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Law Relating to on the Street Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General

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THE LAW RELATING TO "ON THE STREET" DETENTION, QUESTIONING AND FRISKING OF SUSPECTED PERSONS AND POLICE ARREST PRIVILEGES IN GENERAL

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INTRODUCTION

There are four principal questions which will be discussed during this session. They are:

(1) In the absence of sufficient grounds for an arrest, should the police have the right to stop and question a person as to his identity and reason for being where he is, if the appearance or conduct of that person has reasonably aroused police suspicion?

(2) Should the police be permitted to search such a person for weapons or for incriminating evidence?

(3) If police practices of this nature are to be legally sanctioned, what limitations should be imposed?

(4) With respect to police arrest statutes generally, should more freedom be granted to police in recognition of their contentions that existing laws are obsolete and hamper police attempts to meet the public demand for adequate police protection?

Traditionally, all of these issues have been dealt with by the law as a single problem of arrest despite the fact that there are obviously important differences between questioning or frisking on the one hand and taking a person into custody for purposes of prosecution on the other hand. This over-simplified "single problem" approach of the law has had unfortunate consequences. The failure of the law to deal adequately with some important law enforcement problems has left enforcement officials without sufficient guidance, thus creating unnecessary risks both for the officer and for the citizen with whom he deals. It is obvious that clear definition of the scope of legitimate power is important for the officer as well as for persons whose interests would be endangered by its abuse. Explanation for inadequacies in current law comes, in part, from the way the law has developed.

Almost without exception, legal rules defining the power of police officers have been developed on a case by case basis. Putting aside the Uniform Arrest Act, which has been adopted by only three states,[1] no legislature has attempted an adequate formulation of police power in relation to issues like the right to stop and question, the right to frisk and the right to take a person into custody.[2] Such legislation as there is is largely sporadic, usually adopting common law principles and making them applicable to certain designated types of police officers. Case law development is itself not undesirable provided the appellate court gets important issues presented to it in proper perspective. Such presentation has been lacking in this field.[3]

An officer may stop and question a suspect under circumstances in which the officer knows he will be

* I am indebted to Mr. Allan Joseph, a student at the Wisconsin Law School, and to Professor Wayne LaFave of Villanova Law School for considerable help in the preparation of this paper.

[1] DEL. CODE ANN., tit. 11, §1902 (1958); N. H. REV. STAT. ANN. 594.2 (1960); R. I. GEN. LAWS, tit. 12, c. 7. For a discussion of the act, see Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

[2] The American Law Institute has currently under consideration a project to formulate a Model Law of Arrest, Search and Seizure.

[3] Apparently the case law development may be thought adequate so far as the development of the law of torts is concerned. See HARPER & JAMES, THE LAW OF TORTS §3.18, at 275 (1956): "The law of arrest represents the compromise between two conflicting in-

in danger if the suspect is armed. Current police practice under such circumstances is to frisk the suspect.[4] If a gun is found, its admissibility may be in issue in states which exclude evidence which is obtained illegally. The basic issue is whether police have the right to frisk a suspect whom they have no right to arrest. This is not the issue which is presented to the appellate court, however. Typically, the prosecution will argue that an arrest was made and the frisking was incidental to the arrest. The defense will argue that there were no grounds for arrest. However the case is decided, the principal issue, the right to frisk a suspect in the absence of an arrest, is avoided. The law and practice continue, therefore, to fail to reflect each other's influence.

Even the issue of the right to stop and question a suspect is typically avoided with the result that this most common, most important law enforcement practice is neither condemned nor sanctioned in most jurisdictions. For example, in a recent case in the United States Supreme Court the majority of the Court held that the issue of the right to stop and question is identical with the issue of the right to take a person into custody.[5] While the law might properly take the position that there is no right to stop and question a suspect unless adequate grounds for arrest exist, this conclusion ought not be based upon the uncritical assumption that the questions lack important differences.

The individual who desires to challenge the right of a law enforcement officer to stop and question, frisk, or arrest him can do so by bringing a tort action against the officer. Typically, the cause of action will be for the intentional tort of false imprisonment. If the officer is to escape liability he must do so upon one of two grounds: (a) there was no confinement without the consent of the plaintiff and thus no imprisonment at all; or (b) the officer was privileged to confine the plaintiff under the existing circumstances. The only privilege category generally recognized is the privilege which an officer has to make a lawful arrest.[6] In this situation counsel for the police officer is therefore likely to argue either that there was no confinement without consent or that adequate grounds for an arrest existed and thus the conduct was privileged. Whatever the decision of the court, the central problem is avoided. There still is no basis for knowing whether there are circumstances in which an officer can confine a suspect for a short period of time in order to question him when the person does not consent and there are not adequate grounds to make an immediate arrest. As a consequence current practice continues without effective guidance from the law.

