumbell* with approval at 250).

[75] *Storrey*, *ibid.*

[76] This assumption is so strong that it has often been accepted as a justification for upholding further encroachments upon individual privacy and liberty interests subsequent to an arrest. See *Beare*, *supra* note 18 (fingerprinting held constitutional, partially because of the assumption that it is only undertaken once there are reasonable and probable grounds to arrest at 413); *Cloutier*, *supra* note 17 (constitutionality of searches incidental to arrest upheld on a similar basis at 185-86); *R. v. Morales*, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91 [*Morales* cited to S.C.R.] (upholding the constitutionality of placing the onus on the person arrested while on bail to demonstrate why they should be re-released, based on the assumption that there are reasonable and probable grounds to support the charge(s) upon which an individual is rearrested at 736).

entails something less than proof beyond a reasonable doubt or a prima facie case[77] but something more than mere possibility or suspicion.[78] Based on this approach, the standard is said to be met at "the point where credibly-based probability replaces suspicion."[79] Despite these efforts to instantiate the vagueness of the standard, however, it continues to remain a relatively inexact guide as to when an arrest can be undertaken. As Justice LaForest once lamented, it "comprises something more than mere surmise, but determining with any useful measure of precision what it means beyond that poses rather intractable problems both for the police and the courts."[80]

To date, the most concrete guidance from Canadian courts has come in the form of a few rather obvious admonishments to police. In deciding whether or not to arrest, the police have been told to investigate thoroughly, consider all available information, and disregard only information that they have good reason to believe is unreliable.[81] With few exceptions,[82] the courts have demonstrated a consistent reluctance to propose any rigid criteria as to what will constitute sufficient grounds for an arrest. The usual approach for the courts is to recite the facts involved in the case and then announce whether or not those particular facts constitute reasonable and probable grounds. This is not intended as a criticism. To the contrary, although an enumeration of relevant factors on some generalized level of abstraction is possible,[83] there is an undoubted cost for the certainty that such an approach might purchase.

The development of more rigid criteria may have the undesirable effect of denying police the flexibility they need to respond to the myriad of factual situations they confront in the field. The United States Supreme Court acknowledged this reality in

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[77] See *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166, 52 C.C.C. (3d) 193 [*Debot* cited to S.C.R.]. See also *Storrey*, *supra* note 3 at 250-51.

[78] *Baron v. Canada*, [1993] 1 S.C.R. 414 at 448, 99 D.L.R. (4th) 350.

[79] *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 167, [1984] 6 W.W.R. 577 [*Hunter* cited to S.C.R.].

[80] *R. v. Landry*, [1986] 1 S.C.R. 145 at 180, 26 D.L.R. (4th) 368, LaForest J., dissenting [*Landry* cited to S.C.R.].

[81] See *Chartier v. Quebec (A.G.)*, [1979] 2 S.C.R. 474 at 499, 104 D.L.R. (3d) 321 [*Chartier*]. See also *Storrey*, *supra* note 3 at 249-51; *Oniel v. Metropolitan Toronto Police Force* (2001), 195 D.L.R. (4th) 59 at 85 (Ont. C.A.); *R. v. Golub* (1997), 34 O.R. (3d) 743 at 751, 117 C.C.C. (3d) 193 (C.A.); *R. v. Hall* (1995), 39 C.R. (4th) 66 at 75, 79 O.A.C. 24; *R. v. Proulx* (1993), 81 C.C.C. (3d) 48 at 51, 54 Q.A.C. 241.

[82] See *Lewis*, *supra* note 30 ("[a]bsent confirmation of details other than [those] which describe innocent and commonplace conduct, information supplied by an untested, anonymous informant cannot, standing alone, provide reasonable grounds for an arrest ... " at 547). See also *R. v. Bennett* (1996), 108 C.C.C. (3d) 175 at 181, 185, 49 C.R. (4th) 206 (Qc. C.A.) [*Bennett*]. In addition, the odour of burnt marijuana alone has been held inadequate to justify an arrest. See *R. v. Polashek* (1999), 172 D.L.R. (4th) 350 at 358, 134 C.C.C. (3d) 187 (Ont. C.A.).

[83] For such an effort, see American Law Institute, *A Model Code of Pre-Arraignment Procedure* (Washington, D.C.: American Law Institute, 1975), ss. 120.1(2), 120.1(3). For an exhaustive list of the type of factors and information that may provide cause for an arrest, see Wayne R. LaFave, *Arrest: The Decision to Take a Suspect into Custody* (Boston: Little, Brown and Company, 1965) at 244-99.

dealing with the analogous "probable cause" standard under the Fourth Amendment.[84] The court indicated that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[85] This observation seems equally applicable to the Canadian standard. In the end, an assessment of whether or not there are adequate grounds for an arrest will depend on the particular facts with which a police officer is confronted in a specific case.

Police officers are very much on their own in making arrest decisions. In the field, the objective component of the reasonable and probable grounds standard is devoid of actual meaning. For all practical purposes, the task of deciding what "reasonable and probable grounds" means has been delegated to the officer on the street. Unfortunately, as the Royal Canadian Mounted Police Public Complaints Commission recently observed, officers "do not always distinguish evidence that creates a suspicion from evidence that constitutes reasonable grounds for believing that a person has committed a crime."[86] Even among well-trained officers acting with the best of intentions, mistakes in assessing the adequacy of the available evidence against this vague standard are inevitable. A review of the reported cases reveals that officers err in their assessment of the available evidence with relative regularity.[87]

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[84] *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317 (1983).

[85] *Ibid.* at 232. The Supreme Court of Canada has characterized the two standards as "identical". See *Hunter*, *supra* note 79.

[86] Royal Canadian Mounted Police Public Complaints Commission, *Annual Report, 1997-1998* (Ottawa: Minister of Public Works and Government Services Canada, 1999) at 14 (Chair: Shirley Heafey).

[87] The relative regularity of such arrests is reflected by the number of reported cases. Note, however, that if evidence is not obtained following such an arrest, or a civil suit is not subsequently commenced, such cases rarely receive judicial scrutiny. Of those that do, even fewer still become the subject of a written opinion by a court. See *R. v. Dix* (2002), 96 C.R.R. (2d) 1 (Alta. Q.B.); *R. v. Bowerbank*, [2001] O.J. No. 755 (Sup. Ct.) (QL); *R. v. Hummel*, [2001] Y.J. No. 24 (S.C.) (QL); *R. v. Ramirez*, [2001] A.J. No. 489 (Prov. Ct.) (QL); *R. v. Chau* (2000), 150 C.C.C. (3d) 504 (Ont. C.A.); *R. v. Pereira*, [2000] O.J. No. 3741 (Ct. J.) (QL); *R. v. Capistrano* (2000), 149 Man. R. (2d) 42, 47 W.C.B. (2d) 61 (Q.B.) [*Capistrano* cited to Man. R.]; *R. v. Pimental* (2000), 145 Man. R. (2d) 295, [2001] 2 W.W.R. 653 (C.A.) [*Pimental*]; *R. v. Bercier*, [2000] M.J. No. 574 (Prov. Ct.) (QL); *R. v. Leger*, [2000] B.C.J. No. 2695 (Prov. Ct.) (QL); *R. v. Woods* (2000), 48 W.C.B. (2d) 144 (Alta. Q.B.); *R. v. Dupuis* (1999), 42 W.C.B. (2d) 389 (Alta. Q.B.); *R. v. Nguyen*, [1999] B.C.J. No. 12 (S.C.) (QL); *R. v. St. Denis*, [1999] A.J. No. 420 (Prov. Ct.) (QL); *Klein v. Seiferling*, [1999] 10 W.W.R. 554 (Sask. Q.B.); *Thornton v. Hamilton-Wentworth (Regional Municipality of) Police Force* (1999), 173 D.L.R. (4th) 568 (Ont. Ct. J. (Gen. Div.)); *MacCormack v. Halifax (City of) Police Department*, [1999] N.S.J. No. 463 (S.C.) (QL); *R. v. Perzan* (1998), 58 C.R.R. (2d) 80 (Ont. Ct. J. (Gen. Div.)); *R. v. Payne*, [1998] B.C.J. No. 1372 (S.C.) (QL); *R. v. Lauten*, [1998] B.C.J. No. 226 (S.C.) (QL); *R. v. Yousif*, [1998] O.J. No. 6409 (Prov. Div.); *Feeney*, *supra* note 50; *R. v. McMahon*, [1997] O.J. No. 4858 (Prov. Div.) (QL); *R. v. J.A.B.*, [1997] A.J. No. 521 (Prov. Ct.) (QL); *R. v. Farquharson*, [1997] O.J. No. 3777 (C.A.) (QL); *R. v. Hilts* (1997), 203 A.R. 161 (Prov. Ct.); *Bennett*, *supra* note 82; *Januska*,

A closely related problem is the potential for police error in determining the substantive requirements of the crime for which they are arresting. Police officers are not lawyers, and as a result they may make honest mistakes about the legal elements of the crime that they believe an individual has committed. The risk of such mistakes is greatest when the offence involved has been the subject of judicial treatment that explains or refines the meaning of the statutory language or that affects the overall validity of the offence for which an arrest is made. In short, the police may arrest for conduct that they believe constitutes an offence, when in actuality no crime has been committed at all.[88] Honest mistakes aside, there is also the very real danger that the police may sometimes intentionally misuse, or even abuse, their arrest powers.

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supra note 59; *R. v. Lee*, [1996] O.J. No. 2144 (Gen. Div.) (QL); *R. v. Rose* (1996), 30 W.C.B. (2d) 481 (Prov. Div.); *R. v. K.W.*, [1995] O.J. No. 2802 (Prov. Div.) (QL); *Swansburg v. Royal Canadian Mounted Police* (1994), 141 D.L.R. (4th) 94 (B.C.C.A.); *R. v. Thompson*, [1996] O.J. No. 1501 (Prov. Div.) (QL); *Ward v. Maracle* (1995), 24 O.R. (3d) 148 (Gen. Div.); *R. v. C.(T.A.)* (1994), 23 C.R.R. (2d) 365 (B.C.C.A.); *Laroche c. Trois-Rivieres (Ville de)*, [1994] R.R.A. 635 (C.Q.); *Cormier v. Saint John (City of)* (1994), 153 N.B.R. (2d) 293 (C.A.); *R. v. Charley* (1993), 22 C.R. (4th) 297 (Ont. C.A.); *R. v. Brunet* (1993), 21 W.C.B. (2d) 114 (Ont. Prov. Ct.); *R. v. Klimchuk* (1991), 67 C.C.C. (3d) 385 (B.C.C.A.); *R. v. Porquez* (1991), 114 A.R. 1, 12 W.C.B. (2d) 196 (C.A.), leave to appeal to S.C.C. refused, (1991) 127 A.R. 392n, 137 N.R. 160n [*Porquez* cited to A.R.]; *R. v. Evans* (1991), 10 C.R. (4th) 192 (Ont. Ct. J. (Prov. Div.)); *R. v. Daniels* (1991), 110 N.S.R. (2d) 368 (Co. Ct.); *R. v. Cayer*, [1991] B.C.J. No. 3629 (S.C.) (QL); *R. v. Lamy* (1991), 77 Man. R. (2d) 221 (Q.B.); *Perreault c. Québec (P.G.)*, [1991] R.R.A. 825 (Qc. Sup. Ct.); *R. v. Anderson* (1990), 84 Sask. R. 299 (Q.B.); *Schell v. Truba* (1990), 89 Sask. R. 137 (C.A.); *R. v. Seguin* (1990), 73 O.R. (2d) 587 (Dist. Ct.); *Foley v. Shannahan* (1990), 82 Nfld. & P.E.I.R. 271 (Nfld. S.C.); *R. v. Lewis* (1989), 8 W.C.B. (2d) 514 (Man. Prov. Ct.); *Indekh v. Bank of Montreal*, [1988] B.C.J. No. 474 (Co. Ct.) (QL); *Rooney v. Canada (Royal Canadian Mounted Police)*, [1988] B.C.J. No. 2101 (S.C.) (QL); *R. v. Frost* (1988), 53 Man. R. (2d) 180 (Q.B.); *R. v. Spence* (1988), 51 Man. R. (2d) 142, [1988] 3 W.W.R. 180 (C.A.) [*Spence*]; *R. v. Francis* (1988), 212 A.P.R. 211 (N.B. Prov. Ct.); *R. v. Paschal* (1986), 74 N.S.R. (2d) 184 (S.C.); *R. v. Duguay* (1985), 50 O.R. (2d) 375, 18 D.L.R. (4th) 32 (C.A.), aff'd [1989] 1 S.C.R. 93, 56 D.L.R. (4th) 46 [*Duguay* cited to O.R.]; *R. v. Zevallos* (1985), 19 C.R.R. 178 (Ont. Dist. Ct.); *Buck v. Canada*, [1985] F.C.J. No. 1040 (T.D.) (QL), var'd [1986] F.C.J. No. 729 (A.D.) (QL); *Holdbak v. Biagioni*, [1984] B.C.J. No. 978 (S.C.) (QL); *R. v. McCoy* (1984), 17 C.C.C. (3d) 114 (Ont. Prov. Ct. (Crim. Div.)); *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146 (C.A.); *R. v. Stonechild* (1981), 61 C.C.C. (2d) 251 (Man. Co. Ct.); *Chartier*, *supra* note 81; *R. v. Flemming*, [1979] 5 W.W.R. 442 (Sask. Q.B.); *Willan v. R.* (1978), 20 O.R. (2d) 587 (Co. Ct.); *Crossfield v. Canada*, [1977] F.C.J. No. 9 (T.D.) (QL); *R. v. Poitras* (1975), 24 C.C.C. (2d) 201 (Sask. C.A.); *Koechlin*, *supra* note 11.

[88] Paul C. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer" in Allen M. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 416 at 428. See *e.g. Frey v. Fedoruk*, [1950] S.C.R. 517, [1950] 3 D.L.R. 513; *Bahner v. Marwest Hotel Co. Ltd.* (1970), 12 D.L.R. (3d) 646, 75 W.W.R. 729 (B.C.C.A.); *R. v. Potvin* (1973), 15 C.C.C. (2d) 85 (Qc. C.A.); *Carpenter v. MacDonald* (1979), 21 O.R. (2d) 165 (Dist. Ct.), aff'd 27 O.R. (2d) 730 (C.A.); *R. v. Dunlop* (1979), 28 N.B.R. (2d) 387, (1980) 63 A.P.R. 387 (Co. Ct.); *R. v. Clymore* (1992), 74 C.C.C. (3d) 217 at 262, 16 W.C.B. (2d) 538 (B.C.S.C.); *R. v. Houle* (1985), 66 A.R. 156, [1986] 2 W.W.R. 328 (C.A.). For a recent example of an arrest based on an offence previously declared unconstitutional, see *Lucas v. Toronto Police Service Board* (2000), 51 O.R. (3d) 783, 78 C.R.R. (2d) 183 (S.C.).

E. Potential for Misuse and Abuse

During the last hundred years, Canadian police, like their American counterparts, have increasingly come to see themselves as "crime fighters" engaged in a war against crime and those who perpetrate it.[89] In actuality, of course, law enforcement makes up only a small fraction of what police officers do.[90] Although this crime fighting self-image is more rhetoric than reality, its potential influence on the exercise of police discretion should not be discounted. For some officers, it translates into an excessive zeal in law enforcement practices. If the police see themselves as combatants engaged in a competitive endeavour, they will no doubt be more inclined to ignore the formal limits on their power in order to achieve their perceived objective—catching criminals.[91]

This self-perception may cause some rogue officers to use the arrest power as a means of dispensing their own form of summary justice. For instance, some officers may consciously choose to arrest individuals whom they "know" to be criminals, even though the grounds for an arrest may be appreciably thin. Persons with prior criminal histories are the most likely to be subject to this type of unjustified arrest. These are the sorts of individuals whom an officer might view as deserving of harassment because they are "undesirable but not open to effective prosecution."[92]

No doubt this competitive crime-fighting self-image may also explain the periodic use of pre-textual arrests by Canadian police. The practice involves taking an individual

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[89] See Greg Marquis, "Power from the Street: The Canadian Municipal Police" in R.C. Macleod & David Schneiderman, eds., *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994) 24 at 31. See also Samuel Walker, *The Police in America: An Introduction*, 2d ed. (New York: McGraw-Hill, 1992) (noting the prevalence of a "crime fighting" self-image on the part of American police and the fact that police, along with the media, actively perpetuate it at 61-63).

[90] Walker, *ibid.* (noting that less than one third of police work is devoted to law enforcement or crime fighting, while the remainder is mostly spent performing peacekeeping or order maintenance functions at 65-67, 112).

[91] See Herman Goldstein, *Policing a Free Society* (Cambridge, Mass.: Ballinger, 1977) (describing how a "good guy-bad guy" self-perception can fuel a "hunt" mentality on the part of law enforcement at 30).

[92] Weiler, *supra* note 88 (making this observation in the Canadian context at 434). See also Kenneth Culp Davis, *Police Discretion* (St. Paul, Minn.: West Publishing, 1975) (describing a similar mind set on the part of some Chicago police officers who boasted about abusing their arrest powers against individuals who they believed guilty of more serious crimes but where they lacked evidence sufficient to prove the crime suspected at 16-20) [Davis, *Police Discretion*]; James G. Fisk, *The Police Officer's Exercise of Discretion in the Decision to Arrest: Relationship to Organizational and Societal Values* (Los Angeles: Institute of Government and Public Affairs, University of California, Los Angeles, 1974) (the author, a former deputy chief of police of the Los Angeles Police Department, notes that these sorts of unjustified arrests are "sometimes consciously chosen to impose a penalty upon the arrestee, sometimes out of frustration" at 38).

suspected of an offence into custody on the pretext of a less serious charge in the hope of collecting evidence about a more serious offence, usually in the form of a confession.[93] On occasion, the police may actually possess grounds to arrest the suspect on the less serious charge.[94] In other cases, however, a charge will be selected because it seems the most capable of surviving a subsequent challenge.[95] In either case, Canadian courts have deemed the practice to be inherently unfair. Since the enactment of the *Charter*, pretextual arrests have been held to be a violation of subsection 10(a), which guarantees the right upon arrest or detention to be promptly informed of the "reasons therefor".[96] Despite expressions of judicial disapprobation, the number of recent cases suggests that this investigative technique is far from extinct.

As the police role shifts from that of investigators fulfilling a law enforcement function to that of peacekeepers responsible for maintaining order on the streets, the potential for the misuse of arrest powers persists.[97] In urban centres throughout Canada, the police are charged with the obligation of managing the tensions generated by those who are increasingly competing for the use of public spaces, including the homeless, the chronically addicted, and the mentally ill. Historically, the police were able to control

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[93] See Hon. Roger E. Salhany, *The Police Manual of Arrest, Seizure & Interrogation*, 6th ed. (Toronto: Carswell, 1994) at 74.

[94] See *R. v. Greffe*, [1990] 1 S.C.R. 755, [1990] 3 W.W.R. 577 (arrest on outstanding traffic warrants, used as a pretext to investigate suspected drug importation).

[95] See *e.g. R. v. Nicely* (2000), 79 C.R.R. (2d) 24, 48 W.C.B. (2d) 276 (Ont. C.A.) (immigration arrest used as a pretext to search for drugs); *R. v. Brass* (2000), 198 Sask. R. 302, 48 W.C.B. (2d) 192 (Q.B.) (arrest for public intoxication used as a pretext to further robbery investigation); *R. v. Young* (1993), 12 O.R. (3d) 529, 79 C.C.C. (3d) 559 (C.A.) (arrest for obstructing a police officer used as a pretext to further narcotics investigation); *R. v. Longman*, [1993] O.J. No. 4109 (Gen. Div.) (QL) (arrest for assault used as a pretext to investigate robbery); *R. v. W.(W.R.)* (1992), 75 C.C.C. (3d) 525, 15 C.R. (4th) 383 (B.C.C.A.) (arrest for assault used as pretext to further homicide investigation); *Spence*, *supra* note 87 (arrest for possession of goods obtained by crime used as a pretext to investigate a serious assault).

