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FIELD INTERROGATION: ADMINISTRATIVE, JUDICIAL AND LEGISLATIVE APPROACHES*

BY LAWRENCE P. TIFFANY**

One of the recurring questions in the administration of criminal justice is the extent of the power of the police to interrogate. Much of the impetus for concern with this question derives from recent Supreme Court decisions which center on in-custody interrogation by the police. Mr. Tiffany, however, discusses police interrogation problems in the context of on-the-street stopping and questioning of suspects who may not be arrested because the police lack sufficient evidence to arrest. This analysis encompasses the responses of the police, the courts and the legislatures to field interrogation practices. Since adequate responses have not been forthcoming to clarify the ambiguity surrounding the status of field interrogation, the burden may fall upon the courts to resolve the problem. Such a solution, Mr. Tiffany feels, may be based on the traditional arrest-or-nothing approach since police administrative failure to articulate the need for such practices will result in important considerations failing to reach the courts and to affect judicial formulation and treatment of the issues. Clear enunciation of the need for field interrogation and delineation of the scope of the existing practices may avoid such an over-simplification of a complex and sensitive area of police practice.

INTRODUCTION

A COMMON police practice, probably in all localities, is to stop and question suspects on the street when there are insufficient grounds to arrest. In addition to detaining and interrogating the suspect, the police may frisk him if they believe, even without specific grounds, that he may be armed. The stopping and questioning of persons found under suspicious circumstances, who may not be arrested because of insufficient evidence, is referred to by the police as

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field interrogation.[1] Although this phase of police work has been treated ambiguously by legislatures, courts and the police themselves, it seems clear that police consider it an important part of their law enforcement program.

The failure of police to give adequate attention to the definition and justification of field interrogation results in part from the fact that it occurs on the street in the context of closely related police practices which are designed to prevent the commission of crime rather than to detect and apprehend offenders for prosecution. These preventive practices include such programs as crowd control by ordering persons to desist from congregating on sidewalks; search and seizure programs designed to confiscate dangerous weapons in order to lessen the incidence of serious, assaultive conduct on the streets by gang members and others; arrest-and-release of drunks and prostitutes without prosecution; and other similar practices.[2] Inadequate incentive has existed for the police to undertake systematic analysis and control of field interrogation practices and to differentiate them from these preventive practices.

Another reason the police fail to address this problem may be the lack of judicial and legislative attention to the area. The courts usually succeed in avoiding the issue. When officers have acquired evidence of guilt as a result of detention of a suspect on the street, the admissibility of that evidence is dependent upon the legality of the police practice which led to the acquisition of the evidence. In most states, when an officer detains a person on the street for questioning, the only clearly applicable privilege is the privilege to make a lawful arrest. As a consequence, the prosecution typically claims that the evidence was secured as the result of a lawful arrest, and the defense typically asserts that the grounds for the "arrest" were insufficient. Whatever is decided, the field interrogation issue is not confronted. As a result, the police remain in doubt about its legality. The police themselves contribute to this uncertainty since as long as other ways exist to justify the interference, they do not desire to put the status of field interrogation in issue — the loss may be not only that case, but also a desired enforcement practice.

Whether the failure of police to clearly articulate and justify field interrogation practices results from the failure of the courts and legislatures to give attention to this issue or is itself responsible for the judicial and legislative default is not entirely clear. What is clear is that the attention given the problem by the police, courts and legis-

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[1] See, *e.g.*, BRISTOW, FIELD INTERROGATION (1958). The practice is also referred to as "stopping and questioning," "field contact" or "field investigation."

[2] TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME (in press).

latures has not been adequate. The state of California has a highly developed body of case law relating to field interrogation, and the practice there has been recognized as proper in numerous opinions.[3] The California courts, however, are the only ones that have given sustained attention to the issue.

Generally state legislatures have not been concerned with this aspect of police practices. Certain important exceptions to this general legislative inaction do exist, however. Several states have adopted the Uniform Arrest Act provisions dealing with field interrogation,[4] and the New York legislature has recently enacted a so-called "stop and frisk" law.[5] The supporters of the statute clearly have indicated that it was intended to overrule previous cases which denied the legality of some field interrogation practices in New York.[6] That statute is important not only for the practice in New York; its adoption was widely publicized and the New York court approval of the law may stimulate similar legislation in other states.[7] Additional impetus was provided early in 1966 with publication of the American Law Institute's Model Code of Pre-Arraignment Procedure which specifically confronts the field interrogation issue.[8]

Thus, the legality of field interrogation practices is becoming of rapidly increasing concern to those responsible for the administration of criminal justice.[9] The United States Supreme Court has spotlighted police practices in general, and police interrogation practices in par-

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[3] Many of these cases are collected in MARTIN, PROBABLE CAUSE TO ARREST AND ADMISSIBILITY OF EVIDENCE [in California] (1960).

[4] DEL. CODE ANN. tit. 19, §§ 1902-03 (1953); N.H. REV. STATS. ANN. §§ 594:2-:3 (1955); R.I. GEN. LAWS ANN. §§ 12-7-1 to -2 (1956).

[5] See authorities cited note 9 *infra.*

[6] See, *e.g.*, NEW YORK STATE COMBINED COUNCIL OF LAW ENFORCEMENT OFFICIALS, POLICE PROTECTION — MORE OR LESS?

[7] See note 159 *infra.*

[8] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 2.01-.02 (Tent. Draft No. 1, 1966). See also 34 U.S.L. WEEK 2641 (May 24, 1966).

[9] Much of the impetus for this concern is attributable to the publicity which attended the passage of the New York "stop and frisk" law, N.Y. CODE CRIM. PROC. § 180-a. The New York Times, for example, carried at least twenty articles concerning that statute between January 21, 1964, and March 24, 1965. The July 1, 1964, "CBS Evening News with Walter Cronkite" contained a report on the New York statute. At least two major periodicals reviewing news and legal developments with broad appeal noticed this statute. See Kaufman, *The Uncertain Criminal Law,* The Atlantic Monthly, Jan. 1965, p. 61; Time, May 15, 1964, p. 80.

See also Kuh, *Reflections on New York's "Stop-and-Frisk" Law and Its Claimed Unconstitutionality,* 56 J. CRIM. L., C. & P.S. 32 (1965); Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law,* 33 FORDHAM L. REV. 211 (1964); Siegel, *The New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?,* 30 BROOKLYN L. REV. 274 (1964); Wolbrette, *Detention for Questioning in Louisiana,* 39 TUL. L. REV. 69 (1964). See also 31 BROOKLYN L. REV. 174 (1964); *Id.* at 397; 14 BUFFALO L. REV. 545 (1965); Comment, 65 COLUM. L. REV. 848 (1965); 50 CORNELL L.Q. 529 (1965); 78 HARV. L. REV. 473 (1964); Note, 59 NW. U.L. REV. 641 (1964); 10 N.Y.L.F. 410 (1964); Comment, 39 N.Y.U.L. REV. 1093 (1964); 38 ST. JOHN'S L. REV. 392 (1964); 16 SYRACUSE L. REV. 685 (1965); 1965 U. ILL. L.F. 119.

ticular.[10] These decisions give rise to two questions: 1) whether evidence secured as a result of a field interrogation will be admissible at subsequent trials and 2) whether field interrogation may be, in some cases, a workable alternative to in-custody interrogation.[11] Field interrogation is also assuming major importance because it is one type of on-the-street police practice which involves direct confrontation between the police and members of minority groups who typically reside in high crime areas, a problem of current and critical significance.[12]

The major issues in relation to field interrogation practices are analyzed in detail in the Detection of Crime Volume of the American Bar Foundation's series on the Administration of Criminal Justice in the United States.[13] It is the limited purpose of this article to inquire into the nature of the existing involvement of administrators, courts, and legislatures in resolving the question of the appropriate response by the police to the person who arouses police suspicions because of his conduct or appearance, but who may not be arrested because of insufficient evidence.

I. THE ADMINISTRATIVE VIEW OF FIELD INTERROGATION

A. *Need for Field Interrogation: The Police View*

There is little doubt that police administrators view field interrogation as an important, perhaps essential, part of their over-all enforcement practices. This is evident both from statements made by high-ranking police officials and from the ubiquity of the practice. One of the more obvious reasons for utilizing stopping and questioning has been stated by Superintendent Wilson of the Chicago Police Department: "When a policeman encounters someone on the street

[10] The implications for field interrogation of the United States Supreme Court's most recent pronouncement regarding interrogation are unclear. In Miranda v. Arizona, 86 Sup. Ct. 1602 (1966), the Court required that arrested persons be adequately advised of their right to counsel and of their right to remain silent prior to any interrogation of the suspect. The new rules apply to "custodial interrogation." The Court said: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, *supra* at 1612. It has been argued that the limitations do apply to the on-the-street context. 34 U.S.L. WEEK 2641 (May 24, 1966). See also Wong Sun v. United States, 371 U.S. 471 (1963) (verbal evidence illegally obtained was excluded); Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483 (1963).

[11] See, *e.g.*, Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 333-34:

> It might be possible . . . to lessen the risk of arrest without probable cause by giving the police clear authorization to stop persons for restrained questioning whenever there were circumstances sufficient to warrant it, even though not tantamount to probable cause for arrest. Such a minor interference with personal liberty would touch the right to privacy only to serve it well.

[12] Race as a classification factor is discussed in Remington, *Social Change, the Law and the Common Good*, paper presented at Tenth Annual National Institute on Police and Community Relations (Michigan State University 1964) and Conference Leader's Material for Professional Police-Human Relations Training, prepared by Applied Psychological Services for the Philadelphia Police Department, 1961.

[13] TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME (in press).

under circumstances that would lead a reasonably prudent policeman to suspect that something was amiss, he must and should stop the suspect long enough to ask a few pertinent questions."[14] This reason focuses on the dilemma confronting an officer in a situation which causes him to be suspicious but obviously does not justify an arrest under existing limitations. An example from literature supporting the New York "Stop and Frisk" statute illustrates this point:

> The time: one thirty in the morning. The place: a tenement area, with a history of crimes of violence. Watching from an unmarked car, a detective sees two men pacing back and forth, impatiently, glancing into the window of a bar and grill.
>
> One of the men spots his observer, whispers to his companion. Both start away.
>
> The Detective jumps out of the car. Approaching them, he says, 'This is the police. Hold it.'
>
> They do. He frisks them. In the rear pants pocket of one he feels a hard metallic object. He removes it — a fully loaded pistol. A further search reveals four additional shells.[15]

Obviously, sufficient grounds did not exist for an arrest prior to the frisk. Just as obviously, ignoring the suspect is not an acceptable alternative for the police.

A second justification for a field interrogation program, also given by Superintendent Wilson, might be termed "satisfaction of community expectations." This is particularly true when police action is taken in response to a specific request from a private citizen and relates to a particular person. In the words of the Superintendent:

> 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 receiving inadequate protection.[16]

Thus the police feel that they are bound to respond to requests to investigate "suspicious" people who, because of their actions, give rise to some alarm in another citizen. That the police do respond to such requests is made clear in observation of the practice. Only demands which are patently unreasonable may be ignored.

Although most of these cases arise from a telephone call to police

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[14] *Hearings on H.R. 7525 and S. 486 Before the Committee on the District of Columbia of the United States Senate*, 88th Cong., 1st Sess., pt. 1, at 310 (1963).

[15] NEW YORK STATE COMBINED COUNCIL OF LAW ENFORCEMENT OFFICIALS, POLICE PROTECTION — MORE OR LESS? This is a summary of People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965).

[16] Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C & P.S. 395, 398 (1960).

headquarters, which radios the patrolman in the neighborhood, the pressure to investigate is equally as great if the patrolman is contacted directly by the citizen. The police acknowledge this fact: "Information by a citizen concerning a suspicious person should always be acted upon by the police officer. It is good public relations, and will encourage citizens to continue to give information, even though it is sometimes erroneous."[17]

Of course, in many cases such information merely puts the officer in a position where he may make observations which would lead him to make his own decision to stop and question. To the extent that is true, the practice is not criticized by the police. However, in some cases officers are required to conduct field interrogations at the behest of citizens when they would not do so on their own initiative.[18]

The foregoing justification of field interrogation may be generalized into a broader concept of giving the public the type of protection which they are assumed to demand without waiting for specific requests. The practice of interrogating persons on the street to assauge the fears — well grounded or not — of private citizens when complaint is made in specific cases might lead to similar police action despite the fact that no one has notified the police of the "suspicious conduct." Thus, if field interrogation is the response to a specific complaint from a citizen, it would probably be the response if the same activity were initially observed by a patrolman. If the activity is a man lurking about a house — even though unoccupied — the police perception of what action the community expects of them does not change. Observation of the practice clearly substantiates this conclusion. Response to perceived community expectations is particularly understandable when it is noted that the question of the legality of field interrogation is at best ambiguously answered in most jurisdictions.

B. *Propriety of Field Interrogation: The Police View*

Despite some recognition by Illinois courts of a right of field

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[17] CHICAGO POLICE DEP'T, TRAINING BULL., Vol. II, No. 7 (Feb. 13, 1961).

[18] In one instance a Wichita patrol officer registered considerable dissatisfaction at placing much reliance on a radio call relating to alleged drunks parked near a female complainant's home.

> If I had conducted myself within the strict letter of the law I would not have checked that car out because I know from my dealings with courts that I had no good reason to think that these people had actually committed any offense. When I got there they were quiet and orderly. There were no signs that they were drinking, and the only information I had was the word of an unidentified woman which passed through a second party, the dispatcher, and finally got to me. On the basis of this highly insubstantial evidence I actually effected an arrest of all of those persons strictly speaking because I detained them for a period of time.

interrogation,[19] Chicago police literature until recently either assumed the legality of the practice or did not address that question at all.[20] Police manuals pinpoint the need for the practice and the uncertainty of its legality:

> A police officer may stop and question any person carrying bundles or parcels at unreasonable hours or under suspicious circumstances, or whom he may have reason to suspect of unlawful design, and may demand of him his business and where he is going. Courts have upheld officers who have made honest mistakes in making such *arrests*. In these cases an officer must use his best [judgment]. This authority must be exercised with great caution. No law-abiding citizen will object to being questioned if it is done in a polite manner.[21]

At the same time the manual purports to permit stopping and questioning, it denominates the action an arrest. The ambiguity in the law is also reflected in the patrolman's understanding of the propriety of the procedure, although almost all assert its necessity. During the time field data were gathered in Chicago most of the patrol officers interviewed expressed the view that the procedure was illegal because it amounted to a "technical arrest." This same attitude was expressed by most of the officers interviewed in other states. A few officers in these states, however, believed that the police did have a right to stop and question. Many simply did not know, or gave inconsistent answers.

