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Policy, Practicalities, and PACE s.24: The Subsuming of the Necessity Criteria in Arrest Decision-Making by Frontline Police Officers.

Pearson, G.*, Rowe, M. and Turner, E.*****

PACE, as amended by the Serious Organised Crime and Police Act 2005, establishes a complex framework of factors that police officers must consider during arrest decision-making. Officers must possess a reason to arrest, it must be necessary to arrest for that reason, and they must give at least a 'cursory consideration' to alternatives. Based on a four-year ethnographic study of frontline officers from two forces in Northern England, we argue that the 2005 reforms have not achieved their aims. The new regime tasks officers with undertaking a complex legal assessment prior to arrest, but officers are often confused about the necessity criteria which, moreover, is typically a minor consideration in contrast to demanding practical and policy pressures. This means that unlawful and non-Human Rights compliant arrests continue to be regularly made and, equally significantly, that many suspects are escaping the criminal justice system because officers are not considering arrest alternatives.

* University of Manchester, School of Law, Williamson Building, Oxford Road, Manchester, M13 9LP, UK, geoff.pearson@manchester.ac.uk. ** University of Liverpool, Management School, Chatham Street, Liverpool, L69 7ZH, UK, mikerowe@liverpool.ac.uk. ***University of Liverpool, School of Law and Social Justice, Eleanor Rathbone Building, Bedford Street South, Liverpool, L69 7ZA, UK, lizt@liverpool.ac.uk. The authors would like to thank the editor and anonymous reviewers for their helpful and constructive comments on an earlier draft of this paper.

INTRODUCTION AND METHODOLOGY

The current law on arrest necessity is set out in s.24 of the Police and Criminal Evidence Act 1984 (PACE), as amended by the Serious Organised Crime and Police Act 2005.¹ Whether or not to arrest is ‘an operational decision at the discretion of the constable’.² The importance of officers being able to justify the coercive³ trespass to a person which is an inevitable factor in any arrest is a longstanding principle of the law of England and Wales.⁴ The 2005 Act reformed police powers for arresting suspects without a warrant, scrapping the previous rules which had distinguished between ‘arrestable’ and non-arrestable’ offences and significantly extending powers of arrest for minor offences.⁵ However, forces run the risk of being subject to legal challenge for wrongful arrest, so a clear understanding of the rules amongst frontline police officers and custody sergeants is essential. Further, the requirement that the police service comply with Article 5 of the European Convention on Human Rights (ECHR) and do not arbitrarily or unnecessarily detain individuals means that when arrests (leading almost inevitably to some period of detention) can and cannot be made requires analysis, particularly following such a major legislative reform.⁶ More than ten years after the changes (and over thirty years since PACE came into force) confusion amongst officers as to what establishes a necessary and lawful arrest remains. Furthermore, requiring frontline officers to both understand and apply such complex legal assessments reveals a lack of understanding from policy makers about the pressures of modern police work and the ability of the law to drive police reform.

Given the legal and constitutional significance of the subject and the scale of the reforms, there is relatively little case law or academic commentary on the post-2005 regime. Our current understanding of the law is primarily guided by the Court of Appeal in *Hayes v Chief Constable of Merseyside*⁷ which has already received criticism for extending the powers beyond those intended by parliament.⁸ This paper analyses the amended s.24 PACE in action.

¹ s.110.

² PACE Code G 2.4.

³ A. Sanders et al., *Criminal Justice* (2010, 4th edn.) 141.

⁴ Diplock LJ in *Dallison v Caffrey* [1965] 1 Q.B. 348 at 370.

⁵ For a historical overview of the development of arrest powers pre-2005, see Sanders, op. cit., n. 4.

⁶ R. Austin, ‘The New Powers of Arrest: Plus ça Change: More of the Same or Major Change?’ [2007] *Criminal L.R.* 439.

⁷ [2012] 1 W.L.R. 517.

⁸ E. Cape, ‘Arrest: Power of Summary Arrest – Reasonable Grounds for Believing that Necessity to Arrest Person in Question’ [2012] *Criminal L.R.* 35.

It considers whether frontline officers understand the tests and are correctly applying the powers when determining whether to make a summary arrest. It investigates why officers make the decision to arrest suspects and – equally importantly - the many reasons they provide to avoid making arrests. The paper argues that a host of practical, policy, and personal reasons exist that tend to dominate the decision-making process of officers and relegate the legal and human rights determinants of whether an arrest should be made to the back of their mind. This lack of consideration of the necessity criteria not only makes unlawful arrests increasingly likely but also means that other suspects are not only avoiding arrest but also escaping the criminal justice system altogether following informal ‘advice’ from officers.

The paper is based on an ethnographic study of officers working in two urban police forces in the North of England over five years. The authors carried out observations of individual and teams of police officers in the course of their duties and then interviewed them about their use of discretion. Nearly 80 different officers or teams were observed, including officers from Neighbourhood, Response, Traffic, Schools, Specials, and Night-time Economy Teams, as well as Tactical Aid, and the Organised Crime Disruption Squad.⁹ 1,400 hours were spent in the field observing officers on early, afternoon, and night-shifts, and assessing their use of discretion in terms of making summary arrests or administering alternative solutions (for example ‘Voluntary Attendance’ at a police station, penalty notices, or informal ‘advice’). The authors also carried out ten observations in three custody suites, assessing the reasons given for arrest to custody sergeants, totalling a further 90-hours in the field. Due to the extensive time spent in the field and with different officers/units/areas, the authors are confident that they can provide an overview of attitudes and conduct that are indicative of more general tendencies in the way the idea of ‘arrest necessity’ features in the frontline police work in these force areas. However, the authors cannot be certain that similar patterns of behaviour will be occurring nationwide, or in forces with different characteristics and problem profiles, particularly given the evidence of variety between different forces, stations, and units.¹⁰

THE LAW ON SUMMARY ARREST

⁹ The force and all officers/teams/units within it have been anonymised as have exact dates of observations/interviews.

¹⁰ D. Dixon *Law in Policing: Legal Regulation and Police Practices* (1997), pp. 87-88.

The amended PACE s.24 sets out the power of officers to make arrests without a warrant. As with the previous regime, a summary arrest may be made of any individual about to commit an offence, in the act of committing an offence, or when the officer has reasonable grounds for suspecting they are about to commit an offence, are committing an offence, or have committed one.¹¹ This power of summary arrest is exercisable only if the officer has reasonable grounds for believing that any of the reasons set out in PACE are applicable *and* if it is necessary to arrest the suspect for one of those reasons. The reasons include: enabling the suspect's name or address to be ascertained; preventing the suspect causing physical injury to him/herself or another, causing loss/damage to property, committing a public decency offence, or unlawfully obstructing a highway; protecting a child or vulnerable person; allowing the 'prompt and effective investigation of the offence'; or preventing the suspect absconding.¹²

The final two reasons were added by the Serious Organised Crime and Police Act 2005 and, combined with the abandonment of the seriousness criteria through the abolition of the arrestable offences, led to reservations about the extension of police discretion.¹³ Concerns were expressed by the Law Society, the Bar Council, and Liberty, who called the new powers 'utterly unacceptable and grossly disproportionate to the problem identified.'¹⁴ Sanders et al. are highly critical of the 2005 Act in this respect, arguing that it, '...prioritises considerations of police efficiency over the interests of the subject,'¹⁵ and Cape argued the reform would increase police power in a way that would be unfair on officers and restrict the liberty of citizens.¹⁶ The shift in the regulation of powers of arrest for most offences, from a relatively simple list of arrestable offences to a much more complex two-stage consideration of justification and necessity, represents a significant one for both officers and suspects.

Further guidance for officers is set out in PACE Code G, the revised edition of which came into practice in 2012, after the most authoritative case interpreting the amended s.24.¹⁷ The Code requires an officer deciding whether to make a summary arrest to consider their obligations under the Equality Act 2010 not to discriminate on any of the 'protected grounds'¹⁸

¹¹ s.24(1) and (2).

¹² s.24(5).

¹³ H.L. Deb. 14/3/2005 Vol 670 cc1077-93, at 1087 *Baroness Anelay of St Johns*.

¹⁴ House of Commons Research Paper 04/89 2/12/04.

¹⁵ Sanders op. cit. n. 4, p.143.

¹⁶ E. Cape, 'PACE Now and Then: Twenty-One Years of "Rebalancing"', in *Regulating Policing*, eds. E. Cape and R. Young (2008) 202

¹⁷ Hayes op. cit. n. 8.

