

Winter 1960

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Recommended Citation

Caleb Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest, 51 J. Crim. L. Criminology & Police Sci. 402 (1960-1961)

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THE FOURTH AMENDMENT: OBSTACLE OR NECESSITY IN THE LAW OF ARREST?

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The assertion that conventional arrest law and constitutional limitations unduly restrict police activity is as old as our history. With the increases in crime rates which have accompanied the development of modern urban civilization, the demands to accord the police more flexibility for action have grown steadily more insistent.

Since the so-called Uniform Arrest Act was first proposed in 1942, much of this controversy has centered upon a provision of that act which would authorize a policeman to "stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going."¹ Such a stopping would constitute not an "arrest" but a "detention," and the detention could be continued for two hours to permit further investigation. During that time the suspect could be searched for dangerous weapons.

The questions before us at this session of the conference are clearly based on this act. In an important aspect, however, one of the questions posed is more explicit than the act. This particular question asks whether the police should be permitted to search a detained person not only for weapons but also for other "incriminating evidence." In this discussion I intend to treat together the Uniform Act and the question framed for us.

The key question put for this session provides:

"In the absence of sufficient grounds for an arrest, should the police have a 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?"

The fine hand of the advocate can be detected

¹ Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

in the deceptively simple formulation of this proposal. It carefully sugar-coats a proposition which, if accepted, would severely curtail individual rights in rejecting one of our oldest legal traditions and which, at least in part, is almost certainly unconstitutional. Like any good advocate's question, it is so worded that it seems to compel the desired answer. The proposal purports to authorize only "reasonable" police action—the custody of one who has "reasonably aroused police suspicion." Thus one who answers "No" is placed in the position of throttling "reasonable" police activity. The catch, of course, is that the word "reasonable" as used in this proposal and in the Uniform Arrest Act has a meaning all its own.

In the law of arrest and by long constitutional history, "reasonable" has been interpreted as the equivalent of probable cause. An officer acts reasonably if, on the facts before him, it would appear that the suspect has probably committed a specific crime. This is the context in which the word is used in the fourth amendment and in most state arrest laws. Our cases sharply distinguish the reasonableness of an arrest on probable cause from unreasonable apprehension grounded on "mere" suspicion. It might appear, therefore, that the detention provision of the Uniform Arrest Act in the proposal before us is wholly innocuous—an officer can act on reasonable suspicion, *i.e.*, probable cause, which of course he can do anyway without any change in the law.

In a very recent case construing the Uniform Arrest Act's detention provision, the Delaware Supreme Court made such an equation. Apparently unaware of what it was doing to the act in the process, the court uttered the following dictum:

"We can find nothing in 11 Del.C., § 1902 [detention provision] which infringes on the rights of a citizen to be free from detention except, as appellant says, 'for probable cause'.

Indeed, we think appellant's attempt to draw a distinction between an admittedly valid detention [conventional arrest] upon 'reasonable ground to believe' and the requirement of § 1902 of 'reasonable ground to suspect' is a semantic quibble. . . . In this context, the words 'suspect' and 'believe' are equivalents."²

Such a construction of the Uniform Arrest Act, of course, saves its constitutionality at the expense of negating its whole purpose. Clearly this is intended neither by the act, the objective of which was to increase and not just to restate police power, nor by the topic before us, which postulates "In the absence of sufficient grounds for arrest . . .", *i.e.*, without probable cause. The word "reasonable" as a qualifier of suspicion in these proposals must be understood to include at least part of what would be unreasonable under present law. It is perhaps poetic justice that this little deception has backfired in its first court test. In any event, a more accurate posing of the question before us would be: "Should a policeman be allowed to stop and detain even if his action would be unreasonable under the fourth amendment or the common law of arrest?"