[96] *Charter*, *supra* note 1, s. 10(a). See *R. v. Dick*, [1947] O.R. 105, [1947] 2 D.L.R. 213 (C.A.) (using arrest on a charge of vagrancy to facilitate the questioning of an accused suspected of murder is characterized as an "abuse of process of the criminal law" at 124), aff'd [1947] S.C.R. 211, [1948] 1 D.L.R. 687. Under section 10(a) of the *Charter*, the Supreme Court has held that the police are obligated to inform an individual of each offence for which he or she is being detained or arrested. See *R. v. Borden*, [1994] 3 S.C.R. 145 at 166, 119 D.L.R. (4th) 74.

[97] See Herman Goldstein, "Confronting the Complexity of the Police Function" in Lloyd E. Ohlin & Frank J. Remington, *Discretion in Criminal Justice: The Tension Between Individualization and Uniformity* (Albany: State University of New York Press, 1993) 23 (noting that efforts to maintain street order, especially in light of recent efforts in some American cities to "take back the streets", have often resulted in groundless arrests for minor offences that the police do not intend to pursue formally at 49-52).

these groups through an arrest on a charge of vagrancy.[98] But concerns about abuses in enforcing the vagrancy offence led to its repeal by Parliament in 1972.[99]

Today, although legislation in each province enables police to arrest those who are found to be intoxicated in public places,[100] in most jurisdictions there is little that can *legally* be done to respond to complaints regarding other street-level nuisances, such as aggressive panhandling or windshield squeegeeing at city intersections.[101] It would be somewhat naive to assume, however, that because they lack formal authority, the police simply forego taking the steps they consider necessary to combat perceived nuisances. The reality is that much coercion and control takes place on an informal level through orders of legally dubious quality, directing individuals to move along or to desist from behaviour that an officer considers undesirable.[102] Few of these encounters culminate in an arrest, given that most people will quite sensibly acquiesce to police requests. In those rare cases where an individual refuses to comply, an arrest often results. As one former police officer observed:

> Policemen will admit to each other that many arrests are made because a suspect "flunks the attitude test." Most frequently this has reference to a situation where, except for the attitude and verbal behaviour of a suspect, he would not have been arrested. The personality conflict becomes the pivotal fact in decision making. Officers have described ... their successful, deliberate efforts to discipline themselves so that their decision making is not so influenced. Others have described the emotional attrition that builds up tensions

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[98] See *Criminal Code*, S.C. 1953-54, c. 51, s. 164(1)(a) (the language of the offence was as follows: "not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in a place where he is found").

[99] See *Criminal Law Amendment Act, 1972*, S.C. 1972, c. 13, s. 12(1). But remnants of the original provisions remain. See *Criminal Code*, *supra* note 3, s. 179(1). But see *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R (4th) 348 (holding section 179(1)(b) unconstitutional). See also *House of Commons Debates*, vol. 6 (11 June 1971) (Hon. Lucien Lamoureux) (the MP who introduced the bill responsible for eliminating the vagrancy offence acknowledges that there had been "selective and discriminatory enforcement" and that the provision had proven "abusive in application" at 6646-47).

[100] See *e.g. Gaming and Liquor Act*, R.S.A. 2000, c. G-1, s. 115; *Liquor Licence Act*, R.S.O. 1990, c. L.19, ss. 31(4), 31(5).

[101] Both are activities that increased in Canadian cities throughout the 1980s and 1990s. Only a handful of municipalities responded with by-laws intended to limit or ban such behaviour. See Arthur Schafer, *Down and Out in Winnipeg and Toronto: The Ethics of Legislating Against Panhandling* (Ottawa: Caledon Institute of Social Policy, 1998) at 3. See also *Safe Streets Act*, S.O. 1999, c. 8 (the Ontario Government's response).

[102] See George L. Kelling & Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York: Free Press, 1996) at 167. Kelling and Coles note:

> [W]hen police are not provided with explicit authority to deal effectively with the problems they encounter ... they often unwittingly become dirty workers, furtively 'doing what has to be done' through the exercise of their discretion. This is often the case when it comes to controlling or restricting disorderly behaviors.

> incrementally to a breaking point. They report that emotions ebb and flow so that their behaviour is not entirely predictable.
>
> Most persons can retreat from, or avoid in the first place, situations that ... test their ability to make decisions uninfluenced by such things as emotions ... But policemen cannot avoid many of these stressful confrontations.[103]

Unjustified arrests of this sort can be cloaked by the laying of charges for relatively inexact offences, like obstructing a police officer or causing a disturbance.[104] As one study in the early eighties confirmed, Canadian police are quite capable of using these sorts of charges as an "ordering device", especially against those on the margins of society.[105]

Arguably no group is more marginalized in Canadian society, and as vulnerable to unjustified arrest, as the mentally ill. In the last twenty-five years, changes in civil commitment procedures, combined with shortages in mental health resources, have pushed the police into a frontline role for the social control of the mentally ill.[106] Acutely aware of the deficiencies within the health care system—such as long delays in hospital emergency rooms, complicated admission procedures, and quite often, re-release of problematic individuals within a short period—[107] the police often prefer to deal with the mentally ill by invoking the immediate response provided by an arrest and criminal charge. An arrest is perceived by police as "a much more rapid, efficient route toward person-management and one more closely conforming with their role as

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[103] Fisk, *supra* note 92 at 34.

[104] See *Criminal Code*, *supra* note 3, ss. 129(a) ("wilfully obstructs a ... peace officer in the execution of his duty"), 175(1)(a) (causing "a disturbance in or near a public place"). For some examples of individuals being arrested for these offences in circumstances where they had lawfully refused police requests or challenged police authority, see *R. v. Morris* (2000), 269 A.R. 117, 47 W.C.B. (2d) 166 (Prov. Ct.); *R. v. Terrigno* (1995), 175 A.R. 100, 101 C.C.C. (3d) 346 (Prov. Ct.); *R. v. Sharma*, [1993] 1 S.C.R. 650, 100 D.L.R. (4th) 167; *Hewer v. Paquette*, [1990] B.C.J. No. 1549 (S.C.) (QL); *R. v. Dale* (1989), 69 C.R. (3d) 74, 6 W.C.B. (2d) 277 (Ont. Dist. Ct.); *R. v. B.(C.)* (1988), 90 A.R. 200, 5 W.C.B. (2d) 44 (Prov. Ct. (Youth Div.)); *Collings v. R.* (1983), 7 C.R.R. 284, 10 W.C.B. 385 (Ont. Dist. Ct.); *R. v. Guthrie* (1982), 39 A.R. 435, [1982] 5 W.W.R. 385 (C.A.); *Sandison v. Rybiak* (1973), 1 O.R. (2d) 74, 39 D.L.R. (3d) 366 (H.C.J.); *R. v. Eyre* (1972), [1973] 2 W.W.R. 656, 10 C.C.C. (2d) 236 (B.C.S.C.).

[105] See Richard V. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982) at 17, 160, 200-201 [Ericson, *Reproducing Order*].

[106] Simon Davis, "Assessing the 'Criminalization' of the Mentally Ill in Canada" (1992) 37 Canadian Journal of Psychiatry 532.

[107] See Danielle Laberge & Daphné Morin, "The Overuse of Criminal Justice Dispositions: Failure of Diversionary Policies in the Management of Mental Health Problems" (1995) 18 Int'l J.L. & Psychiatry 389 (discussing the Canadian experience at 393, 396, 401-405).

police officers."[108] This creates a real risk of pre-textual arrests and charges as a device to control, and possibly facilitate treatment for, the mentally ill.[109]

Any effort to catalogue the potential for abuse of police arrest powers would be incomplete without some mention of the possible influence of race. Over the last decade the existence of racial discrimination within the Canadian criminal justice system has received official recognition, initially through the findings of government commissions and inquiries, and later in the opinions of Canadian courts.[110] In the case of Aboriginal people, a number of studies identify the existence of widespread racism resulting in systemic discrimination in the criminal justice system.[111] Similarly, the *Ontario Report on Systemic Racism* shows that blacks are subject to discriminatory treatment at several key stages of the criminal process.[112] According to Roberts and

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[108] *Ibid.* at 403.

[109] See E. Glenn Schellenberg *et al.*, "A Review of Arrests Among Psychiatric Patients" (1992) 15 Int'l J.L. & Psychiatry 251 at 262-63. For a classic example, see *Williams v. Webb*, [1961] O.R. 353, 27 D.L.R. (2d) 465 (C.A.) (a malicious prosecution suit in which the police readily admitted to using a groundless vagrancy charge to facilitate treatment). The fact that this is one of few reported cases may stem from the court's refusal to find malice given that the officer acted "to benefit, not to harm or injure the appellant and he had no ulterior motive of personal gain or advantage or spite or ill-will" (*ibid.* at 364). But see *Proulx v. Quebec (A.G.)*, [2001] 3 S.C.R. 9, 206 D.L.R. (4th) 1, 2001 SCC 66 [*Proulx*].

[110] See *R. v. Williams*, [1998] 1 S.C.R. 1128 at 1158, 159 D.L.R. (2d) 493; *R. v. Gladue*, [1999] 1 S.C.R. 688 at 721, 171 D.L.R. (4th) 385 (acknowledging existence of "widespread racism" and "systemic discrimination" against Aboriginals in the criminal justice system); *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 (acknowledging "widespread and systemic discrimination against black and aboriginal people" at 508). See also *R. v. Parks* (1993), 15 O.R. (3d) 324, 84 C.C.C. (3d) 353 (C.A.) (acknowledging "anti-black racism" at 342). See further *R. v. Brown*, [2003] O.J. No. 1251 at paras. 7-9 (C.A.) (QL); *R. v. H.(C.R.)*, 2003 MBCA 38 at para. 49 (acknowledging the potential for "racial profiling" in Canada).

[111] See Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) at 33; Royal Commission on the Donald Marshall, Jr. Prosecution, *Findings and Recommendations*, vol. 1 (Sydney: Province of Nova Scotia, 1989) at 162 [*Marshall Inquiry*]. See also Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 (Winnipeg: Queen's Printer, 1991) at 96-113 (Chair: C.J. T. Alexander Hickman) [*Manitoba Report on Aboriginal Justice*]; *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta: Summary Report*, vol. 2 (Edmonton: Task Force, 1991) at 2-5, 2-46 to 2-51 (Chair: Mr. Justice Robert Allan Cawsey) [*Indian and Metis of Alberta*].

[112] See *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995) (Co-chairs: Margaret Gittens & David P. Cole) [*Ontario Report on Systemic Racism*].

Doob, "Common to the research of Aboriginals and blacks is the finding that discrimination effects are probably strongest at the policing stage."[113]

The official studies confirm what anecdotal evidence has long suggested, which is that members of the Aboriginal and black communities are overpoliced. For example, there are findings that both Aboriginal and black people are stopped and questioned by police at higher rates than members of other racial groups.[114] In addition, the *Ontario Report on Systemic Racism* provides evidence of racial discrimination in police release decisions following arrest. The study compares cases involving white and black accused persons (with comparable criminal records and personal circumstances) charged with the same offences. The comparison reveals that on average white accused persons (twenty-nine percent) are significantly more likely than black accused persons (eighteen percent) to be released by police.[115] In drug cases, the disparity increases considerably: the police released sixty percent of white accused persons in the study, as compared to only thirty percent of black accused persons.[116] The results of the study lead its authors to the "inescapable" conclusion that the difference in release rates is the product of racial bias.[117]

In contrast to post-arrest release decisions by police, the potential influence of race on the initial judgment to arrest is much more difficult to quantify. No doubt some police officers hold overtly racist views that may lead them to abuse their arrest powers. Much more likely, however, is the risk that many more police officers subconsciously operate on the basis of stereotypical assumptions regarding visible minorities. An officer's assessment of her or his grounds for an arrest may be partially skewed by a belief that certain visible minorities are more likely to commit crimes.[118]

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[113] Julian V. Roberts & Anthony N. Doob, "Race, Ethnicity and Criminal Justice in Canada" in Michael Tonry, ed., *Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives*, vol. 21 (Chicago: University of Chicago Press, 1997) 469 at 519.

[114] See *Aboriginal Justice Inquiry of Manitoba*, *supra* note 111 at 595; *Indian and Metis of Alberta*, *supra* note 111 at 2-6, 2-48 to 2-49. Both reports deal with police stops involving Aboriginals. See also *Ontario Report on Systemic Racism*, *supra* note 112 (detailing a higher rate of police stops involving black males at 349-60). See also Scot Wortley, "The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice" (Paper presented at the 48th Annual Conference of the American Society of Criminology, Chicago, November, 1997) Criminol. [forthcoming].

[115] *Ontario Report on Systemic Racism*, *ibid.* at 123.

[116] *Ibid.* at 125.

[117] *Ibid.* at 146. See also Jim Rankin *et al.*, "Singled Out" *Toronto Star* (19 October 2002), online: Toronto Star <http://www.thestar.com/static/archives/search.html> (coming to a similar conclusion after studying Toronto Police arrest records involving charges of simple drug possession from 1996 to 2002).

[118] See Roberts & Doob, *supra* note 113 (citing a 1995 poll of Canadians that revealed that 45 percent of respondents believed there was a link between ethnicity and crime—of this group, two-thirds identified blacks as the group most likely to be involved in crime at 485).

In addition, as was noted in the *Ontario Report on Systemic Racism*, the decision to arrest

> may be influenced by social constructions of black and other racialized people as more likely than white people to warrant detention before trial.
>
> Exercise of the arrest power is highly discretionary and, except when the police obtain prior authorization in the form of a warrant, it is difficult to scrutinize. ... [T]his discretion and low visibility make the arrest power open to many types of abuse, including discriminatory treatment.[119]

This conclusion is not entirely surprising. If racism can infect the exercise of police discretion in other contexts, there is no reason to think that arrests are somehow immune from its toxic influence.

To this point, we have focussed on the fallibility of police arrest decisions. While Canadian courts assume that the "reasonable and probable grounds" standard provides an effective safeguard against unjustified arrests, in reality, this vague standard may actually contribute to police error. In addition, there is a real risk that the police may periodically misuse or even abuse their arrest powers. Unfortunately, in any system that vests individual police officers with the authority to take suspects into custody, unjustified arrests are somewhat inevitable. The main problem with the current Canadian regime is not an unusually high risk of unfounded arrests, but the low visibility of police arrest decisions. As the next section will illustrate, existing procedures do not facilitate timely and meaningful review of police arrest decisions. The failing inherent in current intake procedures is that unjustified arrests may evade prompt detection and, in the worst cases, even result in a period of pretrial detention.

II. The Low Visibility of Unjustified Arrests

A. *Limits of Formal Initiation*

Once arrested, a person who is not released by police must be taken before a justice "without unreasonable delay".[120] Delays occasioned to secure or preserve evidence are not "unreasonable" due to provisions in the *Criminal Code* specifically authorizing the police to hold those arrested for such purposes.[121] The first court appearance may be postponed so that the police can fingerprint and photograph,

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[119] *Supra* note 112 at 147. See also *Manitoba Report on Aboriginal Justice*, *supra* note 111 ("many Aboriginal people are arrested and held in custody when a white person in the same circumstances either might not be arrested at all, or might not be held" at 595); Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice* (Report 34) (Ottawa: Law Reform Commission of Canada, 1991) (concluding that overpolicing of Aboriginals can lead to the laying of unjustified charges at 47).

[120] *Criminal Code*, *supra* note 3, s. 503(1)(a).

[121] *Ibid.*, ss. 495(2)(d)(ii), 497(1.1)(a)(ii), 498(1.1)(a)(ii).

conduct an identification line-up, or carry out an interrogation.[122] The *Criminal Code*, however, imposes a twenty-four-hour time limit on this type of post-arrest detention. If an accused is not released by police or brought before a justice within that period, the detention will become unlawful, which could potentially affect the admissibility of any evidence acquired.[123]

During the interval between arrest and the first court appearance, the charge will formally be laid. An "informant", usually a police officer assigned to court duties, will swear an "information" before a justice. The information is the formal charging document. It sets out the essential ingredients of the charge, like the time, place, and nature of the offence alleged. This *ex parte* procedure requires that the informant make a sworn declaration that she or he has "personal knowledge" or "believes on reasonable grounds" that the person arrested committed the offence specified.[124] The informant's basis for this sworn assertion may simply come from reading a report or synopsis prepared by the arresting officer.[125] There is no obligation on the informant to appraise the justice of the grounds supporting a charge. Rather, the *Criminal Code* mandates that the "justice shall receive the information."[126] This means that, absent some facial defect, the justice must complete this "ministerial" function and receive the charge. There is no discretion to refuse it.[127] The swearing of the information is therefore largely a pro forma exercise—it will not serve to expose or remedy an arrest in the absence of the legally required grounds.

Before moving forward, it is worth noting the ironic implications of the present *Criminal Code* intake procedures. The current statutory scheme actually provides

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[122] See *Storrey*, *supra* note 3 (18 hour delay to conduct line-up was not unreasonable at 252-58); *R. v. Fayant* (1983), 22 Man. R. (2d) 311, 6 C.C.C. (3d) 507 (C.A.) (14 hour delay, during which accused gave a statement, was reasonable at 314-16).

[123] *Criminal Code*, *supra* note 3, s. 503(1)(a). See *R. v. Koszulap* (1974), 20 C.C.C. (2d) 193, 27 C.R. (N.S.) 226 (Ont. C.A.) (taken into account in assessing voluntariness of statement at 200-202); *R. v. Simpson* (1994), 117 Nfld. & P.E.I.R. 110, 88 C.C.C. (3d) 377 (Nfld. C.A.), aff'd in part & rev'd in part [1995] 1 S.C.R. 449, 127 Nfld. & P.E.I.R. 171 (48 hour delay leads to a finding that section 9 of the *Charter* was violated and stay was ultimately ordered) [*Simpson* (Nfld. C.A.)].

[124] See *Criminal Code*, *ibid.*, s. 504, Form 2. See also *R. v. Kamperman* (1981), 48 N.S.R. (2d) 317, 63 C.C.C. (2d) 531 (S.C. (T.D.)).

[125] *R. v. Peavoy* (1974), 15 C.C.C. (2d) 97 at 105-106 (Ont. H.C.J.). But a complete absence of knowledge on the part of the informant does not affect the validity of the information. Nor can the information be attacked collaterally on this basis at the preliminary inquiry or trial. The only potential redress is a motion before the original justice or by extraordinary remedy. See *R. v. Whitmore* (1987), 41 C.C.C. (3d) 555 at 566, 1 W.C.B. (2d) 384 (Ont. H.C.J.), aff'd (1989), 51 C.C.C. (3d) 294, 35 O.A.C. 373 [*Whitmore* cited to C.C.C.]. But see *R. v. Jones* (1971), 1 Nfld. & P.E.I.R. 394, 3 C.C.C. (2d) 25 (P.E.I.S.C.); *R. v. Kamperman* (1982), 48 N.S.R. (2d) 317, 63 C.C.C. (2d) 531 (S.C. (T.D.)) (holding such an information to be null).

[126] *Supra* note 3, s. 504.