The effects of a large part of the various police forces believing that field interrogations are necessary but illegal are not at all clear.[22] One possibility, however, suggests itself. A particularly troublesome aspect of the program involves the situation in which a search accompanies field interrogation.[23] If the officer believes he is detaining without legal authority, he may be less reluctant to perform an exploratory search, not really expecting to find incriminating evidence. If this is true, the uncertainty of the legal status of field interrogation may result in an increase of searches accompanying field interrogation.

C. *The Administrator's Dilemma: Crime Detection or Crime Prevention?*

While the police are obviously interested in maintaining a high

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[19] People v. Faginkrantz, 21 Ill. 2d 75, 171 N.E.2d 5 (1960); People v. Exum, 382 Ill. 204, 47 N.E.2d 56 (1943); People v. Eutice, 371 Ill. 159, 20 N.E.2d 83 (1939); People v. Henneman, 367 Ill. 151, 10 N.E.2d 649 (1937); People v. Mirbelle, 276 Ill. App. 533 (1934).

[20] See, *e.g.*, CHICAGO POLICE DEP'T, TRAINING BULL., Vol. II, No. 7 (Feb. 13, 1961). New training bulletins, however, explain the basis of and limitations on the right to stop and question suspicious persons insofar as the case-law provides those answers. CHICAGO POLICE DEP'T, TRAINING BULL., Vol. V, No. 1 (Jan. 6, 1964); Vol. VI, No. 31 (Aug. 2, 1965).

[21] RULES AND REGULATIONS OF THE POLICE DEP'T OF THE CITY OF PONTIAC [Michigan] § 230 (Jan. 1941). (Emphasis added.)

[22] See note 18 *supra*.

[23] See TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME (in press).

level of effectiveness in terms of the percentage of known crimes which have been cleared by arrest, they also feel that the level of known criminal activity is a measure of their effectiveness. Whether or not this is valid, the police are frequently assigned and accept responsibility for the level of criminal activity in a community. A number of police practices mentioned previously have evolved from the pressures on the police not only to apprehend those who have committed crimes, but also to prevent the commission of crimes in the first place.[24]

As a result of placing responsibility on the police for the level of crime, police administrators have tended to adopt a twofold position: (1) a major task of a police department is to reduce the commission of crime in the first place; and (2) frequent contact with persons on the street will further that objective. Superintendent Wilson states the first part of that contention:

> 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. . . . Their [the police] 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.[25]

The tools which the police have available to them to combat what they believe to be incipient criminality have several shortcomings. Attempt laws are too restricted to apply to "suspicious loiterers," except where the scope of those inchoate laws have been expanded to situations such as possession of burglary tools with the intent to commit a burglary.[26] Conspiracy and solicitation concepts, while perhaps encompassing a broader range of inchoate activity, present problems of proof and resource allocation which normally are considered insurmountable by the police. Some officers feel that vagrancy-type laws provide part of the answer since they bridge the gap between possible intending criminals and those who may be convicted of attempt.[27]

But it is also asserted that field interrogations aid in controlling intending criminals because the confrontation involved in field interrogation has the same preventive efficacy as practices exclusively de-

[24] *Id.* ch. 1.

[25] Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C. & P.S. 395, 398 (1960).

[26] See, *e.g.*, MODEL PENAL CODE § 250.12, comment (Tent. Draft No. 13, 1961).

[27] Williams, *Police Control of Intending Criminals*, 1955 CRIM. L. REV. (N.Y.) 66, 136.

signed for that purpose. Commenting on an intradepartmental proposal to implement a system of Field Interrogation Reports in the Chicago Police Department, a top-level administrator made these express assumptions about the value of a field interrogation program:

> The amount of crime committed is closely related to the criminal's estimate of his chances to commit the crime without being apprehended.
>
> The criminal's estimate of his potential for success is influenced by the effectiveness of police patrol operations, and the criminal is most influenced by the effectiveness of patrol operations when he has personal contact with them.
>
> The thief or burglar is likely to be wary of working in an area where he is frequently questioned by the police and his identity and description are made a matter of record, and the thief intent on committing a crime is likely to desist following a field interrogation.[28]

This assumption, that field interrogation will reduce the crime rate, is a strongly held belief of most officers who are on actual patrol.[29] They are quick to admit that it is largely unsupported by any real evidence, but they are understandably unwilling to forego the practice in order to find out whether field interrogations have any real effect on the crime rate.

One result of the police policy not to restrict activities to detecting completed crimes is an obfuscation of the distinction between several types of different practices. Thus, for example, three isolable police practices frequently are rendered indistinguishable at both the policy and operational levels: (1) operations designed mainly to make felt the presence of the police for general deterrence purposes; (2) field interrogations when the officer believes that a person is about to commit a crime; and (3) field interrogations when the officer believes that a person has committed a crime.

The formal law seems to restrict police activity to those situa-

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[28] Memorandum to the Superintendent of the Chicago Police Dep't from the Director of Planning in re field interrogation, March 27, 1962. See also BRISTOW, FIELD INTERROGATION 5 (1958), where one of the functions of field interrogation is stated as follows:

> The frequent stopping and questioning of suspicious persons usually tends to reduce the crime rate in a given district. Word travels quickly by the criminal grapevine that a certain area is being well patrolled. Criminals rarely frequent areas where they are continually stopped for interrogation, and tend not to choose such districts for criminal activity.

[29] *Cf.* CHICAGO POLICE DEP'T, TRAINING BULL., Vol. VII, No. 23 (June 6, 1966):

> The alert and aggressive officer on patrol will through experience learn what locations on his beat are used by young 'toughs' as hangouts. He will check these out even though no criminal activity is taking place at that particular moment. . . .
>
> By aggressive patrol procedure, the patrolling officer can create doubt in the mind of the would-be criminal as to the possibility of successfully committing a crime. This is the deterrent effect of aggressive patrol. . . .
>
> The professional criminal will weigh the risk of the crime against what he stands to gain if he gets away without being caught. By aggressively patrolling an area you will impress the criminal with the fact that what he is about to do would either be observed and that he would eventually be captured or that any attempt would be futile and capture would be immediate.

tions in which a crime has probably been committed by the suspect.[30] Thus, police assumption of responsibility for the level of criminal activity seems to be at odds with the limitations imposed by the formal law upon their power. The policeman's dilemma in this regard is further aggravated by the failure of the formal law to adopt clear policy limitations on the scope of police authority to engage in activities which interfere with individuals for purposes other than criminal prosecution.[31]

The police themselves typically will not attempt to delineate such prevention policies. In large part this simply results from a general reluctance on the part of administrators to take a clear, public stand on controversial matters since to do so would result in their having to defend, perhaps unsuccessfully, the position adopted. If their policies were rejected, practices they feel are necessary to good police work might be lost to the department. However, failure to make clear their position results in confusion between crime prevention and crime detection practices.

Despite some confusion, field interrogations are usually distinguishable from the kinds of programs engaged in by police which are not specifically directed toward a person suspected of having committed an offense or about to commit one. It seems clear that the legality of police programs designed, for example, only to get guns and knives off the street, or to increase the cost of doing business as a prostitute, must rest on substantially different considerations than field interrogations designed to apprehend offenders for the purposes of prosecution. The fact remains, however, that field interrogation does occur on the street in the context of these other practices and they have not been adequately distinguished either by the police or by the formal law.

II. JUDICIAL DECISIONS RELATING TO SUSPICIOUS PERSONS

Because of legislative default, courts have necessarily become the most important agencies in the system of criminal justice administration dealing with problems relating to police practices. Because of their superior position in the judicial hierarchy and because their opinions are more available to other officials in the system, appellate courts have become the dominant source from which rules governing police conduct emanate. In the absence of legislation and appellate opinions, issues involved in stopping and questioning suspects must be decided by trial courts or by administrative officials.

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[30] *E.g.*, Williams, *Police Control of Intending Criminals*, 1955 CRIM. L. REV. (N.Y.) 66, 136.

[31] It is unclear what might be the future effect of the health inspection cases in this regard. Eaton v. Price, 364 U.S. 263 (1960); Frank v. Maryland, 359 U.S. 360 (1959). See Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46 and authorities cited therein.

The issue confronting the appellate courts has been framed as follows:

> 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?[32]

What is perhaps most significant about the treatment of this issue by appellate courts is that in many cases they have not couched the issue in those terms. Because of their central position in determining proper police conduct and developing the law relating to field interrogation it is important to understand the various approaches which the courts have utilized.

Although field interrogations potentially involve many identifiable steps — surveillance, approach, confrontation, stopping, frisking, questioning, and post-questioning detention — the most critical step clearly is stopping or detaining. At this point of restraint most appellate courts which have denied the legality of the practice have found the practice unsupportable. The steps in field interrogation which precede stopping or detaining have received relatively little close attention; the steps subsequent to the stopping are generally upheld only if the initial detention was proper. Interrogation, for example, receives attention almost entirely as an adjunct to the detention issue, and if there is deemed to be no restraint involved during interrogation, it is upheld. Thus the judicial treatment of issues relating to stopping or detaining suspects for questioning is of critical importance.

Some courts have approved field interrogation practices; however, most courts have avoided directly deciding the question. Why this is so is not entirely clear. Part of the explanation may be that the police themselves have not taken the initiative. The unresolved question is whether lack of police initiative in clearly defining the scope of and need for a field interrogation program contributes to the failure of the judiciary to confront the issue, or whether the converse is the case. Even in those instances in which the police have set out administrative rules defining the standards of their field interrogation program, it is unlikely that their views will be adequately presented and argued when the legality of the action is challenged in court. But this is not the entire explanation, for there have been instances in which the police position was ably presented on appeal and still the issue was avoided.[33]

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[32] Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., C. & P.S. 386 (1960).

[33] See text accompanying note 47, *infra*.

Part of the explanation may lie in the point made by Professor Hurst:

> As fact finders courts were inherently hampered by the limiting tradition of their office. It was not the proper work of judges to initiate broad solutions of public problems. The courts inherited no staff which they could use for independent fact finding. They had no independent funds with which to finance inquiries.[34]

Thus, courts may eschew the establishment of new policies when sources of information are inadequate to fully foresee various ramifications of a decision, and Professor Hurst points out that they are in no position to undertake their own study.

Professor Llewellyn has suggested that courts are attracted to what is available to them — prior appellate opinions — to decide what ought to be done in the particular case:

> The simple available thing in law consists in the rules laid down on the statute books by the legislature, or laid down authoritatively by the supreme court of any given jurisdiction. The statute book is in print. The reports of the supreme court are in print. Both are collected and arranged in libraries. And the easiest thing to extract from either or both is the set of rules which they purport to contain. What wonder, then, that these have been the subject matter of our study? What wonder, either, that once the study is begun we come to think of them as occupying the whole field? At the same time, what an absurdity. Useful and influential as these rules may be (and I do not deny either their influence or their necessity or — when they are soundly handled — their high utility) surely it is clear that they offer the most dubious of pictures of any social behavior outside themselves.[35]

This tendency is reinforced by "that curious drive to create a seeming simplicity, when nothing else will do it, by *verbal* unification, by manipulation of verbal or other symbols which correspond to nothing in the facts."[36] There is a strong tendency on the part of courts — as well as other parts of the system — to frame issues in terms of pre-existing legal categories such as arrest, rather than to frame them in terms of the law enforcement perspective, or in terms of "social behavior outside themselves." The following sections discuss in more detail the judicial methods most commonly used in resolving questions about the legality of stopping and questioning suspicious persons.

A. *Ambiguity in Formation of the Issue: The United States Supreme Court*

On three occasions over a period of years the United States Supreme Court has had an opportunity squarely to face issues relating

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[34] HURST, THE GROWTH OF AMERICAN LAW 412 (1950).

[35] LLEWELLYN, JURISPRUDENCE 82 (1962).

[36] *Id.* at 83.

to stopping suspected persons for questioning. Those three cases are discussed in detail in this section not only to underscore the essential ambiguity inherent in their disposition but also because of the importance of some of the pronouncements contained in the cases in concurring and dissenting opinions.

It is not suggested that what little may be gleaned from those cases is applicable to the states or governs the conduct of state officers. Indeed, the contrary has been assumed under the present state of the law.[37] Thus, state courts and legislatures may be left free to determine proper police practice within permissible limits.[38]

1. *Rios v. United States*[39]

Two plainclothes state police officers were on patrol in an unmarked car. Defendant Rios was observed getting into a taxicab and the officers trailed the cab for about two miles. No reason was given for their action other than the fact that the area being patrolled had a reputation for high narcotic activity. When the cab stopped for a red light, the officers alighted from their car and approached it, one on each side. One officer identified himself.

At this point, conflicting testimony was given at trial of the case. By one version, one of the officers drew his revolver and opened the door of the taxi.[40] But one of the police officers testified that before a gun was displayed and the door of the cab was opened, he saw the suspect drop an object on the floor of the cab. He shined a light on the fallen object and observed a transparent contraceptive filled with a light colored powder. It was common knowledge among police that narcotics dealers often used such a device to contain the contraband. The officer further testified that he opened the cab door and then placed the defendant under arrest "for narcotics."[41]

Prosecution was commenced against the defendant in the Cali-

[37] Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319.

[38] Ker v. California, 374 U.S. 23 (1963).

[39] 364 U.S. 253 (1960).

[40] *Id.* at 257-58 n.2. On remand to the district court, the testimony of the taxicab driver, Smith, was rejected because "he was not an impartial or unbiased witness, but his bias against the police officers was manifest to the point where his testimony lacked probative force in the points wherein it conflicted with other testimony and evidence." United States v. Rios, 192 F. Supp. 888, 889 (S.D. Cal. 1961). It is interesting to note, nonetheless, that Smith testified as follows:

> I thought probably it was just a routine examination. I work the night shift, have for some time, and I have been stopped by the police and they have checked the occupants of my cab. There have been quite a few holdups of taxi drivers and I just thought it was a routine thing.
>
> But the defendant was getting quite agitated and I noticed at this time that Officer Beckmann had his revolver drawn, which seemed to me somewhat extraordinary just to stop and question an occupant of a cab. . . .

Rios v. United States, 364 U.S. 253, 257 n.2 (1960).