Along with this misleading use of the term "reasonable" is another semantic sleight of hand which tends to obscure the real nature of the proposed change. The chief draftsman of the Uniform Arrest Act has stipulated (and our topic implies) that this stopping for questioning and search "is not an arrest" but is merely a detention. One can certainly understand the wish which has fathered this attempted distinction, for "arrest" is a blunt word, implying stigma and dramatizing the instant at which the liberty of the citizen is totally subjected to the power of the state. It has been our boast that under a democratic form of government such awesome power can be exercised only on reasonable belief, *i.e.*, probable cause, and that this limitation constitutes a key link in the protection of the subject's liberty. It is no wonder, therefore, that the authors have attempted to soften the sharp image of their proposed change with a semantic curtain. They would have us believe that a taking into custody for questioning and search is not an arrest but something else, as if a change in the descriptive label of a concept effects a change in the nature of the concept itself. This is Madison Avenue at its best, but it is hard

to see how it advances the cause of legal analysis of this proposal on its merits.

The most commonly accepted definition of an arrest, a definition which is incorporated even in the Uniform Arrest Act, is "the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense."³ Custody is "an actual restraint of the person to be arrested," which occurs at the moment an individual is no longer a free agent to do as he pleases. The Constitution does not use the word "arrest" but expresses the same idea in its reference to "seizure," an even more unambiguous word. A seizure or arrest can be and often is of short duration, and of course the fact whether it is regarded or recorded by the police as an arrest is irrelevant. To determine whether an arrest has taken place we look at the facts to see if there has been "an actual restraint of the person." Often this is not easy to determine, as where an officer says to a pedestrian, "Just a minute, I want to ask you a few questions." Were a civilian to ask such a question there would certainly be no restraint, but what on their face are merely words of request take on color from the officer's uniform, badge, gun and demeanor. The Uniform Arrest Act, however, is unambiguous; the officer can enforce his request by forceably restraining for up to two hours the suspect against whom there is no probable cause.

Under the definition of arrest given above, the only way in which such a restraint of a criminal suspect can be viewed as a nonarrest is to quibble over the qualifying phrase, ". . . in order that he may be forthcoming to answer for the commission of an offense." The most reasonable interpretation of this language would be that it merely distinguishes a restraint the purpose of which is related to the enforcement of the criminal law from the seizure of a lost child in order to return it to its parents, the enforcement of quarantine measures, or the detention of a mentally ill person who requires care and treatment.

There is, however, another possible interpretation which can be found from the bare words alone, if one disregards obvious policy considerations, common sense and a voluminous case law. Hundreds of tort cases to the contrary notwithstanding, many police officers profess to believe that

³ ALI CODE OF CRIMINAL PROCEDURE §18 (1931). For the same definition in the Uniform Act, see Warner, *supra* note 1, at 344.

² De Salvatore v. State, No. 68, 1959 Term, Delaware Supreme Court, June 3, 1960.

they have not "arrested" their prisoner until they have formally booked him on the police blotter. In the recent celebrated Apalachin case in New York, Judge Kaufman gives his judicial weight to this view:

"It is clear that a technical arrest demands an intent on the part of the arresting officer to bring in a person so that he might be put through the steps preliminary to answering for a crime such as fingerprinting, booking, arraigning, etc."⁴ He then proceeds to try to square this belief with the fourth amendment by stating that "it cannot be contended that every detention of an individual" is a seizure in the constitutional sense. As the Apalachin case involved a roundup and detention of alleged Mafia conspirators, Judge Kaufman was presumably not referring to non-criminal child welfare or contagious disease detentions, as to which his statement would of course be true. Aside from a misrepresentation of British law,⁵ he cites no authority for these sweeping assertions. It is apparent, however, that such a construction is absurd, for inasmuch as it makes the officer's intent the controlling factor, it would substitute the policeman for court and law as a protector of liberty. Seizures or arrests without probable cause would be illegal only if the officer ultimately entered a formal charge of crime on insufficient evidence; he would be within the law if the suspect were released after imprisonment without having been booked, or if the period of detention turned up probable cause through search or detention and only then did the officer decide to book him. The short answer to such reasoning is that if Judge Kaufman is correct, then both our tort law of false imprisonment and the whole law of search and seizure developed by the United States Supreme Court in its construction of the fourth amendment are wrong. See, for example, Mr. Justice Jackson's opinion for a unanimous Court in *United States v. Di Re*:

"The government's last resort in support of the arrest is to reason from the fruits of the

⁴ *United States v. Bonanno*, 180 F.Supp. 71, 77 (S.D.N.Y. 1960).

