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# A Proposal to Legitimate Arrest for Investigation

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# A PROPOSAL TO LEGITIMATE ARREST FOR INVESTIGATION

*by*

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## I. INTRODUCTION

> How far can we go to meet the 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?[1]

Tension between law enforcement and individual liberty is the fulcrum of criminal justice policy-making.[2] To a large extent, a nation may be measured (at least in the eyes of legal scholars) by the way in which it balances those two competing interests. Competition between the state's need for effective law enforcement and the individual's need for freedom from repression is especially apparent in a nation which stresses individual liberty and human dignity as political goals. However, it is incredible that there is no definitive answer in our jurisprudence to the question of when or under what circumstances police may take a citizen to a police station in order to conduct an investigation. The purpose of this Article is to propose, in terms as specific as possible, what might be an acceptable resolution of the inherent tension between the interests of law enforcement to investigate a suspect at the station house, and the interests of the suspect not to be deprived of his liberty.

Perhaps the most significant finding in this area of study is the relative absence of detailed discussion of the problem or attempts to offer practical solutions to the genuine issues involved. In the majority of instances suggestions that have been made are piecemeal solutions which fail to deal fully with all of the issues. Furthermore, one reviewing the literature on the law of investigative arrest finds himself hopelessly caught in a jungle of terms having no uniform definition. Commentators seem to deal in semantics, hoping that the labels they use will mask the basic issues left unresolved. Consequently, it is presently impossible to define what is acceptable and legal, and what is condemned and illegal, when a citizen is detained by the police for the purpose of investigation.

Several propositions emerge from the writings of both the courts and the commentators which indicate that perhaps there has never been a more propitious time to formulate investigatory arrest powers. First, it is a common but invisible practice for police to take suspects to the station house for investigation. Second, such action is often based on less than probable cause.[3] Third, such covert police practice is deleterious to both the suspect and to the ideal of substantial justice and fair play, because it often results in the filing of an

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[1] Ploscowe, *A Modern Law of Arrest*, 39 MINN. L. REV. 473, 474 (1955).

[2] *See* W. LAFAVE, ARREST 300 (1965) [hereinafter cited as LAFAVE]: "One of the chronic and difficult problems of criminal justice administration is whether police ought to be entitled to conduct in-custody investigation. . . . and, if so, under what circumstances and subject to what controls. In part, the debate focuses on when the police should be able to take a suspect into custody."

[3] For one of several studies, see *id.*

unwarranted charge (such as loitering) in order to legitimize the police action.

A study of the investigative arrest procedures of the Washington, D. C. police was made in 1961.[4] The report of that investigation has come to be known as the *Horsky Report*, and it has been described as "thoughtful, painstakingly thorough, and scrupulously fair."[5] The *Horsky Report* recommended that investigative arrests be outlawed. However, the *Horsky Report* was delivered in 1962 when the criminal law revolution was still in its infancy. Even at that early stage, the Horsky investigators recognized that a few lower courts had legitimized the practice of investigative arrests, and that "there may be in these opinions the beginnings of a concept which will be new to our criminal and constitutional law . . . ."[6]

Since that statement was made in 1962, those few opinions said to be the beginning of a new concept have multiplied, and to their number one must add a plethora of seminal Supreme Court decisions, all of which point toward a legitimation of some form of investigative arrest.[7]

Before proceeding to examine the case law and its innuendos, some attention must be given to the semantic problem created by the word "arrest." Professor LaFave, probably the leading authority on the law of arrest, defines arrest as the taking into custody of a person for the purpose of prosecution.[8] There is also a subjective element; that is, the person must *feel* that he is not free to leave the presence of the arresting party.[9] One of our most basic conceptual problems is that we are so accustomed to the litany of arrest as "custody for prosecution" that we lose sight of the all-too-frequent, non-prosecutorial uses of the arrest process. For example, drunks are sometimes arrested to be sobered up with no thought of prosecution. In that instance arrest is used as a convenient substitute for more appropriate social services for intoxicated (sick) persons.[10] Furthermore, there are numerous instances of persons legally taken into custody to be conveyed to the scene of a crime for investigation, rather than for prosecution.[11] Apparently we are already willing to tolerate some temporary denial of liberty or freedom of movement for reasons other than prosecution. Therefore, from the standpoint of reality, "arrest" is defined too

[4] REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION (1962).

[5] Kamisar, Book Review, 76 HARV. L. REV. 1502, 1505 (1963).

[6] REPORT, *supra* note 4, at 31, quoted in Kamisar, *supra* note 5, at 1505.

[7] One reason for the earlier lack of judicial opinions dealing with power to arrest for investigation may be the procedural difficulty in bringing such questions before the courts. *See generally* Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 53-57. Further evidence of the difficulty can be found in the rulings by the Supreme Court that an illegal arrest is not a bar to a subsequent trial. *E.g.*, Frisbie v. Collins, 342 U.S. 519, 522 (1952); Ker v. Illinois, 119 U.S. 436, 440 (1886). Of course, if the illegal arrest produces some evidence which is sought to be introduced, then the nature of the arrest may be challenged. Stroble v. California, 343 U.S. 181, 198 (1952); *In re* Johnson, 167 U.S. 120, 126 (1897); Ker v. Illinois, 119 U.S. 436 (1886).

[8] LAFAVE 3-4. Probably one of the most expansive definitions of the word "arrest" is that found in RESTATEMENT (SECOND) OF TORTS § 112 (1965): "An arrest is the taking of another into the custody of the actor for the actual or purported purpose of bringing the other before a court, or of otherwise securing the administration of the law."

[9] *E.g.*, Bailey v. United States, 389 F.2d 305, 314 (D.C. Cir. 1967) (concurring opinion). The Supreme Court has recognized the validity of that definition.

[10] *See* Powell v. Texas, 392 U.S. 514, 530 (1968).

[11] *See* LAFAVE 300-01. *See also* L. TIFFANY, D. MCINTYRE, JR. & D. ROTENBERG, DETECTION OF CRIME 81-94 (1967).

narrowly when its meaning is restricted to taking a person into custody for the singular purpose of prosecution. Nor does it accomplish anything to rely upon other words such as "detention" or "interview" to try to distinguish one species of arrest from another. To its everlasting credit, the Supreme Court has consistently refused to allow basic issues to be avoided by something as trite as manipulating labels.[12] The issue is not whether the act is something other than an arrest, but whether detention is legal in light of fourth amendment requirements.[13] Therefore, the word "arrest" as used in this paper will include all instances where a person is involuntarily taken to the station house by a police officer for the purpose of investigating suspected criminal activity.

## II. THE FOURTH AMENDMENT: THE PROBABLE CAUSE REQUIREMENT—LIMITATION OR SPRINGBOARD?

The constitutional limitation on the power to arrest is found in the fourth amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[14]

The fourth amendment limits the power to seize *persons* as well as things.[15]

Any suggestion that an arrest for investigation may be permissible calls the fourth amendment probable cause requirement into question. Typically, probable cause is characterized as an inviolable *sine qua non* of arrest; arrest may

[12] In Terry v. Ohio, 392 U.S. 1 (1968), the Court said: "There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion." *Id.* at 16. The Court further stated: "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" *Id.* at 19.

