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POLICE ARREST PRIVILEGES IN A FREE SOCIETY: A PLEA FOR MODERNIZATION

O. W. WILSON

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My title, "Police Arrest Privileges in a Free Society," is merely one summation of the dilemma presented by the fact that you cannot have complete, absolute freedom in a free society when some people are confined or their freedom of movement and conduct is restricted. Doctor Samuel Johnson, some two hundred years ago, stated the dilemma and emphasized its apparent insolubility when he said: "The danger of unbounded liberty and the danger of bounding it have produced a problem in the science of government which human understanding seems hitherto unable to solve." The subjects under discussion in this International Conference seem to indicate that Johnson was being unduly optimistic when he modified his statement by the insertion of the word, "hitherto."

It is my intention, in discussing police arrest privileges, to consider both the danger of unbounded liberty and the danger of bounding it, in the belief that a fair compromise is possible between the two—a compromise that will be to the advantage of a free society. The discussion will be within the framework of our Constitution; its amendment or violation is not proposed. This exclusion of the constitutional guarantees from the discussion cannot be absolute, however, for the reason that the reasonableness of search and seizure is often dependent upon the validity of the arrest.

Our free society has created a system designed to identify and apprehend the person who commits a crime and to give him a fair trial in which the truth of his guilt or innocence is to be established. This system is based on the principle that guilty persons should be adjudged guilty. The trial court is as ethically bound to ascertain the guilt of the guilty as it is to ascertain the innocence of the innocent. Rules that exclude material and

relevant facts bearing on the guilt or innocence of the defendant are inconsistent with this principle and with the oath to tell the truth, the whole truth, and nothing but the truth. Since an invalid arrest may result in the exclusion of material and relevant facts, the liberalization of arrest privileges would lessen the likelihood of the exclusion of truth, and would also facilitate the apprehension of criminals and lessen the physical hazards of the police.

The rules that establish the validity of arrest, as well as the other police arrest privileges under discussion, should be established by legislation, as was proposed in 1942 by the Interstate Crime Commission in its Uniform Arrest Act. The courts may then rule on their constitutionality. The decisions would probably be favorable; the provisions of the Uniform Act have not been declared unconstitutional in any of the states that have adopted them.

THE PROBLEM

Both unbounded liberty and its restriction place basic human rights in jeopardy. Unbounded liberty jeopardizes the security of life and property and, indeed, the security of our free society. Were this not so, there would be no need to place any restrictions on liberty. Restricting liberty, on the other hand, jeopardizes the basic human right to freedom in movement and conduct.

The problem, then, is to prescribe restrictions which will provide an acceptable degree of security without unduly infringing upon individual freedom. The restrictions on liberty now under discussion are adjusted by increasing or decreasing police arrest privileges. They must be so regulated that the price paid in inconvenience and restraint has an equal compensating value in the advantages of greater security. To keep the scales of justice

in balance, the advantages to a free society resulting from a reasonable degree of security in one pan must hold in precise equilibrium the other containing the disadvantages that result from restrictions.

This means compromise; some liberty must be sacrificed for the sake of security. A compromise is a modification of opposing views so that they may blend to the mutual satisfaction of the opponents. The opponents in the issue under discussion are not the assailant and his victim but instead law abiding citizens who differ in their appraisals of the danger of unbounded liberty on the one hand and the danger of bounding it on the other. The issue is not simplified by the fact that both groups would like to have at the same time both complete security and complete liberty. The impossibility of achieving both desires simultaneously is recognized, and each group makes a compromise it believes will provide a suitable balance between maximum security and minimum restriction on liberty. Were the appraisals by the groups identical, the problem would be solved. Since opposing groups make different appraisals, a reconciliation of the opposing views must be sought.

WHO SHOULD ARBITRATE?

Compromise is a characteristic of a free society, the strength of which is derived from consolidating the most acceptable features of opposing views into a workable system. In compromise, each side appraises what it gains in advantage against what it loses in disadvantage; there is then a measure of give and take. The appraisal in a free society is participated in by the citizens with the legislature serving as the arbitrator to say, "This is the way it will be." This democratic process enables citizens to have their desires implemented by law.