⁵ Judge Kaufman cites DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 31-62 (1960), on the British practice of questioning suspects and the operation of the Judges' Rules. He uses this material in the context of enforced detention for questioning but neglects to make reference to Lord Justice Devlin's important qualification that the English police cannot use detention or compulsion for such questioning and that "it is up to the police to make sure that a man comes to the station" for questioning "voluntarily." *Id.* at 68.

search to the conclusion that the officer's knowledge at the time gave him grounds for it. We have had frequent occasion to point out that a search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."⁶

In his recent book, *THE CRIMINAL PROSECUTION IN ENGLAND*, Lord Justice Devlin writes of the law from which both our common law of arrest and the fourth amendment were drawn, and he puts this matter very well indeed:

"The police have no power to detain anyone unless they charge him with a specified crime and arrest him accordingly. Arrest and imprisonment are in law the same thing. Any form of physical restraint is an arrest and imprisonment is only a continuing arrest. If an arrest is unjustified, it is wrongful in law and is known as false imprisonment. The police have no power whatever to detain anyone on suspicion or for the purpose of questioning him. They cannot even compel anyone whom they do not arrest to come to the police station."⁷

I have stressed the falsity of this alleged distinction between arrest and detention because an awareness of it is essential to a complete understanding of the nature and complexity of the proposal before us. Probable cause as a standard to guide the police and against which to measure the legality of an arrest or seizure is to be abandoned in favor of some other as yet unformulated standard more favorable to the police. It is true that the detention-arrest permitted under the Uniform Arrest Act would be limited in duration, and that at the end of some time period such as two hours the arrest must be terminated unless by that time the police have acquired sufficient evidence to meet the conventional burden of probable cause. But such a time limitation does not make the detention any less an arrest for the period during which liberty is actually restrained in order to facilitate a criminal investigation. As the standard of probable cause is embodied in the federal and most state constitutions, it seems to me that we are talking about constitutional revision and not merely statutory enactment. That of course does not automatically condemn it, for I suppose not even the fourth amendment is sacrosanct if imperative policy considerations demand its revision.

⁶ 332 U.S. 581, 595 (1948).

⁷ DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 68 (1960).

Reference to this constitutional issue, however, does point up the difficulty and gravity of the proposal.

Underlying this whole discussion is the premise that the police as presently constituted are less effective than they should be. I suppose this is probably true, although it is certainly not established by a high incidence of crime or low clearance rates or the number of instances in which known criminals escape justice. In a democracy police effectiveness is measured even more by what the police do *not* do than by their positive accomplishments:

"... the worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry. There have never been more determined law enforcers than Nazi Germany or the Soviet.⁸

Accepting the premise of ineffectiveness as true, however, it does not follow that the proposed changes in the law of arrest are a prerequisite—or even the best way—to increased efficiency or that such changes will have any significant effect at all. There is a measure of cynicism in the typical advocacy of change, implying that present law handcuffs the police, and that essential, routine, everyday police tactics which are now illegal should receive the law's official sanction. The first argument assumes that the police are actually restrained from necessary action by the law, but the second assumes action and asks for the removal of a stigma of illegality, immunization from the presently nominal threat of false imprisonment actions and protection of police evidence against the onslaught of the exclusionary rule. No doubt in some instances the law actually has the effect of restraining action which would solve crimes, but to the extent that the police generally already stop, question, search and harass along the lines proposed in the queries to this conference, it is hard to see how change in the law is going to have much effect on clearance or conviction rates.