[13] The attempt to differentiate seizure and detention on the basis of the purpose of a restriction would appear to be unsound. The fourth amendment was passed to prohibit arbitrary interference with freedom. From the individual's view, it matters not for what purpose his right to come and go has been curtailed. If purpose is not a valid criterion, the duration of a restriction of freedom per se certainly cannot serve as a basis for holding that the fourth amendment does not apply to detention for investigation.

Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093, 1105 (1967). For an interesting discussion of a historical distinction between an "arrest" and a "detention" see Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393, 406-11 (1963). In Davis v. Mississippi, 394 U.S. 721, 726-27 (1969), the Supreme Court stated: "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *See also* Cupp v. Murphy, 93 S. Ct. 2000, 2003, 36 L. Ed. 2d 900, 905 (1973): "The respondent was detained only long enough to take the fingernail scrapings, and was not formally 'arrested' until approximately one month later. Nevertheless, the detention of the respondent against his will constituted a seizure of his person, and the Fourth Amendment guarantee of freedom from 'unreasonable searches and seizures' is clearly implicated . . . ."

[14] U.S. CONST. amend. IV.

[15] Henry v. United States, 361 U.S. 98, 100-01 (1959). *See also* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 102-03 (1937); LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 53-56 (1968).

take place only if probable cause exists. The implication is that police are not to be trusted and that probable cause is a necessary shackle to restrain what would otherwise be abuse of discretion in the form of arbitrary arrests.[16] Indeed, anyone attempting to formulate criteria for investigative detention must overcome the nagging feeling that he is violating the fourth amendment, an act that is both intellectually wasteful and socially unseemly (at least in legal circles). Many Supreme Court decisions do, in fact, equate probable cause with legal arrest.[17] Beginning law students cut their teeth on statements like those in *Beck v. Ohio*[18] and *Henry v. United States.*[19] In *Beck* the single question before the Court was whether or not the arrest of Beck was legal. The Court made this statement:

> Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.[20]

In *Henry v. United States* the Court was even more explicit:

> 'Arrest on mere suspicion collides violently with the basic human right of liberty." . . . Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen.[21]

*Beck* was decided in 1964, *Henry* in 1959; the Court has made similar pronouncements in more recent times. As late as 1971, in *United States v. Marion*, the Court said:

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.[22]

In *Whiteley v. Warden*,[23] likewise decided in 1971, the Court was asked to make the probable cause requirement less onerous to officers who must make

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[16] It is interesting to note that few people complain about the arbitrary exercise of discretion when police decide *not to arrest* even though probable cause *is* present. Professor Al Reiss of Yale, who has spent years studying police conduct, reports that police do not arrest in approximately 43% of felonies and 52% of misdemeanors when probable cause is present. A. REISS, THE POLICE AND THE PUBLIC 134 (1971). In fact, police are not under a constitutional duty to arrest even in the face of probable cause. *See* Hoffa v. United States, 385 U.S. 293, 310 (1966).

[17] For a thorough discussion see Cook, *Probable Cause To Arrest*, 24 VAND. L. REV. 317 (1971).

[18] 379 U.S. 89 (1964).

[19] 361 U.S. 98 (1959).

[20] 379 U.S. at 91.

[21] 361 U.S. at 101-02, quoting from Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 22 (1958).

[22] 404 U.S. 307, 320 (1971).

[23] 401 U.S. 560 (1971).

hurried decisions in the field under trying circumstances. But the Court was not sympathetic. In the language of the Court:

> [T]he State argues that a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant. That proposition has been consistently rejected by this Court.[24]

In spite of these explicit and somewhat dogmatic pronouncements, courts have consistently upheld the legality of certain arrests for investigation made on less than probable cause.[25] The cases tend to fall into two categories. One category consists of cases justifying an arrest on less than probable cause by characterizing the police conduct as something other than an arrest. Another category consists of cases where the courts meet the problem head-on, and conclude that, under all of the surrounding circumstances, the arrest was justified notwithstanding the lack of probable cause.

*United States v. Vita*[26] is an example of avoiding the problem by characterizing an arrest as something else. Apparently without probable cause, Vita was stopped by FBI agents and told, "You have to come along with us now," whereupon he was taken to FBI headquarters and interrogated for approximately eight hours before he finally confessed.[27] When Vita raised the issue of the illegality of his arrest, the court held:

> Moreover, even if Vita had been involuntarily detained for questioning or had believed that he had no choice but to accompany the F.B.I. agents to headquarters, we would not necessarily hold such detention to be an 'arrest' . . . . This prerogative of police officers to detain persons for questioning is not only necessary . . . to apprehend, arrest, and charge those who are implicated; it also protects those who are readily able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered. The line between detention and arrest is admittedly a thin one, . . . but it is necessary if there is to be any effective enforcement of the criminal law.[28]

One might speculate that Vita was quite surprised to learn that a person taken off a public street by the FBI, conveyed to FBI headquarters, and interrogated for eight hours is not, after all, under arrest.[29]

*United States v. McKendrick*[30] is another instance of denying the existence of an arrest. In that case the suspects were seated in a car parked at the curb.

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[24] *Id.* at 566. *But cf.* Brinegar v. United States, 338 U.S. 160, 174-75 (1949).

[25] The power to detain a suspect for investigation at common law is uncertain, although there is some authority for it. Hale stated that watchmen have power "to arrest such as pass by until the morning, and if no suspicion, they are then to be delivered [released]; and if suspicion be touching them, they shall be delivered to the sheriff." 2 M. HALE, PLEAS OF THE CROWN 96 (1736, reprinted 1971).

[26] 294 F.2d 524 (2d Cir. 1961), *cert. denied*, 369 U.S. 822 (1962).

[27] *Id.* at 528-29.

[28] *Id.* at 529-30.

[29] In the subsequent case of United States v. Middleton, 344 F.2d 78 (2d Cir. 1965), the court distinguished *Vita*. "Finally, unlike United States v. Vita, . . . the Government has failed to show the need for pursuing a continuing process of essential investigation, and, even assuming it did, there was no showing that its officers were acting with the necessary expedition." 344 F.2d at 82.

[30] 266 F. Supp. 718 (S.D.N.Y. 1967), *aff'd*, 409 F.2d 181 (2d Cir. 1969).

The police approached the car with drawn guns and ordered the suspects out. Within minutes the suspects were taken to the police station for further investigation "because traffic was becoming congested."[31] Were the suspects under arrest? According to the court they were not:

> It is abundantly clear, however, that there was no arrest at the time the car was initially stopped on the corner of Flatbush and Sixth Avenues. The police thought that both Scarpa and McIntosh had been involved in the Brandofino shooting; they stopped the car intending only to bring them in for questioning about the shooting. *An arrest requires an intent on the part of the arresting officer to bring a person into custody to answer for a crime charged.* That the police approached the car with guns drawn and frisked both Scarpa and McIntosh after ordering them out of the car does not transform the investigation into an arrest.[32]

This court has chosen to apply the classical definition of arrest[33] in order to exclude the police conduct from fourth amendment restriction.