Generalization is thus made difficult by the ambiguity brought about by the failure of current law to deal adequately with important current enforcement problems like the right to stop and question a suspect or to frisk a suspect thought to be armed and dangerous. The English, if one may judge from Lord Justice Devlin's writings,[7] take pride in their ability to have a responsible law enforcement program with a minimum of formal written legal rules. In the United States it is generally assumed that the written rule of law is an essential method of controlling the exercise of governmental power, and that the principle of government by law requires that reliance upon legal rules be the dominant method of control.

terests of the highest order—the interest in personal liberty and the interest in apprehension of criminals. It represents one of the most successful efforts of the common law to accommodate itself both to the needs of society and of its individual members."

[4] See for example, 2 LOS ANGELES POLICE DEP'T DAILY TRAINING BULLETIN 126 (1950). The practice in Philadelphia is discussed in Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1203 (1952).

[5] Henry v. United States, 361 U.S. 98 (1959). Compare Mr. Justice Burton, concurring in Brinegar v. U.S., 338 U.S. 160, 179 (1949): "Government agents are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search, but when there is reasonable ground for an investigation."

[6] The dilemma created by attempting to make the concept of "arrest" fit all situations in which police conduct interferes with individual liberty is apparent in the literature. It is often asserted that the term "arrest" refers to a privilege which may be asserted as a defense in an action for false imprisonment or battery against an officer. In this context arrest is said to require a purpose to take the arrested person before a court. See for example HARPER & JAMES, THE LAW OF TORTS §3.18, at 285 (1956). On the other hand, it is sometimes assumed that calling police behavior an arrest is essential if the officer is to be held liable for his misconduct. See Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1186 (1952): "By a literal application of the narrower definition, a search of the person, detention for questioning and investigation and wholesale round-ups of suspects would not be arrests. *This means that the police may engage in such activities without being subject to the sanctions for an unlawful arrest.*" (Emphasis added.)

People v. Esposito, 194 N.Y.S. 326, 332 (1922): "Any restraint of liberty is an arrest."

[7] DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND (New Haven: Yale University Press, 1958).

Although this is so, a careful look at the law of arrest discloses a situation of ambiguity so great that there are wide areas of discretion largely untouched by legal rules. As a consequence, there is in fact a delegation of immense power and responsibility to law enforcement agencies whose actions are left largely uncontrolled by the formal legal system.

One other preliminary matter should be mentioned. In talking about the law of arrest, one cannot help but envy those foreign participants who are here from countries where there is a single uniform law throughout the entire jurisdiction. It is difficult when dealing with 50 separate states and the federal government to avoid generalizations so broad that they overlook significant local variations. On the other hand, concentration upon detailed local variations is not possible here. Therefore it is, I think, helpful to try to generalize, even at the risk of over-generalization, in order to provide a framework for the discussions which will follow.

The Law of Arrest

Arrest With a Warrant

In the United States an arrest may be made with or without a warrant. An arrest warrant may be issued by a magistrate on a showing of probable cause to believe that the suspect is guilty of a crime.[8] In most states, the warrant may be issued on the basis of information and belief.[9] In theory the issuance of warrants is a judicial function,[10] although in some states a warrant may be issued by the prosecuting attorney.[11] In practice it is largely a ministerial function, performed as a matter of routine by a clerk, with nothing which could properly be called judicial review of the decision to arrest.

The warrant is utilized today primarily where it serves some administrative function such as making a record of the decision to arrest where the suspect's whereabouts are unknown, or where he is outside the county or the state and the warrant is a prerequisite to an arrest by officers of the other jurisdiction. The warrant may also be issued prior to arrest when the decision to prosecute actually precedes the decision to arrest. This is true, for example, in non-support and in bad check cases where the prosecutor actually makes the decision as to whether the criminal process ought to be invoked, and this decision, reflected by the issuance of a warrant, precedes the arrest. This occurs also in cases involving difficult legal questions like sale of obscene literature or negligent homicide. In these cases, the police may prefer that, before the offender is taken into custody, a legally trained official make the decision as to whether the crime has been committed. However, the common situation is one where the police act first, by arresting a suspect, and then present the case to the prosecutor for his decision as to whether to proceed further. In this situation, the arrest is typically made without a warrant.

Arrest Without a Warrant

In dealing with the law relating to arrest without a warrant, a distinction must be drawn between an arrest for a felony and an arrest for a misdemeanor.

The law relating to felonies is more consistent and easier to state. Generally it may be said that an arrest may be made for a felony whenever a police officer has reasonable grounds to believe that a felony has been committed and that the person to be arrested has committed it.[12] There is indication in some legislation that it is proper to arrest a person who has in fact committed a felony, apparently without regard to whether the officer has

[8] A.L.I. Code of Criminal Procedure §2 (1931).

