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A MODERN LAW OF ARREST

MORRIS PLOSCOWE

There is a widespread feeling among police officers that the law of arrest unduly interferes with law enforcement; that its rules are too restrictive for efficient police work. The law of arrest is therefore widely disregarded. Police officers may make arrests on reasonable suspicion that an individual has committed a felony. They have no right to make arrests on reasonable suspicion in misdemeanor cases when the offense is committed outside the officer's presence. Nevertheless arrests on suspicion in misdemeanor cases are common occurrences.

The law does not permit police officers to make arrests for the purpose of making an investigation to determine whether the individual arrested is involved in a crime. The arrest "on suspicion" for purposes of investigation, however, is a common police practice. Some typical examples may be cited.

An officer sees a man late at night carrying a suitcase in a neighborhood where some burglaries have occurred. Is he the long looked for burglar or a local resident who is coming home from a trip? If this individual cannot identify himself to the satisfaction of the officer, he will be invited or compelled to accompany the officer to the station house. He will be held or released depending upon the results of the inquiry made there.

A storekeeper sees a suspicious bulge on the person of an individual walking out of his store, and also notes that merchandise is missing from his counter. He follows the individual out into the street and calls an officer. Neither the officer nor the storekeeper has seen a larceny committed. The articles stolen, if any, are concealed on the person of the suspect. Unless the suspect satisfies the officer or the merchant, he too will be taken to the station house for further investigation.

An officer is told that a man has just taken a camera out of the back seat of a car and walked away. If the officer is not satisfied

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with the man's explanation that he owns the car but has left his registration certificate at home, an arrest may be made.

An individual stands on a street corner every day receiving money from various people. Is he an insurance collector, instalment collector, policy collector or bookmaker? A trip to the station house may clear up this mystery.

Arrests in all of the above typical cases are illegal, but this fact will not stop them from being made. They serve to illustrate the anomaly existing in law enforcement in every large city. The principal agents for upholding the law, the police, are major instruments in its violation.

The legal rules of arrest are fundamentally responsible for this anomaly. The police are under enormous pressure to produce results. But they are required to work with rules that may serve well in a simple rural society, but are ineffective in meeting today's complex law enforcement and crime problems.

We cannot amend the rules to give police officers more power to make arrests without warrants, without considering the basic issues of civil liberties which are involved. How far can we go to meet legitimate police demands for a more realistic law of arrest without paving the way for a police state? How far can and should individual liberty be sacrificed so as to provide a greater degree of social security?

Changes in the law of arrest which are sensitive to police needs as well as to the basic civic liberties issues involved must consider such problems as the following:

1. Should police officers be given a limited right to stop, question and detain persons acting suspiciously?

Such a right is granted by the Uniform Arrest Act and by states which have adopted its provisions.\(^1\) The permissible detention period under this Act is two hours and the detention is not recorded as an arrest in any official record. We believe that this is a reasonable answer to the illegal arrest on suspicion. It gives the police power to hold an individual for investigation for a limited period, which the police feel they must have. At the same time, the inconvenience to the public, a two hour detention, is not very great. It is also an advantage for the individual who becomes innocently involved in a suspicious situation in that the detention is not deemed an arrest.

2. Should police officers have the right to arrest without a warrant on reasonable suspicion in misdemeanor cases?

Police officers have the right at the present time to make arrests

\(^1\) Delaware, New Hampshire and Rhode Island.
for misdemeanors or breaches of the peace occurring in their presence. They have no right to make arrests on suspicion when the misdemeanor was committed outside their presence. If these limitations on the law of arrest were honestly adhered to, law enforcement would be paralyzed especially in the area of petty thefts. We believe that the right on the part of the police to make arrests without a warrant on reasonable suspicion should be extended to misdemeanors. There is some precedent for this change.\(^2\) Arrests should not, however, be authorized in misdemeanor cases where it is practicable to bring a person before a court by a summons.