Fortunately, other courts have been more candid in their approach, and have met squarely the problems of the need to arrest without probable cause. One excellent example of meeting the problem head-on and without equivocation is the opinion in *Biehunik v. Felicetta.*[34] There the Buffalo, New York, Police Commission was attempting to identify several officers who allegedly had beaten some suspects. The commissioner ordered all of the policemen who had been in the surrounding area—a total of 62 policemen—to appear for a line-up. Those policemen sought an injunction to prohibit being placed in the line-up. Although the court admitted that the order to appear in the line-up amounted to a seizure of the persons,[35] and further admitted that there was no probable cause for such action,[36] the court stated:

> Set against this background, the question before us becomes whether upon a balance of public and individual interests, the order to plaintiffs to report to the lineup was reasonable under the particular circumstances, even though unsupported by probable cause.[37]
>
> Under these circumstances, to forbid defendants to proceed with the lineup would unduly hamper police officials in their difficult task of supervising and maintaining a dependable and trusted police force, with little compensating gain to plaintiff's individual rights.[38]

There are, of course, other examples of courts taking the bull by the horns and simply declaring that an arrest was legal, even though there was no probable cause.[39]

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[31] *Id.* at 721-22.
[32] *Id.* at 724 (emphasis added).
[33] *See* note 8 *supra.*
[34] 441 F.2d 228 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).
[35] *Id.* at 229. *But cf.* United States v. Dionisio, 410 U.S. 1 (1973).
[36] 441 F.2d at 229-30.
[37] *Id.* at 230.
[38] *Id.* at 232.
[39] *E.g.*, Mallory v. United States, 354 U.S. 449 (1957), reasoned that arrest may proceed only upon "probable cause," followed as quickly as possible by arraignment to determine judicially the issue of probable cause. Yet the Court recognized that circumstances may justify a delay between arrest and arraignment, "as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties." *Id.* at 455. In *State v. Gengler* it was held that taking all of the members of a motorcycle gang into cus-

*Morales v. New York*[40] is probably the most famous case containing a direct recognition of the right to make investigative arrests. The United States Supreme Court granted certiorari in the *Morales* case, and then decided to avoid the issue. However, the Court made this statement: "The ruling below, that the State may detain for custodial questioning on less than probable cause for a traditional arrest, is manifestly important [and] goes beyond our subsequent decisions in *Terry v. Ohio* and *Sibron v. New York*."[41]

Recognition by the Supreme Court that the question of the legality of custodial questioning on less than probable cause *was not* settled by the *Terry* and *Sibron* cases is too significant to ignore. In fact, in *Morales* the Supreme Court explicitly stated that it chose "not to grapple with the question of the legality of custodial questioning on less than probable cause . . . ."[42] In three separate cases, *Terry*, *Sibron*, and *Morales*, the Supreme Court had an opportunity to declare that probable cause is a *sine qua non* for investigative arrest, and yet it did not do so. That point is the cornerstone of the argument that an investigative arrest may be made legally on less than probable cause. If probable cause is, in fact, a *sine qua non* for all arrests, as some cases seem to say,[43] then the Supreme Court would not have stated that the *Morales* case presented a question that was "manifestly important," a question that went beyond the holdings in *Terry* and *Sibron*.

Obviously, probable cause is no mere shibboleth. Probable cause is a necessary ingredient for *most* arrests, because they would be unreasonable without it. There is a real possibility that overzealous police officers left unrestrained would subject intolerably large numbers of innocent citizens to investigative arrests. But the probable cause requirement should not be allowed to tip the scales the other way—*against* legitimate law enforcement interests. In other words, though probable cause is sacrosanct when it applies, it should not be used as an all-encompassing substitute for practicality and reasonableness. The fourth amendment is bottomed on reasonableness. Probable cause can be nothing but a reflection of that reasonableness. The Supreme Court has made the same point, exemplified by this quotation from *Elkins v. United States*: "It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures. . . . [I]t can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement."[44] Recalling that the fourth amendment was a reaction to the evils of the general warrant and writ of assistance, helps to place it in

tody for a short time until the victims of the gang's sexual attacks had regained sufficient composure to identify the specific culprits was not an illegal action by the police. 294 Minn. 503, 200 N.W.2d 187 (1972). *See also* Application of Kiser, 419 F.2d 1134 (8th Cir. 1969).

[40] 22 N.Y.2d 55, 61, 238 N.E.2d 307, 312, 290 N.Y.S.2d 898, 904 (Ct. App. 1968), *vacated on other grounds*, 396 U.S. 102 (1969).

[41] 396 U.S. at 104-05. "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of detention and/or interrogation." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

[42] 396 U.S. at 105-06.

[43] *See* material and cases cited notes 17-24 *supra*.

[44] 364 U.S. 206, 222 (1960).

proper perspective.[45] "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[46]

Can there be instances where an intrusion by the State is warranted without probable cause? In other words, are there instances where it is reasonable for the State to intrude on individual liberty without having probable cause to do so? Are there situations where the need for effective law enforcement sufficiently outweighs the right to individual liberty so that law enforcement may interfere with that liberty without first meeting the probable cause standard? Lately, these questions have been put to the Supreme Court and the answers have been affirmative. Although most of the cases involve searches, not arrests, the principles are the same insofar as the need for probable cause is concerned.[47]

In 1971 the Supreme Court decided *Wyman v. James*.[48] The question was whether a social service case worker must have probable cause before making a home visit to a welfare recipient. The Supreme Court held that the probable cause standard was not applicable because "the visit does not fall within the Fourth Amendment's proscription. This is because it does not descend to the level of unreasonableness. It is unreasonableness which is the Fourth Amendment's standard."[49] One could not ask for a more authoritative statement of the proposition that probable cause is not definitive of all instances of state intrusion on individual liberties. *Wyman v. James* stands for the proposition that reasonableness is the definitive test for invoking the fourth amendment limitations.[50] The famous duet of *See v. City of Seattle*[51] and *Camara v. Municipal Court*[52] evidences the same approach.[53] In *See* the owner of a commercial warehouse refused to allow an inspection of his building for fire regulation violations because the inspector had neither probable cause nor a warrant. The Supreme Court held the warrant to be required because there seemed to be no exigency which would make obtaining a warrant unreasonable. However, the Court stated that the inspector's right to obtain a warrant should be based upon "a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved."[54] In *Camara v. Municipal Court* the issues were the same, except that the owner of a private residence was involved. Once again the Court looked to the concept of reasonableness as the deciding factor, and stated: "To apply this stan-