[9] In some states information and belief is clearly sufficient to support the issuance of a warrant. See for example Wis. Stat. §954.02 (1957). In other states, there seems to be a requirement of direct information similar to that required for a search warrant.

Perhaps the most accurate generalization is that the officer applying for the warrant must either have actual knowledge or must disclose to the magistrate the source of his information so that the magistrate can make an independent assessment of its adequacy. Giordenello v. United States, 357 U.S. 480 (1958).

[10] Giordenello v. United States, 357 U.S. 48 (1958): ". . . inferences from the facts [are to be] drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

[11] See for example Wis. Stat. §954.01 (1957). There is no clear concensus as to what function the warrant should serve. This was pointed out thirty years ago by Alfred Bettman in his Report on Prosecution for the National Commission on Law Observance and Enforcement at p. 88 where, in commenting upon prior surveys, he says: "None of the surveys, however, searchingly face, either in the gathering of the data or in the discussion, this problem of whose function it should be to determine the institution of prosecution and what should be the working methods and principles which govern its administration. Should the clerk of court be the official in whom this function is placed, using clerical methods, or the prosecuting attorney using methods appropriate to that office, or the magistrate using methods of a judicial nature?"

[12] A.L.I. Code of Criminal Procedure §21 (1931); Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 210, 233 (1940). Cal. Penal Code §836.

knowledge which makes it reasonable for him to conclude that the individual has committed a felony.[13] It is clear, however, that the fact that the person is actually guilty of the felony will not justify a *search* if there are no reasonable grounds to believe him guilty of the felony at the time the arrest is made.[14] Probably the effect of these statutes is to preclude tort liability on the part of the officer when the arrested person is in fact guilty though the officer has no reasonable basis for concluding this at the time of the arrest.[15] This is another instance of the failure to make important distinctions; here, the statutes neglect the difference between the power of the officer to make an arrest and the right of an individual to a civil recovery against the officer. To assert that a person who is actually guilty of a felony has no right of recovery against an arresting officer does not require the enactment of legislation giving an officer the power to arrest a person, actually guilty, where there are no reasonable grounds to justify the officer's belief.

It is more difficult to generalize about the situation in regard to the law relating to misdemeanor arrests. There are at least three identifiable views:

(1) An arrest for a misdemeanor may be made without a warrant only when a misdemeanor amounting to a breach of the peace is committed in the presence of the officer.[16] It is typically held that an offense is committed "within the presence" when the officer can detect its commission by the use of his senses, including the senses of hearing and smelling as well as seeing the elements of the offense.[17]

(2) The law of some jurisdictions provides a somewhat broader right of arrest, allowing an arrest for *any* misdemeanor, not only a breach of peace, committed in the presence of the officer.[18]

(3) Finally, some few states allow an officer to arrest for a misdemeanor whenever he has reasonable grounds to believe that a misdemeanor has been committed. Typically these statutes require a further showing that the officer had reasonable grounds to believe that an arrest was necessary in order to prevent additional harm or to prevent the escape of the person reasonably suspected of having committed the misdemeanor.[19]

This general legislation is, in most states, modified by specific legislation either increasing or contracting a power of arrest depending on what kind of officers are involved and in some instances depending upon what kind of offense the arrested person is suspected of having committed.[20]

The Right of the Police to Stop and Question a Suspect

It is obvious that an officer may ask an individual a question and not subject himself to a risk of liability provided that he does not confine or restrain the individual without his consent.[21] More difficult is the question whether the officer can, under circumstances where grounds for arrest are lacking, by force or display of authority confine or restrain an individual for a brief period of time for the purpose of questioning him.

There is no doubt that it is common police practice to stop and question suspects as to whom there are no sufficient grounds for arrest.[22] In

[13] See for example A.L.I. CODE OF CRIMINAL PROCEDURE §21(b) (1931): "When the person to be arrested has committed a felony, although not in the presence of the officer."

[14] People v. Brown, 45 Cal.2d 640, 290 P.2d 528 (1955).

[15] HARPER & JAMES, THE LAW OF TORTS §3.18, at 280 (1956).

[16] RESTATEMENT, TORTS §121 (1934), stating the common law view.

[17] McBride v. U.S., 284 Fed. 416 (5th Cir. 1922); Dilger v. Commonwealth, 88 Ky. 550, 11 S.W. 651 (1889).

[18] A.L.I. CODE OF CRIMINAL PROCEDURE §21(a) (1931); CAL. PENAL CODE §836.

[19] WIS. STAT. §954.03 (1957).

[20] For a careful study of the situation in one state, see Comment, *Arrest Without Warrant in Wisconsin*, 1959 WIS. L. REV. 489.