If the goal is improved law enforcement, there are obvious alternatives to change in the law. One would be to improve the caliber of policemen, and it is certainly significant that the federal police forces, which have to operate under the most restrictive legal "handcuffs" in the nation, also

enjoy a relatively superior reputation for efficiency and respect for individual rights. This would suggest that when you are willing to pay enough to get a police force which is both adequately trained and reasonably dissociated from politics, you can obtain marked improvement in effectiveness. It would also suggest that the effect of restrictive law upon police activity may be just the opposite of what is generally assumed. One reason that the F.B.I. has been able to recruit a higher caliber of personnel is the public confidence it has built for itself by operating within the law. The same has been said of British and Canadian police forces, where the seed of lawful operation has led to a harvest of public respect and cooperation.

A related alternative which is less satisfactory in the long run but may be politically more expedient is to concentrate upon an increase in the numerical strength and supervision of a police force instead of or in addition to efforts to improve overall personnel quality. During the last four months of 1954 the New York police conducted an experiment in their 25th precinct, an area of about one square mile with a population of 120,000 and an extremely high crime rate. The number of patrolmen on duty was increased from 188 to 440, and the number of supervising sergeants, from 15 to 33. Proportional increases were made also in personnel of higher rank. Foot posts were reduced in size to a point where the officer assigned could reasonably be expected to observe all incidents and conditions on his post, and the men were held closely accountable for what happened. While the statistics are incomplete and may have defects because of the department's self-interest in building a case for higher appropriations, the total number of felonies reported in the precinct declined 55.6% from the comparable period of the year before, while the clearance rate for felonies rose from 20.2% to 65.6%. No comparable changes were reported in the rest of the city.⁹

The chief disadvantages of these alternatives is that they cost money and require the exercise of political and administrative statesmanship, whereas enacting new arrest laws offers the illusion of doing something about crime without financial or political complications and has a natural appeal to political expediency. I suspect that in police work, as elsewhere, one generally gets no more than he pays for, and that legislation on police

⁸ Schwartz, *On Current Proposals to Legalize Wire-tapping*, 103 U.P.A.L.REV. 157, 158 (1954).

⁹ NEW YORK CITY POLICE DEP'T OPERATION 25 (undated, probably 1955).

power is a wholly inadequate substitute for responsible police fiscal and personnel policy.

The importance of seeking alternatives within the present legal framework is emphasized when one examines the impact of police arrest practices upon our constitutional respect for privacy. The right to be let alone—to be able sit in one's house or drive one's car or walk the streets without unwarranted police intrusion—is surely one of the most important factors to be weighed in achieving a balance between individual liberty and public necessity. Ironically, it is this factor about which we know the least. Although they are often inadequate, we collect at least some data on the number of crimes reported, the number of crimes cleared by arrest, and the mortality between charge and conviction. We also have figures purporting to state the number of persons "arrested," but usually this only reflects cases where the police have booked, fingerprinted and charged the suspect. We cannot even guess at the true arrest rate because we have no data on the number of people whose liberty is restrained but who after investigation are released without charge. Under these circumstances to try to make an intelligent evaluation of how the right of privacy fares under present conditions and how proposed changes in the law would affect it is very much like trying to compute batting averages when one knows only the number of hits for each player but has no data on numbers of times at bat.