In the absence of legislation bearing on some aspect of police arrest privileges, the appellate courts may make decisions that are as binding in their effect as legislative enactments. The process which results in an appellate decision is markedly different from the legislative process. The issue before the court relates to the rights of the appellant, who has been judged guilty by the most liberal system of criminal justice found anywhere in the world. The court considers whether the rights of the appellant have been violated, not by organized society, but by a policeman whose actions are often viewed with distaste because all of the facts which may have justified the action are not on the record. The court ponders the alleged

infringement of the rights of the convicted person as a legal abstraction and feels obliged to consider the question as it would apply were the individual innocent. Finally, the desires of the general public for some reasonable measure of security and for a redress of the wrong done to the innocent victim of the criminal are not made known nor are they readily available to the court.

The issue before us does not jeopardize the integrity of the Constitution. Instead, it involves an appraisal of relative dangers, of advantages arrayed against disadvantages, which result from restrictions on liberty imposed by police arrest privileges. Statesmen representative of the people seem better qualified to make fair appraisals of public needs than appellate judges who, by virtue of their positions, are not so responsive to the desires of the public. The fundamental question is not a legal one after its constitutionality has been established. Instead, it is a philosophical problem in the science of government.

APPRAISAL OF THREATS TO SECURITY

It is apparent that equilibrium in the scales of justice may necessitate adjustment of the weight in one pan to compensate for a change in weight in the other. Should reasonable security be jeopardized by an increase in criminality, further restrictions on liberty may be justified. On the other hand, a society that has minimum criminality may enjoy maximum liberty.

An accurate and valid comparison of the crime frequency of this country with that of other countries is not possible today, but analysis and fair interpretation of available statistics lead to the conclusion that our country is among those having the highest crime rates. This fact in itself is apparently not alarming to a people accustomed to excel in industrial production, in standard of living—and in liberty.

Some cause for concern is found, however, in that the extent of criminality in our country is not remaining constant at this excessively high level. Instead, it is increasing at an alarming rate year by year. For example, the frequency of those crimes categorized by the F.B.I. as "Part I crimes" increased four times more rapidly than the population of this country during the first seven years of this decade.

In 1958, the F.B.I. adopted a new crime index which differed from the previously used Part I crimes by the exclusion of negligent manslaughter, statutory rape, and larceny under \$50. This new

and more accurate index revealed that crime increased five times more rapidly than population from 1957 to 1958.

Reports for the first nine months of 1959 from cities with a total population of 69 million showed an overall decrease of 1% in the number of crimes from the comparable 1958 statistics. It seems unwise to conclude from these incomplete figures, however, that the upward crime trend has been halted.

During the past decade, the police of this country have been strengthened in number, in training, and in equipment. They are better organized and are using more progressive procedures to prevent crime and to apprehend criminals than ever before in their history. Crime increases during the past decade have not resulted from a decrease in police effectiveness; they must be accounted for by other factors.

The effectiveness of a free society in controlling criminals may be measured in part by its success in convicting defendants. Comparison of 1957 and 1958 conviction rates with the average for the previous five-year periods in offenses included in the new crime index (excluding forcible rape, for which statistics are not available prior to 1958) and in four other classes of crimes (stolen property offenses, weapons offenses, narcotic law violations, and gambling) reveal a startling trend, as is shown in the table reproduced here.

In each of these crime categories (except homicides and narcotic offenses in 1957), the 1957 and

1958 conviction rates are lower than the average for the preceding five years. In 1957 the conviction rate for robbery, compared to the previous five-year average, decreased 19%; for aggravated assault, 18%; for burglary, 11%; for stolen property offenses, 12%; for weapons offenses, 16%; for gambling, 30%. In 1958, the conviction rate for robbery, compared to the previous five-year average, decreased 18%; for aggravated assault, 14%; for burglary, 7%; for stolen property offenses, 14%; for gambling, 29%; for homicide, 4%; for narcotic offenses, 6%.

Decreases of such magnitude in conviction rates may be taken, with the persistent increase in crime, as a warning that the scales of justice are getting out of balance. Where lies the fault? There is no indication that police procedures used in marshaling evidence against the defendant are becoming less effective; indeed, the reverse seems more likely. Nor does it seem that prosecutors have grown less vigorous or that defense attorneys have suddenly discovered new and more successful techniques. May the explanation be found in the restrictions that have been imposed on the police by appellate decisions?