[21] Note, *Arrest—Stopping and Questioning as an Arrest*, 37 MICH. L. REV. 311 (1938). The police may properly ask a person to accompany them to the station, and if the suspect consents there is no confinement without consent. Gunderson v. Struebing 125 Wis. 173, 104 N.W. 149 (1905).

[22] Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1205 (1952). Although the practice is well known, it is difficult to document. Police manuals often ignore the problem or deal with the matter ambiguously, in this respect probably reflecting the ambiguity of current law. A study of 26 police manuals from cities of varying size shows the following results:

(1) Thirteen of the manuals make no reference to questioning suspicious persons.

(2) Six of the manuals assume the necessity for questioning but do not attempt to define when questioning is proper.

(3) Seven of the manuals assume the necessity for questioning and make an effort to define the circumstances in which questioning should be conducted. Illustrative of these is the Denver, Colorado, manual: "4. Patrol Procedures. .17 Suspicious persons and known criminals should be carefully observed and interrogated if circumstances warrant such action. .18 A suspicious person is one whose actions, appearance, or very presence in certain places at late or unusual hours would normally excite the suspicions of an ordinarily prudent person. An officer armed with knowledge gained by ex-

some instances this can be justified on the basis of some statutory privilege, other than arrest, such as the privilege to stop a vehicle for the purpose of examining a driver's license.[23] In many instances, however, there is no specific statutory privilege, and thus the issue remains as to whether the police have the right to stop and question a suspect, without his consent, in the absence of grounds for an arrest. Despite the importance of the question in day-to-day enforcement, it is difficult to give a clear answer in most jurisdictions.[24] The problem has been largely ignored by commentators[25] and dealt with ambiguously by most courts, in part at least because it is assumed that the issue is whether there were adequate grounds for arrest.[26] In a recent case,[27] the United States Supreme Court was urged to give explicit recognition to the right of police to stop and question persons suspected of crime. The government argued that

> "Being stopped by a police officer for purposes of inquiry may at times cause some inconvenience to the person stopped, but that temporary inconvenience is normally minor compared to the importance of such reasonable inquiry to effective law enforcement. Without the power, for example, to stop a suspiciously-acting automobile to ask questions, the police might be forced to spend fruitless hours investigating actions which the occupant, had the police been able to ask him questions, could readily have explained as being entirely innocent. In a fair balancing of the interest at stake, we submit that the rights of the person questioned are adequately protected by his privilege not to answer and that the police, having reasonable grounds for inquiry, ought not to be foreclosed from at least the opportunity, by asking questions, to determine whether further investigation is necessary."[28]

The court dealt with the issue with traditional ambiguity, returning the case to the trial court to determine when the arrest was made without giving explicit attention at all to the issue of whether a right to stop and question exists apart from arrest and, if it does, within what kinds of

perience and guided by information concerning the amount and type of crime being committed on his beat, or in his precinct, would be justified if he were more suspicious than the ordinary citizen."

See similar provisions in: (a) Honolulu, Hawaii, RULES AND REGULATIONS OF THE POLICE DEPT. under Duties of the Policeman: ¶17, 19, and 33, p. 57; (b) Topeka, Kansas, POLICE DEPT. MANUAL OF REGULATIONS under "Duties of the Patrolman" §7, p. 52; (c) Detroit, Michigan, REVISED DETROIT POLICE MANUAL, 1958, Ch. 16 (arrest) §25; (d) Harrisburg, Pa., RULES AND REGULATIONS OF BUREAU OF POLICE p. 29 under "Valuable Information for Policemen"; (e) Salt Lake City, POLICE DEPT. MANUAL, Ch. 14 ¶38; (f) MILWAUKEE POLICE DEPT. RULES AND REGULATIONS, Rule 29, §24, Rule 14, §§17, 18.

Police training material tends to be unduly limited in its objective, instructing the officer how to question but not when it is proper to question. There are, however, exceptions, as in LOS ANGELES POLICE DEPT. DAILY TRAINING BULLETIN 123 (1958): "There is no hard and fast rule which will determine when a field interrogation should be made. The decision to interrogate must be based on the circumstances of each individual case. Generally, the circumstances will involve time, place, appearance, and actions of a person. When one or more of these elements appears to be out of the ordinary, it may indicate that an interrogation should be made."

See also MILWAUKEE POLICE TRAINING SCHOOL BULLETIN, "Field Interrogation" (1954).

[23] Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 207 (1940); DONIGAN & FISHER, KNOW THE LAW 228 *et seq.* (1957).