[41] *Id.* at 256.

fornia state court for illegal possession of heroin. But at the preliminary examination a motion to suppress the evidence was made and granted, and the defendant was released.[42] A prosecution for the same offense was then commenced in federal court.[43] The federal trial judge denied the defendant's alternative motions to quash the indictment which had been returned against him by a federal grand jury or to suppress the evidence. The trial court found that (1) the evidence was not illegally seized and (2) even if it were illegally seized, it would be admissible in federal court under the so-called "silver platter doctrine" because federal officers did not participate in the seizure of the narcotics or the arrest of the defendant.[44] The conviction of the defendant was upheld by the Ninth Circuit Court of Appeals.[45]

When *Rios* reached the Supreme Court for decision, the silver platter doctrine had been overruled[46] so that *Rios* required a determination of the legality of the seizure of the narcotics by the state officers. The government took the position that the Court should give express recognition to the right of police officers to stop persons for interrogation when adequate grounds for an arrest do not exist:

> Our position is generally that investigation is a legitimate and necessary part of law enforcement; that a police officer may stop a person for the purpose of inquiry on less information than would constitute probable cause for his arrest; and that any temporary detention that may be involved in the act of making inquiry does not constitute an arrest. We think further that this is as true of a passenger or driver in a vehicle as it is of a person walking in the street, except to the extent that, in judging the reasonableness of the officer's action, one factor to be considered is the manner in which the vehicle is stopped. Where, as here, the vehicle is at a standstill, an officer may as legitimately approach and detain the occupants to make inquiry as he could a pedestrian, even though that same basis might not be sufficient to justify forcing a moving vehicle to the curb with a police car or, at a further extreme, shooting at the tires of a vehicle to force it to stop. In short, we think that police officers have a right to make *reasonable* inquiry even though some restriction of movement is involved; that the issue of whether the

[42] The reason for the suppression of the evidence in the California state court does not appear in the federal reports, and apparently the case is unreported elsewhere. The circuit court noted, however, that the federal district court's finding that the evidence was not illegally seized was made upon more testimony than was taken at the preliminary hearing in the state court. Rios v. United States, 256 F.2d 173, 176 n.5 (9th Cir. 1958). While it is true that California has had the exclusionary rule since 1955, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, it is also true that California has the most highly developed judicial recognition of the right of enforcement officers to conduct field interrogations.

[43] The appellate court noted that a plea of res judicata in this type of situation has been specifically rejected in Serio v. United States, 203 F.2d 576, 578 (5th Cir.), *cert. denied*, 346 U.S. 887 (1953).

[44] See Elkins v. United States, 364 U.S. 206 (1960).

[45] Rios v. United States, 256 F.2d 173 (9th Cir. 1958).

[46] Elkins v. United States, 364 U.S. 206 (1960) (a companion case to *Rios* on appeal).

> inquiry is reasonable is to be determined under all the circumstances; and that here the inquiry was reasonable . . . .
>
> A distinction between the requirements for an arrest and for a temporary detention for purposes of inquiry is, moreover, a necessary one if law enforcement is not to be unduly hampered.[47]

But the Court remanded the case to the district court for a factual determination of when the arrest was made.[48] The possible alternative findings were outlined: (1) "If . . . the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could make that arrest lawful, or justify a search as its incident."[49] (2) If the court found that the arrest was not made until after the defendant voluntarily revealed the package of narcotics, the arrest which followed would be lawful because the officers would then have had reasonable grounds to believe that a felony was being committed. The language of the Court regarding this latter alternative is of some relevance in determining the degree of recognition given the practice of stopping and questioning persons who may not be lawfully arrested:

> But the Government argues that the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission. If the petitioner thereafter voluntarily revealed the package of narcotics to the officers' view, a lawful arrest could then have been supported by their reasonable cause to believe that a felony was being committed in their presence. The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night.[50]

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[47] Brief for United States, pp. 24, 30-31, Rios v. United States, 364 U.S. 253 (1960). The government's brief also contains the following language:

> The questioning of persons suspected of criminal activities or likely to have knowledge of them is a necessary and proper part of law enforcement, and in our view police officers may properly, if reasonable under the circumstances, detain persons for a limited time for that purpose. [p. 10] Being stopped by the police officer for purposes of inquiry may at times cause some inconvenience to the person stopped, but that temporary inconvenience is normally minor compared to the importance of such reasonable inquiry to effective law enforcement. Without the power, for example, to stop a suspiciously-acting automobile to ask questions, the police might be forced to spend fruitless hours investigating action which the occupant, had the police been able to ask him questions, could readily have explained as being entirely innocent. In a fair balancing of the interests at stake, we submit that the rights of the person questioned are adequately protected by his privilege not to answer and that the police, having reasonable grounds for inquiry, ought not to be foreclosed from at least the opportunity, by asking questions, to determine whether further investigation is necessary. [pp. 11-12] The importance of promptly questioning a possible suspect does not lie primarily in obtaining incriminatory evidence against him. It is perhaps even more important as a means of dissipating suspicions and releasing the officers from further fruitless investigation. [p. 31]

[48] Rios v. United States, 364 U.S. 253, 262 (1960).

[49] *Id.* at 261-62.

[50] *Id.* at 262.

It is clear from this opinion that the Court did not intend to confront the question whether it would be proper for officers to detain for questioning persons suspected of crime who could not be arrested because of lack of a sufficiently high evidentiary basis. The Court speaks of the problem only in terms of arrest, search, and seizure or voluntary conduct on the part of the suspected person. This is the most significant fact about the opinion because this approach has probably become the most frequently encountered among the various judicial approaches to these issues. The case was remanded to the district court to determine when the arrest occurred without providing any significant guidelines concerning whether the fourth amendment permits a distinction between temporary detention for interrogation on the one hand and arrest on the other.

Because of the subsequent findings of fact, the trial court avoided all of these issues. That court held that the state officers were "lawfully making a routine surveillance of the taxicab and its occupants, and for the purpose of making a routine interrogation, they approached the taxicab but did not stop or detain it until after the commission of a crime by the defendant in the officers' sight and presence."[51] The trial court also found that the defendant alighted from the cab voluntarily and that he was then arrested. Thus the arrest was legal, and because the defendant had dropped the narcotics before alighting from the taxicab, there was no seizure: "the defendant voluntarily gave up possession thereof."[52]

2. *Henry v. United States*[53]

Federal agents were investigating defendant in connection with thefts of whisky from interstate shipments. They had received some general information concerning his "involvement" — from an undisclosed source — and on two occasions observed him and the other defendant loading cartons into a car. After observing the second of those transactions, the officers followed the car and waved it to a stop. Stolen interstate shipments of radios were found in plain view. Defendants were convicted of possession of stolen interstate goods.[54]

The circuit court divided in their opinions,[55] the majority upholding the police action on the grounds that the officers had sufficient probable cause to search, and that the discovery of the radios, bearing interstate labels, together with an unsatisfactory explanation by de-

[51] Rios v. United States, 192 F. Supp. 888, 889 (S.D. Cal. 1961).

[52] *Id.* at 890.

[53] 361 U.S. 98 (1959).

[54] *Ibid.*

[55] United States v. Henry, 259 F.2d 725 (7th Cir. 1958).

fendants in regard to the ownership of the cartons, constituted probable cause to make the subsequent arrest.

The majority of the Supreme Court, however, agreed with the dissenting judge of the circuit court and held that the defendants were arrested at the time the car was stopped — a conclusion which the government conceded[56] — and that probable cause to arrest did not exist at that time.

Mr. Justice Clark, dissenting, rejected both the result reached by the majority and the traditional analysis relied upon in reaching that result. He gave considerable recognition to the right of police officers to stop suspected persons for interrogation:

> The Court seems to say that the mere stopping of the car amounted to an arrest of the petitioner. I cannot agree. The suspicious activities of the petitioner during the somewhat prolonged surveillance by the agents warranted the stopping of the car. The sighting of the cartons with their interstate labels in the car gave the agents reasonable ground to believe that a crime was in the course of its commission in their very presence. The search of the car and the subsequent arrest were therefore lawful and the motion to suppress was properly overruled.
>
> In my view, the time at which the agents were required to have reasonable grounds to believe that petitioner was committing a felony was when they began the search of the automobile, which was after they had seen the cartons with interstate labels in the car. The earlier events certainly disclosed ample grounds to justify the following of the car, the subsequent stopping thereof, and the questioning of petitioner by the agents. This interrogation, together with the sighting of the cartons and the labels, gave the agents indisputable probable cause for the search and the arrest.[57]

The dissenting opinion would give clear recognition to the right of officers to stop for interrogation persons who have reasonably aroused police suspicion when there is not sufficient evidence to arrest. While Mr. Justice Clark does not define arrest, he necessarily rejects the narrow definition which is usually couched in terms of "any restraint." Further, it is not clear that the majority would have equated stopping with arrest but for the concession of the government on that point. That such an equation was made is not expressly stated, although, as Mr. Justice Clark pointed out, it does seem to be implicit in the result reached by the majority.

3. *Brinegar v. United States*[58]

While the majority of the Supreme Court in *Brinegar* also took the traditional arrest-or-nothing approach in analyzing the issues presented, other opinions filed in connection with this case shed some light on the question whether officers may stop a person in a vehicle

[56] Henry v. United States, 361 U.S. 98 (1959).

[57] *Id.* at 106 (dissenting opinion).

[58] 338 U.S. 160 (1949).

on less than probable cause to arrest. Even though those statements were not controlling in the final disposition of the appeal they are important because of their source. The principal opinion of the Court summarized the relevant facts as follows:

> At about six o'clock on the evening of March 3, 1947, Malsed, an investigator of the Alcohol Tax Unit, and Creehan, a special investigator, were parked in a car beside a highway near the Quapaw Bridge in northeastern Oklahoma. The point was about five miles west of the Missouri-Oklahoma line. Brinegar drove past headed west in his Ford coupe. Malsed had arrested him about five months earlier for illegally transporting liquor; had seen him loading liquor into a car or truck in Joplin, Missouri, on at least two occasions during the preceding six months; and knew him to have a reputation for hauling liquor. As Brinegar passed, Malsed recognized both him and the Ford. He told Creehan, who was driving the officers' car, that Brinegar was the driver of the passing car. Both agents later testified that the car, but not especially its rear end, appeared to be 'heavily loaded' and 'weighted with something.' Brinegar increased his speed as he passed the officers. They gave chase. After pursuing him for about a mile at top speed, they gained on him as his car skidded on a curve, sounded their siren, overtook him, and crowded his car to the side of the road by pulling across in front of it . . . .
>
> As the agents got out of their car and walked back toward petitioner, Malsed said, "Hello, Brinegar, how much liquor have you got in the car?" or "How much liquor have you got this time?" Petitioner replied, "Not too much," or "Not so much." After further questioning he admitted that he had twelve cases in the car.[59]

The evidence was conflicting whether there was liquor in the car visible to the officers at the time the car was stopped. After denial of defendant's motion to suppress the seized liquor, he was convicted for importing intoxicating liquor into "dry" Oklahoma from Missouri, in violation of federal statute.[60]

A plethora of judicial opinions resulted from the conviction and subsequent appeals. Despite disagreements about the proper conclusions to draw from the facts presented, most of the opinions did approach the problem relying on traditional concepts of arrest, search, and seizure or voluntary disclosures. The district court, in the words of the Supreme Court:

> was of the opinion that "the mere fact that the agents knew that this defendant was engaged in hauling whiskey, even coupled with the statement that the car appeared to be weighted, would not be probable cause for the search of this car." Therefore, he thought, there was no probable cause when the agents began the chase. He held, however, that the voluntary admission made by petitioner after his car had been stopped constituted probable cause for a search, regardless of the legality of the arrest and detention, and that therefore the evidence was admissible.[61]

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[59] *Id.* at 162-63.

[60] *Id.* at 161-62 n.1, 169 n.8.

[61] *Id.* at 163.

The majority of the court of appeals affirmed that position, adding what seemed implicit in the district court's opinion — that the stopping of the car did not amount to a "technical arrest."[62] Both of these opinions rely on arrest concepts but found that no arrest occurred until after the incriminating statements were made.

The dissent in both the circuit court and the Supreme Court considered the chase to be illegal either because it was a search or because it was an arrest. The dissenting judge in the circuit court stated that he believed the officers would have searched the car even if defendant had denied possession of the liquor, so that "the search was on when the chase began and Brinegar was crowded off the road and prevented from going his lawful way . . . ."[63] That judge concluded that the "officers were illegally investigating when they pursued the car, forced it to the side of the road, compelled it to stop, and interrogated the driver."[64] The reasoning of the court was that police officers should not be encouraged in obtaining "an admission ordinarily inadmissible under the Fifth Amendment, while engaged in violation of the Fourth Amendment."[65] Mr. Justice Jackson, dissenting from the other two opinions filed by the Court, apparently shared this view. He stated: "When these officers engaged in a chase at speeds dangerous to those who participated, and to other lawful wayfarers, and ditched the defendant's car, they were either taking the initial steps in arrest, search and seizure, or they were committing a completely lawless and unjustifiable act."[66] He contended not only that defendant's car was one of his "effects and hence within the express protection of the Fourth Amendment,"[67] but also that there was no probable cause to conduct the search prior to the statements made by the defendant.

The majority opinion of the Court shared the approach to the problem but differed on the existence of probable cause to initiate the chase and the subsequent stopping. Mr. Justice Rutledge, writing for the majority, concluded that the officers had probable cause to believe that the car contained contraband; therefore the actions of the officers were proper under the rule that an automobile moving on a public highway may be searched without a warrant if probable cause for the search exists.[68]

All of those opinions approach the problem in terms of arrest

[62] Brinegar v. United States, 165 F.2d 512, 514 (10th Cir. 1947).

[63] *Id.* at 516 (dissenting opinion).

[64] *Ibid.*

[65] *Id.* at 517 (dissenting opinion).

[66] Brinegar v. United States, 338 U.S. 160, 187-88 (1949) (dissenting opinion).

[67] *Id.* at 182 (dissenting opinion).

[68] *Id.* at 164.

or search and either unquestionably equate stopping with search or arrest, or completely ignore that formulation of the issue. Mr. Justice Burton, however, took an entirely different approach in his concurring opinion. In his analysis, it was unnecessary to determine whether probable cause to search existed prior to the incriminating statements made by Brinegar, for the officers had a right to stop and interrogate him. The subsequent statements provided the necessary grounds for the search:

> The earlier events, recited in the opinion of the Court, disclose at least ample grounds to justify the chase and official interrogation of the petitioner by the government agents in the manner adopted. This interrogation quickly disclosed indisputable probable cause for the search and for the arrest. In my view, these earlier events not only justified the steps taken by the government agents but those events imposed upon the government agents a positive duty to investigate further, in some such manner as they adopted. It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in the enforcement of the law and this requires affirmative action not only when there is reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation.[69]

In this opinion, Mr. Justice Burton framed the term "reasonable ground for an investigation" — a term meant to allow the stopping for interrogation of persons against whom some evidence of guilt exists, but which does not amount to probable cause to arrest or search.