¹⁸ PACE Code G 1.1.

and the Article 5 ECHR Right to Liberty and Security.¹⁹ In this respect, the Code states that, ‘...officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means...’, and it should be applied in a proportionate manner.²⁰ With regard to s.24(5)(e) (allowing the ‘prompt and effective investigation of the offence’), which our observations indicated was one of the most often stated reasons for arrest, the Code suggests this would apply where, ‘further action considered necessary to properly investigate their involvement in the offence would be frustrated, unreasonably delayed or otherwise hindered and therefore be impracticable’.²¹

In addition to suspecting an offence, the officer therefore needs, (a) a reason to arrest for that offence/suspected offence, and (b) needs to believe that it is *necessary* to arrest for that reason. Here there is significant overlap, but the guidance given in Code G and the case law is clear that merely possessing one of the reasons set out in s.24(5) does by itself also amount to proof that the arrest is necessary. Austin’s commentary on the changes argues that the increased importance of the necessity criteria²² post-2005, ‘may make arrest powers more difficult to exercise lawfully’,²³ highlighting the objective nature of the necessity test and noting that, “‘Necessary’ means that there is no alternative to arrest; that enabling or preventing, as the case may be, one or more of the arrest conditions set out in s.24(5), cannot be achieved by any other means short of arrest.”²⁴

The Court of Appeal in *Hayes* disagreed with this analysis and Hughes LJ instead followed the test used in *Re Alexander’s Application for Judicial Review* that the arresting officer must ‘at least consider’ whether having a suspect voluntarily attend a police station for interview is a ‘practical alternative’. However this may ‘require no more than a cursory consideration’²⁵ and it is not the case that ‘there must be no feasible or viable alternative or that arrest must in every cases be a matter of last resort’.²⁶ Hughes LJ was of the opinion that the arresting officer in *Hayes* had considered the alternative of asking the suspect to voluntarily

¹⁹ PACE Code G 1.2 which has a direct vertical effect on police authorities under the Human Rights Act 1998. The Court of Appeal in *Shields v Chief Constable of Merseyside Police* [2010] EWCA Civ 1281 noted that the new s.24 ‘ensures conformity’ with Art.5 ECHR.

²⁰ PACE Code G 1.3.

²¹ PACE Code G 2.9.

²² It should also be noted that ‘necessity’ as a principle for summary arrest existed prior to 2005; for non-arrestable offences, an officer could arrest if a summons was inappropriate or impracticable and the arrest was necessary.

²³ *op. cit.* n. 7 p. 471.

²⁴ *op. cit.* n. 7 p. 464.

²⁵ [2009] N.I.Q.B. 20. Sir Brian Kerr LCJ at para. 19.

²⁶ *Hayes* at para. 32.

attend the police station but ‘had summarily rejected it’,²⁷ noting that, ‘it is not always the case that a voluntary attendance is always as effective a form of investigation as interview after arrest.’²⁸ This is reiterated in the latest guidance in Code G, which states that while an officer must have,

reasonable grounds for believing it necessary to arrest, he or she is not required to be satisfied that there is no viable alternative to arrest... [T]he officer should consider that arrest is the practical, sensible and proportionate option in all the circumstances at the time the decision is made.²⁹

This means that, ‘the officer who has given no thought to alternatives to arrest is exposed to the plain risk of being found by a court to have had, objectively, no reasonable grounds for belief that arrest was necessary’.³⁰ The ACPO Position Statement on arrest necessity supports this position: ‘Code G requires officers to *consider* [our emphasis] other practical alternatives to arrest’.³¹

This is a low threshold, but *Hayes* does not make arrest necessity a merely subjective test. Instead Hughes LJ set out a two-stage test. First, the officer must actually believe that arrest is necessary (and for a reason set out in PACE), and secondly, the decision must be made on reasonable grounds (on the information known at the time).³² This is supported by jurisprudence on arrest necessity from a handful of other reported cases post-2005. The High Court in *Lord Hanningfield of Chelmsford v Chief Constable of Essex Police*³³ applied *Hayes* when ruling, *inter alia*, that the police did not have the sufficient arrest necessity under s.24(5)(e) to arrest someone/a suspect at his home during a fraud investigation. Justice Eady conceded that although the arresting officer possessed a subjective belief that the arrest was necessary to allow the prompt and effective investigation of the offence, there was not ‘any rational basis for rejecting alternative procedures’ to arrest, merely a ‘theoretical possibility’ the claimant may interfere with the investigatory process. Similarly, in *Richardson v Chief Constable of West Midlands Police*,³⁴ a constable’s decision to arrest (again under s.24(5)(e)) a suspect of good character who had already attended the police station voluntarily on two

²⁷ Para. 26.

²⁸ Para. 42.

²⁹ PACE Code G Note 2.C.

³⁰ *Hayes*, para. 34.

³¹ <<http://library.college.police.uk/docs/APPREF/ACPO-Position-Statement-Necessity-to-Arrest.pdf>> (November 2012).

³² Paras. 40-42.

³³ [2013] 1 W.L.R. 3632.

³⁴ [2011] 2 Cr. App. R. 1.

occasions was ruled unlawful. The officer's concern that the suspect may leave a voluntary interview was purely speculative given their previous conduct in the investigation, and the decision to arrest on those grounds was *Wednesbury* unreasonable.³⁵ This position is supported in *B v Chief Constable of Northern Ireland*,³⁶ where it was held that there were no reasonable grounds to reach the conclusion that arrests of British soldiers suspected of committing serious offences on Bloody Sunday were necessary because, *inter alia*, they had already offered to attend a station in order to be interviewed.³⁷ Finally, *R (on the application of L) v Chief Constable of Surrey*³⁸ reiterates that the arresting officer must have objective grounds for determining that an arrest is necessary and that the decision to arrest must take into account the particular circumstances of the case rather than be driven by a generic force policy.

The position set out in *Hayes* has not escaped criticism. Cape points out that, 'if "necessary" is to mean something more than "convenient" there is a need to consider not only the objectives of the police, but the importance of the right to liberty of the suspect and the proportionality of the police as a response'.³⁹ Bearing in mind both the s.3 Human Rights Act 1998 duty of courts to interpret the legislation in line with ECHR rights (in this case the meaning of 'necessary' in line with Art. 5) and the explicit reference to proportionality in Code G, this is a fair point. Any application of the proportionality test should include an assessment of whether the arrest is necessary, requiring consideration of whether there is a less restrictive alternative. Further, given that officers should already be considering the *reasons* for arrest, it is difficult in practice to see how a 'cursory' consideration of necessity would go beyond the subjective deliberation as to what reason exists for potentially making a summary arrest. Nevertheless, the Court of Appeal in *Hayes* remains the dominant authority on the meaning of arrest necessity and will be the focus for the analysis in this paper; so long as, 'the arresting officer can demonstrate that he did apply his mind, if only fleetingly, to the alternatives, it will be difficult to impugn his conclusion that arrest was necessary'.⁴⁰

We now turn to how the scheme was observed to operate during the ethnographic study of how officers utilised their discretion to arrest or seek another disposal. The first part of this

³⁵ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223.

³⁶ [2015] E.W.H.C. 3691 (Admin.).

³⁷ The Divisional Court suggested that the objective element of the necessity test existed 'to safeguard the liberty of the individual'³⁷ (and presumably make the scheme compliant with Art. 5 ECHR).

³⁸ [2017] EWHC 129 (Admin)

³⁹ *op. cit.* n. 9, p. 38.

⁴⁰ *id.* p. 39.

analysis identifies considerable confusion on the part of frontline officers as to what arrest necessity means.⁴¹ We contend this makes it difficult for constables to ensure their arrests are lawful. We further contend that such difficulties should come as no surprise given the complexities of the two-stage decision-making process officers are now expected to follow. The second part of our analysis considers the decision-making processes engaged in by officers when they determined whether or not to make an arrest. Here we argue that both reasons for arrest and arrest necessity are subsumed by other concerns and pressures which have a far greater influence on whether suspects will find themselves taken into custody. Our arguments here reflect many of the previous debates in criminology and socio-legal studies as to the extent to which the law can regulate the police, which we will engage with in our later discussion.