Only occasionally, and then usually in newspapers or other unofficial sources, do statistical tidbits appear which cast glimmers of light. Recently, for example, the Baltimore Sun gave its "Policeman of the Year" award to the inventor of the "Battaglia plan."¹⁰ This hardly novel invention was to stop and "check" cars driven by teenagers at night. The Sun reported that during its first year of operation 157,000 cars were stopped in this operation, netting "more than 1,000 arrests" for non-traffic offenses. How many of these arrests proved to be well grounded is not stated. Assuming a figure of 1,000, and further assuming that the cars averaged two occupants each, the Baltimore police were making one hit for every 314 persons "checked." The nature of the checking process is not described; for some it was doubtless only a roadside detention, but for others additional restraint may have been involved. In Massachu-

¹⁰ Baltimore Sun, Jan. 22, 1960. See especially lead editorial, "The Captain's Plan."

setts, state police stopped 400 motorists in a drive to catch residents who were buying their holiday cheer at cut rate New Hampshire prices and bagged one violator, described as "an elderly, bewildered man."¹¹ A five hour roadblock on Chicago's south side is reported to have involved stopping 1,190 cars, with a net catch of seven persons arrested for narcotics investigation, five suspected drunken drivers and six drivers who did not have licenses in their possession.¹²

These are the minor surface manifestations of a very serious problem. Of much more importance are the spectacular round-ups of suspects after major crimes and the routine daily investigations of suspicious characters, loiterers, past offenders and others deemed suspect or undesirable by unarticulated police standards. The roadblock affects everyone indiscriminately and probably does not develop any focused public resentment, but these other activities are concentrated in poorer economic areas with high crime rates. The police batting average here may not be as low as in indiscriminate roadblocks, but is probably not very high. What does the right of privacy mean for such people in such neighborhoods? What proportion of the total number of arrests is made up of persons abruptly arrested, investigated for minutes or hours or days, and as abruptly released without booking? What is the cumulative impact of a high ratio of mistaken "detentions" upon police public relations and the development of attitudes of active public cooperation with the police? These and many other related questions urgently need to be answered if we are to be able to evaluate and reassess the role the police should play in our society. In our present state of ignorance the hypothesis that the best interests of democratic law enforcement demand stricter compliance with the fourth amendment is at least as plausible as the view that the standard of the fourth amendment should be relaxed.

The last point I wish to make is that analysis of any proposal to increase police power is handicapped because of the imprecision of what is being proposed. After many years of discussion we are still left very much in the dark as to precisely what is desired by advocates of reform. I have

¹¹ Boston Herald, Dec. 22, 1959, p. 1, col. 1; *id.*, Dec. 23, 1959, p. 3, col. 1.

¹² See photostats of Chicago newspaper clippings dated Sept. 11 and 12, 1954, reproduced in CHICAGO MOTOR CLUB, *THE CONSTITUTION—SHALL IT BE VIOLATED WHEN APPLIED TO MOTORISTS 8-9* (1954).

already noted that the standard employed in the Uniform Arrest Act and in the queries for this session—reasonable suspicion—is meaningless if reasonable is not equated with probable cause. And obviously it is not; it suggests only that there should be some undefined limitation upon the police. If probable cause is no longer to be the test, at least at the initial point of arrest, where is the line to be drawn short of indiscriminate police detentions on hunch? No greater service could be rendered by advocates of change in the law than the formulation of specific standards illuminating the limits of the proposed buffer zone which would lie between arrest on probable cause and the protection of the individual from intrusion based on nothing more substantial than a policeman's hunch.

The factors suggested in this session's query are a disturbing illustration of the difficulties of such a formulation. An officer's impressions of a suspect's explanation of his "identity and reason for being where he is" are wholly subjective and seem to suggest almost unlimited discretion in the police. They are, moreover, reminiscent of the elements of common law vagrancy, an outmoded relic of feudal class distinctions which has been grossly abused by the police in dealing with socially and economically disadvantaged elements of our society, but without whatever protection is afforded from the fact that vagrancy is a status offense which in theory can be established only by repeated observation over a period of days or weeks.