[127] See *Whitmore*, *supra* note 125 at 562-63; *R. v. Jean Talon Fashion Center Inc.* (1975), 56 D.L.R. (3d) 296 at 300, 22 C.C.C. (2d) 223 (Qc. S.C.).

greater procedural protection for those charged with an offence whom the police choose not to arrest or release. If the police forego an arrest in favour of a summons or some other intake process, the procedure for the laying of an information remains the same. However, the justice receiving the information is required to play a "judicial" role in deciding whether or not to issue a summons or to confirm the process previously issued by police.[128] In either case, an in camera pre-inquiry must be conducted, at which time the justice must hear and consider *ex parte* the allegations of the informant and, if considered necessary, the evidence of the witnesses. According to the relevant *Criminal Code* provisions, the process should be issued or confirmed if the justice "considers that a case for so doing is made out."[129] This language has been held to require a determination that "there is disclosed by the evidence a prima facie case of the offences alleged."[130] If this standard is not met, a summons will be refused, or in those cases where the police have already issued the process, it will be cancelled and the individual involved will be notified not to attend court.[131]

At least in theory, those who do *not* face the prospect of restrictive bail conditions or pretrial detention are assured that, before being required to attend court in answer to a criminal charge, an independent judicial officer will have passed upon the adequacy of the grounds supporting the allegations.[132] In contrast, under current intake procedures, those who are arrested and held by police do not receive the benefit of a pre-inquiry. No doubt the rationale for this difference is that those who are held by police must be taken before a justice within twenty-four hours for a bail hearing.

B. Limits of Bail

Once an individual held by police is before the court, along with the sworn information, the *Criminal Code* mandates that the presiding justice order his or her

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[128] See *Whitmore*, *ibid.* at 562; *Re Bahinipaty and The Queen* (1983), 5 C.C.C. (3d) 439 at 445, 23 Sask. R. 36 (C.A.); *R. v. Allen* (1974), 20 C.C.C. (2d) 447 at 448 (Ont. C.A.).

[129] *Criminal Code*, *supra* note 3, ss. 507(1)(b), 508(1)(b). See *Southam v. Coulter* (1990), 75 O.R. (2d) 1, 60 C.C.C. (3d) 267 (C.A.); *R. v. Whitmore* (1989), 51 C.C.C. (3d) 294, aff'g *Whitmore*, *supra* note 125 [*Whitmore* (Ont. C.A.)]; *Re Cohen and The Queen* (1976), 32 C.C.C. (2d) 446 at 449 (Qc. C.A.). All of these cases uphold and confirm the *ex parte* and in camera nature of the pre-inquiry.

[130] *Whitmore* (Ont. C.A.), *ibid.* at 296 But see Law Reform Commission of Canada, *Compelling Appearance, Interim Release and Pre-trial Detention* (Working Paper 57) (Ottawa: Law Reform Commission of Canada, 1988) (criticizing the ambiguity of the legislative language at 32-34).

[131] *Criminal Code*, *supra* note 3, ss. 507(1)(b), 508(1)(c).

[132] See Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (Working Paper 62) (Ottawa: Law Reform Commission of Canada, 1990) [Law Reform Commission of Canada, *Working Paper 62*]. *Working Paper 62* suggests that the procedure is so routine that in many cases it is largely pro forma and that the protective benefits for the citizenry are "largely lost" (*ibid.* at 70). The paper argues that better legal training for justices of the peace, who are not lawyers, would serve to make this a more effective check on police authority (*ibid.* at 75).

release unless the Crown shows cause why pretrial detention is justified.[133] In theory, this means that a bail hearing should be commenced within twenty-four hours of an arrest. But in practice, heavy caseloads and the authority to adjourn these hearings for up to "three clear days" at a time without the accused's consent can often mean delays of several days, or even a week, before a bail determination is made.[134] The potential for delay to one side, it is also important to note that the presumption in favour of release does not operate in every case. In certain circumstances, and for some offences, an accused must demonstrate that pretrial detention is unnecessary.[135] In either situation, however, the criteria for granting bail remain the same.

Subsection 515(10) of the *Criminal Code* is the controlling provision. It provides that detention of an accused is justified on *one* or more of the following grounds:

> (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
>
> (b) where the detention is necessary for the protection or the safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
>
> (c) *on any other just cause being shown and without limiting the generality of the foregoing*, where the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.[136]

These same factors continue to control if the initial bail determination is appealed by either the accused or the Crown.[137]

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[133] *Criminal Code, supra* note 3, s. 515(1).

[134] *Ibid.*, s. 516(1). See *Interpretation Act*, R.S.C. 1985, c. I-21, s. 27(1) (the term "clear days" refers to the days between two events, so for example, a bail hearing may be remanded from a Monday to a Friday without an accused's consent). See Pamela Koza & Anthony N. Doob, "Some Empirical Evidence on Judicial Interim Release Proceedings" (1975) 17 Crim. L.Q. 258 (documenting the very real potential for delay in practice at 266-70).

[135] See *Criminal Code, ibid.*, ss. 515(6)(a)-(d) (placing the onus, in some circumstances, on an accused to show that pretrial detention is not justified). See also *ibid.*, ss. 515(1), 515 (11), 522 (making detention automatic when the most serious indictable offences, like murder and treason, are charged; in these cases the accused must bring an application to secure release).

[136] *Ibid.*, s. 515(10) [emphasis added]. See *R. v. Hall*, (2002) 167 C.C.C. (3d) 449, 217 D.L.R. (4th) 536, 2002 SCC 64 [*Hall*] (invalidating the italicized language because it authorizes detention on grounds that are not sufficiently narrow and precise, thereby contravening section 11(e) of the *Charter*—the balance of subsection 515(10) was upheld).

[137] See *Criminal Code, ibid.*, ss. 520, 521, 680 (setting out the appeal procedure).

It is important to point out what subsection 515(10) omits as a controlling consideration. The provision does not make the existence of reasonable and probable grounds to support the charge(s) a precondition for a bail determination. As a result, those who are arrested unjustifiably may then be released subject to onerous bail conditions: curfews, reporting requirements, and travel restrictions are permissible and quite common bail conditions.[138] Much worse, however, is the possibility that an individual who is arrested without adequate cause may then be detained pending his or her trial.

The reasons why current bail procedures allow for these potential outcomes require some elaboration. Even before the addition of paragraph 515(10)(c) in 1997, the strength of the Crown's case was viewed as a relevant factor in deciding whether or not to grant bail. If the Crown's case is strong and the offence charged is serious, pre-trial release gives rise to both flight and public safety concerns.[139] No doubt this is why the *Criminal Code* has long authorized the prosecution to lead evidence at the bail hearing "to show the circumstances of the offence, particularly as they relate to the probability of conviction of the accused."[140] Appellate courts have cautioned, however, that this is "only one factor to be considered among several others."[141] The addition of paragraph 515(10)(c) has changed little, beyond lifting this factor from the case law and transforming it into an explicit consideration.[142] A strong prosecution case continues as an additional factor weighing in favour of pretrial detention.

In contrast, a weak prosecution case is no guarantee that bail will be granted. The present bail criteria require pretrial detention for accused persons who are unlikely to attend court and for those who will pose a threat to public safety if released, irrespective of other considerations. This means that those most vulnerable to unjustified arrest—individuals with prior criminal histories, the homeless, and the mentally ill—are also the least likely to qualify for pretrial release. There are a few

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[138] See *ibid.*, s. 515(4) (for the complete list of potential bail conditions).

[139] See Gary T. Trotter, *The Law of Bail in Canada*, 2d ed. (Toronto: Carswell, 1999) at 128-29, 139-42, 154-56 [Trotter, *Law of Bail*]; Daniel Kiselbach, "Pre-Trial Criminal Procedure: Preventive Detention and the Presumption of Innocence (1989) 31 Crim. L.Q. 168 at 188-90. See also the numerous cases referred to by both authors.

[140] *Criminal Code*, *supra* note 3, s. 518(1)(c)(iv). See *R. v. Baltovich* (1991), 6 O.R. (3d) 11 at 13, 68 C.C.C. (3d) 362 (C.A.).

[141] *R. v. Perron*, [1990] R.J.Q. 1774 at 1782, 51 C.C.C. (3d) 518 (C.A.). See also *R. v. Braun* (1994), 120 Sask. R. 189 at paras. 12-14, 91 C.C.C. (3d) 237 (C.A.); *R. v. Lamothe*, [1990] R.J.Q. 973 at 980, 58 C.C.C. (3d) 530 (C.A.).

[142] See *Hall*, *supra* note 136 (making clear that if the offence charged is serious, the prosecution's case is strong, and an accused is facing a lengthy prison sentence if convicted, the need to maintain public confidence in the administration of justice may require that bail be refused at paras. 40-41). But see *R. v. Khan* (1998), 129 C.C.C. (3d) 443, 131 Man. R. (2d) 70 (C.A.) [*Khan* cited to C.C.C.] (reading the subsection as though the "apparent weakness" of the prosecution's case would in itself justify pretrial release at 445).

reasons for this. First, these individuals often lack the ties to the community that are perceived by courts as prerequisites for bail.[143] Those living on the margins rarely have suitable sureties who are willing to take responsibility for them while on bail. In addition, given their circumstances, they commonly have prior convictions for failing to attend court, a factor that can singlehandedly lead to pretrial detention.[144] Finally, in addressing the public safety ground, these same individuals frequently possess the type of long and uninterrupted criminal record[145] (or they may have prior convictions for crimes while on bail, including breaching the terms of past bail orders) that invariably results in a detention order.[146] This is not, however, meant to suggest that a weak prosecution case is irrelevant to the bail equation.

Quite obviously, demonstrating that the Crown's case is deficient and that an acquittal is likely will go some way towards ensuring that bail is granted. A court will be disinclined to find that an accused who is probably innocent poses a flight or safety risk if released or that his or her detention is necessary to maintain public confidence in the administration of justice. In the end, however, a release decision motivated by factual innocence must still be reconciled within the established legislative criteria for granting bail.[147] Even assuming that courts are prepared to act on this factor alone, thereby placing diminished weight on the legislatively mandated concerns, problems remain.

On a practical level, meaningfully exploring the strength (or weakness) of the prosecution's case at the bail hearing can be quite difficult. In the interest of expediency, the *Criminal Code* relaxes the rules of evidence at bail hearings, authorizing the presiding justice to "receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case."[148] This

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[143] See *e.g. R. v. Powers* (1972), 9 C.C.C. (2d) 533 (Ont. H.C.) ("detention for the purpose of ensuring attendance in Court for the trial includes consideration of such things as residence, fixed place of abode, employment or occupation, ... proximity of close friends and relatives [and] character witnesses ... " at 541).

[144] See *R. v. Riach* (1972), 9 C.C.C. (2d) 110 (B.C.S.C.) (holding that persons "who have previously skipped bail or escaped from lawful custody" should be denied bail because "experience teaches that such record is likely to be of greater significance than any expression of pious future intentions" at 111).

[145] See *e.g. R. v. St-Pierre* (1990), 107 N.B.R. (2d) 141 (Q.B. (T.D.)) (an uninterrupted criminal record over the preceding twenty years, including convictions for crimes of violence, results in a detention order for public safety reasons).

[146] See *e.g. R. v. Sophonow (No.2)* (1984), 29 Man. R. (2d) 48 (C.A.) (four prior convictions for failing to comply with the terms of prior release orders result in a denial of bail). See also Kiselbach, *supra* note 139 (cases cited by author at 173-74).

[147] See *e.g. Khan, supra* note 142 (the court explicitly addresses each of the legislated grounds despite concluding that there is "a real possibility that the applicant will eventually be acquitted on this charge" and that release should be ordered, as otherwise the court might be "detaining a possibly innocent man in custody" at 444-45). See also *R. v. Rivest* (1996), 49 C.R. (4th) 392 (Qc. C.A.).

[148] *Criminal Code, supra* note 3, s. 518(1)(e).

provision enables the court to act upon the allegations as outlined by the prosecutor. In busier jurisdictions, the prosecutor will simply read aloud to the court a "show cause report" that is normally prepared by the arresting officer.[149] This type of report is often the only source of insight into the prosecution's case available at the bail hearing. A complete brief of evidence is usually weeks—and in more complicated matters—potentially months away.

Unfortunately, the quality of show cause reports can vary from officer to officer and from one police force to the next. These unsworn reports will typically provide a description of the offence alleged. Information supplied by witnesses will often be synthesized into a narrative account that can occasionally gloss over gaps in the prosecution's case. Show cause reports have a short shelf life and their utility is usually spent by the time the brief of evidence is completed. As a result, mistakes and embellishments are common, which means that the reports are often unreliable indicators of whether or not there are in fact reasonable and probable grounds to support the charge(s).[150]

As currently structured, the bail hearing is an ineffective procedural tool for identifying and remedying unjustified arrests. Quite simply, ferreting out unjustified charges is not something for which existing bail procedures are designed. Instead, bail hearings are focussed on flight and public safety concerns; matters of culpability are intentionally deferred. As the leading authority on bail in Canada has noted, "[I]t is difficult to assess the strength of the Crown's case at a bail hearing. The expeditious and sometimes informal nature of a bail hearing may reflect an unrealistically strong case for the Crown."[151] As a result, in the worst cases of unjustified arrest, when the

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[149] There are competing lines of authority with respect to the permissibility of this practice. Some cases endorse it. See *R. v. Kevork*, [1984] O.J. No. 926 (S.C.) (QL); *R. v. Atwal*, [1986] B.C.J. No. 728 (S.C.) (QL). Others hold that if the practice is challenged, affidavit or viva voce evidence is required, but that it can come in the form of hearsay. See *R. v. Milton* (1985), 70 N.S.R. (2d) 155 (S.C. (T.D.)); *R. v. Dhindsa* (1986), 30 C.C.C. (3d) 368 (B.C.S.C.); *R. v. Woo* (1994), 90 C.C.C. (3d) 404 (B.C.S.C.); *R. v. Broadbent* (1996), 182 A.R. 74 (Q.B.). Still another decision suggests that each side can make submissions rather than suffering the attendant delay of insisting on more formal proof. See *R. v. Courchene* (1999), 141 C.C.C. (3d) 431, 141 Man. R. (2d) 171 (Q.B.). Yet another case holds that the investigating officer or complainant must always testify. See *R. v. Hajdu* (1984), 14 C.C.C. (3d) 563 (Ont. H.C.J.).

[150] For a critical discussion of how these reports are prepared and of the problem of inaccuracy in the contents of the reports, see *Ontario Report on Systemic Racism*, *supra* note 112 at 151-53. For an example, see *Nolan v. Toronto (Metropolitan of) Police Force*, [1996] O.J. No. 1764 (Gen. Div.) (QL). For a general discussion of how malleable police reporting can be, see Ericson, *Reproducing Order*, *supra* note 105 at 15-16.

[151] Trotter, *Law of Bail*, *supra* note 139 at 128. See also Gary T. Trotter, "Bail Pending Appeal: The Strength of the Appeal and Public Interest Criterion" (2001) 45 C.R. (5th) 267 ("[i]t is well recognized that the case may seem artificially strong or cogent at the bail hearing, due to the relaxed rules of evidence" at 269). See also *Ontario Report on Systemic Racism*, *ibid.* at 123. That report notes that of the 1,653 cases studied from bail determination to final disposition, on average 18

individual affected also happens to be a poor candidate for bail, pretrial detention is likely. Such an individual must look elsewhere to secure his or her freedom, possibly to the favourable exercise of a Crown prosecutor's discretion.

C. Limits of Prosecutorial Discretion

In Canada, both in theory and in practice, it is the police who are solely charged with the function of investigating crimes and deciding whether charges are warranted and an arrest is necessary. Although the advice of prosecutors may be sought, in practice, such consultation is rare and usually reserved for the most serious of cases. In contrast, once the accused is brought before the court, the decision of whether or not to pursue the charge(s) belongs exclusively to prosecutors.[152] In making this decision, prosecutors across Canada apply a relatively uniform standard. Official policy in most provinces now dictates that charges not be pursued if there is no reasonable "chance", "prospect", or "likelihood" of a conviction.[153] In other words, to proceed with a prosecution, "the Crown must have sufficient evidence to believe that guilt could properly be proved beyond a reasonable doubt ... "[154] A fair application of any of these comparable standards would require a prosecutor to withdraw a charge that lacks reasonable and probable grounds to support it. Unfortunately, due to both practical and institutional limitations, prosecutorial review provides no assurance of timely relief for those who are unjustifiably arrested.

The practical impediments stem from questions of timing and logistics. Depending on the province, the timing of charge screening by prosecutors can vary. In some jurisdictions, like British Columbia, Quebec, and New Brunswick, prosecutors are required to approve charges before an information is laid.[155] In most other jurisdictions, however, post-charge screening has been favoured. Under the latter approach, charges are only reviewed after criminal proceedings are formally

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percent of those denied bail—close to one in five—were *not* found guilty of the allegation that led to detention. This seems to confirm that even when the Crown's case is weak, denials of bail are quite common.

[152] See Law Reform Commission of Canada, *Working Paper 62*, *supra* note 132 (discussing the theoretical and functional separation between police and prosecutors at 69-76). See also *R. v. Regan* [2002] 1 S.C.R. 297, 209 D.L.R. (4th) 41, 2002 SCC 12 (explaining this separation of functions, emphasizing the limited role played by prosecutors in investigations at paras. 62-91).

[153] Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) (Chair: Hon. G. Arthur Martin) [*Martin Report*] (describing the standards contained in the guidelines from most provinces at 52-54). See also Ontario, Ministry of the Attorney General, *Crown Policy Manual*, Policy No. C.S.-1 (15 January 1994) s. 1(b)(i) [Ontario, *Crown Policy Manual*]; Canada, Department of Justice, *Crown Counsel Policy Manual* (January 1993) c. II:1.

[154] *Proulx*, *supra* note 109 (setting a floor on the minimum standard to be applied by prosecutors—proceeding on less makes a prosecutor susceptible to a malicious prosecution claim in tort at para. 31).

[155] Law Reform Commission of Canada, *Working Paper 62*, *supra* note 132.

initiated.[156] In cases where an accused is arrested and held for a bail hearing, special logistical considerations arise. In these cases, Crown prosecutors require information regarding the charge almost immediately so that it can be presented in bail court. Depending on how busy the jurisdiction and how complex the case, it could be a couple of weeks or even a month before a complete brief of evidence is actually delivered to the prosecutors' office.[157] In the interim, prosecutors will rely on a show cause report for information about the case. As explained in the last section, however, these reports are less than reliable indicators of the strength of the Crown's case. As a result, an individual could spend a considerable period in custody before a prosecutor finally has an opportunity to meaningfully review the actual evidence supporting the arrest and charge(s). But even assuming that a complete brief of evidence quickly finds its way into a prosecutor's hands, reasons for concern remain.

In busier jurisdictions, a fragmentation of the work done by prosecutors, combined with fatigue brought on by heavy caseloads, may sometimes undermine the utility of charge screening procedures. As Professor Grosman noted in his study of Canadian prosecutors:

> This "balkanization" of Crown responsibility perpetuates original errors caused by inadequate screening of charges and evidence. No one prosecutor is given, or assumes, responsibility for the conduct of a case from the first arraignment through trial. As a result, it is often only when the case has reached the trial itself that the prosecutor assigned to the trial will review and prepare the prosecution's case. It is at this stage that he may become aware of the limitations of the evidence or the inadequacy of the charge.
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> ...
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> It is only in the later stages of the process ... that there is time for reflection on the sufficiency of the original charges and the proof against the accused. ...
>
> In effect great confidence is placed by the prosecuting authorities in the competency of the police officer on the beat, for his decision to arrest is adopted as their decision to prosecute.[158]

As a result, an erroneous arrest decision by police poses a very real risk of controlling an individual's custodial status long into the criminal process.

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[156] See *e.g.* Ontario, *Crown Policy Manual*, *supra* note 153, s. 1(a) (requiring that charges be screened "as soon as practicable after the charge arrives at the Crown's office and prior to setting a date for preliminary hearing or trial").

[157] See *Martin Report*, *supra* note 153 (acknowledging that in more complicated matters more time will often prove necessary because "the documentation is not short, simple, and entirely completed upon arrest or shortly thereafter" at 128-29).

[158] Brian A. Grosman, *The Prosecutor: An Inquiry into the Exercise of Discretion* (Toronto: University of Toronto Press, 1969) at 26-27.