CONFUSION BETWEEN ARREST REASONS AND NECESSITY

We asked arresting officers why they decided to make an arrest rather than choosing an alternative disposal. Alternatives to arrest for offences ranged from turning a blind eye, giving ‘advice’ (often a ‘telling-off’), issuing a Fixed Penalty Notice (FPN) or TOR (Traffic Offence Report) for driving offences,⁴² or requesting Voluntary Attendance (VA) for an interview. Officers typically provided an explanation for the practical reasons why they chose to make an arrest, or would list one of a number of the reasons set out in s.24. It was exceptionally rare that an officer, unprompted, would explain why s/he felt that it was *necessary* to make the arrest for that reason. When the research team had questions about the legality of the arrest, arresting officers were usually asked a question along the lines of, ‘what was your arrest necessity?’ This often worked as a trigger for the officer to think back to PACE, but still rarely led to a discussion of the type of contemplation envisaged by the case law and guidance as to whether there was a viable alternative to arrest. Instead the response tended to refer the researcher to the *reason* for arrest. This was most likely to be, the s.24(5)(e) reason (commonly referred to as ‘prompt and effective’) or, in domestic abuse cases particularly, s.24(5)(d) (‘to

⁴¹ Our research also suggests that custody officers rarely confront these misunderstandings, but we do not wish to focus on this for three reasons. First, this has been the subject of much previous research. Secondly, our observations here are relatively limited. Finally, this only tells us one side of the story when it comes to arrest; we are equally concerned with the reasons why arrests are *not* made.

⁴² These allow an officer who witnesses a minor traffic offence to issue a notice of the offence to the driver but to delegate the disposal decision to a separate department.

protect a child or other vulnerable person from the person in question’). There was therefore considerable confusion between arrest *reasons* and arrest *necessity*.

In the first example, a group of teenagers found at school in possession of modified marker pens with blades were issued ‘advice’ rather than being arrested (or having any formal action taken against them). When asked about whether s/he had the required arrest necessity to make an arrest, the officer suggested that the necessity would have existed if they had been carrying the weapons outside the school:

If we actually took them off school site and put them into a public arena then they would have been arrested, no two ways. I’m pretty certain I would have arrested them. The criteria then would be I don’t know who they are... it is a particularly nasty piece of kit.... Have I got the legal power? Yes. Is it appropriate if it was out in a public environment? Yes. As always we want to make people safe, to protect, and to bring offenders to justice.⁴³

While this approach appears well-thought out and eminently sensible, it demonstrates what we found to be a frequent confusion amongst officers on the distinction between arrest reasons and necessity;⁴⁴ confiscating the weapons would have removed the risk to any member of the public without need for an arrest.

A second example illustrating this confusion comes from a discussion with an officer from a different force:

Researcher: Even if you’ve got a *reason* to arrest, e.g. to protect a vulnerable person, that’s not the same as arrest necessity.

Constable: No, it *is* arrest necessity. You could arrest someone purely to protect a vulnerable person. So I could arrest somebody in theory for littering if it was to protect a vulnerable person, and hold them in custody (...) that is, absolutely, that’s Code G.⁴⁵

The significant overlap between reason and necessity, and the focus of officers on the former appears to reduce the likelihood that the second limb of the test will be considered. If the officer believes that an arrest can be justified because they wanted to ensure a ‘prompt and effective’ investigation of the offence, an arrest would often be made without considering whether protection of evidence or the securing or an interview be achieved in another way. Similarly,

⁴³ Interview: Neighbourhood, November 2014

⁴⁴ There is a general confusion amongst many officers about the meaning of ‘necessity’ in the test of proportionality and ‘officers consistently conflated necessity with legitimacy’ (K. Bullock, K and P. Johnson, ‘The Impact of the Human Rights Act 1998 on Policing in England and Wales’ (2012) 52 *Brit. J. Criminology* 630 at 637).

⁴⁵ Interview: Response, November 2016.

officers looking to protect a vulnerable person would often make an arrest without considering whether the person could be protected by other means (for example, by moving either the vulnerable person or the suspect).

Observations of arresting officers at custody suites revealed many who appeared not to have considered the reason for the arrest, which in turn meant they could not have applied the necessity criteria correctly. In some cases, when faced with silence or confusion from the arresting officer, the custody sergeant would make suggestions for likely reasons, or would tick the arrest form with reasons they thought were most likely. When in doubt, the ‘go-to’ reason for arrest by both the arresting officer and the custody sergeant was ‘prompt and effective’, without any further discussion about in what way arrest was necessary to allow such an investigation. In one custody suite, a piece of A4 paper was sellotaped to the custody desk setting out the possible reasons for arrest under s.24 to assist arresting officers.⁴⁶ In line with the pre-2005 regime findings of McKenzie, Long and others, it was highly unusual for custody sergeants to refuse to authorise detention, although they may offer ‘words of advice’ to the arresting officer for future arrests.⁴⁷

With specific regard to ‘prompt and effective’, and the failure of officers to express what this meant in each specific case, further concerns as to the legality of arrests are raised following *B v Chief Constable of Northern Ireland*, in which the Divisional Court considered the relationship between arrest reasons and necessity. It ruled that necessity ‘plainly requires more than merely desirable or more convenient to the arresting authority’.⁴⁸ The court was clear that for s.24(5)(e), the arrest must be necessary for the investigation to be both prompt *and* effective,⁴⁹ and that whether or not an investigation was ‘effective’ was not the same as efficient or cost-effective but instead, ‘[i]t means tending to achieve its purpose’.⁵⁰ An officer who uses ‘prompt and effective’ as a default reason for an arrest which has not been clearly thought through would struggle to explain how the investigation would not have achieved its purpose without the arrest.

⁴⁶ Fieldnotes: Custody, November 2013.

⁴⁷ I. McKenzie ‘Helping the police with their inquiries: the necessity principle and voluntary attendance at the police station’ [1990] *Criminal L.R.* 22; J. Long, ‘Keeping PACE? Some Front Line Policing Perspectives’, in *Regulating Policing*, eds. E. Cape and R. Young (2008) 95. This also reflected the findings of McConville et al. that PACE’s requirement that detention was “necessary” was displaced by the working rule of Custody Sergeants to assist with detention (M. McConville et al., *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (1993) 42).

⁴⁸ Para. 26.

⁴⁹ Para. 27.

⁵⁰ Para. 28.

Some officers, however, had a better understanding of the importance of arrest necessity, and one of the forces researched had implemented online training courses to assist officers. Reflecting this, one constable argued that arrest used to be ‘more of an instinctive reaction’ but that the force were, ‘much more stringent on the necessity criteria these days’ following the reported unlawful arrest cases: ‘More so the last couple of years we have to consider the necessity criteria and consider whether we should be taking away someone’s liberty’:

So you were (...) going into custody with the same person, and it’s the old ‘prompt and effective investigation of the offence’, and the custody officer is like, ‘happy days’, ‘great’, and all that, and booked them in. Then the Home Office... came back to us and said... what it’s about is avoiding taking people’s liberty unnecessarily and we need to have more than just this ‘prompt and effective’. And if you ask bobbies now they will probably say arrest rates have gone down, probably like, 80%... Because bobbies being bobbies, it’s the path of least resistance (...) Current climate you’re more inclined to sit back and think about it before [...] ⁵¹

There was also evidence that custody sergeants possessed greater knowledge of the complexities of the arrest necessity criteria. Although it remained very rare for them to probe the difference between the reason and the necessity for arrest, there were a handful of examples of custody sergeants declining to take a prisoner into custody.⁵² In the following scenario a constable arrested a teenager suspected of being part of a gang who were trying to break into vehicles following an unsuccessful search for items pertaining to car theft:

He arrests the lad for dangerous cycling, no lights and anything else he can think of. He needs an appropriate adult because he is 15 or 16 and so [the officer] says he cannot issue the tickets there and then. They call for a van to take the bike back to the station. (...) As it happens, the Inspector is driving the van. He makes no comment on the arrest (...). At [the custody suite], the Custody Sergeant asks the usual questions. But he is not impressed. Quietly, to avoid the officer’s embarrassment, and very conscious that [the researcher is present], the Sergeant asks whether there were other options? Are his parents at home? He understands what the officer is trying to do, he says, but he cannot authorise detention.⁵³

⁵¹ Interview: Neighbourhood, September 2015. Between 2006/07 and 2016/17, arrests in England and Wales dropped by 53% (Home Office 2017 Police Powers and Procedures Statistics: <<https://www.gov.uk/government/statistics/police-powers-and-procedures-england-and-wales-year-ending-31-march-2017>>).

⁵² Of course, it is difficult to know the impact of the researcher’s presence here. It is possible either that CO’s were more likely to act ‘by the book’ and refuse detention, or less likely to embarrass officers in front of an external observer.