A hypothetical situation discussed by Justice Jackson in his dissent might also be urged as support for a recognition of the right to investigate when evidence available will not meet the usual standards for arrest or search. Justice Jackson urged that

> [I]f we are to make judicial exceptions to the Fourth Amendment for these [enforcement] reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.[70]

To uphold the validity of stopping for questioning short of the usual evidentiary standards for arresting, two approaches might be

[69] *Id.* at 178-79 (concurring opinion).

[70] *Id.* at 183 (dissenting opinion).

taken: (1) recognizing the difference in the evidentiary standards because of a recognition of the difference in the amount of interference involved; or (2) continuing to call the interference an arrest or a search, but lessening the required probable cause standard to conduct such an arrest or search in particular situations. Clearly, it is the latter type of approach to which Mr. Justice Jackson has addressed himself. His approach represents a lessening of the standards of probability to conduct a lawful search without a search warrant and not incident to a lawful arrest, and in that sense is still representative of the traditional approach. That approach does not speak to the issue of probable cause to investigate in the sense that term is used by Mr. Justice Burton in his concurring opinion. Arguably, then, this method is but an instance of a watered-down application of the traditional approach.

4. *Critique*

The key question which must be answered in determining the legality of conducting field interrogations is whether there are situations in which police officers may stop or detain a person for interrogation without possessing sufficient grounds to make an arrest. Stated otherwise, the issue is whether stopping or detaining must be equated with arrest. A detailed discussion of the three major Supreme Court cases which are the most nearly in point fails to answer that question. While individual justices have expressed a clear view, the actual holdings of the Court leave the law ambiguous. The majority opinions invariably rely on the arrest concept in reaching their decisions since they can dispose of the issues in traditional terms without having to resolve difficult new issues.

On the basis of the current state of the law, it could be argued that the Court has consistently held that arrest, search, and seizure concepts are the only means by which such police conduct can be upheld, that the evidentiary standards for those interferences must be met before the conduct may be held lawful. But it could be argued with equal authority that the Court has never held that stopping and questioning without adequate grounds to arrest is unlawful for federal officers, much less for state police. In short, the Court seems to have neglected the entire area.

It is, of course, quite possible for a court to treat all detentions in terms of arrest. But if that approach is to be taken, it should at least be predicated on a recognition that interferences with the suspect concerned are such that the court feels it cannot be justified on any less evidence of guilt than is required to take a person into custody to be charged with a crime. If, however, the personal inter-

ferences are deemed to be substantially less than those imposed when a person is taken to the station to be booked and arraigned, an equation of the evidence sufficiency to justify stopping, with that required to justify arrest, would seem to be based on an assumption that there is no legitimate need for stopping for questioning of suspicious persons.

On the other hand, if a court recognizes a need for field interrogation of suspicious persons, as well as the fact that such an interrogation may involve less burden on the suspect than does arrest for prosecution, then it would seem that there would be sufficient justification for distinguishing those two practices and for allowing stopping for questioning in cases in which grounds for arrest do not exist.

Whichever answer one may prefer to the issue posed, failure to answer the question at all is probably the least desirable approach. If it is decided that the practice cannot constitutionally be permitted, then the courts may take appropriate steps to discourage it. If the question is decided in favor of permitting the practice, then courts must develop rules to limit and control the practice to keep it within constitutional bounds so that administrators will know with which law they must comply. But the inevitable result of a failure to confront the initial question about the legality of stopping for questioning is that the police, given their current attitudes about its necessity in effective law enforcement, will engage in the practice and will have the power to determine under what circumstances the practice is permissible. The effect is that of a grant of discretion to police administrators to work out their own rules unguided by formal law.[71]

Observation of the current practice makes it amply clear that while the concept of allowing a degree of interference with a person against whom there is not sufficient evidence to make a lawful arrest for prosecution is a relatively novel one, it is novel only to the formal law — not to the administration of that law by front-line administrative personnel. The vast majority of persons stopped and questioned are not taken to the police station, and it is therefore fair to assume that however high may be the number of arrests occurring in any jurisdiction, the number of field interrogations is much higher. Despite that fact, the law on the questions presented by the practice in many jurisdictions is a mystery. While these police practices may not have been declared to be legal by the lawmakers in those jurisdictions,

[71] The point here is not that police ought not to have discretion in enforcement of the criminal laws. Obviously they must have. LAFAVE, ARREST 490-525 (1965); Goldstein, *Police Discretion: the Ideal versus the Real*, 23 PUB. ADMIN. REV. 140 (1963). *But see* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960). The point rather is that a minimal requirement for granting police discretion ought to be recognition that such a grant has been made.

the chances are very good indeed that neither have they been declared illegal.

The arrest-or-nothing approach, with its resultant ambiguity, has been the most common and unfortunate treatment which the problems have thus far received by appellate courts. The three Supreme Court cases discussed above typify that approach.

B. *Reliance on Tort Concepts*

A less frequently encountered judicial answer to this problem is observed where the courts again rely entirely on arrest concepts in analyzing the police conduct involved in the case but take the additional step of adopting a definition of arrest.

Prior to judicial adoption and development of exclusionary rules of evidence, the principal mode of testing the legality of detention by police was the civil suit for false imprisonment. The decisions of appellate courts in those actions provided a ready body of law relating to the question of what constituted the act necessary to maintain such an action. Some courts have relied heavily on those cases, probably because of a lack of any other source of law to which they could look. The results have varied, due at least in part to semantic confusions caused by the nature of that tort action.

The confusion seems to stem from failure to distinguish between the statement of the act which constitutes *imprisonment* from the statement of *privilege* the absence of which makes the imprisonment a "false" imprisonment. The following is a typical definition of the *act* necessary to maintain the action: "any exercise of force, by which in fact the other person is deprived of his liberty and compelled to remain or to go where he does not wish . . . is an imprisonment."[72] When the plaintiff in a false imprisonment suit shows that act, the defendant, to escape liability, must show that he was privileged to commit that act. Several types of privilege are available to him such as self-defense, defense of others, defense of property, and the privilege of an owner of a chattel to recapture it by force. But the only privilege category arguably applicable to the type of restraint imposed in stopping a person for questioning is the privilege afforded to police officers to effect arrests.

The *privilege* consists of two parts. The first part involves a determination of what constitutes an arrest, and there are at least three common definitions of that. One is the "any restraint" definition given above. The second is the current definition of arrest contained in the new Illinois Code of Criminal Procedure: " 'Arrest'

[72] Great Atlantic & Pac. Tea Co. v. Smith, 281 Ky. 583, 598, 136 S.W.2d 759, 767 (1939).

means the taking of a person into custody."[73] That section was amended just prior to the enactment of the new code. Before amendment the term was defined in a third way: " 'Arrest' means the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense."[74]

The second part of the privilege involves determining when that arrest — however the term is defined — may occur. Apart from the use of arrest warrants, statutes usually provide that a peace officer may arrest when he has grounds to reasonably believe that a felony has been committed, and that the arrestee committed it, or when a misdemeanor is committed in his presence.[75] Those statutes are approximate codifications of common law.

Within that framework, courts have taken two different approaches. The first is typified by *Busby v. United States*.[76] As a result of stopping for questioning of "suspicious men" in an automobile, California officers found a weapon which led to a prosecution in federal court for possession of an unregistered firearm. On appeal, the court was faced with the contention that the weapon was unlawfully obtained, because either stopping the car or ordering the occupants from it constituted illegal police conduct. The court held that these acts did not constitute an arrest or search because the California statute defines that term as follows: "An arrest is taking a person into custody, in a case and in the manner authorized by law."[77] The "case" applicable here is: "At night, when there is reasonable cause to believe that he has committed a felony."[78] The court stated that: "No one had been taken into custody in this case until after the shotgun which gave rise to probable cause was seen. Certainly not every police practice constitutes an arrest or search."[79]

The difficulty with this analysis is that the facts of the case make it clear that there was an initial restraint when the car was stopped and an additional momentary detention following the stop. Thus, in tort law there clearly was an "imprisonment." The question would then become whether that restraint was privileged. To hold that the restraint did not amount to an arrest because it did not satisfy the requirements of the statutory definition of that term is but to say that in the statutory context the restraint did not fall within the arrest

[73] ILL. REV. STAT. ch. 38, § 102-5 (1963).

[74] PROPOSED ILL. CODE CRIM. PROC. § 38-5 (1963).

[75] LAFAVE, ARREST chs. 11-12 (1965).

[76] 296 F.2d 328 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962).

[77] CAL. PEN. CODE § 834(5).

[78] CAL. PEN. CODE § 836(5).

[79] Busby v. United States, 296 F.2d 328, 331 (9th Cir. 1961), *cert. denied*, 369 U.S. 876 (1962).

privilege. The logical result of this approach would be to hold that the taking of a person into custody for any purpose other than prosecution does not amount to an arrest in those states in which that term is defined to include an intention on the part of the officer to hold the suspect to answer for a crime. This is an unlikely result.

In contrast to the approach taken in *Busby,* other courts hold that an arrest occurs when there is "a restriction of the right of locomotion or a restraint of the person . . . ."[80] When that conduct occurs on insufficient evidence, the result is an *illegal* arrest. Certainly this approach comports better with the tort law analysis.

Underlying this approach is an implicit assumption that tort concepts deriving from false imprisonment actions should govern interpretations of constitutional provisions prohibiting unreasonable seizures. By rigid application of tort definitions and privilege categories to the area of police practices, courts preclude any meaningful decisions regarding field interrogation based on policy considerations unrelated to false imprisonment suits. Normally, the result of this approach will be to find that the stopping for questioning was illegal, for detention is equated with the "seizure" prohibited except on "probable cause" and is normally lacking in field interrogations.

The semantic confusion caused by applying various definitions and modes of analysis to the question of whether an officer may stop a suspected person for questioning led one writer to conclude that the better definition of arrest was the "any restraint" concept because to define arrest in terms of taking a person into custody that he may be forthcoming to answer for the commission of a crime would mean that "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."[81]

Cases which rely solely on the arrest concept to resolve issues inherent in stopping for questioning seem to be predicated on two assumptions, neither of which is made express and neither of which is beyond dispute. First, courts assume that arrest — as that concept is handled in tort law — is the only proper mode of analysis to be used in criminal prosecutions in determining the legality of stopping suspected persons for investigation. Second, they assume that the arrest privilege is the only privilege officers may have to interfere with persons suspected of crime. Certainly a court could reasonably rule that stopping for questioning on less than probable cause to arrest is an illegal police practice on the grounds that it is an unreasonable

[80] Price v. United States, 119 A.2d 718, 719 (D.C. Munic. Ct. 1956).

[81] Note, 100 U. PA. L. REV. 1182, 1186 (1952).

seizure, but such a decision should not be predicated on a paucity of available privileges provided by tort law. Conversely, a court could uphold that practice in a limited number of situations, but again that decision should not be predicated on semantic manipulations of what are essentially tort law concepts.

C. *Consent*

Earlier pages discuss the problem of determining when, in terms of restraint or assumption of control, police action toward a suspect ought to be subjected to the kinds of limitations on police authority presumed to follow from attaching the label "arrest" to that action. A related problem is discussed here. That problem is whether concepts of "voluntary cooperation" versus "involuntary cooperation" may realistically be used to set the outer limits on the law's concern with police, on-the-street practices.[82] The major difficulty is that compliance with a request of a police officer to provide him with information because of the citizen's own perception about his social obligations frequently cannot be distinguished reliably from compliance influenced by subtle and unarticulated, albeit real, threats of arrest or other use of superior force. For example, if the police confront and question a person on the street and elicit from him self-incriminating statements, is it desirable in later stages of the criminal justice system to make factual inquiries about why the suspect cooperated? This problem is present in various forms in many of the observed field interrogations. The courts have not adequately resolved the problem, and legislatures have not addressed it at all.[83]

A court may avoid the question whether detaining a suspected person for interrogation was proper if it finds that the suspect "consented." If the suspect consents, there is no detention since the word implies involuntariness on the part of the suspect. In a strict sense, then, the question of whether the suspect consented relates not to the *reasonableness* of detention but to the question of whether there *was* in fact, a detention.

In many instances a court is confronted with a situation in which it is amply clear that the officer intended to detain the suspect and

[82] At least one court has rejected that concept in the field of search and seizure in some cases: "Around 1:30 in the afternoon, the defendant Busby was accosted on the street by two members of the narcotic squad of the metropolitan police department who knew the defendant as a drug addict. Busby 'consented' to a search of his person, although he denied having any marihuana. Finding marihuana in defendant's coat pocket, the officers arrested him . . . ." United States v. Busby, 126 F. Supp. 845, 846 (D.D.C. 1954). The court found that the consent was not voluntary in this type of situation. Conceivably, the same approach might be taken in stopping and questioning cases in which it is evident to the suspected person that the mere detention would reveal evidence of his guilt.

[83] *But see* ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.01 (Tent. Draft No. 1, 1966), entitled *"Voluntary Cooperation With Law Enforcement Officers."*

clearly conveyed that intention to the suspected person. That the suspected person has not consented to the detention is clear in those instances in which he attempts to leave and is physically restrained by the officer.[84] In other cases, the officer may verbally convey his intentions by informing the person that he is being detained,[85] or this may be made clear by the actions of the officer such as by drawing a gun.[86]

The difficult cases arise when the suspected person stops to talk to the officer and the officer does not clearly indicate his intentions. The answer to the question whether the stop or detention was involuntary on the part of the suspected person may even be ambiguous when an automobile is stopped by the police, for such stops may be made by waving to the driver, sounding the horn, or by use of a spotlight.

There are several ways to look at the problem of the voluntariness of the detention. One might take the position that if the suspected person does not object to the stopping, either verbally or by conduct, it would then be considered voluntary. But the realities involved in police confrontation of persons on the street indicate that such a position is highly unrealistic. To presume that consent to interrogation was tacitly given because the suspected person did not object is to rely on expediency at the expense of a real attempt to understand the nature of the detention.

Another approach might emphasize the importance of whether the suspected person correctly believed that he had an alternative to submitting to the detention. Obviously, the consent cannot be considered voluntary if there was no real alternative. The alternative, if there were one, would be to avoid confrontation with the officer who has indicated that he wants to interrogate. Two difficulties arise in considering that alternative. First, the courts often consider flight or avoidance to be evidence of guilt.[87] In some instances, flight or avoidance is even considered sufficient to constitute probable cause to arrest.[88] Thus, if the only alternative to "consenting" to detention is to provide the officer with even more evidence of guilt, and perhaps enough to support an arrest, then the suspect is caught in a legal dilemma. If a suspect submits because of this reason, then it clearly cannot be considered voluntary.

