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


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 Harter & James, The Law of Torts §3.18, at 275 (1936): "The law of arrest represents the compromise between two conflicting in-

* 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.
in danger if the suspect is armed. Current police practice under such circumstances is to frisk the suspect. 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. 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. 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, 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.

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."

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 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 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?13 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20}

\textbf{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.\textsuperscript{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.\textsuperscript{22} In

\textsuperscript{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."

\textsuperscript{14} People v. Brown, 45 Cal.2d 640, 290 P.2d 528 (1955).

\textsuperscript{15} Harper & James, The Law of Torts §3.18, at 280 (1956).

\textsuperscript{16} Restatement, Torts §121 (1934), stating the common law view.

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

\textsuperscript{18} A.L.I. Code of Criminal Procedure §21(a) (1931); Cal. Penal Code §836.
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. 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. The problem has been largely ignored by commentators and dealt with ambiguously by experience 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 SCHOOL BULLETIN, "Field Interrogation" (1954).

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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 shake-down' 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 shake-down.'"\(^{37}\)

The 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 ..."\(^{38}\)

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\(^{29}\) See MORGAN, MAGUIRE & WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 763 n.3 (1957).

\(^{30}\) Wis. Stat. §947.02(2) (1957).


\(^{32}\) 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. 132.
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. This is specifically provided for in the Uniform Arrest Act. On the other hand, it is frequently assumed that frisking is illegal unless, at the time, there were sufficient grounds for arrest.

**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.

5: DETROIT, MICH., REV. DETROIT POLICE MANUAL (1958) ch. 16, sec. 41; RALEIGH, N.C., MANUAL POLICE DEPT.' 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 DEPT. INSTRUCTOR'S MANUAL—POLICE TRAINING DIVISION (1958); PEACE OFFICERS' TRAINING SCHOOL REPORT (Kansas) (1960) at pp. 19–20.

29 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).

30 Warner, The Uniform Arrest Act, 28 VA. L. REV. 315, 324–326 (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.

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 indiscriminating 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.”

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.” In Rios v. United States, the government argued that questioning should be proper where an officer has “reasonable grounds for inquiry.” 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


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."46

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 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.


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; 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. 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? It is obvious that 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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References:

- 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).
- 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.