[45] *See* Warden v. Hayden, 387 U.S. 294, 301 (1967).
[46] Schmerber v. California, 384 U.S. 757, 767 (1966).
[47] *See generally* notes 14-43 *supra*, and accompanying text.
[48] 400 U.S. 309 (1971).
[49] *Id.* at 318.
[50] The court pointed out the visits complained of were reasonably conducted, and that the court might reach a different decision should the facts of another case disclose unreasonableness. "Our holding today does not mean, of course, that a termination of benefits upon refusal of a home visit is to be upheld against constitutional challenge under all conceivable circumstances. The early morning mass raid upon homes of welfare recipients is not unknown. But that is not this case. Facts of that kind present another case for another day." *Id.* at 326.
[51] 387 U.S. 541 (1967).
[52] 387 U.S. 523 (1967).
[53] *See generally* Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287, 313-15 (1971).
[54] See v. City of Seattle, 387 U.S. 541, 545 (1967).

dard [reasonableness], it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen."[55]

The foregoing cases demonstrate that it is possible to have instances of legally sanctioned intrusion by the State into individual liberty without probable cause, provided the intrusion is reasonable; legality is determined by measuring the governmental interests involved and comparing them with the interests of individual citizens. But measuring "governmental interests" against "interests of the individual citizen" allows far too much speculation on the part of the intruder. Given the gravity of the notion that the State can legally interfere with personal liberty without probable cause, more sophisticated criteria are desirable.

What are some of the criteria, and under what conditions may they be applied? The Supreme Court has already held that police have the right to "stop and frisk" a suspect on the street, based upon reasonable suspicion—a criterion which is less than probable cause.[56] Since the right to stop and frisk represents an exception to the need for probable cause, one might posit that one exception is enough. But is it? Are there instances of need for a station-house investigation which are just as real and just as legitimate as the need to stop and frisk on the street? Perhaps the need for an investigation at the station house can best be analyzed from three standpoints: (1) the nature of the suspected criminal activity; (2) the type of information required by the police; and, (3) the character of individual liberty which will be subjected to interference.

The nature of the criminal activity has served to justify extending the right to frisk beyond a mere pat-down of outer clothing where air piracy is the suspected crime.[57] The justification for a more extended search than a frisk was expressed in *United States v. Lopez*, one of the cases dealing with a suspected skyjacker: "[M]any factors would be taken into account including the seriousness of the offense, the absolute need to conduct this type of investigation, the nature of the locale, activities of the suspect, the danger to the public if immediate action is not taken, the nature and length of detention, and the harm to the suspect."[58] If those criteria are applied to a situation on a public street where a police officer suspects a person of preparing to commit a burglary, the right to detain and search would reasonably be limited to a stop and frisk. But where a person is suspected of threatening the safety of a plane loaded with people, the power to detain and search might reasonably be extended to meet the necessitous circumstances. Suspected criminal activity is simply not a homogeneous phenomenon calling for one single limited response (for example,

[55] Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967).

[56] Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968).

[57] United States v. Moreno, 475 F.2d 44 (5th Cir. 1973). "Due to the gravity of the air piracy problem . . . the airport . . . is a critical zone in which special fourth amendment considerations apply. . . . [W]ere we to hold that airport security officials must always confine themselves to a 'pat down' search . . . we think that such a per se restriction in the final analysis would be self-defeating." *Id.* at 51.

[58] 328 F. Supp. 1077, 1094 (E.D.N.Y. 1971), quoting from Player, *Warrantless Searches and Seizures*, 5 GEO. L. REV. 269, 277 (1971).

street detention and frisking). Mr. Justice Jackson made the same point in his famous dissent in *Brinegar v. United States* in 1949:

> If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be 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.[59]

Justice Jackson's dictum was brought to life in *People v. Sirhan*[60] when the Supreme Court of California passed upon the legitimacy of a warrantless search of Sirhan's house made by police shortly after Sirhan had been arrested for the assassination of Robert Kennedy. Although there was no probable cause to make the search, the court sustained its legality because "[t]he crime was one of enormous gravity, and the 'gravity of the offense' is an appropriate factor to take into consideration."[61] That case is only one of several recent examples of judicial recognition of the necessity to consider the larger public interests that arise from a catastrophic crime or the threat of such a crime. An even broader approach was recently expressed by the United States Supreme Court in *United States v. Biswell.*[62] In that case, the Court approved a statute which empowered United States Treasury agents to search the premises of licensed gun dealers without first having probable cause or a warrant.[63] After alluding to the pervasiveness of public interests involved in the regulation of firearms, the Court declared that "[l]arge interests are at stake," and concluded: "We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."[64] In similar fashion, a balance between governmental interest and the constitutionally protected interest of the private citizen was struck by the District of Columbia Court of Appeals in *Wise v. Murphy.*[65] At issue was "whether, absent facts warranting formal arrest for rape, a person identified from photographs as the possible perpetrator may be required by court order and under other constitutional safeguards to stand in a lineup to be viewed by the victim."[66] The court concluded:

> [C]ourt ordered lineups predicated on reasonable grounds short of a basis for formal arrest can be squared with the Fourth Amendment—the test being

[59] 338 U.S. 160, 183 (1949).
[60] 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).
[61] *Id.* at 739, 497 P.2d at 1140, 102 Cal. Rptr. at 404.
[62] 406 U.S. 311 (1972).
[63] *Id.* at 315. *But see* Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).
[64] 406 U.S. at 315-17.
[65] 275 A.2d 205, 211 (D.C. Ct. App. 1971). *But see* Davis v. Mississippi, 394 U.S. 721 (1969).
[66] 275 A.2d at 207.

whether the particular intrusion is reasonable when based on all the known facts and legitimate law enforcement interests.[67]

. . . .

. . . Grave reservations exist, however, as to whether this type of court-ordered lineup . . . may be used constitutionally in other than serious felonies involving grave personal injuries or threats of the same. . . . In such cases it is highly likely that the governmental interests in law enforcement cannot outweigh the right of liberty, or freedom . . . .[68]

Another approach to a reasonable formulation of guidelines is to evaluate the nature of the information desired by the police in light of the character of individual liberty to be interfered with in gathering that information. For instance, it is apparent that the Court in *Wise* would *not* have approved of an order commanding the suspect to come to the station house to undergo interrogation about his suspected involvement in the crime. In such a case, the police (acting without probable cause) would be seeking a suspect's cooperation in self-incrimination, a gross violation of his fifth amendment rights. On the other hand, courts have approved less repressive instances of police questioning without probable cause, as in the case of *United States v. Bonanno*[69] where the police blocked the roadway and briefly questioned the occupants of cars passing through. Another court has expressed the point this way: "The temporary loss of personal mobility which accompanies detention may be deemed part payment of the person's obligation as a citizen to assist law enforcement authorities in the maintenance of public order, an obligation reflected in the operation of such traditional institutions as the sheriff's posse, the hue and cry, etc."[70]

Despite its sacrosanct character, probable cause is not an inevitable requirement in every instance of interference with individual liberty by the state. Instead, probable cause simply represents the balancing point in most criminal cases. But if the scales are tipped at either end by a circumstance that is out of the ordinary, then reasonableness becomes the ultimate fulcrum for balancing the interests of the state to investigate against the interest of the individual to be free from interference. In the process, a whole series of factors are applicable, *inter alia* the nature of the crime, the type of information required by the police, the means most reasonably available to secure that information, the urgency of the need to know, the character of the personal liberty to be interfered with, and the setting in which the interference will take place. Most assuredly, such a list results in some hard choices to make, but they are being made now, and undoubtedly they will continue to be made. It behooves us, therefore, to deal with the problem openly so that reliable and workable guidelines can be established.