⁵³ Fieldnotes: Response, July 2015.

FACTORS DETERMINING WHETHER TO ARREST

Officers are therefore regularly making arrests without considering arrest necessity, and sometimes without even considering what their arrest *reasons* are. So what is informing their decision-making process? Our observations suggested that it was not the case that officers were making arbitrary decisions to arrest (although there were considerable differences between judgements made by individual officers, which were sometimes exacerbated by the role they were performing (e.g. Response vs Traffic roles)), or even regularly making decisions based on morally-objectionable grounds (officers inevitably thought they were ‘doing the right thing’ and would robustly and thoughtfully defend their decisions). Instead the decision to make an arrest tended to be informed by a number of (sometimes conflicting) policy and practical pressures, as well as an officer’s interpretation of their own role, the context and circumstances of the suspected offence, and the demeanour, history, and attitude of the suspect.

In line with most prior research into police discretion, we found that these external pressures and internal interpretations played a far more significant role in the decision whether to make an arrest than the requirements of s.24 PACE and Code G. Further, it was very rare that a decision to arrest would be challenged by other officers or the custody sergeant, meaning that the non-application of s.24 and Code G almost always led to a significant restriction of the suspect’s liberty through subsequent detention. Conversely, where decisions were made not to arrest, there were observed occasions where members of the public and the suspect themselves were left at risk. Both outcomes, in the absence of a correct application of s.24, leave forces at risk of litigation.

1. *Force Policy*

The operational freedom of the officer determining whether to make an arrest is frequently restricted by force policy. This is often influenced by national agencies, and feeds back to officers through training packages, force briefings, or regular briefings given by Inspectors or Sergeants at their police station. Officers and their immediate superiors are answerable for failures to follow force policy, so this has the potential to affect how an officer makes an arrest decision. Our observations suggested that policies – or at least officers’ *interpretations* of those policies - were usually at the forefront of their minds when they determined whether to arrest, and regularly played a more influential role than Code G. It should be borne in mind here that the legal status of instructions from senior officers cannot make an unlawful arrest lawful; in

O'Hara v Chief Constable of the Royal Ulster Constabulary,⁵⁴ the instruction from a senior officer to 'arrest that man' was held not to be sufficient to satisfy reasonable grounds⁵⁵ and following, *R (Tchenguiz and R20 Limited) v Director of the Serious Fraud Office*, this 'O'Hara rule' seems now to be established.⁵⁶ Force policy will also fall under this principle,⁵⁷ and yet observations showed that policy often pushed thoughts of arrest reason and necessity to one side.⁵⁸

For example, officers rarely wanted to arrest for possession of small amounts of cannabis, which were frequently uncovered in searches of suspects or vehicles. However, many explained that force policies on repeat drug offenders 'took away' their 'discretion'; in one observed incident the officer explained that s/he didn't want to arrest given the small fine that the court would impose (the same result could have been achieved by street disposal, but with significantly less time and resources used):⁵⁹

[Force A]'s policy is that they get a cannabis warning... they have to admit the offence so if they don't admit the offence you have to take them in. But if they admit the offence they get a cannabis warning but they have to have no previous to get that. Once they have had a cannabis warning then they get a fixed penalty... The third time they have to be taken in and charged. If they have previous for supply they have to be taken in as well...⁶⁰

At no stage did the officer consider using VA; the force policy had morphed from taking action to investigate the offence into making an arrest. Force A's policy of immediately drug testing those committing so-called 'signal offences' also provided a policy direction encouraging officers to make an arrest rather than considering alternatives.

However, even the clearest force policies were subject to resistance by some officers. Both participant forces had a policy that where violence was suspected to have occurred in a domestic incident to which officers responded, 'positive action' to separate the parties was required; a policy in place primarily to safeguard victims from further abuse. On the ground many officers interpreted 'positive action' to mean an arrest *must always be made* in these

⁵⁴ [1997] 1 All E.R. 129. Confirmed by ECtHR in *O'Hara v UK* (2002) 34 E.H.R.R. 32.

⁵⁵ cf. *Hough v Chief Constable of Staffordshire* [2001] E.W.C.A. Civ. 39.

⁵⁶ [2013] 1 W.L.R. 1634. See also *Parker v Chief Constable of Essex* [2017] EWHC 2140 (QB).

⁵⁷ This contention is supported by *R (L) v Chief Constable of Surrey Police* op. cit. n. 39.

⁵⁸ The situation here has been improved by the phasing out of arrest 'targets' which were prevalent at one of the forces under observation until the second year of research. Officers at this force reported previously having to make a certain minimum number of arrests in a calendar month, which varied depending on role.

⁵⁹ Fieldnotes: OCDS, September 2015.

⁶⁰ Interview: OCDS, March 2014.

situations (in other words, that there was a mandatory arrest policy). It was not clear why this misinterpretation occurred, although there were indications that this was also how the policy was interpreted further up the chain of command, perhaps due to a desire to avoid any risks in this sensitive area of police work.

Regardless, there was an observable preference for arrest, and frontline officers believed that a decision not to arrest would mean they were ‘fighting against the system’:

For the last five years at least the DV policy is that if you attend a domestic incident, positive action must be taken which effectively... it doesn’t explicitly say that in the policy but it is certainly enforced culturally, from the senior management team, that (...) domestics must result in arrest except in exceptional circumstances.⁶¹

Many officers expressed the view that the policy had taken away their discretion in these cases and considered it unnecessary and ill-judged. The feeling amongst participants was that most officers preferred to follow the policy rather than ‘fight the system.’⁶² It is clear how such an expectation of arrest may lead to unlawful arrest where an alternative safeguarding option is available. Following the interview above, an observation was carried out of the same officer as s/he responded to a domestic incident. S/he showed genuine stress and anxiety about the fact that an arrest was expected, drumming fingers on the steering-wheel anxiously and muttering, ‘I don’t have a choice’ while trying to think of ways to avoid making what s/he perceived to be an unjustified arrest of a youth who had sent abusive texts to, and then pushed, his girlfriend. Both parties lived separately with their mothers but one solution, to simply return the house-key for the girlfriend’s mother’s property and VA the suspect did not appear to be considered by the officer.⁶³

However, some officers observed attending domestic incidents involving allegations of violence were willing to manipulate or resist the system where (a) they understood force policy to mean mandatory arrest, and (b) they did not believe an arrest was fair or appropriate. In one incident, a mother called the police after a 21-year old had been involved in a minor scuffle with his teenage brother. The older sibling was not present by the time the officer arrived but the officer’s view of force policy was that s/he had to arrest both brothers. Feeling that this was unfair on the teenager, the officer did not record his assault (and did not switch on body-worn

⁶¹ Interview: Response, November 2016.

⁶² Fieldnotes: Response January 2017.

⁶³ Fieldnotes: Response, November 2016.

video as per force policy) and instead focussed exclusively on the mental health and drug abuse of his brother, recommending he was sectioned under the Mental Health Act once found. Other officers expressed surprise at the officer's decision when the scenario (in hypothetical terms) was put to them, but the next observed domestic abuse response involving three officers responding separately to the same incident resulted in a similar decision not to record the assault in order to avoid having to make an arrest:

The door is open and we can hear shouting and a loud crash. [PC1] leads the charge through the door and we arrive just in time to see a man being pushed so hard that he falls over a pram in the hallway. Picture frames lie on the floor and there is a hole in the plaster of a wall. The man is in his early 20s and is bare-chested. The other party is his mother, a woman in her 40s twice his size. [PC1] splits up the fight, pushing the woman forcibly into the kitchen.... The mother is furious, complaining that the son 'shows me no respect'. When asked about the fight she claims her son pushed a chair against her throat to try and strangle her. The son in the other room shows scratches and bruises on his torso and claims he is bare-chested because his top has been torn off. The scratches are visible but not serious... [PC2] pushes the son outside, telling him that he has to leave the property and asking if he has somewhere to sleep tonight. The son says he can sleep at a friend's house... The son is furious as he finds a new top. Why, he asks, aren't the police doing anything about his mother who has assaulted him? (...)