Admittedly, charge screening procedures have become more formalized since Professor Grosman's study. As noted above, official guidelines are now in place in most provinces prescribing the standard for, and timing of, charge screening. That said, the risk of prosecutors passing deficient cases down the line remains. There are a few reasons for this. First, some unjustified charges simply go undetected by prosecutors screening cases. A busy prosecutor may rely too greatly on an overly optimistic police report and fail to detect the inadequacy of the evidence. Second, some prosecutors, particularly if overworked and inexperienced, may prefer to avoid the burden of justifying a withdrawal to superiors, colleagues, police, and victims.[159] Much more likely, however, is that the decision to defer a withdrawal will be motivated by tactical considerations.

Delay will afford the police a chance to shore up an inadequate case through further investigation, possibly making a withdrawal unnecessary. For a prosecutor engaged in charge screening, the colleague eventually responsible for conducting the preliminary inquiry or trial—who works closest with the police on a given case—may be viewed as best positioned to decide whether or not charge(s) should be withdrawn after the police have been given every opportunity to bring their best case forward. After all, why withdraw prematurely and risk allowing a potentially guilty individual to go free? This sort of goal-oriented decision making is of course symptomatic of a larger institutional limitation on the charge screening function performed by prosecutors.

There is good reason to doubt whether prosecutors are best suited for the task of serving as the only early check on police arrest decisions. Despite lofty pronouncements about the special role played by Crown attorneys,[160] it should not be assumed that these high standards are met by all prosecutors at all times. Prosecuting those accused of crime is a partisan enterprise.[161] Although a prosecutor's review of the evidence increases the chances of a meritless charge being withdrawn, the utility of such review may sometimes be undermined by a less than objective perspective.[162] As the Supreme Court

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[159] See *ibid.* (discussing the deleterious impact of heavy case loads on the perspective of prosecutors—as one prosecutor interviewed noted, "it is the volume, the mass of people, and the mass of cases, and the never-ending assembly line that can influence the outlook of a prosecutor" at 69-71).

[160] See *Boucher v. R.*, [1955] S.C.R. 16, 26, 110 C.C.C. 263 (Crown prosecutors are described as "Ministers of Justice" who perform a "public duty" that "excludes any notion of winning or losing" at 23-24). See also Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1988), c. IX (describing the duty of prosecutors in similar terms).

[161] See *Marshall Inquiry Report*, *supra* note 111 (describing the inherent conflict in the prosecutor's dual functions at 241); H. Richard Uviller, "The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit" (2000) 68 Fordham L. Rev. 1695 (arguing that prosecutors' varying roles are "incompatible" and proposing a separation between prosecutors performing an adjudicatory role, like charge screening, and those who serve as advocates litigating cases at trial at 1713-16).

[162] Uviller, *ibid.* (noting that prosecutors "see themselves primarily as advocates" and that a prosecutor "cares a good deal more for supplementary information that fortifies the case against the defendant than new data that calls his thesis into question" at 1699-1700).

has previously cautioned, "The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control."[163]

Under existing intake procedures, a prosecutor's intervention provides the best chance for timely relief. For the reasons noted, however, the involvement of a prosecutor is no panacea for the unjustifiably arrested. And while the decision by a prosecutor to withdraw a meritless charge is deserving of praise, on a practical level, the exercise of this discretion is part of a larger systemic problem. In part, because prosecutors invariably halt such cases prior to a preliminary inquiry or trial, there is no way to really measure the exact size of the problem of unjustified arrests.

The statistics on the number of charges stayed and withdrawn each year by prosecutors in Canada, however, provide evidence to suggest that the problem is quite real. For statistical purposes each accused is counted as a "case" regardless of the number of charges involved. Over a twelve-month period between 1999 and 2000, adult criminal court statistics from seven provinces and one territory revealed that 122,676 cases (33 percent) resulted in "stays or withdrawals".[164] Of course, beyond an inadequate basis for the initial arrest decision, there are a variety of reasons why a case might meet this statistical fate.[165] That said, some of the statistics available strongly suggest that so many cases end up in this category because prosecutors regularly differ with police as to the adequacy of the evidence to support an arrest and charge(s).

Of the jurisdictions surveyed during that period, Quebec is the only one that also requires prosecutors to approve charges before they are laid. It has the highest conviction rate of any of the reporting jurisdictions (73.6 percent). Interestingly, it also has a significantly lower rate of cases in the "stays or withdrawals" category—only 11 percent of cases in Quebec were terminated in this way. In contrast, this figure was two to three times higher in all other reporting jurisdictions, ranging from a low of 22 percent in Prince Edward Island to a high of 40.8 percent in Ontario.[166] Statistics Canada attributes this drastic difference in the percentage of "stays or

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[163] *Bain v. R.*, [1992] 1 S.C.R. 91 at 104, 69 C.C.C. (3d) 481 (holding unconstitutional under section 11(d) of the *Charter* (fair trial) the *Criminal Code* provision entitling prosecutors to "stand aside" prospective jurors, a power that was not shared by the defence).

[164] See Statistics Canada, Canadian Centre for Justice Statistics, "Adult Criminal Court Statistics, 1999/00" (2001) 21:2 Juristat 8. Note that New Brunswick, Manitoba, British Columbia, and Nunavut do not furnish information for statistical compilation.

[165] For instance, in some jurisdictions, relatively minor cases are diverted out of the criminal justice system through alternative measures programs. Other cases fall apart because witnesses fail to attend court, making a conviction impossible. Finally, prosecutors quite often withdraw the charge if there is no reasonable prospect of a conviction, even though the initial decision to arrest may have been entirely justified.

[166] Statistics Canada, *supra* note 164 at 10.

withdrawals" to the fact that in Quebec prosecutors scrutinize police charge and arrest decisions before criminal proceedings are formally instituted. In contrast, in all other reporting jurisdictions deficient cases are only detected after an information is sworn, resulting in a much higher rate of "stays or withdrawals".[167] This disparity provides an empirical basis for concern that police officers often arrest and charge despite the inadequacy of the evidence. And, as we have seen in this section, given practical and institutional limitations, the staying or withdrawing of charges by prosecutors will not always result in *prompt* relief for those affected. In the interim, those who are unjustifiably arrested will often spend considerable periods either subject to restrictive bail conditions or, in the worst cases, pre-trial detention.

III. The Constitutional Regulation of Arrest Reconsidered

The *Charter* has precipitated considerable change within the Canadian criminal justice system since its enactment in 1982. Our focus in this part will be on how the police authority to arrest—to decide that there is adequate cause to take a suspect into custody to face a criminal allegation—has been scrutinized by Canadian courts under the *Charter*. Before beginning, however, a caveat. As explained in Parts I and II, the real danger flowing from the arrest power is the low visibility of police arrest decisions. This is a problem mostly due to deficiencies in the current legislative scheme; gaps in existing procedures that fail to minimize the risk of unjustified arrests or to provide a means of promptly detecting and remedying such occurrences. No doubt many of the problems detailed above could be remedied through legislative intervention. Past experience teaches, however, that absent constitutional prodding by the courts such changes are unlikely. Law reform measures aimed at strengthening due process safeguards have little political appeal.[168]

This legislative apathy is problematic because, institutionally, the legislature is far better suited to the task of criminal procedure law reform than are the courts. Parliament is capable of receiving input from affected stakeholders and developing the best base of legislative facts from which to craft necessary rules that are both clear and accessible. In contrast, as the Supreme Court has acknowledged, the courts "are not in a position to receive such evidence, and they deal with specific cases that ordinarily involve people who have broken the law, a fact that does not encourage the

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[167] *Ibid.*

[168] This is best demonstrated by Parliament's failure to implement the numerous recommendations made by the Law Reform Commission of Canada relating to criminal law and procedure, including arrest. See Law Reform Commission of Canada, *Report 29*, *supra* note 4 at 49-55 and Law Reform Commission of Canada, *Working Paper 41*, *supra* note 4 at 131-36. Only one of these recommendations was ever implemented. See *supra* note 49 for the discussion of changes to the wording of section 495(1) of the *Criminal Code*.

broader perspective that should be brought to the issue."[169] The Court's recognition of its own institutional limitations has contributed to the development of a dialogue between the legislative and judicial branches under the *Charter*.[170]

This dialogue has frequently played itself out in a criminal procedure context. While in the past law reform in this area has not been a priority of Parliament, the latter has been quick to respond with legislative reform whenever its hand has been forced by the *Charter* decisions of the Supreme Court. In circumstances where the Court has held that a particular investigative power or practice was unconstitutional, either because it lacked needed legal authority or because the enabling legislation did not meet minimum *Charter* requirements, a response from Parliament has usually been forthcoming. The legislation enacted has typically refined the investigative power involved, in order "to build in civil libertarian safeguards that meet the requirements of the *Charter* as set out by the Supreme Court of Canada."[171] In fact, over the last decade, most criminal procedure law reform has been the product of this dialogue.[172] The Supreme Court has acknowledged this co-operative dynamic, insisting that it has "the effect of enhancing the democratic process, not denying it."[173]

This background is essential in understanding why, in the pages that follow, our focus will be on the *Charter* and its guarantees. Ultimately, positive reform will require a comprehensive legislative response that corrects the low visibility of police arrest decisions. Past experience teaches, however, that without judicial intervention under the *Charter*, Parliament is unlikely to voluntarily engage in criminal procedure law reform. Instead, it is for the courts to get the constitutional ball rolling. As one Canadian commentator has observed, "[I]f the Court avoids taking bold steps, chances

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[169] *R. v. Evans*, [1996] 1 S.C.R. 8 at para. 4, 104 C.C.C. (3d) 23. See also *R. v. Wong*, [1990] 3 S.C.R. 36, 60 C.C.C. (3d) 460 (suggesting that the task of creating new police powers is best left to Parliament, with the court playing a reviewing function under the *Charter* at 56-58).

[170] See Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75 (explaining and documenting this "dialogue").

[171] *Ibid.* at 88.

[172] See Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481 at 486 (listing many of the decisions and legislative responses at 518-23) [Roach, "Dialogues"].

[173] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 139, 156 D.L.R. (4th) 385. See also *R. v. Mills*, [1999] 3 S.C.R. 668 at 710-13, 139 C.C.C. (3d) 321. But see Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513. Manfredi and Kelly offer a critique that questions the existence of a "dialogue" where one side, the court, is the final interpreter of the constitution. See also F.L. Morton, "Dialogue or Monologue?" in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 111.

are that the dialogue will never get off the ground and we will have neither judicial nor legislative rules designed to maximize the fairness of the process."[174]

This part will begin by explaining why the *Charter* has so far proven an ineffective means of regulating police arrest decisions. This will entail a consideration of how it is that under current jurisprudence an unlawful arrest does not necessarily violate the *Charter*. An interpretive solution to this problem will then be offered. Following that, our focus will shift to the potential for future reform under the *Charter*. Specifically, we will chart an interpretive path for recognizing why the gaps in existing procedures—which fail to prevent or promptly detect and remedy unjustified arrests—are constitutionally suspect. This part will then close by recommending two legislative amendments that could effectively redress the shortcomings in current arrest, intake, and bail procedures.

A. Scrutinizing Arrest Decisions under Section 9

Section 9 of the *Charter* provides: "Everyone has the right not to be arbitrarily detained or imprisoned."[175] So far it has served as the only constitutional provision to regulate police arrest decisions. No doubt this is because arrests obviously trigger the guarantee. If arrested, an individual is clearly "detained", and if not released by police, an individual is also "imprisoned". But arrests are not the only encounters between individuals and the state that attract scrutiny under section 9 of the *Charter*. The Supreme Court has interpreted "detention" quite generously. Any form of "compulsory restraint"—physical or psychological—can qualify. Physical restraint, while sufficient, is not essential; a demand or direction by a law enforcement official that effectively assumes control over an individual's freedom of movement will also suffice.[176] The test is whether "the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist."[177] Under this definition section 9 of the *Charter* casts a broad net, catching for constitutional scrutiny a host of encounters between individuals and government officials.

Claims under section 9 of the *Charter* have generally taken two forms. First, the guarantee has been used to challenge the constitutionality of a wide array of legislation that authorizes detention or imprisonment. These cases have ranged from

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[174] Alan N. Young, "The *Charter*, the Supreme Court of Canada and the Constitutionalization of the Investigative Process" in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 1 at 32.

[175] *Charter*, *supra* note 1, s. 9.

[176] *R. v. Therens*, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481 [*Therens* cited to S.C.R.], Le Dain J., dissenting (defining "detention" for the purposes of section 10 of the *Charter* at 644). See also *R. v. Thomsen*, [1988] 1 S.C.R. 640 at 648-50, 40 C.C.C. (3d) 411; *R. v. Hufsky*, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398 [*Hufsky* cited to S.C.R.] (holding that "detained" under section 9 of the *Charter* has the same meaning at 632).

[177] *Therens*, *ibid.*

attacks upon provincial laws that authorize the police to stop motorists at organized checkpoints and through roving, random stops[178] to challenges directed at the *Criminal Code* provisions allowing for the indefinite imprisonment of persons found to be dangerous offenders.[179] In these cases, it has been the presence of too little or too much discretion in the statutory authority conferred that has proven determinative. Legislation that mandates a loss of liberty without the need to consider any rational criteria or standards has been held to operate "arbitrarily".[180] The Supreme Court has recognized that "it is the absence of discretion which would, in many cases, render arbitrary the law's application."[181] At the same time, the Court has found legislation at odds with section 9 of the *Charter* when it conferred unfettered discretion on state agents to detain individuals. In such circumstances, "[a] discretion is arbitrary if there are no criteria, express or implied, which govern its exercise."[182]

The second category of claims under section 9 of the *Charter* involves challenges directed at the decision to detain or imprison in individual cases. In the *Charter*'s early years the struggle to give meaning to the arbitrariness standard, in this context, reduced many Canadian courts to the use of dictionary definitions. In a series of cases, courts across the country held that the decision to detain or imprison will have been undertaken "arbitrarily" if it is made in a "capricious", "despotic", "high-handed",

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[178] See *Hufsky*, *supra* note 176; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257, 56 C.C.C. (3d) 22 [*Ladouceur*]; *R. v. Wilson*, [1990] 1 S.C.R 1291, 56 C.C.C. (3d) 142 [*Wilson*]. All three decisions are cases in which the Court held that the legislation authorizing such stops, which contained no fixed criteria and thereby granted unfettered discretion to stop, violated section 9. However, after citing statistical evidence documenting the catastrophic effect of drunk and unlicensed drivers, the Court upheld these powers as reasonable limits under section 1 of the *Charter*. Such stops are only permissible under section 1, however, if their purpose is limited to checking licenses, insurance, driver sobriety, and the mechanical fitness of vehicles. Any probing beyond these limited purposes is prohibited (*Ladouceur*, *ibid.* at para. 60) and may transform a stop from an encounter which was constitutionally permissible at its inception into an arbitrary detention (*R. v. Mellenthin*, [1992] 3 S.C.R. 615 at 624, 76 C.C.C. (3d) 481).

[179] See *Lyons v. R.*, [1987] 2 S.C.R. 309, 37 C.C.C. (3d) 1 [*Lyons* cited to S.C.R.]; *R. v. Milne*, [1987] 2 S.C.R. 512, 38 C.C.C. (3d) 502. *Lyons* upheld the dangerous offender scheme because it "narrowly defines a class of offenders with respect to whom it may properly be invoked, and prescribes quite specifically the conditions under which an offender may be designated dangerous" (*Lyons*, *ibid.* at 347). See also *R. v. Luxton*, [1990] 2 S.C.R. 711, 58 C.C.C. (3d) 449 (upholding sentencing scheme for first degree murder on a similar basis at para. 11).

[180] See *R. v. Swain*, [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481 (holding unconstitutional under section 9 of the *Charter* the *Criminal Code* provisions requiring trial judges to automatically commit those found not guilty by reason of insanity to strict custody without considering their particular mental health circumstances at 1012-13).

[181] *Lyons*, *supra* note 179 at 348.

[182] *Hufsky*, *supra* note 176 at 633. See also *Ladouceur*, *supra* note 178 at para. 36; *Morales*, *supra* note 76 at 740; *R. v. Pearson*, [1992] 3 S.C.R. 665, 77 C.C.C. (3d) 124 [*Pearson* cited to S.C.R.] ("detention is arbitrary if it is governed by unstructured discretion" at 700).

"unreasonable", or "unjustified" manner.[183] In this way, much of the jurisprudence served to "shift the search for meaning from one synonym to another."[184] The elusive nature of the arbitrariness standard has presented special problems for the constitutional regulation of police arrest decisions in individual cases.

An arrest in the absence of reasonable and probable grounds is unlawful, as was explained above. But, despite twenty years of litigation under section 9 of the *Charter*, it remains unclear whether such an arrest is necessarily arbitrary and unconstitutional. To date, the Supreme Court has intentionally refrained from addressing the problem.[185] Its guidance has been limited to a dictum suggesting that an arrest will violate section 9 of the *Charter* if it is undertaken "because a police officer was biased towards a person of a different race, nationality or colour, or that there was a personal enmity between a police officer directed towards the person arrested."[186] This observation has equal force with respect to all detentions, not just those culminating in arrest. It is difficult to imagine anything more unjustified and arbitrary than a detention undertaken for a discriminatory motive or other improper purpose.[187] But beyond this, the Supreme Court has left the constitutional status of unlawful

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[183] Initially, these terms were used to describe legislation that would offend section 9. At that time, the Supreme Court had not yet provided more meaningful guidance on the topic. See *Re Mitchell and The Queen* (1983), 42 O.R. (2d) 481 at 498, 6 C.C.C. (3d) 193 (H.C.J.); *R. v. Konechny* (1983), 6 D.L.R. (4th) 350 at 371, 10 C.C.C. (3d) 233 (B.C.C.A.); *R. v. Smith* (1984), 8 D.L.R. (4th) 565 at 571, 11 C.C.C. (3d) 411 (B.C.C.A.), rev'd on other grounds, [1987] 1 S.C.R. 1045, 34 C.C.C. (3d) 97 [*Smith* cited to D.L.R.]; *R. v. Langevin* (1984), 45 O.R. (2d) 705 at 727, 11 C.C.C. (3d) 336 (C.A.); *R. v. Slaney* (1985), 56 Nfld. & P.E.I.R. 1 at para. 29, 22 C.C.C. (3d) 240 (Nfld. C.A.). The use of these terms was soon extended to the context of challenges to specific decisions to detain or imprison. See *Belliveau v. R.*, [1984] 2 F.C. 384 at 395, 13 C.C.C. (3d) 138 (T.D.); *R. v. McIntosh* (1984), 29 M.V.R. 50 at 58 (B.C.C.A.); *Maxie v. Canada (National Parole Board)*, [1985] 2 F.C. 163 at 171, 47 C.R. (3d) 22 (T.D.); *R. v. Williamson* (1986), 68 A.R. 130 at para. 25, 25 C.C.C. (3d) 139 (Q.B.); *R. v. Cayer* (1988), 28 O.A.C. 105 at para. 36, 66 C.R. (3d) 30; *R. v. Baker* (1988), 88 N.S.R. (2d) 250 at 251, 9 M.V.R. (2d) 165 (S.C. (A.D.)); *R. v. Sieben* (1989), 70 Alta. L.R. (2d) 337 at 359-60, 51 C.C.C. (3d) 343 (C.A.); *R. v. Scott* (1990), 24 M.V.R. (2d) 204 at 210 (B.C.C.A.); *R. v. Madsen* (1994), 42 B.C.A.C. 259 at para. 8, 21 C.R.R. (2d) 376; *R. v. Iron* (1987), 53 Sask. R. 241, 33 C.C.C. (3d) 157 (C.A.) ("capriciousness" adopted but "unjustified" considered and then specifically rejected at para. 9).