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[84] Commonwealth v. Doe, 109 Pa. Super. 187, 167 Atl. 241 (1933).

[85] See, *e.g.*, United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959) (suspect told he was not under arrest, but "just being detained"); People v. Murphy, 173 Cal. App. 2d 367, 343 P.2d 273 (1959) (suspect told he was just being "checked out," but not being held).

[86] See, *e.g.*, People v. Mirbelle, 276 Ill. App. 533 (1934).

[87] Green v. United States, 259 F.2d 180 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 917 (1959).

[88] United States v. One 1951 Cadillac Coupe, 139 F. Supp. 475 (E.D. Pa. 1956).

Secondly, even when the flight or avoidance would not be considered by a court to be evidence of guilt sufficient to permit detention or arrest, the suspected person may still face a dilemma for it is clear that police officers almost invariably attempt to restrain a person who does not "willingly" submit to interrogation. If the alternative to voluntary submission is physical restraint, it again seems clear that the suspect cannot be considered to have assented to the questioning. Nevertheless, some courts continue to refer to the right of the suspect to refuse to halt,[89] an alternative that has a tenuous existence.

Other courts emphasize the mental attitude of the suspect or of the officer. It has been held that confrontation by an officer in uniform amounted to detention because the suspect "no doubt thought he was bound to stop when approached,"[90] and one judge argued that the suspect involved "was arrested as soon as the police accosted him, for he must have known at once that he was no longer free to walk away."[91]

Whether the suspect in fact has available to him the alternative of refusing to halt may depend upon the intent of the police officer who confronts him. When the officer's conduct is such that it does not clearly indicate whether he intends to use force to detain should that become necessary, the only way of ascertaining that intent is to ask the officer. In one case, the officer indicated frankly that he did not know what he would have done if the suspect tried to leave.[92] In other cases, the court simply held that consent is a question of fact to be determined by the fact finder at trial.[93]

The difficulty with these approaches to resolving the question of consent is that they assume that voluntariness is a meaningful concept in this context. The fact which is perhaps of greatest significance is that the overwhelming majority of persons whom the police desire to interrogate do in fact submit to that interrogation. Because of that fact it seems unlikely that an officer would form an intent to forcibly detain should he encounter what is almost a purely hypothetical contingency of a refusal to submit. It is possible, of course, that a particular officer may have made a generalized decision

[89] Green v. United States, 259 F.2d 180 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 917 (1959).

[90] State v. Gulczynski, 32 Del. 120, 123, 120 Atl. 88, 89 (1922).

[91] Ellis v. United States, 264 F.2d 372, 375 (D.C. Cir.) (dissent), *cert. denied,* 359 U.S. 998 (1959).

[92] Pena v. State, 111 Tex. Crim. 218, 12 S.W.2d 1015 (1928).

[93] See, *e.g.,* People v. Sanchez, 191 Cal. App. 2d 783, 12 Cal. Rptr. 906 (1961).

to use force, if necessary, anytime he encounters a suspected person who refuses to submit to his interrogation. It seems unlikely that an officer who entertains an actual belief that the person he desires to interrogate may be guilty of a criminal offense would permit investigation to be thwarted by the simple expediency of a refusal to halt. This is particularly true if the officer believes he has a right to stop and interrogate persons who reasonably arouse his suspicions.

Because an officer probably does not even make a particularized decision in each case, and because if he did it likely would be to use actual restraint if that became necessary, it may be argued that "consent" on the part of the suspect is a meaningless concept. This may be true even when the suspect does "voluntarily" submit to interrogation by stopping. He may believe that he has an alternative, but in fact he probably does not.

In one type of situation, the "calculated risk" theory has been advanced in support of consent doctrines. In *United States v. Vita*,[94] the question arose as to whether damaging statements were made while the defendant was under arrest or while voluntarily in the presence of the police. The court found that he had voluntarily submitted to the investigation:

> Vita was apparently confident of his ability to talk himself clear of whatever suspicions the F.B.I. had of his possible complicity. Surprising as it may seem, the guilty are often as eager as the innocent to explain what they can to law enforcement officials. The very same naive optimism which spurs the criminal on to commit his illegal act in the belief that it will not be detected often leads him to feel that in a face-to-face encounter with the authorities he will be able to beguile them into exculpating him. Having chosen to talk with the F.B.I. agents, Vita cannot now be heard to complain because his calculated risk worked to his disadvantage.[95]

Perhaps the same assumptions underlie those cases which hold that the defendant consented to a search which revealed possession of contraband.[96] It would seem that consent is an appropriate concept to use in the field interrogation only if a court is willing to attribute not only that type of reasoning to the suspected person who submits, but in addition assumes that a real alternative existed to the suspect and that he was aware of it.

D. *The Petty Offender*

When a case arises in which a police officer has stopped or de-

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[94] 294 F.2d 524 (2d Cir. 1961), *cert. denied*, 369 U.S. 823 (1962).

[95] *Id.* at 529.

[96] See, *e.g.*, People v. Sanchez, 191 Cal. App. 2d 783, 12 Cal. Rptr. 906 (1961).

tained a person who committed a traffic offense[97] and has thereby secured evidence of guilt of a more serious offense, courts have tended to oversimplify their approach to determining the legality of the police conduct. Quite frequently the appellate court will advert to the fact that the suspect committed a violation and conclude that the detention was therefore lawful: "About 10:45 at night Officer Lewis and his partner saw defendant making a U-turn. They had a right to interrogate him."[98]

In a number of cases this simplified approach leads to an obfuscation of the issues relating to field interrogation. Whether or not the officer had reasonable grounds to suspect the person of criminal activity apart from traffic infractions, the appellate court's determination of the legality of the detention may be based entirely on the essentially fortuitous presence of a traffic infraction.[99] But

[97] Most of the observed and reported cases involved traffic violations. But in Green v. United States, 259 F.2d 180 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 917 (1959), members of a narcotic squad saw two men on the street, one of whom was known to them as a narcotic user. They called the two men to come to the car. The known user did, but the other man attempted to escape from them by running into a nearby house. He was unsuccessful in gaining entry and was apprehended.

The court upheld the subsequent arrest, but one judge dissenting, posed the issue as follows:

> If appellant's attempt to get into the house amounted to a crime we would reach some of the problems, pressed on us by appellant, as to whether the police may, in effect, manufacture the justification for searching a mere suspect by spurring him into committing some misdemeanor. E.g., is a person liable to arrest for illegal entry if he runs into the nearest house, against the owner's will, in an attempt to flee from threatened violence by unidentified assailants? If, instead of forcing his way into a house in flight from the apparent threat, the person runs across a street against a traffic light, may the police arrest him and, if so, may they search him? Since appellant's conduct did not amount to a crime, as I view the case, these problems do not arise.

259 F.2d at 183 n.1.

[98] People v. Cantley, 163 Cal. App. 2d 762, 767, 329 P.2d 993, 996 (1958). Whether "erratic" driving patterns actually constitute an offense has been considered of secondary importance to some courts, and stopping such drivers to determine whether they are intoxicated has generally been upheld. See, *e.g.,* Hodge v. State, 97 Okla. Crim. 73, 258 P.2d 215 (1953); Raper v. State, 96 Okla. Crim. 18, 248 P.2d 267 (1952); Robedeaux v. State, 94 Okla. Crim. 171, 232 P.2d 642 (1951); Ervin v. State, 196 Tenn. 459, 268 S.W.2d 351 (1954).

[99] Robinson v. United States, 283 F.2d 508 (D.C. Cir.), *cert. denied,* 364 U.S. 919 (1960); People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956); People v. One 1955 Ford Victoria, 193 Cal. App. 2d 213, 13 Cal. Rptr. 910 (1961); People v. Lewis, 187 Cal. App. 2d 373, 9 Cal. Rptr. 659 (1960); People v. Nesbitt, 183 Cal. App. 2d 452, 7 Cal. Rptr. 8 (1960); People v. Underhill, 169 Cal. App. 2d 862, 338 P.2d 38 (1959); People v. Anders, 167 Cal. App. 2d 65, 333 P.2d 854 (1959); People v. Sanson, 156 Cal. App. 2d 250, 319 P.2d 422 (1957); People v. Dore, 146 Cal. App. 2d 541, 304 P.2d 103 (1956); People v. Johnson, 139 Cal. App. 2d 663, 294 P.2d 189 (1956); State v. Moore, 187 A.2d 807 (Super. Ct. Del. 1963); State v. Harris, 265 Minn. 260, 121 N.W.2d 327, *cert. denied,* 375 U.S. 867 (1963); Moore v. State, 306 P.2d 358 (Okla. Crim. App. 1957); State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962).

Other types of offenses give rise to suspicion that the driver is guilty of a felony. When officers observe a car with no license plate or a plate which is not illuminated at night, or when they observe a person driving without any lights at night, they may conclude that the person is attempting to avoid being detected or identified. And a person seen speeding is viewed in the same way as a person running down the street—both are considered suspicious. The fact that the suspicious conduct of the one is an

observation of the practice makes it clear that a violation of the traffic code is frequently used as a subterfuge by officers who desire to interrogate a person about a more serious offense.

The discretion held by patrol officers not to enforce traffic regulations may be used by them to gain "consent" to field interrogation or to a thorough search of either the person or his car. If nothing incriminating is found in the search, then no citation is issued. Seldom will the subject complain for he is being given a "break" by the nonenforcement of the traffic laws. The petty offense is a subterfuge relied upon by the officers to gain the cooperation of the person and, if incriminating evidence is found, may later be urged as justification of the stopping and detaining for questioning.[100]

Although a large body of law has been developed on the question of the legality of conducting searches of traffic violators,[101] the courts have seldom considered the question whether the same violation ought to justify stopping a person for interrogation unrelated to the traffic offense.[102]

Because of the judicial approach to field interrogation problems in cases where the suspect is also a traffic violator, a number of different, recurring factual situations are insufficiently analyzed. These situations are: (1) the violator who does not cause suspicion of any other offense; (2) the driver whose violation itself causes suspicion of a greater offense (for example, a missing license plate suggests to the police that the car may be stolen); (3) a driver who is already under suspicion commits a traffic offense (if followed long enough many persons will be observed to commit some minor infraction); (4) manifestation of suspicion by police causes a traffic offense (frequently drivers will attempt to flee after officers have indicated they want to interrogate them and will commit traffic violations in their flight). A police officer, of course, is privileged to stop vehicles when a violation of a traffic regulation is committed in his presence. However, it is questionable whether the police conduct is

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offense while the conduct of the other is not is essentially incidental. Both will be stopped and questioned. See also Busby v. United States, 296 F.2d 328 (9th Cir. 1961), *cert. denied,* 369 U.S. 876 (1962); Campbell v. United States, 289 F.2d 775 (D.C. Cir. 1961); People v. Linden, 185 Cal. App. 2d 752, 8 Cal. Rptr. 640 (1960).

100 The Chicago Police Department awards one hundred dollars to the patrol officer who solves a serious crime through a stop for a traffic violation. It is entitled the "Traffic Award of the Month."

101 Agota, *Search and Seizure Incident to Traffic Violations — A Reply to Professor Simeone,* 7 ST. LOUIS U.L.J. 1 (1962); Notes, 14 HASTINGS L.J. 459 (1963); 49 ILL. B.J. 680 (1961); 10 MIAMI L.Q. 54 (1955); 11 OKLA. L. REV. 317 (1958); 1960 U. ILL. L.F. 440; 6 WAYNE L. REV. 413 (1960); 1959 WIS. L. REV. 347.

102 *But see* State v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960).

within that privilege when the detention is for purposes other than issuance of a summons.[103]

The police certainly must be privileged to detain traffic violators, and it might be reasonable to privilege officers to stop and question suspicious persons found on the street, but different questions arise when one is used to accomplish the other. But for the most part, courts have tended to equate the two.

The question arises why police officers who have decided that a person is suspicious and should be interrogated bother to attempt to justify the stop on the basis of a traffic violation when they believe, in some cases, that they are within the realm of their authority in making the stop without observing the violation. There seems to be a twofold answer. First, following this practice probably results in better public relations than would the practice of informing the person that the officer deemed him to be suspicious. In addition to avoiding the accusation inherent in a field interrogation, the suspected person often believes that the police have given him a "break" because the traffic violation does not result in a traffic ticket. Second, where the law is ambiguous in some respects, the practice may be followed because the police desire to uphold beyond cavil the legitimacy of the stop should the investigation prove fruitful, or to uphold the legitimacy of a search by using an implied threat of a traffic ticket to induce permission to search the person and vehicle. Because courts have failed to make the important distinctions emphasized in this section, to some extent, at least, the police have been successful in gaining acceptance of stopping and questioning practices by disguising them under the privilege to stop persons for the purpose of issuing a summons or traffic ticket.

E. *The Test of Reasonableness of the Police Conduct*

One group of courts has used a different mode of analysis in resolving field interrogation issues. One way of viewing the system of criminal justice administration is in terms of the amount of evidence

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[103] The problem is analogous to that which arises from stops made by officers under the authority of the so-called demand statutes, which imply authority of an officer to stop a driver and demand to see his operator's license. See, *e.g.*, ILL. REV. STAT. ch. 95 1/2, § 6-118 (1963); KAN. GEN. STAT. ANN. § 8-244 (1963); MICH. STAT. ANN. § 9.2011 (1960); WIS. STAT. ANN. § 343.18(1) (1958). The Illinois statute provides in part: "Every licensee or permitee shall have his operator's or chauffeur's license or permit in his immediate possession at all times when operating a motor vehicle and, for the purpose of indicating compliance with this requirement, shall display such license or permit . . . upon demand. . . ."

Courts have held that those statutes do give an officer authority to stop motorists, but they have also insisted that the stop be made in "good faith," that is, for the purpose of ascertaining whether the driver is properly licensed and not as a subterfuge to uphold stops made for the purpose of investigating other possible offenses. An excellent analysis of these statutes is contained in Note, 1960 WASH. U.L.Q., 279. Similar reasoning might lead to the conclusion that officers may not use a traffic offense as a pretext to stop motorists for investigation of more serious crimes.

of guilt which must be available to the state in order to impose restrictions on individual liberties; the *sine qua non* of legal state action — whether by police, prosecutors, judges, or juries — is possession of evidence which meets a pre-determined, generalized standard of sufficiency of evidence which increases both quantitatively and qualitatively at various stages of the criminal justice process. It is clear, for example, that a higher standard of sufficiency of evidence must be met in order to convict than is required at preliminary examinations to bind over a defendant for trial.