[PC1] later explains [to the researcher] that force policy says that in that situation 'we should have brought them both in'... [or] that they should have arrested the son and requested the mother to attend the police station tomorrow so that there was someone to look after 'the kids'. I ask him why [PC1] didn't do that. It is clear that the decision, even against [their interpretation of] force policy, was one that both [PC2] and [PC3] thought was appropriate. 'You've seen how it is.' [PC1] explains the lack of officers who responded to the call and refers back to an earlier conversation we had about them being understaffed. [PC1] doesn't think they can afford to be off the streets for that long when there are so many calls coming in.⁶⁴

Here, the officers possessed both a reason (to protect individuals from further imminent physical harm) and necessity (while the son had said he could stay at his friend's, there were no means of checking if this was possible), and their understanding of force policy was that an arrest had to be made. However, discretion was still used to avoid the practical implications of taking either suspect into custody. This 'cuffing' of incidents⁶⁵ fits into the overall pattern observed in much earlier research on dismissive police attitudes to domestic violence

⁶⁴ Fieldnotes: Response, October 2016.

⁶⁵ A. Myhill and K. Johnson 'Police use of Discretion in Response to Domestic Violence' (2015) 61/1 *Criminology and Criminal Justice* 3.

perpetrators.⁶⁶ Our research suggests a wider variation in terms of officer response; on the one hand many officers are making unlawful arrests due to a desire to avoid conflict with (an interpretation) of force policy. This reflects earlier statistical research indicating that in the United States at least, mandatory arrest policies at least modestly increase the likelihood of arrest.⁶⁷ However, on the other hand, it is clear that the focus on practice and policy can also have the opposite effect. In the above case, this also has potential ECHR Art. 2 Right to Life implications should the failure to arrest put the lives of either of the protagonists or children in the house at risk. The focus on the rights, wrongs, and implications, of arrest also meant that alternative discretionary options (most obviously VA) were not given sufficient consideration.

2. Tactical Use of Arrest

While the above indicates a reticence among some response officers to arrest, observations carried out with the Organised Crime Disruption Squad (OCDS) indicated that arrest reasons and necessity could be put to one side in order to try and disrupt the activities of organised crime groups (OCGs). The OCDS would be sent into an area where OCGs were operating, usually after the discharge of a firearm. The focus would be on the use of stop and account, stop-checks, searches, and arrest against those considered ‘the type’ to be engaged with OCGs in order to disrupt drug-dealing and deter future gun crime. OCDS officers were less concerned than Response or Neighbourhood officers about ‘taking themselves off the street’ with a visit to custody. Instead their primary intention was the disruption of gang activity, and this sometimes meant an imaginative approach to PACE. Officers often boasted about taking a suspected OCG member into custody even if they didn’t have enough evidence for a charge - having them taken off the street for a night was considered a ‘result’.⁶⁸ Returning to the incident above where the teenager was arrested for dangerous cycling, the constable described the arrest as being about ‘disruption’ (‘stopping that group causing any more trouble that night’).⁶⁹ In another incident an arrest made for possession of Class A drugs was justified by the arresting officer because, it was ‘breaking up a drugs operation’. Here it was not just the issue of taking

⁶⁶ S. Holdaway, *Inside the British Police: A Force at Work* (1983); C. Hoyle *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (1998). There are signs that the National Crime Reporting Standard is starting to make it more difficult for officers to ‘cuff’ crimes such as this.

⁶⁷ D. Eitle, ‘The Influence of Mandatory Arrest Policies, Police Organizational Characteristics, and Situational Variables on the Probability of Arrest in Domestic Violence Cases’ (2005) 51/4 *Crime and Delinquency* 573. Some research suggests that part of the increase can be attributed to elevated chances of female suspects being arrested or dual arrests (D. Hirschel et al., ‘Domestic Violence and Mandatory Arrest Laws: To What Extent do they Influence Police Arrest Decisions?’ (2007) 98/1 *The Journal of Criminal Law and Criminology* 255).

⁶⁸ Fieldnotes: OCDS, February 2014.

⁶⁹ Fieldnotes: Response, July 2015.

the suspected dealer out of circulation for the evening (which might have been achieved by disposing of the drugs), but because the resulting charge would lead to bail conditions preventing him entering the city centre prior to his trial.⁷⁰ In contrast, at another observation a drunk and disorderly man who put his hands on an officer was not being arrested. The officer said that, had the suspect 'been OCG', an arrest would have been made.⁷¹

Arrest was also used tactically to achieve other objectives that overrode the Code G criteria; on one occasion officers were observed using arrest to avoid revealing their intelligence source.⁷² Here, officers used an arrest in order to carry out a search of premises under s.18 PACE for proceeds of drug-dealing without gaining a warrant. Provided that they found this evidence, it meant that they would not have to reveal their informant, who had indicated the activities of the suspect. When asked about the necessity of the arrest, the officer suggested that, 'it was necessary to arrest in order to search the home as a way of advancing the case'; in other words to allow a 'prompt and effective' investigation.⁷³

3. The 'Criminal Type', 'Decent Folk', and Contempt of Cop

We have seen from the above that 'being [suspected] OCG' would significantly increase a suspect's chances of being arrested for an offence. This leads on to another factor that officers often took into account; their perception of the 'type' of person the suspect is. Officers can legitimately take into account a suspect's previous history or current behaviour when deciding whether to arrest; they may not believe that the personal details provided are correct, or they may see that the suspect has a history of non-attendance at a police station when requested. However, we also observed a difference in treatment when it came to arrest decisions between those considered the 'criminal type', and those referred to as 'decent folk' (occasionally 'decent people', 'working people', 'taxpayers', or 'ordinary').

Prolific offenders (according to their previous convictions) were more likely to be arrested, which was in line with the OCDS's tongue-in-cheek claim they 'ensured premium service' for their 'customers'. 'Prolific priority offenders' ('that means he's bang at it all the

⁷⁰ Fieldnotes: Night-time Economy Team, October 2015.

⁷¹ Fieldnotes: Neighbourhood Support, January 2015.

⁷² McConville et. al. note that many reasons for arrest could be found in police 'working rules', including the gathering of intelligence (op. cit. n. 48, p. 99).

⁷³ Fieldnotes: Neighbourhood Support, January 2015. Further doubt is cast on the legality of arrests used in this way by *R (L) v Chief Constable of Surrey* op. cit. n. 39.

time')⁷⁴ rarely received penalty notices or advice. In one incident, such an offender was suspected of stealing kitchenware following a stop-and-search for stolen goods and was arrested despite the officers being mindful of a three-hour wait at the custody suite. The reasons given were to secure evidence and assist a 'prompt and effective' investigation, but there was no discussion of the necessity for this arrest despite the identity of the suspect being known and the goods having been recovered.⁷⁵

Equally often, the 'decent folk' categorisation of a suspect was used by the officer to justify not making an arrest, particularly for minor drug or traffic offences⁷⁶ but also for possession of offensive weapons. A fifteen-year old boy found with a knuckle-duster who had no previous criminal history, said he had been 'put up to it', and seemed genuinely distressed when searched by the officer, was merely given a verbal advice in front of his mother. 'There was no way I was going to take him into custody,' said the officer, again ignoring the fact that a compromise might have been to request VA.⁷⁷ Similarly, a man discovered with a baton in the door-well of his van was merely 'given an advisory'; 'Had he been a young lad like the type we are after...' the officer said s/he would have arrested him. Would the officer have acted differently had one of the two suspected OCG members stopped earlier in the shift been in possession of the same item? 'Yes, definitely, I would have taken them into custody'.⁷⁸ When pressed on the reasoning behind this discrepancy in approach towards arrest, another officer argued that, 'If you're a career criminal, are you going to benefit from advice from the police? I don't think you ever would... If they are habitual offenders then I don't think dealing with them by verbal advice would be right.'⁷⁹ Once again, officers tended to adopt an 'all-or-nothing' approach to arrest, seemingly not giving even the 'fleeting' consideration to alternatives.

Occasionally an officer's consideration of the personal characteristics of the suspect when deciding whether to arrest were not limited to those considered to be the 'criminal type'. Even without prior regular involvement in criminality (whether proven or suspected), the decision to take an individual into custody could be heavily influenced by the suspect's attitude towards the officer. The idea that arrests are made for 'contempt of cop' is particularly

⁷⁴ Fieldnotes: OCDS, March 2014.

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ Fieldnotes: OCDS, July 2015.

⁷⁸ It is clear from these examples that there is also potential age and gender discrimination taking place in contravention of the Equality Act 2010.