3. May an unlawful arrest be made lawful by the ex post facto discovery that the person arrested has committed a crime?

An arrest may be illegal in its inception because the officer did not have sufficient probable cause to make the arrest. At the station house, however, a search may reveal that the officer was absolutely right in his hunch that the person arrested was involved in crime. May facts discovered after an illegal arrest is made legalize the arrest? Should an officer be deemed guilty of making an unlawful arrest when the person arrested is in fact guilty of a crime?

The Uniform Arrest Act has adopted the rule that if a lawful cause of arrest exists, the arrest is lawful, even though the officer charges the wrong offense or gives a reason that does not justify the arrest. However, one wonders with such a rule, whether any limitations on the law of arrest can have any value if an officer can go ahead and make an arrest in the hope that something will turn up which will legalize that unlawful action that has already been taken.

4. Should not the law specify that probable cause warranting an arrest exists in certain types of situations in which police normally act to apprehend offenders?

The determination of the legality of an arrest frequently depends upon an ex post facto determination as to whether given the specific circumstances of the arrest, the officer's suspicions were reasonable. Judges will differ as to the weight that they will attach to similar circumstances and to police experience. The pressure to have an arrest declared illegal is especially great in states which exclude illegally obtained evidence. Any evidence obtained as a result of the arrest may be excluded from consideration at the trial. We believe that the law should specify that probable cause exists in certain stereotyped situations in which police normally act in

making arrests. They should not be faced with a later claim that the arrest was illegal. Among such situations in which the police may be deemed to have acted on the basis of probable cause are (1) arrests as a result of official communications by telephone, telegraph and radio; (2) complaints by private individuals that a specific person has committed a crime; (3) tips by reliable informants; (4) information obtained from a purported accomplice.

5. How far can a police officer go in making a lawful search incident to an arrest?

May the premises where an arrested person resides be searched as well as his personal effects or car in which he may have been riding? If a person is arrested in the street, may his house be searched? If he is arrested in his living room, may his entire apartment or house be searched? If a man is arrested in his store, may the officers search his cellar? May officers search for evidence connecting the defendant with the crime as well as contraband, the fruits of the crime, arms and instruments with which the crime was committed? These are some of the practical questions that confront police officers in the realm of search and seizure after a lawful arrest. They present burning issues of constitutional law and have been subject to fierce debate.3

But while lawyers and judges argue the limitations of the Fourth Amendment, the police must act. This is one area where the police are entitled to clear directions from the law, instead of the impassioned rhetoric of judges. How far the police can go in making searches and seizures incident to a lawful arrest should be clearly spelled out by the law.

6. When may police officers use deadly force to effect arrests or prevent escapes?

This is also a violently debated issue in the law.4 Should the rule that deadly force may be used against a fleeing felon if he can not otherwise be taken, be extended to cover misdemeanors, or should it be restricted to dangerous felonies? May a police officer use deadly force to overcome a resisting misdemeanant, even if he is in no personal danger himself? Does a private person have the right to resist an unlawful arrest, even to the extent of using deadly force? These are some of the basic questions which are causing debate, and


4. See, e.g., IX Proceedings A. L. I. 179 (1930); 1 Restatement, Torts § 131 et seq. (1934).
which must be resolved if the police are to be given a set of rules that they can live by. Our own view is that the right to shoot to kill should be restricted to dangerous felonies or to those situations where the person sought to be arrested is known to be dangerous. We also believe that due regard must be taken for the safety of the innocent bystander who may get hurt when the police start to shoot. We also feel that no one should have the right forcibly to resist an arrest, even if he believes that the arrest is unlawful.

These are a few of the many basic questions which must be resolved before a modern law of arrest can be formulated. Such a law is long overdue. The American Law Institute is entitled to great credit for attacking the problems involved in a modern law of arrest in connection with the formulation of a Model Penal Code. It is to be hoped that a modern law of arrest will emerge from its deliberations, acceptable to the great body of lawyers, as well as the great mass of fair-minded police officers.