Most of the limited judicial opinion which could be enlisted in support of a detention drafting project comes from automobile cases. As has been noted, the police today can question a pedestrian on the streets or go to a house to request an interview with a suspect. They can solicit a confession or statement, bluff the suspect by pretending that they already know he is carrying contraband, or take advantage of the mere opportunity to ask questions to induce the suspect to tip his hand. In England the police frequently invite a suspect to come to the police station for an interview, a practice of which American police apparently have not taken advantage. If such measures cause the suspect to make an incriminating admission or to try to dispose of incriminating evidence, an arrest on probable cause can follow. Most of the cases, incidentally, which are cited as purporting to authorize a power to "stop and question" a suspect

involve an incriminating admission to an officer's first question. They are authority for the power to ask a question but not for a restraint of one who declines to stop and talk. The case upon which the so-called Maryland "accosting" rule is based, for example, qualifies the right to question upon lack of "coercion" by the police: "If he had been merely passive and silent, when confronted with the sergeant's implied accusation, he would have been immune from any police interference until a warrant had been procured."¹³ In his discussion of the British practice, Lord Justice Devlin emphasizes: "But it is up to the police to make sure that a man comes to the station voluntarily. . . ."¹⁴ No doubt many people feel compelled to stop and answer when questioned by an officer, and the unavoidable ambiguity in such a situation operates to the officer's advantage.

If the suspect is in a moving automobile, however, there is no ambiguity. The officers cannot ask a question as he drives past. They can follow the car until it is parked or perhaps stopped by a red light, and then approach the occupant as they would a pedestrian; or they can forego the opportunity to question; or they can stop the car. The last alternative is often the only practicable one, and because the restraint involved in hailing a car to the side of the road is much more direct than asking a question of a pedestrian it is here that a right of detention on something less than probable cause would seem to be most likely to arise. In *Carroll v. United States*, however, the Court equated the stopping or interruption of a car with a search and proscribed either except upon probable cause:

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage *without interruption or search* unless there is [probable cause]. (Emphasis added.)"¹⁵

The later cases of *Brinegar v. United States*¹⁶ and *Henry v. United States*¹⁷ have also been decided on the assumption that probable cause must exist

¹³ *Blager v. State*, 162 Md. 664, 161 Atl. 1 (1932).

¹⁴ Devlin, *supra* note 7, at 68.

¹⁵ 267 U.S. 132, 153-4 (1925).

¹⁶ 338 U.S. 160 (1949).

¹⁷ 361 U.S. 98, 103 (1959).

before the car is stopped. No other justice joined Mr. Justice Burton's concurring opinion in *Brinegar* suggesting the existence of an intermediate zone which would warrant stopping a car for questioning on evidence insufficient to justify a search. Neither this opinion nor the few cases which have purported to apply it are helpful as explorations of the possible limits of such a rule, distinguishing it from roadblocks or other random interruptions.

Nor would the attempt to formulate standards for detention receive much useful guidance from discussions of hypothetical emergency situations such as the right of the police temporarily to detain one found near a fresh corpse, or Mr. Justice Jackson's reference to the kidnapping of a child after which "the officers throw a roadblock about the neighborhood and search every outgoing car. . . ."¹⁸ Whatever the law may be in such situations, the reasonableness of the police action is conditioned by an immediate crisis and would have no general application. Mr. Justice Jackson proceeds to qualify his illustration by distinguishing a roadblock which is "the only way to save a

¹⁸ *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (dissenting opinion).

threatened life and detect a vicious crime" from "a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." Narrowly drawn exceptions to the requirement of probable cause to cover such emergencies would have great merit but would have little bearing on the everyday police problems to which our topic invites attention.

Those of us who believe that the fourth amendment's resolution of a very difficult problem through the formula of probable cause is as good a compromise as we can find are not likely to be convinced otherwise unless we can see how a power of arrest without probable cause would be limited, how it would work in specific situations, and how its proponents propose to deal with the constitutional obstacles to its validity. In the meantime, I am afraid that the pressing problem which faces us in the law of arrest is not how to find ways to increase the power of the police. If illegality in police arrests is as widespread as present evidence would suggest, and existing sanctions against it as ineffective as I believe them to be, perhaps the appropriate queries for the next conference would be: Can we afford to enforce the fourth amendment and the law of arrest, and if so, how?