[24] Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 319 (1942). One reason for the failure to deal with the issue is suggested by Kaufman, J. in United States v. Bonanno, 180 F. Supp. 71, 78 (S.D.N.Y. 1960): "I believe the relative dearth of authority in point can be explained by the fact that few litigants have ever seriously contended that it was illegal for an officer to stop and question a person unless he had 'probable cause' for a formal arrest."

The right of an officer to stop and question a suspect is not dealt with in the RESTATEMENT OF TORTS or treatises in that field presumably because the question is seldom dealth with in appellate litigation.

[25] There are apparently only two efforts to deal explicitly with the issue: Note, *Arrest—Stopping and Questioning as an Arrest*, 37 MICH. L. REV. 311 (1938); DONIGAN & FISHER, KNOW THE LAW 228 *et. seq.* (1957). See also Waite, *The Law of Arrest*, 24 TEX. L. REV. 275, 279 (1946), and Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 318 (1942), both of whom assert that a detention for purposes of questioning is probably illegal unless grounds for arrest exist. In Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 261 (1940), it is said that an officer ought to have the right to question when sufficient grounds for arrest ex st. In RISTOW, FIELD INTERROGATION 6 (1958), it is said that an officer may question anyone who arouses suspicion.

[26] In Henry v. United States, 361 U.S. 98 (1959) F.B.I. agents stopped a vehicle in which suspects whom the agents had under surveillance were riding. The government and the majority of the Court assumed that the legality of the stopping had to be determined according to whether adequate grounds for arrest existed at the time of the stopping. Justice Clark, joined by Chief Justice Warren, took the position that there were adequate grounds for further investigation which justified stopping the vehicle: "The earlier events certainly disclosed ample grounds to justify the following of the car, the subsequent stopping thereof, and the questioning of petitioner by the agents. This interrogation, together with the sighting of the cartons and the labels gave the agents indisputable probable cause for the search and arrest." *Id.* at 106.

[27] Rios v. United States, 364 U.S. 253 (1960).

[28] Brief for United States, p. 11, Rios v. United States, 364 U.S. 253 (1960).

limitations. The prosecution's suggestion that the test should be "reasonable grounds for inquiry" was neither accepted nor rejected.[29]

State courts are in disagreement as to whether there is a right to detain a person for purposes of questioning prior to arrest. The issue has been most often dealt with in California, where the courts have typically recognized the right to question.[30] Some other state courts have had less occasion to consider the question but have given some indication that police may stop and question under circumstances in which an arrest would be improper.[31] Finally, a group of state court decisions reject the right to detain for questioning unless there are grounds for arrest.[32]

Questioning by an officer may produce sufficient additional information to justify an arrest. It is not clear whether a refusal to answer can be given weight in determining whether grounds for arrest exist.[33] The answer would seem to depend upon whether a court considers the privilege against self-incrimination to apply to on-the-street-questioning and, if it does, whether it requires excluding a refusal to answer from the issue of arrest as well as from the issue of guilt or innocence. Here, too, current law is ambiguous.[34] A refusal to answer seems relevant as a matter of substantive law in vagrancy cases where being "unable to account for his presence" is an element of the offense.[35]

The Right to Frisk a Suspect

If the right to stop and question a suspect is recognized, then it follows that the officer ought to be allowed to frisk, under some circumstances at least, to insure that the suspect is not possessed of a dangerous weapon which would put the safety of the officer in peril.[36]

Certainly it is current practice to frisk some suspects as to whom there are not sufficient grounds for arrest. The Training Bulletin of the Los Angeles Department states:

> "Although persons may appear to be logical suspects for interrogation, they often prove to be innocent of any crime. Unless the interrogation is to be more than a casual conversation, an officer should not place his hands on the person questioned. However, if there is any reason to believe that a suspect is armed, he should be searched immediately for offensive weapons. It is seldom advisable to make a 'wall shakedown' immediately upon contacting an individual, unless he is known to be, or suspected of being, an armed or dangerous criminal. After a short explanation, the average innocent citizen will usually be able to comprehend the reason for a field interrogation, but he will seldom be convinced of the necessity for a 'wall shakedown.'" [37]

[29] The fact that the case was returned to the trial court to determine when the arrest was made may imply that the prior stopping and questioning were proper, assuming the officer did not intend, at that time, to take the suspect into custody. Yet this is not made explicit, and it is not at all clear what test the trial judge should apply in determining when the arrest took place.

This issue was dealt with more explicitly in United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y. 1960), where Judge Kaufman stated, "Not every temporary restriction of absolute freedom of movement is an illegal police action demanding suppression of all resultant evidence."