This requirement of satisfaction of an ascending evidence sufficiency standard is predicated on a belief that the amount of interference with individual liberties which the state action might entail must be justified by a concomitant certitude that the person is guilty of criminal conduct. Because conviction is normally more onerous to a defendant than is charging, evidence of guilt must be greater to support the legality of the former than of the latter.

If that is the way the system is designed to function, one would logically expect to find expressions of evidence sufficiency standards to match all phases of state interferences with individuals. But that is not always the case. Typically the first standard one encounters on the ascending scale is that which governs arrests.

But the approach taken by some courts in resolving issues relating to the legality of stopping for questioning is to create a concept which might be termed "reasonable grounds to investigate." Under this approach, courts require a certain amount of evidence of criminal conduct — less than that required for arrest — to support investigative interferences which constitute burdens on the suspected person less than that engendered by arrest for prosecution. Under this scheme, investigative techniques such as stopping a person on the street for questioning would require some evidence of guilt, but less than the "probable cause" or "reasonable grounds" which are required to effect an arrest. Consistent with the rest of the criminal justice intake system, the lower evidence sufficiency standard might be justified by the lesser degree of interference with the suspect.

This approach finds considerable support in California, and, to a lesser extent, in some other jurisdictions. The following quotation is typical of the approach taken by California courts:

> The right to interrogate, under the circumstances noted, includes the right to stop the automobile in which the person to be interrogated is riding. . . . Such a procedure does not constitute an arrest even though the person interrogated may be detained momentarily . . . and the existence of facts constituting probable cause to justify an arrest is not a condition precedent to such an investigation.[104]

[104] People v. Ellsworth, 190 Cal. App. 2d 844, 847, 12 Cal. Rptr. 433, 435 (1961).

The question may be raised whether states are free to take that approach in the wake of *Mapp v. Ohio*[105] which requires states to exclude evidence which is illegally seized. Must state courts follow federal rules relating to what evidence is illegally obtained? At this point there are two answers to that question. In the first place, it is by no means clear that state courts will not be left free to decide the proper ambit of the exclusionary rule subject only to minimal standards set by federal courts. This is apparently the assumption of the California courts.[106] Secondly, there is no clear federal rule on whether stopping for questioning on grounds less than that which would be necessary to effect an arrest constitutes an illegal procedure.

Indeed, one of the most significant opinions dealing with the problem is *United States v. Bonanno,*[107] the case arising out of the so-called "Appalachian meeting." State officers for some time had been investigating the owner of an estate in Appalachia. When they learned that a large meeting was being held on that estate and that several of the participants were persons known to have criminal records, they notified federal agents. Together these agencies decided to set up a roadblock on the road leading from the estate to learn the identity of the persons attending the meeting. Several persons were stopped and questioned as they drove from the estate and, when the volume of cars became too great for the officers, the persons were requested to go to the local police station to give their name, address, and reason for being there. With one exception, all of the approximately sixty persons questioned either answered the questions of the officers at the roadblock or later at the station without objection. One man refused to answer any questions and he was allowed to proceed. A subsequent prosecution was based on the theory that the participants in the meeting had conspired to conceal the real purpose of the meeting, and the defense moved to suppress the evidence of the conspiracy obtained during the questioning.

Judge Kaufman held that police could, under certain circumstances, stop persons for questioning and that such a police procedure would not constitute illegal conduct requiring exclusion of any evidence obtained. The defendants claimed that the stopping for questioning amounted to an arrest and, because it was accomplished on insufficient evidence, was illegal. But the court refused to rest its opinion on the definition of a word which may mean different things in different contexts:

> 'Arrest' is just such a word, not only because it is necessarily unspecific and descriptive of complex, often extended processes, but

[105] 367 U.S. 643 (1961).

[106] Traynor, *Mapp v. Ohio at Large in the Fifty States,* 1962 DUKE L.J. 319.

[107] 180 F. Supp. 71 (S.D.N.Y. 1960), *rev'd on other grounds sub nom,* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

> because in different contexts it describes different processes, each of which has built up, in both legal and common parlance, sharply divergent emotional connotations.[108]

The court pointed out, for example, that the stopping did not amount to a "technical" arrest under New York law because "arrest" is there defined as taking a person into custody that he may be held to answer for a crime.[109] Neither, said the court, would a layman be likely to consider a stopping for interrogation an arrest.[110] Judge Kaufman then redefined the issue presented to the court:

> But, to rely solely upon the fact that there was no technical arrest, or no arrest as that term is commonly understood, would be to fall into the very semantic trap alluded to above. The problem, as I see it, is not whether the challenged police procedures constituted an 'arrest,' but whether these procedures were of such a character that all evidence stemming from them must be suppressed.[111]

It was concluded that the stopping for questioning under the circumstances of this case was proper, that evidence gained thereby would not be excluded, and that no federal rule existed which required a contrary finding.[112]

On appeal to the Second Circuit Court of Appeals, the conviction was set aside on grounds not relating to the admissibility of the evidence used at trial.[113] The principal opinion filed on that appeal treated the issue as moot,[114] but the concurring opinion went further:

> Thus the detention, transportation to the distant Vestal police station, and search there of most of the defendants . . . seems highly dubious, and the admission of their statements in evidence of doubtful validity. So the court's ruling supporting admissibility in . . .

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[108] United States v. Bonanno, 180 F. Supp. 71, 77 (S.D.N.Y. 1960).

[109] *Ibid.*

[110] *Id.* at 78.

[111] *Ibid.*

[112] One of the chief difficulties faced by the court was the holding of the Supreme Court in United States v. Henry, 361 U.S. 98 (1959). Judge Kaufman relied on two grounds to distinguish that case: (1) the government in *Henry* conceded that the stopping was an arrest and the only question then was whether probable cause existed to arrest the suspects; (2) physical contraband was seized in *Henry* while in *Bonanno* the evidence consisted of voluntary, exculpatory statements. On the second point, the court said: "It is impossible to equate the seizure of physical, incriminating evidence with the elicitation of voluntary, exculpatory statements." United States v. Bonanno, 180 F. Supp. 71, 86 (S.D.N.Y. 1960). But it appears that the United States Supreme Court has made that equation in Wong Sun v. United States, 371 U.S. 471 (1963). In addition to limiting the holding to cases involving "voluntary, exculpatory statements," the court limits the right of police to stop and question by permitting such conduct only when: (1) it is believed that a crime has already been committed; (2) the grounds for such belief are reasonable; and (3) there is need for immediate action.

Comment, 109 U. PA. L. REV. 262 (1960) criticizes the *Bonanno* opinion for failure properly to distinguish the *Henry* case. It is there contended that the court could not fairly distinguish *Henry* on the ground that different types of evidence were secured in the two cases because "the point at issue here is whether stopping is an arrest, the determination of which is not affected by the sort of evidence uncovered as a result of stopping." *Id.* at 264 n.21. However the court expressly stated that whether stopping is an arrest is not the issue; the issue was the reasonableness of the police conduct involved in the stopping.

[113] United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

[114] *Id.* at 413 n.6.

> Bonanno . . . would seem at variance with Henry v. United States . . . and the rationale there set forth.[115]

On the other hand, several years later, Judge Lumbard who wrote the principal opinion, emphasized the need for police officers to know their powers of stopping for questioning.[116] There are similar divisions of opinion within other federal circuits and among circuits.[117]

It is difficult to assess the relationship between a court's selection of a mode of analysis and its possible pre-disposition about the result that should be reached in the particular case or in regulating police conduct in the entire area of stopping for questioning. There is some evidence, however, that the way in which the issue is posed and analyzed is merely a reflection of a pre-disposition to decide the case one way or the other. It is clear, for example, that when the court decides that the case must be approached in terms of "arrest" and that term is then defined to mean "any restraint," the court will, in the large majority of cases, decide ultimately that the stopping for questioning was illegal for there will often be inadequate evidence to meet that standard set for effecting arrests.

But when a court decides that stopping for questioning is not illegal conduct per se, and that the ultimate disposition of the case must turn upon a determination of the "reasonableness" of the police conduct involved, then the court still must find either that the conduct complained of was legal or illegal. The selection of this approach does not necessarily lead to an inevitable result as does selection of the other approach. There is some evidence, however, that selection of this approach does, in fact, normally lead to upholding the police conduct.

California courts are the leading judicial exponents of the "reasonableness" approach to resolving issues relating to stopping and questioning. It may be of some significance that in only a trivial number of those cases did an appellate court find the conduct of the police unreasonable.[118]

Even though California courts have considered the question more often than have other courts, the results of those decisions are not necessarily representative of all courts which have chosen to reject the arrest-or-nothing approach in favor of the more flexible rule. If California courts have been too lax in their determinations

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[115] *Id.* at 420 n.3 (concurring opinion).

[116] Lumbard, *The Administration of Criminal Justice: Some Problems and Their Resolution,* 49 A.B.A.J. 840, 842 (1963).

[117] *Compare* Smith v. United States, 264 F.2d (8th Cir. 1959) *and* Lee v. United States, 221 F.2d 29 (D.C. Cir. 1954), *with* Plazola v. United States, 291 F.2d 56 (9th Cir. 1961).

[118] A search is usually involved in such cases. See, *e.g.,* People v. Schraier, 141 Cal. App. 2d 600, 297 P.2d 81 (1956).

about what is reasonable police conduct,[119] the fault may lie in their determinations about what factors are relevant in considering whether given police action was reasonable.

III. Legislation Relating to Suspicious Persons

Only a very small part of the legislation arguably related to field interrogation actually confronts the issues in those terms. Thus, there is little legislative definition of who may be detained. For the most part, legislation deals with the problem as one of substantive criminal law ostensibly designed to control "suspicious" persons. Legislative bodies have taken five different approaches to the problem.[120] These are: (1) suspicious conduct or appearance, without more, may be made a criminal offense; (2) suspicious circumstances may be the basis of a criminal prosecution when the suspect does not "satisfactorily account" for those circumstances; (3) suspicious conduct or appearance, combined with a failure to account, may be made the basis for in-custody investigation, not considered an arrest; (4) suspicious conduct or appearance may be made the basis of on-the-street interrogation only, unless adequate grounds to arrest are discovered; and (5) the police may be authorized to order a suspicious person to remove himself from the area where he is found. Several of these approaches may exist in the same jurisdiction.[121]

A. *Suspicion as a Substantive Offense*

The Kansas statute is typical:[122]

> Any person . . . who shall be found loitering without visible means of support in any community . . . shall be deemed a vagrant, and upon conviction thereof shall be fined in any sum not less than one hundred nor more than five hundred dollars, and shall be imprisoned in the county jail for a period not less than thirty days nor more than six months.[123]

On its face, it is not at all apparent that this type of statute is aimed at the same problem with which field interrogation is supposed to deal. It seems, rather, to be an embodiment of the "breeding ground of criminals" theory with a concomitant imposition of criminal sanctions against persons whose economic status is presumed to make them peculiarly susceptible to criminal propensities.

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[119] See, *e.g.*, People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956).

[120] Model Penal Code § 250.12, comment (Tent. Draft No. 13, 1961).

[121] See text accompanying note 151 *infra*.

[122] Vagrancy laws of various types are collected and discussed in these articles: Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1 (1960); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603 (1956); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 Harv. L. Rev. 1203 (1953); Sherry, *Vagrants, Rogues, and Vagabonds — Old Concepts in Need of Revision*, 48 Calif. L. Rev. 557 (1960); Comment, 23 Calif. L. Rev. 506 (1935); Comment, 23 Calif. L. Rev. 616 (1935); Note, 37 N.Y.U.L. Rev. 102 (1962); Note, 59 Yale L.J. 151 (1950).

[123] Kan. Gen. Stat. Ann. § 21-2409 (1963).

In practice the vagrancy laws in Kansas are used as a means of obtaining custody of a person the police desire to investigate for a suspected offense but who may not be arrested on the more serious charge.[124] Because of the broad sweep of the law, the poor economic status of the persons involved, and the cooperation of lower court judges, this use of the vagrancy laws goes substantially unchallenged.

Despite the increasing amount of literature which is highly critical of this type of law,[125] similar provisions have survived substantive code revisions.[126] Why this is so is not entirely clear, but a California experience provides some interesting evidence that it is felt that these laws are needed to fulfill a law enforcement function not related to vagrancy.

In 1959 the California legislature approved a proposal which would, *inter alia,* repeal two provisions of the existing vagrancy laws.[127] The existing law included the following classes of persons among those denominated vagrants: (1) every person who roams about from place to place without any lawful business and (2) every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business.[128] Governor Brown vetoed the repeal of these two sections and subsequently explained his reasons:

> I am sympathetic to the overall purpose of the Bill which was to punish individuals only for wrongful actions and not simply because of their status. But I found that in accomplishing this laudable objective the proposed legislation unfortunately removed from police control certain dangerous conduct, regulation of which is necessary in the public interest.
>
> The Bill proposed to repeal subdivisions 3 and 6 of the present law without substituting any kind of control over those whose conduct afforded occasion for legitimate suspicion. I am aware that police action in this regard has led to criticism, and I agree that the present law should be revised. But I do not think that the possibility of abuse justifies completely denying any controls at all. Legislation in this area would be effective if it gave some definition of authority and obligation to which the private citizen and the policeman could reasonably and fairly conform.[129]

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[124] LAFAVE, ARREST 354-60 (1965).

[125] See authorities cited in note 122 *supra.* The most common criticism is the peculiar susceptibility to abuse inherent in this type of legislation.

[126] Only one state — Illinois — does not have vagrancy-type law either by statute or common law. But local ordinances serve the same purpose. See, *e.g.,* CHICAGO, ILL., MUNICIPAL CODE § 193.1 which lists as a disorderly person "all persons found loitering about any hotel, block, barroom, dram-shop, gambling house, or disorderly house, or wandering about the streets either by night or day without any known lawful means of support. . . ." The standard Chicago Municipal Court "Quasi-Criminal Complaint" carried by all patrolmen lists this section but curiously omits the word "block" which is potentially the broadest category.

[127] Sherry, *Vagrants, Rogues and Vagabonds — Old Concepts in Need of Revision,* 48 CALIF. L. REV. 557, 568-72 (1960).

[128] CAL. PEN. CODE § 647.