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[67] *Id.* at 208.

[68] *Id.* at 216.

[69] 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960); *accord*, Gilbert v. United States, 366 F.2d 923, 928 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967), *cert. denied*, 393 U.S. 985 (1968) (suspect removed from telephone booth for questioning and identification; probable cause arose at point of identification).

[70] People v. Manis, 268 Cal. App. 2d 653, 74 Cal. Rptr. 423 (1969).

## III. The Necessity To Establish Normative Guidelines for Investigative Arrest

For too long we have approached the subject of investigative arrest on a case-by-case basis, relying, in the main, on tricks to make the law conform to daily reality. As one judge expressed it:

> Investigation is too important and recurring a police function to have good policework commended only after judicial brushwork touches up the way situations are handled in the real world. Investigation is subject to its own types of abuses, but these should be guarded against as such and not dealt with by manipulating the already overused concepts of arrest and probable cause.[71]

Perhaps in no other instance is the discrepancy between law in the books and law in action more apparent than it is in the area of arrest without probable cause made for investigative purposes. No one knows how many arrests are made without probable cause. The true magnitude is obscured by absence of statistics, cover-up charges, et cetera.[72] Precise numbers are not particularly important, because we know that arrests without probable cause for investigative purposes are frequent occurrences, and have been for years.[73]

Why do we tolerate such a large discrepancy between arrest practices and arrest laws? In the first place, the law of investigative arrest is not well defined. As discussed earlier, some investigative arrests are upheld on a case-by-case basis. Another suggested reason for tolerating such a dramatic discrepancy is that it is apparent to us all that investigative arrests are often reasonable under present-day conditions.[74] Criminal investigations are more complicated now. The inherent changes in today's society have demonstrated that the arrest procedure designed centuries ago does not work well any more. Although painful for us to admit, our present life circumstances make law enforcement, more than ever, a matter of pursuing subjective suspicions which arise at the scene. Sometimes these suspicions cannot be confirmed or refuted without taking the suspect to the stationhouse for some particular purpose, such as further identification, or perhaps for interrogation by some other officer more familiar with the crime being investigated.

As the law presently exists in most jurisdictions, an officer confronted with a suspicious person or circumstance cannot take the suspect to the station house for further investigation without the suspect's consent. We know from every-

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[71] Bailey v. United States, 389 F.2d 305, 313-14 (D.C. Cir. 1967) (Leventhal, J., concurring).

[72] *See* S. ASCH, POLICE AUTHORITY AND THE RIGHTS OF THE INDIVIDUAL 48 (1967); J. LOFTON, JUSTICE AND THE PRESS 143-44 (1966); Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U.L. REV. 16, 29 (1957).

[73] *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 98 (1968); Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 315-16 (1942). For cases discussing the practice of investigative arrest, see, *e.g.*, Manuel v. United States, 355 F.2d 344 (5th Cir. 1966); Seals v. United States, 325 F.2d 1006 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 964 (1964); Staples v. United States, 320 F.2d 817 (5th Cir. 1963); Collins v. United States, 289 F.2d 129 (5th Cir. 1961).

[74] "No doubt the problem of safeguarding the normal population from the subnormal and maladjusted is, under present conditions, tremendously acute. As between strict adherence to outmoded rules, and practices at odds with such rules, the latter may well be the lesser evil. But that alternative, as a deliberate policy, cannot in a society constructed upon law, be a permanent one." Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 366 (1936).

day experience that a police officer in the field may often have a suspicion, but because of the surrounding circumstances and the contemporaneous events, he is unable to verify or rebut that suspicion. What is an officer to do in that situation? Common sense tells us that he should do something. *Terry*[75] and *Sibron*[76] tell us that he can stop the suspicious individual and ask some initial, tentative questions, and if his suspicion is verified, he has probable cause to arrest. But what if, instead of verifying or falsifying his suspicions, the officer simply becomes more suspicious? Generally, the officer has three choices: (1) let the suspect go; (2) arrest him for some specious charge, for example, loitering, vagrancy, etc.; (3) claim probable cause exists, and arrest the suspect for the offense. None of these alternatives are desirable, either to the officer, the suspect, or the American public.

Investigative station-house detention has the same purposes as a stop and frisk which takes place on less than probable cause. However, investigative station-house detention is more like a classic arrest for which probable cause is normally required. Persons taken to the station house for investigation might be booked, fingerprinted, restrained in cells, interrogated, viewed in line-ups or show-ups or subjected to other methods of police investigation. Therefore, although a stop and frisk on less than probable cause is reasonable, the same rationale may not extend to a station-house detention, because station-house detention is much more obnoxious than a street detention. Obviously, an effort must be made to make investigation at the station house less repugnant if it is to meet the fourth amendment reasonableness standard. Unless it is strictly controlled, the power to make investigative arrests will be abused,[77] but the risk of abuse should not be a deterrent;[78] instead, we should learn from our past experience and design the authority to make an investigative arrest so that the abuse potential is narrow, if not altogether obliterated. The balance of this Article is devoted to that goal.

## IV. A Statutory Proposal

### A. *Introduction*

Based upon the discussion in the first part of this Article, one can classify all arrests into three main categories:[79] (1) a probable cause arrest made for the purpose of prosecution; (2) a harassment arrest, which may or may not include probable cause, made to harass the suspect instead of to prosecute him; (3) an investigative arrest, made without probable cause.

The probable cause arrest is self-regulating. The harassment arrest is patently illegitimate and should be eliminated altogether. The investigative

[75] Terry v. Ohio, 392 U.S. 1 (1968).

[76] Sibron v. New York, 392 U.S. 40 (1968).

[77] "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

[78] The power to make a temporary detention on the street is likewise subject to abuse, yet it has become an invaluable police tactic. *E.g.*, White v. United States, 271 F.2d 829, 831 (D.C. Cir. 1959) (officer stopped and searched everyone who walked down the street because "anyone walking in that area at that time of morning is involved in some illegal activity").

[79] See text accompanying notes 9-11 *supra*; *cf.* LAFAVE 437-38.

arrest is arguably legitimate and necessary, but only if properly controlled. The most feasible means of controlling investigative arrest is a statute designed specifically for that purpose. If investigative arrests were limited and controlled by a special statute, what would prevent the police from avoiding the statute by simply labeling the arrest as a probable cause arrest made for prosecution? Seemingly, the only solution to that possibility is to insist on immediate screening of all persons arrested. In other words, when a suspect is brought to the station house, a decision must be made as to whether he is under a probable cause arrest or whether he is under an investigative arrest.[80] Of course, if it is determined that the suspect has been subjected to a harassment arrest, he should be released immediately.