⁷⁹ Fieldnotes and Interview: OCDS, March 2014.

prevalent in studies on US policing.⁸⁰ This phenomenon occurs where officers arrest not because of the nature of the suspected offence but because the individual has challenged their authority.⁸¹ As Black summarised, ‘Unquestionably, the suspect who refuses to defer to police authority takes a gamble with his freedom’.⁸² Challenging or humiliating an officer who had stopped a suspect was particularly likely to result in arrest where it took place in front of other members of the public,⁸³ and officers in the current research both talked about the impact of contempt of cop (although this was not a phrase they used) and were observed taking this into account when making arrest decisions. As one neighbourhood officer explained, having arrested an offender who had sworn at them, ‘I treat everybody the same but not when they don’t treat me the same’.⁸⁴ It appeared that offenders who were drunk and swore at officers in public were likely to be arrested for ‘drunk and disorderly’, whereas swearing at other members of the public was more likely to result in a quiet word.⁸⁵ Similarly, physically confronting (‘fronting up’) an officer would also most likely result in an arrest.⁸⁶ In contrast, suspects who were apologetic and helpful towards the officer were much less likely to end up in custody.⁸⁷

4. *Vulnerable Offenders and Mental Health*

Officers were keen to use their discretion to avoid arresting ‘decent folk’ and this was extended further when they were faced with individuals who they interpreted to have mental health issues, personality disorders, or they otherwise classed as vulnerable. Here officers were more likely to show sympathy towards individuals (in contrast to those who were drunk or under the influence of prohibited substances). In one incident, an 80-year old man with apparent mental health problems had attached a knife to the end of a pole and was brandishing it threateningly in the street. When the officers arrived he was sat on the settee in his house with it. The makeshift weapon was seized but no action was taken. ‘What if it was your grandad?’ asked the officer explaining the decision.⁸⁸

⁸⁰ T. Barker, *Police Ethics: Crisis in Law Enforcement* (2011) 31.

⁸¹ F. Cooper ‘Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian’ (2011) 11/1 *Nevada Law Journal* 1.

⁸² D. Black, ‘The Social Organisation of Arrest’ (1971) 23 *Stanford Law Review* 1087, at 1099.

⁸³ See also P. Waddington, *Policing Citizens: Police, Power and the State* (1999) 154; R. Worden (1989) ‘Situational and Attitudinal Explanations of Police Behaviour. A Theoretical Reappraisal and Empirical Reassessment’, 23/4 *Law and Society* 667 at 688.

⁸⁴ Interview: Neighbourhood, January 2014.

⁸⁵ Fieldnotes, Night-Time Economy Team: October 2015.

⁸⁶ Fieldnotes: OCDS February 2014.

⁸⁷ Fieldnotes: OCDS, March 2014; Fieldnotes: Response, January 2017.

⁸⁸ Interview: Mental Health Triage, September 2015.

Officers were also mindful that taking a vulnerable individual into custody would make them unpopular with custody sergeants, some of whom were likely to order the arresting officer to stay with the prisoner in an observational capacity in the cell.⁸⁹ During another observation, Response officers arrived at a house to persuade a woman who was suffering from a personality disorder and had taken an overdose to go to hospital:

The woman (...) comes downstairs and starts swearing and being aggressive at the officers. She then goes into the kitchen, opens the knife drawer, pulls out a carving knife and starts waving it around in the direction of the officers, shouting. The two Response officers quickly move in. One of them draws a baton and they grab the knife out of her hand.

Despite the woman having obtained and waved a bladed weapon at the officers, neither the Response officers nor the Mental Health Triage officer⁹⁰ present were willing to make an arrest. Later in this incident the woman's (adult) son arrived and she was also aggressive towards him. Although the triage officer explained that this now allowed the Response officers to arrest to prevent a breach of the peace, they did not want to spend time in custody with the suspect waiting for 'her bloods to be checked' before she could be de-arrested.⁹¹ The Triage officer further claimed that Response officers often 'diagnose' mental health issues as an 'excuse' to avoid arrest and try to push suspects towards a National Health Service solution, whereas in the view of Triage officers they should be considering arrest because the behaviour was usually related to dependency and anger management issues, neither seen as mental health characteristics.⁹²

5. Community Considerations

As we considered above, many constables were mindful of what members of the public would think about their decision whether to make an arrest or not. Officers could be swayed into a decision to avoid arrest where they thought members of the public would view arrest as inappropriate or disproportionate, particularly where the suspects were children or elderly. More general community tensions or sympathies would also be taken into account. During another observation, OCDS officers at a murder scene made the decision not to arrest any mourners coming to lay flowers even though many were smoking cannabis in front of them

⁸⁹ Fieldnotes: Mental Health Triage, September 2015.

⁹⁰ A mental health triage officer might be a police officer with expertise in mental health, as in this case, or a psychiatric nurse or other professional attached to a police unit.

⁹¹ Fieldnotes: Mental Health Triage, January 2016.

⁹² Fieldnotes: Mental Health Triage, September 2015.

and were suspected OCG members who in other circumstances might have been arrested for that offence. The officers explained their decision to only speak informally to the individuals on the basis that they were concerned that ‘tensions were running high’ within the community.⁹³

In contrast, where offences occurred in sight of the public, officers took into account what they thought the onlookers would expect them to do.⁹⁴ Serious offences were therefore more likely to lead to an arrest, even though a less-serious offence may actually coincide with a better reason for arrest and increased necessity. So an officer who took a woman seen snorting what appeared to be a prohibited substance in a phone box into custody highlighted both the seriousness of the (Class A drug) offence, and the fact it was in a public area. In this case there was, in the officer’s mind, a public expectation that the police would arrest: ‘It was opposite a college and a set of traffic lights [...] People saw her doing it and the public wouldn’t have understood a VA’.⁹⁵ The decision to arrest was made before s/he had ascertained the identity of the suspect and even though the drugs had been recovered. In another example, two youths who were being verbally abusive and physically obstructive to police officers attempting to respond to a separate incident were arrested under s.5 Public Order Act. The justification given afterwards was that members of the public, some of whom were recording the incident on their mobile phones, would have expected an arrest to be made.⁹⁶

6. Practical Considerations and Colleague Relations

As we have already seen under ‘Tactical Use of Arrest’, some arrests were made in order to be able to impose bail conditions and restrict the movements (and suspected illegal activities) of suspects,⁹⁷ both in domestic violence cases and also in situations where the officer wanted to exclude a drug dealer from a particular location. Another practicality that tended to subsume the legal tests for arrest set out in PACE and Code G arose when officers considered the impact their decision would have on their colleagues. If they decided to arrest or ‘do a VA’, would this place an additional workload on their colleagues and in turn make them unpopular in the

⁹³ Fieldnotes: OCDS: July 2015.

⁹⁴ See also Waddington, op. cit. n. 84, p. 686.

⁹⁵ Fieldnotes: OCDS, September 2015.

⁹⁶ Fieldnotes: Response, September 2017.

⁹⁷ For a recent example of this on a mass scale, see J. Gilmore et al. *Report on the Policing of Barton Moss Community Protection Camp* (2016) Centre for the Study of Crime, Criminalisation and Social Exclusion. <https://www.ljmu.ac.uk/~media/files/ljmu/research/centres-and-institutes/ccse/bm_final_170216_email.pdf?la=en>.

station? One sergeant in the Specials, (the voluntary constabulary), explained how s/he preferred to use VA when dealing with a minor because of ‘the nightmare of getting parents to turn up to custody, particularly late at night’. Their Inspector disagreed: VA should be avoided because it placed workload on other officers: ‘If we were going to VA, when would they next come in? When would we next be on duty? It’s more complicated for us to VA.’

In a scenario when they had to decide whether to arrest for possession of Class A drugs, rather than addressing legal reasons and necessity, the Inspector focussed solely on the impracticality of a VA and its impact on other officers:

[The suspect would be] straight in [into custody]. As Specials I think if you are working with a regular bobby then you have the choice to VA or process them in a different way... what you don’t want to be doing is handing workload over to a normal bobby. There’s nothing worse than them coming in on a Saturday morning and seeing a job that the Specials have left them... I would rather take somebody in and have them released the following day on bail (...) than to land it with one of my colleagues um with a VA or whatever.⁹⁸

The fact that VA brought with it its own practical problems made it less likely to be utilised. Making an arrest, although usually a time-consuming and unpleasant process, would normally end the officer’s meaningful involvement with that case (once an interview had been carried out), allowing them to approach the next shift with a ‘clean slate’. A VA normally meant that s/he would need to attend custody at a later shift. Moreover, for the ‘criminal type’, the feeling was that there was a very high likelihood they would not attend as agreed, which would mean the officer then had to locate them and make an arrest. Potential delays in processing a suspect do not, however, make an unlawful arrest lawful. Allowing a ‘prompt’ investigation does not provide the sufficient arrest necessity - the test is whether the investigation is *effective*.⁹⁹

However, practical considerations normally lowered the risk of arrest, even where the officer possessed a clear s.24(5) reason and the arrest was necessary. Officers were mindful of how long was left in their shift – if there were less than a couple of hours remaining, many officers were less likely to make an arrest (or respond to a call where arrest was a likely outcome)¹⁰⁰ because this could take them beyond the end of their shift. When custody suites

⁹⁸ Interview: Specials, July 2015.