THE PLIGHT OF THE POLICE

People on the whole want protection from criminal attack; they want to feel secure in their homes and on the streets from disturbances and molestations. To meet this need, local communities in our free society have created uniformed bodies of

PROPORTION OF PERSONS CHARGED WHO WERE CONVICTED, 1957 AND 1958
COMPARED WITH PREVIOUS 5-YEAR AVERAGES

	Percentage of Convictions					
	1952-56 Average	1957	Per Cent Change	1953-57 Average	1958	Per Cent Change
Murder and nonnegligent manslaughter	59.8	67.6	+13.0	62.2	59.5	-4.3
Robbery	76.7	62.3	-18.8	74.0	60.8	-17.8
Aggravated Assault	50.3	41.2	-18.1	48.5	41.8	-13.8
Burglary—breaking and entering	75.0	66.6	-11.2	72.8	67.8	-6.9
Larceny—theft	75.4	70.2	-6.9	74.2	71.0	-4.3
Auto theft	64.7	62.3	-3.7	64.2	64.0	-0.3
Stolen property; buying, receiving	54.2	47.8	-11.8	53.5	45.6	-14.8
Weapons; carrying, possessing, etc.	75.9	63.7	-16.1	73.4	63.3	-13.8
Narcotic drug laws	69.7	71.9	+3.1	70.0	65.5	-6.4
Gambling	65.2	45.4	-30.4	63.1	45.1	-28.5
Total	666.9	599.0	-10.2	655.9	584.4	-10.9

Note: Rape not included because statutory rape was excluded from this category in 1958.

Source: FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS (1952-1958).

police to prevent crimes and to bring to court those who commit them. Responsibility for the prevention of crime rests principally on city police forces, sheriffs' departments, and local detachments of state police.

A crime occurs when a person who desires to commit it discovers the opportunity to do so. Such unwholesome desires spring from and are a measure of criminality. The police cannot prevent the development of criminality, except as their contacts with potential and actual offenders may have this wholesome effect; nor are the police charged with this responsibility. Their basic purpose is to remove or lessen by both physical and psychological means the opportunity to commit crimes.

To prevent crime, the police must either stand guard at every point of possible attack, which is a physical and economic impossibility, or intercept the person with criminal intent before he robs, rapes, or kills. It is better to have an alert police force that prevents the crime than one that devotes its time to seeking to identify the assailant after the life has been taken, the daughter ravished, or the pedestrian slugged and robbed.

The task of the police in preventing crime is quite different from that of identifying the perpetrator and marshaling evidence to prove his guilt. To prevent crime by intercepting the criminal while he seeks his prey is not unlike hunting a predatory animal; prompt and decisive action is called for at a critical moment not of the huntsman's choosing. The policeman who fails to act at the critical moment may nonetheless prevent an impending crime, but the criminal, who more times than not is wanted for previous unsolved crimes, remains at large to continue his depredations. Restrictions on arrest privileges hamper the police not only in preventing crime but also in clearing cases by the arrest of the perpetrator and in marshaling evidence to support prosecution.

The local police feel the restrictions imposed on arrest privileges more keenly than do the specialized police agencies whose principal responsibility is the gathering of evidence to identify and convict persons after they have committed a crime, rather than to prevent the act in the first instance. Frequently the criminal, whose act is within the jurisdiction of a specialized police agency, has already been arrested by local police who often apprehend him in the act or in flight from the crime scene. These are critical moments for police

action. In cases where the culprit has not been arrested, the critical moment for arrest can often be set by the specialized police; it is planned after sufficient evidence is marshaled to justify the arrest which is often authorized by warrant. In contrast, most arrests by local police are made without warrant at a critical moment not of their choosing before they have had an opportunity to marshal evidence beyond what they personally observed at the time.

The typical citizen would feel that the police were remiss in their duty should they fail on their own initiative, or refuse on legal grounds, to investigate by questioning a person who was lurking in the neighborhood for no apparent reason. The disturbed citizen would expect the police to discover whether the suspect was armed and, if so, to disarm him and prosecute him should it be discovered that he was carrying the weapon illegally. Should the suspect refuse to explain what he was doing in the neighborhood, and the policeman apologized for questioning him and then went about his duties leaving the suspect to continue his lurking, the citizen would consider that he was not receiving adequate protection.

The typical citizen is surprised when he discovers that in many jurisdictions police arrest privileges are so carefully circumscribed by statutory and case law as to render the policeman virtually powerless to deal effectively and safely with situations that confront him almost hourly during his duty tour. The police action demanded by the citizen from his protector is illegal in many jurisdictions.