[30] The leading case, upon which later decisions rely, is Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43 (1908). See also People v. Simon, 45 Cal.2d 645, 290 P.2d 531 (1955); People v. Jones, 1 Cal. R. 210, — Cal. App. 2d — (1960); People v. Jackson, 164 Cal. App. 2d 759, 331 P.2d 63 (1958); People v. Ambrose, 155 Cal. App. 2d 513, 318 P.2d 181 (1957); People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57 (1956); People v. Martin, 46 Cal.2d 106, 293 P.2d 52 (1956); People v. West, 144 Cal. App. 2d 214, 300 P.2d 729 (1956); People v. Jiminez, 143 Cal. App. 2d 671 (1956).

[31] People v. Henneman 367 Ill. 151, 10 N.E.2d 649 (1937); People v. Mirbelle, 276 Ill. App. 533 (1934); State v. Hatfield, 112 W. Va. 424, 164 S.E. 518 (1932); State v. Zupan, 155 Wash. 80, 283 Pac. 671 (1929); Pena v. State, 11 Tex. Cr. 218 (1929); State v. Gulcznski, 32 Del. 120, 120 Atl. 88 (1922).

[32] People v. Esposito, 118 Misc. 867, 194 N.Y. Supp. 326 (1922); Arnold v. State, 255 App. Div. 422, 8 N.Y.S.2d 28 (1938); People v. Tinston, 6 Misc.2d 485, 163 N.Y.S.2d 544 (1951); Commonwealth v. Balanzo, 261 Pa. 507 (1918); Commonwealth v. Doe, 109 Pa. Sup. 187, 167 A.2d 241 (1953); Travis v. Bacherig, 7 Tenn. App. 638 (1928); Shirey v. State, 321 P.2d 981 (Okla. Cr. 1958), noted in Bandy, *Power of Police Officer to Detain for Investigation*, 11 OKLA. L. REV. 320 (1958).

[33] In People v. Simon, 290 P.2d 531 (1955), the court said: "There is, of course, nothing unreasonable in an officer's questioning persons outdoors at night . . . and it is possible that in some circumstances even a refusal to answer would, in the light of other evidence, justify an arrest . . . ."

[34] See MORGAN, MAGUIRE & WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 763 n.3 (1957).

[35] WIS. STAT. §947.02(2) (1957).

[36] See Hall, *Police and Law in a Democratic Society*, 28 IND. L. J. 133, 158 (1953); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1204 (1952).

[37] LOS ANGELES POLICE DEPARTMENT DAILY TRAINING BULLETIN 126 (1958). Typically police manuals are ambiguous as to when a right to frisk exists, often reflecting the ambiguity of the law. Often it is not clear whether the right is said to exist only where an arrest could be made. See ATLANTA, GA., POLICE DEP'T. RULES AND REGULATIONS, Rule 539, p. 65; SAN FRANCISCO RULES AND PROC. POLICE DEP'T. 12–13; MICH. STATE POLICE, RULES AND REGULATIONS, p. 35 sec.

Usually courts which have recognized a privilege to stop and question a suspect have also recognized the right of the officer to frisk the suspect if the officer has reason to believe him dangerous.[38] This is specifically provided for in the Uniform Arrest Act.[39] On the other hand, it is frequently assumed that frisking is illegal unless, at the time, there were sufficient grounds for arrest.[40]

Limitations Upon the Right to Stop, Question, and Frisk

There is increasing concern with the question of when it is proper to subject an individual to the inconvenience of a reasonable investigation to determine whether he is guilty of crime. If it is assumed that there is no right to question, for example, unless there are grounds for arrest, then the issue is resolved. But, if it is assumed that there is a right to question in situations where there is no right of arrest, these situations must then be defined. No one, I think, would assert that questioning should be completely indiscriminate.

Perhaps the test should depend upon the seriousness of the suspected offense. This has been suggested by Mr. Justice Jackson:

> "If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger."[41]

It is not an easy task to develop a verbal formula to describe the probability of guilt requisite for stopping and questioning, assuming the objective is less than the "reasonable grounds to believe" typically required for arrest, but more than the mere good faith suspicion of the officer. Development of an adequate formula is particularly difficult if the sliding scale suggested by Justice Jackson is followed. The Uniform Arrest Act proposes "reasonable ground to suspect."[42] In *Rios v. United States*,[43] the government argued that questioning should be proper where an officer has "reasonable grounds for inquiry."[44] The need is for a test clear enough for day-to-day enforcement and adequate enough to reflect the need to balance the nature of the interference with the individual involved against the risk created by the suspected conduct. The obvious difficulty of the task does not justify the easy alternative of ignoring the issue.