[184] *Smith*, *ibid.*, Lambert J.A., dissenting (cautioning that while these "words may be illustrative of the meaning of 'arbitrary', ... they should not be regarded as definitive" at 577).

[185] See *Latimer*, *supra* note 14 (Lamer C.J.C., on behalf of the majority, indicated, "[I]t is not necessary to address that question [of whether an unlawful arrest is "inherently arbitrary"], because Mr. Latimer's arrest was entirely lawful, and failing an attack against the legislative provision which authorized the arrest, I do not see how a lawful arrest can contravene s. 9 of the *Charter* for being arbitrary" at 232).

[186] *Storrey*, *supra* note 3 at 251-52.

[187] See *Brown*, *supra* note 27 (in the "improper purposes" category the court sensibly includes "purposes which are illegal, purposes which involve the infringement of a person's constitutional rights and purposes which have nothing to do with the execution of a police officer's public duty" at 238).

arrests unsettled. Until the Court directly addresses the issue, trial judges must take their lead from the opinions of Canadian appellate courts.

The Ontario Court of Appeal's decision in *R. v. Duguay* is the leading case on the subject. It came soon after the *Charter*'s enactment. Like many early decisions interpreting "arbitrarily", it imports into the constitutional equation the need for an oblique motive on the part of the arresting officer. According to *Duguay*, someone who is unlawfully arrested is not necessarily "arbitrarily detained". This is because the basis for an arrest may fall "just short" of the reasonable and probable grounds needed to arrest.[188] MacKinnon C.J.A. explains:

> The person making the arrest may honestly, though mistakenly, believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not be said to be *capricious or arbitrary*. On the other hand, the entire absence of reasonable and probable grounds for the arrest could support an inference that no reasonable person could have genuinely believed that such grounds existed. In such cases, the conclusion would be that the person arrested was arbitrarily detained. Between these two ends of the spectrum, shading from white to grey to black, the issue of whether an accused was arbitrarily detained will depend, basically, on two considerations: first, the particular facts of the case, and secondly, the view taken by the court with respect to the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the person making the arrest.[189]

From a constitutional standpoint, a police officer's good faith reliance upon his or her legitimate suspicions can often cure the wrong of an unlawful arrest.[190] There are good reasons, however, why this early approach should now be reconsidered.

In giving "arbitrarily" this meaning, the *Duguay* court did not have the benefit of later Supreme Court decisions that explained the need for a "purposive" approach in

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[188] *Duguay*, *supra* note 87 (in affirming this decision, the Supreme Court did not address this issue at 382-83).

[189] *Ibid.* [emphasis added]. The court held that section 9 of the *Charter* was violated because the police "had neither grounds nor *an honest belief that they had the necessary grounds*" to arrest the three accused (*ibid.* at 383 [emphasis added]).

[190] For some examples, see *Pimental*, *supra* note 87; *Capistrano*, *supra* note 87 at 54; *R. v. Speller* (1993), 47 M.V.R. (2d) 129 (Ont. Ct. J. (Prov. Div.)); *R. v. Brown* (1987), 76 N.S.R. (2d) 64 at paras. 42-43, 33 C.C.C. (3d) 54 (C.A.). But see *Simpson* (Nfld. C.A.), *supra* note 123 (implicitly questioning this approach without referring to *Duguay*). See also *Porquez*, *supra* note 87 (holding that an arrest in the absence of reasonable and probable grounds violated section 9 of the *Charter* without ever addressing the subjective mind set of the arresting officers).

the interpretation of the *Charter*'s guarantees.[191] Under this method, dictionary definitions are to be avoided.[192] Instead, the words used are to be read in a manner that best achieves the purpose underlying the guarantee. In identifying that purpose, the court may look to the larger objectives of the *Charter*, the actual language used to express the right, the historical origins of the guarantee (including its drafting history), and its interrelationship to the other constitutional provisions. Ultimately, the interpretation should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection."[193] Each of these factors points towards an interpretation that treats unlawful arrests as arbitrary detentions under section 9 of the *Charter*.

Any effort to reconcile the *Duguay* decision with the purposive approach runs into immediate difficulty. Like most early judgments interpreting section 9, the case is bottomed upon dictionary definitions that transform a malevolent motivation into the touchstone for arbitrariness. Such a reading seems inconsistent with the larger objectives of the *Charter* and its legal rights guarantees.[194] If protecting the individual vis-à-vis the state is the primary objective of the *Charter*, it makes little sense under section 9 to view the encounter exclusively from the perspective of the responsible state official. For the person aggrieved, it is cold comfort that the arresting officer's grounds fall "just short" of what the law requires. Instead, it seems much more consistent with the *Charter*'s overarching goal of protecting individuals from state abuses to read "arbitrarily" as prohibiting any illegal detention or imprisonment—including an unlawful arrest.[195] This interpretation is made more compelling by its connection to the historical approach to the protection of liberty in Canada.

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[191] See *Hunter*, *supra* note 79 at 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344, 18 C.C.C. (3d) 385 [*Big M Drug Mart* cited to S.C.R.]; *B.C. Motor Vehicle*, *supra* note 8 at 500-501; *Therens*, *supra* note 176 at 641, Le Dain J., dissenting in the result only.

[192] *Hunter*, *ibid.* ("[t]he task of expounding a constitution is crucially different from that of construing a statute" at 155).

[193] *Big M. Drug Mart*, *supra* note 191 at 344. See also Sidney R. Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25 Osgoode Hall L.J. 1 at 6-31; Peter W. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall L.J. 87 (discussing the "purposive" approach at 102-104).

[194] *Charter*, *supra* n. 1, ss. 7-14. See *Hunter*, *supra* note 79 (the purpose of the *Charter* is "the unremitting protection of individual rights and liberties" at 155); *Debot*, *supra* note 77 ("[t]he legal rights guaranteed by the *Charter* are designed *inter alia* to circumscribe these coercive powers of the state within boundaries of justice and fairness to the individual" at 1173); *R. v. Hebert*, [1990] 2 S.C.R. 151, 57 C.C.C. (3d) 1 [*Hebert*] ("it is to the control of the superior power of the state *vis-à-vis* the individual who has been detained by the state, and thus placed in its power, that s. 7 and the related provisions that follow are primarily directed" at 179).

[195] See Peter W. Hogg, *Constitutional Law of Canada*, vol. 2, looseleaf (Toronto: Carswell, 1997) [Hogg, *Constitutional Law of Canada*] (after acknowledging the effect of *Duguay*, the author writes that "[p]robably, ... strict compliance with the law is a necessary (although not a sufficient) condition for compliance with s. 9" at 46-5).

The Anglo-Canadian common law constitution has long required that any interference with individual liberty be based on lawful authority. This proposition, known as the "principle of validity", requires that "every official act must be justified by law."[196] Dicey has characterized this concept as central to the "rule of law". For him the antithesis of this "fundamental principle of the constitution" is the exercise of "arbitrary power".[197] Of specific interest, given our interpretive task, is one of the ways in which Dicey has illustrated this point in his text, noting that the English constitution forbids "arbitrary arrest".[198] This evidences a long history of equating illegality with arbitrariness. But looking this far back is not essential: the drafting history provides a more contemporary justification for such a reading.

An early draft of section 9 had provided that "[e]veryone has the right not to be detained or imprisoned except on grounds, and in accordance with procedures, established by law."[199] But several groups that testified before the Special Joint Committee on the Constitution complained that this wording was flawed. They correctly pointed out that, as written, the right would have served to constitutionalize any scheme for detention or imprisonment passed by Parliament, no matter how unfair or irrational the prescribed legislative criteria might be.[200] In an acknowledged effort to address these concerns, in the next draft, the government changed the wording to its final form. The goal was clear: to strengthen—not weaken—the guarantee.[201] Later, when questions were raised as to whether legality should be

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[196] *Ibid.* at 31-4. See cases cited *supra* notes 9, 11.

[197] Albert V. Dicey, *Introduction to the Study of the Constitution*, 10th ed. (New York: Macmillan, 1965) at 202. He elaborates upon this point at 207-208:

> The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification. ... [P]ersonal freedom in this sense of the term is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law, *i.e.* ... under some legal warrant or authority ...

[198] *Ibid.* at 193, 196.

[199] October 1980 Draft of the *Charter*, reproduced in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill, 1989) at 747. Similarly, a July 1980 draft of the *Charter* read: "Everyone has ... the right not to be detained or imprisoned except on grounds provided by law and in accordance with prescribed procedures" (*ibid.* at 600).

[200] See Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, vol. 1, No. 7 at 11-12 (18 November 1980) (Canadian Civil Liberties Association), vol. 1, No. 7 at 89-90 (18 November 1980) (Canadian Jewish Congress), vol. 1, No. 15 at 7-8, 18 (28 November 1980) (Canadian Bar Association).

[201] See January 1981 Draft of the *Charter*, reproduced in Bayefsky, *supra* note 199 at 768. See also Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, vol. 3, No. 36 (12 January 1981) (Hon. Jean Chrétien, Minister of Justice, explained that the changes to section 9 [and other provisions] were

specifically mentioned, a deputy minister of justice assured the committee that such a change was unnecessary because "if the arrest were illegal, [if] it were against the law, then it would be annulled by the courts for that very reason."[202] To the limited extent that the "framers' intent" may be gleaned from such historical materials,[203] it would appear to have been assumed that illegal detentions would be subsumed within the arbitrariness standard contained in section 9 of the *Charter*.

On such a reading, section 9 would operate very much like article 9(1) of the *International Covenant on Civil and Political Rights* ("Covenant"), which reads, in part: "No one shall be subjected to arbitrary arrest or detention" and "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[204] As a signatory to the Covenant, Canada agreed to implement its provisions into its domestic law. A reading of section 9 that equates arbitrariness with illegality would better serve to fulfill Canada's international treaty obligations. Although not a conclusive interpretive consideration, this is an additional reason for reading "arbitrarily" as including "unlawful".[205]

Finally, if the Supreme Court chooses to endorse this approach, it would bring consistency to the interpretation of the legal rights guarantees. Legality, for instance, is a precondition for a search or seizure to be "reasonable" under section 8 of the

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made in direct response to the concerns expressed—the objective being "to strengthen the protection of human rights and freedoms" at 10-11).

[202] Canada, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, vol. 4, No. 46 (27 January 1981) [*Minutes*, 27 January 1981] (see questions by Senator Asselin and the responses of the Deputy Minister of Justice Tassé at 116-17).

[203] See *B.C. Motor Vehicle*, *supra* note 8 (holding that courts may consider testimony before the Special Joint Committee in interpreting the *Charter*, but cautioning that because of the multiplicity of actors involved in negotiation, drafting, and adoption, the words of a few civil servants cannot be considered determinative and should therefore be given "minimal weight" at 504-509).

[204] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 9(1), Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]. The wording of article 9(1) looks like an amalgam of section 9 of the *Charter* and its earlier drafts.

[205] *ICCPR*, *ibid.*, art. 2(2) (obligating signatories to implement the Covenant's guarantees). See *Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 Dickson C.J., dissenting ("the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratificd. ... [Such international norms] provide a relevant and persuasive source for interpretation of the provisions of the *Charter* ... " at 349). This view was later adopted by a majority of the Court, see *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57, 59 D.L.R. (4th) 416. See also William A. Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed. (Toronto: Carswell, 1996) (discussing the use of international rights instruments to interpret the *Charter* at 34-49).

Charter.[206] An unlawful search always violates section 8 regardless of a police officer's subjective state of mind. This does not mean that the good intentions of law enforcement are irrelevant. To the contrary, as the Supreme Court's seminal decision under subsection 24(2) of the *Charter* makes clear, in deciding whether or not to exclude unconstitutionally obtained evidence, among other factors, a court must consider if a violation occurred "in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant."[207] This provides further support for reconsidering what "arbitrarily" means. It makes little sense to count a police officer's good faith twice in the constitutional analysis, especially where an individual's liberty (as opposed to his or her privacy alone) is at stake.

As this review should make plain, the ultimate purpose of the guarantee would appear to be protecting individual liberty from unjustified state interference. In theory, section 9 accomplishes this objective in two ways. First, it serves to entrench the long standing Anglo-Canadian constitutional principle that the government cannot interfere with individual liberty absent lawful authority to the contrary. Second, it supplements that historic safeguard by empowering courts to scrutinize laws authorizing detention or imprisonment and to invalidate those that would operate arbitrarily. The Supreme Court has already put the second aspect of the guarantee into action, developing section 9 standards for assessing whether or not laws operate "arbitrarily". It remains to be determined whether it will do the same for the first by finally recognizing that an illegal detention is inherently arbitrary. Such an interpretation would finally make clear that arrests undertaken on inadequate grounds are always unconstitutional.

In recent years there have been mixed signals as to the chances of this approach coming to dominate in future.[208] In maintaining this distinction, courts undoubtedly fear being required to characterize as "arbitrary"—and unconstitutional—unlawful detentions resulting from a "technical error of process."[209] But this objective is not

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[206] See *R. v. Collins*, [1987] 1 S.C.R. 265, 282 C.C.C. (3d) 1 [*Collins* cited to S.C.R.] (holding that, in addition to other requirements, to be "reasonable", a search or seizure must be "authorized by law" at 278). See also Stuart, *Charter Justice*, *supra* note 60 (noting the dissimilarity between unlawful searches as compared to unlawful detentions and pointing out that viewing unlawful detentions as necessarily arbitrary would make section 9 "a far more powerful protection" at 263).

[207] *Collins*, *ibid.* at 285 (quoting from *Therens*, *supra* note 176 at 652, LeDain J. dissenting).

[208] See *Monney* (C.A.), *supra* note 32 (focussing upon "unjustifiable" from among the available synonyms at 669-70). See also *Monney* (S.C.C.), *supra* note 32 (finding the detention at issue lawful, thereby avoiding this issue). See also *R. v. Mitchell* (1988), 81 N.S.R. (2d) 57, (1987), 39 C.C.C. (3d) 141 (C.A.) (holding that section 9 is violated when "a person is detained or imprisoned without any legal justification" at para. 22). But see *Brown*, *supra* note 27 (keeping the *ratio* from *Duguay* alive by repeating the principle that "not all unlawful detentions are necessarily arbitrary" at 233).

[209] *Simpson* (Nfld. C.A.), *supra* note 123 (offered to explain why an "an unlawful detention is not necessarily an arbitrary detention" at para. 47). For example, such a holding would mean that a failure by the police to bring an accused before a justice within 24 hours of an arrest would necessarily lead to an unconstitutional detention—regardless of any good reasons for the delay. See *supra* notes 120 to

worth muddying the conceptual waters through the creation of an unnecessary dichotomy between unlawful and arbitrary detentions. Although a similar trend emerged under the early section 8 *Charter* jurisprudence as to whether "unlawful" searches or seizures were necessarily "unreasonable", the Supreme Court quickly put an end to this debate by making lawful authority a precondition for reasonableness.[210] The result has been much clearer constitutional standards and more well defined statutory search and seizure powers.[211] The technical or inadvertent nature of a constitutional violation is best dealt with when fashioning the appropriate remedy. This is the great benefit of a discretionary exclusionary rule. It permits the courts to interpret the constitution's guarantees purposively, free from concerns that too generous an approach might have an unfair exclusionary effect in some unforeseeable future case.[212]

Unfortunately, recognizing that unlawful arrests are always unconstitutional under section 9 of the *Charter* is not enough. Although this would enable section 9 to more effectively do important case-specific work by finally making clear the status of unlawful arrests, on its own this would not redress the larger systemic issues. It should be remembered that the real problem, outlined in Parts I and II above, is the low visibility of some unjustified arrests; cases where an illegal arrest does not lead to the acquisition of incriminating evidence and that never come to trial because the charge(s) are invariably withdrawn or stayed. In these cases there is never any opportunity to assert a section 9 *Charter* claim.[213] A constitutional fix that will get at

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123 and accompanying text (explaining this obligation upon the police). It would also mean that if a police officer arrested an individual in circumstances under which such an arrest is prohibited by the *Criminal Code*, or failed to release an individual as required by the *Criminal Code*, the resulting detention would be characterized as arbitrary and unconstitutional. See *supra* notes 60 to 72 and accompanying text (outlining the duty not to arrest and the duty to release following arrest).

[210] *Collins*, *supra* note 206. For examples of early cases holding that unlawful searches are not necessarily "unreasonable", see *R. v. Heisler* (1984), 8 D.L.R. (4th) 764, 11 C.C.C (3d) 475 (Alta. C.A.); *R. v. Cameron* (1984), 16 C.C.C. (3d) 240, 13 C.R.R. 13 (B.C.C.A.). See also *R. v. Haley* (1986), 14 O.A.C. 297, 27 C.C.C. (3d) 454 (noting that "every illegality, however minor or technical or peripheral or remote, does not ... render such search unreasonable" at para. 45). See also *R. v. Noble* (1984), 48 O.R. (2d) 643, 16 C.C.C. (3d) 146 (C.A.).

[211] Roach, "Dialogues", *supra* note 172. See also Part III.C, below, for a general discussion of section 8 of the *Charter*.

[212] See James Stribopoulos, "Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate" (1999) 22 B.C. Int'l & Comp. L. Rev. 77 at 136-38.

[213] In theory, a person who is unjustifiably arrested could bring an application for immediate *Charter* relief in the superior court for a violation of section 9. See *R. v. Rahey*, [1987] 1 S.C.R. 588, 33 C.C.C. (3d) 289 [*Rahey*] (stating that superior courts always have jurisdiction to hear *Charter* claims, but should only intervene on a pretrial motion if "there is ... no trial court within reach and the timeliness of the remedy or the need to prevent a continuing violation of rights is shown ... " at 604). In practice, however, such an application is very unlikely. First, there is the delay inherent in retaining a lawyer to file and argue the motion. Second, as the applicant, the accused would be required to show that the arrest was unlawful; that is, she or he would have to show that the arresting officer's grounds were

the systemic shortcomings that allow for these sorts of cases will require moving beyond section 9 for solutions.

Section 9 cannot do the job because there is nothing "arbitrary"—as that term has been defined by the Supreme Court in the context of challenges to legislation—[214] about any of the specific statutory provisions making up the existing scheme. Similarly, regular mistakes or abuses in the exercise of the arrest power—combined with the prospect of onerous bail conditions or pretrial detention in some cases—do not make any specific statutory provision involved unconstitutional.[215] The problem is not the fault of any existing section in the *Criminal Code*. Rather, it stems from what is missing from existing arrest, intake, and bail procedures: the absence of any procedural checks capable of preventing, or promptly redressing, unjustified arrests. Recognizing the constitutional significance of these shortcomings requires looking to other guarantees in the legal rights provisions of the *Charter*.

B. Habeas Corpus in Subsection 10(c)

To the uninitiated, subsection 10(c) of the *Charter* seems like an obvious candidate for redressing unjustified arrests. It guarantees the right on arrest or detention "to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."[216] This provision gives constitutional protection to the historic writ of habeas corpus.[217] For the most part, however, it has not served to alter the writ's traditional common law limitations. Habeas corpus continues mostly as a jurisdictional remedy. It allows a superior court to review whether the individual, tribunal, or court responsible for a detention had the authority it purported to exercise. Such review does not go to the substance of the underlying decision to detain. Rather, it is limited to "an inquiry into the jurisdiction of the court by which process the subject is held in custody and into the validity of the process

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deficient. A barren assertion of one's innocence would not suffice. This would require awaiting disclosure or calling the arresting officer. But the more trial-like such an application becomes, the more likely it is that a superior court judge will defer jurisdiction to the trial court.

[214] See *supra* notes 178 to 182 and accompanying text, where the standards developed by the Supreme Court for assessing whether legislation authorizing detention or imprisonment violates section 9 are explained. Of course, the Supreme Court could choose to modify these standards. To date, however, the Court has given no indication of a willingness to jettison its established jurisprudence in this area.