The police, under local control as in our form of government, are inclined to provide the protection their citizen-employers demand; otherwise the police fail to prevent crime and are subject to sharp criticism for their failure to protect the public. Also, since they usually act with courtesy, discretion, and good judgment, only infrequently is the legality of their acts questioned, and then by a citizen who fails to understand and appreciate the police motive or by a lawyer who uses the incident in the defense of his guilty client.

The discrepancy between what the people expect the police to do and what the police are privileged to do in protecting public peace and security results principally from a lack of understanding of the police purpose and of what the police must do to accomplish it.

The police must accept some blame for lack of

public confidence in the means they use to achieve their purpose. Police abuse of their authority must be eliminated, not by withdrawing essential authority or by freeing the guilty criminal, but by raising police standards to a level of trustworthiness and by some action which will penalize the community that employs an officer who abuses his privileges.

Police leadership has been dilatory in raising service qualifications and ethical standards. However, the police now have an acceptable code of ethics and their qualification standards are being raised from coast to coast. Each local community should insist on improvement in the quality of its police service until all have achieved professional status. The community that is penalized for abuse of arrest privileges will be likely to demand both higher standards and disciplinary action against the offending officer.

Lack of public understanding of the police purpose and what the police must do to accomplish it is accentuated by two circumstances that tend to cast the police in the role of agents bent on unnecessarily oppressing freedom. The first grows out of police responsibility in the enforcement of traffic and other regulatory laws sometimes violated by the most conscientious citizen, an enforcement that aligns good citizens against the police. The other is ignorance of the facts involved in the war against crime in a free society. People are apt to fear and hate what they do not understand—and the hate is often stimulated by traffic violation experiences.

These misunderstandings continue unabated because the police are not a vocal, scholarly group that devotes much time to presenting in a favorable light the facts that bear on the problem. The literature in consequence is principally devoted to the case against the police; little has been written in their defense. The press, the literature, and even case law are all directed at incidents that discredit the police. Small wonder that those who read the papers or research the literature and case law conclude that the police are evil. Information on which a fairer judgment might be based is not generally circulated.

Highly intelligent people ponder the police role as a hypothetical abstraction, in ignorance of the true facts, and conceive the police to be a potential instrument of tyranny which will destroy the essential freedom of a free society. Since their reading and research are restricted to incidents that discredit the police, they conclude that all

police are bad. These citizens, as protectors of liberty and freedom, then align themselves against the police without giving attention to the cost of criminal depredations.

There have been exceptions in which men whose integrity and judgment are respected have accompanied the police on their tours of duty in order to learn and report the true facts. Professors John Barker Waite of the University of Michigan Law School and Sam Bass Warner of the Harvard Law School are two examples. Their experiences gave them a sympathetic understanding of the problems confronted by the police in consequence of antiquated rules governing the questioning and detaining of suspects, searching them for weapons when police safety is jeopardized, arresting them when conditions warrant such action, and the right of the suspect under some conditions forcibly to resist arrest by a uniformed policeman. These men have championed in books and articles the liberalization of arrest privileges because through their experiences they have gained a sound understanding of the handicaps of the modern policeman in his legal war against crime. On the basis of his police experiences, Professor Warner played the principal role in drafting the Uniform Arrest Act.

ESSENTIAL POLICE ARREST PRIVILEGES

Law enforcement may be strengthened by legalizing common police practices, already legal in some jurisdictions, which would have the effect of facilitating the discovery of criminals and evidence of their guilt and of lessening the exclusion of relevant evidence from their trials. The police should be authorized to question persons whose actions under the circumstances then existing are such as to arouse reasonable suspicion that the suspect may be seeking an opportunity to commit a crime. A police officer should be privileged to search such a suspect for weapons when the officer has reasonable grounds to believe that he is in danger if the person possesses a dangerous weapon, and, should the suspect be illegally armed, to arrest him for this offense. Should the suspect be unable or unwilling to explain satisfactorily the reasons for his presence and actions, the officer should be authorized to take him to a police station and hold him while the investigation is continued, for a period of two hours, without placing him under arrest.

The police should be privileged to release an arrested person without bringing him before a

magistrate when their investigation reveals his innocence or when a drunk has become sober. The police should be authorized to hold an arrested person before bringing him before a magistrate for at least 24 hours, excluding days when courts are not in session. Magistrates should be authorized to order the defendant to be held for an additional period when good cause for such detention is shown.