⁹⁹ *B v Chief Constable of Northern Ireland*, op. cit. n. 37, paras. 26-28,

¹⁰⁰ Although officers always responded to emergency calls where they felt there was a threat to life or another officer needed support.

became busy, officers could be faced with a wait of up to three-hours and such a wait would be a factor taken into consideration by an officer when options other than arrest were available. Officers would instead look for reasons *not* to arrest in these situations, taking into account, for example, that the drunken woman involved in a scuffle outside the nightclub was with friends who promised to take her home immediately,¹⁰¹ or that the doorman who had punched the complainant had first been spat at.¹⁰² If no such reasons existed then the officer would often interpret the situation in a way that ensured, for example, that there was no risk to others, therefore eliminating the arrest reason.¹⁰³

The paperwork that attaches itself to an arrest is another disincentive to find arrest necessity. At one force, a specialised Prisoner Processing Team that would handle most of this had recently been disbanded, and frontline officers indicated that this made them less inclined to make an arrest. Again, in the vast majority of these cases, the police decision was not replaced by a VA; instead officers preferred to issue informal ‘advice’ to the suspect. The impact of this was that crimes were not being recorded, or incidents were being ‘de-crimed’, a phenomenon that has been noted particularly in respect of domestic violence.¹⁰⁴ Nevertheless, even with these workload and time pressures, officers would still make arrests for what they deemed to be very serious offences,¹⁰⁵ or where the suspect had been wanted by the force for a while.

DISCUSSION

The changes to PACE ss.24-25 were heralded as bringing ‘greater clarity and transparency to the law from the perspective of the police officer and the citizen’, in contrast to the ‘complexity’ of the previous regime.¹⁰⁶ Our findings suggest they have not achieved this. Officers are struggling to adapt to the shift to a very different regulatory framework for arrest. Instead of simply needing to know which offences are arrestable, they now need to apply a much more complex, two-stage assessment of whether there is a reason to arrest and whether the arrest is necessary in respect of all suspected offences. Baroness Anelay’s predictions about the reform have been borne out:

¹⁰¹ Fieldnotes: Night-time Economy Team, October 2015.

¹⁰² Fieldnotes: Response, January 2017.

¹⁰³ See fieldnotes above on domestic abuse and also Myhill and Johnson, *op. cit.* n. 66.

¹⁰⁴ Myhill and Johnson, *op. cit.* n. 66.

¹⁰⁵ See also Waddington, *op. cit.* n. 84, p. 39.

¹⁰⁶ HL Deb. 14/3/05 March 2005 Vol 670 cc1077-93, at 1077 *The Minister of State, Home Office (Baroness Scotland of Asthal)*.

To use the necessity test correctly, the police officer will need to consider whether his interference with the person's rights is legitimate, necessary and proportionate. Essentially, this is a Human Rights Act assessment of the use of powers in each case and whether the interference with the individual's rights under Article 5—the right to freedom from arbitrary detention—and Article 8—the right to privacy—is justified. Expecting officers to make that kind of judgment on the spot is hardly making life easier for them.¹⁰⁷

The general lack of discussion of Art. 5 ECHR as the SOCaP Bill progressed through Parliament was notable. Necessity should provide a 'substantial discipline on discretion',¹⁰⁸ and although constables participating in our research were aware of the Human Right Act 1998, this awareness seldom came into frontline officers' considerations of whether an arrest was necessary. Rather than ensuring only proportional restrictions on Art. 5, the law and codes add an extra level, and type, of complexity that does not stop officers using extensive discretion but does enable them to support arrest decisions retrospectively through reference to the HRA. This supports Bullock and Johnson's view that the HRA can be limited in a policing context to merely providing bureaucratic frameworks which 'provide a mechanism to structure and facilitate both advanced and post-hoc rationalization of a wide range of decision making.'¹⁰⁹ For many officers, it does indeed seem that human rights are considered 'a procedure to be followed rather than a paradigm to be cultivated, adopted and practised....'¹¹⁰

Necessity in the context of arrest, while sometimes referred to in human rights terms, was too often confused with the arrest reasons themselves; the existence of the latter was typically deemed to indicate the presence of the former. The existence of, for example, a potential threat to a member of the public was seen alone to make the arrest necessary without any consideration of alternative courses of action. In order to be compliant with Art. 5, arrests need to be lawful, proportionate, and necessary. Arrest reasons can support an officer's view that the arrest is proportionate to prevent an immediate risk to members of the public or for an effective investigation of the offence, and an arrest may sometimes be proportionate because of the reasons behind force policy or due to a lack of resources. However, necessity should be the final hurdle which goes beyond both arrest reasons and balancing the rights of the suspect

¹⁰⁷ id. 1087-1088 *Baroness Anelay of St Johns*.

¹⁰⁸ P. Neyroud and A. Beckley, *Policing, Ethics and Human Rights* (2001) 66.

¹⁰⁹ Bullock and Johnson, op. cit. n. 45, p.643.

¹¹⁰ C. Harfield, 'Paradigm Not Procedure: Current Challenges to Police Cultural Incorporation of Human Rights in England and Wales' (2009) 4 *Journal of Law and Social Justice* 91 at 104. See also Bullock and Johnson, op. cit. n. 45, p.635.

versus the public. The test here is relatively simple: is arrest the least restrictive way of achieving the lawful and proportionate aim of preventing harmful criminality or bringing an offender to justice, or are there alternative approaches which could achieve the same aim without restricting the liberty of the suspect? However, as we have seen, the legal definition and purpose of arrest is subsumed by a host of other practical and policy pressures and objectives. It is not simply that the test is too confusing for many officers, but that attempting to regulate police behaviour through legal means rarely achieves the intended results.

Our research supports the well-established view that police officers have considerable discretion when it comes to decisions such as whether to make an arrest.¹¹¹ This discretion is ‘a necessary element in law enforcement’,¹¹² and ‘the pivot upon which the exercise of authority revolves’,¹¹³ which is greater amongst lower-ranking officers who have the most interaction with the public.¹¹⁴ It also supports the findings of social-scientific research that police officers invoke but rarely enforce the law,¹¹⁵ that they are ‘extra-legal’,¹¹⁶ and that the law is often seen simply as a resource for peacekeeping rather than a determinant.¹¹⁷ The law ‘enables’ officers to cover their behaviour with a ‘legal canopy’¹¹⁸ or ‘fit’ a justification around their decision.¹¹⁹ It acts as a ‘control device’ to impose order, reproduce social control,¹²⁰ assert authority, or acquire intelligence.¹²¹ The officer’s primary focus still appears to be ‘peacekeeping’,¹²² meaning officers prefer to give informal warnings than make arrests, and that ‘the characteristic feature of policing is *under enforcement of the law*... most of the time, discretion is exercised in favour of non-enforcement.’¹²³ We also found that many officers are

¹¹¹ e.g. R. Ericson, *Reproducing Order: A Study of Police Patrol Work* (1982); J. Kleinig, *Handled with Discretion: Ethical Issues in Police Decision-Making* (1996); Waddington (1999) op. cit. n. 84; S. Walker, *Taming the System: The Control of Discretion in Criminal Justice 1950-1990* (1993); S. Walklate, *Gender and Crime: An Introduction* (1995).

¹¹² J. Pollock, *Ethical Dilemmas and Decisions in Criminal Justice* (2007, 6th edn) 199.

¹¹³ Waddington op. cit. n. 84, p. 31.

¹¹⁴ M. Rowe, *Introduction to Policing* (2008).

¹¹⁵ E. Bittner, ‘The Police on Skid Row: A Study of Peacekeeping’, (1967) *American Sociological Review* 32: 699-715, p. 710; M. Banton, *The Policeman in the Community* (1964); J. Wilson, *Varieties of Police Behaviour* (1968).

¹¹⁶ Ericson, op. cit. n. 112; R. Worden (1989) ‘Situational and Attitudinal Explanations of Police Behaviour. A Theoretical Reappraisal and Empirical Reassessment’, 23/4 *Law and Society* 667, at 668.