[215] See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193, 2000 SCC 69 (holding that a pattern of error or abuse in the application of an otherwise constitutional statutory power is not a basis for invalidating that power at paras. 76-82).

[216] *Charter*, *supra* note 1, s. 10(c).

[217] The writ is said to predate the *Magna Carta*. For a discussion of its history and origins, see Leonard W. Levy, *Origins of the Bill of Rights* (New Haven: Yale University Press, 1999) at 44-67.

upon its face."[218] A more probing review, going to the merits of the decision to detain, can only be had through ordinary appeal procedures.[219]

The restriction of habeas corpus to jurisdictional errors effectively precludes the use of the writ by those who are arrested unlawfully but then ordered detained after a bail hearing. In these cases, the justice who denies bail will issue a "warrant for committal", which then supplies the legal foundation for detention.[220] The superior court will not look beyond such a warrant if it is facially valid and issued by a court with jurisdiction.[221] As a result, an accused "is not entitled to be discharged on *habeas corpus* in respect of the irregularity of his arrest if the ... warrant in due form and duly endorsed is returned in answer to the writ. So long as valid cause of detention is shown on the return of the writ, that is sufficient."[222] As Professor Létourneau bluntly observed, habeas corpus "does not lie to challenge the legality of an arrest."[223] Of course, it may very well be that subsection 10(c) of the *Charter* could serve to change all of this.

In the era of the *Charter*, the Supreme Court has occasionally relaxed some of the historic limitations on the writ. It has concluded that claims for habeas corpus based on violations of the *Charter* should not be denied through the application of overly rigid, technical, or artificial rules.[224] Instead, the Court has held that "common law rules surrounding *habeas corpus* applications must be applied in a flexible manner where the applicant *has established* that his continued incarceration breaches the Charter."[225] But in each case where the Supreme Court has agreed to relax the rules of

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[218] *R. v. Goldhar*, [1960] S.C.R. 431 at 439, 126 C.C.C. 337 [*Goldhar* cited to S.C.R.]. See also *R. v. Sarson*, [1996] 2 S.C.R. 223, 107 C.C.C. (3d) 21 [*Sarson*] (which similarly summarizes the common law limitations on the writ at paras. 22-24).

[219] *Goldhar*, *ibid.* at 440-41. But see Robert J. Sharpe, *The Law of Habeas Corpus*, 2d ed. (Oxford: Clarendon Press, 1989) (noting that courts have historically defined "jurisdictional error" broadly to effect review if no other appeal procedure is available—extradition cases provide the best historic example at 59-60).

[220] See *Criminal Code*, *supra* note 3, s. 519(3) and Form 8 (Warrant for Committal).

[221] See *Re Trepanier* (1885), 12 S.C.R. 111 at 113; *Ex parte Macdonald* (1896), 27 S.C.R. 683 at 687, 3 C.C.C. 10; *Re Shumiatcher* (1961), [1962] S.C.R. 38 at 47, 31 D.L.R. (2d) 2; *Goldhar*, *supra* note 218 at 439.

[222] *R. v. Haagstrom* (1942), [1943] 1 D.L.R. 236 at 237, 2 W.W.R. 442 (B.C.S.C. (T.D.)).

[223] Gilles Létourneau, *The Prerogative Writs in Canadian Criminal Law and Procedure* (Toronto: Butterworths, 1976) (quoting from a judgment in noting that with habeas corpus, "the paramount question is not was the applicant lawfully arrested?, but is he lawfully detained?" at 242).

[224] See *R. v. Gamble*, [1988] 2 S.C.R. 595, 45 C.C.C. (3d) 204 (ignoring the rule that usually shields superior court judgments from habeas corpus review to redress a sentence imposed under the wrong statutory provision at 639-40); *Pearson*, *supra* note 182 (constitutional challenge to bail provisions proceeds on habeas corpus review despite a statutory appeal procedure). See also *Sarson*, *supra* note 218 (acknowledging this same principle at paras. 40-41).

[225] *Sarson*, *ibid.* at para. 41 [emphasis added] (the Court also noted that if the detention "does not give rise to a *Charter* violation, the expanded scope of *habeas corpus* review does not apply" at para. 43).

habeas corpus to facilitate constitutional review, an inquiry into the factual circumstances underlying the detention was unnecessary—[226] a fact that the Supreme Court emphasized in *R. v. Pearson*, noting that "[t]he constitutional claim can be determined without evidence about the applicant's specific circumstances."[227] In contrast, a habeas corpus application that challenges a police officer's grounds for arrest would be an entirely fact driven enterprise. Despite a more relaxed approach to habeas corpus under the *Charter*, the Supreme Court has given no indication that it is prepared to sever the writ entirely from its jurisdictional moorings.[228]

Even assuming that Canadian courts would be prepared to delve into the factual matrix underlying a police officer's arrest decision, practical problems remain. The individual who claims that he or she was unconstitutionally arrested would bear the legal and persuasive burdens.[229] The time needed to retain a lawyer to file the writ, coupled with inevitable delays in obtaining the disclosure materials necessary to substantiate the claim, make habeas corpus an unlikely means of securing prompt relief for those who are arrested unjustifiably and then denied bail.

The main difficulty with habeas corpus is that it is a case-specific remedy. As such, it fails to get at the cause of the problem outlined in Parts I and II above, namely the absence of any procedural checks capable of preventing or promptly redressing unjustified arrests. It is these shortcomings that allow individuals who are arrested based on inadequate grounds to then also be subject to onerous bail conditions or, in the worst cases, pretrial detention. In the last two sections we shall explore two possible interpretive paths under the *Charter*. The goal is to plot the best route for developing constitutionally mandated procedural safeguards capable of redressing these systemic shortcomings.

C. Seizures of the Person and Section 8

The failure to effectively regulate police arrest powers under the *Charter* stands in sharp contrast to the relative success enjoyed in developing constitutional controls for

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[226] *Supra* note 224.

[227] *Pearson, supra* note 182 at 680.

[228] See Robert J. Sharpe, "Habeas Corpus and the Canadian Charter of Rights and Freedoms" in Guy S. Goodwin-Gill & Stefan Talmon, eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Oxford University Press, 1999) 479 (noting that "the Charter has not dramatically altered the law of habeas corpus" at 498). This is unlike the federal experience in the United States, where federal courts expanded the scope of "jurisdictional error" to conduct constitutional review of state court proceedings. See Jordan Steiker, "Innocence and Federal Habeas" (1993) 41 UCLA L. Rev. 303.

[229] *Collins, supra* note 206 (holding that the *Charter* applicant bears the burden at para. 21).

police search powers.[230] Section 8 of the *Charter* guarantees "the right to be secure against unreasonable search or seizure."[231] In *Hunter v. Southam Inc.*, the Supreme Court borrowed heavily from the seminal decision of the United States Supreme Court under the Fourth Amendment in defining the purpose of section 8 as the protection of individuals' reasonable privacy expectations.[232] Drawing as well on the history of search powers at common law and under statute, the Court articulated the basic requirements for "reasonable" intrusions upon privacy under section 8. First, a warrant is necessary to search whenever it is feasible to obtain one—warrantless searches are presumed to be unreasonable and must be justified by the state. Second, warrants should only be issued based on reasonable and probable grounds, established upon oath, that an offence has been committed and that evidence will be found in the place to be searched. Finally, those authorizing the searches, although not necessarily judges, must at least be capable of acting judicially.[233]

Hunter was quickly followed by *R. v. Collins*, referred to above, which sketched out a broader framework for assessing reasonableness. In *Collins*, the Court held that, at minimum, in order to be "reasonable" a search must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner.[234] Later cases made clear that *Hunter*'s requirements only applied to criminal or quasi-criminal search powers. Fewer due process protections—including the absence of a warrant—are required for search powers to be considered "reasonable" in other contexts.[235]

So far, section 8 has only played a peripheral role in regulating police arrest powers. The Supreme Court has upheld the common law authority of police to

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[230] For a general discussion that includes a consideration of some recent decisions that signal a narrowing of the guarantee, see Don Stuart, "The Unfortunate Dilution of Section 8 Protection: Some Teeth Remain" (1999) 25 Queen's L.J. 65.

[231] *Charter*, *supra* note 1, s. 8.

[232] The Supreme Court embraced the holding of the United States Supreme Court in *Katz v. United States* (389 U.S. 347, 88 S. Ct. 507 (1967)), where Stewart J. concluded that the Fourth Amendment protects "people, not places" (*ibid.* at 351). See *Hunter*, *supra* note 79 (holding that "this approach is equally appropriate in construing the protections in s. 8 of the *Charter* ... " and indicating that the guarantee can be expressed "negatively as freedom from 'unreasonable' search and seizure, or positively as an entitlement to a 'reasonable' expectation of privacy ... " at 159).

[233] *Hunter*, *ibid.* at 162.

[234] *Collins*, *supra* note 206.

[235] See *R. v. Simmons*, [1988] 2 S.C.R. 495 at 528-29, 55 D.L.R. (4th) 673; *R. v. Jacques*, [1996] 3 S.C.R. 312 at 323-25, 139 D.L.R. (4th) 223; *Monney* (S.C.C.), *supra* note 32 (border searches at paras. 33-37, 41-42). See *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406 at 419-22, 115 D.L.R. (4th) 702 [*Potash*]; *Thomson Newspapers Ltd. v. Canada* (1988), [1990] 1 S.C.R. 425 at 505-509, 67 D.L.R. (4th) 161 [*Thomson Newspapers* cited to S.C.R.]; *R. v. McKinlay Transport Ltd.* (1988), [1990] 1 S.C.R. 627, 55 C.C.C. (3d) 530 [*McKinlay Transport* cited to S.C.R.] (administrative or regulatory searches at 644-50). See *R. v. M.(M.R.)*, [1998] 3 S.C.R. 393, 166 D.L.R. (4th) 261 (searches of students while in school at 413-16, 419-23).

conduct a search incidental to a lawful arrest without any need for a warrant or particularized grounds beyond those justifying the arrest. Either right before or soon after an arrest, the police may search the person arrested and his or her possessions and nearby surroundings for weapons and evidence.[236] If an arrest is undertaken on inadequate grounds—so that it is unlawful—the incidental search is not "authorized by law" and will violate section 8.[237] The exclusion of any evidence so obtained then becomes possible under subsection 24(2) of the *Charter*.

The expansive search incidental to arrest power undoubtedly played a role in the Supreme Court's recent decision revisiting the common law authority of police to enter private premises to arrest.[238] If arrested while at home, a suspect's entire residence can be searched without a warrant, an anomalous result given the strict warrant requirement that *Hunter* incorporated into the guarantee. In *R. v. Feeney*, the Supreme Court reconsidered the entry to arrest rule in light of section 8 of the *Charter*. It held that unless police are in hot pursuit of a fleeing suspect, they require a warrant before entering a dwelling to carry out an arrest.[239] Such a warrant should issue only if there are reasonable grounds for an arrest and reasonable grounds to believe the person is at the place to be entered.[240] Parliament's response is now in the *Criminal Code*: these special warrants can be applied for by telephone or facsimile and can be dispensed with if exigent circumstances exist.[241]

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[236] See *Cloutier*, *supra* note 17. See also *R. v. Debot* (1986), 30 C.C.C. (3d) 207, 54 C.R. (3d) 120 (Ont. C.A.) (holding that the search may be undertaken before the arrest so long as the grounds for arrest precede the search at 223-25). This issue was not addressed in the Supreme Court's decision on the same case (*Debot*, *supra* note 77).

[237] *R. v. Stillman* (1996), [1997] 1 S.C.R. 607, 144 D.L.R. (4th) 193 [*Stillman*] (holding that a search incidental to an unlawful arrest is unreasonable under section 8 at 634).

[238] At common law, after making a proper announcement, the police could enter any private place, including a home, to arrest, if they had reasonable and probable grounds to believe that an individual had committed an indictable offence and could be found inside. See *Eccles v. Bourque* (1974), [1975] 2 S.C.R. 739 at 746-47, 50 D.L.R. (3d) 753; *Landry*, *supra* note 80 at 164.

[239] *Feeney*, *supra* note 50 at 47-50. The Court expressly refrained from addressing whether "exigent circumstances" generally would justify a warrantless entry to arrest (*ibid.* at 49-50, 53-54). See also *Macooh*, *supra* note 46 (recognizing the authority of police to enter private premises to arrest in cases of "hot pursuit" at 813-16).

[240] *Feeney*, *ibid.* At the time the *Criminal Code* did not contain a procedure for this sort of specialized warrant. This was considered immaterial by the Court: "If the *Code* currently fails to provide specifically for a warrant containing such prior authorization, such a provision should be read in. ... [I]ts absence cannot defeat a constitutional right of the individual" (*ibid.* at 51). In the spirit of dialogue the Court later granted the government a six-month transition period in which to craft a suitable scheme. See *R. v. Feeney (No. 2)*, [1997] 2 S.C.R. 117.

[241] See *Criminal Code*, *supra* note 3, ss. 529-529.5, Form 7.1 (section 529.5 allows for warrants to be applied for and authorized by telephone or facsimile; section 529.3(1) authorizes entry to arrest without a warrant in exigent circumstances; section 529.3(2) defines exigent circumstances, where

It is important not to exaggerate the effect of the *Feeney* decision. It sensibly removed an artificial distinction between entry into the home to search for evidence as opposed to entry to search for a person. If a warrant is required for one form of entry then why not the other? But a *Feeney* warrant is far from a solution to the problem explored in Part I above. Judicial scrutiny of the adequacy of the grounds supporting an arrest can easily be avoided by simply waiting for a suspect to leave home. More significantly, given that most arrests take place in public places soon after the commission of an offence, the prophylactic benefits of *Feeney* warrants only apply to a small proportion of cases.[242] Finally, those most likely to be arrested unjustifiably are also the least likely to enjoy the sanctuary of a home and, as a result, the protection afforded by such warrants.

To date, section 8 of the *Charter* has only impacted on arrest in these indirect ways by regulating some of the incidental privacy implications and mandating a direct check on police arrest decisions in those comparatively rare cases involving an in-home arrest. To make the guarantee do more in the context of arrest would require a change in approach: it would require a refocussing on the plain language in section 8 of the *Charter* and its disjunctive prohibition on unreasonable "searches *or seizures*".[243] The term "seizure" has been interpreted by the Supreme Court as meaning "the taking of a thing from a person by a public authority without that person's consent," provided that the person has a reasonable expectation of privacy in the thing taken.[244] So far this has meant that only inanimate items like bodily samples and private documents have qualified.[245] In a criminal context, each of the protections set down in *Hunter* for the constitutional control of searches has been held to apply equally to section 8 seizures.[246]

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there are reasonable grounds to believe that immediate entry is needed, to prevent "imminent bodily harm or death to any person" or "the imminent loss or imminent destruction of evidence").

[242] A study in the United States explored both the timing and location of arrests. It found that fewer than 10 percent of arrests occur at a suspect's residence; 50 percent of arrests are made within two hours of the crime through an immediate search of the crime scene or surrounding vicinity; 45 percent of arrests occur more than one day after the crime; and 35 percent of arrests occur after more than one week has elapsed. See The Institute for Defense Analyses (IDA), *Science and Technology: A Report to the President's Commission on Law Enforcement and Administration of Justice* (Task Force Report) (Washington, D.C.: United States Government Printing Office, 1967) at 95-96 (Chair: Nicholas deB. Katzenbach) [IDA, *Science and Technology*].

[243] *Charter*, *supra* note 1, s. 8 [emphasis added].

[244] *R. v. Dyment* (1987), [1988] 2 S.C.R. 417 at 431, 434-35, 55 D.L.R. (4th) 503 [*Dyment* cited to S.C.R.]. See also *McKinlay Transport*, *supra* note 235 at 641-42.

[245] See *e.g. R. v. Dersch*, [1993] 3 S.C.R. 768, 85 C.C.C. (3d) 1 (taking of blood); *R. v. Colarusso* (1993), [1994] 1 S.C.R. 20, 110 D.L.R. (4th) 297 [*Colarusso* cited to S.C.R.] (taking urine & blood); *Stillman*, *supra* note 237 (taking of scalp hair, pubic hair, and saliva); *Thomson Newspapers*, *supra* note 235 (order to produce business documents); *Potash*, *supra* note 235 (photocopying of business documents).

[246] See *Dyment*, *supra* note 244 at 440-41. See also *Colarusso*, *ibid.* at 52-53.

A more generous reading of "seizures" would see its meaning expand beyond the taking of things to the taking of persons. The individual arrested could be treated like the "thing taken". Such an interpretation could be supported by both a plain meaning and a purposive reading of the guarantee. First, on a plain meaning approach, Canadian criminal law routinely uses the term "seizure" or "seize" to refer to the act of taking control over another human being.[247] More importantly, treating an arrest as a "seizure" also seems consistent with the purpose ascribed to section 8 of the *Charter* by the Supreme Court, which is the protection of people—not places or property.[248] This expanded reading of seizures could serve to transform the regulation of police arrest powers under the *Charter*. It would make arrests subject to the very same standards and safeguards that are required for searches or seizures to be considered reasonable under section 8 of the *Charter*. The protective benefits of this reading aside, there is good reason for rejecting this potential interpretation.

To the extent that commentators and courts have addressed the issue, they have normally reasoned that because section 9 expressly refers to individuals being "detained or imprisoned", the meaning of "seizures" under section 8 is limited to inanimate objects.[249] On its own, this argument seems less than compelling.[250] A better response links this claim up with the drafting history that culminated in the final wording of section 8 of the *Charter*. A proposed amendment to section 8 would have expressly extended the guarantee to protection from "unreasonable search or seizure of *person* or property."[251] But after hearing testimony that "so far as persons are concerned ... the seizure of a person ... is covered by the next clause, Clause 9 ... [the] right not to be arbitrarily detained or imprisoned," the Special Joint Committee on the Constitution defeated this proposed amendment by a vote of fifteen to nine.[252] Although the Supreme Court has given minimal interpretive weight to the testimony of civil servants who appeared before the committee, it has understandably taken a

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[247] See *Whitfield*, *supra* note 13 (the Supreme Court's definition of arrest includes "the actual *seizure* or touching of a person's body with a view to his detention" at 48 [emphasis added]). See also *Criminal Code*, *supra* note 3, ss. 279(2), 279.1(1)(a) (the offences of forcible confinement and hostage taking each include a reference to someone who "forcibly *seizes*" another person [emphasis added]).

[248] See *Hunter*, *supra* note 79 at 159.

[249] See *e.g.* Scott C. Hutchinson, James C. Morton & Michael P. Bury, *Search and Seizure Law in Canada* (Toronto: Carswell, 1993) at 2-6. For a case coming to this same conclusion, see *R. v. Parton* (1983), 50 A.R. 233 at 237, 9 C.C.C. (3d) 295 (Alta. Q.B.). But see Morris Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Emond-Montgomery, 1983) at 288-89.

[250] See *Rahey*, *supra* note 213 (rejecting this sort of "water-tight compartment approach" to the interpretation of *Charter* rights, which proceeds on the artificial assumption that police powers neatly fit into distinct sections for constitutional review at para. 67). For example, an unjustified arrest has a concurrently adverse impact upon individual liberty (section 9) and privacy (section 8) interests.

[251] *Minutes*, 27 January 1981, *supra* note 202 at 102-108 [emphasis added].

[252] *Ibid.* at 103-108 (questions by Mr. Fraser and responses of Deputy Minister of Justice Tassé).

very different view of specific amendments that were proposed, considered, and then rejected by the committee.[253] This weighs heavily against an interpretive solution that depends upon arrests being equated with "seizures" under section 8 of the *Charter*. The quest for more meaningful constitutional protections depends upon one final *Charter* guarantee.