Major Current Issues

There are a number of very important current issues relating to the right of police to detain, to frisk and to arrest persons suspected of crime. It may be helpful to try to enumerate these issues, some of which have already been discussed:

(1) Can a suspect be detained for purposes of questioning on the basis of less evidence of guilt

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5; DETROIT, MICH., REV. DETROIT POLICE MANUAL (1958) ch. 16, sec. 41; RALEIGH, N.C., MANUAL POLICE DEP'T. ch. 8, §2. Training materials stress methods of frisking, without treating the issue of when it is proper to frisk. See PHILA. POLICE ACADEMY TRAINING PAMPHLETS, vol. 6, pamphlets 2, 11, and 16; CHICAGO POLICE DEP'T. INSTRUCTOR'S MANUAL—POLICE TRAINING DIVISION (1958); PEACE OFFICERS' TRAINING SCHOOL REPORT (Kansas) (1960) at pp. 19–20.

[38] See for example Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43 (1908): "The officers did nothing which the plaintiff did not desire, except the examination of his person to see if he carried concealed weapons. This, however, was a precaution which the officer might well take under the circumstances of the meeting and the conduct of the plaintiff whether the plaintiff was under arrest or not."

See also People v. Martin, 46 Cal.2d 106, 293 P.2d 52 (1956); People v. Jones, 1 Cal. R. 210, — Cal. App. 2d — (1960); People v. Jackson, 164 Cal. App. 2d 759, 308 P.2d 38 (1958); People v. Brittain, 149 Cal. App. 2d 201 (1957); People v. Jiminez, 143 Cal. App. 2d 671, 300 P.2d 38 (1956).

[39] Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 324–327 (1942): "Section 3. Searching for Weapons. Persons Who Have Not Been Arrested. A peace officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in section 2, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon."

[40] See People v. Esposite, 194 N.Y. Supp. 326 (1922); People v. DiDanna, 210 N.Y. Supp. 135 (1925). See CAL. PENAL CODE §833 (1958). This statute authorizes frisking where grounds for arrest exist even though an arrest has not been made. It casts some doubt upon earlier California cases which held that frisking was proper in some circumstances where grounds for arrest did not exist.

[41] Brinegar v. United States, 338 U.S. 160, 183 (1948).

[42] Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320 (1942).

[43] 364 U.S. 253 (1960).

[44] Brief for United States, p. 11, Rios v. United States, 364 U.S. 253 (1960).

than is necessary to justify his arrest? If so, how much evidence of guilt is needed to make it proper for an officer to stop and question a suspect? This important law enforcement issue too often has been ignored entirely or dealt with ambiguously.

(2) How great a probability of guilt should the law require before allowing the police to make an arrest without a warrant? It is safe to assume that the "in presence" requirement involves the highest probability of guilt of the alternatives, since the officer must actually observe something which he reasonably concludes to be a crime being committed in his presence. If he is to arrest for a misdemeanor not committed in his presence, he must get a warrant. This requirement would have meaning if there were in fact a judicial review of his decision to arrest; but where the issuance of the warrant is in ministerial function, it is not apparent what purpose is served by this process except perhaps a delay in the decision to arrest and, as a result, more reflection than would take place if the arrest were made immediately. Statutes allowing police to arrest upon reasonable grounds to believe the suspect guilty of any crime have been in existence sufficiently long to make it possible to assess their effect in current administration and to make meaningful evaluation of the alternatives.

(3) Does the "reasonable ground to believe" requirement for arrest necessitate as much evidence of guilt as is required to charge a person with a crime and hold him for trial? Some courts have at least implied that the requirements are the same. For example, the United States Supreme Court said in the *Mallory* case:

> "Presumably, whomever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate."[45]

However, subsequent to the *Mallory* case, a majority opinion of the Court of Appeals for the District of Columbia, in applying the *Mallory* Rule, assumed the contrary to be true:

> "A vital factor to bear in mind is that as these steps progress the burden of the law enforcement agency increases. What may constitute probable cause for arrest does not necessarily constitute probable cause for a charge on arraignment."[46]

The issue is an obviously important one, in terms of both the standard for arrest and the right of police to interrogate a suspect between the time of his arrest and his initial appearance before a magistrate. As to some offenses, there is no problem. For example, an arrest is not made for non-support unless there is adequate evidence to warrant charging and conviction. As to other offenses, however, a difficult problem does exist. For example, it is not uncommon to arrest a number of suspects in an armed robbery case under circumstances in which it would not be proper or desirable to charge each person arrested.[47] In this kind of situation it has been thought proper by most police agencies to arrest on the basis of less evidence than is needed to warrant charging and holding for trial. On the whole, the situation is characterized by unnecessary ambiguity.