Once armed with a requirement that *all* arrests be screened as to nature and type, the task of drafting provisions to protect personal liberty remains. In order to protect personal liberty adequately, the statute must set forth standards for making investigative arrests, provide a mechanism for objectively locating the presence or absence of those standards, place limitations upon the extent to which personal liberty may be denied, and finally, provide some safeguards or deterrents against abuse.

From the standpoint of draftsmanship, the job of formulating the standards for making an investigative arrest is most difficult. Indeed, one is tempted to argue that the bedrock standard of "reasonableness" would suffice.[81] More specific standards will probably aid lawyers more than they aid the suspect, on whom our attention should focus. Lawyers are not comfortable unless they have objective standards to serve as the backdrop for their arguments before

[80] Resort to a mechanism like the *Mallory* rule of prompt arraignment is obviously necessary for the success of the legislation proposed in this Article. *See* Mallory v. United States, 354 U.S. 449, 453 (1957); FED. R. CRIM. P. 5(a). But it is to be noted that continued judicial opposition to an expansive enforcement of this rule and apparent legislative discontent (inspired no doubt in part by increased public concern with street crime) has rendered the *Mallory* rule a failure. *See* Note, *Title II of the Omnibus Crime Control Act: A Study in Constitutional Conflict*, 57 GEO. L.J. 438, 454 (1968). *See also* Note, *Pre-arraignment Interrogation and the McNabb-Mallory Miasma: A Proposed Amendment to the Federal Rules of Criminal Procedure*, 68 YALE L.J. 1003 (1959). During the legislative year following the *Mallory* decision no less than five major bills were proposed in Congress attempting to limit or deny its effect. H.R. 8624, 85th Cong., 1st Sess. (1958); H.R. 11477, 85th Cong., 2d Sess. (1958); S. 2970, 85th Cong., 2d Sess. (1958); S. 3325, 85th Cong., 2d Sess. (1958); S. 3355, 85th Cong., 2d Sess. (1958). The Willis-Keating Bill, H.R. 11477, 85th Cong., 2d Sess. (1958), the only bill to pass either house, was defeated on a point of order ruling by then Vice President Nixon. 104 CONG. REC. 19,576 (1958). After the initial flurry of activity, nearly ten years passed before Congress passed the Omnibus Crime Control Act, 18 U.S.C. § 3501(c) (1970), which, its supporters claimed, emasculated the *Mallory* rule. *See* Frazier v. United States, 419 F.2d 1161, 1171 (D.C. Cir. 1969) (dissenting opinion by Circuit Judge Burger). The argument in support of emasculation is that the *Mallory* rule embodies a rule of evidence which is subject to congressional control. *See* United States v. Carlson, 359 F.2d 592 (3d Cir.), *cert. denied*, 385 U.S. 879 (1966) (the *Mallory* rule is not of constitutional dimension); *cf.* Little v. United States, 417 F.2d 912 (9th Cir. 1969) (*Mallory* does not apply to prisoners in state custody). An examination of whether the *Mallory* rule, when coupled with recognition of a right to arrest for investigation on less than probable cause, would be widely accepted, is beyond the scope of this work. However, timely arraignment is an essential regulatory element, without which the statutory scheme herein proposed could not be enforced or even monitored.

[81] *See* text accompanying note 44 *supra*; *accord*, People v. Rosemond, 26 N.Y.2d 101, 257 N.E.2d 23, 308 N.Y.S.2d 836 (Ct. App. 1970). "The police can and should find out about unusual situations they see, as well as suspicious ones. It is unwise, and perhaps futile, to codify them or to prescribe them precisely in advance as a rule of law. To a very large extent what is unusual enough to call for inquiry must rest in the professional experience of the police." *Id.* at 104, 257 N.E.2d at 25, 308 N.Y.S.2d at 839.

a court.[82] Fortunately, the courts have already begun to articulate a standard for making an investigative arrest. The standard would require the officer to point to specific and articulable facts which, together with rational inferences from those facts, are sufficient to justify the particular intrusion on personal liberty. For example, if the intrusion on personal liberty is a relatively mundane, temporary detention on the street, the standard is: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[83] Of course, if the nature of the intrusion on personal liberty is more substantial (for example, taking to station house for investigation) then the standard must be correspondingly higher.[84]

Since our law already recognizes the stop and frisk, a good way to avoid abuses of station-house investigative detentions is to insist that as much investigation as possible take place at the stop-and-frisk stage. In other words, the statute would prohibit bringing a suspect to the station house for an investigation that could just as well be made on the street during the course of a stop and frisk. Such a limitation would discourage station-house detentions of "suspicious" persons who can be dealt with on the street in most instances.[85] For example, the statute might provide that a person may not be brought in unless the station house is the only reasonably appropriate place in which to conduct the investigation.[86] Otherwise the police will undoubtedly be tempted to use station-house detention as a form of harassment.[87]

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[82] One must not overlook the fact that standards are constitutionally required to some extent. In Terry v. Ohio, 392 U.S. 1, 20-22 (1968), the Supreme Court argued for objective standards to be applied when evaluating the reasonableness of a search or seizure in any given case.

[83] *Id.* at 21-22.

[84] *See* People v. Manis, 268 Cal. App. 2d 653, 74 Cal. Rptr. 423 (1969), where the court set forth three criteria: (1) rational suspicion that some activity out of the ordinary has taken place; (2) some indication to connect it to the person under suspicion; (3) that the activity is related to crime.

[85] The phenomenon of the "suspicious persons" arrest is well known to the courts. *See, e.g.*, People v. Moore, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968) (defendant in a phone booth in high crime area, turned his back when officer drove by); People v. Anonymous, 48 Misc. 2d 713, 265 N.Y.S.2d 705 (County Ct. 1965) (defendant detained when observed carrying a box of books). *See also* TEX. CODE CRIM. PROC. ANN. art. 14.03 (1965), *as amended*, (Supp. I, 1972) (authorizing an arrest of persons found under suspicious circumstances).

[86] In Stone v. People, 174 Colo. 504, 485 P.2d 495 (1971), the court recognized that it was sometimes reasonably necessary for an officer to detain a suspect, even though there was no probable cause to do so. The court established three criteria for such detentions: "(1) the officer must have a reasonable suspicion that the individual has committed, or is about to commit, a crime; (2) the purpose of the detention must be reasonable; and (3) the character of the detention must be reasonable when considered in light of the purpose." 485 P.2d at 497. Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IOWA L. REV. 1093, 1104-05 (1967).