¹¹⁷ S. Herbert, ‘Police Culture Reconsidered’, (1998) 36/2 *Criminology* 343, at 352.

¹¹⁸ McConville, op. cit. n. 48, pp. 174-75.

¹¹⁹ Bittner, op. cit. n. 116; C. Willis, *The Use, Effectiveness and Impact of Police Stop and Search Powers*, (1983) Research and Planning Paper 15, London HMSO; Dixon et al. ‘Reality and Rules in the Construction and Regulation of Police Suspicion’ (1989) 17/2 *International Journal of the Sociology of Law* 185.

¹²⁰ S. Choongh, ‘Policing the Dross: A Social Disciplinary Model of Policing’, (1998) 38/4 *Brit. J. Criminology* 623.

¹²¹ Holdaway, op. cit. n. 67.

¹²² Banton, op. cit. n. 116; Bittner, op. cit. n. 116.

¹²³ Waddington, op. cit. n. 84, p. 4.

skilled at getting around administrative rules,¹²⁴ and on occasion make unlawful arrests followed by use of the 'Ways and Means Act' to describe the incident in such a way that recourse to arrest is legally justified retrospectively.¹²⁵

These established features of policing have contributed to a failure of the current arrest protections to secure suspects' rights in a uniform way. Critics of attempts to legally regulate the police, such as McConville et al. argue not only that police are adept at 'working around' new rules,¹²⁶ but that it is a mistake to see legal rules as being on their own capable of (or indeed necessarily interested in) protecting suspects' rights. Following this, the failures of the amended s.24 to regulate the police therefore should not be a surprise. There is much to be said in support of McConville et al's critique of legal regulation, but our data suggests it focuses too much on the infringements of rights, and not enough on how the limits of legal regulation equally cause a lack of use of police powers. With respect to arrest, the police invoke the law in order to pursue a range of objectives, for example to take an OCG member of the streets for any minor offence. However, they also choose not to invoke it to meet other objectives, some of which may be as mundane as getting away on time at the end of their shift. Further, our research suggested McConville et al underplay the 'drip down' effect of legal regulation through force policies. These can distort the law and act counter to its objectives, but as Dixon argues, legal regulation does tend to change policing, , albeit with a 'wide variation between forces and stations',¹²⁷ and ,from our research, individual officers.

Further, this impact has accelerated post-2000 as a result of the Human Rights Act. It is well-documented that the HRA has not had the impact at a level of culture or working-ideology on the police service that might have been expected,¹²⁸ but officers in our research, to varying degrees, were changing their practices in a way which made them more compliant with Art 5. This was an indirect effect of the HRA following changes to force-wide policies to achieve human rights (or s.24) compliance, and the alterations in practice were by no means consistent or uniform. However, gradual change was noticeable even during the duration of the

¹²⁴ R. Ericson, 'Rules in Policing: Five Perspectives' (2007) 11/3 *Theoretical Criminology* 367.

¹²⁵ Holdaway, op. cit. n. 67; Waddington, op. cit. n. 84, pp.135-36.

¹²⁶ op cit. n. 48, pp. 182-84.

¹²⁷ Dixon op. cit. n. 11, , pp. 87-88.

¹²⁸ A. Sanders, 'Reconciling the Apparently Different Goals of Criminal Justice and Regulation: The "Freedom Perspective"', in *Regulation and Criminal Justice: Innovations in Policy and Research*, eds. H. Quirk et al. (2010); C. Harfield, 'Paradigm not Procedure: Current Challenges to Police Cultural Incorporation of Human Rights in England and Wales' (2009) 4 *The Journal of Law and Social Justice* 91, at 104; M. Lamb, 'A Culture of Human Rights: Transforming Policing in Northern Ireland' (2008) 2/3 *Policing* 386. The police force is by no means the only criminal justice organisation where there has been a lack of 'receptiveness' to human rights (R. Costigan and P. Thomas, 'The Human Rights Act: A View from Below' (2005) 32/1 *Journal of Law and Society* 51, at 62).

current study. Our research also suggested that the problem in terms of suspect rights was not usually the result of officers intentionally ‘working around’ rules or deliberately ignoring or abusing rights, but instead because many officers were genuinely confused about basic principles of proportionality and necessity. Replacing the seriousness of offence (through abolishing ‘arrestable offences’) with increased discretion to arrest for any offence where this is necessary for one of the (extended) list of reasons, combined with the inconsistent way in which officers have been taught (or have understood) the required human rights principles, has resulted in a lack of certainty when it comes to the suspects’ rights. The 2005 reforms have in effect asked officers not only to learn new bureaucratic rules but also to change the way in which they think about arrest decision-making for most offences. The confusion and uncertainty this has led to is further exacerbated by shifting practical and policy pressures on police decision-making, for example positive action following domestic violence.

The failure by officers to consider, even in a ‘fleeting’ way whether the arrest is necessary does not just mean that unlawful arrests and non-Human Rights compliant detentions are occurring, but also that many officers are unconsciously discounting alternative resolutions to incidents. Practical and resource pressures upon officers should lead to a consideration of alternatives to arrest such as VA, but instead what happens all too often is that the chosen alternative is simply to take no formal action. Our research suggests that police officers typically responded to the post-2005 arrest regime with an all-or-nothing response to suspected criminality, with many suspects dealt with by way of informal advice or ‘turning a blind eye’.¹²⁹ In cases where policy pressures to arrest were particularly strong (for example domestic violence), it could also lead to officers closing incidents with misleading information being fed back to call-handlers, most usually to the effect that reported incidents had not occurred.

We do not consider the increased use of VA to be a panacea to all the problems we have identified here. We acknowledge that VA can often be impracticable and can sometimes be as resource-draining as an arrest. On its own, encouraging the increased use of VA may not significantly reduce the number of ‘blind eyes’ turned or the number of misleading accounts that essentially de-crime serious incidents at source. In terms of suspect rights, as previous researchers have pointed out, the ‘voluntary’ aspect of VA needs to be taken with a pinch of salt because genuine consent on the part of the suspect cannot be established due to the imbalance of power resulting from the implied threat of arrest or other sanction.¹³⁰ There have

¹²⁹ Our findings mirror the decline in arrests seen nationwide in Home Office statistics (op. cit. n.52).

¹³⁰ D. Dixon et al. ‘Consent and the Legal Regulation of Policing’ (1990) 17/3 *Journal of Law and Society* 345.

been further concerns about the use of VA relating to take-up of legal advice,¹³¹ the lack of regulation in terms of time questioning can take, and the fact that it is not always made clear to the suspect that they are free to leave.¹³² Nevertheless, concerns over VA¹³³ should not overshadow the fact that it is preferable in terms of the treatment of a suspect when compared to the lengthy and unpleasant procedure of arrest and custody. Moreover, it simply does not raise the same Art. 5 ECHR concerns as an unnecessary arrest (followed as it is by almost inevitable detention).

If the increased use of (properly regulated) VA can reduce the concerns expressed in this paper, then HMIC and individual forces would need to address how it can be made a more appealing option for officers. This could be achieved by cutting down on paperwork and procedure, reducing the time that frontline officers spend attending custody suites to process VAs (e.g. by opening up more specialist VA suites), and making it easier to chase up those who do not attend as agreed. Our research suggests that the increased use of VA could have a positive effect on the number of unlawful arrests and detentions, without at the same time allowing those who pose a continuing risk to the public to avoid the criminal justice system. ‘Bobbies’ repeatedly admit they are inclined to choose ‘the path of least resistance’ when exercising their discretion, and a combination of practical and policy inducements have the potential to alter the working practice of many officers.

However, if we actually wish to change frontline officers’ understanding of arrest necessity, and embed human rights principles deeper into the working habits and routines of police officers, then we are confronted with the need for both substantial legislative changes to s.24 PACE (in the expectation this will feed into force policies and work rules), and changes to the training of serving frontline officers, new recruits, and custody sergeants. Such reforms would need to place the ‘necessity’ of an arrest at the forefront of an officer’s decision-making process, prior to their consideration of arrest reasons. Unfortunately, given what we already know about the problems inherent in legally regulating the police service, change by this avenue would be unlikely to be either quick or uniform, nor would it eliminate the everyday working pressures that tend to distort the operation of the law in policing.

¹³¹ Dixon *id.*, at p. 356.

¹³² McKenzie, *op. cit.* n. 48.

¹³³ Our observations raised no concerns regarding the time spent in the police station, but legal representation for suspects was unusual.