(4) When, assuming a person is to be subjected to criminal prosecution, is it necessary to take him into custody immediately? This question is resolved by those statutes which require, in addition to reasonable ground to believe that a misdemeanor has been committed, a showing that there were reasonable grounds to believe that further damage or escape would result unless an arrest were immediately made.[48] However, the "in presence" statutes, although requiring a high probability of guilt, do not in any way require a showing that immediate custody is necessary. Thus a person who fails to come to a complete stop at a stop sign may be taken into custody though he is a well-known member of the community, and though it is apparent that neither further harm nor escape would be at all likely. Typically an arrest would be made in such a situation only where the officer desired to make a search and used the arrest to legitimize the search. Whatever the merits of allowing a search in such a situation, the obvious consequence is to distort the law of arrest.

Statutes authorizing the use of a summons in lieu of arrest have apparently not been much utilized in practice, in some states at least. Knowledge of why this is so would be helpful in devising workable substitutes for arrest in situations where immediate custody is unnecessary.

[45] Mallory v. United States, 354 U.S. 449, 456 (1957).

[46] Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960).

[47] *Ibid.*

[48] WIS. STAT. (1957) §954.03.

(5) What function should the warrant of arrest serve? There is abundant evidence that in current practice the warrant does not serve as a judicial review of the decision to arrest. It is, therefore, important to known precisely what function it does serve and, on the basis of this knowledge, to re-examine legal requirements relating to the issuance and execution of the warrant.

(6) Do police have a right to release a person, once arrested, without charging him? His release may be made because there is insufficient evidence to convict; because subsequent investigation has disclosed the innocence of the person arrested; because charging will not accomplish anything worthwhile, as, for example, in the case of the drunk who is arrested and released when sober;[49] because the arrested person agrees to serve as an informant; or, because the arrest itself has served a deterrent purpose without the necessity of further official action.

It is often asserted that the police must bring an arrested person before a magistrate and that a failure to do so renders the arrest unlawful.[50] Yet the practice is clearly to the contrary, and recent legislative proposals frequently contain provisions legitimizing this practice.

(7) How much discretion should police have in determining what conduct should be subjected to the criminal process, and how should the exercise of that discretion be controlled?[51] It is obvious that arrests are not made for every offense which comes to the attention of the police. So great has been the proliferation of criminal statutes that arrest of all violators would cause a breakdown of the criminal justice system. There must therefore be a limitation upon the number of persons subjected to the criminal process. As a practical matter, this limitation must take place, in large part, at the arrest stage since this is ordinarily the first official decision relating to the offender's conduct. The power and responsibility which this discretion gives police is immense. Too often the existence of this discretion is denied and its exercise is, therefore, left without guidance and control from the legal system.

These are abviously difficult problems which cannot easily be solved. Adequate solution requires detailed knowledge of current arrest practices and the consequences of those practices in current administration. This is an objective of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States.[52] The results of the pilot phase of this survey will be published in a year or two.[53] Other research efforts are now in the planning stage. The American Law Institute has tentative plans to prepare a Model Law of Arrest, Search and Seizure which certainly must face these issues and make an effort to resolve them.

Whatever the difficulties, existing legislation can certainly be made more adequate. Police agencies deserve clearer guidance in the discharge of their law enforcement responsibility than is afforded by the law today.

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[49] Hall, *Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 354 (1936).

[50] For an able analysis of how the issue of release by the police should be handled in tort, see Bohlen & Shulman, *Effect of Subsequent Misconduct on Lawful Arrest*, 28 CALIF. L. REV. 841 (1928).

[51] See Williams, *Turning a Blind Eye*, 1954 CRIM. L. REV. (N.Y.) 271, where the following view is expressed: "And so to demand that he [the policeman] should exercise some sort of discretion, and refrain from enforcing certain laws is neither fair nor correct. In the first place, it demands of him a judgment and a sense of responsibility which is scarcely reflected in our treatment of him when we fix his salary in relation to that of other public officers. But, more important, such a process must inevitably subject all police activity to the personal likes and dislikes of individual policemen."

For a contrary view see Dunning, *Discretion in Prosecution*, 1 POLICE J. 39, 47 (1928): "But if they [the police] believe that the prosecution is not necessary as an example and warning to others, they may legitimately consider whether the offender may be saved from a repetition of his offense by treating him otherwise than by prosecution."

See also ARNOLD, THE SYMBOLS OF GOVERNMENT 160 (Yale University Press, 1935), where the view is expressed that discretion in the police is inherent in current administration: "However, so far as the effect of the number of criminal laws on policemen or the prosecutor is concerned, they are more apt to be a help than a hindrance. Such persons are trying to apprehend individuals who at the time happen to be considered dangerous to society, and the wider the selection of laws which they have, the more chance there is of conviction."

[52] The entire cost of the project has been covered by a grant from the Ford Foundation in the amount of $445,000. For a description of the general aims of the research see Remington, *Criminal Justice Research*, 51 J. CRIM. L., C. & P. S. 7 (1960).

[53] For an analysis of some of the data relating to police discretion see Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L. J. 543 (1960).