Even though it is suggested that this type of vagrancy law is a necessary weapon in the police arsenal, there is much to indicate that it is considered a means to accomplish in-custody investigations rather than to support on-the-street interrogation practices. In California, the proposed abolition of the two sections of the vagrancy law would not have affected stopping and questioning authority since that is derived from appellate cases[130] and is not dependent on the vagrancy statute. But there is, of course, no case-law doctrine which would permit in-custody investigations without arrest and without consent. For that practice the vagrancy offense was needed.[131]

Legislatures may resist repeal of vagrancy-type laws because of their cognizance and approval of the investigative use made of them; on the other hand, this reason does not demonstrate a legislative desire to permit stopping and questioning. This type of statute does not appear to authorize that practice, and it is not used for that purpose. A California legislative committee concluded: "It is fairly obvious that the police often use a vagrance arrest to cover a suspicion arrest."[132] The same is true in Wisconsin and Kansas.[133]

B. *Satisfactory Account Clauses*

One result of the agitation for legislative reform of the California vagrancy law was retention of that law in modified form. The section is now entitled "disorderly conduct" and provides:

> Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor: . . .
>
> (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to iden-

[129] REPORT OF [California] ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE 12 (1959-1961).

[130] Many of these cases are collected in MARTIN, PROBABLE CAUSE TO ARREST AND ADMISSIBILITY OF EVIDENCE [in California] (1960).

[131] People v. Wilson, 145 Cal. App. 2d 1, 301 P.2d 974 (1956), illustrates the operation of the vagrancy laws as an aid to investigation of suspicious persons. The police suspected defendant of engaging in gambling operations but surveillance and field interrogation over a period of time failed to reveal evidence adequate to arrest for that offense. On appeal the court reversed a gambling conviction obtained as a result of a search of defendant and his car following his arrest for vagrancy:

> The present case is a good example of over-zealous law enforcement. The arrest for vagrancy was an obvious subterfuge to try and secure evidence of bookmaking, and when that arrest, and the search of the person, failed to produce evidence of that activity, the police officers determined to search defendant's automobile. . . . All that appears in the record is that the police, for some undisclosed reason, decided to keep a certain restaurant and pool hall under surveillance. Whatever that reason may have been, it certainly was not for the purpose of finding evidence that defendant was a vagrant. During that three-week period of surveillance, defendant was observed daily. During that time he was not observed committing one illegal or even suspicious act.

145 Cal. App. 2d at 5-6, 301 P.2d at 977. Similar uses of the vagrancy laws are discussed in the REPORT OF [California] ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE 8-19 (1959-1961).

[132] REPORT OF [California] ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE 10 (1959-1961).

[133] LAFAVE, ARREST 354-60 (1965).

> tify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.[134]

The comments of the legislative committee regarding this section seem to indicate that they view it less as a means of permitting investigation arrests than as a way of enforcing the police right to conduct field interrogations of suspicious persons, a right recognized by appellate courts.[135] Thus, the intent was to shift from recognition of a need for in-custody investigation of persons who may not be arrested, to recognition of the police right to stop and question suspected persons.

While the legislative background of statutes in other states is less clear, similar vagrancy-type laws — those containing satisfactory account clauses — may be retained because they imply a power to stop and question.[136] In Wisconsin, for example, after a thorough revision of the substantive law code, the vagrancy law still classes as vagrant "A person found in or loitering near any structure, vehicle or private grounds who is there without the consent of the owner and is unable to account for his presence."[137] Despite the lack of a clear legislative purpose to relate this provision to a right to stop and question, the statute does seem to imply that power.

This implication has been questioned, however. The comments to a Model Penal Code provision on loitering (vagrancy) also advert to the relation between account clauses, the right to stop and question, and arrest. Although the reporter drafted a proposal which contains a satisfactory account clause, he disapproved of its adoption by the Institute. "Loitering statutes, whether or not they include provisions for police interrogation and compulsion on the loiterer to explain his presence, appear to be designed to enable the police to arrest persons suspected of having committed or being about to commit offenses."[138]

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[134] CAL. PEN. CODE § 647(e) (Supp. 1965).

[135] REPORT OF [California] ASSEMBLY INTERIM COMMITTEE ON CRIMINAL PROCEDURE (1959-1961).

[136] See, *e.g.*, Freeman v. United States, 322 F.2d 426 (D.C. Cir. 1963); Cogdell v. United States, 307 F.2d 176 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 957 (1963); United States v. Sykes, 305 F.2d 172 (6th Cir. 1962), *rev'd on other grounds*, 376 U.S. 364 (1964); Kelly v. United States, 298 F.2d 310 (D.C. Cir. 1961); People v. Lucas, 180 Cal. App. 2d 723, 4 Cal. Rptr. 798 (1960); People v. Romero, 156 Cal. App. 2d 48, 318 P.2d 835 (1957); Miles v. Weston, 60 Ill. 361 (1871); City of Portland v. Goodwin, 187 Ore. 409, 210 P.2d 577 (1949). See also Comment, 4 ARIZ. L. REV. 284 (1963).

[137] WIS. STAT. ANN. § 947.02(2) (1958).

[138] MODEL PENAL CODE § 250.12, at 63, comment (Tent. Draft No. 13, 1961).

C. *Suspicious Conduct or Appearance, Combined with a Failure to Account, Authorizes In-Custody Investigation Not Considered an Arrest*

The Uniform Arrest Act provisions have been adopted by the legislatures of only three states: New Hampshire,[139] Rhode Island,[140] and Delaware.[141] Appellate cases have dealt with some of the issues raised by this extension of arrest laws in the latter two states. The cases have dealt mostly with the in-custody detention provisions. If the appellate cases are representative of the use made of the Uniform Arrest Act sections, then its primary function is to allow time for the police to administer in-custody sobriety tests to persons suspected of driving while intoxicated.[142] The statute has been invoked in cases where it appears that probable cause to arrest exists,[143] the detention provisions are confused with post-arrest detention prior to arraignment,[144] and the intended difference between the evidentiary standards to detain and to arrest has been referred to as a "semantic quibble."[145]

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[139] N.H. REV. STAT. ANN. § 594.2 (1955).

[140] R.I. GEN. LAWS ANN. §§ 12-7-1 to -2 (1956), adopted in 1941. The evidence sufficiency standard to stop provided for by the Uniform Arrest Act is "reasonable ground to suspect." This was changed to "reason to suspect."

[141] DEL. CODE ANN. tit. 19, §§ 1902-03 (1953), adopted in 1951. Minor grammatical changes were made.

[142] Halko v. State, 54 Del. 180, 175 A.2d 42 (1962); Cannon v. State, 53 Del. 284, 168 A.2d 108 (1961); State v. Smith, 47 Del. 334, 91 A.2d 188 (1952); Kavanagh [sic] v. Stenhouse, 93 R.I. 252, 174 A.2d 560 (1961), *appeal dismissed,* 368 U.S. 516 (1962).

[143] De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960).

[144] State v. De Koenigswarter, 54 Del. 388, 177 A.2d 344 (1962).

[145] De Salvatore v. State, 52 Del. 550, 163 A.2d 244 (1960). The court's language, which has been quoted with approval in Kavanagh [sic] v. Stenhouse, 93 R.I. 252, 255, 174 A.2d 560, 563 (1961), stated:

> We can find nothing in [the Uniform Arrest Act] . . . 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 upon 'reasonable ground to believe' and the requirement . . . of 'reasonable ground to suspect' is a semantic quibble. We point out that in Wilson v. State, in referring to the arrest of the defendant, we said, 'Nor can it be doubted that the arrest was legal, that is, upon reasonable suspicion of felony.' . . . In this context, the words 'suspect' and 'believe' are equivalents.

De Salvatore v. State, *supra* at 555, 163 A.2d at 249. The Rhode Island court, relying on *De Salvatore,* said that the "reason to suspect" of their detention statute was the equivalent of the "reasonable ground to suspect" of the Delaware statute. Kavanagh [sic] v. Stenhouse, *supra* at 255, 174 A.2d at 563. See also Wilson v. State, 49 Del. 37, 109 A.2d 381 (1954), *cert. denied,* 348 U.S. 983 (1955).

In only one reported instance arising under this act was a stopping and questioning unrelated to a traffic offense involved. Schaffer v. State, 184 A.2d 689 (Del. 1962), *cert. denied,* 374 U.S. 834 (1963).

The cases arising under the Uniform Arrest Act which involve suspected driving while intoxicated litigate only the question whether in-custody detention was proper. The legality of the on-the-street detention seems to have been assumed. See *e.g.,* Cannon v. State, 53 Del. 284, 168 A.2d 108 (1961). Furthermore, these cases do not primarily involve a desire to gain verbal evidence. Instead, the stop provides an opportunity to smell the breath of the suspect and to observe his physical condition. It appears that probable cause to arrest may exist without the necessity for field interrogation in this type of case. See, *e.g.,* State v. Klinehoffer, 53 Del. 550, 173 A.2d 478 (1961).

Thus, these legislative attempts to deal procedurally with the problems raised by the suspicious person who may not be arrested may have failed — at least to the extent that in-custody investigation was intended to be authorized when grounds to arrest did not exist. A state which now adopts the Uniform Arrest Act detention provision runs the risk that it will be similarly emasculated by its courts relying on the earlier cases.

In contrast, the assumed forerunner of the Uniform Arrest Act has recently been interpreted by a Massachusetts court to authorize field interrogation, or a "brief threshold inquiry" as that court termed it.[146] The Massachusetts statute, which some claim is based on common law,[147] provides:

> Powers and [D]uties [of Police Officers] . . . . During the night time they may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are going. . . . Persons so suspected who do not give a satisfactory account of themselves . . . may be arrested . . . and may thereafter be safely kept by imprisonment or otherwise unless released in the manner provided by law, and taken before a district court to be examined and prosecuted.[148]

Whether this statute actually authorizes prosecution as vagrancy-type statutes do is doubtful, but at least one authority has assumed that it does.[149] The Uniform Arrest Act, which clearly was intended to permit in-custody detention without arrest,[150] may have been ineffectual in doing so. The Massachusetts statute, which may have been designed to provide for arrest and prosecution, was interpreted by the court to authorize only on-the-street detention for questioning when adequate grounds for arrest do not exist.

New Hampshire has both the Uniform Arrest Act provision and a statute similar to the one in Massachusetts:

> Every watchman may arrest any person whom he shall find committing any disorder, disturbance, crime, or offense, or such as are strolling about the streets at unreasonable hours, who refuse to give an account, or are reasonably suspected of giving a false account, of their business or design, or who can give no account of the occasion of their being abroad.[151]

Because both of those statutes are present in New Hampshire, the legislative scheme may be interpreted to mean that an officer, in ap-

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[146] Commonwealth v. Lehan, 347 Mass. 147, 196 N.E. 2d 840 (1964).

[147] *Ibid.* See also note 149 *infra.*

[148] MASS. GEN. LAWS ch. 41, § 98 (1958).

[149] See 45 Mass. L.Q., Dec. 1960, p.4, 68-70. THE JUDICIAL COUNCIL OF MASSACHUSETTS FOR 1960, 36TH REPORT, disapproved of adding a penalty provision to this law on the ground that a general statute gives courts power to punish defendants when no punishment is specifically provided in the substantive statute.

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

[151] N.H. REV. STAT. ANN. § 105:12 (1955).

propriate cases, has authority either to arrest or to detain in custody. However, neither statute has been judicially interpreted.

The Illinois courts have recognized a right to stop and question persons who reasonably arouse the suspicions of the police.[152] During the recent revision of the Illinois Criminal Procedure Code, a proposal was made to add a provision which would codify that case law and extend it to include a detention provision similar to that contained in the Uniform Arrest Act. The tentative final draft provided:

> § 43-2. Right of Inquiry
>
> A peace officer may under reasonable circumstances inquire of any person his name, address, and the circumstances of his presence.
>
> § 43-3. Right of Detention
>
> (a) A peace officer may under reasonable circumstances detain for investigation for a reasonable period of time any person whom he believes has committed, is committing, or is about to commit any offense, even though the nature of the offense may be unknown.
>
> (b) A period of detention in excess of four hours shall be prima facie unreasonable. At the end of the detention period the person so detained shall be released or shall be arrested.
>
> (c) The release of the person detained does not of itself render the detention unlawful.[153]

Both sections were dropped from the Code before enactment.[154]

The deletion of these sections is apparently attributable to opposition expressed by both the American Civil Liberties Union and the Chicago Police Department.[155] Opposition was also expressed by

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[152] People v. Faginkrantz, 21 Ill. 2d 75, 171 N.E.2d 5 (1960); People v. Exum, 382 Ill. 204, 47 N.E.2d 56 (1943); People v. Euctice, 371 Ill. 159, 20 N.E.2d 83 (1939); People v. Henneman, 367 Ill. 151, 10 N.E.2d 649 (1937); People v. Mirbelle, 276 Ill. App. 533 (1934).

[153] TENTATIVE FINAL DRAFT OF THE PROPOSED ILLINOIS CODE OF CRIMINAL PROCEDURE 1963, §§ 43-2 to -3 (1962).

[154] The comments to the Proposed Code, note 153 *supra,* indicate that the drafters did not conceive of the inquiry section as a substitute for "investigation arrests," but intended the detention section to serve that purpose. In the comments to the latter section, it is stated: "In the great majority of cases in all jurisdictions police unwarrantedly use vagrancy, disorderly conduct and obstructing justice statutes to support an arrest when all they need is a little time to verify or 'check out' a story." *Id.* at 98. For support of the detention provision, the comments cite ILL. REV. STAT. ch. 38, § 10-3(c) (1961), which provides:

> Any merchant, his agent or employee, who has probable cause to believe that a person has wrongfully taken or has actual possession of and is about to wrongfully take merchandise from a mercantile establishment, may detain such person in a reasonable manner and for a reasonable length of time for the purpose of investigating the ownership of such merchandise. Such reasonable detention shall not constitute an arrest nor an unlawful restraint nor shall it render the merchant, his agent or employee liable to the person detained.

It is doubtful that this statute provides any precedent for the detention provision proposed, but rejected, in the procedural code. Under this section, probable cause must exist and that is not true of the proposed detention statute. Secondly, it does not provide for custody at a police station but, apparently, only detention at the "mercantile establishment." No appellate case has dealt with the shoplifter statute.

[155] Letter from Judge Richard B. Austin, Chairman, Joint Committee to Revise the (Illinois) Criminal Code, to Superintendent O. W. Wilson of the Chicago Police Department, Jan. 16, 1963, on file at the Chicago Police Department.

the Civil Rights Committee of the Chicago Bar Association. It was directed principally at the four-hour detention provision but also criticized the stopping and questioning section because it failed to make clear what actions would be appropriate should an officer encounter a refusal to cooperate on the part of a suspected person. The argument was that the right of inquiry section placed in juxtaposition with the detention provision led to the conclusion that detention would be appropriate in such cases.[156]

Superintendent Wilson of the Chicago Police Department opposed the field interrogation provision for the following reasons:[157]

1. The stopping and questioning section did not make it clear that officers have the right to stop and question. The section was entitled "Right of Inquiry" and it merely provided that an officer could ask questions of persons. It has never been doubted that officers may ask questions of persons on the street if no detention is involved.