D. Fundamental Justice and Section 7

Section 7 of the *Charter* provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[254] This provision is considered the gateway to the other legal rights guarantees. The Supreme Court of Canada has explained that these other provisions (sections 8 through 14) build upon section 7 by addressing "specific deprivations of the 'right' to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7."[255] This does not mean that the specific guarantees in sections 8 through 14 exhaust the content of the principles of fundamental justice. Rather, the Court has repeatedly held that unless a claim falls squarely within a very specific guarantee in sections 8 through 14, additional protection may still be found in section 7. Under this "residual theory" of section 7, what the principles of fundamental justice require may exceed the specific guarantees contained in sections 8 through 14.[256]

In this light, looking to section 7 of the *Charter* for a better approach to the constitutional regulation of arrest seems sensible. None of the *Charter*'s other legal rights guarantees appear capable of getting at the problem outlined above, which is the inherent potential for unfairness that flows from gaps in existing procedures.[257]

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[253] See *R. v. Prosper*, [1994] 3 S.C.R. 236, 118 D.L.R. (4th) 154 (for this reason refusing to read a right to immediate free legal advice into section 10(b) of the *Charter* at 266-67); *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 (similarly refusing to read the protection of property into section 7 of the *Charter* at 1003-1004).

[254] *Charter*, *supra* note 1, s. 7.

[255] *B.C. Motor Vehicle*, *supra* note 8 at 502.

[256] See *Lyons*, *supra* note 179 at 353-54; *Thomson Newspapers*, *supra* note 235 at 536-39; *Hebert*, *supra* note 194 at 162-64, 176-78; *R. v. Genereux*, [1992] 1 S.C.R. 259 at para. 102, 70 C.C.C. (3d) 1 at 38; *Morales*, *supra* note 76 at 727; *Pearson*, *supra* note 182 at 682-89; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at 1076, 101 D.L.R. (4th) 654 [*Dehghani* cited to S.C.R.]; *R. v. Rose*, [1998] 3 S.C.R. 262 at 315, 166 D.L.R. (4th) 385 [*Rose* cited to S.C.R.]. But see Hogg, *Constitutional Law of Canada*, *supra* note 195 (critizing the residual theory for the uncertainty it creates at 44-20 to 44-21). This approach parallels that employed by American courts in dealing with the interrelationship between specific constitutional guarantees and the "due process clause".

[257] The fact that section 7 of the *Charter* has not been considered in this context should not dissuade us from considering it here. It is important to remember that the guarantee is in its relative infancy.

Before proceeding, however, a preliminary consideration is whether section 7 of the *Charter* is engaged. Triggering the principles of fundamental justice requires a real or imminent threat to either life, liberty, or security of the person.[258] But this initial hurdle is easily overcome in the case of arrests, given their obvious impact on individual liberty and security interests. To varying degrees, restrictive bail conditions or pretrial detention only serve to prolong these effects.[259] This means that procedures for arrest, intake, and bail must comport with the principles of fundamental justice. In the future, the challenge will be determining what these principles demand in this context.

At its core, fundamental justice is about fairness. And while fairness often relates to process, it inevitably also raises questions of substance. Quite simply, sound procedure cannot undo the fundamental injustice of applying an unfair law.[260] The Supreme Court of Canada quickly recognized this and concluded that the principles of fundamental justice are not confined to matters of procedural fairness.[261] In explaining the source of these principles, however, the Court has been less than consistent. In its early decisions involving substantive claims, the Court concluded that the requirements of fundamental justice could be found in the "basic tenets and principles" of the Canadian legal system.[262] As an interpretive key, the "basic tenets" approach has been criticized for failing to provide "any real guidance".[263] In addition, given its inevitable emphasis on historical practice, it seems particularly ill-suited for grappling with contemporary procedural fairness claims. This may explain why later cases drifted away from the "basic tenets" in favour of a balancing approach. Under

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See Kathleen McManus, "The Sleeping Giant of Rights: Section 7 and Substantive Review" (1994) Dal. J. Leg. Stud. 35.

[258] See *R. v. White*, [1999] 2 S.C.R. 417 at 436, 174 D.L.R. (4th) 111; *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451 at 479, 121 D.L.R. (4th) 589 [*S.(R.J.)* cited to S.C.R.]. See also Robert J. Sharpe & Katherine E. Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) (outlining the two-step approach to analysis under section 7 of the *Charter* at 136).

[259] See *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at 78, 177 D.L.R. (4th) 124. The Court adopts the following passage from Lamer J.'s dissent in *Mills v. R.* ([1986] 1 S.C.R. 863 at 919-20, 29 D.L.R. (4th) 161 [footnote omitted]):

> [S]ecurity of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation". These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

[260] See Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 (noting that the Constitution could not be taken seriously if courts held that "fundamentally unjust laws are acceptable as long as they are applied to all in a fair and even-handed manner" at 110).

[261] See *B.C. Motor Vehicle*, *supra* note 8 (rejecting the view that "the principles of fundamental justice" are synonymous with "natural justice" or "procedural due process" only at 498-504, 511-13).

[262] *Ibid.* at 512. See also *Beare*, *supra* note 18 (in assessing if a particular law enforcement measure is consistent with these principles, the "principles and policies that have animated legislative and judicial practice in the field" should be considered at 402-403).

[263] Hogg, *Constitutional Law of Canada*, *supra* note 195 at 44-17.

this interpretive method, the principles of fundamental justice are to be discerned by weighing the competing interests at stake in a particular context to determine if a legislative scheme strikes "a fair balance".[264] In more recent cases, both approaches have been employed, with the "basic tenets" of the legal system being treated as an additional factor to be weighed in the balance.[265] The indeterminate and potentially subjective nature of either approach is difficult to deny.[266] A lack of precision to one side, it is still necessary to consider the potential result if these principles are ever focussed on existing arrest, intake, and bail procedures.

On a substantive level, the issue to be addressed is the standard for authorizing arrests. As we saw above in Part III.A, a law authorizing arrests on some arbitrary basis—like an individual's eye or skin colour—would easily contravene section 9. But what if Parliament simply chose to lessen the standard for arrest without resorting to improper or discriminatory criteria? For instance, could Parliament choose to license arrests based on a "reasonable suspicion" that an individual has committed a crime as opposed to "reasonable and probable grounds"? Such a standard would not run afoul of section 9 of the *Charter*—under existing Supreme Court case law—because it is premised on "rational criteria" and does not grant "unfettered discretion" to arrest.[267] It is at this point that the residual protection of the principles of fundamental justice could come into play. Given the long history of the "reasonable and probable grounds" standard as the minimum threshold required for arrests at common law and under statutes, it arguably qualifies as a "basic tenet" of the Canadian legal system. In the context of arrest, this standard has historically been seen as striking "a fair

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[264] See *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193 (introducing the need to balance the "spectrum of interests" reflected by the principles of fundamental justice at 603). See also *Cunningham v. Canada*, [1993] 2 S.C.R. 143, 80 C.C.C. (3d) 492 (making no mention of "basic tenets" and introducing the need to question if "a fair balance" has been struck between competing interests at 152). For a critique of the open ended nature of the balancing method, see Thomas J. Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995) 74 Can. Bar. Rev. 446.

[265] See *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, 152 D.L.R. (4th) 577 (openly acknowledging this new approach and describing it as "eminently sensible and perfectly consistent with the aim and import of [section 7], since the notion that individual rights may, in some circumstances, be subordinated to substantial and compelling interests is itself a basic tenet of our legal system ... " at 898-901). See also *United States v. Burns*, [2001] 1 S.C.R. 283 at 321-27, 2001 SCC 7.

[266] See *B.C. Motor Vehicle*, *supra* note 8 (the Court has partially acknowledged this, noting that the principles of fundamental justice "cannot be given any exhaustive content ... but will take on concrete meaning as the courts address alleged violations of s. 7" at 511-13). Also see Alan Young, "Fundamental Justice and Political Power: A Personal Reflection on Twenty Years in the Trenches" (2002) 16 Sup. Ct. L. Rev. (2d) 121 (critiquing of the balancing approach as inherently political and antithetical to the counter-majoritarian purpose of the *Charter*—instead advocating a return to the basic tenets approach, with any necessary balancing taking place under section 1 at 135-45).

[267] *Supra* notes 178 to 182 and accompanying text (these are the standards developed under section 9 for assessing whether legislation authorizes arbitrary detention or imprisonment).

balance" between individual and state interests.[268] As such, the historic standard for arrests would likely qualify as a principle of fundamental justice. This would foreclose Parliament from substituting some lesser standard for arrests in the future.[269]

More challenging is deciding whether existing arrest and intake procedures accord with the principles of fundamental justice. Setting confusion as to the source of these principles aside, the Supreme Court has consistently recognized that "the requirements of fundamental justice, at a minimum, embrace the requirements of procedural fairness ... "[270] It has explained that the safeguards required by these principles may vary with the context and the interests at stake and that protections required in one setting may be unnecessary in another.[271] But within a given context, "[t]o determine the nature and extent of the procedural safeguards required by s. 7 a court must consider and balance the competing interest of the state and the individual."[272] The ultimate question is whether an impugned procedure or practice strikes a fair balance. If it does not, it fails to accord with the principles of fundamental justice and is unconstitutional under section 7 of the *Charter*.

The state and individual interests at stake in this context are substantial. On the state's side of the ledger, in cases where there is good cause to believe an individual has committed a crime, an arrest and denial of bail are often essential. For instance, if a suspect is unlikely to attend court, poses a threat to public safety, or is likely to commit further offences—including destroying evidence or interfering with witnesses—pretrial detention can be critical. In such cases, the impact upon individual liberty, privacy, and autonomy interests is obvious. Even if bail is granted, restrictive conditions like curfews, reporting requirements, or travel restrictions can continue to

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[268] *Supra* note 3 and accompanying text; *supra* notes 36 to 51 and accompanying text. See also *Hebert*, *supra* note 194 at 162-63; *S.(R.J.)*, *supra* note 258 at 487-88. Both cases hold that the "basic tenets" may be reflected in common law and statutory requirements.

[269] This is not to suggest that a lesser standard might not be constitutional for less intrusive encounters. For instance the "articulable cause" standard endorsed by the Ontario Court of Appeal in *Simpson* for brief investigative detentions. See *supra* notes 19 to 35 and accompanying text.

[270] *Lyons*, *supra* note 179 at 313. See also *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 212-13, 17 D.L.R. (4th) 422 [*Singh* cited to S.C.R.]; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 884-85, 84 D.L.R. (4th) 105.

[271] *Lyons*, *ibid.* (a jury is not necessary in the sentencing phase when dangerous offender status is determined). See also *United States v. Dynar*, [1997] 2 S.C.R. 462 at 516-17, 147 D.L.R. (4th) 399; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 at 657-58, 97 D.L.R. (4th) 577 [*Idziak* cited to S.C.R.]; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438 (procedural fairness demands less in extradition proceedings than it does in domestic criminal trials at 847-48); *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289 [*Chiarelli* cited to S.C.R.] (coming to a similar conclusion in the context of deportation proceedings involving national security interests at 743-46); *Dehghani*, *supra* note 256 (procedural fairness does not require that counsel be provided to refugee claimants at port of entry interviews at 1076-78).

[272] *Idziak*, *ibid.* at 657. See also *Chiarelli*, *ibid.* at 237.

effect a significant restraint on liberty. If bail is refused, the impact upon the individual can be profound. Those detained pending trial are held in maximum security facilities, where personal searches, overcrowding, and long lockdowns are quite normal.[273] In addition, pretrial custody can jeopardize a suspect's job, result in a loss of residence, undermine personal or family relationships, and interfere with the ability to prepare a defence.[274] The issue under section 7 of the *Charter* is whether existing arrest, intake, and bail procedures strike a constitutionally "fair balance" between these equally important yet competing interests. In considering this question, we will begin by first addressing the police authority to arrest before turning to current intake and bail procedures.

As we have seen, the police currently have ultimate authority over most arrest decisions. Unless an in-house arrest is planned, there is no obligation to obtain prior judicial approval. Unlike searches, arrest warrants are not mandatory even in those cases where it would be entirely feasible for the police to get one. This power on the part of police to arrest for indictable offences without a warrant has a long and uninterrupted history, preceded by an analogous power for felony arrests at common law.[275] No doubt, history weighs in favour of a conclusion that this power is consistent with the principles of fundamental justice.[276] But under the Supreme Court's more recent decisions, history is not controlling. Instead, a balancing analysis is necessary, in which the competing costs and benefits are weighed.[277]

The flexibility of the current arrest regime undoubtedly has its benefits, but it also has its costs. As we saw in Parts I.D and I.E above, the police are partisan participants in the criminal justice system whose arrest decisions can often be skewed by a lack of

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[273] See *Ontario Report on Systemic Racism*, *supra* note 112 (detailing these conditions at 115). See also *R. v. Wust* (1999), [2000] 1 S.C.R. 455 at 470-72, 477-78, 2000 SCC 18. See also Tom Blackwell, "Jail Overcrowding Prompts Judges to Cut Sentences" *National Post* (19 October 2002) A11 (reporting on overcrowding in Ontario, Alberta, and Manitoba).

[274] See *Ouimet Report*, *supra* note 61 at 101-102; Weiler, *supra* note 88 at 428; Friedland, *supra* note 61 (summarizing all of these effects at 16). There is also evidence that those subject to pretrial detention are more likely to plead guilty, to be found guilty after trial, and to receive heavier sentences if convicted (Friedland, *ibid.* at 60-62, 110-25). See also Pamela Koza & Anthony N. Doob, "The Relationship of Pre-Trial Custody to the Outcome of a Trial" (1974-75) 17 Crim. L.Q. 391.

[275] See *supra* notes 38 to 51 and accompanying text (detailing the common law and statutory history of arrest powers in Canada). See also *Criminal Code, 1892*, *supra* note 10, s. 552 (setting out powers to arrest without warrant).

[276] See *Thomson Newspapers*, *supra* note 235 ("[w]hile I realize that the longevity of a statute cannot alone render it consistent with the principles of fundamental justice, it is nevertheless a factor that must be weighed very heavily in any attempt to decide what is required by those principles in particular areas of the law" at 547). See also *Beare*, *supra* note 18 (although the "common law is ... not determinative ... it is certainly one of the major repositories of the basic tenets of our legal system ... " at 406).

[277] See *Idziak*, *supra* note 271 and accompanying text; *Chiarelli*, *supra* note 271 and accompanying text.

objectivity. The current arrest rules seem weighted in favour of the state. They allow the need for efficiency in law enforcement practices to predominate over the interests of the individual. The arrest that is carefully planned following a lengthy investigation is treated exactly the same as the impromptu arrest that takes place in the immediate aftermath of a crime. So long as a private residence is not involved, neither requires prior judicial approval. An approach that strived for balance would distinguish between these sorts of cases. If law enforcement's ends are not appreciably advanced by an immediate arrest, fairness to the individual would seem to require that the supporting grounds be subjected to prior judicial approval.

There are a number of predictable responses to such an argument. Initially, at least, the most likely reaction is to repeat the oft-quoted statement—offered up whenever a procedural fairness claim is denied—that the principles of fundamental justice only require fairness not "the most favourable procedures that could possibly be imagined."[278] But such rhetoric cannot get past the undeniable preference for state interests that informs existing arrest powers. The better response will actually weigh into the balancing analysis and argue why change would tilt the scale at too great a cost to public safety.

A presumptive arrest warrant requirement—it could be argued—would be hopelessly unworkable, endangering the police by causing them to second-guess their arrest decisions.[279] But this sort of concern is not borne out by experience. For example, there are a handful of American jurisdictions where a presumptive arrest warrant requirement has been in place for many years, mandated either by legislation[280] or the interpretation of state constitutions.[281] There is no evidence to

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[278] See *Lyons*, *supra* note 179 at 362. See also *Rose*, *supra* note 256 (collecting and citing the numerous Supreme Court cases that have repeated this quotation at 317-18).

[279] See Law Reform Commission of Canada, *Working Paper 41*, *supra* note 4 (rejecting the need for arrest warrants "in every case" and noting that "[p]olice, confronted with a murderer whose avowed purpose is to flee the jurisdiction, cannot be compelled to ... seek arrest warrants" at 73). The Commission takes an all or nothing approach to the issue. It does not acknowledge the potential for an exigency exception to any arrest warrant requirement that would seem to give police the flexibility to deal with the hypothetical described.

[280] See Tex. Code Crim. Proc. Ann. § 14.04 (Vernon 1994) (restricting the authority to conduct felony arrests based on information supplied by third parties to instances where police have reason to believe that "the offender is about to escape, so that there is no time to procure a warrant"). Also see *DeJarnette v. State*, 732 S.W.2d 346 (Tex. Crim. App. 1987) (delineating the factors to be considered in assessing whether an escape is imminent at 352-53). See also Colo. Rev. Stat. Ann. § 16-3-102(1)(c) (West 1973) (coupling the authority of police to arrest with a requirement that an "arrest warrant should be obtained when practicable"). See also *People v. Casias*, 563 P.2d 926 (Colo. 1977) (explaining this presumptive arrest warrant rule). But see Colo. Rev. Stat. Ann. § 16-3-102(1)(c) (West 1977) (ultimately removing the arrest warrant requirement).

[281] See *Campos v. State*, 870 P.2d 117 (N.M. 1994) [*Campos*]. *Campos* held that for an arrest to be reasonable there must be "probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency ... that precluded the officer from securing a warrant. If

suggest that police officers in these states have had any difficulty distinguishing between those cases where it is feasible to get an arrest warrant and those cases where it is not. The experience of Canadian police with the presumptive search warrant requirement is to the same effect. If Canadian police officers are capable of deciding when a search warrant is impractical, why should arrest warrants be any different? Arguably, the task of police would be made easier if the in-house/out-of-house distinction developed in *Feeney* were overtaken by a general exigency exception for all arrests. Such a rule could then be codified by Parliament, along with a procedure for securing arrest warrants by telephone or facsimile. This could be linked up with a generous exigency exception that allowed for immediate arrest in cases where there were justifiable concerns about flight, public safety, or the preservation of evidence.[282]

The better objection involves an attack on the effectiveness of warrants generally. It begins by arguing that justices of the peace identify so closely with law enforcement that they are far from an "objective check" on police power.[283] In addition, even if independent, they often lack the necessary training to distinguish between suspicion and reasonable and probable grounds. These arguments are buttressed by two recent Canadian studies reporting alarmingly high error rates in the issuance of search warrants.[284] On this cynical view, a presumptive arrest warrant requirement would only serve to add another layer of paperwork to the already heavy administrative burdens shouldered by police, in effect, draining scarce policing resources away from the street while providing illusory protection for those arrested.

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an officer observes the person arrested committing a felony, exigency will be presumed" (*ibid.* at 121). See also *State v. Canby*, 252 S.E.2d 164 (W.Va. 1979) (holding that "in order for police officers to make an arrest without a warrant, they must have ... probable cause, and, in addition, there must be exigent circumstances, not of the police officers' creation, which militate in favour of immediate arrest" at 166); *Stuck v. State*, 264 N.E.2d 611 (Ind. 1970) (holding that an arrest warrant must be obtained "wherever practicable" at 615); *Payne v. State*, 343 N.E.2d 325 (Ind. Ct. App. 1976) (detailing an exception where "there is probable cause to arrest, coupled with exigent circumstances making the obtaining of an arrest warrant impracticable" at 334-35). But see *Funk v. State*, 427 N.E.2d. 1081 at 1084-85 (Ind. 1981).

[282] See *supra* note 241 (detailing Parliament's legislated response to *Feeney* that provides an excellent model of how a presumptive arrest warrant requirement could be met with a flexible statutorily prescribed exigency exception).

[283] See Richard V. Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981) (a pre-*Charter* study that described a collaborative dynamic between police and justices issuing warrants at 152-54).

[284] See Casey Hill, Scott Hutchison, & Leslie Pringle, "Search Warrants: Protection or Illusion?" (2000) 28 C.R. (5th) 89 (a study of 100 search warrants issued in Toronto found that 61 percent should not have been issued and that 40 percent failed to disclose adequate grounds at 91, 96, 128); The Honourable Casey Hill, "The Role of Fault in Section 24(2) of the *Charter*" in Jamie Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 57 (an earlier study of 100 warrants found that 39 percent should not have been issued and that 29 percent did not disclose adequate grounds at 67-69).