[87] Commonwealth v. Swanger, 300 A.2d 66 (Pa. 1973), provides an interesting example of how police tend to use a legitimate right to investigate for illegitimate purposes. The police made an early morning stop of the defendant's vehicle, ostensibly for the purpose of inspecting for a driver's license. In the process, they shined a flashlight in the window and discovered burglary tools. The court denied the evidence, holding that the officer had no right to stop for any reason other than to determine if the vehicle and its operator was properly licensed. The court went on to say:

> We do not believe that the intrusion by state officials . . . can be justified on the grounds that there is a statistical chance that a violation may be discovered. We believe that, since the officers could point to no specific and articulable facts to warrant the intrusion in this case, it was unconstitutional to

As mentioned earlier, standards alone are not enough—there must be a mechanism for determining, in an objective fashion, that the police have met those standards. The best known mechanism is the magistrate's hearing which, in this instance, should be held immediately upon the suspect's arrival at the station house, and prior to any investigatory activity there.[88] Obviously, that strict a requirement will work a hardship on the police in some cases, but it appears to be the best mechanism to protect personal liberties from abuse at the station house.[89] A long history of law enforcement practices in the United States indicates that our police are simply under too much pressure to be expected to comply voluntarily and wholeheartedly with limitations on the law enforcement effort. It is imperative that the statute have some sanction to encourage compliance. Customarily, we rely upon the exclusionary rule to serve that purpose. But the exclusionary rule would not be an adequate sanction for this statute, because the persons most likely to be harmed are those who are detained wrongfully, which, in most cases, would mean that they were eventually released without going to trial. Probably the best and most functional sanction would be a statutory cause of action for money damages.[90]

### B. *The Statute*

Section 1. *Arrest Under Warrant.* Any law enforcement officer may arrest a person pursuant to a warrant ordering the arrest of such person.

Section 2. *Arrest Without Warrant.* Any law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe that such a person has committed a crime.

#### *Commentary*

Sections 1 and 2 are very truncated statements of probable cause arrest powers. Sections 1 and 2 are included in order to give context to the subsequent sections dealing with investigative arrest on less than probable cause. Since the primary emphasis of the statute is on investigative arrest, there will be no attempt here to include additional sections on the probable cause arrest. One must recognize, however, that a complete statutory scheme would include additional sections dealing with other aspects of a

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permit the fruits of the intrusion to be used in evidence.

*Id.* at 69-70.

[88] Indeed, the Supreme Court has indicated that the magistrate's hearing may be a constitutional requirement in some cases: "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." Terry v. Ohio, 392 U.S. 1, 21 (1968). However, there is no constitutional requirement that the suspect be taken before a magistrate *immediately*, prior to any investigatory activity. *See* note 80 *supra.*

[89] With a sufficiently detailed recitation of articulable facts the judicial officer will be able to perform his all-important function of evaluating the reasonableness of the proposed intrusion against its impact, though limited to the extent possible, on personal liberty. In this way, the vice of old general warrants and writs of assistance is avoided and we remain faithful to our fundamental commitment against the use of dragnet technique.

Wise v. Murphy, 275 A.2d 205, 217-18 (D.C. Ct. App. 1971).

[90] *Cf.* Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 Sw. L.J. 573, 579-80 (1971).

probable cause arrest, such as authority to issue summons in lieu of arrest, the necessity for a warrant for misdemeanors committed outside the presence of the officer, etc.

Section 3. *Stopping of Persons.* A law enforcement officer, having identified himself as such, may stop a person abroad for a reasonable period of time provided:

(1) The officer reasonably suspects that the person has committed, is committing, or is attempting to commit a crime involving injury to persons or the taking of or damage to property and,

(2) In order to obtain or verify the identification of the person and to investigate the facts and reasonable inferences, it is necessary to stop the person.

(3) The investigation must be conducted in the vicinity of where the person was stopped.

*Commentary*

To some extent, section 3 is patterned after section 110.2, ABA-ALI Model Code of Pre-arraignment Procedure (Official Draft No. 1, 1972). The Uniform Arrest Act (A.L.I. 1940) also granted power to stop. A brief synopsis of the Uniform Arrest Act, and its implementation, is contained in Cook, *Varieties of Detention and the Fourth Amendment,* 23 ALA. L. REV. 287, 296 nn.34-36 (1971).

Section 3 may restrict the power to stop as defined in *Terry v. Ohio,* 392 U.S. 1 (1968). Stops are authorized in Section 3 only when the suspected crime is one of violence, or a crime against property. Therefore, stops are not permitted simply because the person appears to be "suspicious" or out of place in his surroundings. Hopefully, such a limitation will reduce some of the harassment inherent in aggressive patrol tactics.

Paragraph (3) limits the investigation to the vicinity where the person is stopped. Therefore, a clear distinction is drawn between a "stop" and "station house investigative detention."

Section 4. *Frisk for Dangerous Weapons.* A law enforcement officer who has stopped any person pursuant to Section 3 may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any dangerous weapons by an external patting of such person's outer clothing. If in the course of such search he feels an object which he reasonably believes to be a dangerous weapon, he may take such action as is necessary to examine such object.

*Commentary*

This section is taken from section 110.2(4), ABA-ALI Model Code of Pre-arraignment Procedure (Official Draft No. 1, 1972).

Section 5. *Station House Investigative Detention.* A law enforcement officer who has stopped a person and completed an investigation pursuant to Sections 3 and 4 may command the person to come to the police station for the purpose of further investigation provided:

(1) The officer has a reasonable suspicion based upon his investigation that the person has committed, is committing or is attempting to commit a felony involving injury to persons or the taking of or damage to property.

(2) The aforesaid reasonable suspicion is one which the officer reasonably feels can be verified or disproved by further investigation of a particular and specific kind.

(3) The surroundings and circumstances are such that said further investigation cannot reasonably be conducted in the vicinity of where the person was stopped, and said further investigation cannot reasonably be conducted without the presence of the person at the station house.

Section 6. *Station House Investigative Detention: Required Statement of Purpose.* If a law enforcement officer commands a person to come to the station house pursuant to Section 5, the officer must immediately advise the person of the felony he is suspected of committing; of the specific kind of investigation that will be conducted at the station house; of why the investigation cannot be conducted in the vicinity; and of why the investigation cannot be conducted without the presence of the person at the station house. Furthermore, the officer shall immediately advise the person that he does not have to make any statements, and that any statements he makes can be used in evidence against him.

*Commentary*

Section 5 is designed to insure that persons will not be brought to the station house for an investigation that could have been made during the course of a stop. Although section 3 allows a stop for any crime of violence to the person or threat to property, section 6 allows a station-house detention only if the crime is a felony involving violence to the person or threat to property. By requiring the officer to articulate reasons for the station house detention section 6 insures as much individual liberty as possible and prepares the suspect to defend himself, or even secure his release, at the later required magistrate's hearing. When the officer makes his statement of purpose many suspects may attempt to debate with the officer. Therefore, the officer is required to advise the suspect of the fifth amendment privilege.

Section 7. *Persons Detained in the Station House.* No person shall be involuntarily detained in a police station unless:

(1) He is detained pursuant to a warrant for his arrest, or

(2) He is detained awaiting a magistrate's hearing as described in Section 9 or,

(3) He is detained under an order of investigative detention as described in Section 10 or,

(4) He is officially charged with a crime or,

(5) He is serving a sentence for a crime.