A police officer should be authorized to arrest under a warrant when the warrant is not in his possession, to arrest without a warrant for any misdemeanor committed in his presence, and to arrest without a warrant for petty thefts and other misdemeanors not committed in his presence when he has reasonable grounds to believe that the defendant could not be found after the warrant was issued.

Suspects should be denied the right to resist illegal arrest by a person the suspect has reasonable grounds to believe to be a police officer. The police should be authorized and urged to use notices to appear in court in lieu of physical arrest in suitable misdemeanor cases when they believe the defendant will appear as agreed. Persons the police have reasonable grounds to believe to be witnesses to crimes should be legally required to identify themselves to the police.

These are essentially the provisions of the Uniform Arrest Act. To them should be added authority for the police to search any convicted narcotic offender for contraband, without a warrant, when his actions, under the circumstances then existing, are such as to arouse reasonable suspicion that the suspect may have contraband in his possession.

The reasonable arrest privileges mentioned above would facilitate the achievement of objectives in law enforcement desired by all persons except the criminals themselves. The privileges would enable the police to exercise such control over persons in public places as to enhance the peace and security of all citizens.

These privileges do not threaten the lives or health of the innocent; the inconvenience of two hours of detention short of arrest is experienced only by the innocent person who inadvertently or by poor judgment is found in a situation that arouses police suspicion and which the suspect is unable or unwilling to explain on the spot. In view of the present jeopardy to public security, such inconvenience seems a small price to pay for the privilege of living securely and peacefully.

SAFEGUARDS AGAINST POLICE ABUSE OF AUTHORITY

Police abuse of authority with criminal intent resulting in serious offenses must always be dealt with by criminal prosecution and disciplinary action. Establishing safeguards against abuse of authority by the overzealous policeman in the day-to-day performance of his duty presents quite a different problem. Safeguards that weaken law enforcement or free the guilty are socially undesirable; if possible the problem should be solved in some other way.

Civil suits for damages filed against the individual officer have not proved adequately effective in preventing police abuse of authority. Were this procedure effective, however, it would emasculate vigorous police action and law enforcement would be weakened at a time when it needs to be strengthened.

Negating police overzealousness by freeing guilty defendants violates the principle that the guilty should be adjudged guilty, punishes society rather than the policeman, rewards the guilty, and is a miscarriage of justice. Its effectiveness as a control of police abuse of authority has not been demonstrated.

The Committee on Criminal Law and Procedure of the California State Bar proposed that

“ . . . the answer might lie in a new kind of civil action, or better, a summary type of proceeding, for a substantial money judgment in favor of the wronged individual, whether innocent or guilty, and against the political subdivision whose enforcement officers violated that person's rights. After not many outlays of public funds the taxpayers and administrative heads would insist upon curbing unlawful police action.¹

Professor Edward L. Barrett, Jr., of the University of California Law School, in commenting on this proposal, stated:

“Legislative action along these general lines gives promise of providing a more adequate solution than the exclusionary rule at a smaller social cost. . . . The remedy would be available to the innocent as well as the guilty, for the illegal arrest as well as the illegal search. The courts would have frequent opportunities for ruling on the legality of police action, for enunciating and developing the governing law. If in any community a substantial number of such actions

¹ 29 CAL. ST. BAR JOUR. 263-64 (1954).

become successful, the financial pressure on the police to conform more closely to judicial standards would doubtless follow. Finally, if a careful line is drawn between those situations where increased personal liability should be placed upon the individual policeman (basically those involving serious and intentional violations of law) and those where he should be immunized and sole liability placed upon the governmental agency, interference with the efficient functioning of law enforcement would be minimized."²

CONCLUSION

The modernization of arrest privileges is needed to make them consistent with the conditions under which the police today must protect the public from criminal attack. The following advantages would be gained from liberalizing ancient rules of arrest based on conditions that no longer exist

² 43 CALIF. L. REV. 565, 595 (1955).

and from penalizing a political subdivision for abuse of authority by its police:

1) Public peace and security would be increased by enhancing the likelihood of discovering persons seeking an opportunity to attack.

2) The effectiveness of the administration of justice would be increased by facilitating the investigation of suspects, the arrest of criminals, and the collection of admissible evidence. By these means both clearance and conviction rates would be increased.

3) The security of the police would be increased by permitting them to discover weapons that may be used to attack them and by making it illegal to resist arrest by a known peace officer.

4) Higher standards of service and stricter adherence to the legal restrictions imposed on the police would result when a community or other political subdivision was penalized for abuse of authority by its police.