2. The section did not make it explicit whether the suspect's answer or refusal to answer may be considered relevant to a determination to *arrest.*

3. The section did not take into account police officer "expertise" in evaluating the adequacy of evidence to stop and question or arrest.

4. The proposal did not make it clear that officers may frisk incident to a field interrogation.

The Superintendent also opposed the detention provisions for two reasons: (1) it was subject to abusive administration and (2) it was unnecessary. It was felt that the provision would be interpreted by officers to give them the power to pick up and hold for four hours any person suspected of criminal activity, and that the four-hour maximum would tend to be construed as a convenient "rule of thumb" to be applied to all detentions. Finally, the Superintendent expressed his awareness of the possible unconstitutionality of the section.

Although the Superintendent is a firm advocate of a right to stop and question, he expressed the view that an adequate field interrogation power combined with adequate arrest powers would eliminate the need for custody-without-arrest powers:

> If provision is made for effective inquiry and if there is a continued recognition of the fact that good law enforcement requires a

[156] REPORT BY THE CIVIL RIGHTS COMMITTEE OF THE CHICAGO BAR ASS'N ON CERTAIN DETENTION AND ARREST PROVISIONS OF THE DRAFT ILLINOIS CODE OF CRIMINAL PROCEDURE, Jan. 21, 1963. The report was not acted upon by the Chicago Bar Ass'n as a whole.

[157] Wilson, *Comments Presented at the Conference on the Proposed Illinois Code of Criminal Procedure,* Jan. 12, 1963.

> reasonable opportunity for in-custody investigation following arrest, then we do not feel that there is a need for an additional provision enabling the police to take into custody suspects when there are not reasonable grounds for arrest. In other words, adequate authority to inquire as proposed will minimize the need for in-custody investigation of suspects and thus achieve the objective not only of effective enforcement but also of minimizing the instances in which suspects have to be taken into custody.
>
> We appreciate that the four-hour detention proposal is made with the objective of increasing the capability of law enforcement to deal with the increasingly serious crime problem. Needless to say, we concur in that objective. But we think the objective can better and more properly be achieved by making clear the need for and the propriety of adequate inquiry and an adequate opportunity for reasonable in-custody investigation following a lawful arrest.[158]

Because of the perceived inadequacies of the proposed legislation the legislature apparently intended to leave to the courts the task of developing the existing Illinois case-law which presently recognizes a right to stop and question.[159]

D. *On-the-Street Interrogation Only*

A recent New York law omits the in-custody detention provision:

> 1. A police officer may stop any person abroad in a public place who he reasonably suspects is committing, has committed or is about to commit a felony or [specified misdemeanors] . . . and may demand of him his name, address and an explanation of his actions.
>
> 2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.[160]

Some New York cases decided prior to enactment of this statute held that some field interrogation procedures were unlawful under

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[158] *Id.* at 7.

[159] 52 ILL. B.J. 106, 108 (1963). Similar legislation, H.B. 1078, has recently been vetoed. See veto message from Governor Otto Kerner to Secretary of State (Illinois), August 17, 1965.

[160] *McKinney's Session Law News,* ch. 86 (1964) which became N.Y. CODE CRIM. PROC. § 180-a, eff. July 1, 1964. For discussion of this statute see Kuh, *Reflections on New York's "Stop-and-Frisk" Law and Its Claimed Unconstitutionality,* 56 J. CRIM. L., C. & P.S. 32 (1965); Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law,* 33 FORDHAM L. REV. 211 (1964); Siegel, *The New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?,* 30 BROOKLYN L. REV. 274 (1964); Wolbrette, *Detention for Questioning in Louisiana,* 39 TUL. L. REV. 69 (1964). See also 31 BROOKLYN L. REV. 174 (1964); *Id.* at 397; 14 BUFFALO L. REV. 545 (1965); Comment, 65 COLUM. L. REV. 848 (1965); 50 CORNELL L.Q. 529 (1965); 78 HARV. L. REV. 473 (1964); Note, 59 NW. U.L. REV. 641 (1964); 10 N.Y.L.F. 410 (1964); Comment, 39 N.Y.U.L. REV. 1093 (1964); 38 ST. JOHN'S L. REV. 392 (1964); 16 SYRACUSE L. REV. 685 (1965); 1965 U. ILL. L.F. 119.

New York law.[161] Sponsors of this measure have made it clear that the law was intended to disapprove of those cases which held that on-the-street detention with an incidental frisk was illegal.[162]

E. *Move-On Orders*

It has been suggested that a fifth way of dealing with suspicious persons who may not be arrested is to empower the police to order them to remove themselves from where they are found.[163] The assumption is that this would prevent a crime if they are contemplating one. One way of granting this power is to prohibit loitering[164] and thereby presumably empower the police to exercise discretion not to arrest all persons who fall within the literal purview of the law, but to order them to move on instead, i.e., to desist from their illegal activity.

However, New York Penal Law section 722 specifically authorizes the police to order loitering persons to move on. That statute provides in part: "Any person . . . with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned . . . congregates with others on a public street and refuses to move on when ordered by the police"[165] is guilty of disorderly conduct. The statute has withstood numerous constitutional attacks,[166] and it has been held that the statute was intended to give police broad discretion

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[161] No New York case actually held that on-the-street detention, without more, was unauthorized. Reversals of convictions have been predicated on frisking, People v. Rivera, 38 Misc. 2d 586, 238 N.Y.S.2d 620 (1963), *rev'd*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965), and in-custody detentions, People v. Estrialgo, 37 Misc. 2d 264, 233 N.Y.S.2d 558 (Sup. Ct. 1962). *Cf.* People v. Salerno, 38 Misc. 2d 467, 235 N.Y.S.2d 879 (1962) which upheld the right to frisk. In *Estrialgo*, the court indicated the police did have a right to stop and question, but stated that the right is severely restricted.

[162] The "stop and frisk" law, as it is called, was part of a package recommendation made by Governor Rockefeller to the New York Legislature. This package included the law authorizing execution of warrants without notice to occupants of a dwelling in some situations. Support for both of these measures centered in the New York State Combined Council of Law Enforcement Officials, an organization created for this purpose, and coordinated by Richard H. Kuh. Support for the measure is found in Kuh, *The Mapp Case One Year After: An Appraisal of Its Impact in New York*, 148 N.Y.L.J. 4 (1962). The Combined Council also published a booklet entitled "Police Protection—More or Less?" which criticizes the results in some of the New York cases in a legitimate memorandum.

The bill was disapproved by the New York Civil Liberties Union, LEGISLATIVE MEMORANDUM No. 14, Jan. 25, 1964; by the Committee on Criminal Courts of the Association of the Bar of the City of New York, 1964 LEGISLATIVE BULLETIN No. 2; and by the New York State Bar Association Committee on Penal Law and Criminal Procedure, NEW YORK STATE BAR NEWS, RELEASE No. 21, Feb. 25, 1964.

[163] MODEL PENAL CODE § 250.12, comment (Tent. Draft No. 13, 1961).

[164] Many of the vagrancy-type laws include loitering as one type of prohibited behavior and it is usually combined with other elements such as "no visible means of support." In addition to those authorities cited in note 122 *supra*, see Comments, 49 J. CRIM. L., C. & P.S. 562 (1959); 6 ST. LOUIS U.L.J. 247 (1960).

[165] N.Y. ANN. PEN. LAW 39 pt. I, § 722 (3).

[166] The cases are collected in Annot., 65 A.L.R.2d 1152 (1959). This annotation deals almost exclusively with the New York statute. *But see* People v. Diaz, 4 N.Y.2d 469, 151 N.E.2d 871, 176 N.Y.S.2d 313 (1958).

in determining whom they might order to move on. Upholding the conviction of defendant for disorderly conduct when he failed to move on, the court said:

> Certainly the evidence shows that the defendant did "congregate" with five or six friends on a public street, even if he did so in an orderly and inoffensive way. . . . Their act was probably not unreasonable. . . . It was near midnight on a summer evening. . . . Doubtless the sidewalk was then used mainly for recreation, yet it was the duty of the police officer to see that its use for pedestrian passage was not unreasonably obstructed. The evidence sustains a finding that the police officer's direction to these groups to move on was given in performance of that duty.
>
> Even if we should find that the police officer's interference was unnecessary, and, in the circumstances, ill-advised, we could not find that it was unauthorized. . . . Friends may congregate on the sidewalk in an orderly group for a short conversation, without creating disorder or unduly offending or obstructing others, but they must 'move on' when a police officer so directs for the purpose of avoiding possible disorder which otherwise might ensue. . . . A refusal to obey such an order can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order.[167]

Certainly the New York court construed the statute in its broadest possible meaning. Still, two difficulties remain with using this approach. First, "loiterers" constitute a group not inclusive enough to encompass the broad range of persons who arouse the suspicions of the police. This approach would not empower an officer to take any action with regard to persons who were acting suspiciously but not loitering. A related difficulty is that ordering suspicious persons to move on is not often a solution to the problem. This alternative "hardly solves the problem of the individual who *is* bent on crime, and confers a disturbingly unbounded discretion upon the police."[168] Such a response could be a solution to the problems caused by a man lurking about a person's home (if not limited to groups), but it is of little help to authorize the police to order a man to move on who flees at the very sight of the police and thereby arouses suspicion.

In practice, loitering ordinances, whether or not they contain an express move-on provision, are used primarily to support the type of street control activity noted in the quoted material above. In Chicago, the "bum squad" constantly orders the disbanding of groups who are not suspected of any criminal offense. Indeed, the practice is so common that often they get the desired result by just looking at the

[167] People v. Galpern, 259 N.Y. 279, 284-85, 181 N.E. 572, 573-74 (1932).

[168] MODEL PENAL CODE § 250.12, comment (Tent. Draft No. 13, 1961).

group without saying anything. The order, express or tacit, is ultimately enforced by arrest.[169]

But with respect to the application of such provisions to suspected persons, the practice observed seems to indicate that move-on orders are issued only after stopping and questioning when the police are not suspicious enough to arrest, but are not completely satisfied with the person's explanation for being where he is.

Thus, the move-on order is either used when persons are not suspected, or, if they are suspected, it is used after completion of field interrogation. Because of this, it seems clear that the police do not consider the power to order persons to move a substitute for field interrogation.[170]

The legislative responses to the problem of suspicious persons discussed in this section range from making a substantive offense of being found in suspicious circumstances through authorizing the police to order persons to move from where they are found. Each of the responses has serious defects. The vagrancy-type laws are a drastic approach because they permit conviction of merely suspicious persons. They also appear to support in-custody investigations when adequate grounds to arrest are not otherwise present. The same is true of the in-custody detention provision of the Uniform Arrest Act. Authorization to order persons to move on largely relates to entirely different police problems.

While some police rely on vagrancy arrests to facilitate investigations, others feel that field interrogation, including authority to frisk, is sufficient. The principal difficulty with that approach is that it is unclear what responses the police may make when a suspected person refuses to cooperate or fails to allay suspicion. If arrest and prosecution are the sanctions, this seems to lead right back to a vagrancy-type law with a "satisfactory account" clause. The effect is similar.

CONCLUSION

Analysis of current field interrogation practice contributes to a more thorough basis for dealing with two major issues. The first is the extent to which field interrogation is important to the police and

[169] One instance was observed in which officers of the "bum squad" stopped and observed a group of men who were standing outside the door of a bar at night. When the men did not disperse, two of the men were placed under arrest. They claimed that they had just moved to the neighborhood and did not know the significance of the police stopping to look at them. In most cases, however, persons automatically disperse without a verbal order and without threat of arrest.

[170] Further evidence of this is inherent in the New York experience. There, the police have very broad authorization to order groups to move on. See text accompanying note 167 *supra*. But even with that authority, the "stop and frisk" legislation was deemed by the police to be essential.

is necessary if they are to have adequate investigative authority. Certainly, the degree to which the police actually need to conduct field interrogations is an important factor to be taken into account in resolving value questions about whether the practice should be authorized. It is equally important to understand the amount of interference to persons on the street which is brought about by the practice. In constitutional terms, these questions relate to whether current interpretations of proscriptions against unreasonable police action permit a distinction between arrest and on-the-street detention on the one hand, and between search and frisk on the other.

The police themselves have not sufficiently addressed these questions. The extreme ambiguity which characterizes the formal law relating to field interrogation may, in part, be attributable to this police inactivity. The failure of the formal law to address the important issues involved in field interrogation does, however, leave the police in a position to take the initiative in the establishment of administrative rules to regulate their own conduct, and to formulate policy which may later prove useful in resolving these issues in a judicial or legislative setting. In the absence of such administrative initiative, the courts or legislatures will ultimately be forced to decide, and the decision will necessarily occur in the absence of articulated administrative experience with the problems, and all field interrogation practices may be lost to the police as a result.

A second major issue is whether field interrogation can realistically be separated from other, on-the-street police practices. This raises the question whether it is feasible to recognize a police right to stop and question suspicious persons on the street without, at the same time, giving unwanted support to other, less desirable practices which also occur on the street.

The police currently do not sufficiently distinguish between practices designed to result in prosecution of offenders if sufficient evidence of guilt is discovered and those practices designed to decrease the level of criminal activity without prosecutions. Legislatures have given tacit support to crime preventive measures by making suspicious conduct or appearance a substantive criminal offense whether or not provision is made for the suspect's exculpation by giving a "satisfactory account" of the causes of suspicion. Such legislation has its roots in attempts to deal with a disruption of feudal society caused by labor shortages resulting from the Black Plague in England. Their current relevance is ambiguous.

Courts have also given some support to preventive practices — albeit unwittingly — by justifying police action in terms of the privilege of officers to issue traffic tickets to minor traffic offenders and

by application of notions of "consent" to the on-the-street interrogation which happens to result in evidence of guilt. It is doubtful, however, that courts would lend support to such practices as stopping and questioning persons not suspected of crime if the issue were posed to the court in those terms. Judicial reluctance to support such practices may result in failure to approve any field interrogation practices if the court believes that such approval would lend unwanted support to other, nonprosecution-oriented practices of the police. Thus, again, administrative failure to clearly articulate the limits of their field interrogation practices may contribute to reluctance to legitimize any police practice short of arrest.