Section 8. *Appearance Before Station Officer.*

A. Any person brought to the station house pursuant to Sections 2 or 5 hereof shall be presented immediately before the law enforcement officer in charge of the station who shall immediately make a written record of the date and time of the presentation. The written record shall be read by the station officer to the person detained, whereupon it shall be signed in duplicate by the station officer and the person detained. The station officer shall retain a copy and the person detained shall be given a copy.

B. In addition to containing the date and time, the written record shall contain the following statements of the rights of the person detained:

(1) That unless he has been officially charged with a crime he may not be detained more than five hours without a magistrate's hearing.

(2) That he does not have to make any statements and that any statements he makes may be used in evidence against him.

(3) That a pat down of his outer clothing to discover dangerous weapons will be made, but no search of his person or inventory of his possessions may be made unless he is detained by order of the magistrate.

(4) That no investigation or attempt at identification shall be made until ordered by the magistrate after a hearing.

(5) That he has the right to be returned with reasonable promptness to the place from where he was taken, if a magistrate orders his release without charges being filed.

*Commentary*

Harassment-type arrests will be very inconvenient for the police under the conditions set forth in sections 7 and 8. Perhaps that fact is one of the strongest features of sections 7 and 8.

Delay of the right to search and investigate is the most unattractive feature of sections 7 and 8. The delay includes persons arrested on probable cause without a warrant (section 2) as well as persons under investigate detention (section 5). This feature is aimed at control of frequent police abuse of their power to arrest a suspect, search his person, and fingerprint and photograph him at the station house. A specious arrest, followed by a search or investigation, often leads to "serendipitous" discovery of highly incriminating evidence which, in reality, is not serendipitous at all, but rather the product of the arrest. Delaying the right to search and investigate will serve the laudatory purpose of stimulating administrators to provide a magistrate's hearing at the earliest possible moment. The magistrate's hearing is the best protection of individual liberties. A person under a probable cause warrantless arrest seems to be as deserving of that protection as a person under station-house investigative detention.

Allowing a five-hour delay before the magistrate's hearing is a provision that might generate considerable debate. Obviously, five hours is an arbitrary time that may appear too short or too long, depending upon one's viewpoint. Five hours was selected as the longest reasonable period that would not unduly interfere with the daily routine of a person being detained under sections 2 or 5.

Section 9. *The Magistrate's Hearing.*

A. All persons who are involuntarily detained in a police state without an official charge of a crime shall be entitled to a hearing before a magistrate within five hours of their arrival at the station house.

B. Prior to any hearing under this section, the magistrate shall warn the person that he does not have to make any statement, and that any statement he makes can be used in evidence against him if he should be officially charged with a crime.

C. If such person has been brought to the station house pursuant to Section 2, the magistrate shall proceed with a hearing to determine the probable cause for the arrest. If the magistrate determines that there is probable cause for the arrest, the person shall be officially charged with a crime or released within three hours. If the magistrate determines that there is no probable cause for arrest, the person shall be discharged as provided in Section 8B(5), unless the magistrate should find

that a station house investigative detention under Section 5 is warranted, in which case the magistrate shall proceed under paragraph D of this section.

D. If such person is being detained under the authority of Section 5 the law enforcement officers shall file written specifications with the magistrate at the time of the hearing and provide the person detained with a copy thereof which written specifications shall state:

(1) The circumstances that gave rise to the reasonable suspicion under Section 3.

(2) The facts determined as a result of the investigation conducted under Section 3.

(3) The crime that the officer suspects the person has committed.

(4) The specific kind of investigation that the officer desires to conduct at the station house, and the estimated time necessary to conduct that investigation.

(5) The reason why the investigation cannot be conducted without the presence of the person at the station house.

E. If, from the written specifications called for in Paragraph D, together with any statement made by the person being detained, the magistrate determines that there are reasonable grounds to suspect that the person has committed the crime specified, and that the investigation requested is reasonably necessary, and that the investigation cannot be conducted reasonably without detaining the person at the station house, the magistrate shall enter a written order for investigative detention, and provide the person with a copy of said order. If the magistrate shall determine that no reasonable grounds exist to suspect that the person committed the crime specified, or if no reasonable grounds exist to conduct the investigation requested, or if no reasonable grounds exist to detain the person during the investigation, then the magistrate shall order the person released according to Section 8B(5):

*Commentary*

This section requires the law enforcement officer to articulate in writing whatever it is that gives rise to his reasonable suspicion. By thus forcing written specifications from the law enforcement officer the individual citizen is protected from a detention based on the officer's hunch, or some vague, generalized suspicion. Furthermore, the information called for in the written specifications will enable the magistrate to measure the delicate balance between the reasonableness of the request for further investigation on the one hand, and the person's right to liberty on the other hand.

Section 10. *Order for Investigative Detention.* Based upon the facts and circumstances determined at the hearing, the magistrate's order for investigative detention shall include the following:

(1) An order that the person be detained at the station house for a specified period of time reasonably necessary to complete the investigation but not to exceed 10 hours. Said period may be extended for one additional period of five hours, but only in the event the magistrate finds at a later hearing that the law enforcement officers have made all reasonable efforts to complete the investigation within the first period ordered. The magistrate may admit the person to bail conditioned that the person report to the station house as requested by law enforcement officers. If admitted to bail, the period of the investigation may extend for a total of 72 hours.

(2) An order specifying the particular investigative procedure authorized. No other investigative procedure shall be conducted. The order may be amended at a later hearing, but only if the magistrate finds that the first investigative procedure

has led to facts or circumstances which justify some additional investigative procedure.

(3) Any other orders reasonably necessary under the circumstances to protect the rights of the person being detained.

*Commentary*

Station house investigative detentions should not occur unless justified by a reasonable need to investigate at the station house. Furthermore, station house investigative detentions should not be allowed to deteriorate into a form of harassment arrest, where the person is detained, only to lie about in a cell at the convenience of the police. If the station house detention is in fact justified, then the police should have no particular difficulty in complying with the limitations placed upon them by the order for investigative detention. If the police are merely attempting to harass a suspect, the administrative inconvenience brought about by sections 7 through 10 should act as a strong deterrent.

Section 11. *Penalties and Exclusions.*

A. Any law enforcement officer who willfully and purposely violates or fails to comply with Sections 3, 4, 5 or 6 of this Act shall be liable to the citizen stopped for damages in an amount not less than $100, plus all costs of court and reasonable attorney's fees.

B. Any law enforcement officer or magistrate who willfully and purposely violates or fails to comply with Sections 7, 8, 9 or 10 of this Act shall be liable to the citizen detained for damages in an amount not less than $200 for each 24 hour period of detention, plus all costs of court, plus reasonable attorney's fees.

C. No evidence obtained in violation of any provision of this Act shall be admitted in the trial of any criminal case of this state.

*Commentary*

Hopefully, any lingering doubt about the potential abuses of the station house investigative detention will be dispelled by this section. A citizen wronged under the meaning of this statute is given a cause of action for guaranteed damages plus attorney's fees, along with the protection of the exclusionary rule. Citizens thus abused would be better protected than persons illegally arrested under traditional probable cause standards.