If true, these failings would be tantamount to a "knockout punch" for a presumptive arrest warrant requirement in any cost-benefit analysis.

The reality, however, is not as stark as sceptics of the warrant process might suggest. Regarding the independence of justices of the peace, a study in the post-*Charter* era revealed that seventy-two percent of justices surveyed perceived their role as being "to serve as a buffer between the police and the ordinary citizen."[285] If the slant inherent in such self-reporting does not answer concerns about the objectivity of justices, a forty-seven percent refusal rate for the 5,504 telewarrant applications filed in Ontario should eliminate any concern that justices of the peace are nothing more than rubber-stamps.[286] With respect to the error rates for search warrants, it is not insignificant that both studies involve Ontario, where justices of the peace receive no formal training before being appointed.[287] Rather than revealing an inherent flaw in the warrant process, these studies point to the importance of adequately training those who issue warrants. Finally, putting aside the checking function of warrants, there are also certain benefits generated by the process itself. If the police must pause, reflect, and articulate the justification for an arrest to an independent third party, then this alone promotes a more responsible use of police powers.[288] These benefits do not necessarily come with the added burden of another layer of paperwork. To the contrary, written reports following an arrest are already a part of police practices. In cases where it is feasible, the added effort of swearing to the grounds and submitting a copy for prior judicial approval, by facsimile for instance, does not seem overly burdensome. Beyond providing a needed check, such a rule would bring greater structure and, consequently, reliability to police reporting practices.[289]

On a balancing approach, it would seem that an arrest warrant requirement, coupled with a generous exigency exception, would strike a fairer balance between individual and state interests. In contrast, the current rule seems unduly weighted in

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[285] Anthony N. Doob, Patricia M. Baranek & Susan M. Addario, *Understanding Justices: A Study of Canadian Justices of the Peace* (Toronto: Centre of Criminology, University of Toronto, 1991) at 25 [Doob, Baranek & Addario, *Understanding Justices*].

[286] Hill, Hutchison, & Pringle, *supra* note 284 (citing statistics compiled by the Ontario telewarrant project over an 89 week period at 100).

[287] Doob, Baranek & Addario, *Understanding Justices*, *supra* note 285 (in lieu of formal training, in "Ontario, after being appointed, justices of the peace were supplied with written material to read ... Attendance at a seminar may have been offered some months later" at 61). See also Hill, Hutchison & Pringle (calling for more continuing education for justices of the peace and explaining the high error rate by noting that "justices of the peace ... are largely without formal training" at 110, 114).

[288] See H. Richard Uviller, *Tempered Zeal: A Columbia Law Professor's Year on the Streets with the New York City Police* (Chicago: Contemporary Books, 1988) at 25; William J. Stuntz, "Warrants and Fourth Amendment Remedies" (1991) 77 Va. L. Rev. 881 at 908, 920-25, 927. Both authors make this observation with respect to the benefits of the search warrant process.

[289] See Davis, *Police Discretion*, *supra* note 92 (emphasizing the importance of confining, structuring, and checking police discretion at 170).

the state's favour. By subordinating individual interests to police flexibility in all cases, even when this is entirely unnecessary, the current regime sacrifices fairness for efficiency. So far, however, no Canadian appellate court has tackled this problem. The closest any court has come was a 1997 decision by the Ontario Court of Appeal. In *R. v. Manolikakis*,[290] the court allowed a Crown appeal where a trial judge had found that section 7 was violated when the police arrested a man without a warrant in circumstances where they had ample opportunity to get one.[291] After indicating that "[w]e doubt the correctness of each of the trial judge's rulings" (there were several issues unrelated to the warrant question), the court proceeded to resolve the case exclusively on the basis of subsection 24(2) of the *Charter*, deciding that, despite any *Charter* violations, the evidence should have been admitted.[292]

The only Supreme Court judgment providing any clues on how that court might tackle the issues raised here is *Winnipeg Child and Family Services v. K.L.W.*[293] In *K.L.W.*, a section in Manitoba's child welfare legislation was challenged as inconsistent with the principles of fundamental justice under section 7 of the *Charter*. In a provision that mirrors police arrest powers in a criminal context, the legislation allows state officials to apprehend a child if there are "reasonable and probable grounds" to believe that the "child is in need of protection."[294] The child can then be held until the disposition of a child protection hearing. As with arrests, prior judicial scrutiny of the supporting grounds is only necessary if the authorities are entering private premises. There is also an exception to this warrant requirement for emergency situations.[295] The absence of any need for prior judicial scrutiny of the grounds for apprehension in non-emergency situations formed the basis for the section 7 challenge in *K.L.W.*

The majority and dissent in that case agreed that the interests at stake on both sides were substantial. For the dissent, the profound impact of state intervention in this context meant that, whenever feasible, the principles of fundamental justice

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[290] (1997), 102 O.A.C. 235 [*Manolikakis* (Ont. C.A.)].

[291] *R. v. Manolikakis*, [1994] O.J. No. 3208 (Prov. Div.) (QL). The trial judge found that the accused's section 7, 8, 9, 10(a), and 10(b) *Charter* rights were violated. With respect to section 7, the judge reasoned that, as with searches under section 8, the principles of fundamental justice require that police obtain an arrest warrant in cases where this is feasible. Accordingly, the judge read subsection 495(1) down (*ibid.* at paras. 191-95).

[292] *Manolikakis* (Ont. C.A.), *supra* note 290 at 236.

[293] [2000] 2 S.C.R. 519, 191 D.L.R. (4th) 1, 2000 SCC 48 [*K.L.W.*].

[294] See *The Child and Family Services Act*, S.M. 1985-86, c. 8, s. 21(1). "Child in need of protection" is further defined in section 17.

[295] *Ibid.*, ss. 21(2) (allowing for entry without a warrant if there are grounds to believe a child is in "immediate danger" or is "unable to look after and care for himself or herself" and has been left alone), 21(3) (allowing for warrants to issue authorizing entry into private places if there are "reasonable and probable grounds for believing there is a child who is in need of protection" inside).

require a warrant before a child can be apprehended.[296] In construing the requirements of fundamental justice in this way, the dissent found the procedural safeguards developed under section 8 of the *Charter* for regulating search powers to be instructive.[297] In contrast, the majority rejected a constitutional requirement for warrants. Justice L'Heureux-Dubé wrote that "the interests at stake in the child protection context dictate a somewhat different balancing analysis from that undertaken with respect to the accused's s. 7 and s. 8 rights in the criminal context."[298] By implication, this seems to contemplate a different result if the authority of police to conduct warrantless arrests for indictable offences were challenged under section 7 of the *Charter*.

Still unaddressed is the constitutionality of current intake procedures for those who are arrested without a warrant and held for a bail hearing. A presumptive warrant requirement would only provide protection for a small proportion of all arrests. Most arrests take place in the immediate aftermath of a crime, following a fresh and continuous investigation, making a warrant impractical.[299] If a suspect is arrested without a warrant and is held for a bail hearing, as Part II above explained, gaps in existing intake and bail procedures mean that there is no obligation on the state to demonstrate the existence of reasonable and probable grounds as a precondition for restrictive bail conditions or pretrial detention. This means that the partisan assessment of a police officer as to the sufficiency of the evidence for an arrest and charge(s) will control an individual's custodial status long into the criminal process.

On any balancing analysis, the unfairness inherent in current Canadian arrest, intake, and bail procedures is difficult to deny. As the United States Supreme Court has acknowledged, those state interests that might counsel against embracing a presumptive arrest warrant requirement "evaporate" once a suspect is in custody. In contrast, for the individual, the negative effects of an arrest, which is often followed by restrictive bail conditions or pretrial detention, only tend to increase with the passage of time.[300] Basic fairness demands that shortly after a warrantless arrest

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[296] *K.L.W., supra* note 293 at para. 27, Arbour J., dissenting (joined by McLachlin C.J.C.).

[297] *Ibid.*, Arbour J., dissenting ("where state action impinges on the *Charter*-protected rights of individuals, procedural safeguards must be in place to ensure that the state action is well-founded and assessed by an independent arbiter who is not herself implicated in the merits of the case" at para. 21).

[298] *Ibid.* at para. 98, L'Heureux-Dubé J. In addition, in its balancing analysis the majority expressed the view that it would be difficult to distinguish between emergency and non-emergency situations and that errors could come at too great a cost given the special vulnerability of children in need of protection (*ibid.* at paras. 99-116). The dissent argued the distinction was not difficult, pointing out that legislation in several provinces included a presumptive warrant requirement with an emergency exception (*ibid.* at paras. 31-35, Arbour J., dissenting).

[299] See IDA, *Science and Technology, supra* note 242.

[300] See *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975) (holding that in cases involving warrantless arrests the Fourth Amendment requires a prompt judicial determination that there is probable cause for the arrest and charge(s) before liberty restricting bail conditions can be imposed or

(before traditional bail criteria are even considered) the state make a preliminary showing as to the existence of reasonable and probable grounds to justify the charge(s). After all, it is the arrest itself which ultimately provides the underlying justification for detention. By allowing for liberty-restricting bail conditions, or pretrial detention, based only upon a police officer's subjective assessment of the evidence, existing procedures are both unfair and constitutionally suspect under section 7 of the *Charter*.[301]

In order for current intake and bail procedures to comply with the principles of fundamental justice, legislative changes would be necessary. Given that sections 8 through 14 are illustrative of these principles, it makes sense that the procedural safeguards mandated by section 7 for arrests *at least* match the protections developed for regulating searches under section 8. At a minimum, this would require an independent judicial assessment of the supporting grounds based upon a sworn document.[302] A "fair balance", however, is a context specific determination. A need for surprise requires that warrants to search or arrest be obtained on an *ex parte* basis. But this rationale no longer holds once a suspect is in custody.[303] In this context, basic procedural fairness, of the sort guaranteed by the principles of fundamental justice, demands that an accused be afforded an opportunity to address the decision maker on the adequacy of the grounds supporting an arrest and charge(s).[304] An informal hearing on the issue would seem to be constitutionally mandated.

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bail can be denied at 113-14). Also see *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661 (1991) (holding that the probable cause determination must be undertaken within 48 hours of an arrest at 56-57). But see *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820 (1976) (rejecting a presumptive arrest warrant requirement under the Fourth Amendment). Also see Albert W. Alschuler, "Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process" (1986) 85 Mich. L. Rev. 510 (arguing that the due process clause would seem to demand an even greater showing before bail is denied, "substantial preliminary proof" of a defendant's guilt, or "clear and convincing evidence of guilt" at 558-66).

[301] See Law Reform Commission of Canada, *Our Criminal Procedure* (Report 32) (Ottawa: Law Reform Commission of Canada, 1988) (noting that "fairness requires the neutrality and impartiality of those accorded important decision-making functions" at 23)

[302] See *supra* note 233 and accompanying text.

[303] See *Nova Scotia (A.G.) v. MacIntyre* (1981), [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385 (recognizing this in the search warrant context and noting that in camera and *ex parte* procedures are required in the application process to maintain the essential element of surprise, but acknowledging that after execution, the "need for continued concealment virtually disappears" at 187-88).

[304] See *Singh*, *supra* note 270, Wilson J., concurring (recognizing that the principles of fundamental justice include a right to be heard by a decision maker at 213-15). An individual has a right "to state his case and know the case he has to meet" (*ibid.* at 214). But see *Whitmore*, *supra* note 125. That case upholds the *ex parte* nature of pre-inquiries for the issuance of summonses based on the notion that procedural fairness is only required "where final decisions are made affecting a [person's] rights—not at the initial hearing where a decision is to be made as to whether a hearing should later be held where the person's rights would actually be in jeopardy" (*ibid.* at 572). This limitation seems

Parliament could accommodate these constitutional developments through a couple of amendments to existing intake procedures. First, in cases involving warrantless arrests, a procedure for backing informations (the charging document) with an affidavit prepared by the arresting officer that sets out the grounds in support of the charge(s) could be added to the *Criminal Code*.[305] These sworn documents would go some way in redressing the problems associated with show cause reports.[306] In addition, the bail provisions could be amended to include a requirement that, before considering the conventional criteria, the presiding justice review the supporting affidavit and verify that it discloses reasonable and probable grounds to support the charge(s). Before this determination is made, the accused would be allowed to make submissions as to the inadequacy of the grounds disclosed in the supporting affidavit. A similar opportunity could even be provided to those who are arrested pursuant to a warrant, to ensure that they receive equivalent protection. The presiding justice could be authorized to reassess the adequacy of the grounds disclosed in the affidavit sworn to obtain the arrest warrant. Finally, if prepared to suffer the attendant delay of the arresting officer's personal attendance, cross-examination on either type of affidavit could be permitted.[307] In the end, if the justice concluded that reasonable and probable grounds were lacking, immediate release would be necessary.

An interpretation of the principles of fundamental justice requiring the development of the types of prophylactic measures outlined here also finds support in *K.L.W.* Given the context, the majority declined to hold that the principles of fundamental justice required prior judicial authorization before a child believed to be in need of protection could be apprehended by the state. The Court proceeded to hold, however, that "the seriousness of the interests at stake demands that the resulting disruption of the parent-child relationship be minimized as much as possible by a fair and prompt post-apprehension hearing."[308] At that hearing, a determination is made whether the child is in fact "in need of protection". According to the Court, to be "fair" the hearing must involve "reasonable notice" to the parents with "particulars" and an opportunity to "participate meaningfully in the proceedings."[309] Delaying such

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inapplicable where pretrial detention is involved as an accused's liberty interests are already in jeopardy.

[305] See *e.g.* American Law Institute, *A Model Code of Pre-Arraignment Procedure: Complete Text and Commentary* (Washington: American Law Institute, 1975), § 310.1(2).

[306] *Supra* note 150 and accompanying text.

[307] I recognize that this entitlement could be used to obtain otherwise unavailable discovery rather than testing the grounds to support an arrest. The reader should note, however, that under existing bail procedures if an accused refuses to proceed on the informal basis of a show cause report viva voce evidence is also possible. But because of delays associated with insisting on viva voce evidence few accused are willing to suffer more time in custody to secure discovery benefits alone. See *supra* note 149 and accompanying text.

[308] *K.L.W.*, *supra* note 293 at para. 122.

[309] *Ibid.* at para. 123.

hearings for seven days, as contemplated by the Manitoba legislation, was considered sufficiently "prompt" to comply with the principles of fundamental justice.[310]

As the *K.L.W.* majority carefully pointed out in rejecting a presumptive-warrant requirement, the constitutional requirements for child-protection proceedings are context specific.[311] That said, the same concerns which lead the Court to conclude that a "prompt post-apprehension hearing" is demanded by the principles of fundamental justice would seem to have equal force with respect to criminal arrest, intake, and bail procedures. At bottom, in both contexts, the basic requirement of fair process is the same. Fundamental justice demands that in situations where it is feasible for the state to do so, it should be required to satisfy an independent judicial officer that there is good cause to interfere with an individual's liberty and security interests. Simply put, it is unfair for individual rights and liberties to be impacted adversely for extended periods based solely upon the judgment of partisan state officials.

Conclusion

Although the *Charter* ushered in an era of robust protections for civil liberties in the criminal investigative context, it has largely left the authority of police to arrest untouched. In the intervening years, Canadian courts have continued to entertain the fiction that individuals are protected adequately against the spectre of unjustified arrests by the fairness of the "reasonable and probable grounds" standard. But as Part I of this paper served to illustrate, despite occasional claims to the contrary in the cases, the truth is that mistakes, misuses, and even abuses of the arrest power are an unfortunate and somewhat inevitable reality in Canada. Given this, the focus of any effort to minimize the occurrence of unjustified arrests must be on increasing the visibility of police arrest decisions.

Unfortunately, as Part II of the paper explained, existing intake procedures fail to provide a meaningful early check on police arrest decisions. Even worse, existing bail criteria have the tendency to increase the chances that those most likely to be subject to unjustified arrest—individuals with prior criminal histories, the homeless, and the mentally ill—are also the most likely to be denied bail. In addition, given that

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[310] *Ibid.* at paras. 122, 127. The Court suggested that two weeks would "lie at the outside limit of what is constitutionally acceptable" but refrained from setting a "precise constitutional standard" (*ibid.* at para. 125). In the end it upheld Manitoba's seven-day requirement with a caveat that "no additional delays should generally be tolerated if the parents are ready for a hearing" (*ibid.* at para. 128).

[311] There are a number of dissimilarities between each context. The accused receives a bail hearing and, much later, potentially either a preliminary inquiry or a trial, or both. But as we have seen, the bail hearing does not go to the adequacy of the underlying grounds for the charge(s) and a preliminary inquiry or trial could be months away. In child-protection proceedings, on the other hand, the hearing is the "trial". But, unlike the criminal trial, the result is only temporary; further hearings are needed for the state to maintain custody of the child unless a permanent wardship application is brought—but this is an entirely different kind of proceeding.

unjustified arrests ultimately culminate in the withdrawal of a charge prior to, or on the morning of, a scheduled preliminary inquiry or trial, the true extent of the problem outlined in the first half of this paper is impossible to measure with any certainty.

Over the last twenty years the *Charter* has not served to alter the low visibility of police arrest decisions. Instead, as explained in Part III.A, difficulty in ascribing meaning to the arbitrariness standard under section 9 of the *Charter* has meant that the constitutional regulation of arrest has barely been able to get off the ground. The hang-up has been the "unlawful" versus "arbitrary" dichotomy. The resolution of this interpretive bottleneck lies in finally recognizing that a purposive reading of the guarantee requires that unlawful arrests are inherently arbitrary and unconstitutional under section 9. Such an interpretation would better enable section 9 to do important case-specific work. Once this issue is resolved, courts could finally begin focussing on the development of safeguards that are capable of regulating police arrest decisions on a systemic level. This will require looking beyond section 9 for potential solutions.

The main problem with the existing arrest regime in Canada is its potential for unfairness. The absence of effective procedural safeguards means that the individual's right to be free from unjustified arrest depends almost exclusively upon the police. This is dangerous because the police are partisan participants in the criminal justice system. Under the current scheme, individuals bear the risk of being unjustifiably arrested and detained for considerable periods, before the deficiency of the case against them ultimately leads to the charge(s) being withdrawn or dismissed. As structured, the current system unnecessarily places the state's interest in effective law enforcement ahead of the liberty interests of the individual. As we saw, section 7 of the *Charter* provides the judiciary with the constitutional tool with which to strike a fairer balance.

It is up to Canadian courts to take the first steps towards reform and recognize that current arrest and intake procedures are constitutionally deficient under section 7 due to their inherent potential for unfairness. Parliament could respond by developing two prophylactic measures capable of substantially reducing the risks inherent in the current scheme. First, in those cases where it is clearly feasible for police to subject their grounds for arrest to prior judicial scrutiny, an arrest warrant could be required. Secondly, because most arrests will occur in exigent circumstances that make getting a warrant impractical, changes to existing bail procedures could allow for an early and independent check on the grounds underlying an arrest and charge(s). A judicial determination as to the adequacy of the grounds could be required before the traditional bail criteria are considered.

The development of meaningful constitutional controls over police arrest decisions is possible. It will, however, require a rethinking of past assumptions and approaches, and a willingness to both reconsider section 9 and then to move beyond it for solutions. If unjustified arrests are inevitable, what is needed most are systemic protections that correct their low visibility. Unfortunately, current procedures fail to

do this; they neither serve to prevent nor promptly redress unjustified arrests. If Canadian courts were to recognize the fundamental injustice of these shortcomings under section 7 of the *Charter*, Parliament could respond with needed safeguards. The result would be significant: police arrests powers would finally be subject to meaningful checks.